

PROHIBITION AGAINST RETROACTIVE APPLICATION OF CRIMINAL LAW



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About Cambodian Center for Human Rights

The Cambodian Center for Human Rights (“CCHR”) is a non-aligned, independent, non-governmental organization (“NGO”) that works to promote and protect democracy and respect for human rights – in particular civil and political rights – in the Kingdom of Cambodia (“Cambodia”).

CCHR’s vision is of a peaceful Cambodia in which all people can enjoy the fundamental human rights to which they are entitled, all are subject to the rule of law without impunity, all are treated equally without discrimination, all are empowered to participate fully in the democratic process, and all can share in the benefits of Cambodia’s sustainable economic development. CCHR’s logo shows a white bird flying out of a circle of blue sky – this symbolizes Cambodia’s bid for freedom.

CCHR’s Cambodian Human Rights Portal, accessible at <http://www.sithi.org>, is the 2011 winner of the Information Society Innovation Fund Award in the category of Rights and Freedoms and the 2013 winner of the Communication for Social Change Award awarded by the Centre for Communication and Social Change at the University of Queensland in Brisbane, Australia.

For more information about CCHR, please visit www.cchrcambodia.org.

About the Fair Trial Rights Project

The Module on the Prohibition Against Retroactive Application of Criminal Law (or Principle of Legality) is part of a series of modules on fair trial rights produced by CCHR’s Fair Trial Rights Project (“the FTR Project”). The FTR Project is the first – and only one – of its kind in Cambodia, uniquely and innovatively working to promote and protect fair trial rights in practice. It overall aims to increase the impartiality and independence of Cambodia’s judiciary by supporting the right to a fair trial in Cambodia’s courts. In pursuit of this goal, the FTR project has two specific objectives: to socialize the concept of fair trial rights among the public by raising its awareness of fair trial rights and to increase compliance with fair trial standards within the judiciary through trial monitoring.

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Queries and Feedback

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**The Prohibition Against
Retroactive Application of
Criminal Law
(or Principle of Legality)**

1. Definition



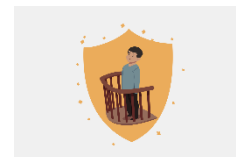
The prohibition against retroactive application of criminal law prohibits the application of law to events that took place before the law was introduced. In other words, newly adopted criminal laws only apply to acts committed after they came into force and criminalized such acts.

This prohibition derives from the general **principle of legality**, which is composed of the following doctrines:

- The doctrine *Nullum crimen sine lege*, which literally translates as “no crime without law,” provides that a person cannot commit a crime unless it is an act prohibited by law at the time it was committed.¹
- The doctrine *Nulla poena sine lege*, which literally translates as “no punishment without law,” provides that only a penalty provided by law can be imposed on a convicted person. In addition, courts cannot impose a penalty that is heavier than the one applicable at the time the criminal offense was committed.²

The principle of legality overall means that only the law can define crime and prescribe penalties. Consequently:

- No one may be prosecuted and can be found guilty of a criminal offense for an act or omission that did not constitute a criminal offense at the time the alleged action or omission took place.
- If found guilty of an existing criminal offense, the convicted person cannot be imposed a sentence that is not provided by law and that is heavier than the penalties provided by law at the time the offense was committed.



The rationale behind the principle of legality and the prohibition against retroactive application of criminal law is that individuals cannot be held responsible for committing an offense for an act they undertook unless they could reasonably find out that this act was a criminal offence at the time it was undertaken.

The principle of legality requires that the State **defines precisely criminal offenses and their penalties within the law** to enable individuals to know for what acts and omissions they can be held criminally liable.³



However, this requirement does not mean that the State must prove that the individual knew that the act in question was illegal to prosecute them for committing a criminal offense as this would place an undue burden on the State. The State must only ensure that individuals have access to the information that enables them to know what acts are prohibited or not, notably through the **publication of laws**.⁴

¹ CCHR, ‘Fair Trial Rights and Trial Monitoring Handbook’ (February 2012), page 28, <https://sithi.org/tmp/publication/view/2012-02-13-fair-trial-rights-and-trial-monitoring-handbook> (CCHR’s FTR Handbook).

² Ibid.

³ Amnesty International, “Fair Trial Manual”, (Second edition, 2014), chapter 18, page 138-141, <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (Amnesty International’s Fair Trial Manual).

⁴ CCHR, ‘Fair Trial Rights and Trial Monitoring Handbook’ (February 2012), page 28.

It is also important to highlight that the prohibition against retroactive law applies to acts that constitute criminal offenses both under **national or international law**. This means that even if national criminal law does not criminalize certain acts at the time they were committed but international law does, then these acts can be prosecuted. This is for example the case for genocide, crimes against humanity, war crimes, etc.⁵

2. Legal Framework



2.1. International Law

The retrospective application of criminal law is expressly prohibited under international law, including under the **Universal Declaration of Human Rights** (“UDHR”) and the **International Covenant on Civil and Political Rights** (“ICCPR”). It is also enshrined in the **Convention on the Rights of the Child** (“CRC”).



Article 11 (2) of the UDHR:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

Article 15 of the ICCPR:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

Article 40 (2) (a) of the CRC:

“[...] 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

- (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed; [...].”*

⁵ Amnesty International Fair Trial Manual, page 138.

2.2. Cambodian Law

The prohibition against retrospective application of criminal law is guaranteed under the **Criminal Code of the Kingdom of Cambodia** (“Criminal Code”).

Article 3 of the Criminal Code: “Conduct may give rise to criminal conviction only if it constituted an offence at the time it occurred.”

Article 9 of the Criminal Code: “A new provision which abolishes an offense shall be applicable immediately. An act committed before the new provision came into force shall no longer be subject to prosecution. Any ongoing prosecutions shall be terminated.

Article 10 of the Criminal Code: “A new provision which prescribes a lighter penalty shall be applicable immediately. However, final judgments shall be enforced regardless of the severity of the relevant penalties. A new provision which prescribes a heavier penalty shall be applicable only to acts committed after the provision came into force.”

3. Importance



The prohibition against retroactive application of criminal law is crucial as it underpins one of the most fundamental principle of criminal justice: **the principle of legality**, which requires that criminal offenses be prescribed by law. This principle is a cornerstone of the **rule of law**.

By providing a framework for the exercise of the judicial power, the prohibition against retroactive application of criminal law protects individuals **against State abuse**, notably **against arbitrary and unlawful prosecution, conviction and punishment**,⁶ and thus ensures the **fairness of the judicial authority** and the **foreseeability of the law**.⁷ By knowing which acts and omissions can make them criminally liable and the penalties they face as well as when such acts or omissions start or stop being criminalized, individuals are able to adapt their behavior accordingly.

Any violations of this prohibition therefore threaten the fairness with which individuals must be treated by the judiciary and can lead to abuses, especially to the unlawful prosecution, conviction and punishment of individuals for acts or omissions that did not constitute criminal offenses at the time they were undertaken.

4. Limitations

Article 15 of the ICCPR, which guarantees the prohibition against retroactive application of criminal law, is in the exhaustive list provided by Article 4 of the ICCPR of rights and principles that cannot be derogated from during a state of emergency.

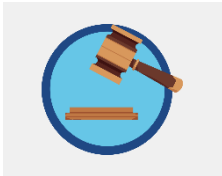


⁶ Amnesty International’s Fair Trial Manual, page 139.

⁷ OSCE, “Legal Digest of International Fair Trial Rights,” (2012), pages 185-186, <https://www.osce.org/odihr/94214#:~:text=The%20Legal%20Digest%20of%20International,of%20OSCE%20trial%20monitoring%20operations> (OSCE’s Legal Digest of International FTR).



However, international law sets out an exception by providing that any provisions imposing a lighter penalty must benefit offenders. The retroactive application of criminal law is therefore allowed for more lenient criminal law which favor the accused. This means that if criminal laws change after the time the offense was committed but before any final judgment is rendered, then the courts must apply the criminal laws that are the most favorable to the accused.⁸



Similarly, an individual can no longer be prosecuted for an act that constituted a criminal offense at the time it was committed but that was decriminalized before the individual was finally convicted. The United Nations Human Rights Committee (“UNHRC”) has indeed affirmed that Article 15 (1) of the ICCPR provides the retroactive effect of a lighter penalty and that the scope of this article must not be interpreted narrowly. Consequently, this retroactive effect also applies to laws abolishing a penalty for an act that no longer constitutes an offense.⁹



In addition, the prohibition of retroactivity of criminal law only applies to changes in laws impacting the criminalization of a conduct and not to changes in procedural or evidentiary rules that do not affect the nature of the offense.¹⁰

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⁸ Ibid., page 139.

⁹ UNHRC, “Jean-Pierre Cochet v. France: Communication No. 1760/2008”, (UN Doc CCPR/C/100/D/1760/2008, 2010), para. 7.2 to 7.4, <http://hrlibrary.umn.edu/undocs/1760-2008.html>

¹⁰ OSCE’s Legal Digest of International FTR, Section 8.1.3, page 188; Also see UNHRC, “David Nicholas v. Australia: Communication No. 1080/2002”, (UN Doc CCPR/C/80/D/1080/2002, 19 March 2004), para.7.7, http://www.worldcourts.com/hrc/eng/decisions/2004.03.19_Nicholas_v_Australia.htm.