

## Rules of Evidence in Customs Matters : A Reading from the Perspective of Customs Law and Case Law

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### Abstract:

Customs litigation is characterised by a distinctive legal specificity that differentiates it from conventional criminal and civil disputes. This specificity has a direct effect on case law in terms of the interpretation and application of customs provisions. The implementation of customs legislation by the customs administration may give rise to disputes between the administration and those dealing with it; these disputes are commonly referred to as customs disputes. They may affect the development of trade and the achievement of economic objectives. However, this type of litigation raises a number of issues, primarily concerning the legal nature of such disputes, whose specificity derives from the rules of customs law, a body of law distinguished by its particular character.

**Keywords:** customs disputes; customs smuggling; rules of evidence; customs criminal liability; presumption of innocence; Algerian customs law

### Introduction

Are these disputes considered administrative disputes, on the basis that the customs administration is a party to them, to be settled either amicably through administrative procedures or judicially before the administrative courts? Or are they to be considered customs offences connected with violations defined by the Algerian legislature in Law No. 17-04 of 19 Jumada al-Ula 1438, corresponding to 16 February 2017, amending and supplementing Law No. 79-07 of 26 Sha'ban 1399, corresponding to 21 July 1979, containing the Customs Code, for which penalties and fines have been prescribed, thereby making them subject to prosecution before the ordinary courts, in the criminal division?

In answer to this question, a customs dispute begins with a disagreement between the customs administration and those dealing with it. This disagreement may be settled amicably before the customs administration is within the framework of the provisions governing settlement. It may

also develop into the filing of legal proceedings, followed by customs litigation. Whenever the matter concerns the application of the principle of legality to administrative decisions issued by the customs administration, this entails the application of the rules governing the jurisdiction of the administrative courts in accordance with the Code of Civil and Administrative Procedure.

However, where the matter concerns a customs offence, as is most often the case in customs disputes, jurisdiction is assigned to the ordinary courts in the criminal division, in accordance with the approach adopted by the legislature in Article 272 of the Customs Code. The dispute may also fall within the jurisdiction of the civil division, pursuant to Article 273 of the same Code. Nevertheless, this study focuses on criminal liability in customs law by attempting to answer the following question:

What are the features and specificities of customs disputes within the framework of the protection of the national economy, and what is their impact on case law?

## **The First Section**

### **The Specificity of Customs Disputes in Terms of the Expansion of the Definition of the Material Element of the Offence and Departure from the General Rules of Evidence**

#### **First Subsection: The Expansion of the Definition of the Material Element of the Offence**

The material element is manifested in the criminal conduct that falls within the scope of an act criminalised by law and to which the classification of a misdemeanour or contravention under the customs code applies. The specificity of the material element in a customs offence lies in the contribution of the executive authority to the definition of this element, unlike other offences, where the authority to define the material element belongs to the legislative authority.

#### **First Branch: The Definition of the Object of the Offence**

In customs law, the executive authority, represented by the Ministry of Finance as the supervisory authority over the customs administration, plays a major role in defining the material element of the customs offence. Goods in customs matters are defined by virtue of special regulations that determine the goods permitted for import or export and identify goods subject to specific restrictions or high duties.

The object of the customs offence is also defined. For example, in smuggling offences,<sup>1</sup> prohibited goods or goods subject to high duties discovered on board vessels with a tonnage of less than one hundred tonnes, crossing the maritime zone within the customs territory, are deemed to be goods imported by way of smuggling, even if they have been declared, as provided for in Article 25 of the Customs Code.

The Supreme Court defined the offence of customs smuggling as applying to any smuggled commodity or goods that cross Algerian borders illegally, whether from outside to inside the country or from inside to outside it.<sup>2</sup>

The same applies where imported goods are not presented before the competent customs office for customs control, as well as where goods subject to a movement permit are circulated within the land zone of the customs territory without a permit obtained by the carrier. The carrier is required to comply with the instructions contained in the movement permit, particularly the specification of the route and the duration of movement, in accordance with Article 221 of the Customs Code.

In this context, the Supreme Court confirmed, in its Decision No. 236342 of 25 March 2001, that ‘The carrier is liable for his personal fault, in

<sup>1</sup> Smuggling, according to Article 324 of the Customs Code, is: the importation or exportation of goods outside customs offices; the violation of Articles 51, 53 bis, 60,

addition to his contribution to acts that enabled a third party, wholly or partly, to evade customs duties.’

### **Second Branch: The Effect of Defining the Material Element of the Customs’ Offence on Its Criminal Classification**

The executive authority determines the list of goods subject to a movement permit by virtue of a decision issued by the Minister of Finance, pursuant to Article 220 of the Customs Code. Thus, the intervention of the executive authority in determining the nature of prohibited goods, the scope of movement permits, and other customs-related matters has a direct effect on the classification of the offence as a misdemeanour, felony, or customs contravention, as well as on the penalty imposed for that offence.

Customs felonies relate primarily to serious offences punishable by life imprisonment, such as felonies classified in the first degree, including arms smuggling, since arms are goods absolutely prohibited from entering the Algerian customs territory.<sup>3</sup>

The same applies to second-degree smuggling felonies that affect the national economy and threaten public security or public health; these

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62, 64, 221, 222, 223, 225, 252 bis, and 226 of the Code; and the fraudulent unloading and loading of goods.

<sup>2</sup> Supreme Court Decision No. 232586, 28 May 2005.

<sup>3</sup> See Article 14 of the Customs Code.

are punishable by life imprisonment, in addition to the confiscation of the smuggled goods.<sup>4</sup>

Misdemeanours are also found in the offence of customs smuggling, where the penalty ranges between confiscation, a financial fine, and the imposition of a custodial sentence of imprisonment from two months to six months.

Customs contraventions, by contrast, are divided into five degrees, and their penalty consists of the imposition of a simple fine, amounting at most to 15,000 Algerian dinars, in addition to the confiscation of the goods forming the subject matter of the contravention.

### **Second Subsection: The Distinctiveness of Customs Disputes through Departure from the General Rules of Evidence**

#### **First Branch: With Regard to the Burden of Proof**

Upon careful examination of customs law, one observes a departure from the general rules of evidence, which require that proof be incumbent upon the claimant, on the basis that the prosecuting authority is exercised by the public prosecution, in support of the principle of the presumption of innocence enshrined in Article 41 of the Constitution. The criminal judge also enjoys broad authority in matters of evidence and in the assessment of facts to arrive at the

truth and form a personal conviction. He may not base his decision except on the evidence presented to him during the pleadings and debated adversarially before him, pursuant to Article 349, paragraph 2, of the Code of Criminal Procedure.

As a matter of principle, reports drawn up by the judicial police are taken only as evidentiary indications before the criminal judge. However, by way of departure from this rule, customs procedural law has conferred upon customs reports probative force and absolute evidentiary authority in providing customs offences with regard to the material findings they contain.

On the basis of Article 286 of the Customs Code, which provides that ‘in any action relating to seizure, the burden of proving that the offense was not committed shall lie with the person from whom the goods were seized’, this means that the Public Prosecution is exempted from the burden of proof and from establishing evidence that the accused committed the criminalised act. Rather, it is the accused who must prove that he did not commit the act, which in turn affects the presumption of innocence, a constitutional principle.

In view of Article 254 of the Customs Code, which provides that ‘customs reports drawn up by at least two sworn officers from among the

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<sup>4</sup> See Article 15 of the Customs Code.

officers mentioned in Article 241 of this Code shall remain valid unless challenged on grounds of forgery with respect to the material findings resulting from the use of their content or by material means capable of allowing their accuracy to be verified. The validity of confessions and statements recorded in inspection reports shall be established unless the contrary is proven ...', this means that customs reports concerning material findings are deemed valid and have absolute evidentiary authority unless challenged on grounds of forgery. However, reports relating to statements and confessions remain valid until the contrary is proven.

The Supreme Court confirmed this matter in its Decision No. 173804 of 23 November 1998, stating that 'customs reports enjoy evidentiary force and legal probative authority until challenged on grounds of forgery, unless the matter concerns a technical issue requiring recourse to specialists'. It confirmed this once again in its Decision No. 1003933 of 28 January 2021.

In contrast, judicial police reports do not enjoy the same evidentiary authority; rather, they are taken as evidentiary indications and are subject to the discretionary authority of the judge. Even border guards do not have the capacity to

establish customs offences, according to Supreme Court Decision No. 191877 of 22 March 1999.

It follows from the foregoing that the public prosecution is exempted from providing and establishing evidence against the accused that he committed the criminalised act. Rather, the burden of proof falls upon the accused, who must seek to establish evidence and proof of his innocence of the offence attributed to him. This constitutes a departure from the rule of the presumption of innocence, which is a constitutional principle, as well as a restriction on the freedom of the criminal judge to form his conviction in deciding the case, since customs reports have a special evidentiary authority in view of Article 254 of the Customs Code.

### **Second Branch: The Role of Presumptions in Proving Customs' Offences**

A presumption is the inference of a judgement concerning a particular fact from other facts, in accordance with the requirements of reason and logic. Legal or material presumptions inferred by the judge from one fact by relating it to other facts constitute evidence and a means of proof before the courts.

However, upon careful examination of customs law, Article 303 of the Customs Code<sup>5</sup> considers

<sup>5</sup> Article 303, amended by Article 120 of Law No. 17-04 of 16 February 2017, amending and supplementing Law No. 79-07 of 21 July 1979 relating to the Customs Code,

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every person in possession of goods subject to fraud to be liable for fraud. This means that the offense is attributed to the accused even when criminal intent, which requires the elements of knowledge and will, is not established. Therefore, the carrier of the goods bears liability for fraud merely upon the discovery of the goods subject to fraud in his vehicle, whether the goods belong to him or to those who hired him, and whether or not he knew of their presence. This is what the Supreme Court confirmed by stating: ‘Good faith does not exempt one from liability in customs offences.’

This, in turn, constitutes a serious breach of the rules of evidence and, in particular, of the presumption of innocence because this presumption, which the Supreme Court has affirmed, is conclusive in its effect. It places a heavy burden on the carrier of the goods, whether public or private, and restricts the judge’s authority to assess the facts and to apply the law properly.

It is therefore necessary to reconsider the conclusive effect of these presumptions by making them rebuttable so that the possessor or carrier of the goods may defend himself and refute the charge brought against him, in a manner consistent with the right of defence, which is a constitutional principle and a strong safeguard for public rights and freedoms.

## **The Second Section**

## **Specificity of Customs Disputes in Terms of Determining Liability and Imposing Penalties**

### **First Subsection: The Nature of Liability in Customs Disputes**

Algerian case law has settled on the view that civil liability, through which the customs administration seeks to obtain compensation by means of a fine and confiscation, is not inseparable from criminal action and that the absence of one does not preclude the existence of the other.

### **First Branch: Criminal Liability in Customs Law**

Criminal liability in customs law arises either from participation in the offence, from incidental possession of the goods, or from the exercise of a professional activity.

#### **First: Criminal Liability Arising from Participation in the Offence**

Criminal liability arises as a result of the breach of the regulations and laws applied by the customs administration. It includes the prosecution of the perpetrator, whether a natural or legal person, as well as accomplices on the basis of their contribution, in accordance with the general rules of law, whether as a principal offender, accomplice, or beneficiary of fraud.

In customs offences, however, liability may be based on what is conventionally termed presumed liability, which consists of holding a person criminally liable without the need to prove criminal intent or actual participation on the basis of legal presumptions or professional status. Faults are presumed even when the element of knowledge is not present.

The concept of the perpetrator in customs legislation has a broad meaning. It is not limited to the material and moral perpetrator alone but extends to other people, namely, the possessor, the carrier, the declarant, the customs agent, the guarantor, and even the person who fails to inform the competent public authorities of acts of smuggling.<sup>6</sup>

Customs criminal liability arises merely upon the existence of the material act contrary to the law, without the need to prove criminal intent. In other words, the act of fraud or of the offence itself entails liability, even when intent or personal contribution has not been established. Under customs law, the apparent perpetrator is criminally prosecuted.

Customs liability is also based on what is known as the presumption of possession. Mere possession of the goods subject to fraud constitutes a conclusive presumption of the

commission of the offence, since the possessor of the smuggled goods or goods subject to fraud, whether by virtue of transporting or declaring them, is alone subject to criminal prosecution. Liability can be denied only by proving the existence of force majeure that prevented knowledge of, and control over, the goods.

Criminal liability is also founded on the principle of personality, meaning that only the person who committed the act is liable, whether as a principal offender or as an accomplice in the offence. Customs law, however, recognises the liability of third parties, such as the beneficiary of fraud, even where that person has not committed any criminalised act, whether as a principal offender or accomplice, and nevertheless bears full liability.<sup>7</sup>

Liability is also established even in cases involving preparatory acts that have not reached the stage of commencement of execution of the offence, such as the preparation of transport documents or equipment, to preserve the economy and protect the customs territory. This constitutes an exception to the general presumption of innocence.

## **Second Branch: Civil Liability in Customs Disputes**

<sup>6</sup> See Article 18 of Order No. 05-06 of 23 August 2005 relating to the fight against smuggling, as amended and supplemented by Order No. 06-09 of 15 July 2006,

approved by Law No. 06-20 of 11 December 2006, *Official Gazette*, no. 80, dated 11 December 2006.

<sup>7</sup> See Article 310 of the Customs Code, as amended by Article 123 of Law No. 17-04 of 16 February 2017.

Following the amendment of the Customs Code in 1998, the legislature abandoned the civil nature of the fiscal action, which had been provided for in Article 259 of the Customs Code prior to the amendment, and the customs administration became a civil party before the criminal courts, despite the independence of the fiscal action from the public prosecution.

The customs administration may initiate fiscal action even in the absence of public prosecution, which is exercised by public prosecution in the name of the public right. The fiscal action must be adjudicated, pursuant to Article 272 of the Customs Code, by the judge hearing the criminal action, irrespective of whether it is dependent upon, or separate from, the public prosecution. In other words, the fiscal action continues regardless of the outcome of the public prosecution, even when the public prosecution has decided to close the case file.

In this context, the Supreme Court confirmed, in its Decision No. 1003933 of 18 January 2021, that ‘the fiscal action must be adjudicated and the claims of the customs administration relating to the imposition of fiscal penalties must be examined, regardless of the outcome of the public prosecution, since the two actions are independent’.

The trial judges do not have discretionary authority to assess the fiscal fine; rather, their role is confined solely to determining the extent

to which the customs administration has complied with the provisions of the law. This was affirmed by the Supreme Court, which held that the assessment of the fiscal fine falls within the competence of the Customs Administration and that the trial judges have no discretionary authority in this regard (Decision No. 233891 of 29 January 2001).

### **Second Subsection: The Nature of the Penalty in Customs Disputes**

The concept of the penalty, and the purpose of imposing it, differs between customs law and the penal code. The former seeks to generate revenue for the Public Treasury and to protect the national economy, whereas the latter seeks to realise the idea of general deterrence and to prevent impunity.

The customs penalty is derived from the general rules of the penal code. However, the legislature exercised discretion and endowed it with a special character. Hence, customs offenses are distinguished into two types of penalties: financial penalties in the form of a monetary fine and confiscation and personal custodial penalties involving the deprivation of liberty.

### **First Branch: Effects of Penalties on the Offender’s Financial Assets**

Before the amendment of the customs code in 1998, the Algerian legislature considered, in Article 259 of the customs code, that the customs

fine was predominantly civil in nature; that is, it constituted ‘civil compensation’. Following the amendment by Law No. 98-10, the final paragraph of the aforementioned Article 259 was repealed, and the legislature remained silent and did not specify the legal nature of the customs fine.<sup>8</sup>

In light of the issuance of the Order of 28 August 2005 relating to the fight against smuggling, Article 25 provides that the penalties of temporary imprisonment, imprisonment, and fines prescribed by that order should be doubled in the event of recidivism.

Article 24 of the same order, in its final paragraph, provides that ‘if the penalty prescribed for a natural person is life imprisonment, the legal person who committed the same acts shall be punished by a fine ranging from DZD 50,000,000 to DZD 250,000,000’. This suggests that the legislature adopted the penal character of the customs fine, thereby enabling the public prosecution to act in place of the customs administration in submitting claims concerning the customs fine. Had the legislature regarded it as civil in nature, the public prosecution would not have been able to submit

claims relating to the imposition of the fiscal fine.

Consequently, the judiciary sought to determine the nature of the customs fine by conferring upon it a dual character. According to the Supreme Court decision of 29 January 1995, the fine was considered to be neither a criminal penalty nor civil compensation but rather a combination of both, resulting from the dual nature of the fiscal action that seeks to apply it.

In its Decision No. 141061 of 30 December 1996, issued by the Criminal and Contraventions Chamber, the Supreme Court also held that the claims of the Customs Administration are not ordinary civil compensation whose determination is subject to the rules of general law but rather a customs fine of a fiscal nature, the determination of which is governed by special rules laid down in the Customs Code.<sup>9</sup>

Among the penalties affecting the offender’s financial assets is, in rem customs, confiscation of the goods subject to fraud and of the means by which they are transported, or confiscation in exchange for a monetary sum within the framework of settlement, pursuant to Article 336 bis of the Customs Code.<sup>10</sup> The legislature

<sup>8</sup> Ahsan Bousqi’a, *Customs Disputes: Definition and Classification of Customs Offences, Prosecution and Suppression of Customs Offences* (Algiers: Dar Houma, 2013), 330.

<sup>9</sup> Supreme Court Decision, Criminal and Contraventions Chamber, No. 141061, 30 December 1996, unpublished.

<sup>10</sup> Article 336 bis of the Customs Code provides: ‘The Customs Administration may allow persons prosecuted for committing a customs offence, who have submitted a request within the framework of settlement, to recover the goods in accordance with the legal and regulatory conditions, in return for payment of their value on the

derived this from the penal Code and adapted it to the customs context. It is considered a financial penalty and is a mandatory, not optional, sanction that the judge is required to apply where the material element of the offence is established, irrespective of whether the goods are owned by the offender or by another person.

### **Second Branch: Custodial Penalties**

The custodial penalty in customs offences is characterised as being deterrent rather than reformatory, since the objective of imposing punishment in the offence of customs smuggling, in view of the content of Order No. 05-06 relating to the fight against smuggling, is to limit harm to the national economy,<sup>11</sup> rather than to rehabilitate the offender, as the penalty may extend to life imprisonment and the death penalty in the offence of arms smuggling, pursuant to Article 14 of the Order.

The Supreme Court affirms that the judge must observe the principle of proportionality when imposing the penalty and that financial penalties and confiscation are to be preferred except in cases of organised or serious smuggling. Alternatives are encouraged in nonserious offences by replacing the custodial penalty with a financial fine or confiscation where the offense

domestic market, as a substitute for confiscation calculated on the date of commission of the offence.'

<sup>11</sup> See Supreme Court Decision No. 108312, 21 June 2000, which considered that the smuggling of foreign goods without a customs declaration, and the imposition of a

is not accompanied by an aggravating circumstance. This is reflected in the position of the Supreme Court in its decision of 10 November 2010, in which it upheld the judgment convicting the accused of smuggling goods across the land border and imposing only a fine, confirming that the latter achieves both general and specific deterrence.<sup>12</sup>

### **Conclusion**

Through our study of the specificity of customs disputes, it is observed that they are largely confined to the criminal aspect, notwithstanding the existence of a civil aspect with regard to civil liability. They are distinguished by special texts and provisions in comparison with the rules of general law and the penal code. The most prominent aspect in the field of case law in customs matters concerns the criminal dimension, which is dictated by the distinctive nature of customs disputes, whose aim is to protect the national economy and generate revenue for the Public Treasury. However, we have observed the intervention of the executive authority in determining the list of goods subject to a movement permit by virtue of a decision issued by the Minister of Finance, which has a direct effect on the classification of the offence as a misdemeanour, felony, or customs

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term of imprisonment, were justified because the offence affects the national economy.

<sup>12</sup> See Supreme Court Decision No. 201345, 10 November 2010.

contravention, as well as on the penalty imposed for that offence. Customs criminal liability arises merely upon the existence of the material act contrary to the law, without the need to prove criminal intent, by application of presumed liability, which entails the presumption of fault even where the element of knowledge is absent.

In other words, the act of fraud or of the offence itself entails liability, even when intent or personal contribution has not been established. Under customs law, the apparent perpetrator is criminally prosecuted. Under the general rules, criminal liability is founded on the principle of personality, whether the person is a principal offender or an accomplice in the offence. Customs law, however, recognises the liability of third parties, such as the beneficiary of fraud, even without that person having committed any criminalised act, whether as principal offender or accomplice, and nevertheless holds him fully liable. Customs liability is based on what is known as the presumption of possession. Mere possession of the goods subject to fraud constitutes a conclusive presumption of the commission of the offence; the accused alone is criminally prosecuted, and liability can be denied only by proving the existence of force majeure that prevented knowledge of, and control over, the goods. The criminal judge must adjudicate the fiscal action and examine the claims of the customs administration related to the imposition of fiscal penalties, regardless of

the outcome of the public prosecution, since they are two independent actions. The judge does not enjoy discretionary authority in assessing the fiscal fine; rather, his role is confined solely to determining the extent to which the customs administration has complied with the provisions of customs law.

Customs reports enjoy evidentiary force and legal probative authority until they are challenged on grounds of forgery, unless the matter concerns a technical issue requiring recourse to specialists. This makes the public prosecution exempt from providing and establishing evidence against the accused that he committed the criminalised act. Rather, the burden of proof falls upon the accused, who must establish evidence and proof of his innocence of the offence attributed to him. This constitutes a departure from the rule of the presumption of innocence, which is a constitutional principle, as well as a restriction on the freedom of the criminal judge to form his conviction in deciding the case, since customs reports have special evidentiary authority in view of Article 254 of the Customs Code.

For this reason, we propose the following recommendations:

1. The intervention of the executive authority in the field of criminalisation and in determining the material element of the offence must be limited, and this

must be made an inherent competence of the legislative authority to guarantee the fundamental rights and freedoms protected by the Constitution.

2. Customs legislation must be amended by making criminal intent a mental element required for the establishment of the customs offence and by excluding presumed liability, which is based on the presumption of fault even where the element of knowledge is absent, in a manner consistent with the general principles of criminal legislation.
3. The presumption that customs reports enjoy evidentiary force and legal probative authority until challenged on grounds of forgery must be excluded by treating them merely as evidentiary indications, such as other judicial police reports, because it affects the presumption of innocence by exempting the public prosecution from establishing evidence, restricts the judge's authority to form his conviction in deciding the case, and infringes the constitutionally guaranteed right of defence.

of Articles 51, 53 bis, 60, 62, 64, 221, 222, 223, 225, 252 bis, and 226 of the Code; and the fraudulent unloading and loading of goods.

Supreme Court Decision No. 232586, 28 May 2005.

<sup>2</sup> See Article 14 of the Customs Code.

<sup>3</sup> See Article 15 of the Customs Code.

<sup>4</sup> Article 303, amended by Article 120 of Law No. 17-04 of 16 February 2017, amending and supplementing Law No. 79-07 of 21 July 1979 relating to the Customs Code, *Official Gazette of the People's Democratic Republic of Algeria*, no. 11, issued 19 February 2017.

<sup>5</sup> See Article 18 of Order No. 05-06 of 23 August 2005 relating to the fight against smuggling, as amended and supplemented by Order No. 06-09 of 15 July 2006, approved by Law No. 06-20 of 11 December 2006, *Official Gazette*, no. 80, dated 11 December 2006.

<sup>6</sup> See Article 310 of the Customs Code, as amended by Article 123 of Law No. 17-04 of 16 February 2017.

<sup>7</sup> Ahsan Bousqi'a, *Customs Disputes: Definition and Classification of Customs Offences, Prosecution and Suppression of Customs Offences* (Algiers: Dar Houma, 2013), 330.

<sup>8</sup> Supreme Court Decision, Criminal and Contraventions Chamber, No. 141061, 30 December 1996, unpublished.

<sup>9</sup> Article 336 bis of the Customs Code provides: 'The Customs Administration may allow persons prosecuted for committing a customs offence, who have submitted a request within the

## Footnotes

<sup>1</sup> Smuggling, according to Article 324 of the Customs Code, is: the importation or exportation of goods outside customs offices; the violation

framework of settlement, to recover the goods in accordance with the legal and regulatory conditions, in return for payment of their value on the domestic market, as a substitute for confiscation calculated on the date of commission of the offence.’

<sup>10</sup> See Supreme Court Decision No. 108312, 21 June 2000, which considered that the smuggling of foreign goods without a customs declaration, and the imposition of a term of imprisonment, were justified because the offence affects the national economy.

<sup>11</sup> See Supreme Court Decision No. 201345, 10 November 2010.