

## Principle of criminal legality and dumping of asbestos waste

***“If the power of interpreting laws be an evil, obscurity in them must be another, as the former is the consequence of the latter. This evil will be still greater, if the laws be written in a language unknown to the people; who, being ignorant of the consequences of their own actions, become necessarily dependent on a few, who are interpreters of the laws, which, instead of being public and general, are thus rendered private and particular.”***

(Beccaria, On Crimes and Punishments)

An individual was prosecuted for unauthorized dumping of several tons of waste in the countryside.

The *Gendarmerie Nationale* (one of two national law enforcement forces in France) and the French Biodiversity Office charged him with various offenses, including one specific to environmental law and defined in Article L.216-6 of the French Environmental Code, i.e., the offence of dumping or disposing of large quantities of waste in surface or underground water or in seawater.

The individual was acquitted on the basis of a cardinal principle of criminal law: The principle of criminal legality.

Article L.231-2 of the French Environmental Code stipulates as follows:

*“The fact of disposing of, depositing or causing to be deposited waste, under conditions contrary to Chapter I of Title IV of Book V, and the fact of managing waste, as defined in Article L. 541-1-1, without complying with the requirements concerning the characteristics, quantities, technical conditions for taking charge of the waste and the treatment processes implemented, as set out in application of Articles L. 541-2, L. 541-2-1, L. 541-7-2, L. 541-21-1 and L. 541-22, when they cause a substantial degradation of the fauna and flora or the quality of the air, soil or water, are punishable by three years’ imprisonment and a fine of €150,000.*

*The statute of limitations for public prosecution of the offense mentioned in the first paragraph of this Article starts running from the time the damage is discovered”.*

In order to characterize this offense, it is, therefore necessary, to assess several elements.

## **The material element of the offense**

The material element of the offense is the act of dumping and managing waste in violation of standards, whenever this causes substantial damage to fauna and flora, or to the quality of air, soil, or water.

It is therefore necessary to demonstrate that:

- the indictee has disposed of or managed waste in violation of standards;
- the disposal or management of waste has caused a substantial degradation of the fauna and flora or the quality of the air, soil or water.

In other words, the material element of the offence comprises both a conduct (action or lack of action) and a harmful result (ecological damage). We are therefore dealing here with an *infraction matérielle* under French law, i.e., a strict liability offense.

## **The moral element of the offense**

Pursuant to Article 121-3 of the French Criminal Code, this type of offense also requires a culpable intent.

It is only if the material and moral elements of the offense are established that such offense can be characterized.

This requirement to follow precisely the provisions set forth in the applicable piece of legislation stems from the principle of criminal legality. This principle can be summed up by the Latin adage “*Nullum crimen, nulla poena sine lege*”<sup>[1]</sup>. It means that there can be no crimes, misdemeanors, or petty offenses without a prior definition of these types of offenses, set out in a text that lays down their constituent elements and the applicable penalty. Without these constituent elements, the offense cannot be characterized and the indictee must be acquitted.

This principle of criminal legality has evolved, since historically the law was enacted solely by the legislative power, based on the premise that criminal law was “*the expression of national sovereignty, which holds the right to punish and must be able to use it freely*”.<sup>[2]</sup>

The aim was to avoid arbitrary decisions by judges.

However, there was a difficulty with this principle: The relevant text could sometimes be poorly drafted, and consequentially its application adversely affected.

The principle of criminal legality then evolved.

Going beyond Portalis' statement that *"In criminal matters (...) we need precise laws and no case law"*, courts updated the applicable law<sup>[3]</sup>. The French Constitutional Council, with its procedure concerning applications for a priority preliminary ruling on the issue of constitutionality, has also made it possible to review criminal law to ensure that it complies with the French Constitution.

However, regarding the constituent elements of the offense, the principle of strict interpretation of criminal law remained unchanged. If it is not proven that the conduct can be analyzed through the constituent elements of the offense, the indicted cannot be punished.

In the case at hand, the investigation services considered that the dumped waste was asbestos, without having carried out any analysis. The defense lawyer argued that the absence of an analysis did not allow the waste to be considered as asbestos. He also pointed out that no analysis had been conducted to identify any potential pollution caused by the dumping.

The presence of asbestos was a constituent element of the offense, since the materialization of the offence required the presence of hazardous waste that could have polluted the soil.

The offense had not been characterized and the application of the principle of criminal legality precluded any conviction. The individual was, therefore, acquitted.

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<sup>[1]</sup> literally "No crime, no punishment without law"

<sup>[2]</sup> *Cahiers du Conseil Constitutionnel* No. 26 (Chapter: Constitution and Criminal law) - August 2009

<sup>[3]</sup> Criminal Chamber of the Cour de Cassation, March 16, 2016, No. 15-82.676

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