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Research Paper

Prohibition of the application of criminal law by analogy within the principle of legal certainty

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ABSTRACT: *Analogy has existed as an institute in criminal law and has served to fill the legal vacuum in cases where a socially dangerous act was not expressly provided for as a criminal offense. From a theoretical point of view, doctrine prohibits the application of law by analogy, considering that the institute contradicts the principle of legality. This approach is also based on the practical point of view, given that the application of analogy results to be unnecessary as long as the Criminal Code itself has been enriched and supplemented with new criminal offenses and adapted to the requirements of the fight against crime.*
Interpretation of criminal norms in order to identify their content, their substance, is a process of a particular importance, especially in criminal law. The latter recognizes several types of interpretations leaving open the debate among jurists as to which of them is more accurate and more effective for the fairest application of a norm. This discussion is considered closed when we talk about a special kind of interpretation, namely the interpretation by analogy, which is absolutely forbidden, even harmful in any trial, especially when it aims to worsen the position of the defendant.
Focusing on this point of view, the following paper provides an overview of the causes of prohibition of analogy in principle, the legal scope for its application in terms of favoring the position of the defendant and the issues related to this institute compared to the Italian doctrine of criminal legislation.
KEYWORDS: *analogy, criminal law, legality, prohibition, Italian doctrine, exceptional application*

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I. ANALOGY IN CRIMINAL LAW

The application of law by analogy is that interpretive process which, in the absence of a written legal regulation, implies the resolution of a case by reference to the resolution of a similar case (*analogis legis*) or by reference to the general principles of law (*analogis iuris*).

The prohibition of analogy in the field of criminal law is characterized by several specifics. Provisions regarding analogy in the Albanian Criminal Code are inspired by the legislation of democratic countries, especially the Italian codifications. Thus the prohibition of analogy in criminal law finds its source in article 29 of the Constitution of the Republic of Albania and in the articles of the Criminal Code, expressly articles 1/c, 2, and 3. This principle is also affirmed by the European Convention of Human Rights (ECHR).[1]

Prohibition of application refers mainly to the contradictions that the institute of analogy has with the principle of legality. Proponents of the theory of absolute prohibition of analogy take into account the priority need for security and uniformity of criminal law, which would be put in question from the application of the law by analogy.

Most of the doctrine claims that the prohibition of analogy in criminal law has an absolute character despite the existing theories for the sorting of analogy in *malam partem* (not in favor of the offense) and in *bonam partem* (in favor of the offense). These claims are based on the legal certainty that consist the foundation of the principle of legality. According to this principle the judge cannot punish for a fact that is not expressly provided by law as a criminal offense.

In regard of this orientation goes also the extraordinary character of soft criminal norms, since their analogical interpretation may exclude the application of a punitive norm, falling into logical contradiction with the prohibition of analogy. We refer as soft criminal to those norms that contain reasons for exclusion from criminal responsibility or mitigating circumstances. In other words, the prohibition or permission of analogy

cannot be complete or partial, as it may result that by applying the analogy in favor of the offense we are faced with punitive situations and norms. Thus the substance of the prohibition of analogy in both criminal and constitutional law is extended only within the punitive framework. The purpose of this prohibition is intended to not aggravate the legal situation of the subject and not to eliminate or reduce the harmful consequences.

At this point, it is worth making a distinction between interpretation by analogy and the extended interpretation. The latter adheres to the norm, but expands to its limits, while on the contrary the analogy goes beyond the limits of the norm and assumes the role of the latter even for facts that are not legally provided by law.[2]

II. ANALOGY AND THE PRINCIPLE OF LEGALITY

The law reserve in criminal law implies the need for political-criminal choices to be reserved only to the state power, representative of the will of the people, having in mind that the term 'law' refers to law in the formal sense approved by Parliament, as representative of all the people, precisely referring to the relationship between the majority and the opposition. Another barrier that stands between legal certainty and the criminal judge is the prohibition of analogy to the detriment of the criminal offense (*analogia in malam partem*), otherwise provided as the principle of legality.

The extent of interpretation by analogy of a norm that turns in disadvantage of the defendant is considered analogy *in malam partem* in two cases.[3] Firstly it's about the case when the defendant is punished for a fact not provided by law, or the case when it is applied a sentence more severe than that provided by law or a circumstance aggravating his position, not provided by law.

The legal reserve has been included in the doctrine of Albanian criminal law only in the last twenty years. Although our post-communist Criminal Code of 1995 referred in entirely to the Italian Criminal Code, both Albanian criminalists and constitutionalists were not up to date with the provision of legal reserve under criminal law. What was known was only the principle of legality, also with reference to Italian doctrine.

In the interpretation of articles 1 and 2 of the Criminal Code, the court may not punish for facts not provided explicitly by law as criminal offenses or apply criminal laws to offenses that were not provided as such from the law of the time.

The prohibition of analogy (*in malam partem*) presumes that the legislator must have previously provided for precise criminal norms.[4] This prohibition is overlooked when the legislator creates legal spaces that enable the judge not to adhere to the law by filling these spaces through references to different norms. In many cases when it is claimed the application of law by analogy from the judges, we actually have to do with the existence of norms that in terms of legislative technique are not formulated correctly and violate the principle of legal certainty, more specifically the principle of precision of criminal law norms. The principle of legal certainty in criminal law implies the obligation of the legislative power to accurately predict not only the definition of the concrete criminal offense, but also its constituent elements, the manner of committing the offense, the form of guilt etc., thus avoiding subjective interpretations of the legal-criminal norm. According to this principle, the legislator has the obligation to accurately predict the criminal offense and the criminal sanction in order to avoid the subjectivism of the judge in the process of decision making. The principle of precision of norms as part of the principle of legal certainty is in fact the guarantee for freedom and security.

That's why, the Italian Constitutional Court in its decision of 24 March 1988 has determined that only through precise and clear laws, the citizen can understand what is legal and what is not. Italian jurisprudence significantly influenced the enrichment of Albanian doctrine and practice regarding the meaning of legal reserve in the framework of the correct formulation of criminal legal norms.

Only through the principle of precision, thus by means of clear and precise criminal norms, the state guarantees the defendant the full implementation of the right for defense. An incorrect norm prevents the defendant or his lawyer from identifying the object of the charge and from presenting arguments and evidence in order to absolve him.

In the attempt to give life to the principle of legality, it is underlined in jurisprudence that, in order for the criminal norm to respond to the need for legislative clarity, it is necessary that the norm itself should be clearly and precisely formulated so that to allow the judge to identify the type of illegal fact that is regulated by the concrete criminal norm.

If for the norms that have the above features, the criminal law leaves no room for discussion, ambiguities are encountered in the cases of provisions that do not aggravate the position of the defendant, on the contrary justify the latter. These norms, for the most part, do not belong to the substantive law but to the criminal procedural law.

The Criminal Code does not explicitly provide for the principle of legal certainty or that of legal reserve, as it has more of the features of a constitutional principle that stands at the top of the hierarchy of norms. Also, the principle of legal certainty is clearly encountered in the Constitution of the Republic of Albania and the European Convention on Human Rights.

The codes of the most developed countries, such as the Italian Criminal Code, have given the necessary space to this very important principle, distinguishing it from other parts of the principle of legality.

While the principle of legal certainty belongs to the hierarchy of sources of criminal law, the principle of legality includes the technique of formulating concrete criminal norms in order to protect the individual from abusive application of the law by the judiciary.

III. ANALOGY IN FAVOR OF THE OFFENSE AND CAUSES OF IMPUNITY

According to the doctrine, the prohibition of analogy in criminal law exists only in those cases when its application would be in disadvantage of the subject, ie would aggravate the position of the latter (*analogia in malam partem*). This interpretation prohibits judges from using the analogy for irrelevant facts in the legal-criminal sense or to apply harsher sentences than those provided by law. Also, the prohibition of analogy should not extend the effects to those cases when the subject is excluded from criminal liability or when its use significantly facilitates his position (*analogy in bonam partem*).

Law enforcement by analogy is thought to be acceptable in cases of specific norms, which are an expression of the general principles of criminal law. For example, necessary defense is an expression of the general principle that considers fair the right to respond to violence with violence, or the exercise of a right expresses the principle that a person exercising a right does not commit an unlawful fact.

However, the admissibility of law enforcement by analogy finds limitation in the following three interpretations:

1) The application of the law by analogy should not include the case that is required to be resolved in the narrow, literal sense, but should refer to the general principles applied in similar cases, as it would lead to the avoidance of investigation and trial. For example, the application of the general principles of committing a criminal offense in conditions of irresponsibility due to mental state may be acceptable in the case of committing a criminal offense in the state of somnambulism (since the latter is not expressly provided as a criminal offense under criminal law).
2) The legal gap identified by the interpreter should not be "intentional", but should be a consequence of coincidence and lack of legal framework.
3) The favorable provision should not have an extraordinary character.[5]

The Italian Criminal Code, specifically article 14, essentially prohibits the judge from addressing the interpretation of law by analogy to condemn criminal facts not provided by law as criminal offenses. Even though there is no specific provision allowing the application of analogy in favor of the defendant, some jurists think that through the grammatical interpretation of the above norms and taking into account the general legal principle that what the law does not prohibit, is allowed, we can reach the conclusion that to facilitate the position of the defendant we can theoretically turn to analogy.

The Albanian Criminal Code follows the same line. The analogy in favor of the offense in Albanian criminal law not only does not find legal regulation, but at the same time, it is not recognized by the criminal legal doctrine.

In the Albanian judicial practice we do not find cases of application of the law by analogy in favor of the criminal offense. However from the beginning of the 50s until the end of the 60s, when the trials were conducted by the state party, as popular trials, there is information that to favor the position of a defendant and to make possible his reintegration into society, after accepting the offense and making self-criticism, the popular judges used socially justifying arguments with features of analogy in favor of the offender.

The analogy is not applicable in the case of impunity due to the extraordinary character of these norms. The general principle of criminal law is that the perpetrator of an unlawful fact committed with guilt must necessarily be held criminally liable and punished according to the sanctions provided by law and therefore cases of exemption from punishment are considered extraordinary cases.[6]

There are opinions that the interpretation by analogy should not extend the effect in the case of the application of mitigating circumstances, since these circumstances are closely related to the criminal fact and the actions of the defendant. So their application is the result of criminal policies and court conviction.[7]

In conclusion, we can say that both the application of analogy in favor of the criminal offense and the application of the most favorable law for the subject are based on the same principles.

IV. ANALOGY IN THE ALBANIAN CRIMINAL LAW

Albania gained its independence from the Ottoman Empire in 1912. From this time on, every aspect of life of Albania and Albanians was completely dominated by the Italian model, including legal and territorial reforms, the organization of state power, etc. The codification was finalized in the period of the kingdom with the Criminal Code and the Civil Cod of respectively, 1927 and 1929. These codes were inspired by the modern civilization of the time, such as that of the Italian Renaissance, specifically from the Criminal Code of Zanardelli that operated in the kingdom of Italy in the period between years 1890 - 1930.

The Criminal Code of the Kingdom was characterized by a democratic spirit and as such was built on the principle of legality. On the basis of this principle, is made the introduction of this Code, which expressly provided not only the prohibition of the application of law by analogy for acts which were not provided by law as criminal offenses, but the norm had a wider character. It also prohibited the application of penalties which were not provided by law.[8] Like the Criminal Code of Zanardelli, the Criminal Code of the Albanian Kingdom also divided the criminal offenses into crimes and misdemeanors.[9]

In 1939, Albania handed over the crown to the King of Italy, Victor Emmanuel III, creating this way the Italian protectorate of the Kingdom of Albania. It should be noted that although in this period it was 9 years since the Criminal Code of Rocco entered into force in Italy, there is no data that this Code has been applied in Albania. Since Albania was known for its self-government, it is thought that in this period still continued the use of the previous Italian code, that of Zanardelli.

After the liberation of Albania from Nazi occupation, in 1944, it was necessary to draft new criminal legislation. It was time when the communist party came to power and it was thought that the legislation of the new communist state should be inspired by Marxist-Leninist ideology and it should manifest the power of the totalitarian state. The temporary criminal code was carried out in cooperation with the Yugoslav and Russian political party advisers who were in Albania during the last years of the war.

Initially, the role of the codes was played by two separate laws.[10] Criminal law after liberation, at a certain point of its development recognized and affirmed the institute of analogy. This institute was expressly provided by the Law on the Criminal Code of 1948. Specifically, article 5, point 3 of this law provided for criminal liability *'... for a socially dangerous offense, which although not expressly provided by law, corresponds to a criminal offense expressly provided by law by resemblance of its elements*'. An example of the criminal offense not provided by the law of the time was the escape. This came as the result of the fact that many intellectuals educated in the west after seeing the totalitarian spirit of the communist party that just came to power and taking into consideration the great danger that threatened them due to their controversial political convictions, decided to leave for the west. Another criminal offense for which the analogy was applied was non-delivery to the central political committees of food or agricultural machinery. This meant that traders or any other person who possessed significant quantities of different foods or any other means necessary for the production of food were obliged to surrender otherwise keeping them for themselves constituted a criminal offense.

These criminal facts that were not provided expressly as criminal offenses were considered as such on the basis of a binding decree regarding compulsory collection. The same methodology referring to the application of law by analogy was applied to seizure and confiscates the property of the so-called 'enemies of the people' or 'war criminals'. In fact the meaning of war crimes for the totalitarian Albanian communist state had nothing in common with the meaning of war crimes committed during World War II by senior Nazi fascist officials and subsequently tried by the Nuremberg tribunal. Merchants, fugitives, intellectuals, officials who had worked in the administration during the Nazi occupation and any other person with liberal democratic convictions who disagreed with the communist ideology, were considered war criminals.

The provision in question then defined the basis and limits of criminal liability through the application of analogy and how the latter referred to other provisions or special laws.

Another moment of application of analogy under this law can be found in the law of the time.[11] The analogy to the relevant norm is encountered when "*the new law takes into criminal liability or aggravates the punishment for criminal offenses provided by special provisions*". In other words the abovementioned Criminal Code had retroactive power not only in favor of the offense, regarding the exclusion from criminal liability and the application of a the most favorable punishment, but also referring facts that were not provided as criminal offenses before its entry into force.

On the other hand retroactive aspects of the Criminal Code of 1948 are not found only in the aforementioned article. It also provided retroactive force referring to criminal offenses committed before the entry into force of the code for which there was not given a final decision.[12] The article in question served as a form of scrutiny for any decision of innocence given by the partisan trials,[13] but of which executive committees and political advisers still had their doubts during the years of occupation. This article was totally contrary to the principles that the Criminal Code should provide in favor of the defendant, principles which were provided from the previous code of the Kingdom. That's why it was issued on 8 October 1949; Decree no 941 in order to achieve a rigorous application of these norms.[14]

It is still unclear to researchers how two diametrically opposed articles could exist in the same law in terms of the meaning of retroactivity, but this is not the only case. There are also logical inconsistencies regarding the definition of criminal responsibility and criminal offense. Specifically, article 4 of the Code provides that '*criminal guilt can be provided and the sentence can be determined only by law*', whereas article 5/3, which legitimizes the application of analogy, provides that *'there is criminal responsibility for a socially dangerous act which, although not expressly provided by law, by the resemblance of its elements corresponds to*

a criminal offense expressly provided by law'. We must note that the formulation of article 4 is in line with the doctrine of the classical school according to the principle of legality, while the admissibility of the application of analogy under article 5/3 was a step back in terms of jurisprudence, aiming to strike all political opponents and the consolidation of the new communist government.

In the Criminal Code of the People's Republic of Albania of 1952, the analogy was affirmed that it could be applied only in exceptional cases. It was provided by article 3 of the Code as follows:

'*When a socially dangerous offense is not directly provided by the criminal law, the basis and limits of criminal responsibility for this offense are determined according to the provisions of criminal law, which provide for crimes of a similar nature.'*

Thus, the Code recognized only the analogy to the detriment of the subject, taking as references criminal offenses provided in the Code or other special laws, in order to resolve those facts that from the point of view of judges and prosecutors of the time had elements of criminal offenses, regardless that they were not expressly provided by law as such.

The above interpretation was also based in a special provision provided by the Code in question,[15] according to which the general provisions of the Criminal Code also applied to other crimes provided for in other criminal laws.

Despite the above, for the application of analogy in this period, many jurists and researchers think that it was not applied at all, or only in some very rare exceptional cases in practice.[16] A novelty of the Code of 1952, however, is the prohibition of the retroactive effect of criminal law.

The provision of the general part of the Criminal Code, which provided for the institute of analogy, was repealed by Decree no 2804, dated 4 February 1958. In 1977, the new Criminal Code of the Socialist People's Republic of Albania that entered into force did not explicitly provide for the application of analogy. However it contained the same special provisions of the previous code. This provision allowed at the same time the application of the general provisions of the Criminal Code to criminal offenses provided by special criminal laws.

In the Criminal Code of 1977 there is no legal provision for the definition of a criminal offense and criminal liability intertwined with the principle of legality. On the basis of criminal responsibility stands only the Labor Party, the working class and the ideology of Marxism-Leninism. In this interpretation and in the absolute absence of the principle of legality we also note the absence of the prohibition of the application of the analogy provided in the relevant provisions. As noted above, many jurists are of the opinion that the interpretation of criminal law by analogy came to an end in the late 1960s and with the entry into force of the Criminal Code of 1977. Although there were no explicit legal provisions to prohibit it, the analogy was not applied due to the enrichment of the code with new provisions. However, the judge had all the discretion to defend the dictatorship of the proletariat as the main task of the criminal legislation, to interpret within the limits actions that were considered against the popular power and the party as it is the case of agitation and propaganda, without having a precise definition which statements would enter the scope of this offense.[17]

The continued existence of this special provision enabled law enforcement agencies to apply the aggravating circumstances (a form of analogy *in malam partem*) provided by the general part of the code, for those acts that were sanctioned only in special laws.

The Criminal Code of 1977, as the last code of the communist period, indeed took a step forward in not anticipating the analogy in its structure, but neither did it explicitly forbid the application of the latter, as did the Criminal Code of 1995. At this point we can note the fact that it recognized the principle of legality previously sanctioned by the Criminal Code of the Kingdom.

What resulted in 50 years of dictatorship in the field of law is that in the communist state there was no need for doctrine and theory, so we encounter an absolute lack of the principle of legality and legal reserve in criminal legislation. The new popular justice had to be only effective and the criminal legal norms did not have any formulation to specifically distinguish elements of criminal behavior. They were easy to apply in terms of trial by judges and prosecutors but many of them were difficult for the population to understand.

V. LEGAL-CRIMINAL ISSUES OF THE POST-COMMUNIST TRANSITION YEARS

In 1991, Albania held its first pluralist elections after 50 years of communist dictatorship, where the state party influenced every aspect of Albanian life in the justice system, medicine, the economic system. It is about the most difficult years of the Albanian state, both in terms of economic and legal problems; are the years when organized crime begins to generate and Albania becomes the gateway to Europe for any kind of traffic.

The Criminal Code of the Republic of Albania entered into force only in 1995 and for a period of 4 years the Albanian state and the justice system functioned without a written Criminal Code but only based on legal-criminal norms of a general nature referring to the Criminal Code of Socialist People's Republic of Albania of 1977.

As difficult years of transition, they brought new forms of crime, unprecedented in our country. Among them we can mention the criminal offenses of trafficking of human beings, narcotics and weapons. Exactly with these types of offenses are linked the legal problems of the time. Information on the application of the law at this time is extremely scarce, due to a still communist mentality, according to which the investigation phase and court proceedings were conducted in complete secrecy.

As for these new forms of criminal offenses and organized crime, they did not find a proper legal provision in any of the internal laws of the new democratic state. From the limited information we have, it results that the perpetrators of these criminal offenses were kept in cells based on the application of norms with similar legal-criminal elements, as a mere form of analogy. We can bring as an example the application of norms regulating the criminal offense of prostitution even in the case of trafficking for prostitution purposes, or the norms on the illegal possession of firearms in the case of arms trafficking, or the case of provisions on illegal possession of narcotic substances and psychotropic drugs used for the offense of narcotics trafficking.

This legal chaos came to an end with the entry into force of the Criminal Code and the Code of Criminal Procedure of 1995, as well as with the ratification by the Albanian parliament of all international conventions related to trafficking of human beings, trafficking of weapons and narcotics, prevention of torture etc. One more time, the codification in the field of criminal law was inspired from the Italian model.

VI. ANALOGY AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

Court decisions referring to the prohibition of analogy are few.

Since the adoption of the European Convention on Human Rights and the establishment of the European Court of Human Rights (ECHR), the jurisprudence of the court has mostly in focus the violation of article 7 '*No punishment without law*', or otherwise the retroactive effect of a juridical-criminal norm, than specifically the prohibition of analogy. Practice cases in this regard are numerous.

Some of them refer to the prohibition of application of retroactive force of criminal norms to the detriment of the defendant. Here we can mention *Kokkinakis v Greece* and *Jamil v France*.[18]

Other cases of prohibition of the application of retroactive force, or more precisely when the unlawful act is not expressly provided by law as a criminal offense are *Ould Dah v France* or *Vasiliauskas v Lithuania*.[19]

In the context of the prohibition of application by analogy of punishments we can mention *Hummatov v Azerbaijan, Hakkar v France, Vinter and others v United Kingdom*.[20]

With regard to the severity of the punishments, the European Court of Human Rights has ruled that the sentence of life imprisonment would not be considered equivalent to or more severe than the death penalty applicable at the time the criminal offense was committed and then repealed. Thus the death penalty should not be replaced with life imprisonment if the provision has not provided for it expressly.

One of the most well-known cases of practice is the Krohn case.[21] Although the decision does not have a criminal character, the Court affirms that general Community norms are applicable by analogy only in cases where this application prohibits the violation of a Community principle.

Also this decision is important because the application of the law by analogy would avoid violating the Community principle of equal treatment.

In another decision,[22] the European Court of Human Rights has assessed and sanctioned the application of the principle of legality (*nullum crimen, nulla poena sine lege*), with the aim of stopping the extension of existing criminal offenses even for facts which at the time when committed were not provided for by law as criminal offenses, thus prohibiting the application of criminal law by analogy. Also in the same spirit, the European Court of Human Rights, in support of the prohibition of analogy, sanctions the prohibition of extended interpretation to the detriment of the subject, the perpetrator.**[**23**]**

VII. THE DIFFERENCE BETWEEN THE APPLICATION OF LAW BY ANALOGY AND EXTENDED INTERPRETATION

The Albanian doctrine of criminal law recognizes several forms of interpretation of the juridical-criminal norm. Among the most important are judicial interpretation, doctrinal interpretation, grammatical interpretation, logical interpretation, etc. As we have highlighted above, even this aspect of the Albanian doctrine is inspired from the Italian model. However, in this paper, what we think is worth comparing, due to the similarities they often have with each other, is the difference between the application of a criminal norm by analogy and the extended interpretation of the criminal norm.

Extended interpretation consists in reasoning the constituent elements within the limits provided by the norms, but always within the framework of these elements. In itself, extended interpretation is a form of judicial interpretation, materialized concretely in those cases when the interpretation of the norm or its constituent elements is done by the High Court through unifying decisions or decisions of the United Colleges.[24]

Unlike the application of the criminal norm by analogy, which is nothing but taking on criminal responsibility for an action not legally provided as a criminal offense,[25] the extended interpretation does not contradict the principle of legality, namely the principle of legal certainty, which we have addressed above.

In many cases, the extended interpretation of legal-criminal norms, clarifies the constituent elements of the norm, for which the practice is unclear.[26] Here we bring to attention the interpretation of the grave consequences in the criminal offenses of theft and fraud, through the unifying decision of the United Colleges and for which the High Court had to determine concrete values that served as orientation for the courts.[27]

Another case of extended interpretation is the condition of the territory in the consumption or attempted trafficking of criminal offenses related to trafficking [28] or the definition of small dose in the criminal offense of "*Production and sale of narcotics*", provided by article 283 of the Criminal Code,[29] where the High Court had to define the allowable amount from law for personal use.

In all the above mentioned cases, where in our point of view we are dealing with an extended interpretation of criminal norms, it must be underlined that we are talking only about criminal norms of a simple criminal legal nature.

The difficulty of defining a dividing line between the application of the norm by analogy and the extended interpretation often leads to the confusion of these two institutes, either as legal concepts or in terminology. In terms of terminology we think the most appropriate expression would be to apply the norm by analogy rather than analogous interpretation, as it's commonly used. As we have mentioned above, the extended interpretation is nothing but the concrete definition of a constituent element of the figure of the criminal offense or any definition provided in the norm, always within the limits of the norm. In contrast, the application of the norm by analogy is the taking on criminal responsibility for a criminal offense not expressly provided by law, based on the legal elements of another similar figure. For these reasons, the application of the norm by analogy violates important principles such as the principle of legality (*nullum crimen, nulla poena sine lege*).

The ambiguity related to the extended interpretation occurred for the same reasons of incomprehensibility of criminal legal norms by Albanian lawyers and non-recognition and consequently non-application of the principles of legal reserve in the creation of these legal criminal norms. We can say that only recently, when the Albanian Criminal Code referred entirely to the Italian model, clear and comprehensible criminal legal norms were created without putting the court in the conditions of diametrically opposed interpretations.

VIII. CONCLUSIONS

The principle of legal certainty (legal reserve) embodies the prohibition of punishment in case of a concrete fact not provided specifically by law as a criminal offense. In particular, this principle seeks to exclude the executive power of the state from the criminal jurisdiction. Although in itself the principle of legal certainty is not provided in any specific article of the Criminal Code, it derives from the basic law and protects the individual from abusive formulations of legal-criminal norms made by the legislative and executive branches. On the other hand, the principle of legality, includes the technique of formulating concrete criminal norms in order to protect the individual from the abusive application and interpretation of the law by judicial bodies.

The principle of legal certainty derives from constitutional norms rather than from criminal law norms, even though it is in function of the latter. On the other hand, the prohibition of law application by analogy, although part of the general principles of the Criminal Code, it's an absolute principle, very specific and subject to the principle of legality.

From a theoretical point of view, law prohibits the application of law by analogy, considering that the institute of analogy contradicts the principle of legality (*nullum crimen, nulla poena sine lege*). This attitude is even based on the practical point of view, given that the application of analogy has become unnecessary as long as the Criminal Code itself has been enriched and supplemented with new criminal offenses and adapted to the requirements of the fight against crime.

The scope of the prohibition of analogy in criminal law lies only within the punitive framework. This prohibition is intended to not aggravate the legal situation of the subject and not to eliminate or reduce the harmful consequences.

According to the doctrine, the prohibition of analogy in criminal law exists only in those cases when its application would be in disadvantage of the subject, thus would aggravate the position of the latter (*analogy in malam partem*).

However, the admissibility of the application of the law by analogy happens only if the following conditions are met:

- The application of the law by analogy should not include the case that is required to be resolved in the narrow, literal sense, but should refer to the general principles applied in similar cases; otherwise it would lead to the avoidance of investigation and trial.

- The legal gap identified by the interpreter should not be "intentional", but should be a consequence of coincidence and lack of legal framework.
- Favorable provision should not have an extraordinary character.

The prohibition of analogy (*in malam partem*) presumes that the legislator must have previously provided for precise criminal norms. Thus, the legislator has the obligation to accurately predict the criminal offense and the criminal sanction in order to avoid the subjectivity of the judge in giving the decision. The principle of precision as part of the principle of legal certainty is the guarantee of the citizen for freedom and security.

What is worth noting is the difference between the prohibition of analogy and the expanded interpretation, which consists in understanding the constituent elements within the limits, provided by the norms, but always within the frameworks of these elements. Unlike the application of the criminal norm by analogy, which is nothing but taking into criminal responsibility for an action not legally provided as a criminal offense, the extended interpretation does not contradict the principle of legality.

Beyond the common features, the difference between the legal certainty, principle of legality or analogy, consists concretely in addressing each of them. Legal security is addressed to the protection of the individual from abusive conceptions of legal-criminal norms made by the executive and legislative authorities, based on the principle of accuracy. The principle of legality serves to the protection of the individual from the interpretation and application of legal-criminal norms by judicial bodies. While the analogy is the punishment of a fact or action not provided actually by the criminal law referring to the juridical-criminal elements of a similar norm.

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[6]. Eg the case of renunciation from the commission of a criminal offense or appropriation of joint property of spouses when they are not yet legally divorced, as in the latter there's the interpretation that family items can not be the material object of theft.
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[10]. The Albanian Law no 599, dated 13.05.1948 'On Criminal Code'; The Albanian Law no 372, dated 12.12.1946 'On criminal offenses against the people and the state'.
[11]. Art 95, point 3 of the the Albanian Law of Criminal Code, 1948.
[12]. Art 104 of the the Albanian Law of Criminal Code, 1948.
[13]. Bodies of revolutionary popular justice during the anti fascist national liberation movement. They were initially set up as people's trials in partisan detachments, in the first months of 1943, also in battalions and district headquarters. With the establishment of the General Headquarters (GH) of the Albanian National Liberation Army (ANLA), the organization, functioning and competencies of partisan trials were defined in detail by instructions of the Central Committee (CC) of the Albanian Communist Party (ACP) and the GH. The trial panel consisted of the deputy political commissar as chairman, the deputy commander and one of the ranks of the fighters. The preliminary investigation and sending of criminal cases to court was done by the investigator, who was appointed by the brigade headquarters. In examining the cases, the court was guided by the instructions of the ACP and the highest military bodies, which required full and objective verification of all circumstances. Reports were kept by a secretary and the decision was given in writing and reasoned. Partisan trials reviewed cases of betrayal, espionage, sabotage, murder, robbery, etc. done by military or civilians, as well as acts of desertion, breach of discipline and offenses that discredited the ANLA and the partisan figure. The punishments that were imposed were observations, expulsions from ANLA and even shooting. Partisan trials continued their activity to the threshold of Liberation.
[14]. Published in the Official Gazette No 81, 25 October 1949, 14.
[15]. The Criminal Code of the People's Republic of Albania, 1952, art 63.
[16]. Sh. Muçi, *E drejta penale, pjesa e përgjithshme (Criminal law, general part),* (Tirana: Botimet Dudaj, 2007), 36.
[17]. The Criminal Code of the People's Socialist Republic of Albania, 1977, Art 55.
[18]. Eur. Court H.R., *Kokkinakis v Greece*, Judgment of 25 May 1993; Eur. Court H.R., *Jamil v France*, Judgment of 24 August 1998 available at https://hudoc.echr.coe.int.
[19]. Eur. Court H.R., *Ould Dah v France*, Judgment of 17 March 2009; Eur. Court H.R. (GC), *Vasiliauskas v Lithuania*, Judgment of 20 October 2015 available at https://hudoc.echr.coe.int.
[20]. Eur. Court H.R., *Hummatov v Azerbaijan*, Judgment of 29 November 2007; Eur. Court H.R., *Hakkar v France*, Judgment of 8 October 2002; Eur. Court H.R. (GC), *Vinter and others v United Kingdom*, Judgment of 9 July 2013 available at https://hudoc.echr.coe.int.
[21]. Krohn & Co. Import - Export GmbH & Co. KG v Commission of the European Communities, Judgment of 26 February 1986, Summary of the Europian Union Commission, (1986), 753.

[22]. Eur. Court H.R., *Varvara v Italy*, Judgment of 29 October 2013 available at https://hudoc.echr.coe.int.
[23]. Eur. Court H.R., *Contrada vs. Italy*, Judgment of 11 May 2014 available at https://hudoc.echr.coe.int.
[24]. Sh. Muçi, *E drejta penale, pjesa e përgjithshme (Criminal law, general part), (*Tirana: Botimet Dudaj, 2007), 58.
[25]. G. Fiandaca, E. Musco, *Diritto Penale, parte generale (Manual of criminal law, general part),* (Bologna: Zanichelli Editore SpA, 7th ed, 2014), 120.
[26]. I. Elezi, S. Kaçupi, M. Haxhia, *Komentar i Kodit Penal të Republikës së Shqipërisë (Albanian criminal law, general part),* (Tirana: Botimet Kumi, 2001), 30.
[27]. Unifying Decision no 5, 2003 of the Joint Colleges of the Albanian High Court available at http://www.gjykataelarte.gov.al/web/Unifying_decisions
[28]. Unifying Decision no 3, 2011 of the Joint Colleges of the Albanian High Court available at http://www.gjykataelarte.gov.al/web/Unifying_decisions
[29]. Unifying Decision no 1, 2008 of the Joint Colleges of the Albanian High Court available at http://www.gjykataelarte.gov.al/web/Unifying_decisions