

The Principle of Legality in International Law and Comparative Criminal Law

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Professor Gallant's book is a comprehensive and scholarly examination of the principle of legality (non retroactivity of crimes and punishments) in international law and a wide range of national legal systems. His work traces the origins of the principle of legality from its earliest appearances in the works of Justinian and the Magna Carta to its modern manifestations in a variety of human rights instruments, international humanitarian law treaties, the jurisprudence of international criminal tribunals and national statutes. The sharp decline of the principle under the Nazi regime and Soviet era is explored and its subsequent resurgence in international and national law following World War II driven to a large extent by the international human rights movement. As well as meticulously researching the law Professor Gallant enriches his discussion of the legality principle with historical material from many of the pivotal political events of the twentieth and early twenty first century.

Chapter 1 analyses the core tenets of the legality principle, its purposes and various political and legal doctrines which have tended to compete with or erode the principle. It sets out a number of rules associated with the principle of legality and variants of them including the key precepts that:

- No act that was not criminal under a law applicable to the actor at the time of the act may be punished as a crime;
- No act may be punished by a penalty that was not authorized by a law applicable to the actor at the time of the act;
- No act may be punished by a court whose jurisdiction was not established at the time of the act;
- No act may be punished on the basis of lesser or different evidence from that which could have been used at the time of the act;
- No act may be punished except by a law that is sufficiently clear to provide notice that the act was prohibited at the time it was committed;
- Punishment is personal to the wrongdoer. Collective punishments may not be imposed for individual crime;
- Interpretation and application of the law should be done on the basis of consistent principles;
- Everything not prohibited by law is prohibited.

Gallant divides the underlying purposes of the principle of legality into four categories, the protection of human rights, the promotion of legitimate governance, the protection of democratic structures by assigning lawmaking to the correct organ of government and the reinforcement of the fundamental purposes of criminal law including deterrence, retribution, incapacitation and rehabilitation. He adds three purposes which are typically associated with international criminal law and post conflict societies, accountability, restorative justice and reconciliation. He then embarks on a discussion of critiques or competing doctrines to the principle of

legality which include the indeterminacy of language and the impossibility of setting out all rules of criminal law in advance, the potential for expansive statutory interpretation by judicial bodies, the vagaries of common law development of criminal law and the pre-eminence of executive rather than legislative decision making. This clear exposition of the principle, its purposes and the tensions between legality and other legal and political imperatives sets the stage for the detailed examination of state practice which follows.

In his partial history of the principle of legality up to World War II in chapter 2, Gallant emphasises the implementation of the principle in the three major criminal law systems, civil, common and Islamic contrasting the different pedigrees of the principle in each system. The early common law development of a reasonably predictable and well understood set of major crimes by the courts is contrasted with the preference of the civil law system for statutory articulation of crimes while the more recent codification by Islamic States of ta'azir crimes and punishments is cited as evidence of acceptance of the fundamental principle of legality in Islamic legal systems. The prominent theme of legality in international criminal law is also introduced in this chapter which discusses the various positions of the Allied powers following World War I on the creation of an international criminal tribunal to try individuals for war crimes. The chapter then goes on to analyse the demise of legality under the Nazi regime and other dictatorships in Italy and Soviet Russia. Gallant points out that, although a Nazi law of 1935 destroying the principle of legality in German criminal law has always been regarded as one of the most egregious abandonments of the principle, successive Communist decrees following the Russian Revolution had effected an even more thoroughgoing destruction of the principle.

Chapter 3 deals with the attitudes adopted to the principle of legality in the negotiations leading up to the International Military Tribunal at Nuremberg and in the judgments of both the Nuremberg Tribunal and the International Military Tribunal for the Far East. Gallant examines in great detail the views of key negotiators at the London Conference on International Military Trials held in August 1945 and how these framed the debate on the principle of legality. He also discusses the political solutions which had been mooted by Churchill and Roosevelt right up until the end of the war implying that international law places little or no restriction on the political authority of victors to deal with the political leadership of a nation that they have vanquished in war. While this perspective did not wholly prevail in the Charter of the IMT which emerged from the London Conference, it did result in the status of the principle of legality being ambiguous in the text of the Charter and undoubtedly influenced the different opinions expressed by Counsel for the various victor nations on the status of legality throughout the Nuremberg trials. Gallant notes that the entire Nuremberg process, including the unanimous judgement of the IMT was shot through with ambiguities on the issues of legality and retroactivity of criminal law. This was even more apparent at the Tokyo Tribunal where the separate opinions revealed deep divisions about the status of legality in criminal law generally.

The remainder of Gallant's book charts the crystallization of the principle of legality in international law and comparative criminal law through its persistent inclusion in international human rights instruments, international humanitarian law treaties, the Rome Statute establishing the International Criminal Court and national criminal law statutes. Gallant's research demonstrates that the principle of legality now has a firmly entrenched status as an international human right through established provisions in universal and regional treaties such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter of Human and People's Rights and the Arab Charter on Human Rights, many of which are non derogable. Gallant also notes the International Committee of the Red Cross view that the non retroactivity of crimes and punishment has become a norm of customary international law status applicable in both international and non international armed conflict based on its inclusion in the Third and Fourth Geneva Conventions of 1949 and Additional Protocols I and II and abundant state practice. He also comments that in the design and implementation of modern international criminal courts and tribunals such as the International Criminal Court, the ad hoc UN tribunals for the Former Yugoslavia, and for Rwanda, the Special Court for Sierra Leone and the internationalized courts for Kosovo, East Timor and Cambodia, the principle of legality has been adopted as a core principle.

Gallant cites and appends an impressive collection of excerpts from national constitutions of over one hundred States which now support the non retroactivity of crimes and punishments and individual criminal responsibility and provide evidence of the customary international law status of the principle of legality in international law and its prevalence in comparative criminal law. In his conclusion, Gallant argues that the principle of legality has come to play a central role in the international practice of criminal justice and that its endurance is critical to the prevention of tyranny through retrospective crime creation. His book is a rich repository of State practice which amply reinforces this proposition and of should be of intrinsic interest to international law scholars.

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