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The Human Right Principle of Legality: Nullum Crimen/Nulla Poena Sine Lege Certa

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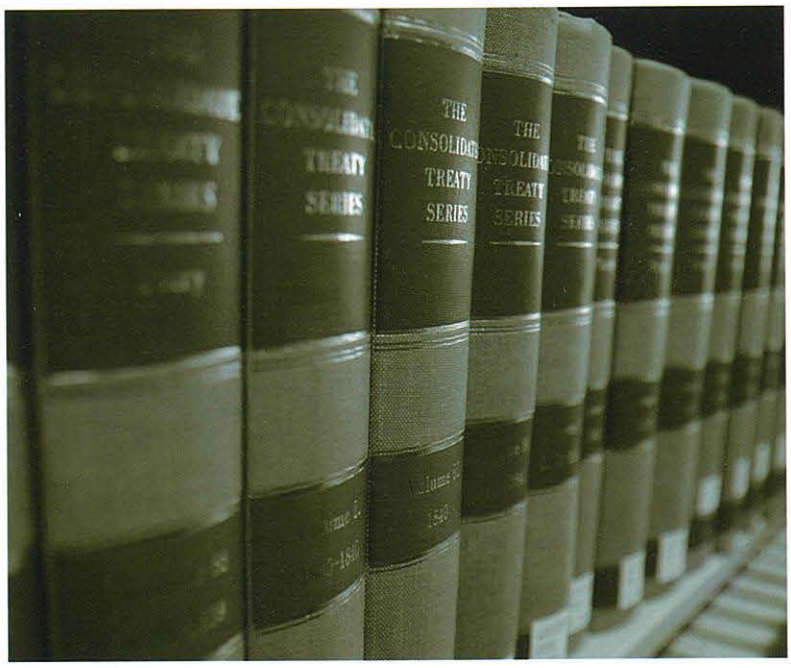
1. INTRODUCTION

The principle of legality is of universal significance. It is not only found in national laws but has its counterparts in regional as well as in international law. In its crudest and simplest form the principle of legality can be expressed by the Latin maxims *nullum crimen/nulla poena sine lege certa*. The Latin maxim *nullum crimen sine lege certa* means that the criminal law must have existed for the conviction to be based on it at the time when the act in question was committed. The Latin maxim *nulla poena sine lege certa* means that no heavier punishment for the infringement of the law may be imposed than was in force at the time the act was committed. The two ingredients of the principle of legality, that is, the *nullum crimen sine lege* and the *nulla poena sine lege*, are separable. Indeed, there may exist a case where no punishment is inflicted upon an accused person but a purely declaratory judgment is delivered in which a criminal law provision is applied with retrospective effect and is declared to have been infringed. This declaratory judgment may still have prejudicial consequences for the person in question, even apart from the social repercussions that it may also entail.[1]

Moreover, the principle of legality can be seen within both a wider perspective and a narrower – criminal law – perspective. Ben Emmerson and Andrew Ashworth, when writing on



the European Convention on Human Rights, refer to the said principle in its wider significance. They observe that the principle of legal certainty runs throughout the Convention. It plays an important role in determining whether a detention is 'lawful' for the purposes of Article 5, and in the Court's assessment of whether an interference with one of the qualified rights in Article 8 to 11 is 'prescribed by law' or 'in accordance with the law'.[2] These authors then note that in addition to these wider constitutive ingredients to the human rights principle of legality there is also the application of this principle to criminal law. Hence, in its broader formulation, the principle of legality is defined by Emmerson and Ashworth as 'the principle that before something can be regarded as law, it must meet certain fundamental requirements which distinguish government on the basis of law from administration resting on discretion and arbitrariness.'[3]

However, the principle of legality adopted in this paper is used in its narrow formulation, that is, in the sense of *nullum crimen/nulla poena sine lege*: it applies to legality with regard to one aspect of a branch of the law – the criminal law. This is stated at the very inception of this paper to distinguish this principle from its wider formulation ▷

[1] P. van Dijk and G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, The Netherlands, Kluwer Law and Taxation Publishers, 1990, p. 359.

[2] Ben Emmerson and Andrew Ashworth, Human Rights and Criminal Justice, London, Sweet & Maxwell, 2001, p. 281, paragraph 10.01.

[3] J.G. Merrills, The Development of International Law by the European Court of Human Rights, Manchester, Manchester University Press, 1993, pp. 129-130.

[4] Corpus Iuris Civilis, Digest, Book L, Title XVI, 'Concerning The Significance of Terms', paragraph 131.

which applies to all - rather than to one - aspect of a branch of the law. Further, this paper identifies the constitutive ingredients of this principle when applied in criminal law in addition to demonstrating how this principle has gained universal recognition in national, regional and international law.

2. THE HISTORICAL EVOLUTION OF THE PRINCIPLE OF LEGALITY

Roman Law had incorporated the principle of legality in the *Corpus Iuris Civilis*, in the *Digest (Pandects)*, wherein it was stated that

A great difference exists between a fine and a penalty, for the term 'penalty' is a general one, and means the punishment of all crimes; but a fine is imposed for some particular offence, whose punishment is, at present, a pecuniary one. A penalty, however, is not only pecuniary, but usually implies the loss of life and reputation. A fine is left to the discretion of the magistrate who passes sentence; a penalty is not inflicted unless it is expressly imposed by law, or by some other authority. And, indeed, a fine is inflicted where a special penalty has not been prescribed. Moreover, he can impose a penalty upon whom jurisdiction has been conferred. Magistrates and Governors of provinces alone are permitted by the Imperial Mandates to impose fines; anyone, however, who has a right to take judicial cognizance of a crime or a misdemeanour can inflict the penalty.[4]

J.T. Woodhouse[5] opines that the principle of retroactivity is derived from Emperor Theodosius who stated that 'Leges et constitutions futuris certum dare est formam negotiis, non ad facta practerita revocari, nisi nominatim et de practerito tempore et adhuc pendentibus negotiis cautum sit.[6] Even Canon Law, through Pope Gregory IX, had also adopted this principle.[7] This principle was subsequently espoused in *Magna Carta* of 1215 which reads as follows:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.[8]

The French Declaration of the Rights of Man and of the Citizen dated 26 August 1789 had provided that:

'La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée.'[9]

But this principle continued to develop further in time.[10] According to Stefan Glaser, the principle in question, having been adopted in Europe since the end of the XVIIIth century, was thereafter elaborated in the XIXth century, as a reaction against the system of absolute discretion in the sphere of legislation and jurisprudence: the discretionary power of the judge to fill up *lacunae* in the law results in uncertainty as to what the law is and what the punishment, with the further consequence that punishments are unequal, varying according to the social position of the condemned, and often that punishment is inflicted on the innocent. The same author writes that in the XIXth century there began a revolt against this state of affairs and an insistence on the subordination of the judge to law.[11]

Loukis G. Loucaides writes that the Latin expression of the principle was for the first time formulated by the German jurist Feuerbach who also introduced the principle as part of the Bavarian Penal Code of 1813.[12] The American Constitution of 1789 adopted the rule in the form of a prohibition of *ex post facto* legislation.[13]

The Permanent Court of International Justice applied this principle in its *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees With The Constitution of the Free City*. The Court concluded that the law alone determines and defines an offence and decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case whilst a penalty decreed by the law for a particular case cannot be inflicted in another case. In other words, criminal laws may not be applied by analogy.[14]

The Court further noted that the first decree modifying the Penal Code of the Free City of Danzig lays down the rule that an act is punishable (1) where it is declared by law to be punishable; and (2) where, according to the fundamental idea of a penal law and according to sound popular feeling, it deserves punishment. Where there is no particular penal law applicable to the act, it shall be punished in virtue of the law whose fundamental conception applies most nearly. On this second point, the Court stated that the Danzig Constitution takes as its starting-point the fundamental rights of the individual; these rights may indeed be restricted, as already pointed out, in the general public interest, but only in virtue of a law which must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act can no longer be justified as an exercise of a fundamental liberty and becomes a punishable offence. It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.[15]

3. THE PRINCIPLE OF LEGALITY IN ITS CRIMINAL SENSE: RATIONALE AND INGREDIENTS

Surely, the principle of legality is a fundamental principle. It has been stated that there can be no crime except in accordance with the law.[16] In R. v. Price (1884), Stephen L.J. had to establish whether the burning of a corpse was a criminal offence in the absence of a statutory basis. His ruling was as follows:

Before I could hold that it must be a misdemeanour ... I must be satisfied ... ▷

[5] J.T. Woodhouse, 'The Principle of Retroactivity in International Law, Transactions of the Grotius Society, Vol. 41, Problems of Public and Private International Law, Transasctions for the Year 1955 (1955), pp. 69-89, at p. 69.

[6] Nov Iust. 113.1.1.

[7] Decretalium Gregorii papae ix compilationis, Liber I, Titulus II, De constitutionibus, Capitulum XIII:
Constitutio futura respicit, et non praeterita, nisi in ea de praeteritis caveatur: Quoniam constitutio apostolicae sedis omnes adstringit et nihil debet obscurum vel ambiguum continere, declaramus, constitutionem, quam nuper super praeferendis in perceptione portionis maioribus et consuetis servitiis, a minoribus exhibendis, edidimus, non ad praeterita, sed ad futura tantum extendi, quum leges et constitutiones futuris certum sit dare formam negotiis, non ad praeterita facta trahi, nisi nominatim in eis de praeteritis caveatur.

[8] Article 39 of Magna Carta.

[9] Article 8 of the French Declaration of the Rights of Man and of the Citizen.

[10] Vide Vincenzo Manzini, Trattato Di Diritto Penale Italiano, Torino, UTET, 1981, Vol. I, pp. 225-232 and pp. 352-358.

[11] Stefan Glaser, 'Nullum Crimen Sine Lege', Journal of the Society of Comparative Legislation, Vol. XXIV, pp. 29-35, at p. 30.

[12] Loukis G. Loucaides, Essays on the Developing Law of Human Rights, The Netherlands, Martinus Nijhoff Publishers, 1995, p. 33.

[13] Ibid.

[14] Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees With The Constitution of the Free City, PCIJ, Series A/B No. 65, 4 December, 1935, p. 14.

[15] Ibid., p. 20.

[16] L.B. Curzon,

that it is, on plain, undeniable grounds, highly mischievous or grossly scandalous … but I cannot take even the first step … The great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden law. This rule is no doubt subject to exceptions, but they are rare, narrow, and to be admitted with the greatest reluctance and only upon the strongest reasons.[17]

Jacobs and White develop this point further by maintaining that the principle has a dual application, affecting on the one hand the legislature, and on the other hand the criminal courts. In the first place, it prohibits retrospective penal legislation. Secondly, it precludes the courts from extending the scope of the criminal law by interpretation.[18] As to the rationale behind the principle of legality, Donald A. Dripps explains that the legality principle ensures a degree of neutrality among persons in the administration of justice. Indeed, rules made in advance cannot as easily be directed toward despised individuals. Even absent oppressive motives, the legality principle helps to prevent punishment that is merely gratuitous and arbitrary. This author opines that the legality principle expresses the judgment that punishment must be justified by some public purpose important enough to be articulated generally and prospectively. Further, without that declaration, the state may not argue that the general interest requires the suffering of a particular person. The chance that such an argument is meritorious is considered to be too remote, the chance that the argument is feigned too immediate, to justify its temptation in every case. For Dripps, the principle of legality may prevent political oppression and contribute to individual security but, more categorically, it may simply be wrong to punish those who have not offended an express rule.[19]

As above stated in the Introduction, the basic ingredients of the principle of legality are: *nullum crimen sine lege certa* and *nulla poena sine lege certa*. The Inter-American Court of Human Rights, quoting the Inter-American Commission of Human Rights, has stated that the principle of *nullum crimen nulla poena sine lege praevia* is the cornerstone of a government of laws and a basic principle of criminal law. When coupled with the principles of legal certainty and juridical security, a range of principles follow that serve to reinforce it. These are, in the Inter-American Commission's view:

1) guarantees of criminal procedural law; 2) guarantees for those imprisoned or in custody; 3) the guarantee of a competent, independent and impartial judge previously established by law; 4) the guarantee of judicial control of execution of sentence; 5) the principle of non-respectivity of laws and prohibition of retroactivity when unfavorable to the defendant; 6) the principle prohibiting the use of analogy in criminal law; 7) the principle of adjudication by the laws and the constitution in effect at the time the crime was committed; 8) the principle of the proportionality of the sentence; 9) the principle prohibiting judicial lawmaking; 10) the principle prohibiting ambiguity in the law; and 11) the principle whereby sentences may not be amended for the worse, or reformatio in peius, etc.[20]

At this stage, it is pertinent to analyse the issues which derive out of the principle of legality.

4. DERIVATIVE ISSUES ARISING OUT OF THE PRINCIPLE OF LEGALITY

A number of points derive from the principle of legality: (1) the prohibition of the creation of offences by analogy; (2) the requirement of a clear and ambiguous formulation of the penal provision; (3) the curtailment of judicial law-making and judicial discretion; (4) restrictive interpretation of the penal provision; (5) non-retroactivity of the criminal law; (6) inapplicability to non-criminal law branches of the law; and (7) predictability of court decisions. These are each considered below.

4.1. PROHIBITION OF CREATION OF OFFENCES BY ANALOGY

Helen Fenwick asserts that an existing part of the criminal law cannot be applied by analogy to acts it was not intended for. Allowing such extension would fall foul of the general principle that the law must be unambiguous, which is part of the principle that someone should not be convicted if he or she could not have known beforehand that the act in question was criminal.[21]

On the other hand, M. Cherif Bassiouni maintains that diverse legal systems differ as to the treatment of analogy and that in his view there are three approaches to this matter. The first category involves a legislative enactment that allows the use of interpretative analogy to permit judicially created crimes. Some legal systems allow it for foreseeably analogous crimes, thus excluding unforeseeable ones, while most modern systems disallow it entirely, particularly for serious offences. The second category is when a legislative enactment is not sufficiently clear or fails to articulate with enough specificity one of the elements of the crime or does not completely list the instrumentalities of the material. The third category applies to penalties that are not legislatively defined, or that allow judicial discretion for their determination in individual cases. It is noteworthy that among the systems that apply the principles of legality most rigidly, and thus totally forbid recourse to analogy, there remains an exception; the rule *favor rei*.[22]

4.2. THE REQUIREMENT OF A CLEAR AND NAMBIGUOUS FORMULATION OF PENAL PROVISIONS

In King v. Att. Gen.[23] the Irish Supreme Court had the opportunity to establish that 'statutory provisions creating criminal offences in vague and indefinite terms are invalid.' The Court further stated that:

Criminal Law, London, Longman Group UK Ltd., 1991, p. 7.

[17] Ibid Emphasis in the original..

[18] Francis G. Jacobs and Robin C.A. White, The European Convention on Human Rights, Oxford, Clarendon, Press, 1996, p. 162.

[19] Donald A. Dripps, 'The Constitutional Status of the Reasonable Doubt Rule', California Law Review, Vol. 75, pp. 1665-1718, at pp. 1684-1685.

[20] Inter-American Court of Human Rights, Castillo Petruzzi et al, Judgment of 30 May 1999, paragraph 114 (b).

[21] Helen Fenwick, Civil Liberties, London, Cavendish Publishing Limited, 1994, p. 52.

[22] M. Cherif Bassiouni, Crimes Against Humanity In International Criminal Law, The Netherlands, Kluwer Law International, 1999, p. 124.

[23] [1981] I.R. 233.

[24] James Casey, Constitutional Law in Ireland, London, Sweet & Maxwell, 1992, p. 416.

[25] [1992] 2 S.C.R. 170, p. 42.

[26] Ibid., p. 43.

[27] [1990] 1 S.C.R. 1123.

[28] 269 U.S. 385 (1926), p. 391.

[29] 408 U.S. 104 (1972), pp. 108-9.

[30] [1992] 2 S.C.R. 606, p. 643.

[31] [1992] 1 S.C.R., 901.

[32] Ibid., p. 930.

[33] [1997] 1 S.C.R. 948.

[34] Ibid., p. 55. Underlining in the original.

[35] R.A.A. McCall Smith and David Sheldon, Scots Criminal Law, Edinburgh, Butterworths, 1992, p. 6.

[36] Ibid., pp. 9-10.

[37] Hans Thomstedt, 'The Principle of Legality And

Teleological Construction of Statutes in Criminal Law', Scandinavian Studies in Law, Vol. 4, 1960, pp. 211-246, at p. 221.

[38] Ibid.

[39] Tuck & Sons v. Priester (1887) 1 QBD 629 at 638.

[40] Ibid., p. 10.

[41] Court of Criminal Appeal, The Police (Inspector Martin Sammut v. Edward Joseph O'Connor, 17 November 2003, per Mr. Justice Joseph Galea Debono (appeal no. 89/2003). For a detailed study of retroactivity in Maltese law, vide Mary Anne Buhagiar, 'The Concept of Retroactivity: Its Variations in the Different Branches of Law', Id-Dritt Law Journal, Vol. IX, December 1978, pp. 1-36. Vide also Stephen R. Munzer, 'Retroactive Law', The Journal of Legal Studies, Vol. 6, No. 2 (June 1977), pp. 373-397.

[42] J.J. Cremona, Selected Papers, Malta, Publishers Enterprises Group (PEG) Ltd., 1990 p. 149.

[43] J.E.S. Fawcett, The Application of the European Convention on Human Rights, Oxford, Clarendon Press, 1987, pp. 202-203.

[44] Ozturk v. Germany (1984) 6 E.H.R.R. 409.

[45] Ibid., p. 222.

[46] Such is the case in the Czech Republic (Charter of Fundamental Rights and Freedoms, article 8), Hong Kong (Bill of Rights Ordinance 1991, article 12), Israel (Basic Law: Human Dignity and Liberty 1992, article 8), New Zealand (Bill of Rights Act 1990, article 26) and the United Kingdom (Human Rights Act 1998, Schedule 1, Part I, Article 7). Senegal incorporates by reference in its constitution article 7 of the African Charter on Human and Peoples' Rights.

[47] William A. Schabas, An Introduction To The International Criminal Court, Cambridge, Cambridge University Press, 2004, p. 3 and 41.

... the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature ... so out of keeping with the basic concept inherent in our legal system that a man may walk about in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which an offence is at variance.[24]

In *William Thomas Kelly v. Her Majesty The Queen the Supreme* Court of Canada stated that it was a fundamental principle of the criminal law that it had to be certain and definitive and that a crime which offended this fundamental principle was unconstitutional.[25] Indeed, the Supreme Court agreed that it would be contrary to the principles of fundamental justice to permit a person to be deprived of his/her liberty for the violation of a vague law.

In *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man.)*,[27] the Supreme Court of Canada referred to the doctrine of vagueness as applied in U.S. Courts. In *Connally v General Construction Co*[28] it was held that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Again, in *Grayned v. Rockford*,[29] it was stated that 'Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence, a reasonable opportunity to know what is prohibited, so that he may act accordingly... Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'

In the Supreme Court of Canada case R v. *Nova Scotia Pharmaceutical Society*[30] Gonthier J. summed up the standard of vagueness as follows: 'a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate.'

In *United Nurses of Alberta v. Alberta (Attorney General)*,[31] McLachlin stated that the;

union cites the principle that there must be no crime or punishment except in accordance with fixed, pre-determined law. But the absence of codification does not mean that a law violates this principle. For many centuries, most of our crimes were uncodified and were not viewed as violating this fundamental rule. Nor, conversely, is codification a guarantee that all is made manifest in the Code. Definition of elements of codified crimes not infrequently requires recourse to common law concepts...[32]

In R. v. McDonnell[33] the issue arose as to whether a law is vague because it fails to delineate the exact penalty that is to be inflicted for a criminal offence when the statute in question provides a range within which the penalty has to be inflicted. The Supreme Court of Canada held that the principle of legality

applies to the question of what conduct is criminalized. It neither has nor should be applied to sentencing ranges. The protection against vague criminal legislation entitles a person to know what the prohibited conduct is and the type of sentence it may attract. ... the Criminal Code contains hundreds of offences with wide penalty ranges. To hold that the law must describe with certainty the precise sentence which particular conduct may attract would be to render all these laws subject to attack on the ground that

they are too vague. In place of the existing regime of broadly defined offences with broad ranges of sentences, Parliament would be compelled to legislate thousands of precise crimes attaching precise penalties. While judicial discretion to sentence would be reduced, it may be debated whether the public would in the end be better informed.[34]

These judgments - taken from different jurisdiction - indicate the same reasoning adopted by different courts when faced with an unclear and unambiguous criminal provision: they all tend to consider it to violate the *nullum crimen sine lege certa* maxim.

4.3. CURTAILMENT OF JUDICIAL LAW-MAKING AND JUDICIAL ISCRETION

R.A.A. McCall Smith and David Sheldon maintain, with regard to Scottish Criminal Law, that a further source of criminal law is the declaratory power of the High Court. This is the power vested in the High Court to declare conduct to be a crime, even if it has not previously been considered to be criminal. This power is exercised retrospectively; it is therefore possible that a person may act on sound legal advice that what he is doing is not criminal, only to discover subsequently that he is to be penalised.[35] According to these authors, the declaratory power offends the basic legal principle that there should be no criminal offence without clear prior prohibition.[36]

Hans Thornstedt argues that the principle of legality implies that discretion should be ruled out from the administration of the law.'[37] The claim for freedom from discretion implies that the law shall be administered objectively and in accordance with fixed principles.[38]

4.4. RESTRICTIVE INTERPRETATION OF THE PENAL PROVISION

A corollary to the *nullum crimen nulla poena* principles is that criminal law should be construed in a narrow fashion. As Lord Esher held -

If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for construction of penal sections.[39]

4.5. NON-RETROACTIVITY OF THE CRIMINAL LAW

The principle of *lex non habet oculus retro*, or better, the principle of non-retroactivity of the criminal law, also derives from the principle of legality. R A A McCall Smith and David Sheldon contend that the retroactive application of a sanction is unjust in that it punishes one for unavoidable ignorance. If a legal prohibition does not exist at the time at which the act is committed, then there could not have been any opportunity of knowing the law.[40]

The Maltese Court of Criminal Appeal has held that in view of article 12 of the Interpretation Act, the repeal of a statute has no effect on pending proceedings.[41]

4.6. INAPPLICABILITY TO NON-CRIMINAL BRANCHES OF THE LAW

J.J. Cremona refers to the case law of the Strasbourg organs which have held that the principle of legality does not apply to civil matters or to disciplinary proceedings. Nor was it concerned with the enforcement of a sentence already pronounced.[42] J.E.S Fawcett adds to this list that it also does not apply to detention on remand and release from prison on probation, of a person charged.[43]

Correct as it might be to state that the principle of legality 'postulates a conviction of a criminal offence', it has to be stated that over time the Strasbourg organs have had to apply this principle in the light of new developments in the law. I have here in mind administrative offences. The European Court does not always consider administrative offences as falling *strictu sensu* within the ambit of the civil law: on the contrary it applies its own definition of criminal law to administrative offences and if the Court is of the opinion that the so-called administrative offence under examination from the Convention's perspective is wrongly classed, it will consider that offence as being criminal and not administrative in nature and apply thereto the provisions of Article 7 of the European Convention.[44]

4.7. PREDICTABILITY OF COURT DECISIONS

According to Hans Thornstedt the decisions of the criminal courts should be predictable. Knowledge should embrace only what has already taken place in legislation and precedents; it is also necessary that the public shall know that the law will be applied in the same way in the future It must be considered a requirement of common decency in public affairs that a citizen who wants to get prior information of the limits of permissible action and of the sanctions against transgressions shall be able to do so.[45]

5. THE PRINCIPLE OF LEGALITY IN NATIONAL LAW

That the principle of legality has gained universal acceptance can be evidenced by the various national laws that give effect to this principle. It is considered to be of such fundamental importance to various states that it has been adopted in the form of a constitutional prohibition. For a list of Constitutions which afford this right, vide the Appendix to this paper. At other times, when the principle of legality is not adopted in the constitution, it is enshrined in ordinary law.[46]

6. THE PRINCIPLE OF LEGALITY IN REGIONAL AND INTERNATIONAL LAW

[48] France et al v. Hermann Goering et al.(1946) 22 IMT 203.

[49] William A. Schabas, op. cit., p. 6.

[50] 36 I.L.R. 5 (1961).

[51] Ibid., paragraphs 24-29. For a discussion of this case and the principle of legality vide Hans W. Baade, 'The Eichmann Trial: Some Legal Aspects', Duke Law Journal, Vol. 1961, No. 3, pp. 400-420, at pp. 408-415.

[52] Prosecutor v. Erdemovic, Case No.IT-96-22-T, Sentencing Judgment, 29 November 1996, paragraph 38.

[53] Decision on the Defence Motion on Jurisdiction, IT-94-1-T, 10 August 1995, paragraph 65-74.

[54] Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, paragraphs 139-142.

[55] Quoted in M. Cherif Bassiouni, op, cit., p. 156.

[56] Ibid.

[57] Vide footnote 44.

[58] Attila Bogdan, 'Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia', International Criminal Law Review, Vol. 6, 2006, pp. 63-120, at p. 103.

[59] Prosecutor v. Milutinovic et al, IT-99-37-AR72, Appeals Chamber on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May, 2003, paragraph 38.

[60] Ibid.

The principle of legality is enshrined in article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 9 of the American Convention on Human Rights and article 7 of the African Charter on Human and Peoples' Rights. There is also the Charter of Fundamental Rights of the European Union (Chapter VI, article 49) and the EU Treaty Establishing a Constitution For Europe (Part II, Title VI, A Article II-109) which, though not binding instruments, enshrine the principle of legality.

The principle of legality is also enshrined in international law. Indeed, it can be found in article 11 of the U.N. Universal Declaration of Human Rights and article 15 of the U.N. International Covenant on Civil and Political Rights. It is also found as a defence in the statutes of international criminal tribunals.

6.1. THE PRINCIPLE OF LEGALITY AS A DEFENCE IN THE STATUTES OF INTERNATIONAL CRIMINAL TRIBUNALS

Although the Versailles Treaty 1919 did provide for a special tribunal for the trial of Kaiser Wilhelm II, such trial never materialised as he managed to flee to the Netherlands which did not extradite him. The charges were considered by the Dutch government to constitute retroactive criminal law.[47] The same problem of ex post facto criminalisation arose before the International Military Tribunal at Nuremberg in its case of *France et al v. Goering et al.*[48] Schabas sums up the Tribunal's judgment as follows:

Rejecting such arguments, the Tribunal referred to the Hague Conventions, for the war crimes, and to the 1928 Kellogg-Briand Pact for crimes against peace. It also answered that the prohibition of retroactive crimes was a principle of justice, and that it would fly in the face of justice not to leave the Nazi crimes unpunished. This argument was particularly important with respect to the category of crimes against humanity, for which there was little real precedent.[49]

The District Court of Jerusalem judgment *Attorney-General of the Government of Israel v. Eichmann*[50] relied on the reasoning of the International Military Tribunal at Nuremberg in convicting Adolf Eichmann of various international criminal laws.[51] So did the International Tribunal For The Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The Territory Of The Former Yugoslavia Since 1991 (ICTY) Trial Chamber in sentencing judgment in *Prosecutor v. Erdemovic*.[52]

This issue was also raised before the ICTY in *Prosecutor v. Tadic*,[53] The Trial Chamber emphasized that the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognised by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. The Appeals Chamber[54] decided that it was settled international customary law that crimes against humanity apply in the context of both international and internal armed conflicts and that there is, thus, no violation of the principle *nullum crimen sine lege*.

Finally, Article 22 (entitled *nullum crimen sine lege*) and Article 23 (entitled *nulla poena sine lege*) of the 1998 Rome Statute of the International Criminal Court also incorporate the principle of legality.

6.2. THE PRINCIPLE OF LEGALITY IN INTERNATIONAL CRIMINAL LAW AS A PRINCIPLE OF JUSTICE

The principle of legality has been considered to be akin to the principle of justice by international criminal tribunals. The International Military Tribunal at Nuremberg, when attempting to justify why it should not apply the *nullum crimen* rule - which was not mentioned in its constitutive Charter - held that:

The maximum nullum crimen sine lege is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[55]

The Tokyo Tribunal[56] followed suit and so did the Israeli District Court.[57] Attila Bogdan[58] refers to the *dictum* of the Appeals Chamber of the ICTY which noted that the principle *nullum crimen* sine lege is first and foremost, a 'principle of justice.' However, the Appeals Chamber noted that this principle does not prevent a court from interpreting and clarifying the elements of a particular crime.[59] Nor does it preclude the progressive development of the law by the court.

7. CONCLUSION

This paper has shown that the principle of legality is well embedded in national laws and in regional and international human rights conventions. It has undoubtedly affirmed itself, especially following the Second World War, as a fundamental principle of human rights law, even if its formulation might differ from state to state and from treaty to treaty. The more time passes the more does this fundamental principle extend itself to reach all countries in the world thereby becoming universally binding in each and every state. ■