

Legal Security in Criminal Law

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Abstract:

This study addresses the issue of enshrining legal security within the specificity of criminal law, regarded as one of the most fundamental principles that states strive to achieve. Legal security provides assurance to the legal system overall, as well as stability to society, individual rights, and legal statuses. This necessitates an exploration of its concept, elements, and manifestations in the criminal law of any country. The study aims to elucidate the characteristics of criminal law from the perspective of legal security and to examine how it is affected within the realm of criminal legislation..

key words: legal security, stability of legal statuses, criminal law.

Introduction :

Criminal law is part of the legal system that defines actions disrupting societal order, which the legislator considers crimes and specifies the penalties for them. The presence of legal security requirements in criminal legislation strongly indicates the achievement of legal stability, clarity, and precision in criminal law, as well as understanding and comprehension by those addressed by the criminal legal rule. This applies across all branches of law.¹

Legal security is currently one of the most discussed concepts in the legal and judicial fields, especially when evaluating a specific legal or judicial system or when challenging the process of establishing a legal rule, whether by the legislator or through judicial precedent. Criticisms of legal and judicial systems often revolve around several factors, particularly the proliferation of legal texts or the instability of laws due to their frequent amendment based on economic public order needs, or the undermining of transaction stability due to the expansion of judicial oversight in contractual matters, or the overturning of established judicial precedent to adopt new interpretations with retrospective effect in time. These and many other factors lead to the destabilization of individual expectations regarding the law, particularly in regulating new

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¹ Serwan Osman Faraj, "Criminal Legal Security," Master's Thesis, University of Sulaimani, Iraq, 2019, p. 1.

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areas associated with modern technology use, such as electronic contracting and electronic signatures, which are fraught with previously unknown risks, thereby affecting legal security.¹

If that is the case, legal security becomes even more crucial in criminal legislation, which must be free of defects to avoid creating a state of legal and judicial instability, potentially leading to a real infringement on criminal legal security.

The main problem this study addresses is as follows: What are the principal issues facing legal security in criminal matters? In addition to this fundamental issue, it raises subsidiary questions that, when answered, reinforce the main problem: What is the concept of legal security? What are its most important fundamental elements? What are the characteristics of criminal law from the perspective of legal security?

To address this problem, we adopted a descriptive analytical method aimed at comprehensively understanding and analyzing the phenomenon. The study is divided into two sections: the first deals with the conceptual framework of legal security, while the second is dedicated to examining its manifestations in criminal matters.

THE FIRST TOPIC : The Conceptual Framework of Legal Security

Given that legal security is a relatively new concept, it necessitates research into its origins, definition, and subsequent elucidation of its elements.

FIRST REQUIREMENT: Origin and Definition of Legal Security

We will address in this section the genesis and definition of legal security.

Firstly: The Genesis of Legal Security

- The principle of legal security, which took root in Germany since 1961, is considered one of the primary philosophical and legal foundations supporting the judicial and legislative system in many contemporary democracies. The Federal Constitutional Court of Germany has affirmed the constitutionality of this principle, embodying the idea that the law should be predictable and stable, thus enabling individuals and commercial entities to plan their actions with confidence that the laws will not change arbitrarily or retrospectively.

Although the German Constitution does not explicitly incorporate the principle of legal security in its texts, this did not prevent the German constitutional judiciary from acknowledging this principle and emphasizing its importance in the legislative process and public policy design. This approach reflects the understanding that legislation fundamentally aims to provide legal security as an integral part of national security.

In comparison, the Spanish Constitution of 1978 went a step further by explicitly incorporating the principle of legal security in its provisions, reflecting a clear commitment to ensuring legitimacy, the hierarchy of legal rules, the publication of laws, and maintaining the principle of non-retroactivity of legal provisions that could harm individuals or restrict their rights.

Internationally, the importance of the legal security principle was recognized through the Court of Justice of the European Communities in a 1962 decision and subsequent rulings concerning legitimate expectation, a concept closely related to the principle of legal security. Additionally, the European Court of Human Rights has emphasized the necessity of legal certainty as a

¹ Abdelmajid Ghomija, "Justifications for the Principle of Legal Security and the Necessity of Judicial Security," Judicial Supplement Magazine, Issue 2, Morocco, 2008, p. 55

fundamental requirement for legal security since 1981, highlighting the crucial role this principle plays in protecting individual rights and freedoms at the continental level.¹

Secondly :Definition of Legal Security

1_ The Jurisprudential Definition of Legal Security

Although the term "legal security" is common, it has seldom been the focus of specific definition or analysis by legal scholars, perhaps due to the complexity of defining a principle that is multifaceted, carries multiple meanings, and is prevalent across various domains ..²

Some have attempted to equate it with legitimate expectation, yet others argue that legitimate expectation is more akin to fairness than to legal certainty. Despite the similarities between legal certainty and legitimate expectation, jurisprudence differentiates between them, as does the French Constitutional Council .³ .

Legal security has been defined by some as "the presence of a kind of relative stability in legal relationships and a minimum level of stability in legal positions to promote a sense of security and peace of mind among the parties in legal relations, regardless of whether these are private or public legal entities. These entities should be able to organize their affairs according to the applicable legal rules at the time they commence their activities without exposure to surprises or unforeseen actions emanating from any of the state's powers, which could undermine the pillar of stability or shake the spirit of confidence and tranquility between them, and between the natural evolution and change of such rules "..⁴

Legal security has also been defined as "the measures taken by public authorities to achieve a balance between the stability and clarity of prevailing legal rules, aiming to build trust and assurance among citizens, and accommodate the natural evolution and change of these rules."⁵

Furthermore, it has been described as encapsulating several requirements: the law must be understandable, predictable, lawful, and within the jurisdiction of the legislator. It adds that "legal security is a principle aimed at protecting citizens from the negative side effects of the law, especially contradictions or complexities in laws and regulations, or their too frequent changes." Montesquieu provided insights on the necessity of well-crafted legislation,

¹ Sherif Tayeb Mofaq, "The Evolution of the Legal Value of the Concept of Legal Security," Legal Security Forum, Faculty of Law and Political Sciences, Kasdi Merbah University Ouargla, December 6-5, 2012, p. 35.

Kamal Boubaaya and Abdelatif Wali, "Legal Security in Algerian Criminal Legislation," Journal of Legal and Political Research, Volume 2, Issue 2, Algeria, p. 330.

² Abdelmajid Ghomija . OP ,CIT ; P 57

³ Jean-François Boudet - La Caisse des dépôts et consignations. Thèse de doctorat Université du droit et de la santé. UFR de sciences juridiques, politiques et sociales (Lille) 2004 p. 27 et 28. 13 - Cathy Pomart - La magistrature familiale. Editions L'Harmattan (1 janvier 2004. p. 164

474 Roseline MARILLE LA SÉCURITÉ JURIDIQUE : UN CONCEPT EUROPÉEN MULTIFORME Roseline MARILLE MULTIFORME. Revue du notariat, 110(2), 463–480.

⁴ Dr. Yasser Mohamed El-Essar, "The Role of Practical Considerations in Constitutional Judicature," Dar Al-Nahda Al-Arabiya, Cairo, 1999, p. 245.

Mazen Leelo Raadhi, "From Legal Security to Legitimate Expectation: A Study in the Evolution of Administrative Judiciary Principles," Law Faculty Journal - Al-Nahrain University, Volume 21, Issue 1 (March 31, 2019), Iraq, p. 6.

emphasizing that "unnecessary laws weaken the necessary ones" and that "sometimes it is necessary to change certain laws, but we must touch them only with a trembling hand".¹

2_ The Judicial Definition of Legal Security

The principle of legal security was not explicitly adopted in national legislative systems until after a series of important decisions issued by the Court of Justice of the European Union, starting from the 1960s, specifically its decision on March 22, 1961,² and subsequently by the European Court of Human Rights, which underscored this principle in 1979 in the *Marckx* case. The European judiciary found that legal security is one of the fundamental principles required in the European legal system, although the legal texts of the European Union and the European Convention on Human Rights do not expressly stipulate legal security as a mandatory principle for member states in their legislations.

France, influenced by the European and German judicial decisions on legal security, saw in the report of the French Council of State issued on March 24, 2006, in the *KPMG*³

case, an affirmation that the principle requires legislators to draft laws precisely to specify rights and duties clearly, and that legal rules must be clear and stable, not subject to frequent or unexpected changes.⁴

This definition highlights the main elements of the principle of legal security, which are legal accessibility, legal stability, and legitimate expectation⁵.

Legal Accessibility: This concept encompasses two aspects: First, physical access to the law, which means that the legal rule must be published to be applicable to individuals. Second, intellectual access to the law, which refers to the quality of the law. Legislators must consider formal and substantive standards when enacting laws, including adherence to the principle of equality, stability of legal rules, clarity of legal norms, and the understandability of the law. Both the physical and intellectual accessibility of the legal rule and the effectiveness of the law, in particular, and legal security, in general, are considered means or tools to achieve justice.

Legal Stability: The idea of legal stability implies that the legal rules should be definitive and specific in their organization of legal statuses, and it is one of the primary goals that the law seeks to achieve.

Legitimate Expectation: The concept of predictability encompasses the law on one hand and subjective rights on the other. The predictability of the law means that every individual has the right to the stability of the legal rule and to be protected from sudden amendments, thus ensuring legal security, which represents the bright aspect of the law. On the other hand, the predictability in the realm of subjective rights implies that the organization of a citizen's

¹(De l'Esprit des lois, 1748). Mikaël Benillouche, Anne-Laure Chavrier, Sophie Corioland, Manuel Delamarre *Leçons d'Introduction au droit* (2016), pages 76 à 78

² Dr. Mohamed Abdel Latif, "The Principle of Legal Security," *Journal of Legal and Economic Research*, Issue 36, October, p. 90. CE, 24 mars 2006, *KPMG et autres*, n° 288460, Rec. Lebon, p. 154 (GAJA, 2019, n° 104)..

³ 8 CE, 24 mars 2006, *KPMG et autres*, n° 288460, Rec. Lebon, p. 154 (GAJA, 2019, n° 104).

⁴ Errayn, N. (2018). *Legislative Inflation and Legal Security*. *Scientific Research Notebooks*, 6(2), 120.

⁵ Hussein, M. R. (No specific publication date provided). *The Principle of Legal Security and Its Impact on Limiting the Retroactivity of Annulment Judgments*. *Journal of University of Raparin*, p. 298.

Faraj, S. O. (No specific publication date or source title provided). For more details, refer to the previous reference, p. 10.

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activities in various life spheres should be clear and not subject to unexpected changes, surprising them with laws or regulatory decisions that contradict their legitimate expectations based on objective foundations derived from the existing systems adopted by state authorities. Examples of this include the non-retroactivity of laws and respect for individuals' acquired rights.¹

It's important to note that before the explicit acknowledgment of the principle of legal security through the KPMG decision, the recognition of legal security was "largely embodied through a set of derived and goal-specific principles." However, this recognition was limited due to the judiciary's tendency to disproportionately prioritize principles of legality and change. For this reason, the implicit effects of objective legal security can be discerned within the context of judicial proceedings related to annulment and invalidation, both in terms of legal administrative actions creating rights or the principle of non-retroactivity of regulatory acts, as well as legal actions concerning the annulment of an illegal administrative act that has not yet become effective..²

Based on the aforementioned definitions, we conclude that legal security refers to a combination of knowledge and predictability. Knowledge means that the law should be accessible and clear. Predictability assumes that this law should be stable and foreseeable.

In France, the Constitutional Council has enshrined the requirements of legal clarity. In 1999, it issued a decision in favor of codifying various legal codes through decrees, adding that this should meet "an objective of constitutional value related to the accessibility and understanding of the law," which mandates that citizens have sufficient knowledge of the legal systems applicable to them. This decision was seen by some as "a consecration of the principle of legal security," inspired by jurisprudence from the Court of Justice of the European Communities³.

The perspective adopted by the French Constitutional Council underscores the importance of having clear and understandable laws, reinforcing the principle of legal security and affirming France's commitment to explicit, accessible, and comprehensible legal principles. This approach is greatly inspired by the jurisprudence of the Court of Justice of the European Communities, which has regularly emphasized the importance of clarity and predictability of the law to ensure the fundamental rights of citizens within the European Union.

In Algeria, based on the establishment of legal security according to important standards, the legislator constitutionalized legal security in the 2020 Constitution, where its preamble states: "The Constitution guarantees the separation and balance of powers, the independence of justice, the legal protection and monitoring of public authorities' actions, and ensures legal and democratic security".

The constitutional provisions related to fundamental rights, public freedoms, and their guarantees obligate all authorities and public bodies. The rights, freedoms, and guarantees can only be restricted by law, for reasons related to maintaining public order and security, protecting

¹ Serwan Osman Faraj . OP . CIT , P 10

² Hélène HARDY . Le principe de sécurité juridique au sens du droit de la Convention européenne des droits de l'homme. THÈSE POUR OBTENIR LE GRADE DE DOCTEUR DE L'UNIVERSITÉ DE MONTPELLIER. 2019 , P 3

³ Jean-Louis BERGEL . LA SÉCURITÉ JURIDIQUE ; Revue du notariat Volume 110, numéro 2, septembre 2008 ,P 8

national constants, and those necessary to protect other rights and freedoms enshrined by the Constitution. In all cases, these restrictions cannot affect the essence of the rights and freedoms.

To achieve legal security, the state ensures, when legislating on rights and freedoms, their accessibility, clarity, and stability.

Thus, the need for clear and understandable legislation forms a fundamental pillar of legal security in modern legal systems. This approach aims to ensure that all citizens can understand the laws governing their daily lives, thereby facilitating the exercise of their rights and understanding of their obligations. In this context, the principle of legal security emerges not only as a requirement for stability and predictability of the law but also as a demand for accessibility and clarity, emphasizing that the law must serve its supreme purpose: to be a tool in service of society.¹

SECOND REQUIREMENT: Requirements for Achieving Legal Security

The principle of legal security aims to protect individuals from the negative consequences of legislation, especially in cases of inconsistency, complexity, or frequent amendments, leading to the loss of legal security. To realize this principle, several requirements must be met in the laws to ensure the entrenchment of legal security in reality. Among the most important of these requirements are:

Firstly: Non-retroactivity of Laws and Respect for Acquired Rights

- Firstly, the non-retroactivity of laws is one of the fundamental bases on which the principle of legal security relies to protect legal statuses. The Algerian Constitution articulates this in Article 43: "There shall be no conviction except by virtue of a law issued before the commission of the act."

Similarly, Article 2 of the Penal Code states, "Penal laws shall not have retroactive effect, except for those less severe."

The principle of non-retroactivity in penal law means that the provisions for criminalization apply only to acts committed after the law comes into effect and do not apply to actions taken before that time. The applicable text for a crime is the one in force at the time of its commission, not the one in effect at the time of the trial of its perpetrators. This rule is emphasized in most constitutions.

The rule of non-retroactivity mandates that penal law should not be applied to actions that were carried out before its enactment, whether it criminalizes for the first time an act that was permissible before its effect, or it imposes a harsher penalty on an act that was subject to a lighter punishment at the time of its commission.

Therefore, it is not permissible to punish a person for an act that was not punishable at the time of its commission, nor to impose a harsher penalty than the one that was established for it. The principle of non-retroactivity of penal laws regarding the past is based on considerations of justice and individual freedoms, as it is a right of every person to know at the time of committing an act whether it is permissible or criminal.

This rule is also based on the necessity to respect acquired rights and the stability of legal statuses that were established under a specific law. Hence, this rule is a logical outcome of the principle of legality of crimes and punishments.¹

¹Anwar Ali, Explanation of the Penal Code, General Theory, Volume 1, Dar Al-Nahda Al-Arabiya, 1987, p. 133

Secondly, respecting acquired rights refers to not infringing upon the legitimate and legally established rights of individuals, whether by judicial decision or related to the fundamental rights and freedoms stipulated in the constitution, such as the right to nationality and property rights.¹

Secondly The Principle of Legitimate Expectation and Limiting the Retroactive Effect of Unconstitutionality Rulings

1- the Principle of Legitimate Expectation:

This principle pertains to preventing the state from suddenly or unexpectedly issuing laws, decisions, and regulatory regulations that contradict the legitimate expectations of individuals. The European Union, as well as the European Court of Human Rights, advocated for this principle. In its ruling dated April 24, 1990, the European Court of Human Rights criticized the French court for establishing legal rules on telephone communication monitoring. The criticism was based on the fact that these legal rules were not clear or adequately understood by the citizens.²

2_ The Retroactive Effect of Unconstitutionality Rulings

This refers to declaring a law unconstitutional after it has been in effect for a certain period, treating it as if it never existed. Such a declaration, coming after the law has been operational, can harm the acquired rights of individuals or affect the legal statuses they obtained under the annulled law, thereby infringing upon the principle of legal security. Consequently, some legal scholars have emphasized the necessity of establishing controls to limit the retroactive effect of unconstitutionality rulings to protect individual rights and reinforce the principle of legal security. The issue of unconstitutionality is raised only after the constitutionality of laws has been challenged and a judgment in the constitutional matter has declared the law in question unconstitutional.

Upon close examination, it becomes evident that the doctrine of restricting the retroactive impact of a decision declaring a law unconstitutional ostensibly conflicts with the principle of legal security. Individuals who have been governed by the now-invalidated statute during a specific timeframe experience a sense of unease and insecurity, having organized their affairs in reliance upon it. Nonetheless, from another perspective, this restriction preserves the legal stability for the broader populace, as the essence of the legal norm is to act as a social conduct rule derived from the societal collective..³

¹ Badawi Abdul Jalil . Hanan Ali, OP. CIT p. 8

² Abdelmajid Lakhdari & Fatima Ben Djedou, Legal Security and Judicial Security: A Relationship of Complementarity, Al-Sahab Journal, University of El Oued, Volume 4, Issue 2, 2018, p. 390.

³ Belhamzi, Fahima. (2018). Legal Security of Constitutional Rights and Freedoms. Doctoral Thesis, Public Law, Faculty of Law and Political Sciences, University of Abdelhamid Ibn Badis Mostaganem, p. 35.

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THE SECOND TOPIC : :: Manifestations of the Principle of Legal Security in Criminal Law

Discussing legal security within the framework of criminal legislation necessitates addressing the characteristics of the latter from the perspective of legal security, and then examining the aspects of infringement upon this principle in criminal law.

FIRST REQUIREMENT: Characteristics of Criminal Law from the Perspective of Legal Security

There are significant characteristics of criminal law from the viewpoint of legal security, among which are:

Firstly: legal security is of utmost importance in the application of legal norms. To define the concept of legal security in relation to criminal law, we must initially consider some assumptions summarized by the legal scholar Jadwiga Potrzebacz in two hypotheses:

The first assumption is well expressed by the Latin phrase *Ubi societas, ibi ius* (where there is society, there is law). Human social life cannot exist without law. Therefore, the existence of positive law represents a very important value from the perspective of social life.

The second assumption is well captured by the idea *Hominum causa omne ius constitutum est* (all law is established for the sake of humans). The articulation of these assumptions reveals that positive law in general, and criminal law in particular, represents a very important value, but it is not an end in itself; rather, it is an instrumental value, serving to realize another ultimate value, which is the human being and their personal dignity..¹

Secondly, "Criminal law is human-related - the human is both the perpetrator and often the victim of the crime, and the punishment affects the individual. Thus, this legal system is geared towards serving humans, providing protection on one hand, and applying punishment to the perpetrator on the other.

This prominent characteristic of criminal law means that it must respect inherent human dignity and possess a humane dimension. It should place the human at the center of its functions, safeguarding the most important human values such as life, health, human dignity, and personal security.

According to the foundations of criminal law, 'the guiding principle of criminal law should be the preservation of human dignity, both for the victim and the perpetrator.' The humanitarian principle holds utmost importance within criminal law because it employs the most severe deterrents to protect these values. Therefore, it must adhere to the principle that criminal repression should be proportional to the perpetrator's fault without violating his dignity or responsibility."..²

Thirdly, "Criminal law serves both evaluative and obligatory functions:

As evaluative law, it signifies the importance of certain values to society, the state, and the individuals therein, by safeguarding these values.

¹ Jadwiga Potrzebacz, 'THE CONCEPT AND MEANING OF LEGAL SECURITY IN CRIMINAL LAW', *Teka Kom. Praw. – OL PAN*, t. XI, 2018, nr 1, 306

² A. Marek, *Pojęcie prawa karnego, jego funkcje i podział*, in: *System prawa karnego*, vol. 1: *Zagadnienia ogólne*, ed. A. Marek, Wydawnictwo C.H. Beck, Instytut Nauk Prawnych PAN, Warszawa 2010, p. 7.

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As obligatory law, it operates imperatively, setting forth standards of obligation through commands and prohibitions that dictate acceptable and unacceptable behaviors. Criminal legislation thus prescribes the behavioral patterns that the state endorses." ".¹

Fourthly, "Criminal law functions as a law of boundaries. It delineates what is legally permissible and what is forbidden and punishable by prohibiting behaviors that infringe upon protected values and establishing criminal sanctions for such violations.

However, it also delineates the scope of individual freedom, offering legal security to those who adhere to these boundaries. The boundary-setting characteristic of criminal law fulfills a dual role: it serves a protective function by safeguarding legal rights from infringement and a guarantee function, ensuring that individuals are only held accountable for crimes committed within the ambit of the operative criminal law."²

SECOND REQUIREMENT: Manifestations of Infringement on Legal Security in Criminal Law

Legal instability can arise, potentially leading to genuine infringement on criminal legal security. Among the most significant manifestations of this are legislative inflation in criminal law and the complexity of understanding the law.

Firstly : Legislative Inflation in Criminal Law

This refers to a legislative phenomenon in criminal law resulting from an unjustified increase in the number of criminalization and punishment provisions, which adversely affects the criminal justice system and society. In modern times, criminal law experiences widespread legislative inflation, both in special criminal laws and regulatory laws governing public services, due to excessive legislative reliance on the tools of criminalization and punishment.

The phenomenon of legislative inflation in criminal law has had negative effects in various aspects, including its impact on criminal legal security. It becomes evident through the destabilization of legal statuses due to instability and inconsistency in criminal provisions. The law creates legal statuses for individuals governed by its provisions, which should be characterized by stability and permanence because these legal statuses, once established, must continuously provide legal protection. It is illogical for these statuses to be subject to frequent and rapid destabilization. However, the reality confirms that these legal statuses face instability and inconsistency, undermining legal security. Stability and permanence in legal statuses are what achieve legal security, which is a fundamental pillar that ensures stability for various legal statuses.³

Secondly: Complexity in Understanding the Law

Ambiguity and the difficulty in comprehending legal texts are among the most common features of poorly crafted legislation. The clarity of text is an attribute of perfection in legislation, but its defects and ambiguity, along with susceptibility to interpretation due to imprecise phrasing or the presence of words with multiple meanings without subsequent clarifying terms, are significant issues.

¹ Grześkowiak, Alicja. 2015. "Wprowadzenie do nauki prawa karnego." In Prawo karne, edited by Alicja Grześkowiak, and Krzysztof Wiak, 1–55. 5 ed. Warszawa: Wydawnictwo C.H. Beck pp. 7–8

² Ibidem, p. 19.

"For more information, see:" Jadwiga Potrzeszcz OP CIT , P 306

³ Al-Taie, Drew Melouh. (2022). The Impact of Legislative Inflation on the Violation of the Principle of Legal Security in Criminal Law. Journal of the Law Faculty, Volume 24, Issue 4, p. 43.

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According to the European Court, one of the conditions for criminalization is specificity, meaning the terms used must be precise, clear, simple, and easy to understand.

Conclusion:

In conclusion, this study has ascertained that legal security within the ambit of criminal law is a contemporary concept, whose primary importance lies in safeguarding individuals from the adverse effects of the legislation. It embodies several fundamental principles such as legal stability, accessibility, and predictability. The study has deduced numerous pivotal outcomes and recommendations:

- **Results:**

- The suggested definition of legal security is in harmony with the core functions of criminal law: the protective function and the guarantee function.
- Legal security holds a distinctively significant value within the sphere of criminal law.
- The majority of legislative frameworks have constitutionalized legal security, as exemplified by the Algerian legislature in the 2020 Constitution.
- The realization of the principle of legal security necessitates fulfilling various prerequisites on a practical level, including the clarity and comprehensibility of legal texts for the intended audience.
- One of the manifestations of legal security violation in criminal law is legislative inflation.

Recommendations:

- Refrain from criminalizing actions already regulated under other legislation.
- It is urged that criminal legislators across various jurisdictions rectify inconsistencies and flaws inherent in criminal legislations and periodically refine them.
- Optimize the criminalization policy to ensure legal security in criminal legislation.

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