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Restriction of the Principle of Non-Retroactivity of Criminal Law

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CONTENTS

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INTRODUCTION

My research showed that the principle of non-retroactivity of criminal law is not an absolute one. There are many judicial decisions restricting this principle. Subsequently, my paper is designed to answer the question whether or not this restriction is lawful, does it fall under the principle of state governed by rule of law and does not it violate individuals' rights?

First chapter of the paper is an overview of the principle of non-retroactivity of criminal law. Firstly, it introduces the historical origins of the principle, where it derives from. Then, the second part of the chapter explores the main idea of the principle showing the importance of it in terms of the rule of law. This historical remark would help reader to thoroughly deepen into the subtle issues that I discussed in the paper.

Second chapter covers legislative sources and provisions of the principle starting from international conventions finishing with domestic constitutions and criminal laws. It, also studies judicial decisions related to the principle of legality both in common and civil law systems. It shows that the principle is a cornerstone of nowadays society; it is important guarantee in the hand of every person.

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Third chapter touches upon the main issue of the paper. It thoroughly deepens into the restriction of the principle. I show how the courts and judges restrict the principle both in common and civil law systems. In this chapter I also discussed the other side of the coin – whether or not that restriction violates individuals' rights and freedoms.

The Conclusion highlights important findings of the research. It shows the essence of an interpretation of law. Particularly, how can it effect on the final decision of courts. Finally, I suggest a new lens, methods through which courts and judges can reconsider their view in terms of the principle of non-retroactivity of a criminal law.

Chapter 1

OVERVIEW OF THE PRINCIPLE NON-RETROACTIVITY OF CRIMINAL LAW

a) Historical origins of the principle

Back in ancient times, kings had absolute power: they could punish everyone just by their own will. It was an unfair and cruel period throughout the whole evolution of human history. One king could be genuinely righteous and punish justly, and the other could happen to be the opposite. Thus, the situation was entirely arbitrary; there was no legal certainty at all.

In 1215, Magna Carta somehow put an end to this chaos, forbidding a punishment of a free man without judgment of peers or by the law of the land[1]. This seemed to be the creation of the principle *nullum crimen sine lege*, which means, that an action, notwithstanding its dangerousness, is not a crime unless it is directly stipulated in criminal code, statute or law[2].

b) Essential meaning and purpose of the principle

[1] Stefan Glaser, *Nullum crimen sine lege,* Vol.24, No.1, p. 29 (Cambridge University Press, Journal of Comparative Legislation and International Law 1942).
[2] Առաբելյան, Գաբուզյան և այլք, ՀՀ Քրեական Իրավունք, Ընդհանուր Մաս էջ 83, (վեցերորդ հրատ., 2012)

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Being the basis of democratic criminal law, i.e. criminal law that is suitable to a democratic society, the principle of *nullum crimen sine lege* is a matter upon which there are many different opinions. Some claim that this principle has its origin in "Magna Carta". "Others deny the English origin of the principle, on the ground of the admitted fact that English criminal law is (largely) based on the common law, whereas in the maxim, the word *lege* means statute-law". They consider the principle as a "child" of the French Revolution, which is, at the same time, a revolution of "individualism against socialism"[3].

The primary purpose of the principle of *nullum crimen sine lege* was to reduce the discretion of a court and to ensure the legitimate expectation of a person to be punished only by law. With this regard, the statement of Charles Montesquieu is a felicitous example: "the judge must be the mouth of law"[4]. In other words, the court is duty-bound by the laws and cannot go beyond them. Montesquieu and Cesare Beccaria have spread this principle worldwide. The author of the Latin term *nullum crimen sine lege* is a German lawyer and philosopher Paul Johann Anselm Ritter von Feuerbach[5].

One of the sub-principles of the *nullum crimen sine lege* is the ***non-retroactivity of deteriorating criminal law***[6]. The meaning of this principle is that criminal law, which deteriorates a legal status of a person, is applicable to an action only if it occurs after the law came into force[7]. People, standing behind a state, can punish an individual for an action, only if they beforehand warned him or her that the action is wrongdoing and subsequently punishable. Thus, the principle of *nullum crimen sine lege* goes with the principle of *nulla poena sine lege*, which 'requires that a person shall not be punished if the law does not prescribe punishment'.[8] These two principles give effect to the principle of legality.[9] In a larger sense, they underpin the rule of law.[10] To conclude, if

[3] Glaser, *Supra* p. 30
[4] Céline Spector, *La «bouche de la loi»? Figures du juge dans L''Esprit des lois*, Issue No.3, P. 1 (Montesquieu Law Review, Université de Bordeaux Octobre 2015).
[5] Claus Kress, *Nullum Crimen Sine Lege*, p. 3 (Max Planck Institute for Comparative Public Law and International Law 2010)
[6] Kress, *Supra* p. 1
[7] *Del Río Prada v. Spain*, 42750/09, para. 116 (ECHR 2013). *Kokkinakis v. Greece,* 14307/88, para. 52 (ECHR 1993)
[8] Mohamed Shahabuddeen, *Does The Principle of Legality Stand in the Way of Progressive Development of Law?,* p. 1008, (Oxford University Press, Journal of International Criminal Justice 2004).
[9] *Ibid*
[10] *Ibid*

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one commits an action, which is lawful at the time of committing, he or she cannot be held liable, even if that action is criminalized later on.

Chapter 2

LEGISLATIONS AND JUDICIAL DECISIONS ON NON-RETROACTIVITY OF CRIMINAL LAW

a) The Sources

As we have seen in the previous chapter, the principle of non-retroactivity of criminal law has huge importance in terms of ensuring legality. Moreover, it is not just a legal principle or doctrine, but it is a basic human right. This principle gradually gained legislative stipulations. Nowadays, it is an inseparable part of international and domestic legislations. It has wide geography; in every continent there is at least one convention including this principle. Chiefly, the principle enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),[11] in the Universal Declaration of Human Rights,[12] in the International Covenant on Civil and Political Rights,[13] in the American Declaration of the Rights and Duties of Man[14], in the African Charter on Human and Peoples' Rights,[15] in the Armenian (RA)[16], American (USA)[17], German (FRG) [18] constitutions, etc.

b) United States of America

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, 1 (1953)
[12] Universal Declaration of Human Rights, art. 11, 2 (1948)
[13] International Covenant on Civil and Political Rights, art. 15, 1 (1976)
[14] American Declaration of the Rights and Duties of Man, art. 25 (1948)
[15] African Charter on Human and Peoples' Rights, art. 2, 7 (1986)
[16] Armenian Const. art. 73, 1 (2015)
[17] U.S Const. art. 1, para. 9, cl. 3 (1787)
[18] German Basic Law, art. 103, cl. 2 (1949)

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The Constitution of the United States places great emphasis on the principle of non-retroactivity of a law. It explicitly prohibits all ex post facto[19] criminal laws.[20] Moreover, it addresses not only retroactivity of just criminal law, but it occupies larger area:

> *"**No State shall** enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; **pass any** Bill of Attainder, **ex post facto Law**, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."* [21]

The United States Supreme Court interpreted prohibition of retroactivity of criminal law in a very strict manner:

> *"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; **settled expectations should not be lightly disrupted**. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."*[22]

c) Federal Republic of Germany

German Basic Law (Constitution) states that an act may be punished only if it was defined by a law as a criminal offence before the act was committed.[23]

German federal constitutional court revealing the purpose of this provision posited:

> *"Article 103.2 of the Basic Law obliges the legislature to describe the prerequisites of punishability in such concrete terms that the scope and area of application of the offences can be recognized and can be ascertained through interpretation. This obligation serves a two-fold purpose. On the one hand, it serves the protection of the addressee of the provision in line with the rule of law: Everyone should be able to predict what conduct is banned and punishable."*[24] "*In this connection, the requirement*

[19] ***Ex Post Facto Law*** is the U.S. equivalent of ***Retroactivity of Law***, it is the direct wording of the U.S. Constitution.
[20] U.S Const. art. 1, para. 9, cl. 3
[21] U.S Const. art. 1, para. 10, cl. 1, bold/italic added
[22] 62 Kay, Richard S., *Retroactivity and Prospectivity of Judgments in American Law,* p. 38 (The American Journal of Comparative Law 2014), bold/italic added
[23] German Basic Law, art. 103, cl. 2
[24] BVerfG, BvR 2150/08, para. 65 (2009), bold added, http://www.bverfg.de/e/rs20091104_1bvr215008en.html

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of the protection of legitimate expectations is closely related and structurally similar to the "nulla poena" principle"[25] *"On the other hand, it should be ensured that only the legislature decides on punishability. In this regard, Article 103.2 of the Basic Law contains a strict legal reserve which prevents the executive and legislative powers deciding themselves on the prerequisites for punishment."*[26]

d) Republic of Armenia

Armenian amended Constitution (2015) and the criminal code contain provisions regarding the principles of legality and non-retroactivity of criminal law:

1. One can be sentenced for an action or inaction only if it was a crime at the time of committal[27] *(nullum crimen sine lege).*
2. More severe punishment than that applicable at the time of committal the criminal offence may not be imposed[28] *(nulla poena sine lege).*
3. Laws and other legal acts deteriorating the legal condition of a person shall not have retroactive effect[29] *(non-retroactivity of deteriorating law).*
4. Laws and other legal acts improving the legal condition of a person shall have retroactive effect where these acts so provide for[30] *(retroactivity of ameliorating law).*

The constitutional court of the Republic of Armenia interpreting the principle of non-retroactivity of criminal law held that the RA Constitution prohibits the retroactive effect of the law making the offence punishable and aggravating the punishment. It also prohibits the retroactive effect of the law instituting or aggravating the liability.[31] The constitutional court stressing the importance of this principle elaborated on this saying that the principle of non-retroactivity of deteriorating law, along with the principle of legal certainty, is intended to ensure respect for a person's legitimate expectations. This principle is at the same time an important guarantee of the principle of legal certainty. The principle of non-retroactivity of deteriorating law comes from the

[25] BVerfG, BvR 2365/09, para. 141 (2011), italic added, http://www.bverfg.de/e/rs20110504_2bvr236509en.html
[26] BVerfG, BvR 2150/08, para. 65 (2009), italic added, http://www.bverfg.de/e/rs20091104_1bvr215008en.html
[27] Armenian Const. art. 72, sent. 1 (2015), Armenian Criminal Code art. 12, 1
[28] Armenian Const. art. 72, sent. 2 (2015)
[29] Armenian Const. art. 73, 1 (2015)
[30] Armenian Const. art. 73, 2 (2015), Armenian Criminal Code art. 13, 1
[31] ՍԴՈ 1000, էջ 3 (2011)

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prohibition that it is inadmissible to restrict or abolish rights enshrined in previously existing legal norms.[32]

Discussing this principle, the court of cassation of the Republic of Armenia stated that solving the question of the applicability of a criminal law, the moment of actual committal of the criminal act and the moment of entry into force of the criminal law shall be considered.[33]

Several years ago, in one of the Armenian police departments policemen allegedly tortured a person to extract a confession.[34] At that time torture was not a crime, only in 2015 it was criminalized.[35] After the criminalization, just last year, this case was discovered. As, at the time of committal the act was not a crime, the special investigation service of Republic of Armenia launched a criminal case on "abuse of power", not on "torture".[36] It is a good example of how the principle of non-retroactivity of criminal law works in practice.

e) European Convention on Human Rights

The Convention explicitly prohibits retroactivity of deteriorating criminal law:

> *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.[37] This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."[38]*

Apart from that, there is huge interpretation and case law on the article 7 by the European Court of Human Rights (The Court).[39] Particularly, in *Kokkinakis* it held:

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[32] ՍԴՈ 1326, էջ 15 (2016)
[33] 3 ՀՀ վճռաբեկ դատարանի որոշումների գիտագործնական մեկնաբանություններ, էջ 11 (2016)
[34] https://www.youtube.com/watch?v=pova3so7oI8&t=100s (last visited March 27, 2020)
[35] Armenian Criminal Code, art. 309.1
[36] http://www.ccc.am/hy/1428493746/3/6155 (last visited March 27, 2020)
[37] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, 1 (1953)
[38] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, 2 (1953)
[39] *Guide on Article 7 of the European Convention on Human Rights, no punishment without law: the principle that only the law can define a crime and prescribe a penalty,* (Councel of Europe, 2019)
https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf (last visited March 28, 2020)

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"The Court points out that Article 7 para. 1 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[40]

The article 7 unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage.[41] The principle of non-retroactivity of criminal law applies both to the provisions defining the offence[42] and to those setting the penalties incurred.[43] Even after the final sentence has been imposed or while the sentence is being served, the prohibition of retroactivity of penalties prevents the legislature, the administrative authorities and the courts from redefining or modifying the scope of the penalty imposed to the sentenced person's disadvantage.[44] The principle of non-retroactivity is infringed in cases of retroactive application of legislative provisions to offences committed before those provisions came into force. It is prohibited to extend the scope of existing offences to acts which previously were not criminal offences. However, there is no violation of Article 7 where the acts in question were already punishable under the Criminal Code applicable at the material time – even if they were only punishable as an aggravating circumstance rather than an independent offence[45] or where the applicant's conviction was based on the international law applicable at the material time.[46]

The Court also interpreted the concept "law" under the article 7. in order for everyone to understand what kind of characteristics should a criminal law have. Particularly, it must be:

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[40] *Kokkinakis v. Greece*, 14307/88, § 52 (ECHR 1993), italic added
[41] *Del Río Prada v. Spain*, 42750/09, § 116 (ECHR 2013)
[42] *Vasiliauskas v. Lithuania,* 35343/05, para. §§ 165-166 (ECHR 2015)
[43] *Jamil v. France*, § 34-36 (ECHR 1995)
[44] *Del Río Prada v. Spain*, 42750/09, § 89 (ECHR 2013)
[45] *Ould Dah v. France,* point B (ECHR 2009)
[46] *Vasiliauskas v. Lithuania,* 35343/05, §§ 165-166 (ECHR 2015)

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1. ***Accessible;*** as regards accessibility, The Court verifies whether the criminal "law" on which the impugned conviction was based was sufficiently accessible to the applicant, that is to say whether it had been made public.[47]

2. ***Foreseeable;*** "An individual must know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will make him criminally liable and what penalty will be imposed for the act committed and/or omission".[48] The concept of "appropriate advice" refers to the possibility of taking legal advice[49].

Besides, the European Court of human rights stresses that the prohibition of retroactive force of criminal law *"is an essential element of the rule of law, [it] occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency."*[50] However, as non-derogable rights may be either absolute or non-absolute,[51] there could be risen a legitimate question; whether or not this principle is absolute?

Chapter 3. CASE LAW RESTRICTING THE PRINCIPLE OF *NON-RETROACTIVITY OF CRIMINAL LAW*

a) Case of S.W. v. The United Kingdom

A British citizen (the applicant) married in 1987, and the relationship between spouses was not smooth. In 1990 the wife announced that she thinks that their marriage is over. The applicant announced that they had an argument, and eventually he moved her wife out of house by hearting

[47] *Kokkinakis v. Greece*, 14307/88, § 40 (ECHR 1993)
[48] *Cantoni v. France*, 17862/91, § 29 (ECHR 1996)
[49] Jorgic v. Germany, § 113 (ECHR 2007)
[50] Mohamed Shahabuddeen, *Does The Principle of Legality Stand in the Way of Progressive Development of Law?,* p. 1008, footnote 7 (Oxford University Press, Journal of International Criminal Justice 2004).
[51] https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx (last visited March 29, 2020)

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her arm. As a result, she run to the neighbor's house and called the police. The police went and spoke to the spouses separately. After the incident the wife returned home and they had a sexual intercourse. Later the wife decided to leave the house taking their child with her. Again, she went to the neighbor's house, called the police and announced that her husband raped her by pointing the knife on her.[52]

In the United Kingdom, at that time, there was a law on sexual offences, which stated that *"it is a felony for a man to rape a woman"*.[53] The offence of rape, at common law, was traditionally defined as **unlawful sexual intercourse with a woman without her consent by force,** fear or fraud.[54] The word "unlawful" for decades have been interpreting in light of a common law principle stated by Sir Matthew Hale CJ in his History of the Pleas of the Crown published in 1736:

> *"**But the husband cannot be guilty of rape committed by himself upon his lawful wife,** for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."*[55]

Section 1 (1) of the Sexual Offences (Amendment) Act 1976 provides, in so far as it is material, as follows:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if

- (a) he has **unlawful sexual intercourse** with a woman who at the time of the intercourse does not consent to it ..."[56]

Before going to mentioned case, it is important to state that on 20 November 1990, in *R. v. J.* Mr. Justice Rougier upheld the general common law rule, considering that the effect of section 1 (1) (a) of the 1976 Act was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He further stated:

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[52] *S.W. v. The United Kingdom,* 20166/92, § 8 (ECHR 1995)
[53] Sexual Offences Act, section 1, (1956)
[54] *S.W. v. The United Kingdom,* 20166/92, § 19 (ECHR 1995), bold added
[55] Ibid § 10, bold/italic added
[56] Ibid § 20, bold added

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"... there is an important general principle to be considered here, and that is that the law, especially the criminal law, should be clear so that a man may know where he stands in relation to it. I am not being so fanciful as to suppose that this defendant carefully considered the authorities and took Counsel's advice before behaving as alleged, ***but the basic principle extends a long way beyond the bounds of this case and should operate to prevent a man being convicted by means of decisions of the law ex post facto."***[57]

Indeed, till the case of R. v. R. the English courts, confronting with such kind of cases, had always held that husband has at least some form of immunity from any charge of rape or attempted rape by reason of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage. The proposition of Sir Matthew Hale quoted above has been reaffirmed until recently, for example in the case of R. v. Kowalski, concerning the implied consent of the wife to acts which if performed against her consent would amount to an indecent assault. Mr. Justice Ian Kennedy, giving the judgment of the court, stated, obiter:

"It is clear, well-settled and ancient law that a ***man cannot, as actor, be guilty of rape upon his wife."***

"dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement".

In another case, Lord Justice O'Connor held:

"The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage ... ***she cannot unilaterally withdraw it."***[58]

However, on 5 November 1990, Mr. Justice Simon Brown held in R. v. C. [1991] that the whole concept of marital exemption in rape was misconceived:

[57] Ibid § 23, bold/italic added
[58] Ibid § 22, bold/italic added

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"Were it not for the deeply unsatisfactory consequence of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

Rougier and Swinton Thomas JJ stated that unfortunately section 1 (1) (a) of the 1976 Act precluded them from taking the same line as Simon Brown J in R. v. C.[59]

Even the Law Commission, which was working for the amendment of Sexual Offences Act in 1990 reiterated that

> "It is generally accepted that, subject to exceptions, **a husband cannot be convicted of raping his wife** ... Indeed, **there seems to be no recorded prosecution before 1949 of a husband for raping his wife** ...
>
> The immunity has given rise to a substantial body of law about the particular cases in which the exemption does not apply. The limits of this law are difficult to state with certainty. Much of it rests on first instance decisions which have never been comprehensively reviewed at appellate level ..."

Coming back to the case. An appeal to the Court of Appeal, Criminal Division, was dismissed on 14 March 1991. Lord Lane noted that the general proposition of Sir Matthew Hale in his History of the Pleas of the Crown (1736) that a man could not commit rape upon his wife was generally accepted as a correct statement of the common law at that period of time. Further, Lord Lane made an analysis of previous court decisions, from which it becomes clear that in R. v. Clarence (1888), the first reported case of this nature, some judges of the Court for Crown Cases Reserved had objected to the principle. In the next reported case, R. v. Clarke (1949), the trial court had departed from the principle by holding that the husband's immunity was lost in the event of a court order directing that the wife was no longer intending to live with him. Almost every court decision thereafter had made increasingly important exceptions to the marital immunity. The Court of Appeal had accepted in R. v. Steele (1976) that the implied consent to intercourse could be terminated by agreement. This was

[59] Ibid § 23

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confirmed by the Court of Appeal in R. v. Roberts (1986), where it held that the lack of a non-molestation clause in a deed of separation, concluded on expiry of a non-molestation order, did not revive the consent to intercourse.

Lord Lane added the following observations:

"Ever since the decision of Byrne J in R. v. Clarke in 1949, courts have been paying lip-service to Hale CJ's proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. ***This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.***

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behavior.

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment. That in the end comes down to a consideration of the word 'unlawful' in the 1976 Act."

Lord Lane then critically examined the different strands of interpretation of section 1 (1) (a) of the 1976 Act in the case- law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. He concluded:

"... [W]e do not consider that we are inhibited by the 1976 Act from declaring that the husband's immunity as expounded by Hale CJ no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.

The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. ***This is not the creation of a new offence, it is the removal of a common law***

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fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.

Had our decision been otherwise and had we been of the opinion that Hale CJ's proposition was still effective, we would nevertheless have ruled that where, as in the instant case, a wife withdraws from cohabitation in such a way as to make it clear to the husband that so far as she is concerned the marriage is at an end, the husband's immunity is lost."[60]

On a further appeal by the appellant in the above case, the House of Lords upheld the Court of Appeal's judgment, declaring, inter alia, that the general principle that a husband cannot rape his wife no longer formed part of the law of England and Wales. It stressed that the common law was capable of evolving in the light of changing social, economic and cultural developments. Whilst Sir Matthew Hale's proposition had reflected the state of affairs at the time it was enunciated, the status of women, and particularly of married women, had changed out of all recognition in various ways. Apart from property matters and the availability of matrimonial remedies, one of the most important changes had been that marriage was in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.[61]

The applicant brought an application to the Commission claiming that national authorities breached the article 7 of ECHR retroactively applying deteriorating criminal law.[62] The Commission referred his application to the Court[63]. The latter reiterated the essential meaning of the article 7,[64] which was thoroughly discussed in the second chapter of this paper. Then the Court continues holding that:

"However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a

[60] Ibid § 11, bold added
[61] Ibid § 12
[62] Ibid § 32
[63] Ibid § 13
[64] Ibid § 35

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well-entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[65]

The applicant does not dispute that the conduct for which he was convicted would have constituted rape within the meaning of the statutory definition of rape as applicable at the time, had the victim not been his wife. *His complaint under Article 7 of the Convention relates solely to the fact that in deciding on 18 April 1991 that the applicant had a case to answer on the rape charge, Mr. Justice Rose followed the Court of Appeal's ruling of 14 March 1991 in the case of R. v. R. which declared that the immunity no longer existed.*[66]

It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords, that ***the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.***[67]

Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. ***This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law."***[68]

[65] Ibid § 36
[66] Ibid § 41 bold added
[67] Ibid § 42 bold added
[68] Ibid § 43 bold added

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Subsequently, the Court agreeing with the United Kingdom's courts held that article 7 of the Convention had not breached and that the applicant *"could not invoke immunity to escape conviction and sentence for rape upon his wife".*[69]

b) Federal Republic of Germany

Between 1949 and 1961 roughly two and a half million Germans fled from the German Democratic Republic (GDR) to the Federal Republic of Germany (FRG). With the aim of staunch the huge flow of fugitives, the GDR built the Berlin Wall in 1961 and improved all the security measures along the border between the two German States, particularly they have placed anti-personnel mines and automatic-fire systems. A lot of people who wanted to cross the border and pass to the western state died, the reason were the security measures or the border guards shot them. The official number of people who died by the mentioned reasons was 264. Higher figures have been advanced by other sources, such as the "13 August Working Party", which reports about 938 dead. It is very difficult to decide the exact number of persons killed in any event, because such cases at the border were kept secret by the GDR authorities.[70]

In the first of the border guard cases to come before the Federal Court of FRG, the defendants, two young soldiers of the GDR Border Guard Troops, shot at a 20-year-old East German trying to escape over the wall to West Berlin during the night. When the fugitive climbed the wall on a ladder he had brought with him, one of the defendants shouted at him to freeze and, after firing some warning shots in the air, both of the soldiers fired at him with automatic rifles in order to stop the escape, **even at the cost of the fugitive's life**. The man, hit by bullets in his back and knee, fell from the ladder. After some time, he was dragged to a watchtower by two other soldiers where, **despite his repeated requests for medical treatment, he received no attention. Since the incident had to be kept secret no civilian or other person on emergency duty was allowed to be called.** Only after two hours was the fugitive taken to a police hospital, where he died shortly afterwards.[71]

Most of the cases followed the same pattern: fugitives trying to climb over the border installations or to swim across the border at points where it ran through waters separating East from

[69] Ibid § 43 bold added
[70] Էլիսթեր Մոուբրեյ, Գործեր և Նյութեր, Մարդու Իրավունքների Եվրոպական Դատարան, էջ 496 (երևան «Բավիդ» 2010թ)
[71] Rudolf Geiger, *The German Border Guard Cases and International Human Rights*, p. 541 (EJIL 9, 1998).

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West Berlin. One case, however, seemed to be slightly different. There the Federal Court had to review a case in which the fatal shots were not directed at a fugitive from the GDR, but at two West Berlin sunbathers — a 42-year-old man and his 21-year-old daughter, both wearing swimming suits — who were sitting in a small inflatable motor boat coming from West Berlin waters at noon on 15 June 1965. Apparently, they did not realize that the border fence was situated well behind the line where East Berlin territory began. When they had inadvertently intruded into East Berlin waters to a distance of about 10 meters, the defendant fired some warning shots from his watchtower. **Although the father and daughter turned the boat around right away and headed for the West Berlin side, the defendant fired at them, immediately before the boat crossed the border line again, hitting each of them with several shots.** The boat floated to the West Berlin side. Both persons had been hit in the head; the man died on the spot his daughter became irreversibly disabled. **A GDR military Investigation committee finally reported that the defendant had acted in accordance with his orders and *deserved commendation.***[72]

All the cases showed some characteristics in common:

1) The border guards had been instructed daily that under no circumstances were fugitives to be allowed to escape across the border line — **in the last resort they had to be 'annihilated'**;

2) The incidents had to be kept secret as far as possible, **even at the cost of the fugitives' lives**;

3) border guards, successful in keeping fugitives from leaving GDR territory, merited commendation.[73]

The punishment of border guards should be resolved by the unification treaty[74] and by German criminal code[75], which led to GDR's laws. According to them border guards' actions are fully justified. In particular, border guards may, if necessary, shoot at a person to prevent or to stop the commission of a major crime. Crossing the wall was considered a major crime under GDR law.

[72] Ibid
[73] Ibid
[74] Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment or German Unity ("Unification Treaty"), art. 8, (1990)
[75] German Criminal code, art. 2, 1

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In other words, the border statute allowed them to kill persons escaping from GDR to FRG[76], actually from the east part of Berlin to the west part of the same city. After reunification of two Germanies' such actions were already punishable. However, as it was already mentioned, the article 103 of the basic law of FRG explicitly prohibits retroactive application of deteriorating criminal law. Thus, German courts being duty-bound by the basic law must not convict border guards. Nevertheless, domestic courts, including German federal constitutional court, decided that **in these cases the principle of non-retroactivity should be restricted.** They justified their decisions based on several arguments.

1) GDR Law's Against International Human Rights

They pleaded that Article 27 of border statute was applicable according to the unification treaty, because this ground for justification was part of the GDR law governing their case. The federal court, however, confirmed the trial court's conviction of the defendants on charges of homicide and rejected the defendants' argument that article 27 of border statute could provide an acceptable justification. This is when the international human rights standards came into play. Because the court's reasoning is fairly complex, its view on the relevant provisions of the International Covenant on Civil and Political Rights of 19 December 1968 will be presented before examining the Court's arguments on the impact that international human rights standards might have had in frames of the domestic law of the GDR. An identification of the Human Rights being infringed in the court's view. Article 27 paragraph 2 of the border statute, as interpreted by GDR authorities, was incompatible with articles 6 and 12 of the Covenant article 12 paragraph 2 of the Covenant provides that everyone shall be free to leave any country, including his own, and permits restrictions on the exercise of this right only under exceptional circumstances. **The Court held that the border regime of the GDR as it was actually practiced was incompatible with this right in GDR law, the possibility of leaving the country was not the rule, but the exception.**[77] Persons under the retirement age were not usually able to obtain the necessary permission to leave the country. In practice, no reasons were given for rejections of requests to leave and no recourse to the courts was available. Going to court is an implied right of a person guarantied in the article 12 of the

[76] Border Statute, art. 27, (1982) (Prior to the entering into force of the Statute, the use of firearms at the border was dealt with in administrative regulations.)
[77] BGHSt 39, at 1.

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Covenant.[78] It was obviously the highest level of legalism and of legal anarchy. The rejection of an application was considered by the court as being especially harsh because the applicants were separated from people of the same nation, family or other close relations which they tried to maintain. Moreover, the court argued that the border regime violated article 6 paragraph 1 of the Covenant, which provides inter alia that 'no one shall be arbitrarily deprived of his life'. Under the GDR law, as it was interpreted at that time, **the escape of a citizen across the border had to be prevented by all means**, even at the cost of his or her life. In this context, the court observed a trend in many countries towards limiting the powers of state authorities to make use of firearms[79]. The court also quoted General Comment 6(16) of the Human Rights Committee, according to which the 'circumstances under which state organs may deprive someone of his life must strictly be defined and limited by law'.[80] **The court concluded that depriving a person of his or her life is arbitrary in cases where the fugitive was not carrying any weapons and did not cause danger to anybody; the purpose of preventing the escape in those cases was, thus, only to deter others from making similar attempts.**

In its first decision, the federal court, having concluded that the border regulations as practiced were not compatible with international human rights standards, dealt with the problem that the Covenant, although it had become binding for the GDR in 1976, was not incorporated into East German domestic law.[81]

The court's first set of arguments followed what could be called a positivist line. It relied on well-established rules on the impact of international law on the interpretation of national laws; where national laws allow a margin for interpretation (appreciation), they must be interpreted in favor of the state's international obligations. The court argued that international human rights had to be considered in the interpretation of the GDR border statute because (i) these rights were designed to regulate the relationship between the state and its citizens, and (ii) the wording of the article 27 paragraph 2 of the border statute left room for an interpretation in light of the requirements of the Covenant. Although the border statute could be interpreted so as to allow an unlimited use of firearms to stop escapes, a human rights-oriented interpretation must exclude cases where fatal shots

[78] H. Hannum. *The Right to Leave and Return in International Law and Practice,* p. 148 (1987)
[79] The Court highlighted a judgment of the US Supreme Court in the case of Tennessee v. Gamer, 471 US 1 (1985);
[80] Human Rights Committee, General Comment 6(16)
[81] Geiger, *Supra* at 544

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are fired at an unarmed fugitive who is not dangerous to anybody. In such situations, the human right to life and to leave one's own country outweigh the state's interest in stopping the fugitive. Thus, the article 27, being interpreted in favor of international human rights, did not establish a sufficient justification for the defendants.

2) "Radbruch Formula" as Natural Law Argument

The court's opinion reveals a strong affinity to natural law arguments. The Court refers to its Jurisprudence on post-war trials dealing with Nazi crimes. In these trials the German courts had relied on the so-called ***"Radbruch formula"***, which traces back to a famous article by Gustav Radbruch, an eminent German legal philosopher and former minister of justice. [82] The Second World War and the evil done during that period in his native Germany, often under the rubric of law, deeply affected Radbruch. In works written right after the war, Radbruch offered ideas about the connection between the moral merits of a purported legal rule and its legal validity, that would become highly influential. Radbruch wrote:

> *"Positivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the "must" of compulsion, it never serves as a basis for the "ought" of obligation or for legal validity."*

He then went on to offer two different elaborations of his Formula:

1) The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law," must yield to justice.

2) **Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. For law,**

[82] Ibid

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including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.[83]

The first part of the formula is a lambent example of legal positivism. That is to say, the law is a law notwithstanding its harshness, it should be strictly kept, even if it seems to be unjust. This theory derives from Roman law – *dura lex sed lex.*[84] Moreover, the whole meaning of nullum crimen sine lege is legal certainty, i.e. if the act is not a crime by law, no one can be punished, though that act is unjust. This severe positivism is very disputable nowadays, were natural law comes into play.

The second part, contrary, talks about natural law. Many scholars, lawyers, philosophers have tried to distinguish between positive and natural laws, to draw a line between them. However, it is Radbruch, who could find this subtle and thin line. He emphasized that where law-creatures deliberately "infringe" justice writing "special laws" to achieve their own personal goals, then these laws are just formally laws, just because parliaments, national assemblies legitimize them. To be real law, it should serve justice. Here is the distinction between positive and natural laws.

In his opinion, the laws of the Nazi period were null and void if they constituted unbearable violations of fundamental principles of justice and humanity which must be respected by any state, no matter what its form of government.[85]

In the border guard cases, the European Court of Human Rights broke new ground by defining, with the aid of international human rights instruments, the content of these fundamental principles. The Court emphasized for the first time that the core of international human rights gives substance and meaning to these basic principles because human rights express the shared opinions of all nations on important elements of justice and human dignity. The Court concluded that a national law which allowed the escape of an unarmed fugitive to be prevented at the cost of the person's life, in contradiction to the Covenant, was null and void and could not be invoked by the defendant.

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[83] Brian Bix, *Radbruch's Formula and Conceptual Analysis*, p. 46. (University of Minnesota Law School, 2011)
[84] https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-591 (last visited March 30, 2020)
[85] G. Radbruch, *Gesetzlichces Unrecht und ubergesetzllches Recht, Suddeutsche Juristemeitung* p. 105, (1946). bold added

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In its later decisions the federal court created a clearer distinction between the two lines of reasoning and evidently relied more heavily on the Radbruch formula,[86] holding that grounds for exceptions to the right to life or to the right to leave one's own country could never have been valid if they constituted unbearable infringements of justice.[87]

The federal constitutional court of FRG in one of the German border cases held that in this particular case, it is permissible to restrict the principle of prohibition of the retroactive force laid down in Article 103 (2) of the Basic Law, which usually has absolute effect. In this exceptional case, the principle of substantive justice ceases the application of previously justified grounds. The principle of non-retroactivity of the criminal law must yield to substantive justice because those justifications violate the basic requirements of justice and human rights recognized in international law. To create a law permitting the fusillade of its own citizens simply because they are trying to move from one part of the city to another, so unjust that it cannot justify a violation of the fundamental right to life which is the vital ground of all fundamental human rights.[88]

Thus, the German courts, being duty bound by non-retroactivity of deteriorating criminal law enshrined in the German basic law, nevertheless restricted the principle because its literal interpretation would violate the fundamental human rights. As a result, although the border guards would not be held accountable, the rights of the victims would be violated. The German courts, as we have seen, balancing the rights of two sides gave priority to victims' rights.

c) Case of Streletz, Kessler and Krenz v. Germany (ECHR)

The applicants, all German nationals, were senior officials of the German Democratic Republic (GDR): Fritz Streletz was a Deputy Minister of Defence; Heinz Kessler was a Minister of Defence; Egon Krenz was President of the Council of State.[89]

All three applicants were convicted by the courts of the Federal Republic of Germany (FRG), after German unification, under the relevant provisions of the GDR's Criminal Code, and subsequently those of the FRG's Criminal Code, which were more lenient than those of the GDR.

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[86] BGHSt 41.101 (1995)
[87] Geiger, *Supra* at 545
[88] Հայկ Ավետյան, Օրենքի հետադարձ ուժի արգելքը *"Nullum Crimen Sine Lege"* սկզբունքի համատեքստում, էջ 29 («Օրինականություն» հանդես 2019)
[89] *Streletz, Kessler and Krenz v. Germany*, 34044/96, 35532/97 and 44801/98, § 16 (ECHR 2001)

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Mr Streletz, Mr Kessler and Mr Krenz were sentenced to terms of imprisonment of five-and-a-half years, seven-and-a-half years and six-and-a-half years respectively for intentional homicide as indirect principals (*Totschlag in mittelbarer Taïterschaft*), on the ground that through their participation in decisions of the GDR's highest authorities, such as the National Defence Council or the Politbüro, concerning the regime for the policing of the GDR's border (*Grenzregime*), they were responsible for the deaths of a number of people who had tried to flee the GDR across the intra-German border between 1971 and 1989.[90]

The applicants submitted that their actions, at the time when they were committed, did not constitute offences under the law of the GDR or international law and that their conviction by the German courts had therefore breached *inter alia* Article 7, Section 1 of the European Convention on Human Rights (no punishment without law).[91]

The Court reiterated:

> "(…) [C]learly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in (...) the (...) Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[92]

The court thoroughly considering decisions of the German court, found no violation of the Article 7, once again stating that the principle of non-retroactivity of criminal law is not an absolute principle, and also that restricting the principle does not itself violate individuals' rights.[93]

In his Concurring Opinion Judge Zupančič emphasized that *"It is important to understand that this judgment does not rely on Article 7 § 2 or on the concept of an "international offence" in*

[90] Ibid, §§ 19-26
[91] Ibid, §§ 46
[92] Ibid, §§ 49
[93] Ibid, §§ 4

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Article 7."[94] Here is the core idea of restriction of nullum crimen sine lege. Judge Zupančič stressed that they did not rely on second part of the article 7, which is the exception of the rule, but rather they restrict the rule. That is to say, the principle of legality, which is, as discussed, not only a principle but also basic human right, is not an absolute.

CONCLUSION

Non-retroactivity of criminal law is one of the major achievements of the whole history of legal development. As, it is discussed in the paper, the principle ensures individuals' legitimate expectation, helps them to construe their actions in accordance with law. However, there is an inevitable element of judicial interpretation in any case. Indeed, the statement that the legal norm is unambiguous in its meaning and therefore its interpretation is redundant, also is an interpretation (often unaware).[95]

Human life is unexpected and multilayer. The legislator cannot objectively predict all situations in our life in detail, and that is why in the context of a particular case, the court must interpret the laws in such a way that they never violate human equality, which is the very essence of justice.[96]

Therefore, the principle of non-retroactivity of criminal law is not an absolute principle, it can be restricted in some exceptional cases, akin to English and German cases. However, this restriction not only should be in exceptional cases, but also, they should be strictly justified. For that purpose, I offer courts to consider the following elements when restricting the principle:

1) In common law system restriction should be based on development of law. The court should be more than convinced that applying the same law would be unjust, that it is high time to create a new standard.

[94] *Streletz, Kessler and Krenz v. Germany*, 34044/96, 35532/97 and 44801/98, Concurring Opinion of Judge Zupančič (ECHR 2001)
[95] Musielak/Hau, Grundkurs BGB, 15., Rn. 135 (Auflage 2017)
[96] Ավետյան, *Supra,* at 30

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2) In civil law system courts should explore the very essence of law which they are going to apply. If that law is a result of authorities' arbitrary and unjust will and only if that will create unbearable burden for society, it violates fundamental human rights, such as right to life judges are free to overcome that kind of law.

3) In all cases, it should be proven that subject who act according to that unjust law understand dangerousness of her or his action and foresee the punishment at least partly.

In terms of legislation, I think that both international norms and Armenian ones need no changes. I would like to stress again that interpreting existing laws courts are able to make a justice, because **law is an art of interpretation.**

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