



The problem of applying criminal law in terms of time in Algeria

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Abstract:

This paper addresses the issue of the temporal application of criminal law resulting from the succession of penal legislation. The research shows that the basic rule is the non- retroactivity of criminal law to protect rights and freedoms, emphasising the principle of criminal legality. However, this rule is not absolute, as it excludes the retroactivity of the law that is more favourable to the accused according to Article 2 of the Algerian Penal Code, which applies if the new law is more lenient. However, the retroactivity of the most favourable law does not apply to laws of limited duration (temporary and circumstantial), due to the need to preserve their effectiveness in the face of exceptional circumstances.

The research also points to the specificity of the application of the law to continuous, consecutive, and habitual offences, where the new law is applied even if it is more severe, and to security measures that are subject to immediate application.

The research aims to analyse these rules and clarify their limits, relying on the analytical approach of Algerian jurisprudential and judicial texts, in order to enhance legal security and the stability of judicial work.

Keywords: *Application of criminal law, non-retroactivity of the law, best law for the accused, criminal legality, conflict of laws in time, time-bound laws, continuing offences, security measures, legal security.*

Le problème de l'application du droit pénal en termes de temps en Algérie

Résumé :

Cette recherche aborde la problématique de l'application de la loi pénale dans le temps, résultant de la succession des législations pénales. Elle expose que la règle fondamentale est la non-rétroactivité de la loi pénale, principe essentiel pour protéger les droits et libertés et qui souligne le principe de la légalité criminelle.

Cependant, cette règle n'est pas absolue. Une exception est faite pour la rétroactivité de la loi plus douce (lex mitior), conformément à l'Article 2 du Code Pénal Algérien, lorsque la nouvelle loi est plus favorable à l'accusé. Néanmoins, la rétroactivité de la loi plus douce ne s'applique pas aux lois à durée déterminée (lois temporaires et circonstancielles), cela étant nécessaire pour maintenir leur efficacité face aux circonstances exceptionnelles.

La recherche met également en lumière la particularité de l'application de la loi aux infractions continues, successives et aux infractions d'habitude, où la nouvelle loi s'applique même si elle est plus sévère. Elle couvre aussi les mesures de sûreté, qui sont soumises à une application immédiate.

L'étude vise à analyser ces règles et à en clarifier les limites, en s'appuyant sur une approche analytique des textes doctrinaux et jurisprudentiels algériens. L'objectif ultime est de renforcer la sécurité juridique et la stabilité de la pratique judiciaire.

Mots-clés : *Application de la loi pénale, non-rétroactivité de la loi, loi plus douce, légalité criminelle, conflit des lois dans le temps, lois à durée déterminée, infractions continues, mesures de sûreté, sécurité juridique.*



Introduction:

Legal texts are not characterised by eternal stability, but are in a state of continuous dynamism, changing, amending and repealing according to the development of society and its needs, and to confront new phenomena, especially the phenomenon of crime, which requires continuous legislative intervention. This legislative dynamic poses a fundamental issue when applying laws, namely the "conflict of laws in terms of time". At the moment a criminal offence is committed, there may be a law in force that determines the punishment, but soon a new law is promulgated that amends, cancels or even mitigates the provisions of the old law. The dilemma arises: Which law should be applied to the incident? Is it the law that was in force at the time the offence was committed, or the new law that was enacted later? This issue is particularly important in criminal law, as this branch of law affects the rights and freedoms of individuals.

In order to ensure the protection of these rights and freedoms, and to prevent any legislative or judicial arbitrariness, it is necessary to determine the time period during which the criminal law is applied, so that the law containing the offence and punishment must be in force at the time the offence is committed. The general rule is based on the principle of "non- retroactivity of criminal law", which means that a new law does not apply to acts committed before the date of its publication and entry into force if it is unfavourable to the accused. This principle, which is an embodiment of the principle of criminal legality "there is no crime or punishment without a text", is a basic guarantee

for individuals against being surprised by the retroactive criminalisation of previously permissible acts or increased penalties.

However, this rule is not absolute, but is subject to a vital exception dictated by considerations of justice and humanity, namely the "principle of retroactivity of the law most favourable to the accused". If a new law is promulgated that is more favourable to the accused, whether by decriminalising, reducing the penalty, or changing the legal description in his favour, it is applied retroactively. This exception is an expression of the legislature's commitment to social interest and justice, and ensures that the defendant benefits from the more favourable provisions of the new law. However, this exception faces an important limitation: it does not apply to "fixed-term laws" (temporary and circumstantial), which are issued to meet exceptional circumstances and require maintaining their effectiveness. In addition, the determination of the applicable law raises specificity for certain types of offences, such as continuous and consecutive offences and habitual offences, as well as security measures, which are subject to special provisions.

Based on the above, the main question of this research is formulated as follows: What are the rules governing the application of criminal law in terms of time in Algerian legislation? What are the exceptions to these rules and the limits of their applicability? Sub-questions arise from this issue that seek to answer the concept and justification of the principle of non- retroactivity of the penal text, what is the law most favourable to the accused and the rules of its retroactive application, why fixed-term laws are excluded from this principle, in addition to how criminal law is applied in terms of time to continuous, successive and



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habitual offences and the position of security measures in relation to these rules.

This research has been divided into two main sections. The first section deals with the principle of non-retroactivity as a general rule in the application of criminal law in terms of time. It discusses the concept of the principle, its origin, its philosophical and moral justifications, its practical and social justifications, and the scope of its application. The second section is devoted to the principle of the retroactivity of the law most favourable to the accused as an exception and the limits of its applicability, where it discusses what this principle is and its controls, fixed-term laws as an exception to the retroactivity of the most favourable law, and finally the provisions on the application of temporal criminal law to certain types of offences.

The first topic: The principle of non-retroactivity of the penal provision in the application of criminal law in terms of time

The principle of non-retroactivity of criminal law is the cornerstone of the theory of the application of laws in terms of time in the penal sphere. This principle, which is rooted in the principle of criminal legality «there is no crime or punishment without a text», is not only concerned with determining the beginning of the entry into force of a legal text, but goes beyond this to establish philosophical, ethical and practical dimensions that ensure the stability of individuals' legal positions and protect them from any legislative arbitrariness that may affect their freedoms. The adoption of this principle reflects the keenness of legal systems to achieve justice and legal security, as a developed

society cannot be based on laws that surprise its members by criminalising past acts or increasing penalties retroactively. Therefore, this paper will explain and analyse the concept and dimensions of this principle, review its various justifications, and establish its constitutional and legislative foundations in the Algerian and comparative context.

The first requirement: The concept of the principle of non-retroactivity and its origins

The principle of non-retroactivity of the penal provision is a fundamental rule in contemporary criminal law. It is a safety valve that protects individuals from the power to criminalise and punish retroactively. Understanding this principle is only complete by defining what it is, distinguishing it from similar concepts, as well as tracing its historical trajectory and the legal and jurisprudential background that gave it the character of a peremptory norm.

The first section: Defining and establishing the principle of non-retroactivity

The principle of non-retroactivity of penal provisions, also known as the principle of the immediate and direct effect of a new law, is defined as "the non-applicability of a penal provision to facts that preceded its existence and promulgation". (Boussikaia, 2021, p. 160) In more detailed terms, if a new law criminalises an act that was not previously criminalised (creation of a criminal offence), increases the penalty for a previously criminalised act (aggravation of punishment), or adds an aggravating circumstance that did not exist (change in description or aggravating circumstances), this law does not apply to the



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past, i.e. it does not apply to acts committed before the date of its entry into force. In contrast, the law in force and criminalised at the time the act was committed applies, which is the essence of the rule of non-retroactivity. (Khalfi, 2008, p. 125)

Algerian jurist Ahsan Boussikaia explains that this means: "If a new law is passed that punishes an act that was permissible, or increases the punishment for an act that was criminalised, or harms the status of the accused in terms of criminalisation or punishment in some way, this law does not apply to the past". (Boussikaia, 2021, pp. 160,161) This is confirmed by legal logic, which refuses to hold individuals accountable for acts that they did not know were criminalised, or that their punishment would be more severe. The retroactive application of the law empties the principle of legality of its content, threatens legal stability, and surprises individuals with what they did not expect, which contradicts the most basic principles of justice. (Najm, 2003, p. 102)

First: Establishing the Principle

The principle of non-retroactivity is not rooted in a single idea, but in a combination of legal and philosophical origins:

1- Relevance to the principle of criminal legality:

The principle of non-retroactivity of criminal law is a logical extension of the principle of criminal legality (*Nullum crimen, nulla poena sine lege*), which means "no crime and no punishment without a text". Legality requires the law to be clear, public and prior to the criminalised act, so that individuals know what is permissible and what is

prohibited. If the new law is allowed to be retroactive, the principle of legality loses its meaning, because the individual may be held accountable for an act that was lawful at the time it was committed. (Sorour, *Origins of Penal Law: General Section*, 1999, p. 205)

2- Historical development:

The principle of non-retroactivity was not as strongly enshrined in ancient legislation, as the ruler's power to criminalise and punish was absolute. However, this principle began to crystallise with the emergence of Enlightenment thought and the movement to limit state power, especially after the French and American revolutions. It was first enshrined in the French Declaration of the Rights of Man and the Citizen in 1789, which stipulated that "no one shall be punished except by a law established and enacted before the crime is committed". (Souleiman, 2012, p. 110)

3- The immediate and direct effect of the law:

This principle is part of the theory of the immediate and direct effect of laws, which means that a new law applies directly to facts that take place after its entry into force, and does not apply to facts that took place before. However, in criminal law, this immediate effect is restricted to not affecting the past if the new law is worse, while an exception is made if the law is more favourable to the accused, as will be discussed below. (Rabeh, 2020-2021, p. 15)

The enshrinement of this principle, whether in constitutions or penal codes, reflects a global trend towards protecting the rights of individuals and ensuring fairness in the application of the law, and confirms that the law is



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designed to guide future behaviour and not to retroactively hold the past accountable to the detriment of acquired rights.

The second section: Constitutional and legislative basis

The principle of non-retroactivity of criminal law is one of the most important principles that have gained constitutional sanctity in most modern countries, due to its essential role in guaranteeing individual freedoms and legal security. The Algerian legislature has accorded this principle the utmost importance, enshrining it in the highest pyramid of legal rules (the Constitution) and then enshrining it in ordinary laws.

First: Constitutional basis

The Algerian Constitution is the supreme reference for all legal rules in the country, and it contains several articles that emphasise the principle of non-retroactivity of criminal law.

1- Article 168 of the 2020 Constitution:

This article explicitly states that: "There shall be no penalty except as prescribed by law. The law shall apply only to acts occurring after the date of its publication, unless the law stipulates otherwise in non-criminal matters." (P. D. Algeria 2020, 168) This constitutional provision is the main pillar of the principle, as it enshrines the principle of criminal legality and restricts the legislator in matters of criminalisation and punishment, preventing the retroactive application of any penal provision that may harm the accused. This constitutional limitation gives the principle a strong

immunity against any ordinary legislation that may attempt to contravene it.

2- Article 34 of the 2020 Constitution:

This article reinforces the principle by emphasising that "acts shall not be prosecuted except in accordance with the law in force at the time they were committed". (P. D. Algeria 2020, 34) This provision affirms the constitutional protection of the right of individuals to be held accountable in accordance with the law that existed at the time they committed the act, ensuring that they can predict the legal consequences of their behaviour.

General principles of human rights: In addition to explicit texts, modern constitutions, including the Algerian Constitution, draw inspiration for the principle of non-retroactivity of criminal law from international human rights declarations and charters, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which affirm the right not to be convicted for an act that did not constitute a crime at the time it was committed, nor to be subjected to a heavier penalty than that which was applicable at the time the offence was committed. (Nations, 1966, p. 15) This connection to international instruments gives the principle a universal dimension and a human rights value.

Second: Legislative Basis

In accordance with the constitutional principle, the Algerian legislature has explicitly stipulated the principle of non-retroactivity of criminal law in the Penal Code.



1. Article 2 of the Algerian Penal Code:

This article stipulates that: "The Penal Code shall not apply to the past, except insofar as it is less severe." (Algeria P. D., 1966, p. 2) This article enshrines the general rule of non-retroactivity and sets the only exception to it, which is the retroactivity of the law that is most favourable to the accused, which is a protective exception for the individual and not against his interest. This legislative arrangement demonstrates the Algerian legislature's commitment to protecting individual rights and shows that the law is not retroactive if it is unfavourable to the accused.

It should be noted that this article is understood in the light of article 168 of the Constitution, where the term "less severe" is interpreted to include whatever is more favourable to the accused, whether it is decriminalisation, reduction of the penalty, or a change in the legal description leading to a lighter penalty. This correlation between the constitutional text and the legislative text constitutes a strong guarantee against any attempt to apply criminal law retroactively in a way that harms the accused.

The second requirement: Justifications for the principle of non-retroactivity of criminal law

The principle of non-retroactivity of criminal law is not merely a formal legal rule or a legislative necessity, but is based on a number of deep philosophical and ethical justifications that justify its existence and confirm its necessity in any legal system that seeks to achieve justice and protect human dignity. These justifications go beyond the procedural aspect to touch the essence of the relationship between the individual and the state, the concept of justice,

and the sound logic of enacting legislation, and constitute a moral basis that legitimises the application of criminal law.

The first section: Considerations of Justice and Logic

Justice is one of the highest goals pursued by legal legislation, and the principle of non- retroactivity of criminal law is a clear manifestation of this justice. It is fair that individuals should not be held accountable for acts that were not criminalised at the time they were committed, or that they should be punished more severely than they were at the time they committed the criminal act. (Boussikaia, 2021, p. 162) Applying a new law to what was issued before its entry into force is a kind of injustice and unfairness, as the law should not oblige individuals to submit to its provisions and rules before its promulgation and entry into force. This was emphasised by the jurist Abdul Rahman Khalfi, who said: "It is just not to hold individuals accountable for acts that were permissible at the time they were committed, or to impose on them a more severe punishment than that which was prescribed at the time they committed the criminal act." (Khalfi, 2008, p. 126) Justice requires that there should be compatibility between the expectations of the individual and the law in force at the time the act was committed.

Considerations of justice are complemented by common sense that rejects retroactive accountability. A law is a mandate to members of society, whether it governs the performance of a particular act or the abstention from it. Logic dictates that it is unreasonable for a law to order the performance of actions in the past before its entry into force or its provisions, and it is impossible to act in advance of the laws that will be issued by the legislator. The judge, in turn, refers to a law that was in force at the time the offence



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was committed. (Boussikaia, 2021, p. 162) These logical arguments highlight that the principle is not just a technical rule, but a rational necessity to protect confidence in the legal system. Individuals act in their daily lives based on the laws in force, and if these laws are changed retroactively, this disturbs the logic that governs human behaviour and the law loses its respectability and effectiveness.

The second section: Protection of Rights and Freedoms

The principle of non-retroactivity of criminal law represents a protective shield for individual rights and freedoms against the arbitrariness of the state's legislative or executive authority. Allowing the legislature to retroactively criminalise acts or increase their penalties means violating the principle of legal security, which requires individuals to have a clear and prior knowledge of what is criminal and what is permissible, and what the prescribed penalties are, before committing any act. (Sorour, *Origins of Penal Law: General Section*, 1999, p. 205) Legal security is a fundamental guarantee of freedoms, as an individual can only exercise his freedoms with confidence and assurance if he is certain that his behaviour, as long as it is lawful at the time, will not be criminalised later.

This principle is one of the most important fair trial guarantees, as it ensures that individuals are not caught off guard by new laws that criminalise acts they considered legitimate at the time they were committed, or impose penalties that did not exist or were more lenient. The individual must have prior knowledge of which acts are criminal offences and which are not. We can consider the text of the law as an advance warning to individuals not to

commit the criminalised and stipulated acts. This is because reinforcing the commands and prohibitions of the law with the punishment specified in the text makes individuals closer to complying with them than disobeying them, as people's knowledge of the text of criminalisation and punishment deters them from committing the act that the text criminalises. (Habes, 2018, p. 01)

The existence of this text itself is necessary to be a rule of behaviour that people adhere to and act accordingly, whether out of fear or out of respect for order and adherence to the legislator's orders and prohibitions. In other words, the prior existence of the legal text serves as a moral compulsion on the will of individuals to confront their potential criminal tendencies, thus contributing to the protection of their freedoms and giving them the ability to make an informed choice of their behaviour. (Habes, 2018, p. 32) This protection is not limited to the freedom of individuals, but extends to the protection of justice itself, because the retroactive application of the law can be used as a tool for revenge or to settle political accounts, which makes the law lose its objective and just character.

The third section: Practical and social justifications

The principle of non-retroactivity of criminal law is not limited to philosophical and ethical dimensions, but extends to substantial practical and social justifications that contribute to the stability of societies and the fulfilment of the objectives of criminal law. This principle enhances the confidence of individuals in the legal system and contributes to building a stable society in which individuals can predict the legal consequences of their actions. Understanding this principle leads to determining its



precise temporal scope of application and how the law deals with the succession of texts.

First: Confidence and legal stability considerations

The principle of non-retroactivity of criminal law is a fundamental pillar of legal stability in society, which in turn translates into social and economic stability. The retroactive application of the law leads to a lack of trust in the law, which makes the law a destructive tool, rather than a means of regulating the lives of individuals and building society. (Boussikaia, 2021, p. 162) When individuals are not sure that the actions they take today will not be retroactively criminalised tomorrow, or that their punishment will not suddenly be increased, chaos and uncertainty prevail. This uncertainty hinders legal and economic transactions, negatively affects investments, and hinders societal development as a whole. How can a merchant enter into a contract, or an investor undertake a project, if he fears that his action will be criminalised or punished more severely by a future law?

The principle of non-retroactivity promotes legal security, which is defined as "the ability of individuals to predict the legal consequences of their actions". This legal security is an absolute necessity in modern states that rely on the rule of law and honour the rights of individuals. Lack of confidence in the laws erodes confidence in the entire justice system, causing the state to lose its prestige and its ability to impose order and protect social peace. Maintaining this principle is an investment in the stability and progress of society, and reflects the state's keenness to protect the rights of its citizens and provide a fair and stable legal environment.

Second: Preventive and deterrent effect

The practical effect of the principle of non-retroactivity of criminal law is not only to create confidence and stability, but also to enhance the two basic functions of criminal law: Prevention and deterrence. For criminal law to be deterrent and effective, it must serve as an advance warning to individuals not to commit criminal offences. (Habes, 2018, p. 32) Prior knowledge of the criminal offence and the prescribed punishment constitutes a psychological and moral deterrent for individuals, prompting them to comply with the legislator's orders and prohibitions. Without this prior awareness, the preventive function of the law becomes null and void, as an individual cannot be punished for an act that he did not know was criminal at the time he committed it, thus losing the required deterrent value. (Najm, 2003, p. 103)

The third requirement: The scope of application of criminal law in terms of time

The temporal scope of application of the Criminal Code is determined by the period of its application, which starts from the date of entry into force of the new law and ends on the date of its repeal.

The first section: Date of entry into force of the law

The date of entry into force of a new law after its publication in the Official Gazette is usually determined by the text of the law itself or by the general rules that determine how long laws come into force after their publication. (Souleiman, 2012, p. 114) In Algeria, the constitution usually sets the effective date of a new law after its publication in the Official Gazette, which is



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understood from Article 168 of the Constitution, which links the entry into force of a law to the date of its publication. (P. D. Algeria 2020, 168) This date marks the boundary between the old law and the new law.

The second section: Date of expiry of the law

If a rule of law is repealed and replaced by another rule of law, the repealed rule ceases to have effect from the day of its repeal, and the new rule takes its place from the day of its entry into force. The issue of dispute resolution remains the law of the jurisdiction in which it arises and is not affected by the new law, except in exceptional cases (e.g. best interest law). (Rabeh, 2020-2021, p. 15)

First: Explicit cancellation

This is done by an explicit legislative text declaring the cancellation of a law or certain articles thereof. This is the most obvious type of cancellation.

Second: Implied Cancellation

Implied cancellation occurs in two main situations:

- 1) If a new law regulates a subject that was already fully regulated by an old law, the new law implicitly cancels the old one, even if it does not explicitly state so. (Khalfi, 2008, p. 128)
- 2) If the new law conflicts with the old law, so that it is impossible to apply both laws, the old law is implicitly cancelled to the extent that it conflicts with the new law. (Boussikaia, 2021, p. 164)

The determination of the time of commission of an offence is a fundamental issue in the scope of application of

the law in time, as the applicable law is often the law in force at the time of the commission of the act constituting the offence, rather than at the time the criminal result is achieved. This point is particularly problematic for offences of a continuous or sequential nature, which will be discussed in the second section.

The second topic: The principle of retroactivity of the law most favourable to the accused

Despite the fundamental importance of the principle of non-retroactivity of criminal law as a general rule to protect individual rights and freedoms, this principle is not absolute, but is subject to an important exception dictated by considerations of criminal justice and the best interest of the accused, which is the "principle of retroactivity of the law most favourable to the accused". This exception allows a new law to be applied retroactively if it is more favourable to the accused, whether by reducing the penalty, decriminalising, or changing the legal description in his favour. However, this exception is not without limitations, as it excludes some laws of a special nature, such as fixed-term laws. There are also special practical issues regarding the determination of the law applicable to certain types of offences characterised by an extended or consecutive temporal nature. This article will explain and analyse the concept of retroactivity, its justifications and controls, then shed light on its main limitations, and finally discuss the special temporal issues raised by certain offences.



The first requirement: What is the principle of retroactivity of the law most favourable to the accused and its rules

The principle of retroactivity is one of the most important exceptions to the principle of non- retroactivity of criminal law. It expresses a legislative philosophy that balances the protection of society and the interest of the individual, and tends towards leniency when the new law becomes more just or humane. Understanding this principle requires defining its exact concept, explaining its various forms, exploring the legal and jurisprudential basis on which it is based, and the deep justifications that prompted the legislator to enshrine it. Its application is not absolute, but is subject to strict controls and criteria to ensure that the most favourable law for the accused is correctly determined.

The first section: The concept of the principle of retroactivity of the law most favourable to the accused

First: Defining the principle of retroactivity of the law most favourable to the accused

The principle of retroactivity of the law most favourable to the accused (*Lex mitior*) means that "a new criminal law applies retroactively to acts committed before its entry into force, if this law is less severe or more merciful to the accused than the law that was in force at the time of the commission of the offence".²⁶ This principle is an exception to the general rule of non-retroactivity of criminal law and is justified by considerations of justice and humanity. If the legislator considers that an act no longer constitutes a crime, or that the punishment prescribed for it was harsh and

exceeded its limits, it is illogical to continue punishing individuals according to the old law. (Khalfi, 2008, p. 129)

Second: Types of law most favourable to the accused

The most favourable law for the accused can take several forms, which can be summarised as any legislative change whereby the position of the accused becomes better than it was under the old law. The most prominent of these forms are:

1- Decriminalisation:

This is the case in which the new law repeals a provision that criminalised a certain act, making the act permissible. In this case, the old law ceases to apply retroactively, and all criminal consequences of the act are removed, including the cancellation of final judgements of conviction, or the discontinuation of criminal proceedings if the case is still pending. (Souleiman, 2012, p. 115) If the accused has been sentenced and imprisoned, he shall be released, and if he has not yet been sentenced, the public prosecution against him shall be dropped. This situation is explicitly provided for in article 2 of the Algerian Penal Code by the phrase "less severe", which is implicitly understood to include decriminalisation. (Algeria P. D., 1966, p. 2)

2- Reducing the penalty:

This is when a new law reduces the amount of punishment prescribed for a specific offence, whether by reducing the maximum or minimum penalty, or by changing the type of punishment from a heavier penalty to a lighter one (e.g. replacing life imprisonment with temporary



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imprisonment). In this case, the new law is applied retroactively and benefits the accused, whether the case is still pending before the judiciary or the judgement has been issued and has become final, and in the latter case the judgement is amended to apply the lighter penalty. (Najm, 2003, p. 104)

3- Changing the legal description of the offence:

A new law may be enacted that changes the legal description of an act, so that the act becomes less serious (e.g. a felony becomes a misdemeanour). This change necessarily leads to the application of the less severe penalty provisions related to the new description, and therefore the new law is more favourable to the defendant. (Sorour, *Origins of Penal Law: General Section*, 1999, p. 215)

4- Cancelling an aggravating adverb or adding a mitigating adverb:

If the new law cancels an aggravating circumstance that was established in the old law, or adds a mitigating circumstance to the penalty, the new law becomes more favourable to the accused, and is applied retroactively. (Boussikaia, 2021, p. 166)

5- Amending the rules of exemption from punishment or excuse:

If a new law is enacted that adds cases of exemption from punishment or establishes new substitute excuses that did not exist in the old law, these cases are applied retroactively because they are considered more favourable to the accused. (Souleiman, 2012, p. 116)

The second section: Legal Basis of the Principle

The principle of retroactivity of the law most favourable to the accused did not arise in a vacuum, but is based on deep legal and jurisprudential foundations that justify its existence as a necessary exception to the general rule. There are also societal and individual justifications that enhance its value and justify its retroactive application.

First: Legal Basis

1- Constitutional basis:

Although constitutions often focus on the principle of non-retroactivity as a safeguard against the power to criminalise, they implicitly or explicitly refer to the exception of the most favourable law. Article 2 of the Algerian Penal Code, which stipulates that "the Penal Code shall not apply to the past except insofar as it is less severe", is an application of the general constitutional provision in Article 168, which gives the ordinary legislator the power to define exceptions in "non-criminal matters", while emphasising the non-retroactivity of penalties. However, Algerian jurisprudence and jurisprudence interpret "less severe" in Article 2 of the Penal Code in accordance with the spirit of justice, which calls for the application of the most favourable law. (Sorour, Wasset in Penal Law: General Section, 1993, p. 150)

2- Legislative Basis:

Article 2 of the Algerian Penal Code is an explicit legislative text that enshrines the principle of retroactivity of the law most favourable to the accused. This article, in its exceptional formulation, provides an important guarantee for the accused and reflects the legislature's position that



favours reducing the burden on individuals when criminal policy changes towards easing the burden.

3- Jurisprudential basis:

The majority of criminal law scholars agree that the principle of the retroactivity of the law most favourable to the accused should be enshrined, and they justify this with several arguments:

- Evolution of criminal policy: Jurists believe that changing the criminal law, especially towards leniency, reflects an evolution in the criminal policy of society. If society no longer sees the need to criminalise a certain act, or to reduce its punishment, it makes no sense to continue to punish individuals according to an old criminal policy that no longer reflects the values of modern society. (Najm, 2003, p. 105)

- Justice and fairness: Jurists affirm that one of the principles of justice and fairness is not to continue to punish a person for an act that is no longer considered a crime, or with a punishment that is considered harsh in the eyes of the new legislator. The application of the most appropriate law achieves justice in individual cases and minimises injustice. (Souleiman, 2012, p. 117)

- The principle of mercy: The principle of retroactivity of the most favourable law is an expression of the principle of mercy that should govern penal policy. If the legislature decides to reduce the punishment, it is compassionate for all defendants, including those who committed their acts before the new law came into force, to benefit from this reduction. (Boussikaia, 2021, p. 167)

Second: Justifications for the principle of retroactivity of the law most favourable to the accused

The retroactivity of the law most favourable to the accused is justified by several justifications that enhance its legal and moral value:

1- For the community:

Decriminalisation or reduction of punishment reflects a change in society's perception of the seriousness of an act or the need to criminalise it in the first place. If society no longer considers an act to be dangerous and severely punishable, it is not in society's interest to keep people punished for that act or with a punishment that is considered redundant. (Boussikaia, 2021, p. 167) This promotes harmony between law and social values.

2- For the accused:

The retroactivity of the most favourable law provides an opportunity for the accused to benefit from a more lenient penal policy. This encourages the rehabilitation of defendants and minimises the sense of injustice that may result from continued punishment for an act that is no longer as serious. It contributes to restorative justice and the reintegration of defendants into society. (Khalfi, 2008, p. 130)

3- Criminal Justice:

Criminal justice aims to achieve a balance between society's interest in protecting public security and the individual's interest in protecting his rights. When the legislature tends to reduce punishment or decriminalise, it expresses this new balance, and the application of the most



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appropriate law becomes necessary to achieve justice in its comprehensive sense. (Mohamed, 2020, p. 115)

The second requirement: Exceptions to the principle of retroactivity of the law most favourable to the accused

Despite the importance of the principle of retroactivity of the law most favourable to the accused, this exception is not absolute, but is subject to restrictions imposed by necessity and the supreme public interest. One of the most prominent of these limitations, and one of the most controversial, is that the principle of retroactivity does not apply to "fixed-term laws". These laws are issued to address exceptional circumstances or emergencies, and are necessary to maintain the security and stability of society in times of crisis. Therefore, this requirement will define the concept and types of these laws, and then explain the reasons for their exclusion from the principle of retroactivity.

The first section: Fixed-term laws and their types

First: The concept of fixed-term laws

Fixed-term laws, also known as "exceptional laws" or "laws of exceptional circumstances", are those criminal laws that are issued in response to exceptional circumstances or specific crises, in which the legislator specifies a certain period of time for their validity, or their validity is linked to the end of the circumstance that necessitated their issuance. The aim of these laws is to achieve a swift and decisive response to specific threats to public security, public health or economic stability in a certain period of time. (Rabeh, 2020-2021, p. 19) These laws are necessary for the legislator to intervene forcefully in times of crisis without

losing their effectiveness once the circumstance that prompted their enactment has passed.

Second: Types

Fixed-term laws are categorised into two main types:

1. Temporary laws with a text:

These are laws that contain an explicit provision specifying an expiry date or a specific period of time in which they are in force. Once this period expires, the law automatically ceases to be in force without the need for a new text to repeal it. (Boussikaia, 2021, p. 175)

- Laws whose duration is implicitly limited by circumstance: These laws are implicitly limited in their duration by the circumstances that led to their enactment, and they cease to be in force when these circumstances end. One of the most prominent examples is laws regulating activities during war or epidemics, which remain in force as long as the state of war or epidemic continues. (Najm, 2003, p. 109) For example, the health emergency laws issued during the coronavirus pandemic were temporary laws until the end of the pandemic.

- Laws that are explicitly limited in duration: This type of law is determined by the circumstances that led to its promulgation, but it does not expire automatically; rather, the legislator must intervene with an explicit text that puts an end to its validity, as in the case of declaring a state of siege or a state of emergency that may require an official decision to terminate its application. (Mohamed, 2020, p. 116)



2- Circumstantial laws:

These are laws that are issued to address exceptional circumstances or crises, such as epidemics, wars, natural disasters, or economic crises. These laws do not include a specific date for their termination, but rather their expiry is linked to the end of the circumstance or situation for which they were issued. These laws are characterised by flexibility, allowing the legislator to respond quickly to emergency circumstances without being constrained by the limitations of ordinary legislation. (Mohamed, 2020, p. 118) The Algerian Criminal Code, for example, may temporarily criminalise certain acts to address special situations such as monopolies in times of economic crisis, or certain transgressions in times of disaster. These laws aim to achieve special deterrence in a specific period of time, justifying their exceptional nature.

The second section: Reasons for excluding fixed-term laws from the retroactivity of the most favourable law

The exclusion of fixed-term laws from the scope of retroactivity of the law most favourable to the accused is a well-established principle in doctrine and jurisprudence, and is justified by several fundamental considerations aimed at preserving the effectiveness of these laws and achieving their objectives in the face of the exceptional circumstances for which they were promulgated.

First: Maintaining effectiveness and deterrence in exceptional circumstances

The exclusion of time-limited laws from the scope of retroactivity of the law most favourable to the accused is justified by the urgent need to maintain their effectiveness.

These laws are enacted to address exceptional circumstances that require an immediate and decisive response, and cannot be emptied of their deterrent content by a subsequent law that may render their violation effectively unpunishable. (Boussikaia, 2021, p. 176) If the most appropriate law could be applied retroactively to offences committed under these laws, temporary and circumstantial laws would lose all their usefulness and effectiveness. For example, if a law criminalising monopoly was passed during a period of economic crisis, and then decriminalised after the crisis ended, retroactive application of the latter law would exempt all monopolists from punishment, defeating the purpose of the original legislation and encouraging the commission of crime in times of crisis. (Khalfi, 2008, p. 134)

This exception focuses on the fact that the nature of the offence under the temporary law is different from ordinary offences. An offence committed during the period of application of the provisional law poses a special and urgent danger to society at that time, and mitigating its punishment or decriminalising it after the circumstance has passed would lose the preventive and deterrent value that the legislator sought to achieve. (Sorour, *Origins of Penal Law: General Section*, 1999, p. 220)

Second: The nature of the offence under the temporary law and balancing interests

The offence is committed and completed under the provisional law and constitutes an attack on a legally protected interest at that particular time. Once the provisional law expires or the circumstance that led to it ceases to exist, it does not mean that the offence is no longer punishable at all. Rather, it means that the need for



criminalisation or severe punishment has ceased for the time being, but in the past the act posed a real danger and was effectively criminalised. There is a balance between the individual's interest in benefiting from the most favourable law and society's overriding interest in achieving security and stability in exceptional circumstances. (Mohamed, 2020, p. 119)

It can be said that the legislature enters into a kind of temporary "social contract" with individuals under exceptional circumstances, announcing strict rules of behaviour and deterrent penalties to ensure the safety of society. If individuals violate these rules during that period, they are held responsible for their actions in accordance with the law that was in force at the time of the offence, and they cannot invoke the disappearance of the circumstance later. This practical exception emphasises that balancing the interest of the individual with the interest of society is the cornerstone of the philosophy of criminal law, and that the higher interest of society may require restricting certain protective exceptions at specific times. (Court, Criminal Chamber, 2017)

Third: Algerian Jurisprudence

The Algerian judiciary supports this trend, as the Supreme Court has ruled that temporary or circumstantial laws apply to offences committed under them even after they have expired, and defendants cannot benefit from any subsequent law that is more favourable to them. The court reasoned that these laws were put in place for special and urgent purposes that require their continued effectiveness. (Najm, 2003, p. 106)

The third requirement: Provisions on the application of temporal criminal law

Although the general rule for the application of criminal law in terms of time is clear (i.e. the application of the law at the time of commission of the offence), it is not always easy to determine when an offence was committed, especially for offences that are not instantaneous or of a continuous nature. These offences raise particular issues in determining the applicable law when criminal laws are successive. The specificity of the application of the law to security measures and the impact of the nature of the offender are also raised in this context. Therefore, this section will be devoted to examining these issues and defining the provisions relating to them.

The first section: Continuous, consecutive and habitual offences

These types of offences pose a particular challenge to the principle of temporal application of the law, as their material element extends over a period of time or is repeated in batches.

First: Ongoing offences:

1- Continuous offences:

These are offences in which the material element continues for a period of time, i.e. the criminal activity does not end once the act takes place, but continues for a long time. For example, the crime of concealing stolen items, the crime of possessing weapons without a licence, or the crime of unlawfully imprisoning a person. In these offences, the offence is considered to continue for the duration of the continuation. Therefore, the new law (even if it is more



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severe) applies to the continuing offence, as long as the criminal activity continues or continues under the new law. (Khalfi, 2008, p. 131) If a new law is passed that increases the penalty for the offence of possessing a weapon, and the defendant possessed the weapon before the new law was passed and continued to possess it after it was passed, the new, harsher law will apply to him, because the offence is still continuing under it. (Souleiman, 2012, p. 118) The time of commission of a continuing offence is considered to be the entire period during which the criminal activity continued. Therefore, if a new law is passed during this period, it is applied to the offence. (Boussikaia, 2021, p. 169)

2- Sequential offences:

These are offences whose material element consists of several homogeneous acts, each of which constitutes an independent offence in itself, but they are related to each other by the bond of unity of criminal purpose, so the legislator treats them as a single offence. For example: Forgery in several documents, or theft from several places in close proximity and with the same intent. In these offences, if some of the acts occurred under an old law and others under a new law, the new law (even if it is more severe) applies to the entire offence, because the offence was not completed as a "sequence of acts" except under the new law. (Najm, 2003, p. 107)

Second: Habitual Crimes

These are offences that can only be achieved by repeating the criminal activity, so that a single act is not sufficient to create the offence, but must be repeated a

certain number of times determined by law (e.g: The offence of habitual prostitution, or the offence of habitual usurious lending). If the first criminal activity occurs under an old law, and the criminal activity is repeated under a new law (harsher or lighter), the latter applies. (Court, Criminal Chamber, 2018, p. 250) This is because the offence was only committed under the new law, and was not yet completed under the previous law. (Adam, 2017, p. 235) It is the moment when the elements of the habitual offence are completed, namely repetition, and if this final repetition takes place under the new law, this law will apply.

Algerian jurisprudence has settled on the application of these rules. The Algerian Supreme Court has confirmed in many of its decisions that a new law applies to continuous, sequential or habitual offences if the act continues or is repeated under it, even if this law is more severe than the previous law, because the offence was only completed in its final form under the new law. (Adam, 2017, p. 236)

The second section: Formal offences, security measures and the impact of the nature of the offender

In addition to offences with an extended temporal nature, other issues in the application of the law in time relate to formal offences, security measures, and even the impact of theories about the nature of the offender on the applicability of the law.

First: Formal crimes

Formal offences are considered to be offences of risk or potential harm, as they do not require the achievement of a harmful material result to be considered complete, but it is sufficient to simply perform an act or refrain from an act



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that constitutes a breach of the legal text. (Boussikaia, 2021, p. 170) For example: The offence of failing to declare certain facts, or violating specific administrative procedures. In these offences, the determination of when the offence was committed does not pose a major problem, as the applicable law is the law in force at the time of the act or omission that constitutes the material element of the formal offence. If a new law decriminalises or reduces the penalty after the act has been committed, it is applied retroactively if it is more favourable to the accused, in accordance with the general rule of retroactivity of the most favourable law. (Khalfi, 2008, p. 133)

Second: Security measures

Security measures (precautionary measures) raise an important issue in the context of the application of criminal law in terms of time. Security measures are defined as "measures imposed on a dangerous offender to prevent him from committing future offences, which are of a preventive rather than punitive nature, and do not aim at deterrence as much as treatment, reform or restraint". (Algeria P. D., 1966, p. 4) Many jurists believe that precautionary measures are not concerned with the principle of non-retroactivity of criminal law, but are applied with immediate and direct effect, even if they are more severe than those prescribed at the time the offence was committed. This trend is justified by the fact that security measures are not considered penalties in the traditional sense, and therefore are not subject to the same principles that govern penalties. They target a state of danger inherent

in the offender, which may persist or worsen after the commission of the offence. (Najm, 2003)

This view is supported in Algerian legislation as Article 4 of the Penal Code states: "The security measures prescribed in this Code shall be applied immediately to offences committed before its entry into force if they are more beneficial to justice and society." This provision is explicit in applying security measures with immediate effect, and even allows them to be applied retroactively if they are "more beneficial to justice and society", which indicates their preventive rather than punitive nature.

Third: The impact of the nature of the offender

The views of the positivist school of criminal law, which focuses on the personality of the offender (birth offender, habitual offender) rather than the act committed, raise issues about the application of the law in time. Positivists argue that for criminals by birth and habitual offenders, new laws (even if they are more severe) should be applied to them because they aim to remedy their latent dangerousness, not to punish them for a specific act. What matters to them is not the act, but the state of the person's criminal dangerousness. Although modern jurisprudence has moved beyond many of the ideas of the radical positivist school, some aspects of it still influence some legislation on security measures, which focus on the personality of the offender. (Ouhaibia, 2012, p. 29) However, the general rule in Algerian law and other modern legislation continues to emphasise the principle of criminal legality and the non-retroactivity of criminal law as a principle, while maintaining specific exceptions that balance the protection of society and the rights of individuals.



Conclusion:

By analysing the application of the law in terms of time and the principle of retroactivity of the law most favourable to the accused, the fundamental issues governing the relationship between the stability of the legal system and the protection of the rights of individuals in the criminal context become clear. Criminal texts, by their changing nature in response to the requirements of society and the evolution of the phenomenon of criminality, pose constant challenges in determining the law applicable to criminal facts.

Our study has emphasised that the general rule, rooted in the principle of criminal legality, is the non-retroactivity of the penal provision. This principle, which represents a fundamental guarantee of justice and legal security, ensures that individuals are not held accountable for acts that were not criminalised at the time they were committed, or that heavier penalties are imposed retroactively. However, this rule is not absolute and is subject to the exception of the retroactivity of the law most favourable to the accused.

The principle of retroactivity of the law most favourable to the accused is an expression of the legislator's commitment to social interest and justice, and ensures that the accused benefits from more favourable provisions that may be established by the new law. It has been shown that the determination of the most favourable law is done according to strict controls that include the rules of criminalisation and punishment, taking into account the nature of the legal text (whether simple or complex). However, this exception faces an important limitation,

namely that it does not apply to laws of limited duration (temporary and circumstantial).

The exclusion of fixed-term laws from the scope of the retroactivity of the law most favourable to the accused is justified by the urgent need to preserve their effectiveness, as these laws are issued to meet exceptional circumstances that require an immediate and decisive response, and cannot be emptied of their deterrent content by applying a subsequent law that may render their violation effectively unpunishable. This practical exception emphasises that balancing the interest of the individual with the interest of society is the cornerstone of the philosophy of criminal law.

Finally, it is clear that dealing with the temporal overlap of laws, whether by the general rule of non-retroactivity or its exceptions, requires an in-depth understanding of legal principles, jurisprudence, and jurisprudential considerations. While penal texts seek to achieve deterrence and protect society, they must also remain guardians of justice and fairness, which is reflected in the complex interplay between the applicability of laws and their impact on the legal status of individuals. Although Algerian legislation does not explicitly provide for all these aspects, established general principles and prevailing jurisprudence guide judicial application towards achieving this delicate balance.

Results:

In this research, we have reached a number of important findings that shed light on the complexities of applying criminal law in terms of time in the Algerian and comparative legal system:



1. The primacy of the principle of non-retroactivity of criminal law: The principle of non-retroactivity of criminal law is a well-established constitutional and legislative rule in Algerian law and other modern legislations. It constitutes the main pillar of the principle of criminal legality (*nullum crimen sine lege, nulla poena sine lege*) and expresses philosophical (justice and logic), ethical (protection of rights and freedoms and prevention of surprise), and practical (confidence, legal stability and the deterrent function of the law) justifications. These principles emphasise that the law is designed to guide future behaviour and not to retroactively hold the past accountable to the detriment of the defendant's position.

2. The law favourable to the accused as a preventive exception: The principle of retroactivity is a necessary and urgent exception to the rule of non-retroactivity, which is enshrined in Article 2 of the Algerian Penal Code with the phrase "less severe". This principle expresses the legislator's commitment to social interest, justice and mercy, and ensures that the accused benefits from the more lenient provisions that may be established by the new law, whether by decriminalising, reducing the penalty, changing the legal description, or adding permissible reasons or excuses. It has been shown that the determination of the most favourable law is done according to strict controls that include the rules of criminalisation and punishment, taking into account the nature of the legal text.

3. Fixed-term laws: An exception to the exception: Despite the importance of the retroactivity of the most favourable law, this exception faces an important limitation: it does not apply to fixed-term (temporary and

circumstantial) laws. The research has shown that this exception is justified by the urgent need to preserve their effectiveness, as these laws are issued to meet exceptional circumstances that require an immediate and decisive response, and cannot be emptied of their deterrent content by applying a subsequent law that may render their violation effectively unpunishable. This exception emphasises that balancing the interest of the individual with the interest of society is the cornerstone of the philosophy of criminal law.

4. The specificity of offences of a temporal nature: The research revealed particular challenges in applying criminal law temporally to continuous, serial and habitual offences. In these offences, the new law (even if more severe) applies if the criminal activity continues or is repeated under it, because the offence is considered complete or continuous under the new law. Formal offences are often subject to the general rule of retroactivity.

5. Security measures and their retroactivity: It is clear that security measures are not subject to the principle of non-retroactivity of criminal law like penalties, but are applied with immediate and direct effect, and may be applied retroactively if they are in the interest of justice and society, given their preventive nature, which targets the danger of the offender rather than the punishment of the act itself.

6. The importance of jurisprudence: Jurisprudence, especially the decisions of the Algerian Supreme Court, is a crucial element in interpreting and applying these principles and defining their practical scope in the face of complex judicial facts, thus contributing to the stability of the principles and the unification of judicial work.



Recommendations:

Based on our research findings, we make the following recommendations:

- 1) Work to clarify certain terms and concepts that may cause confusion in the application of criminal law in terms of time, particularly with regard to the term "less severe" in Article 2 of the Penal Code, to ensure that it is interpreted in accordance with the objectives of criminal justice.
- 2) Study the possibility of including more detailed constitutional provisions on the principle of the retroactivity of the law most favourable to the accused, in order to strengthen its constitutional immunity and ensure its universal application.
- 3) Review texts related to time-limited laws to ensure an optimal balance between the need to address exceptional circumstances and protect the rights of individuals, while creating mechanisms to ensure that these laws are not abused.
- 4) Continue working to consolidate established principles in the application of criminal law in terms of time, especially with regard to continuous and consecutive offences and habitual offences, by unifying jurisprudence and disseminating the principles issued by the Supreme Court.
- 5) Careful scrutiny when determining the most favourable law for the accused in complex cases, and ensuring a thorough comparison between the old and new laws to ensure that the one that is most favourable to the accused is actually applied.

- 6) Intensify training courses and scientific seminars for judges and judicial officers to keep abreast of jurisprudential and judicial developments in the field of conflict of laws in terms of time.
- 7) In-depth study of the impact of technological development and the emergence of cybercrime on the rules of criminal law application in terms of time, especially with regard to determining the time and nature of the crime (temporal, continuous, sequential).
- 8) Conducting in-depth comparative studies between Algerian legislation and Arab and foreign legislation in this field, in order to exchange legal expertise and extract best practices.
- 9) Analyse the applied aspects of the principle of retroactivity to alternative penalties and new security measures that may be approved by the legislator.

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