

The Relation Between Doctrine as a Source of Law and the Principle of Legality of Indictment

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ABSTRACT: The principle of legality of indictment helps to protect individual rights and to ensure fair and equitable justice. Criminal law is a branch of law that has a significant impact on individual liberty and the fundamental rights of persons, as it establishes the most severe legal liability in society. The principle of legality of indictment is essential to ensure the protection of individuals against arbitrariness and abuse of power committed by the authorities. Furthermore, the legality of indictment ensures predictability and certainty in the application of criminal law, contributing to society's confidence in the criminal justice system. The European Court of Human Rights has established that the legality of indictment, in the sense of accessibility and predictability of the law, is an essential aspect of respecting human rights within the field of criminal law. The law, in particular criminal law, must be spelled out with sufficient clarity to enable individuals to regulate their conduct in accordance with legal provisions. There are situations where normative construction, including criminal law, requires clarification to ensure uniform application. The normative interpretation provided by the High Court of Cassation and Justice, through referrals in the interest of the law and preliminary rulings aimed at clarifying points of law, plays a vital role in enhancing the legal framework. This process allows the doctrine to make a crucial contribution to the clarification and consolidation of the normative text, thereby ensuring consistency and predictability in its application.

KEYWORDS: indictment legality, criminal law, interpretation, doctrine, normative text, unitary application of criminal law

Introduction

Legal doctrine is a systematic and critical study of various legal matters, consisting of authoritative opinions expressed by authors in their works (Popescu 2002, 159). By encompassing the analyses, investigations and interpretations that experts give to legal phenomena, it is the legal science (Popa 2020, 179). In a broad sense, the doctrine is the law, as it is conceived in theory (Popescu 2002, 159); it explains and comments on legal rules, presents theories of law and the practical application of the principles, showing the authors' views on legal issues (Hamangiu, Rosetti-Bălănescu, and Băicoianu 2002, 13). In a narrow sense, the term 'doctrine' refers to an opinion expressed on a particular topic.

As far as the opinion of "renowned experts" is concerned, we need to look more closely at the analysis of this phrase. In the absence of any limitation in the law, we concur with the view that, in principle, they can come from any field of law (Les 2008, 29) and can express their opinion on various legal issues. This reflects the open and interdisciplinary nature of legal doctrine, which can benefit from the contributions of experts from different specialized fields. Essentially, the doctrine is law as conceived by theorists, involving its scientific explanation, generalization and systematization. These doctrinal opinions and analysis contribute to the understanding and development of law, providing a theoretical basis for the interpretation and application of legal rules. As a source of law, the doctrine influences case law and lawmaking and plays a significant role in the development of the legal system. Therefore, the doctrine not only analyzes and criticizes existing law, but also contributes to shaping its future by means of theoretically based proposals and recommendations. The role of legal doctrine has varied over the ages and depending on each and every country, therefore the conception of it is no longer the same as it was in Roman times or even at the beginning of the last century.

The legal doctrine has a significant influence on the creation of legal norms, especially in situations of legislative vacuum, when legislators and legal practitioners turn to doctrine for theoretically grounded solutions and interpretations. Although the doctrine does not participate directly in the drafting of the law, it participates in a subtle and mediated way in the formation and clarification of legal norms. In certain situations, the influence of the doctrine can be immediate and official, especially when renowned legal experts are invited to participate in legislative reform committees, or their opinions are evoked in the analysis of normative texts subject either to referral in the interest of the law or to the resolution of legal matters. In such cases, doctrinal contributions become an integral part of the legislative process, providing the way forward in the formulation of new laws. Therefore, the doctrine not only supports the interpretation and application of existing laws, but also plays a crucial role in developing and improving the legal system, ensuring that new rules are theoretically substantiated and adapted to the needs of society.

Starting from these theoretical aspects regarding the notion of legal doctrine, it is interesting to identify and analyze the way in which this indirect source of law, comes and works with the almost mathematical regulations of criminal law, in terms of the constitutive content of crimes and not only. When we talk about the sources of law in general, we cannot fail to recognize the indisputable value of the legal doctrine. When we analyze the sources of criminal law, we cannot fail to notice a slight overshadowing of the doctrine as a source, even indirectly, of criminal law, by the rigorous principle of the legality of indictment.

Although the principle of legality is a fundamental rule of the entire legal system, it takes on a special importance and distinct particularities in the field of criminal law. Legality in criminal law has a particular nature and expresses itself in certain distinctive features which must be treated with particular care. The particular aspects of legality in criminal law are given by two essential elements. On the one hand, the legality of the provision of the act establishing the criminal offense, the rule according to which an act can only be considered a crime if it is provided for as such by the criminal law. In other words, no person can be convicted of an act or omission that is not clearly defined and described as an offense by the criminal law in force at the time of the commission of the act. This ensures certainty and predictability of legal rules, thus protecting citizens from abuse and arbitrary interpretation of the law. On the other hand, the legality of sanctions, according to which sanctions imposed for offenses must be expressly and clearly provided for by the criminal law. This means that no person may be subject to a punishment that is not established by criminal law for the act in question. This aspect ensures that sanctions are determined according to a pre-established and known legal framework, thus avoiding arbitrary or disproportionate application of penalties.

This study takes into account, in particular, the coexistence in the branch of the criminal law of the doctrine as a source of law, even indirectly, and of the principle of legality of indictment.

The legality of indictment is a fundamental principle of criminal law, intended for both the legislator and the judiciary bodies. According to this principle, only acts that are provided for by criminal law at the time they are committed represent criminal offenses and can be punishable under the criminal law. In order for an act to be considered an offense, it must be clearly and precisely described by the criminal law. This ensures that citizens can know in advance the conducts that are prohibited and the legal consequences they might entail. A corollary of the principle of the legality of indictment is that criminal law cannot be retroactive. In other words, an individual cannot be sanctioned for an act for which the criminal law did not provide as a criminal offense at the time it was committed. This principle protects individuals for potential abuses committed by the authorities, by ensuring that they cannot be sanctioned for acts that have not been declared offenses under an appropriate legislative process. Legality of indictment contributes to legal certainty by providing a stable and predictable framework for the application of criminal law.

Therefore, the principle of legality of indictment is essential to a fair and equitable legal system, thus ensuring that only conduct explicitly prohibited by the criminal law in force at the time of the commission of the act is subject to criminal sanctions. This is a fundamental pillar of the rule of law and the protection of individual rights and freedoms. These two distinguishing features underline the importance of clear and precise criminal legislation that explicitly defines offenses and the corresponding sanctions. The observance of the principle of legality in criminal law is essential to protect the fundamental rights and freedoms of individuals, ensuring that only those acts which are clearly criminalized by law are punishable and that the sanctions imposed are in accordance with the law.

The principle of legality of indictment has been subject to criticism, arguing that a criminal law based on this rule cannot keep pace with rapid and continuous social change. Social relations are constantly changing and rapid social dynamics can generate new illicit behaviors that are not yet covered by criminal law, leaving a legislative vacuum that can be exploited and can lead to significant harm to society. On the other hand, the inability to foresee all the new offenses that may arise in society may lead to the non-punishment of acts that are dangerous for social values. The legislative process is often slow and complex, which can make it difficult to quickly adapt criminal laws to new social and technological realities. At the same time, there is a risk that acts that are no longer socially relevant will continue to be criminally sanctioned. Certain criminal regulations can become anachronistic, by sanctioning behavior that is no longer considered dangerous or relevant to society. This can lead to unfair application of criminal sanctions and unnecessary burden on the justice system.

In relation to these challenges, legislators can adopt more flexible legislative mechanisms, such as delegating powers to executive authorities to issue rapid secondary regulations in urgent situations. Another possible solution to adapt the normative provisions to the continuous movement of society would be the establishment of mechanisms for the periodic review of criminal legislation, which can help to identify and eliminate obsolete rules and adopt new rules that respond to social developments.

The solution that is the focus of this study aims to involve experts in criminal law and other relevant fields in the legislative or interpretative process, who can help to better anticipate social developments and to formulate more adaptable and effective criminal laws, or adapt the existing ones to new social realities. This is the point at which the principle of legality of indictment, which can be perceived as a shield around criminal law, recognizes the importance of doctrinal opinions in both the process of normative drafting and the process of interpretation of criminal law regulations.

Further on, we will exemplify the role of the doctrine in criminal law, with reference to the principle of legality of indictment, as this role is highlighted by the decisions of the High Court of Cassation and Justice both in the referral in the interest of the law and in the resolution of certain matters of law. An important role in this scientific approach was played by the comparative method, which was used to find the common and differentiating elements between national procedural instruments. This was also essential for the identification of solutions of the High Court of Cassation and Justice, based on the doctrinal views on the matter.

Case law study

A first analysis takes into account Decision no. 7/2023 of 29 May 2023 delivered by the High Court of Cassation and Justice – the panel with competent jurisdiction to hear the referral in the interest of the law in case no. 946/1/2023. The referral in the interest of the law brought by the Prosecutor General of the High Court of Cassation and Justice concerned the following legal matter: *“If the act of theft committed by using an improvised device that blocks the activation of the central locking system of the doors of a motor vehicle by jamming the signal of this system meets the conditions of the typicality of the crime of theft under art. 228 para. 1 of the Criminal Code or those of the offense*

of aggravated theft committed by using a fake key referred to in art. 228 para. 1 letter d of the same Code”.

The assistant magistrate assigned to the case presented the report showing that *the legal opinions of several experts* had been requested and submitted in this case. The opinions of renowned experts from the Faculty of Law of the University of Craiova; from the Centre for Research in Criminal Sciences; from the Faculty of Law of the West University of Timișoara; from the Faculty of Law of "Babeș-Bolyai" University of Cluj-Napoca; from the Faculty of Law of "Alexandru Ioan Cuza" University of Iași and from the Faculty of Law of the University of Bucharest were also submitted. In addition to the opinion of legal experts, the assistant magistrate also requested the technical opinion of experts from the Faculty of Electronics, Telecommunications and Information Technology of Bucharest, Department of Electronic Devices, Circuits and Architectures.

In addition to the opinion of renowned experts in the field, the presentation made on the term of "fake key" was based on a series of doctrinal references, as follows:

- ✓ “a fake or counterfeit key or any system for opening locking systems, whether they be doors, car doors, mechanisms fitted to cash boxes or diplomatic bags, lockers of any kind, boxes” (Dobrinou and Neagu 2011, 201 - *Criminal Law. Special Part* – cited in the opinion of the Faculty of Law of the West University of Timișoara);
- ✓ a fraudulently copied or forged key or any other device that can be used to operate a locking mechanism without destroying or damaging it, i.e. "any tool not intended by the owner or person entitled to do so to open the lock regularly (Pascu, and Buneci 2017, 237 - *Criminal Law. Special Part*- cited in the opinion of the Faculty of Law of the West University of Timișoara);
- ✓ “any kind of tool or device which can be used to operate a closing mechanism without destroying, damaging or rendering inoperative” (Toader, 2019, 270 - *Romanian Criminal Law. Special Part* - cited in the opinion of the Faculty of Law of "Alexandru Ioan Cuza" University of Iași; Vasiliu et al. 1975, 209 - *Criminal Code with Commentary and Annotations*; Udroi 2019, 287 - *Criminal Law. Special Part*, cited in the opinion of the Faculty of Law of "Alexandru Ioan Cuza" University of Iași);
- ✓ the access card to a building, the access code, a person's fingerprint or the person's voice can also be keys, in the circumstantial sense of aggravation (Bogdan and Șerban 2020, 48, *Criminal Law. Special Part*).

In support of the aggravating factor, other doctrinal opinions are also held, according to which: “the aggravating factor exists no matter how rudimentary the key used may be” (Cioclei 2021, 274), due to the fact “the legislator intended to make the theft committed by using a fake key more punishable, taking into account not the skill of making the fake key, nor its similarity to the true one, but the fact that the lock, which is intended to provide greater protection for the locked goods, has been broken (Papadopol and Popovici 1977, 182).

By analyzing the aforementioned specialized doctrine, the opinions of experts in the field as well as the relevant case law, the Supreme Court decided that there is no other distinct circumstantial element that exceeds the scope of the aggravating factor provided by art. 229 para. (1) letter d) final thesis of the Criminal Code, "fake key", but on the contrary, it is included in its definition, *as established by the contemporary doctrine and case law*, thus enriching the scope of application of the provisions of art. 228 para. 1 of the Criminal Code in relation to art. 229 para. 1 letter d of the same code and adapting them to new existing social realities.

The second practical case submitted for analysis and which is based on the analysis of experts in terms of establishing the limits of application of the principle of legality in criminal law is Decision no. 18 of 22 April (2024) on the concepts of dwelling, room or outbuilding referred to in art. 226 para. (1) of the Criminal Code. The referral to the High Court of Cassation and Justice in resolving such matter of law aims at the pronouncement of a preliminary decision for the resolution of the following legal matter: “*What if the concepts of dwelling, room or*

outbuilding referred to in art. 226 para. (1) of the Criminal Code are broader than that of domicile, provided for in art. 224 of the Criminal Code, and also include those premises which, even if they cannot be classified as a domicile, provide protection for the privacy of a person, for example, the sanitary group of a clinic or to which several persons have access, a dressing room in a shop, the changing room of a gym?”

In establishing the limits of the principle of legality of indictment in relation to the provisions of art. 226 para. (1) of the Criminal Code and art. 224 of the Criminal Code, in accordance with the provisions of art. 476 para. (10) in connection with art. 473 para. (5) of the Code of criminal procedure, experts in criminal law have been asked to give their opinion on the question of law under examination. In this regard, the West University of Timisoara - Faculty of Law - Center for Research in Criminal Sciences has taken the view that criminal law has extended the meaning of domicile from dwelling to outbuildings, but not in the case of other premises. Therefore, the intention of the legislator to customize these premises and only these premises is clear, and any extension of the terminology would lead to a lack of clarity and predictability of the criminal regulation. This omission indicates a clear differentiation between the concept of privacy and that of domicile, thus suggesting that the protection afforded by the law to privacy is designed to be more specific and limited to certain context and does not automatically extend to all enclosed premises, as in case of the protection of domicile. The persons formulating doctrines have detailed that the terms referred to in art. 226 para. (1) of the Criminal Code fall under the scope of the term of private premises as a result of the attribute of ownership or temporary possession, and not public premises, so that the indictment text provides protection only to private premises by their nature. Therefore, the interpretation of the law must be limited to the exact meaning of the words used, without adding to or extending their meaning. If an extension of the applicability of the law were to be sought, explicit rewording of the text by the legislator would be necessary to clarify the intention and specifically include the additional situations that the law should cover.

Babeş-Bolyai University – Faculty of Law held that the concepts referred to in art. 226 para. (1) of the Criminal Code are equivalent to the concept of domicile provided for in art. 224 of the Criminal Code, not including premises which cannot be qualified as a domicile within the meaning of the criminal law. It has been argued that an analysis of the way in which the criminal legislator has, over time, referred to these concepts shows that, in criminalizing violations of privacy, the legislator has resorted to the use of concepts from previous criminal legislation. Furthermore, in the case of presumed self-defense, the legislature did not intend that the concepts of dwelling, room or outbuilding to be independent of those used in the offense of trespassing. This suggests that there is a continuity and interdependence between old and new legal concepts in order to maintain consistency and clarity in the application and interpretation of criminal law. Therefore, the legislator observed terminological unity. It was stated that the legislator was aware that, in other legislations considered when criminalizing the act, a clear distinction is made between the concept of living space and that of toilet or dressing room, but did not make this clarification in Romanian law. It was argued that the model was taken from the Italian Criminal Code, which referred to the concepts used in the indictment for trespassing. To the extent that the expressions used by the legislator in art. 226 para. (1) of the Criminal Code would, for example, refer to any room without representing a domicile within the meaning of the criminal law, it was considered that the indictment rule would be extended beyond the possible meanings of the concepts used in the precept of the rule. This would result in an analogy to the disadvantage of the defendant, which is contrary to the principle of legality of indictment. Strict interpretation of the criminal law requires that the concepts be understood in their exact meaning, without extension or analogy, in order to protect the fundamental rights and freedoms of the defendant. Furthermore, the principle of legality of indictment would be infringed, including the need to observe the foreseeability of criminal law.

The Faculty of Law of “Alexandru Ioan Cuza“ University of Iași considered that the referral raised a conceptual problem of uniform or heterogeneous interpretation of terms, which affects the typical nature of the offense of invasion of privacy, on which the outcome of the case depends. On the merits of the matter, it argued that, in a comparative approach, the concepts referred to in art. 226 para. (1) of the Criminal Code cover the meaning given in the indictment rule referred to in art. 224 para. (1) of the Criminal Code. The legislator has formulated the conditions for the indictment for invasion of privacy in a precise and restricted manner. This means that any extension of the application of the rule must be clearly defined by law, without ambiguity. The terms used in the legal regulations must be interpreted uniformly to ensure consistency and predictability in the application of the law. For example, the terms used to define invasion of privacy should have the same meaning and applicability as the terms used for trespassing. Different interpretations of the same terms in similar legislative contexts can lead to inconsistency and legal uncertainty. This is why, it is essential that these terms are interpreted consistently, respecting the legislator's intention and the general legal framework. The legislator established the conditions of the indictment for violation of privacy in a precise and restrictive manner, which requires a restrictive interpretation of the indictment rule. This ensures consistency and predictability in the application of the law, by observing the principle of legality and avoiding legal ambiguities. Identical terms must be interpreted in a similar way in order to maintain legislative coherence and to protect individual rights and freedoms in a fair manner. A person's privacy is a fundamental value that must be protected. This protection should not just be limited to the living space, but should also extend to other places where a person may wish to maintain privacy. Legal interpretation must observe the original terms and intentions of the legislation. Forced reinterpretation of terms to extend privacy protection could lead to legal inconsistency and uncertainty. It is the responsibility of the legislator to create and adopt rules that explicitly extend the protection of privacy in non-living premises. Only clear and specific legislative intervention can ensure adequate and consistent protection of privacy. This approach shows that the protection of privacy is essential and underlines the need for legislative intervention to adequately extend this protection, thus ensuring clarity and consistency in the application of legal rules. This opinion emphasizes the importance of normative and interpretative coherence in order to ensure predictability in the application of indictment rules, while observing the principle of legality of indictment. Normative consistency refers to the need for laws and rules to be formulated and applied in a logical and consistent manner. This is essential to ensure a clear and fair legal framework. The interpretation of the rules must be uniform and respect the intention of the legislator, avoiding discrepancies and ambiguities that could lead to unfair or arbitrary application of the law. Predictability in the application of the law is crucial to enable individuals to understand and anticipate the legal consequences of their actions. Predictability ensures that indictment rules are consistently applied and are not subject to unexpected changes or variable interpretations, thus providing stability and legal certainty.

The Faculty of Law - University of Bucharest considered that the concepts of dwelling, room or outbuilding in the offense of invasion of privacy are identical, in terms of content, to the concept of domicile in the criminal sense, except for the enclosed perimeter relating to those premises, as understood in the context of the offense of trespassing. Essentially, it was argued that privacy is a fundamental right that manifests itself in various contexts and places. This implies that, in theory, the protection under the criminal law could be extended to cover premises other than the home and its outbuildings. Privacy includes not only activities that take place at home, but also in other places where a person may have a legitimate expectation of privacy. Although there are theoretical arguments for extending the criminal law protection of privacy beyond the home and its outbuildings, such an extension cannot be achieved without clear regulation in criminal law. The concept of room cannot acquire an autonomous meaning, because the offenses are placed in the same chapter of the Criminal Code, so a unitary

interpretation is required, otherwise, it would be totally lacking in predictability and would introduce by way of interpretation a distinction unforeseen by the law to the disadvantage of the defendant. Therefore, the observance of the principle of legality of indictment requires that the semantic consistency of the terms used in the definition of the offense be observed.

Although the opinion of experts in the field has been relatively unanimous in the sense that the criminal protection of privacy in places other than home and its outbuildings cannot be accepted from the point of view of the principle of legality of criminalization, the High Court of Cassation and Justice admitted the referral for a preliminary ruling on a matter of law and established that the concepts of home, room or outbuilding in the content of the offense of invasion of privacy, provided by art. 226 para. (1) of the Criminal Code, have the same meaning as the concepts of home, room or outbuilding in the offense of trespassing, referred to in art. 224 para. (1) of the Criminal Code, by falling under the scope of the concept of domicile for the purposes of the criminal law.

Conclusions

Although the principle of legality of indictment is fundamental to the protection of individual rights and to ensuring legal certainty, it is important that the legislative system finds ways to adapt quickly to social change in order to maintain the effectiveness and relevance of criminal law. Legal doctrine can contribute to the reinterpretation of criminal law regulations, thus influencing the way in which the principle of legality of indictment is applied, bringing new perspectives and interpretations to criminal law regulations. By means of these new interpretations, the doctrine may influence the application and understanding of the principle of legality of indictment. Legal doctrine, through its analyses and interpretations, can provide clarifications and new perspectives on existing criminal regulations. This is essential for the development and evolution of criminal law. Doctrine can redesign the principle of legality of indictment by offering interpretations that broaden or limit the scope of application of criminal regulations. For example, by way of doctrinal interpretations, certain acts that were not previously considered criminal offenses could be reinterpreted so as to bring them within the scope of existing criminal regulations. This can lead to a better understanding and application of the law, but it must always be consistent with the principle of predictability and clarity of the law.

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