

The Principle of legality

There will be no crime and no punishment except according to law:

Article 58 of the Constitution of Algeria: *“No person shall be held guilty except by virtue of a law duly promulgated before the perpetration of the incriminated act”*.

Article 01 of the criminal law states: *“There shall be no crime or penalty except by virtue of the law”*

In this context “law,” no doubt, means written law. The expression “penalty” only refers to criminal cases. A person can be sentenced to pay damages or other civil compensations, even though there are no statutory provisions on the subject. Criminal liability, however, requires authority by written law. Opinions may differ on how strictly this requirement should be construed. But in principle it is clear that the judge cannot impose a punishment for an act not covered by a statutory provision, even if he finds that the act well deserves punishment.

It is also certain that customary law cannot serve as authority for punishment. In this respect there is a marked contrast between Continental law, which requires written provisions as a basis for punishment, and the situation in England, some of the states of the United States, and other common law countries, where judge made law is recognized in the field of criminal law much as mother fields.

2. The significance of the principle of legality

The maxim, *nulla poena sine lege* (no punishment without a written law), stems from the period of enlightenment. In the first place, the principle must be seen as a reaction against the conditions which the writers of the period of enlightenment found in nearly all European countries: scattered, incomplete and sometimes contradictory penal provisions, and an almost unlimited power for the judge to supplement or make exceptions to them. This situation directly conflicted with the basic principles of the political philosophy of the period of enlightenment. According to the principle of the sovereignty of the people, the authority to create binding rules of law rested with the people themselves and not with the courts. And the principle of separation of powers made it necessary to distinguish between the legislative and executive powers in order to avoid arbitrariness and encroachments.

Today we are not so worried about giving the judge authority to make his own evaluations. We have also seen that it was an illusion by the writers of the period of enlightenment to believe that the law could be made so clear and exact as to subsequently permit adjudication by a purely mechanical application of its rules. It is not even certain that a judicial system built upon precedent need give the judges greater discretion than one based on written law.

Traditionally, however, the principle *nulla poena sine lege* is looked upon, in Algeria, Egypt and in other Continental countries, as one of the basic guarantees of the rule of law. Article 11 No.2, of the United Nations’ Declaration of Human Rights (1948) states that: *“No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed.”* This is a recognition of the principle “*nulla poena sine lege*” in so far as it prohibits the judge from creating new offenses. The provision, however, does not require the conviction to be based on written law. If the act was a penal offense when committed, it makes no difference whether the offense was created by statute or by common law.

The purposes of this principle are to enhance the certainty of the criminal law, provides justice for the accused, achieve the effective fulfillment of the criminal sanctions, prevent abuse of power and strengthen the rule of law. The impact of this principle is the specificity and prohibition of ambiguity in criminal legislation. Consequently, if such act violates any rule, other than criminal legislation, it would neither be characterized as crime nor be subjected to punishment.

The application of the Principles of Legality in criminal law brings about two results:

- **Incrimination and Penalization are prescribed in Criminal Legislation**
- **Prohibition to Use Analogy in Case of Conviction**