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Nulla poena sine lege

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A. Introduction

1 The constitutional principle of *nullum crimen, nulla poena sine lege* constitutes a fundamental element of the broader principle of legality (→ *legality principle*), serving as a cornerstone of the criminal justice system. This principle requires that only conduct clearly defined as criminal by law prior to its commission may be subject to a penalty, thereby prohibiting the retroactive application of criminal laws (see Ambos 320–22; Mokhtar 49–51; → *retroactive application of laws*). In doing so, it safeguards individuals against arbitrary or discretionary prosecution (cf → *judicial discretion*) by the state. Apart from prohibiting the retroactivity of criminal laws, this principle also prevents the enactment of vague or overly broad criminal provisions that could lead to arbitrariness (Velarde Rodríguez 230). Ultimately, it enhances legal certainty, foreseeability, and fairness in criminal law, enabling individuals to regulate their conduct in accordance with the law and to be protected from unforeseeable penal consequences.

2 In analysing the concept, evolution, and significance of this principle, this paper adopts a comparative analysis that considers how the principle of *nullum crimen, nulla poena sine lege* is conceived and implemented (cf → *implementing legislation*) across selected common law and civil law jurisdictions (cf → *jurisdiction*). This comparative approach facilitates an examination of its core components, evolution, and relevance in constitutional systems across the world. More precisely, this paper focuses on the United States and the United Kingdom (as representative common-law countries) and Germany and Argentina, which serve as examples of civil law jurisdictions that have codified this principle (cf → *codified / uncodified constitution*) and grappled with its enforcement in the context of post-conflict or post-authoritarian regimes (→ *authoritarianism*). This comparative approach is valuable, as contrasting common law and civil law approaches can reveal each system's assumptions, together with the different protections afforded to defendants in systems that rely on very diverse constitutional and statutory norms (→ *statutory law*). At the same time, this approach places a particular emphasis on the tensions that this principle has faced when implemented in constitutional systems that sought justice in the context of → *transitional justice* (→ *Transitional Justice in Post-Conflict Situations*) processes.

3 This analysis proceeds as follows. Section B sets out the methodological approach adopted in this paper, whilst Section C considers the historical development and normative content of the principle of *nullum crimen, nulla poena sine lege* in international and constitutional law. Section D, in turn, examines selected jurisdictions, with Section D.1 considering the United States and reviewing the *ex post facto* ban in the Constitution of the United States of America: 17 September 1787 (as Amended to 1992) and leading cases interpreting it. Then, Section D.2 focuses on the implementation of this principle in Europe, by considering Germany and the United Kingdom, the two leading countries in the theorization and constitutionalization of this principle. Whilst Section D.2(b) analyses Germany's strict constitutional guarantee in the Basic Law for the Federal Republic of Germany: 23 May 1949 (as Amended to 13 July 2017) (Ger), including postwar jurisprudence on Nazi and GDR-era offenses, Section D.2(c) explores the common-law roots of legality in the UK (from the → *Magna Carta (1215)* through the seventeenth-century debates), the role of → *parliamentary sovereignty* (cf → *legislative bodies*), and the modern impact of Article 7 → *European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)* (ECHR) under the Human Rights Act. Finally, Section D.3 addresses Argentina: it discusses Article 18 of the Constitution of Argentina: 1 May 1853 (reinst. 1983, as Amended to 1994) (Arg), its incorporation of international norms, and the experience of prosecuting dictatorship-era crimes after 1983.

4 Overall, this comparative analysis will show that while *nullum crimen, nulla poena sine lege* is universally treated as a constitutional or fundamental guarantee, its precise enforcement varies with each system's structure and history. By emphasizing both convergence and divergence in the interpretation of this principle (cf → *interpretation of constitutions*), this paper considers how the principle of legality operates in diverse constitutional traditions, its limitations, and possible evolution.

B. Methodological Statement

5 This paper employs a comparative methodology to examine the principle of *nullum crimen, nulla poena sine lege* across selected legal systems from both the civil and common law traditions (on the benefits of comparative → *constitutionalism*, see Husa; Jacobsohn and Schor). By adopting this approach, the paper facilitates a critical assessment of a principle that, while born in its modern formulation during the Enlightenment, has now been codified in numerous national constitutions and international law instruments (→ *application of international law in domestic legal systems*) as a cornerstone of modern criminal law. Despite its acceptance across jurisdictions, this paper will show that its interpretation, application, and exceptions vary significantly across jurisdictions.

6 In selecting the relevant jurisdictions, this analysis deliberately contrasts systems with codified constitutions (Germany, the United States, and Argentina) with the United Kingdom, which, despite being among the early developers of the legality principle, lacks a codified Constitution. This contrast reveals how a shared legal principle has been embedded in a variety of sources, from constitutional texts and case law to supranational human rights instruments (eg the US Constitution and federal case law, Germany's Basic Law, the Constitution of Argentina, and the UK's reliance on the common law and the case law of the → *European Court of Human Rights (ECtHR)*; → *relation of constitutional courts / supreme courts to ECtHR*), which explains differences in the scope, enforcement, and doctrinal limits of the principle in each jurisdiction.

7 Ultimately, this comparative analysis highlights a tendency to convergence in the constitutional interpretation of the principle of *nullum crimen, nulla poena sine lege*. While all four jurisdictions prohibit retroactive punishment as a matter of principle, the contours of that prohibition, including how 'law' or 'penalty' are defined, and the role of 'general principles' of international law, vary considerably. This paper argues that these selected jurisdictions provide a representative sample of the interpretation of this principle: two civil law and two common law systems, including two countries (Argentina and Germany) with recent authoritarian pasts. This diversity enables a robust analysis of the legality principle that considers not only its doctrinal origins in common and civil law systems, but also its contested application in transitional justice contexts, particularly in Latin America. The findings underscore the flexibility and limits of *nullum crimen, nulla poena sine lege* as a guarantee of legality in the face of competing demands for legal certainty and retrospective justice.

C. Nullum crimen, nulla poena sine lege: Definition and Historical Evolution

8 The historical origins of this principle can be traced back to Antiquity, with some scholars pointing to ancient Greece (Dedes 143-44), where concerns about the impropriety of retroactive legislation emerged. Another early application of this principle can be found in Roman criminal law, where it appears to have prevailed for extended periods (Dedes 144). However, the connection between these early notions and the modern understanding of legality is not straightforward. Instead, it was during the Enlightenment that the principle

truly gained prominence, grounded in the ideals of legal certainty, the → *separation of powers*, and the protection of individual freedoms (Dubber (2013) 4).

9 It is commonly agreed that the modern criminal configuration of the principle of legality is owed to Paul Johann Anselm von Feuerbach, who, in the nineteenth century, theorized on the implications of the principle of legality as the cornerstone of the criminal justice system (see Feuerbach; Gallant; Mokhtar). He explicitly tied the → *legitimacy* of every criminal punishment to a written and published statute enacted before the act made it punishable, coining the maxim *nullum crimen, nulla poena sine lege*. Following his formulation of the principle of legality, four sub-principles emerge (see Gallant; Mokhtar). Firstly, *nullum crimen sine lege scripta* means there is no crime if the law is not written and published as a formal legal norm, since crimes are subject to a statutory law requirement. Secondly, *nullum crimen sine lege stricta* entails that there is no crime if the law is not precise in defining the wrongdoing, and, thus, the analogical interpretation of criminal law that acts to the detriment of the accused is prohibited. Thirdly, *nullum crimen sine lege praevia* means there is no crime if the law was not enacted before the commission of the prohibited act or result, thereby prohibiting the retroactive application of criminal law. Finally, *nullum crimen sine lege certa* means there is no crime if the law does not establish the legal elements clearly and specifically.

10 The theory underpinning Feuerbach's proposal was his *psychologische Zwangstheorie* (psychological theory of coercion), which, contrary to merely retributive theories of punishment, argues that the main purpose of punishment is general deterrence that may be achieved through the threat of legal consequences (Landecker 554). Following Feuerbach's analysis, a rational person will refrain from wrongdoing if they believe that punishment will follow and outweigh any immediate gain arising from the illicit act. This theory entails that announcing the legal consequences of an action deters crime before any sentence is carried out.

11 While the principle of legality is also applicable to other areas of the law, such as administrative and tax law (→ *taxes*), it is within the field of criminal law that it is most deeply rooted, both historically and conceptually. More precisely, the principle of *nullum crimen, nulla poena sine lege* constitutes the cornerstone of modern criminal justice systems, ensuring that no one is punished without a preexisting, clearly defined legal provision. This means that the definition of the criminal offence must precede the criminal action or dangerous behaviour. On the other hand, the legal axiom of *nullum crimen sine scripta, stricta, certa et praevia lege* means that no voluntary act or omission can be considered a crime unless a written, clear, and prior law has defined it as such. The law that defines an act as a crime must be precise and clear (*lex certa*) and strictly established in positive law (*lex scripta et stricta*) (→ *theory of positive law*; → *Legal Positivism*). This principle excludes analogical interpretations that would enable a judge to criminalize a form of conduct or an omission not provided for by law but also raises questions about what can be considered 'law' or 'penalty' (Peno and Bogucki 8).

12 This understanding of the principle of *nullum crimen, nulla poena sine lege* not only regulates the right to punish an individual but also acts as its main limitation. This, in turn, guarantees the rights of the accused vis-à-vis the power of the State (Velarde Rodríguez 233). As Von Wright formulated when stating that 'there is no punishment without law', any action not prohibited within the legal order of a state is permitted within it (Velarde Rodríguez 233). This is also known as the 'closure norm', insofar as it entails that a legal order is closed and does not permit an analogical expansion in the criminal law sphere. Consequently, if it is not possible to prohibit a given conduct based on the existing legal framework, both doing and not doing this given act are permitted (see Alchourrón and Bulygin 65-94). Ultimately, this interpretation seeks to guarantee the predictability of the

legal system and the protection of the rights of the citizens living within it. This sub-principle or closure rule has been summarized as meaning that ‘everything that is not criminally prohibited is permitted’ (see Alchourrón and Bulygin 65–94).

13 Overall, the principle of legality is an essential guarantee of the → *rule of law* that is now embedded in international human rights law (cf → *international human rights law and municipal law*). For instance, Article 11(2) of the → *Universal Declaration of Human Rights (1948)* (‘UDHR’) affirms that ‘no one shall be held guilty of any penal offence, which did not constitute a penal offence, under national or international law, at the time when it was committed’. Similarly, the → *International Covenant on Civil and Political Rights (1966)* (‘ICCPR’) reinforces this principle in Article 15, which also allows for the prosecution of acts that were criminal according to the general principles of law recognized by the international community at the time of commission. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (‘ECHR’) enshrines this principle in Article 7, prohibiting retroactive criminal laws and requiring foreseeability and precision in criminal provisions. Similarly, Article 9 of the → *American Convention on Human Rights (1969)* (‘ACHR’) states that no one shall be convicted of a criminal offense for acts that were not offenses at the time they were committed, mirroring the language and protections of other global instruments. Other regional human rights instruments, such as the → *African Charter on Human and Peoples’ Rights (1981)*, also recognize this principle in Articles 6 and 7(2), which uphold the right to liberty and security and the right to be tried under a law that was in force at the time of the alleged offense. These provisions act as safeguards against arbitrary prosecution and punishment, ensuring that individuals can only be held criminally liable under laws that were clear, accessible, and in force at the time of the conduct examined.

D. Comparative Analysis

1. The Principle of *nullum crimen, nulla poena sine lege* in the United States

14 The principle of *nullum crimen, nulla poena sine lege* constitutes a constitutional principle deeply rooted in US constitutional law (Kreß 12). Its legislative recognition began with the US state constitutions of 1776, particularly those of Virginia and Maryland, and was later incorporated in the → *French Declaration of the Rights of Man and of the Citizen (1789)*. Article 8 of the latter Declaration states that, ‘the law can only establish penalties that are strictly necessary; no one may be punished except under a law that was established and promulgated before the offense and legally applied.’ Currently, the prohibition of retroactive laws as a guarantee of the principle of *nullum crimen, nulla poena sine lege* is contained in Article I, Sections 9 and 10 of the US Constitution, and is reinforced by the → *due process* clauses of the Fifth and Fourteenth Amendments.

15 Despite early formulations of this principle under US Constitutional law, the US has struggled with the legal definition of legality (Dubber (2011); Glaser 31). Generally speaking, the principle of *nullum crimen, nulla poena sine lege* faces significant challenges in common law jurisdictions due to the historical reluctance or failure to adopt a comprehensive penal code (Dubber (2013) 9). As examined in the previous section (Section C), this principle requiring that conduct is only criminalized if defined by a law prior to the conduct assumes a legal framework grounded in clear, accessible, and prospective written statutes (Dubber (2013) 9). However, common law countries tend to diverge from this model due to their reliance on case law within the field of criminal law. For instance, Canada codified criminal law relatively late; the United States never succeeded in establishing a truly comprehensive national criminal code, and England has only partially codified certain criminal conduct and punishments (Dubber (2013) 9–10). As a result, these systems often rely heavily on case law, which can retroactively define criminal conduct and

blur the clarity and predictability that the principle of *nullum crimen, nulla poena sine lege* demands. Thus, from a strict interpretation of the legality principle, some authors argue that the US is a jurisdiction to which this principle remains alien (Dubber (2013) 8).

16 In any case, and although some may argue that codification is a prerequisite to fulfil the principle of legality, it is a misconception to claim that US criminal law relies primarily on unwritten laws (cf → *codified / uncodified constitution*). While the federal criminal code remains largely a disorganized compilation of offence definitions, many states have adopted more structured codes (Dubber (2013) 11-12). A major turning point came with the completion of the American Law Institute's Model Penal Code ('MPC') in 1962, which not only transformed the study of criminal law in the US but also inspired recodification efforts across other US jurisdictions (see Dubber (2002)). The MPC is notable for its clarity, depth, and systematic treatment of key legal concepts, including its detailed and coherent framework for mental states (*mens rea*).

17 Even if codification may be less typical in the common law tradition, the US offers important examples of efforts to uphold *nullum crimen, nulla poena sine lege* through a robust and written legal framework. For instance, courts have considered the limits of this principle in cases that concern the commission of international crimes, such as *Hirota v MacArthur* (1948) (US). This case concerns a judgment in which the → *Supreme Court of the United States* had to examine the conviction of Japanese officials for → *war crimes* by the International Military Tribunal for the Far East ('IMTFE') (→ *Military Tribunals*). Ultimately, the issue was the compatibility of these convictions with the prohibition of retroactivity of criminal laws, which the Court accepted. In Justice William O Douglas's concurring opinion, the Court considered that the principle of *nullum crimen, nulla poena sine lege* is not a limitation of sovereignty (→ *Sovereignty*), but a general principle of justice. His analysis revolved around the possible violation of this principle in cases of international justice, such as the ones considered by the IMTFE. In this analysis, he noted that the principle should not be used to shield acts that violate norms of international customary law (→ *custom (customary law)*), such as launching unprovoked attacks against sovereign nations (→ *nation*) in violation of treaties (cf → *treaty power*) and assurances.

18 According to Justice Douglas, it would be incorrect to argue that punishing such acts was unjust merely because no formal written law explicitly prohibited them at the time in the same way modern statutes do. This argumentation alluded to the existence of international customary law that preceded the commission of these international crimes and justified their criminalization in the absence of written norms, bypassing the prohibition of retroactive criminal laws and punishments. Following this reasoning, whilst *nullum crimen, nulla poena sine lege* would serve to protect individuals from arbitrary or retroactive criminal liability, it would not preclude holding government officials or military leaders accountable for actions that violated established customary international law and justice standards.

19 Indeed, it is within → *international criminal law* that most of the challenges to this principle have been voiced, particularly during the Nuremberg trials held after World War II (Tomuschat 839-41). Defendants frequently invoked *nullum crimen, nulla poena sine lege* to argue that their actions, though morally reprehensible, were not clearly prohibited under pre-existing statutory laws in their domestic jurisdictions and, thus, such conduct could not be punished. Nevertheless, the Nuremberg Tribunal rejected these claims and noted that individuals could be held accountable for acts that violated the 'general principles of law recognized by civilized nations' (Tomuschat 842). This seems to support Justice Douglas's concurring opinion in *Hirota v MacArthur*, explained above, which noted that *nullum*

crimen, nulla poena sine lege could not be invoked merely to shield those who attacked other nations in violation of international laws, whether codified or not.

20 As Kenneth Gallant argued, international criminal law permits a broader reading of legality, including reliance on customary norms and general principles, provided the prohibited conduct is sufficiently clear and universally condemned at the time it occurred (Gallant (2022) 653). This, in a certain manner, may be considered a partial exception to the principle of *nullum crimen, nulla poena sine lege*, recognized by US courts. However, it still requires that the law, whether customary or written, be reasonably foreseeable to the defendant, as examined by the Argentinian Supreme Court in the proceedings against the generals and examined in Section D.3. In international criminal proceedings, this requirement safeguards the defendant against the arbitrary or politically motivated application of justice.

2. The Principle of *nullum crimen sine lege* in Europe

(a) The Supranational Framework in Europe

21 The principle of *nullum crimen, nulla poena sine lege* holds particular importance in the European context, in which it first appeared and gained importance as the pillar upon which the criminal justice system is built. It is embedded not only in national legislation but also in regional instruments, such as EU law or the ECHR. For instance, Article 7 ECHR establishes that no one shall be held guilty of a criminal offence for an act or omission that did not constitute a criminal offence under national or international law at the time it was committed. It also prohibits the imposition of a heavier penalty than what was applicable at the time of the commission of a given offence. Both elements, as examined in previous sections, constitute fundamental components of the principle of *nullum crimen, nulla poena sine lege*. Article 7 ECHR plays a key role in the Convention's system of protection, which appears clearly in Article 15 ECHR and strictly prohibits derogation from it during times of war or other public emergencies that threaten the nation's survival. This, as some authors state, means that it constitutes a 'higher value' ECHR provision, together with the → prohibition of torture and inhuman or degrading treatment under Article 3 ECHR (Murphy 1; Greer 233). Despite its relevance, which has been stated by the Court in cases such as *K.-H. W. v Germany* (2001) (ECtHR) or *Kafkaris v Cyprus* (2008) (ECtHR), its content is less developed than other principles in the Convention.

22 According to the Court's interpretation, 'the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy' (*Kokkinakis v Greece* (1993) (ECtHR) para. 52) must be autonomously interpreted. This means that the conception of the principle of *nullum crimen, nulla poena sine lege* requires that the concepts of 'law', 'crime', and 'penalty' are autonomously interpreted. Under ECHR law, 'law' is not strictly restricted to statutory or codified laws and, instead, comprises written as well as unwritten laws, such as case law (*Tolstoy Miloslavsky v United Kingdom* (1997) (ECtHR) para. 37). At the same time, the definition of 'penalty' does not depend on the national interpretation of this principle, which seeks to preserve the rights of the accused, by preventing that the state frustrates the aims of the Convention (*Kokkinakis v Greece* para. 53). In this vein, the ECtHR has held that, in determining whether something constitutes a 'penalty' within the meaning of the Convention, 'the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision' (*Welch v United Kingdom* (1995) (ECtHR) para. 27). Finally, the notion of 'offence' must be autonomously defined based on the criteria established in *Engel and Others v Netherlands* (1976) (ECtHR). Accordingly, it is first necessary to know whether the provision(s) defining the wrongdoing charged in the respondent State is criminal in nature;

secondly, the nature of the offence must be taken into account, and, finally, the degree of severity of the penalty must also be considered (*Engel v Netherlands* para. 82).

23 The ECtHR has noted that although this prohibition covers both written and unwritten laws, including case law, judicial interpretation of criminal law may have a retroactive effect if it is foreseeable and does not violate the legitimate expectations of the accused. This concerns new interpretations of the law which are more favourable to the accused and, thus, applicable retroactively (*Scoppola v Italy (No 2)* (2009) (ECtHR) paras 103–9). In these cases, a consensus has gradually emerged around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law (*Scoppola v Italy (No 2)* (2009) (ECtHR) para. 106) that is compatible with the principle of *nullum crimen, nulla poena sine lege*.

24 On the other hand, Article 7 ECHR prevents the retroactivity of criminal laws. This requirement is linked to the notion of foreseeability, according to which citizens must be able to predict the consequences of their actions in accordance with Art. 7(1) ECHR (*Kafkaris v Cyprus* para. 150). Nevertheless, Article 7(2) ECHR recognizes exceptions for crimes that were already criminalized under customary international law at the time of their commission, such as → *crimes against humanity* or → *genocide*, similarly to the interpretation developed by the US Supreme Court in the cases of the IMTFE. In line with the principles developed by national and international courts, prosecution in these cases is not considered retroactive, as the conduct was already recognized as criminal under customary international law (*Vasiliauskas v Lithuania* (2015) (ECtHR) paras 172–74). However, states such as Germany added reservations to this particular provision to exclude the retroactive application of such crimes.

25 At the same time, the principle of legality and its *nullum crimen, nulla poena sine lege* component are foundational principles of the rule of law, a founding value of the EU under Article 2 of the Treaty on European Union ('TEU'). This principle requires that EU institutions and Member States are constrained by law, ensuring legal certainty, predictability, and protection against arbitrariness. A traditional interpretation of legality adopted by the CJEU (→ *European Union, Court of Justice and General Court*) has focused on the need to guarantee that the EU operates as a community governed by law, with robust mechanisms that guarantee access to effective remedies (→ *constitutional remedies*) (Van Elsuwege and Gremmelprez 11–12; Tridimas 59–136). The binding nature of the → *Charter of Fundamental Rights of the European Union (2000)* ('CFR') now reinforces the centrality of this principle, with Article 49(1) codifying the principle of *nullum crimen, nulla poena sine lege* in a similar manner to the ECHR. This provision states that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed'. Additionally, it states that the severity of penalties must not be disproportionate to the offence committed and prohibits the retroactivity of the less favourable criminal penalty (→ *limits on criminal penalties*).

26 The expansion of competences in the field of EU criminal law has attributed renewed importance to Article 49 CFR (Toscano 31–33). This provision mirrors Article 7 ECHR and ensures that individuals are protected from arbitrary prosecution or punishment by requiring that criminal liability and penalties are based on pre-existing law. The CFR's Explanations explicitly state that Article 49 is based on Article 7 ECHR, whilst Article 52(2) CFR states that in cases such as this, the meaning and scope of Charter's provisions shall be the same as those laid down by the Convention. This confirms the substantive equivalence between Article 49 CFR and Article 7 ECHR in their interpretation of the

principle of *nullum crimen, nulla poena sine lege*, which, nonetheless, permits that EU law develops a more extensive protection of this principle.

(b) *Nullum crimen, nulla poena sine lege* in Germany

27 The principle of *nullum crimen, nulla poena sine lege* constitutes an essential constitutional principle of German constitutional law. An early interpretation of this principle was contained in the Prussian Code of 1721, which required that ‘offences ... not enumerated in the territorial code nor provided for by the imperial law, should be judged *ex aequitate et analogia juris*’ (Hall 165). This principle was first codified in the Bavarian Criminal Code of 1813 and later enshrined in the German Penal Code and the → *Weimar Constitution (1919)*, establishing a prohibition against retroactive criminalization and arbitrary prosecution (Kuhli). At the same time, it required that criminal laws be clear, precise, and publicly accessible. Currently, this principle is codified under Article 103(2) of Germany’s Basic Law as an essential guarantee of the separation of powers. Accordingly, this provision states that ‘an act may be punished only if it was defined by a law as a criminal offence before the act was committed’.

28 This conception of legality under the → *Federal Constitutional Court of Germany (Bundesverfassungsgericht)* (‘BVerfG’) is firmly rooted in the rule of law and the principle of human dignity (→ *human dignity and autonomy*). Following this conception, German courts have consistently upheld the prohibition of retroactive criminal laws, with challenges to this principle emerging in high-profile cases, such as the *Mauerschützenprozesse* (Berlin Wall trials) (→ *Berlin (1945–91)*). These trials prosecuted former GDR border (→ *borders*) guards and officials for murder at the Berlin Wall, with sentences ranging from three to six years of imprisonment (Oxman and Rudolf 905). Critics have argued that criminal proceedings against soldiers who acted in accordance with legal orders produced under GDR law run counter to the principle of *nullum crimen, nulla poena sine lege*, as they constitute a retroactive application of the law (Anderson 48). Despite these allegations, the Berlin Regional Court in one of these decisions ruled that these orders ‘flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law’ (*Streletz, Kessler and Krenz v Germany* (2001) (ECtHR) para. 19). In practice, the Court applied what is known as the Radbruch’s formula of statutory injustice, according to which laws which are contradictory with justice requirements are void and should not be applied (see Oxman and Rudolf; Dana).

29 By contrast, the German Constitutional Court addressed the issue in BVerfGE 95, 96, where it considered the clash between Article 103(2) of the Basic Law and the need to achieve justice in cases of grave human rights violations. Initially, the Court reaffirmed that retroactivity is, in general, ‘absolutely’ forbidden. However, it also recognized a special situation unique to Germany’s reunification context and noted that ‘it is incompatible with the prohibition of retroactivity to state categorically that reliance on a state practice that violates human rights is not worthy of protection’ (BVerfGE 95, 96, para. 102) (→ *State Practice*). In these cases, the Court invoked analogies to Nazi-era prosecutions, noting that principles of justice should overrule the prohibition of retroactivity. Furthermore, the BVerfG held that Article 103(2) ultimately did not bar conviction here either, as the DDR’s actions had shredded the citizen’s legitimate reliance on that regime’s own constitution and international commitments did not authorize the shootings.

30 Ultimately, the German Constitutional Court has upheld this solution and, in its decision of 24 October 1996, held that Article 103(2) of the German Constitution prohibits the retroactivity of criminal law. However, it also noted that an absolute interpretation of this provision for ‘grave breach[es] of internationally recognized human rights would be contrary to ‘objective justice’, which ‘embraces the need to respect [these] rights’ (BVerfGE 95, 96). According to the Court, the need to respect customary international law and human

rights, together with the → *precedent* set by the Nuremberg trials, were sufficient to justify the criminalization of gross human rights violations without breaching Article 103(2) of the Constitution.

31 The ECtHR examined this case under Article 7(1) ECHR and focused on whether these decisions were compatible with the Convention's understanding of the principle of legality. In its decision, it noted that 'it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime' (*Stretzer v Germany* para. 84). It also established that using the principle of *nullum crimen, nulla poena sine lege* to prevent prosecution in these cases would run counter to the principles upon which the ECHR is built (*Stretzer v Germany* para. 86). Overall, the Court held that such decisions did not infringe on Article 7 ECHR, as the acts committed in the cases examined constituted gross human rights violations and infringed international obligations of the GDR which were clearly defined, accessible, and foreseeable (*Stretzer v Germany* para. 104).

32 Ultimately, the principle of *nullum crimen sine lege* has been present in the German Constitution and is now further reinforced by European human rights law, emphasizing the need for foreseeability and clarity in criminal laws. However, this requirement has been interpreted less restrictively when considering a particular set of cases: those concerning the commission of gross human rights violations and/or international crimes during authoritarian regimes. The interpretation in such cases has followed a similar line of argument to that adopted during the Nuremberg trials, in which it was considered that despite the lack of 'written laws' proscribing the war crimes and crimes against humanity committed during the Nazi regime, Germany's officials were fully aware of the existence of customary international law that prohibited such conduct (Anderson 54–55). In these cases, the courts did not disregard the requirement of *nullum crimen, nulla poena sine lege*, and, instead, adopted a broader interpretation of what constitutes 'law' which encompasses customary international law within its definition. As examined in Section D.2(a), this broad definition adopted by German law is also supported by the ECtHR's case law (see *Kokkinakis v Greece*).

(c) *Nullum crimen sine lege* in the United Kingdom

33 Despite the non-codified nature of the principle of *nullum crimen, nulla poena sine lege* under UK law, this system contains a strong presumption that its legal framework will be interpreted strictly to protect the liberty of the individual (see Hooper (2024) 3). Clause 39 of the Magna Carta already states that there will be no imprisonment (→ *prisons and prisoners*) or arrest 'except by ... the law of the land'. Unlike codified systems, many offences in England and Wales still arise from common law. In this context, Lord Bingham explained in *R v Rimmington* (2005) (UK) that common law in criminal law must respect legal certainty and, as a consequence, 'no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done'. This interpretation mirrors Article 7 ECHR, which explicitly prohibits retroactivity and considers the notion of law as encompassing judge-made law. This has now been incorporated into UK law in accordance with the Human Rights Act 1998 ('HRA 1998').

34 Even though the judicial evolution and creation of law is an essential part of the English legal system and does not challenge compliance with the principle of legality, there are specific limits to this power. For instance, Article 7 ECHR (Section 6 HRA) prohibits retroactive interpretations of criminal laws to the accused's disadvantage. The HRA and judicial policy mean that, absent rare historical exceptions, no one has been criminally punished in England and Wales for conduct that was not criminal at the time. According to

Lord Bingham, 'we must guard against punishing conduct which was not criminal at the relevant time' (*R v Rimmington* (2005), para. 34). Following this interpretation in *X v United Kingdom* (1981) (ECtHR), the Court of Appeal has held that an offence created by retrospective analogy would violate the accused's rights (*R v Shorrock* (1994) (UK)).

35 Nevertheless, courts have been allowed to clarify or extend offences in a manner that would challenge the conception of *nullum crimen, nulla poena sine lege* that characterizes civil law jurisdictions, including Germany. For instance, in *R v R* (1991) (UK), the House of Lords abolished the old rule that a husband cannot be guilty of raping his wife. In reaching this decision, Lord Keith of Kinkel ruled that the marital exemption was based on an outdated fiction that a wife irrevocably consented to sexual intercourse upon → *marriage* (*R v R* para. 610). This was achieved by reading the marital rape exemption down 'step by step' to bring it into line with prevailing values, relying on Parliament's silence. In its decision, the House of Lords considered this interpretation compatible with the principle of legality, as it was deemed reasonably foreseeable in light of social changes when the judgment was delivered.

36 More recently, in *Norman v United Kingdom* (2021) (ECtHR), the ECtHR had to rule on the conviction for misconduct in public office, a common-law offence that included an ill-defined 'seriousness' requirement. Mr Norman argued that the offence was too vague and had been extended unpredictably by the Courts. The ECtHR nonetheless upheld the conviction, finding that Article 7 was not breached, insofar as the offence was interpreted in a manner that was accessible and foreseeable to the individual (*Norman v United Kingdom* para. 59). According to the Court, this provision permits the law to evolve case by case so long as the development is consistent with the essence of the offence and reasonably foreseeable. In this decision, pre-existing guidance (*Attorney General's Reference (No 3 of 2003)* (2004) (UK) and *R v Chapman* (2015) (UK)) gave sufficient warning that serious abuses of trust (including corrupt payments-for-information) fell within misconduct in public office. According to the Court, this meant that Article 7 ECHR 'cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation ... provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen' (*Norman v United Kingdom* para. 60).

37 Overall, ECtHR and the English case law reflect a pragmatic compromise between the principle of *nullum crimen, nulla poena sine lege* and the need to accept the gradual evolution of law through judicial interpretation. Under the HRA, judges will construe and develop offences to align with Convention rights (Section 3 HRA requires reading law compatibly with the ECHR) and, in doing so, they must do so with restraint. As Bingham LJ warned in *R v Rimmington*, if there is no clear authorization, an offence 'should not be extended to cover facts which did not previously constitute that offence' (*R v Rimmington* para. 33). In other words, courts should preserve the core of traditional crimes without expanding them in an unpredictable or unforeseeable manner, which would breach ECHR law. This would be respectful of the principle of legality, which mandates that if a new situation arises, Parliament should respond by creating a statutory offence rather than relying on analogy.

38 This demonstrates that the UK's hybrid approach of judicially developed law guided by Article 7 places continual pressure on the principle of legality. On the one hand, Article 7 and principles like *nullum crimen, nulla poena sine lege* are fundamental to the rule of law in the UK. On the other hand, judicial authorities can create and extend offences in ways that test legal certainty. Nevertheless, UK courts have developed a jurisprudence that allows a gradual evolution of offences but insists on clear boundaries and prior notice. The result is a difficult balance: new harms may be addressed, but only within the confines of existing legal principles. Compared to the civil law jurisdictions examined in this paper (ie

Germany and Argentina), this approach is more flexible, but also more complex to manage from a foreseeability and certainty perspective. At the same time, this interpretation of the principle of *nullum crimen, nulla poena sine lege* leaves open debates about whether codification might ultimately better serve clarity and the guarantees of this principle.

3. *Nullum crimen, nulla poena sine lege* in Latin America: Argentina and Legality in Post-Authoritarian Jurisdictions

39 Article 18 of the Argentinian Constitution protects the principle of *nullum crimen, nulla poena sine lege*, by stating that no citizen may be punished without a prior trial based on a law in force at the time of the offence. This conception of the principle is inspired by the European civil law tradition and aligns with international human rights instruments ratified by the state (cf → *ratification of constitutions*), such as Article 11(2) of the UDHR and Article 15 of the ICCPR, both of which prohibit retroactive criminal laws (see O'Donnell; Bakker). The 1994 constitutional reform further strengthens this principle by granting constitutional status to several international human rights instruments under Article 75(22). These international obligations include the American Convention on Human Rights and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, ratified in 2003.

40 However, when examining the crimes committed during the 1976–83 military dictatorship, Argentina faced a clash between the principle of *nullum crimen, nulla poena sine lege* and demands for accountability (cf → *political accountability*; → *judicial accountability*), similarly to those examined in the context of post-World War II trials in the US and after reunification in Germany. The first Argentinian democratic Congress (1983–85) repealed the military's self-amnesty (→ *amnesty*) law (Ley 23.040) and authorized the Trial of the Juntas, but the prosecution of many officers was cut short by two successive amnesty laws passed in 1986–87: Law 23.492 ('Ley de Punto Final') and Law 23.521 ('Ley de Obediencia Debida'). These laws imposed a deadline for bringing charges against members of the juntas and presumed that lower-level officers acting under 'command responsibility' were not criminally liable. Finally, in 2003, the 'Ley de Punto Final' and the 'Ley de Obediencia Debida' were repealed (Law 25.779), permitting trial against those involved in the commission of gross human rights violations during dictatorship times (see O'Donnell; Bakker).

41 Despite this development, in *Arancibia Clavel* (2004) (Arg), the → *Supreme Court of Argentina* (*Corte Suprema de Justicia de la Nación*) emphasized the need to interpret the principle of legality strictly, by holding that a 2004 law making all crimes against humanity imprescriptible could not be applied to acts before its enactment. This interpretation was considered more respectful of Article 18, which prohibits the retroactivity of criminal laws. However, in *Simón et al* (2005) (Arg), the Supreme Court looked into the practical implementation of the principle of legality more broadly (see Garibian; Badeni). In this case, the defendants were federal police officers (→ *powers and functions of the police*; → *definition of the police*) accused of kidnapping, torture, and forced disappearance of civilians in 1978 (→ *Disappearances*). In this context, the Court reaffirmed the relevance of Article 18's ban on retroactive penal laws and noted that the principle of material legality (*nullum crimen, nulla poena sine lege*) means that neither the definition of the crime nor the penalty may be applied retroactively. The Court stressed that at the time of the 1970s offences, Article 18 guaranteed the principle of non-retroactivity of criminal laws, and thus any change to the law could not prejudice the defendants. Nevertheless, the Court also noted that 'the criminal conduct adjudicated, at the time when it took place ... also constituted a criminal offence under the Argentinian Penal Code' (*Simón et al* para. 30). In other words, kidnapping and disappearance were already punishable under Argentinian law at the time the conduct took place, and, therefore, there was no retroactivity in these

proceedings. Moreover, the Court held that prosecuting so-called ‘crimes against the law of nations’ by relying on domestic statutes was a well-established practice in international criminal law. In its reasoning, it cited international case law to support its analysis, invoking the Inter-American Court’s decision in *Barrios Altos v Peru* (2001) (IACtHR), which declared any amnesty or statute-of-limitation law that precluded accountability for serious human-rights violations to be ‘inadmissible’ and incompatible with the principles that underpin the rule of law (*Simón et al* para. 20).

42 Argentina’s approach illustrates a broader comparative theme: most modern constitutions forbid retroactive criminal laws, but courts in post-conflict or post-authoritarian jurisdictions have had to grapple with the quest for accountability for the commission of gross human rights violations (Garibian 55–58). For example, the US Constitution’s *ex post facto* clause (Art. I.9–10) and Article 103 of the German Constitution prohibit retroactive laws, as examined in previous sections. Yet German courts have prosecuted war criminals by considering war crimes and crimes against humanity as breaches of customary international law in force at the time of the conduct examined. Similar to the approach adopted by German courts, the decision of the Argentinian Supreme Court provides an alternative that relies, primarily, on domestic criminal law (Bakker 13–15). Other Latin American countries have grappled with similar issues. Uruguay’s dictatorship amnesty (‘Ley de Caducidad’) was eventually challenged in *Gelman v Uruguay* (2011) (IACtHR) on the same grounds of impunity, whilst Brazil’s 1979 Amnesty Law blocked prosecutions until its Supreme Court recently upheld that crimes, such as enforced disappearance, do not fall under that amnesty, citing peremptory norms (Schneider 39–41).

43 Overall, each of these constitutions protected *nullum crimen, nulla poena sine lege* as a constitutional principle, but the interpretive solutions differ. Argentina’s Supreme Court, unlike other courts, has been willing to consider dictatorship-era abuses as fitting within pre-existing criminal statutes (or international norms with domestic effect) to avoid any constitutional conflict. This pragmatic reading of Article 18, particularly in *Simón et al*, has allowed the → *judiciary* to comply with both the demand to fulfil the obligations under the *nullum crimen, nulla poena sine lege* principle and the imperative to punish crimes against humanity.

E. Concluding Remarks

44 The principle of *nullum crimen, nulla poena sine lege* constitutes a foundational element of modern criminal justice systems, safeguarding individuals from arbitrary prosecution and ensuring that only conduct explicitly defined as criminal by pre-existing law is subject to punishment. This paper has undertaken a comparative analysis of the principle’s core components, historical evolution, and contemporary relevance across four jurisdictions, including two common law systems (the United States and the United Kingdom) and two civil law systems (Germany and Argentina), with a particular emphasis on their constitutional foundations and the exceptions developed in the context of post-authoritarian regimes and transitional justice mechanisms.

45 In carrying out this analysis, this paper has shown the challenges and differences that arise in common law and civil law countries when implementing this principle. This analysis has demonstrated that common law jurisdictions, such as the US and the United Kingdom, which rely on judge-made law rather than comprehensive codification, pose challenges to the principle’s requirement for clarity and predictability. Initiatives, such as the American Law Institute’s Model Penal Code (1962), have advanced codification at the state level in the US, enhancing legal certainty, but the protection of this principle in jurisdictions without a codified Constitution remains challenging. For instance, the United Kingdom

embeds *nullum crimen, nulla poena sine lege* within its common law traditions, but, in practice, courts have to balance the flexibility of judicially developed law with the need for legal certainty, as seen in cases like *R v Rimmington* and *R v R*. The ECtHR has further shaped this balance, permitting a gradual clarification of criminal liability, but the difficulties surrounding the guarantees of non-retroactivity of the criminal law.

46 On the other hand, Germany's application of *nullum crimen, nulla poena sine lege* is characterized by a strict adherence to its codification in Article 103(2) of the Basic Law, reflecting a post-World War II commitment to the rule of law and human dignity. Whilst this process has faced challenges with the achievement of justice in a post-authoritarian context, the *Mauerschützenprozesse* (Berlin Wall trials) reconciled this principle with the need to prosecute international crimes under customary international law. Similar challenges have been faced by Argentina, which codified this principle in Article 18 of its Constitution. By drawing on international precedents, such as the Nuremberg trials and the Inter-American Court's decision in *Barrios Altos v Peru*, it has managed to balance constitutional protections of legality with the imperative to address past atrocities, ensuring prosecutions remain within constitutional limits.

47 Overall, the comparative analysis carried out in this paper reveals a commitment to the principle of *nullum crimen, nulla poena sine lege* as a constitutional guarantee across all four jurisdictions, prohibiting retroactive criminal laws and emphasizing the need for foreseeability and accessibility in criminal laws. However, divergences emerge in how each system balances this principle with demands for retrospective justice. Common law jurisdictions (US and UK) exhibit greater flexibility due to their reliance on judicial interpretation, which can risk vagueness but allows adaptation to new circumstances. Conversely, civil law jurisdictions (Germany and Argentina) adhere to stricter codification. Nevertheless, both have developed exceptions in post-conflict settings, often invoking customary international law or existing domestic statutes to prosecute serious human rights violations. These findings highlight the principle's enduring relevance and adaptability and, at the same time, how it reflects the unique legal, historical, and societal contexts of each jurisdiction.

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