

Challenges in Applying Criminal Legislation Amid Digital Developments

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Abstract:

The application of the law based on traditional concepts of national sovereignty is no longer sufficient to guarantee security and stability in society, given the remarkable technological advancements that have accompanied the widespread use of modern techniques in committing complex and transnational cybercrimes. This unprecedented development has changed our traditional understanding of criminal behavior, its nature, and its effect, to the extent that these crimes impact traditional centers of legal authority and transcend national boundaries . This requires the amendment of legal texts, especially in their implementation across jurisdictions, to adapt to the criminal changes in the digital world, aiming to achieve legal and practical effectiveness in international cooperation to fight this type of crime.

Keywords: digital world ;Cybercrime ;The Law ;National Sovereignty. Security.

1. Introduction:

The traditional concept of the principles governing the application of the law in terms of place is no longer sufficient to guarantee security and stability in society. The remarkable technological advancement has been accompanied by a parallel development in the use of modern technologies in committing complex transnational electronic crimes, thereby changing the traditional concept of criminal behaviors, their nature, and their effects, which now encroach upon legal jurisdictions surpassing the traditional concept of the nation-state. This implies transcending traditional theories in crime prevention, particularly in fighting cybercrimes. Therefore, it is necessary to amend legal rules to keep pace with the criminal evolution in the digital world in order to fulfill legal and practical effectiveness concerning international cooperation in fighting this type of crime. Perpetrators of cybercrimes often attempt to escape punishment by moving between nations or conducting their activities in territories spanning multiple countries. Accordingly, the international community's concern ensures that serious crimes do not go unpunished and that punishment is imposed for the crime in all its components wherever it is committed. This necessitates addressing gaps related to applicable laws and jurisdictions that enable criminals to find safe havens.

Based on this, we raise the following problem statement: **How have technological means affected the principles governing the application of legal rule in terms of place, and what are the alternative solutions to address these effects?**

We attempted to answer this problem statement through the following elements:

First Section: Theories of Criminal Law Jurisdiction by Place

Second Section: Principle of Universality of Criminal Text

2.First Section: Theories of Criminal Law Jurisdiction by Place

The nature of complex and transnational electronic crimes requires that their commission transcends the territorial borders of nations. This raises questions about the effectiveness of applying criminal laws to prevent perpetrators from escaping punishment when the crime is committed abroad by individuals who neither hold the nationality of the state nor reside there habitually, or when the perpetrators are foreigners. Several legal opinions and formulations concerning this issue have been addressed in numerous international conferences. (Moneim, 2000, pp. 108-109.) .

According to **traditional theories associated with the jurisdiction of criminal law**, numerous principles govern the jurisdiction by place, which vary relying on national legislation. These encompass the territoriality principle, the protective principle, and the personality principle of, and as a general rule, the perpetrator is subject to the criminal legislation of the state where the crime was committed within its territory or where the impacts of the crime extended, regardless of the nationality of the perpetrator or the victim. In accordance with the principle of territoriality of the law. Furthermore, citizens of the state as well as stateless individuals and residents who have habitual residence there are subject to national law if they leave the state's territory without having criminal judgments issued against them by foreign courts for crimes they committed while residing abroad, in accordance with the principle personality of the law (Al-Shanawi, 2014, pp. 142-143.) .

-Firstly, Electronic Crime and the Territoriality Principle

The Territoriality Principle is regarded as the fundamental rule governing the implementation of criminal law concerning place, meaning that national law applies to all legal events that occur within the national territory, regardless of the nationality of the perpetrator or the victim (Bouskia, 2014, p. 88) .

Regardless of the location of the perpetrator and the stance of foreign legislations towards the committed offense, whether it is regarded as an assault on the interests of the sovereign state or other foreign countries, according to this principle, national law shall not apply to events that occur abroad regardless of the nature of the perpetrator or the victim (Hosni, 1989, p. 93) .

This principle has been used by many national legislations, encompassing the Algerian legislature in (Article 3) of the Penal Code

Accordingly, if a criminal act is committed, which is regarded as an electronic crime according to the definition provided by Law No. 09-04, and its articles (Article 303, repeated 1 and 2), as well as Law 18/07, then Algerian law is the one that shall be applied.

Besides, other legislations, such as the French legislator, and legislators in Egypt, Jordan, the

United Arab Emirates, and others, have stipulated this principle. It is a principle relied on the sovereignty of the state and its authority over its territory, implying that all included parties shall be aware of it according to the principle of legitimacy of crimes and punishments. Furthermore, the implementation of foreign law on national territory undermines that sovereignty and weakens the authority of the state. However, the principle of territoriality, despite its many merits, appears limited in light of the developments experienced by criminal activities, particularly electronic crimes, which have become transnational, characterized by the multiple nationalities of perpetrators and victims and their movement across borders. This requires the development of criminal legislation to align with these developments and its spatial application to prevent criminals from escaping punishment.

-Secondly, the Personality Principle

To alleviate the rigidity of the territoriality principle. National legislations have extended the scope of implementation of criminal law extraterritorially in cases of crimes committed outside the national territory. This is known as the Principle of Personality, which can be positive when highlighting the nationality of the perpetrator, and passive when emphasizing the nationality of the victim. Different legislations have adopted this principle in different ways. Some have relied on positive personality, such as the Algerian legislator, the French legislator, the Egyptian legislator, and the UAE legislator (Penal, 2021) . On the other hand, some national legislations have utilized the principle of passive personality, such as the Greek legislator in Article 7/1, the Swiss law in Articles 3, 5, 6, and the French law.

Accordingly, it is preferable for national legislations, entailing Algerian legislation, to follow the example of French legislation in adopting this principle without necessitating the act to be criminalized in the country where the crime occurred, especially concerning electronic crimes, to offer greater legal protection for victims against any form of violation and arbitrary measures.

In the event that the perpetrator is apprehended within the national territory after committing a crime abroad and cannot be extradited to the state with natural jurisdiction, the case should be considered based on international cooperation between states. This is to prevent criminals from escaping punishment, even if it involves applying the law of the country where the crime was committed due to the seriousness of electronic crimes committed within the framework of transnational organized crime (Al-Shanawi, 2014, p. 144) .

Proponents of this view argue that applying foreign law does not undermine the dignity of the state or diminish its stature, as this action is undertaken with the consent of the state and subject to reciprocity. Besides, applying the law of the state where the crime was committed is considered more just, as this law is the one the perpetrator anticipated to be applied when committing the crime. Furthermore, national judges cannot avoid referring to and applying foreign laws in some cases, even for crimes that occur within the territory of the same country. The significance of applying foreign law becomes clearer if it is more favorable to the accused than the law of the state where they were apprehended or if some contributors to the same crime have already been tried under it, requiring its application to all other participants who managed to leave the country before their trial (Mustafa, 1983, p. 139) .

However, the application of criminal law has faced strong objections from the majority of jurists and legislators. It is practically impossible for the national judge to familiarize themselves with all foreign criminal laws. Even assuming the judge could be familiar with these laws, they are formulated according to the criminal policy of their respective countries, which is not feasible when implementing foreign laws. Furthermore, the application of foreign criminal laws conflicts with public order (Al-Shanawi, 2014, p. 144) .

Finally, national and foreign penal laws may conflict. This can occur, for instance, when foreign laws mandate a penalty for certain crimes that the national legislator does not recognize, such as the death penalty, which has been abolished by some countries but retained by others. (Bucharest, 1929, p. 145)

-Thirdly, the Protective Principle

If criminal jurisdiction were limited to the personality principle, it would lead to foreign offenders escaping punishment for crimes committed abroad, regardless of their severity. Consequently, many countries' legislations have determined their jurisdiction to punish any foreigner who commits specified crimes abroad through explicit provisions. It is known as the protective principle. It should not be understood as a partial application of the principle of universality, meaning that the protective principle focuses on specific crimes specified by explicit provisions. In reality, there are other differences between the two principles:

- The universality principle, on one hand, requires that the act be regarded as a crime in the country where it was committed, in addition to being a crime under national law. On the other hand, the protective principle gives national criminal legislation jurisdiction to punish an act deemed a crime within its territory, even if it is not punishable in the country where it was committed.

- On the other hand, the universality principle was enacted in some countries to prevent offenders from escaping punishment for crimes committed abroad, particularly when they are not subject to national law and cannot be extradited to the jurisdictional state. Whereas, the protective principle seeks to allow the state to defend itself against actions that directly or indirectly damage its security, even if these actions do not harm the state in which they were committed and are not regarded as crimes under its law (Al-Shanawi, 2014, p. 147) .

Therefore, when the law specifies jurisdiction over crimes committed abroad by foreigners without specifying these crimes, we apply the universality principle, which simultaneously necessitates these actions to be crimes under the law of the state in which they were committed. However, when it is not required for the act to be punishable under the law of the state in which it was committed, meaning that the legislator follows the protective principle concerning crimes explicitly mentioned in that law.

Some have criticized this principle as being self-serving, seeking solely to further the state's own interests. They base their argument on the variations in legislation concerning its implementation. However, it seems unreasonable to entirely adopt this perspective because while states may criminalize certain actions under this principle to protect their security, they also prosecute and

punish crimes under international criminal law, which threaten the international community as a whole. Accordingly, adhering to this principle prevents offenders from escaping punishment, particularly in cases where they are not extradited to the competent jurisdictions regionally, either due to the absence of agreements or the lack of extradition conditions. Among the legislations that have employed this principle is the German Penal Code of 1971, which stipulates in Article 4(3) paragraph 2, and the subsequent texts, concerning crimes associated with electronic pornography dissemination.

Although the Norwegian Penal Code issued in 1902 shall apply the principle of universality according to Article 12 paragraph 4, it also shall apply the protective principle in Article 12 paragraph 4 concerning crimes specified therein, regardless of the place of commission or the nationality of the perpetrator. These acts encompass crimes that threaten the security and safety of the country internally or externally, in addition to currency counterfeiting, document forgery, crimes against morality, and others (Al-Shanawi, 2014, p. 148) .

3.Second Section - The Universality Principle of Criminal Texts

This principle includes departing from the principle of territoriality and its traditional exceptions by exercising foreign legal jurisdiction to fight dangerous crimes that cross national borders, entailing electronic crimes. This is we be will addressed through the following:

-Firstly - The Concept of Universality of Criminal Texts

This principle requires that the law of the state in whose territory the crime is committed shall be applied to the offender, regardless of the place where the crime occurred and the nationality of the perpetrator or the victim (Al-Shanawi, 2014, p. 145; Moneim, 2000, pp. 108-109) . This principle aims to address the raise in newly emerging crimes with transnational dimensions by bypassing the limitations imposed by the principle of territoriality. Jurisdiction is established regardless of where the crime was committed, the nationality of the perpetrator, the nationality of the victim, or the type of crime (Amer, 1986, p. 87) .

In other words, jurisdiction is established for the criminal judge of any country in the world when a dangerous crime is committed. It is noteworthy that this is an old yet evolving subject, as interest in it started as early as 1883 (Al-Sawy, 1984, p. 205) . Until the present time, it remains a matter of concern in international criminal jurisprudence. The international community has endorsed the principle of universality of criminal jurisdiction in international conventions sought at fighting different international crimes that transcend national borders, such as conventions on fighting white-collar crime (1904-1910), counterfeiting (1929), and drug trafficking (1925-1931-1963-1971-1988...).

Thus, the aim behind employing this principle is also to expand the jurisdiction of national courts in criminal issues to fulfill solidarity among countries in fighting crime and preventing criminals from escaping punishment (Al-Sawy, 1984, p. 205) , particularly in cases of cybercrime. This is intended to diminish the conflicts arising from jurisdictional issues, which become more acute in this type of crime that spans multiple countries. Furthermore, the involvement of perpetrators of different nationalities in committing such crimes creates complexities and difficulties that give

these criminals ample opportunity to exploit legislative gaps to their advantage and serve their criminal purposes (Al-Shanawi, 2014, p. 145) .

At the same time, addressing the criticisms directed at the principle of implementing national jurisdiction to foreign laws is crucial. It is apparent that the principle of universality does not extend to acts that are not criminalized by the law of the state where they were committed. Furthermore, it shall not apply to crimes for which a final judgment has been issued, or for which the perpetrator has served the entire or partial punishment. However, the implementation of this principle is also surrounded by several challenges, in terms of the effort borne by national judiciaries and the raised financial burdens that states incur in trial proceedings and applying judgments. Moreover, the state where the perpetrator is apprehended often lacks sufficient evidence to adjudicate the case conclusively. Besides, the law of the state where the crime was committed is usually the natural law presumed to be implemented, particularly if it is the most appropriate law for the accused (Al-Shanawi, 2014, pp. 145-146) .

These criticisms have affected the tendency to limit the implementation of this principle to crimes that are extremely serious for the international community, for which every state has a genuine interest in resisting and in undertaking this task on behalf of all other states. (Foudil, 2004, pp. 21-22.)

Some laws have implemented the principle of universality as a secondary measure, enabling the trial of perpetrators apprehended within their territory according to the law applicable therein if they are not extradited to the state where the crime was committed. Among these laws (Al-Shanawi, 2014, p. 146) is the UAE law, which states in Article 21: "This law shall apply to anyone found in the country after committing abroad, as an actor or accomplice, a crime of sabotage or disruption of international communications, drug trafficking, trafficking in women, children, or slaves, or crimes of piracy and international terrorism." Similarly, the Jordanian legislator included similar provisions in Article 10/4 , as did the Egyptian legislator with exceptions related to fighting human trafficking in Articles 16 and 17, which referred to Article 4 of the Egyptian Penal Code, as previously mentioned.

The foregoing requires that countries improve the legal capacity of a government to exercise its authority beyond its normal jurisdictional boundaries, particularly when its citizens are perpetrators or victims. This offers a framework for cooperation among countries that have previously exercised such jurisdiction, and it is expected that there will be cases necessitating cooperation between many countries in investigations, while only a few of them may be in a position to prosecute criminals judicially.

Similar provisions are present in other international legal instruments and national laws (Such as the Convention of the Organisation for Economic Co-operation and Development (OECD) on Combating Bribery of Foreign Public Officials in International Business Transactions for the year 1997 (Article 4)) . For instance, Albanian law in Article 6 stipulates that Albanian criminal law shall apply to criminal acts committed by Albanian citizens within the borders of Albania. It also shall apply in cases of criminal acts committed by Albanians in any other territory when the crime is punishable in both countries unless a final judgment has been issued by a foreign court. In the context of this article, Albanian citizens also encompass individuals holding another nationality in

addition to Albanian citizenship. Article 7 of the same law shall apply Albanian law to criminal acts committed by foreigners if the act is committed outside the Republic of Albania or against its interests, or by any citizen involved in organizing prostitution, drug manufacturing, weapons, nuclear materials, pornography, or trafficking in such materials illegally (Legislative Evidence for Implementing the United Nations Convention against Transnational Organized Crime (UNTOC) and its Protocols) .

Moreover, Albanian criminal law, according to Article 8, also shall apply to stateless individuals, whether inside or outside the territory, if the provisions of Article 7 of this code shall apply to them (Legislative Evidence for Implementing the United Nations Convention against Transnational Organized Crime (UNTOC) and its Protocols p. 1.) . Likewise, the Polish Criminal Code in Chapter 13, entitled "Responsibility for Crimes Committed Abroad" (Articles 109 to 113) , as well as the German and Japanese laws, among many others, provide similar provisions.

-Secondly, Regulations for the Application of the Principle of Universality in Criminal Law

From all the above, it is clear how appropriate the principle of universal jurisdiction is for addressing serious crimes such as cybercrimes, which are often transnational. However, specific constraints must be established in place to prevent deviation from its objective and exploitation for goals that infringe upon human rights or interfere with the internal affairs of states. These constraints include:

- The perpetrator must be a foreigner accused of committing a cybercrime as an actor or accomplice.
- The perpetrator must be apprehended within the territory of the state exercising legal jurisdiction.
- The extradition of the perpetrator to the state of their nationality is not requested or feasible.
- The state where the cybercrime was committed on its territory has requested the extradition of the perpetrator for trial, but this was not possible.
- The cybercrime is punishable in the state where the perpetrator was apprehended within its territory.
- The perpetrator is provided with guarantees of a fair trial according to the principle of legality, such as not being punished for the same act more than once and having the right to defense and an interpreter in their language, etc.

4.Conclusion:

The international movement adopted by criminals and the exploitation of advanced technology are among numerous factors that make it more necessary than ever for law enforcement authorities and judicial powers to cooperate with the state exercising jurisdiction over this issue and assist it in fighting cybercrime. From the perspective of legal jurisdiction, it falls under both national and international criminal laws, as it transcends national borders and involves a foreign element. Given the specificity of cybercrime committed across borders, the application of criminal law revolves around the following issues, which can be introduced as recommendations:

- Finding effective solutions to the conflict of laws, whether legislative, jurisdictional, or

procedural, when there is a foreign element in the criminal act. This pertains to perpetrators of the crime, whether they are main actors, accomplices, or victims, when they are citizens of a foreign country, or when the location of the crime, whether fully or partially committed in different places, or its impacts emerge fully or partially in the territory of another country or multiple countries.

- The universality of jurisdiction confers a criminal nature on criminal activities under the provisions of the mentioned law, requiring states to adhere to the principle of prosecution or extradition.

- The theory of double criminality under international criminal law accepts an indirect enforcement approach as a result of the distinction between laws. Accordingly, international treaties are not regarded as part of domestic law unless action is taken by the contracting states to incorporate their provisions into national laws, such as the requirement for legislative approval of the treaty before its ratification and the requirement for its publication for the condition of being informed about it. On the other hand, the principle of unity of law and the implementation of the direct enforcement method, "self-incorporation," means that the provisions of international agreements become effective upon ratification by the contracting states, without the need for any special action by those states, as they constitute a single legal entity.

Therefore, citizens of states, their various bodies and institutions are obligated to adhere to the criminal rule contained in the provisions of the International Convention, just as they would with domestic laws. The principle of "ignorance of the law is no excuse" is applied against them.

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