

2.2 APPLICATION OF THE PRINCIPLE OF LEGALITY IN SA LAW (continued)...

THE IUS PRAEVIUM PRINCIPLE

("PAST" = TIME = act must be an offence at the TIME act committed)

S 35(3)(1) : every (A) has a right to a fair trial, which includes the right not to be convicted of an act or omission that was not an offence under either the national or international law at the TIME it was committed or omitted.

Creation of a crime with retrospective effect is inconsistent with the principle of Legality.

THE IUS CERTUM PRINCIPLE

("CLEARLY" = not vague formulated criminal norms.)

if formulation of a crime is obscure or vague it is difficult for the subject to understand what is expected of him.

COMMON LAW CRIMES (CL)

FRIEDMAN case: the defence argued that the rule in regards to fraud (with which (A) was charged) in terms of which the prejudice need neither be actual nor patrimonial, was unconstitutional on grounds of vagueness. The court rejected this argument and stated: the def of fraud is wide but it does not make it difficult or impossible to determine the conduct which falls within it. NO question about the principle that the rules of CL might be declared null and void on grounds of vagueness (in the judgment)

It is impossible to comply with the IUS CERTUM PRINCIPLE in every respect therefore the principle of L can literally never be fully complied with in any legal system. The legislature must make use of general concepts in order to express itself.

STATUTORY CRIMES

Acts of Parliament (P)

Section 35(3)(1): every (A) has a right to a fair trial, which includes the right to be informed of the charges in sufficient detail to be able to answer to it.

LAVHENGWA case: the court applied s35(3)(1) to the section in question. In deciding whether the definition of a crime is too vague to comply with the provs of the Constitution, it must be kept in mind that:

- (1) absolute certainty is not required, reasonable certainty is sufficient
- (2) in deciding whether there is reasonable certainty, the court approaches the relevant definition of the crime on the basis that the definition is directed at ordinary intelligent people who are capable of thinking for themselves and not at foolish people.

Principle may be based on the following:
*s 12(1)(a) of the Constitution: every1 has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. On which the "void-for-vagueness" rule finds its basis.
* s 35(3)(a) of the Constitution: every (A) has a right to a fair trial, which includes the right to be informed of the charge in sufficient detail to be able to answer to it. (principle of fair warning)

Subordinate Legislation

A court is competent to declare sub legisl null & void on the ground of vagueness or uncertainty:
LASKER case:
Harbour regulation declared null & void as it was uncertain what was meant by the term "harbour"

If a regulation is declared void due to uncertainty, it is another way of concluding that it is ULTRA VIRES

Test: whether a reasonably precise meaning is ascertainable.

NOTE: only reasonable clarity is required.