

Aleksandra Rychlewska

Summary: "The principle of *nullum crimen sine lege* in the state ruled by law. A comparative study based on the European system of human rights protection"

The aim of this work is to determine the modern understanding of the principle of *nullum crimen sine lege* and the actual scope of the guarantee enshrined in it. In the further perspective the author aims to work out a guaranty model of interpretation and application of criminal law, adequate to the modern concept of the rule of law.

Analysis of the historical conditions of the *nullum crimen sine lege* principle justifies the statement that it is an expression of the idea of foreseeable criminalization – achieved by enabling the individual to predict the possible legal consequences under criminal law. Requirements of the statutory description of an offence (*lex scripta*), clarity and precision of criminal provisions (*lex certa*) and strict interpretation (*lex stricta*) used to create a presumption of foreseeability of criminal law, followed by the criminal law security.

The further development of the *nullum crimen sine lege* principle amounts to the retrenchment of the strict implementation of each requirement. At the beginning of the 20th century, under the influence of the idea of social protection, the judge is no longer seen as "the mouth of the law", but he is granted some freedom of interpretation within broad description of crimes. Such a practice allows to base judgments on the criminal law provisions, is cannot however provide the individual with the right to foreseeable criminalization, at least not on the basis of criminal statute. The problem of the lack of objective foreseeability of criminal law is observed from the point of view of the principle of guilt. The subjective awareness of unlawfulness, taken at that time as a condition of guilt, plays also the sole guarantee of foreseeable criminalization (against the principle of *nullum crimen sine lege*).

In modern times, the *nullum crimen sine lege* principle can be brought back to the requirement of foreseeable criminalization, followed by the criminal law security. This requirement constitutes the minimum guarantee that should be provided to the individual, regardless of the *lex scripta (et praevia)*, *lex certa* and *lex stricta* requirements, which may be implemented only to some degree, depending on the current policy of punishment. Since the foreseeability is based on both the legal provision and current interpretation of it in the jurisprudence and legal literature, it is measured from the point of view of lawyer, a person with legal education. The right to foreseeable criminalization is not absolute and in particular circumstances may be subject to balancing with another fundamental human right

(perspective appropriate for the European system of human rights protection, with reservation *quasi-criminal law* in the EU system) or legal assets, protection of which became a justification for criminalization of a particular behaviour (perspective appropriate to the Polish criminal law system).

The analysis of the formal conditions of the *nullum crimen sine lege* principle leads to the conclusion that the foreseeability of criminal law based on both the criminal statute and its current interpretation, is a further-reaching guarantee. Since people who do not have sufficient language communication skills in the field of law are not able to understand the legal text, they are even more incapable of predicting legal consequences under criminal law. Correspondingly, since the key role in the process of cognition of the law by persons without language communication skills in the field of law is played by persons having such skills, they will also play such role in the process of "self-protection" against criminal sanctions. What is significant, from the point of view of the philosophy of language, it should be stated that the foreseeability of criminal law based on both the criminal statute and its current interpretation corresponds with such features of the meaning of legal terms, as social provenance, contextualism and variability over time. Considering that the meaning of words is shaped by the way in which competent users of a given language use them, and persons with legal education, including judges and representatives of legal doctrine, are the competent users of legal language (apart from the legislator), the way how they use a particular legal term in a specific point of time determines the meaning of that term at the that time.

Finally, it should be noted that the principle of *nullum crimen sine lege* understood as the requirement of foreseeability of criminal law based solely on the legal provision, precisely defined and subject to literal interpretation, corresponds to the formal (positivist) concept of the rule of law. Nowadays it seems to be replaced by the rule of law in a material, non-positivist and constitutional approach, where the flexibility of law is a high value. Although it can be claimed that the *nullum crimen sine lege* principle is outdated, such a statement is opposed to the fact that it enshrines one of the fundamental human right and secures human dignity. Since the requirement of foreseeability of criminal law based on both the criminal statute and its current interpretation constitutes a compromise between legal security and legal flexibility, it fits the material (non-positivist) conception of the rule of law.

A comparative analysis of the European system of human rights protection and the Polish legal system leads to the conclusion that the principles of *nullum crimen sine lege* in both cases have the same status, subjective and objective scope of application as well as the essential content. However, while in the jurisprudence of the Constitutional Tribunal the test

of "predictability" of criminal law is emphasized, the Supreme Court, exercising control over the lower courts, uses the requirements of *lex stricta et praevia*, *lex certa* and *lex stricta* rather than the foreseeability of the decision on criminal liability. Such practice may undermine criminal law security, especially in the case of a change in the current interpretation of the particular offense. While the Polish criminal law system allows for the conviction despite the lack of objective foreseeability of criminalization in order to protect any legal assets, not just, as in the case of the European system of human rights protection, in a situation of particularly flagrant violation of fundamental human rights, there is a contradiction between the two systems. In order to strengthen the right to foreseeable criminalization, the requirement of objective foreseeability of criminal law should be prescribed in the constitution and the criminal code.

11.06.2018

Aleksander Ryznar

