The principles of legality “nullum crimen, nulla poena sine lege” and their role

BY

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The principle of legality is a core value, a human right but also a fundamental defense in criminal law prosecution according to which no crime or punishment can exist without a legal ground. *Nullum crimen, nulla poena sine lege* is in fact a guarantee of human liberty; it protects individuals from state abuse and unjust interference, it ensures the fairness and transparency of the judicial authority. The principle is often associated with the attempts to constrain states, governments, judicial and legislative bodies from enacting on retroactive legislation, or *ex post facto clauses* and ensuring that all criminal behavior is criminalised and all punishments established before the commencement of any criminal prosecution. The origins of the principle date back to post-World War II when a set of compelling criminal statutes were established and the drafters of the Nuremberg Statute affirmed the notion of individual criminal responsibility from a tri-dimensional perspective: legal, moral and criminal.

Yet can this principle still find its place in the progressive positive international law, can it still serve its initial purpose? With a glance at some national legislations and taking a look at the European Union’s example, it is fairly obvious that most European Union countries adapted and amended their legislations accordingly to the EU legislation and that the principle is still observed. Moreover, looking at the European Union from an institutional perspective, the existent jurisprudence proves that the principle is effective and applicable. In the *Kokkinakis v Greece* case, 25 May 1993, Case 3/1992/348/421 the European Court of Human Rights clearly confirmed that only a law can define a crime and prescribe a punishment. Moreover in the case of *Criminal proceedings against X*, Joined Cases 74/95 and C-129/95, the Court stated that EU Members States have the obligation to observe the principle of legality with regards to crimes and sanctions when applying European directives into their national law.

In terms of international law, the Article 11 of the Universal Declaration of Human Rights (UDHR) (1948) gives a very well structured definition of the principle: “*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed*”. The same concept with nearly identical wording is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) (1966), the European Convention for the Protection of Human
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However, the effectiveness of this principle has been discussed especially when it comes to international law, as international law treaties unlike national legislation do not always contain precise penalties, pointing out one key issue of customary law vs. legislative law. Despite the arguments supporting the limited effectiveness of the principle in the international customary law, the fairly recent precedent set by the International Criminal Tribunal for the Former Yugoslavia tends to prove that this principle is not only omnipresent but also effective in the positive international law. The tribunal stated that the application of penal sanctions to the various acts that can qualify as violations of the laws and customs of war under Article 3 of the ICTY Statute was legitimate and could be therefore used during prosecution.

Furthermore, if the principles were to be applied per the Statute of Rome (which explicitly states the principle in its article 22 and 23), for instance – due to the limited jurisdictional reach of the International Criminal Court the principle looses partly its effectiveness, making it less binding for non party-states.

In conclusion, given the fact that the principle reflects essentially the core considerations of justice, it should always be present in the states' legislations and practices but at the same time it should also adapt to the needs of the international community in order to ensure that justice is served and to fight impunity.

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