Aleksandra Rychlewska[1]

The Icelandic So-called 'Perfect Analogy'

Abstract

Article 1 of the Penal Code of Iceland states that 'a person shall not be subjected to penalties unless found guilty of behaviour deemed punishable by Law, or totally analogous to such conduct'. The solution – *analogia legis* within the criminal law, in the light of nowadays European regulations should be called an exceptional one. Nevertheless, its *ratio legis* aims at the enhancement of the principle of citizens' equality under the law.

There are two main principles of the Icelandic legal system – separation of the power and – as stressed – non-discrimination of citizens. The form of the principle of legality derives from a conflict between both of them. Therefore, the analogy – strictly 'perfect analogy', as that term should be used within the criminal law – applies to those situations where due to the principle of equality (and of coherence of the system), conducts of two persons, almost indistinguishable, should be adjudicated identically, even though the legislator has not decided so. Undoubtedly, court's action will violate the monopoly on lawmaking, however this practice is socially approved. Notwithstanding, due to the construction of Article 7 of the European Convention on Human Rights (praising the principle of legality) and to the criterion of predictability of law (raised by the Court in Strasbourg), Icelandic solution is not so obvious in breach of the European system.

[1] 5th year-student of Jagiellonian University in Cracow.

I. Introduction

The paper is to provide a brief overview of the specific Icelandic regulation that allows to use analogy to adjudicate on one's criminal responsibility. The expression *specificity* of the issue is a good one as – when comparing systems of penal law existing among European countries – the so-called *analogia legis* can be seen as a much obsolete.

At the outset it should be noted that all legislation of Iceland is, basically, a reproduction of the Danish or Norwegian law[2] (although enriched by indigenous legal culture), and also in the case of criminal law the first Icelandic Penal Code of 1869 – introducing the controversial definition of an offense – was *de facto* translation into Icelandic of Danish criminal act of 1866[3].

At the beginning of the paper the *ratio legis* of such a regulation (in this very form) of the *nullum crimen sine lege* rule will be discussed. Subsequently, it will be explained what it really means to convict someone by analogy in Icelandic legal system and how it works in practice. Last but not least – as a summary of the presented considerations – Icelandic 'perfect analogy' is going to be compared with European principles of criminal law, including those promoted by the European Court of Human Rights.

II. The *nullum crimen sine lege* rule

Article 1 of the Penal Code of Iceland states that 'a person shall not be subjected to penalties unless found guilty of behaviour deemed punishable by Law, or totally analogous to such conduct'[4]. This rule is also written in the Constitution of Iceland of 1944 whose article 69 (1 part) confirms that 'no one may be subjected to punishment unless found guilty of conduct that constituted a criminal offence according to the law at the time when it was committed, or is totally analogous to such conduct'[5].

[2] H. Einarsson, *Old ways and new needs in criminal legislation* [in:] *On criminal law and criminal procedure in Iceland from the beginning of the 19th century,* Reykjavik 1989, p. 61.

[3] *Ibidem*, p. 62. It should be noted that Icelandic legal system had been connected with the Danish one since IX/X century (see: E. Pálsson, Pythagoras and early Icelandic law: a lecture given at the sixteenth World Congress of the International Association for Philosophy of Law and Social Philosophy '*Law justice and the state'*, Reykjavík 1993, p. 7).

[4] Act no 19/1940 of 12 February 1940. Official translation at: http://eng.innanrikisraduneyti.is/legislation/ [access hereinafter: 10.06.2013].

[5] Constitution of Iceland of 17 June 1944. Official translation at http://www.government.is/constitution/.

With a reference to the above-mentioned, article 1 § 1 of the Criminal Code of Denmark states similarly that 'only acts punishable under a statute or entirely comparable acts shall be punished[6]. A. Wąsek, when discussing the system of Danish criminal law[7], emphasizes that the *nullum crimen sine lege* rule is without constitutional status there and the form which has been given to it by the Danish legislator (as shown) leaves much to be desired. *Analogia legis* against the offender is basically accepted among contemporary Danish dogmatists of law (unlike foreign ones). It is due to the fact that – as a basis for a conviction – analogy is not misused, and if so – according to the Scandinavian literature – the result is similar to the one of usage of a broad interpretation of criminal law[8]. In passing it can be noted that such an argument should be considered striking as – according to the European doctrine of criminal law – not only *analogia legis* against the perpetrator is prohibited, but broad interpretation either.

It can be argued therefore that the above-mentioned regulations – both Icelandic and Danish – seem to be a gap in contemporary European system of criminal law, for which reason – opposite to the common law system – the written law and its literal interpretation is of great importance. The rule that a criminal (indictable) offence should be properly defined by law, *stricte* by statute (as *nullum crimen sine lege* states[9]) is supposed to be a fundamental one not only for the criminal law, but for the universal human rights law as well[10].

According to the Icelandic literature, article 1 of the Penal Code is the one that introduces the rule of *nullum crimen sine lege* into the Icelandic law[11]. It can be claimed in the subject that, as such a rule does not state the ban on analogy and refers literally to the potential outcomes of its usage, it is a circumvention of the law (statute).

To continue, the principle of legality and the *nullum crimen sine lege* rule especially are recognized in the Icelandic legal system and prescribed as those of fundamental value just

6 Criminal Code of Denmark of 1930 r. (consolidated on 6 September 1986). Official translation: G. Høyer, M. Spencer & V. Greve, *The Danish criminal code: English version*, København 1999.

7 A. Wąsek, 'Duńskie prawo karne', *Przegląd Prawa Karnego* 1992/6, p. 70–90.

8 *Ibidem*, p. 71–72. As L. Gardocki also claimed the analogy in Danish criminal law not being misused is not contrary to the rule of lawfulness. See: L. Gardocki, *Prawo karne*, Warszawa 2011, p. 17.

9 It is worth to note that as far as the rule of *nullum crimen sine lege* pertain to *lex*, therefore – statute, it is said that the guarantee function of criminal law is fulfilled unless the conviction of individual's act was not predictable by law (*i.e.* latin *ius*). See: S. Pomorski, *Amerykańskie common law a zasada nullum crimen sine lege: studium krytyczne prawotwórstwa sądowego w amerykańskim prawie karnym*, Warszawa 1969, p. 17.

10 See: K. S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge 2009, chapter 7. Also: F. F. Ívarsson, *Um lögjöfnun*, Reykjavik 2012, p. 65 (own translation).

11 H. Einarsson, *op.cit.*, p. 65.

as emphasized above[12]. At the same time, however, the character of the rule is not seen as an absolute one since some exceptions from it are allowed. They can be based either on 'the common law' and practical considerations and on the law itself as well. So is in the case of article 1 *in fine* of the Penal Code of Iceland, which by opening up the definition of the offense to cases not provided for in the law but 'totally analogous', introduces an exception to the rule of *nullum crimen sine lege* for the analogy, *stricte* a perfect analogy, that is distinguished from the concept of the so-called free analogy (see below). Other deviations from the rule – based on 'the common law' – are jurisprudence (judicial practice) and doctrine (literature) concerning the interpretation of the criminal law. In passing it must be added that, as the Icelandic legal system belongs to the civil law system where the written law[13] dominates, even though the cited article 1 of the Penal Code states that an offense is to be determined by the law (contrary to the Danish regulation where the term 'statute' is used), it does not mean the other exceptions are also rooted in this article. Although there is no legal definition of law (especially in the Constitution of Iceland), it still relates to legislation made by legislative power[14].

III. *Ratio legis*

The form of the *nullum crimen sine lege* rule in the Icelandic legal system derives from the current conflict between two over arching principles rooted in it, *i.e.* the tripartite division of powers and assignment of the legislative power exclusively to the parliament and the President on the one hand and equality and consistency of the legal system on the other hand[15].

[12] F. F. Ívarsson, *op.cit.*, p. 65 (own translation). When discussing the Feuerbach's theory, the author claims that some of its basis proved to be resilient and now the *nullum crimen sine lege* rule is a fundamental one in most countries. He emphasized the rule is also of human right range and, as such, is protected by European Convention on Human Rights of 1950 (article 7 therein) and other human rights instruments as well (*e.g.* International Covenant on Civil and Political Rights of 1966).

[13] See: F. F. Ívarsson, *op.cit.*, p. 7. The author says that Icelandic legal system is based essentially on statutory law (civil law legal system characterized by written law).

[14] According to article 2 of the Icelandic Constitution the legislative power is jointly exercise only by Althingi [*i.e.* Icelandic parliament] and the President of Iceland (it states: *Althingi and the President of Iceland jointly exercise legislative power. The President and other governmental authorities referred to in this Constitution and elsewhere in the law exercise executive power. Judges exercise judicial power*).

[15] F. F. Ívarsson, *op.cit.*, p. 10 (own translation): *There are two principles that are rooted in the Icelandic legal system and the Icelandic Constitution. On the one hand, as states 2nd Article of the Constitution, the tripartite division of powers and assignment of the legislative one to the Parliament* [and the President], *and on the other hand,* [equality. The problem is] *when the legislator does not seem to cover specific cases that, from the*

According to R. R. Spanó, Icelandic dogmatic of the criminal law, the interpretation of the law should be carried out so that the results can meet the requirements of predictability, equality and rationality[16]. Thus, a conviction on the basis of the court's assessment of the case *ad casum*, although not fulfilling an offense laid down by law but similar to such, deserving to be punished, constitutes nothing else than court's law-making activity, violating the principle of the division of powers. Nevertheless, the conviction in the previously-mentioned situation is, in the same time, a symptom of the protective function of the state as it provides equality between citizens before the law and the sense of justice as well. The idea behind the regulation is that individuals should be treated equally – both convicted or acquitted – if their conducts are almost identical, so that the principle of equality and consistency of the legal system could be respected. What might be doubtful, however, is the value of predictability of law. How can one talk about it when the legal consequences of a given behaviour is deemed to be punishable not on the basis of universally binding law, available for anyone interested, but in accordance with 'the whim' of the court? The Icelandic doctrine claimed that this predictability should be understood as an opportunity for self-reconstruction (or reconstruction with the assistance of the counsel) of the legal norm applicable in the case *ad casum* with the use of the commonly accepted legal methods. Thus, in Icelandic system analogy, as one of such methods,cannot be used freely by the courts either, but should be foreseeable for citizens (which the issue will be carried on in the later part of the paper).

Further argument *in favorem* 'perfect analogy' can be that relating to legislative practice, *i.e.* that it is impossible to regulate each case of everyday life in the legal text. Therefore, in order to find a good solution for reality judge must look beyond the boundaries of legislative and, for example, make a use of the rules of the law, or help himself by an analogy[17]. It can be claimed that refraining from the strict adherence to the text of legal acts can give possibility to react on criminal behaviours in a more proper way.

perspective of equality, could be perceived as ones that should be regulated as well. The question is if the law should apply strictly and remain unchanged unless legislator amends it, or is it permitted to apply the method as analogy to achieve equality and consistency in the legal system? See also: Article 2 of the Constitution of Iceland cited above and article 65 as follows: *Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status.*

16 R. R. Spanó, *Túlkun lagaákvæða*, Reykjavík 2006, bls. 45 (own translation): *Methods of law construction should therefore satisfy minimum predictability, transparency and consistency, so that those who are 'legal targets' (or their legal advisers) could understand and assess whether arguments for the conclusion are coherent withthe recognized methods of law interpretationwithin the Icelandic legal system.*

17 F. F. Ívarsson, *op.cit.*, p. 7 (own translation): *Law may not cover all possible issues. It must seek inspiration in other legal sources or methods to answer any question that cannot be answered otherwise. To do it, one should, for example, look for items such as the principles and laws of nature (…).*

From the criminological point of view, the Icelandic doctrine agrees that the threat of punishment which the perpetrator is aware of may contribute to reduction of such law-violating conducts. However, since the effect is difficult to estimate, in practice the value of universal respect for the legitimate interests of citizens assessed *in concreto* is given a priority[18]. Another Icelandic dogmatic of criminal law – J. Þórmundsson – emphasizes in this context that although the Feuerbach's concept of mental compulsion cannot be regarded worthless, it is not free from criticism. It should be, of course, required that the legislator indicates precisely what kind of behaviour is going to be punished and, indirectly, what kind of behaviours are prohibited, not withstanding the very assumption that the awareness of penalty will act as a deterrent against committing crimes is unrealistic just because of the fact that the fiction of legal awareness too often occurs to be nothing more than just a fiction, and, apart from the above-mentioned, most crimes are committed unintentionally anyway[19].

IV. The legal method

The answer to the question what is the analogy in the Icelandic legal system, particularly in the criminal law, as well as what is the base for it and its position among other legal methods, is not – despite its momentous function – simpler than elsewhere[20]. Widely understood, it is said to be a special method that allows to use the content of the statutory rule in the case not covered by law. This makes it possible to subsume the facts under the scope of the statutory provision, which in the ordinary interpretation of the law would not have occurred[21]. As aforementioned – the reason behind such an action is to ensure

18 As stated in Explanatory Statement to the Penal Code of Iceland of 1940 [cited in:] H. Einarsson, *op.cit.*, p. 64: *The common ethical view that the legitimate interests of others are to be respected is much more conductive to prevent violation of law than any punishment. However, the knowledge of penal sanctions brought by a certain act also contributes to this end, although this effect is impossible to weigh or measure. A penal stipulation will also often strengthen the view that the punishable act is also a moral wrong (…)*

19 J. Þórmundsson, *Afbrot og refsiábyrgð I*, Reykjavík 1994, bls. 151–152 (own translation): *Some assumptions about teaching Feuerbach were unrealistic, especially the knowledge of the law and the effectiveness of legislative (…). Most crimes are committed without deliberation, usually involuntarily, (…), done in fervent agitation or for other transient imbalanced motives, like fear, jealousy or anger.*

20 F. F. Ívarsson, *op.cit.*, p. 4 (own translation). The author notes that the very term 'analogy' had often caused both law students and lawyers puzzled, since analogy can be an extremely 'challenging task' (*i.e.* something that must be dealt carefully with).

21 *Ibidem*. As the author mentions (briefly): the analogy is an authorization to apply the substance of the statutory rule outside of its scope of application, which cannot take place in the case of law interpretation.

the principle of equality of citizens under the law. Thus, if two situations are similar to each other, but only one of them is recognized by law according to the requirements of legal system, to the principle of non-discrimination and equality, as well as to the consistency of the system, such cases should be evaluated in the same way. In other words, with that legally unregulated situation should be associated legal consequences assigned to the statutory one. The analogy is, therefore, a kind of an instrument eliminating the inequality of legislation.

It follows that in the Icelandic system the understanding of analogy as a legal method does not differ substantially from what is assumed in most European countries[22]. The difference is, however, in its application and admission to, after all, fill in the legal gaps within the criminal law. It seems, therefore, that the Icelandic system of criminal law is not an exhaustive one[23], and among the methods of legal interpretation there is no assumption of rational legislator, at least not in the sense which is given in Poland. While the Polish criminal court in a situation as described above would have to judge that behaviour – being irrelevant from the legal point of view – cannot be considered punishable (as this very branch of the law is thought by the rational legislator to be comprehensive and without legal gaps), Icelandic court is not able to do the same. A judge cannot rely on the given text of law, but he must refer to the legislator's intentions, and assess what should be given therein. In other words, it must be examined whether it is rational – due to some values rooted in the legal system – to penalize the case *ad casum*, and otherwise – whether there would be a breach of the constitutional principle of equality.

Within the Icelandic legal system can be distinguished two sources of criminality (not to be confused with the sources of law) – the law and the analogy (like has been said before – a 'perfect' one). However, it is emphasized that the analogy is not a source of law, nor the method of its application[24].

[22] See: F. F. Ívarsson, *op.cit.*, p. 16–17 (own translation). The author notes that, notwithstanding, within the Danish legal system and the Norwegian one as well the analogy is seen as a method of legal interpretation (*interpretatio extensiva*). Just as by The European Court of Human Rights.

[23] See: K. Radzikowski, 'Analogia w prawie podatkowym', *Przegląd Podatkowy* 2007/4, p. 19.

[24] R. R. Spanó, *op.cit.*, bls. 308–309: *Analogy, however, is an independent action based on the authorization, that has been considered to exist in certain cases, to apply the substantive rule which is behind the provision, to circumstances that does not fall within its scope after its interpretation.*(...) *Analogy is a form of the power to creation, that the courts have the authority to do, as appropriate, when specific conditions are met.*(…) *When all is said and done, the decision of the Court to apply the analogy is in fact based on the constitutional right of the courts to create a rule in some specific situations.* Different view, today perceived as an archaic one, is presented, *e.g.*, by J. Þórmundssona, *op.cit.*, bls. 195, where the author claims that analogy is an independent source of law.

The clue to determine what the analogy is in the Icelandic legal system, lies in a discretion granted to a judge whose aim is to realize the principle of equality of the legal system. It is believed that the use of analogy is within the competence of the courts attributed by the Constitution. When court is to decide whether given conduct – although not of a criminal features according to the legislature, but of such a nature in accordance with other reasons that prejudge the penalty – should be criminalised, it realises the general power to dispense the justice (even though it constitutes law-making activity)[25]. This practice, established by the society, meets the general acceptance just because of the underlying purpose of such a solution. What needs to be emphasized, the courts are not entitled to set some new standards of conduct, but only to extend the scope of application of the existing legislation[26]. If one would like to refer this to the Polish system of criminal law, the courts would be entitled to establish a new rule that expresses the type of criminal offense for the case *ad casum*. Nevertheless, the rule must be based on the existing one that is lying behind the provision[27].

Just because of the link between the new rule and the existing law it is said that the analogy cannot be seen as a separate source of law – by itself it may not constitute the basis for legislation. On the other hand, while using analogy there is no application of the existing provisions, therefore, it also cannot be called the method of legal interpretation. What is more, among the conditions allowing to use the analogy in particular circumstances, there is one that must be a legal loophole[28]. Thus, the relationship between the two methods(legal interpretation and analogy) is such that until the court decides the matter by means of legal interpretation, even extensive one, it will not be entitled to use the analogy[29]. It should be noted that *argumentum a maiori ad minus*, the extensive interpretation of criminal provisions – usually prohibited – also will be allowed in the Icelandic law.

25 Ó. Jóhannesson, *Stjórnskipun Íslands*, Reykjavík 1978, bls. 388 (own translation): *There is no definition of the term 'jurisdiction' in the Constitution, however it is assumed that its meaning is determined and known. (...) According to the traditional sense it binds a judicial authority to determine the specific rights and to provide for what is right and legal in a particular case.* See also: F. F. Ívarsson, *op.cit.*, p. 13: *Therefore, it can be considered that analogy, (…) is part of the judiciary power in the meaning of the 2nd Article of the Constitution and the courts applying the analogy are basically using their power to extend the essence of the legislative to cover particular case* [as they are not excused from giving a judgment even though no rules of law apply].

26 *Ibidem*. As cited above.

27 With reference to so-called 'norma sankcjonowana' (as the rule behind the provision) and 'norma sankcjonującą' (rule explicitly given in the provision), which the terms are hard to translate. See: *Kodeks karny. Część ogólna. Komentarz*, vol. I, A. Zoll (red.), Warszawa 2007, p. 147–148.

28 What be discussed subsequently.

29 F. F. Ívarsson, *op.cit.*, p. 28. The author claims that: *before deciding to apply the analogy the judge must conclude that it is not possible to incorporate case ad casum under legal provision even with the use of the extensive interpretation.*

V. Conditions of analogy

Analogy in criminal law – 'analogy, which allows for penalty – is called within the Icelandic legal system a 'perfect analogy'[30]. Therefore, it is said there are two concepts: the so-called free analogy, and the perfect analogy[31].It is important that there is no material difference between both, and in each case the same conditions must be met for applying one of the methods. Notwithstanding, the Icelandic scholars indicate that àpropos conditions for perfect analogy the criterion of similarity has to go further[32]. While the 'free analogy' requires that the case *ad casum* and the statutory one would be comparable, the 'perfect analogy' needs the two cases to be completely similar. Thus, it is the degree of similarity that indicates the boundary (but rather blurred) between the concepts.

Article 1 of the Criminal Code of Iceland establishing an exception to the *nullum crimen sine lege* rule as the so-called perfect analogy, implicitly set to the conditions of its application. It hardly needs emphasizing that the use of analogy by courts is a subject to restrictions and, basically, it is not arbitrary at all[33].

Icelandic doctrine distinguishes three positive conditions for considering that the court is entitled to make a decision based on the analogy, and the same amount of negative conditions preventing the analogy from being used. The first group includes *primo* requirement that the case *ad casum* cannot be covered by existing law, *secundo* the two cases – on the one hand that under consideration by a court and on the other hand the one described in the legal act – should be of the same kind and of the appropriate degree of similarity, and *tertio* rule created by analogy must be coherent with the general objectives and

30 *Ibidem*,p. 83. The author says: *The Icelandic law, as previously mentioned, has considered only the 'perfect analogy' to be a basis for penalty.*

31 F. F. Ívarsson, *op.cit.*, p. 86: *There remains then only one condition of analogy, the case must be of the same such nature or type.* (…) *Similarity may be lower or can mean almost identity. According to the scholars, somewhere on the scale lays the boundary between free and 'perfect analogy'. Nevertheless, it may be extremely difficult to draw the line so handsomely.* (…) *There is no substantial difference between the terms [free and 'perfect analogy'], but the only difference is when applying the criteria – in both case the same.* (…) *As one would says that the applicability of the 'perfect analogy' (allowing for penalty) is only possible in cases when each condition for analogy is met, it is no longer two different concepts, but merely different requirements for the same concept.*

32 *Ibidem*. As cited above.

33 F. F. Ívarsson, *op.cit.*, p. 14: *Analogy is far from being apply by courts freely. The principle of the Icelandic Constitution is that the legislator puts the right rules and the courts have only limited authority to create such legislation (or extend them as in the case of analogy) and only under certain circumstances. This means obviously that analogy is an exceptional authorization.* (…) *Refers to the first condition, as discussed further, that no other legal rules may apply to the scenario under consideration to allow to cover it by analogy, this must be considered in each case. Courts must evaluate all situations coherent and exclude other possibilities before they are going to use analogy. Therefore, it should be used with caution.*

principles of the Icelandic legal system[34]. The ban on the use of analogy (negative conditions) has application where *primo* the legal text deals with the exceptional rules, *secundo* norms are of a special nature, *tertio* the regulations relates only to the cases listed exhaustively therein[35]. Firstly, the positive condition of analogy will be presented.

Discussing the application of the rules of law in a particular case, also when considering the use of analogy, first what needs to be established, is the legal loophole within the regulation, that means – the case *ad casum* cannot be governed by any applicable law. It is said, that in order to verify this requirement, the scope of application of the provision in question (a probable basis for analogy) must be precisely studied and different meanings of a given expressions should be analysed. If, in spite of applying the method of law's interpretation, including the extensive one, it is not possible to settle the matter, then the analogy would be admissible. What is important, one should examine not only the provision that is going to serve as a basis for *analogia legis*, but also other potentially applicable law[36]. Nevertheless, an interesting idea was put forward in the context of the 'old' regulations, that is to say – it cannot be ruled out that such an obsolete provision prevents the use of analogy by court if the results achieved in this way would be more appropriate to nowadays circumstances[37].

[34] *Ibidem*, p. 37–38. *Most of Icelandic researchers suggest that conditions of analogy can be divided roughly into two categories. The first category includes the so-called positive conditions. Is it a major part and one may distinguish three main criteria. They are, firstly, that the case cannot to be covered by the existing law. That must be examined by taking into account the various meanings of words. Second criterion is the requirement that the case under consideration and the case that is provided for by legal provision are comparable. It is said that the condition is met when nature of both cases or their sex are such. Thirdly, it is also required that a rule invented by analogy has fallen broadly into the Icelandic legal system. This means that it should be logical that the rule is found by analogy and not any by any other source of law.*

[35] *Ibidem*, p. 55. *All of these cases involve the provisions considered to be in some extent unique and they are not subject to public interpretation. Thus, it is considered that the provision includes special rules, cannot be extended by analogy. Is it justified by the general rule that such provisions should be construed narrowly.* (…) *It is also believed that there should not be interpretation extensiva of provisions involving exhaustive list of cases that should fall within the scope thereof. Is it justified as by enumeration the cases in a comprehensive manner, legislator has ruled that the provision should not apply to other cases.*

[36] *Ibidem*, p. 38–39. (…) *one of the conditions for the use of analogy is that no other legal rules cover the case under consideration. It is not enough to establish that the given incident falls outside the statutory provisions that is consider to be basis for analogy. It needs to be verify whether other provisions could potentially cover the incident. One shall also analyze whether the case is not regulated in a special way.*

[37] Á. Snævarr, *Almenn lögfræði*, Reykjavík 2003, bls. 542. *If as an obstacle for the analogy stays an old provision, the judge may considered to apply the analogy when such a rule is seen as more efficient than the old one. Therefore, the analogy should not be prohibited, despite the fact some rules that cover the incident exist* (own translation).

Moreover, the common law or ethical principles cannot be a barrier against analogy because they do not possess binding force[38].

The next criterion of analogy to be briefly analyse is the similarity of the two cases. The analogy applies only to circumstances which nature is comparable to that regulated by law. Therefore, the question is how to understand the expression of 'totally analogous', stated in the Article 1 of the Penal Code of Iceland. What should be analysed is whether the two cases must constitute similar behaviour, that means – at first glance such incidents are analogous. Or maybe it must be a violation of the same rule which stays behind the legal provision that determines the similarity, or – perhaps – both.

If the Polish criminal law was the subject to discuss, the legal provision (so-called 'norma sankcjonująca') would describe the forms of punishable breaches of the substance rule laying behind it (so-called 'norma sankcjonująca')[39]. Second-mentioned rule is to protect the legal asset of which the violation is constituting the untold mark of criminal act penalized by each provision that needs to be established as well. Bearing this in mind, the similarity of the two behaviours might take place when the one *ad casum* does not violate the protected legal asset (i.e. it is not in breach with the rule behind the analysed legal provision), but it filled all the other marks of the criminal act stated by law like the intention or causative act. On the other hand, one may speak of similarity in situation where a breach of a rule has been sanctioned in a different way than had been described by the legislator. It should be stressed that types of criminal acts punishable due to the effect arisen of them are excluded from the analysis. In those cases one should establish the identity rather than similarity of the two incidents, as it is not the way of behaviour that is punishable, but the result occurred. Therefore, the analogy in this context would be considered – for example –when the perpetrator – acting negligently –fulfilled the statutory intentional type of criminal act, or when he breaches the legal asset, regardless of the way of behaviour that was criminalised.

It seems, the Icelandic doctrine understands the similarity as a strict requirement for the internal similarity of the two acts, which means that between two cases must be a resemblance of a material character. In passing, comparing this – again – to the Polish theory of criminal law, one might call such similarity the same culpability of an act in its substance sense[40]. Notwithstanding, the facts of the case – the given behaviour as it physically presents itself – are, of course, subjects to analysis, as this is – that kind of similarity – the factor

[38] F. F. Ívarsson, *op.cit.*, p. 42. *Finally, it is also appropriate to note that the requirement is met even though there is a substance rule, but it is for some reasons not considered to bind. This is evident in the case of ethics rules* (…) [or] *customary law.*

[39] See: *Kodeks karny. Część ogólna. Komentarz*, p. 147–148.

[40] See: E. Plebanek, *Materialne określenie przestępstwa*, Warszawa 2009.

that makes a judge associate the case under consideration with that statutory stated. What will determines the decision (to cover the case *ad casum* by the legal provision by analogy) is, after all, the principle underlying the given provision. Thus, the law should be interpreted in both ways – objectively (just the meanings of words) and subjectively (meanings of words wanted by the legislator). According to the Icelandic literature, the judge must look at the case from the perspective of the legislator and then decide whether to extend the scope of the provision[41]. A significant argument – for or against the judgment of conviction on the basis of analogy – is that, whether there would be a violation of the constitutional principle of equality before the law, if it is considered that the cases are not substantially similar[42].

The third condition of the analogy is not easy to grasp, and among the Icelandic dogmatists there is no common ground as to how it should be understood[43]. As stated above, the new rule – created by analogy – must be in compliance with the general principles of the Icelandic legal system. Additionally, the analogy should be considered acceptable if a rule created by its use is going to be a brilliant and useful one, also with a social dimension[44].

Nevertheless, the existence of the presented positive conditions for analogy, is not enough, because the lack of negative ones need also to be established. Therefore, one cannot apply the analogy in order to expand the scope of the provision that is of an exceptional nature (as in expression *exceptiones non sunt extendae* states). The same will also apply to the special provisions, it is – *lex specialis*. Subsequently, analogy is generally excluded in cases where a legal provision is intended to apply only to the situation exhaustively enumerated therein. It is emphasized that in such cases the will of the legislator is clear – he does not want other circumstances to be covered by provisions of which the scopes of application were narrowed by himself[45].

41 F. F. Ívarsson, *op.cit.*, p. 47. *It is said that the courts must assess both – legal provision and their context. Thus, the courts must carefully examine the views and the arguments that lie behind the regulation and assess whether it is appropriate to let the case under consideration cover by this provision by analogy. One may say that courts need 'to put themselves in the shoes of the legislator' and ask whether he would allow to cover such circumstance by the given provision if he has been asked for opinion.*

42 *Ibidem*, p. 49, referring to B. Thorarensen, *Stjórnskipunarréttur. Mannréttindi*, bls. 582–590: *There is an interesting view that may be a good clue when dealing with the question of whether the cases are substantially similar, namely – whether it would be considered to deal with a violation of the equality rule stated in the Constitution if to assess that cases are not so.*

43 *Ibidem*, p. 50. The author says that the third condition of analogy has always been considered much less clear than the two previous.

44 Á. Snævarr, *op.cit.*, bls. 546. The author defines the condition in question so that a new rule obtained by analogy must be useful or neatly.

45 R. R. Spanó, *op.cit.*,bls. 321 (about *lex specialis*): *When the legislator has determined that a particular case will be handled in a special way,* (…), *must be concluded that of such provision analogy will not be permitted, the conscious action of the legislator precludes that.*

VI. The practice

How does the perfect analogy work in practice? A striking example is the judgment of the Icelandic Supreme Court of 1965, Hrd. 1965, bls. 394, by which five employees of Útvegsbanki Íslands were sentenced under a provision prohibiting employees of state institutions, including the state's banks, to organize and participate in strikes. According to the law on the civil servants of 1915 (No. 33/1915), the prohibition was referred to employees of the bank – Landsbanki Íslands. However, it was the only state bank that time. Therefore, the question to answer was whether the provision stating such prohibition should be extended by analogy to the case *ad casum*.

The court of the first instance gave a negative answer to this question. Even though the positive conditions of analogy were met, especially the one of substance similarity between the two cases, as the same reason laid under the ban on strike of employees of Útvegsbanki Íslands as of Landsbanki Íslands, that is – prohibition of braking the work of state institutions, the court has assumed that the legislature by mentioning only a name of one of them had given the exhaustive list of cases to which the provision should apply. In other words – the negative criterion of analogy has been found. However, the Supreme Court held, subsequently, that due to the equal status of employees of both banks, and general ban on strike by civil servants, Article 1 of the Icelandic Penal Code would apply[46]. It was emphasized that act including the prohibition was stated in 1915, when there was no other bank than Landsbanki Íslands.

The use of analogy in this case was, therefore, a good example of the aforementioned repeal of an outdated regulation due to various social motives, or – more precisely – the revision of such regulation. It is worth to note that there was no doubt that conviction of the employees of Útvegsbanki Íslands will restore the principle of equality before the law and the coherence of the legal system. It seems, however, that in the view of the argument of the negative condition of analogy, its application in the case was not really predictable for citizens who, guided by the widely accepted legal methods, would assess the situation just as the court of the first instance had done.

[46] The judgment of the Supreme Court of Iceland, Hrd. 1965, bls. 394. See: F. F. Ivarsson, *op.cit.*, p. 86-87.

VII. Is there a breakthrough in the European legal system?

Considering the above-mentioned, does the Icelandic concept of the so-called perfect analogy breach the *nullum crimen sine lege* rule, widely promoted in the European legal system? After all, it is said that the prohibition of analogy, as well as extensive interpretation with the detriment of the accused, fall inside the rule. In comparison – Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[47] is interpreted as prohibiting retroactive application of criminal law, and – *sic!* – a ban on the use of analogy or extensive interpretation. It can be claimed, however, as the very declaration of the prohibition to use analogy within the criminal law does not mean *per se* the principle of legality is not going to be violated, so the Icelandic Article 1 of the Penal Code does not mean *per se* the *nullum crimen sine lege* rule is denied. The one to assess the issue is a court that is going to rule the case *ad casum* (or a court of higher instance). The criterion – developed by the European Court of Human Rights – is the clarity and predictability of the criminal law[48].

Following the guidelines of the European Court of Human Rights, it is said that as long as the borders of a criminal offense –and therefore criminal and punishable behavior – are seen not so much as for the ordinary citizen, but for a person which gained a legal education (and may provide the legal advice) and a conviction on the basis of a particular provision would be predictable for him – according to the Court – there is no violation of Article 7 of the European Convention on Human Rights[49]. Therefore, the fact that the case *ad casum* would be judged with an use of analogy, is not essential. The emphasis is given not to the method of adjudication, but to its effect. It need to be stressed that, basically, the European Court of Human Rights does not put forward a requirement of definiteness of criminal acts by a statute. The term of 'law' is not of formal meaning, but the material one[50] (which the fact, undoubtedly, makes the conventional system – effective in almost all of Europe – closer to the Anglo-american common law).

The conclusion of this paper is that one cannot say *a priori* the Icelandic system violates the continental standards of criminal law. It is interesting, therefore, the direct admission

47 *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 the criminal offence was committed.* (…)

48 Judgment of the European Court of Human Rights, the 25th of May 1993 (case of Kokkinakis v. Greece).

49 Judgment of the European Court of Human Rights, the 15th of November 1996 (case of Cantoni v. France).

50 Judgment of the European Court of Human Rights, the 6th of March 2012 (case of Huhtamäki v. Finland).

for an eventual conviction on the basis of the analogy, seems to be an exception to the rule of *nullum crimen sine lege* in the same way as an eventual indirect practice of courts do that. Therefore, it should be considered whether to talk of deviations from the general principle of legality, understood as the primacy of the statute, rather than of the evolution of the principle from the rigorous definiteness of a criminal act, to the predictability of a such?