Notes on Criminal Law

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Distinction between Criminal Offences and Civil Wrongs.

Criminal Offences belong to a much wider class of legal wrongs. A legal wrong is an act, which is contrary to the rule of legal justice and a violation of the law. It is an act, which is authoritatively determined to be wrorg by a rule of law and is, therefore, treated as wrong in and for the purpose of, the administration of justice by the State.

In applying a sanction of the rules of Right, the tribunals of the State may act in one or the other of two different ways: they may either enforce rights or punish wrongs. In other words, they may either comply a man to perform the duty, which he owes or they may punish him for having failed to perform it. Hence the distinction between the civil and criminal justice. The former consists in the enforcements of rights, the latter in the punishment of wrongs. In a civil proceeding, the plaintiff clams a right, and the Court secures it for him by putting pressure upon the defendant to that end: as when one claims a debt that is due to him or the restoration of property wrongfully detained from him or damages payable to him by way of compensation or the preventiori of a threatened injury by way of an injunction. In criminal proceedings, on the other hand, the prosecutor claims no right, but accuses the defendant of a wrong: the Court makes no attempt, as a rule[1], to constrain the defendant to perform any duty already disregarded and or to pay compensation for the right already violated, as when he is hanged for murder or imprisoned for theft.

A wrong regarded as the subject matter of civil proceedings is a civil wrong; when regarded as the subject matter of criminal proceedings, it is a criminal wrong or a criminal offence.

But this is only a formal distinction between the two classes of wrongs. Any description of criminal offences, which centres either in procedure, or in the fact of punishment amounts only to a formal, not to a material definition. It is not enough to know that a criminal offence is a punishable wrong, that is, a wrong that exposes the doer to criminal proceedings designed for his punishment. The problem is why is such wrong punishable? Why, in other words, does the State consider it necessary, in the case of some wrongs but not of others, to take direct disciplinary action?

Many attempts have been made to answer these questions and to propound a general definition of a criminal offence, which shall distinguish wrongs, which are criminal from those which are merely civil. Indeed perhaps, nothing in Jurisprudence has led to more discussion than the true ground of such distinction. In juristic doctrire endless technical distinctions may be drawn without ever arrivirg at anything which satisfies the mind as a real distinction.

In attempting to frame a definition of a criminal offence which shall separate the illegal acts which are criminal from those which must be treated in another branch of the law of wrongs, the first course which naturally occurs to us is to see if some peculiarity, which may serve as a basis for our definition, can be found in the very nature of the criminal act itself.

[1] Exceptions to this rule are orders by the court for the abatement of a nuisance (Section 321, Code of Police Laws; Section 377 (3), (5) Criminal Code), and recognizances to keep the peace and be of good behaviour (Sections 395, 383, Criminal Code).

(i Start with a definition why law?

I. In adopting this course, one way that most naturally suggests itself to a man's mind is the ordinary limitation of the idea of crime to those legal wrongs which offend our moral feelings. In fact there is something more in the notion of most crimes than a mere breach of the legal rule. There is a strong element of morality in their wrongfulness. If popular language may be of any guide, it is clear that the word 'crime' denotes in its ordinary signification something which shocks deeply rooted instincts. We call a thing a crime when we wish to express the strongest disapprobation of it. The major crimes of 'aggression' are undoubtedly, to average moral judgement, peculiarly wrongful. To convey this idea of inherent wrongfulness, the philosophers of the seventeenth and eighteenth centuries defined these crimes as 'mala in se'. Their doctrine was that these wrongs were illegal because they were wrongful; because, in other words, they had been forbidden by a Divine Law which no human authority could possibly abrogate or abridge even if it desired to do so. *"Crimes and misdemeanours"* Blackstone tells us (I Comm. 54), *"such as murder, theft and perjury are 'mala in se' because they contract no additional turpitude from being declared unlawful by the inferior legislature"*. (He means by the 'inferior legislature' simply the human lawgiver, the superior lawgiver being God Himself). And, indeed, throughout the criminal law of all the nations, there runs an unmistakable current of belief that certain kinds of conduct require direct repression by the State because they are evil in themselves.

Now there is no doubt that intrinsic wrongfulness in the moral sense is a characteristic of most crimes: they are wrong according to average moral judgement. But, **Kenny** says (Op. Cit. p.8), "this is only a rough test: it holds of 'grave' crimes in the mass as contrasted with civil wrongs in the mass, but breaks down when we come to apply it with the universality of a definition. Many crimes involve little or no ethical blame. Thus, for example, treason is legally the gravest of all crimes, yet often, as Sir Walter Scott says, it arises from mistaken virtue and, therefore, however highly criminal, cannot be considered disgraceful; a view which has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition. Again, many breaches of statutory regulations and bye-laws which, because they are punishable in criminal proceedings, must be classed as criminal offences, do not involve the slightest moral blame as, for example, the failure to have a proper light on a bicycle or the keeping of a pig in a wrong place, while conversely, an act that involves the greatest moral scandal may not be a criminal offence. Incest, for instance, though it is no doubt an offence against social morals and the purity of domestic life, is not per se a criminal offence in Malta: it is only punishable as an aggravation of another offence (vide Jameson's Report, p.83). So, likewise, many grossly wicked breaches of trust are mere civil wrongs. Directors of a company may ruin it by the grossest negligence, bringing many shareholders to poverty, and yet incur no criminal liability. Conduct may, indeed be grossly wicked and yet be no breach of law at all. A man who should callously stand by and watch a child drowning in a shallow pond would arouse universal indignation; but in Malta and England (unlike in France) he would have committed neither a criminal nor a civil wrong. (Kenny, Op. Cit. p.9).

II. By many persons, the distinction between civil wrongs and criminal offences is identified with that between private and public wrongs. By public wrong is meant an offence committed against the State or the community at large and dealt with in a proceeding to which the State itself is a party, while a private wrong is one committed against a private person and dealt with at the suit of the individual so injured. Blackstone's statement of this view may be taken as representative. "*Wrongs* ", he says (3 Comm. 2), "*are divisible into two sorts or species: private wrongs and public wrongs. The former are an infrigement of civil wrongs; the latter are a breach or violation of public rights and duties which affect the whole community considered as a community, and are distinguished by the harsh appellation of crimes and misdemeanours* ".

"*But* ", as Salmond observes ('Jurisprudence', Ed. *1930,* p.119), "*this explanation is*

insufficient". In the first place, all public wrongs are not criminal. A refusal to pay taxes is an offence against the State, and is dealt with at the suit of the State) but it is a civil wrong for all that, just as a refusal to pay money lent by a private person is a civil wrong. The breach of a contract made with the State is no more a criminal offence than is the breach of a contract made with a subject. An action by the State for the recovery of a debt, or for damages, or for the restoration of public property or for the enforcement of a public trust is purely civil, although in each case the person injured and suing is the State itself. Conversely, and in the second place, all criminal offences are not public wrongs. Many offences are, according to law prosecuted at the suit of a private person (e.g. Section 526 of the Criminal Code), yet the proceedings are undoubtedly criminal, nonetheless.

However, to quote Kenny again, the idea which Blackstone attempted to embody is one of great importance and deserves a very close scrutiny. Criminal offences, according to this idea, are such breaches of the law as injure the community. Now there can be no doubt that if we made a merely general contrast between crimes taken as a mass, and the remaining forms of illegal conduct taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread than that produced by the latter. This fact was observed even as early as in the days of the Roman Empire. Roman jurists who noted this specially strong tendency of crimes to injure the public, supposed it to be the reason why their forefathers had called crimes "delicta pubblica" and criminal trials "judicia pubblica". As a matter of actual history those phrases were not suggested originally by this; nor even, as Justinian fancied (Inst. 4. 18. 1), by the rule that any member of the public can prosecute a criminal; but by the fact that in early Rome all charges of crime were tried by the public itself, that is, by the whole Roman people assembled in the 'Comitia Centuriata'. Long after this form of trial had become obsolete, and the origin of the epithet consequently obscured, crimes still continued to be called 'public'. And the phrase did not end with Roman Law, but, as we have seen, plays a prominent part in the classifications and the definitions of Blackstone. Its survival was doubtlessly due to the recognition of the unmistakable public mischief which most crimes produce. Were only a rough general description to be attempted, this public mischief ought undoubtedly to be made the salient feature. But can we accept it - Kenny goes on - as a sufficient foundation for the precise accuracy necessary in a formal definition? Such a definition must give us "the whole thing and the sole thing", telling us something that shall be true of every criminal offence and yet not true of any conceivable non-criminal breach of law. Clearly then we cannot define by mere help of the vague fact that they "usually injure the community". For every illegal act whatever, even a mere breach of contract, must be injurios to the community, by causing it alarm at least, if not in other wavs also. Indeed, had not this been the case, the community would not have taken the trouble to legislate against the act. Moreover, we cannot even make the question one of degree and say that criminal offences are always more injurious to the community than civil wrongs are. For it is easy to find instances to the contrary. It is possible that, without committing any criminal offence at all, a man may by a breach of trust or by negligent management of a Conpanys' affairs, bring about a calamity incomparably more widespread and more severe than that produced by stealing a cotton pocket handkerchief, though that petty theft is criminal.

Moreover Harris points out (Op.Cit. p.4), an act which is of actual benefit to the public may be a criminal offence: thus, any unauthorised obstruction of a public street is punishable as a public nuisance, and the person who creates such an obstruction is liable to punishment even though it was created in the execution of some work beneficial to the public as, for example, in laying gas pipes.

Hence Kenny concludes - to speak of crimes as those forms of legal wr ongs which are regarded by the law as being especially injurious to the public at large, may be an instructive general description of them, but it is not an accurate definition. (Yet, as we shall see, this 'public' aspect of crime

is a dominant element in the best known 'material' definitions.)

III. Other writers have maintained that a wrong is merely civil if the injury caused thereby can be remedied, whilst it is criminal if the damage cannot be remedied. But this ground of distinction as a universal test is clearly fallacious, for, while for instance, the injury caused by the default of an insolvent debtor cannot be remedied, there are many criminal offences in which the injury can be remedied (e.g. offences against property) and others in which no actual damage is caused at all. (Vide Florian, "Trattato di Diritto Penale", Vol. I, P.1, p.7).

IV. Yet others consider that a wrong is civil where the injury could be avoided by the precautions which nature, common sense and the law provides to everyone; while it is criminal if the harm cannot be avoided except by the threat of punishment. But rather than a fundamental distinction, this is merely a description of what sometimes, or perhaps often, is the case. It is, in fact, obvious that there may be wrongs of a purely civil nature, which cannot be avoided however great the precautions taken; while, on the contrary, there may be criminal injuries, which could be avoided with a minimum of precautions.

The failure of the most approved tests of criminality that are based on the nature or the natural consequences of the acts themselves may lead us to believe that there exists no intrinsic distinction between those acts which are criminal and those which are not.

Thus, we have to fall back and dwell yet further upon the formal or extrinsic test.

Nothing in the character of an act or omission says **Harris** (Op. Cit. p.3) -- enables us to determine whether it is a criminal offence: the only test is the nature of the liability which it entails. The essential characteristic of a criminal offence is that it entails liability to punishrnent: "*the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common feature that they will be found to possess is that they are prohibited by the State and that those who commit them are punished*".

But -- as Harris warns us -- the fact that an act or omission may entail liability to punishment is not sufficient tomake it a criminal offence unless the punishment is inflicted as a result of criminal proceedings. In fact, while punishment is the object of all criminal proceedings, it sometimes is the object of civil ones also. Thus, for example when a Statute imposes a penalty upon an act or omission, it may or may not make that act or omission a criminal offence. Whether it has done so depends on the construction of the Statute and on the nature of the proceedings, that it authorises for the recovery of the penalty. In some cases a penalty imposed by a Statute is recoverable at the suit of the Attorney General or some other public officer as

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the Succession and Donation Duties Ordinance). Such proceecdings although brought for the recovery of a penalty, are not criminal proceedings and the person liable to the penalty is not, therefore, guilty of a criminal offence. Again in some cases punishment by fine or imprisonment may be inflicted for civil contempt of Court, as for instance, for disobedience of an injuction or order of the

Court made in civil prooeedings. (Section 988, Code of Organisation and Civil Procedure): in such cases the punishment is merely a civil process to enforce obedience to the order of the Court and does not make the disobedience or contempt a criminal offence (Harris, ibid.).

The conclusion to be drawn from all this seems to be that no satisfactory 'a priori' test exists for deciding which acts must be considered as civil wrongs and which as criminal offences. The ultimate and sole real test is the law itself, regard being had to the nature of the sanction imposed and the mode of its enforcement.

Indeed, inasmuch as the difference between crimes and civil injuries does not consist of any intrinsic difference in the nature of the wrongful acts themselves, but only in the legal proceedings which are taken upon them, the same injury may be both civil and criminal; for the law may allow both forms of procedure. For almost every criminal offence admits of being treated as a 'tort', that is, a civil injury so that the person wronged by it can sue the wrongdoer for pecuniary compensation. Blackstone even goes so far as to say, universally, that every crime is thus also a civil injury (4. Comm.5.). So also Section 3(1) of our Criminal Code lays down that "Every offence gives rise to a criminal action and to a civil action". But, of course, this cannot be the case with those offences which do not happen to injure any particular individual or where the course of an offence is checked before it has reached the point of doing any actual harm. However, in the vast majority of cases, he who commits a crime does thereby cause actual hurt to the person or property of some other men; and whenever this is so, the crime is also a civil injury. Criminal offences and civil wrongs thus are not sharply separated groups of acts; but are often one and the same act as viewed from different standpoints, the difference being one not of nature but only of relation (Kenny, ibid.).

This affinity between tort and crime is not in the least surprising when it is remembered how late in the history of law there emerged any clear conception of a difference between them. Even the Romans, for all their legal genius, but slowly developed a body of law which we should recognise nowadays as distinctly 'criminal'. In the broadest sense, with the exception of those crimes against the security of the State, for example treason, which were always the concern of the people as a whole, we may say that the history of Roman Criminal Law is the very gradual and the very imperfect emergence of public discipline out of private retribution. The same may be said of criminal law the world over. In primitive codes, true criminal law is unknown. Its place is taken by that portion of civil law which is concerned with pecuniary redress. Murder, theft and violence are not crimes to be punished by loss of life, limb or liberty, but as civil injuries to be paid for: they merely create --illegible note-- to pay compensation in kind, the exaction of which is the concern only of the injured person or his heir. As yet there is no conception at all that certain types of injury to an individual or his property may also be a threat to the security of the State. Only when offences worthy of punishment cease to be matters between private persons and become matters between the wrongdoer and the commuility at large and the and the offender has to answer for his deed to the State itself, will true criminal law be established and maintained.

--Missing notes --punishment by the State is widened and begins to include acts which, though in themselves are merely private wrongs, are a menace to social order and the peace of the State, and the law-making power comes to regard the mere civil remedy for them as being inadequate: inadequate it may be on account of their great immorality, or for the greatness of the temptation to commit them, or of the likelihood of their being committed by persons too poor to pay pecuniary damages (Kenny here says in a foot-note that the Musical Copyright Act, 1906, was enacted to check the sale of

pirated music by penniless street hawkers).

And the process of turning private wrongs into public ones still goes forward in all civilised countries, whenever any class of private wrongs - or even of acts that have never yet been treated as wrongs at all - comes to inspire the community with new apprehension, either on account of its frequency or of some new discovery of its ill effects -- "In sostanza, le sanzioni di diritto penale sorgono la' dove quelle del diritto privato si maniefestano insufficienti: il diritto penale colma le lacune e le insufficienze del diritto privato..... Quindi, il criterio qui imperante e' quello della relativita': l'estensione del reato in confronto col torto civile varia coi popoli e coi tempi a secondo delle necessita' sociali. Il territono del diritto penale e' essenzialmente variabile ed anzi noi vediamo che esso si allarga di continuo parallelamente al progredire ed al moltiplicarsi dei rapporti giuridici in seno della societa'. Mano mano che una data forma di illecito tocca piu' vivamente gli interessi generali e la vita della societa', sorge e si afferma per esso la sanzione penale". (Florian, Op.Cit. p.4).

Definition of a Criminal Offence.

We have seen that the difference between criminal offences and civil injuries does not consist in any intrinsic difference in the nature of the wrongful acts themselves, and we have in consequence concluded that, with relation to positive law (de jure condito), the ultimate test to decide whether a legal wrong is a criminal offence or merely a civil injury, is the nature of the liability which it entails and the proceedings which are taken upon it.

A criminal offence may, therefore, be defined as "a legal wrong which exposes the doer to a punishment to be inflicted upon criminal proceedings". This is of course, a purely formal definition. Indeed, it can be objected against it that it runs in a circle and begs the whole question. In fact it merely amounts to saying that "a punishable wrong is one that is punished". But if one bears in mind that there cannot be a criminal offence which the law has not so expressly declared, and, further, that human laws are dictated by considerations of expediency which vary from time to time and from place to place, it will be seen that no better legal definition can be ventured. This, no doubt, was why certain codes which attempted to give at the outset a definition of their subject-matter, did not go beyond saying generally that "a crime is an offence against the crininal law" (For example, the Neapolitan Code of 1808: "Il delitto e' la violenza della legge penale")

The inquiry will naturally suggest itself: Under what circumstances is the State justified in issuing criminal prohibitions? Kenny says (Op. Cit. p.26 et seq. passim): All modern legislatures are constantly being requested to pass enactments punishing some prevalent practice which the petitioners consider to be injurious to the community and which whether from selfish or philanthropic motives, they desire to see repressed. But Bentham has vividly shown that a lawgiver is not justified in yielding to such appeals merely because it is established that the practice in question really injures his subjects. Before using threats of criminal penalties to supress a illegible word form of conduct, the legislator should satisfy himself upon fewer than six points: -

1. The objectionable practice should be productive not merely of evils, but of evils so great as to counterbalance the suffering, direct or indirect, which the infliction of criminal punishment necessarily

involves. Hence, he will not make a crime of mere lying unless it has caused a pecuniary loss to the deceived person and therefore became aggravated into fraud.

2. It should admit of being defined with legal precision. On this ground such vices as ingratitude, or extravagance, or gluttony (unlike drunkenness), do not admit of being punished criminally.

3. It should admit of being proved by cogent evidence.

4. Moreover, this evidence should be such as can usually be obtained without impairing the privacy and confidence of domestic life. Hence, drunkenness is not punished as a criminal offence unless seen in public.

5. And even if an offence is found to possess all these intrinsic conditions of illegality, the lawgiver should not prohibit it, unless he has ascertained to what extent it is reprobated by the current feelings of the community. For, on the one hand, that reprobation may be sufficiently severe to remove all necessity for those more clumsy and costly restraints which legal prohibitions would impose: just as in England at the present time – Kenny goes on to say – it is really by public sentiment and not by popular Lord's Day Act of Charles II, that our habitual abstinence from trade or labour on Sundays is secured. Or, on the other hand, public opinion may regard an offence so leniently that the fact that a person has to undergo legal penalties for it, would only serve to secure him such a widespread sympathy as would counterveil the deterrant effect of punishment. Criminal legislation must only aim at expressing, as Professor Ottley says, "the judgement of the average conscience as to the minimum standard of right". To elevate the moral standard of the less orderly classes of the community is undoubtedly one of the functions of the criminal law: but it is a function which must be discharged slowly and cautiously. An admirable illustration of the caution which a wise legislator exercises in undertaking the tasks that the moral reformers commend to him, is afforded by the law of sexual excesses. It does not inflict criminal penalties upon all those acts which the ecclesiastical law prohibits: it selects out of them for criminal prohibition those alone in which there is also present some further element, whether of abnormality, or violence or fraud, that provokes such a general popular disgust as will make it certain that prosecutors and witnesses and jurymen will be content to see the prohibition actually enforced.

6. Whenever any form of objectionable conduct satisfies the five foregoing requisites, it is clear that the legislature should prohibit it. But still the prohibition need not be a criminal one. It would be superfluous cruelty to inflict criminal penalties where adequate protection can be secured to the community by milder sanctions,

> which civil courts can wield. Hence, breache of contract are not criminally dealt with: for, even when intentional, they are seldom accompanied by any great degree of wickedness or any like public risk; or by any temptation which the fear of an action for damages would not be likely to counterbalance; or by any ill effects to the other contracting party which such an action could not repair.

But there are other forms of wrongdoing upon which the fear of damages and costs or other civil sanctions do not impose an adequate restraint. The harm done to the immediate victim of the offence may be such that it cannot be redressed by pecuniary compensation: as is the case of murder. Or, as is far more commonly the case, the gravity of the offences or the strength of the temptation to it may be such that every instance of its commission causes a widespread sense of insecurity and alarm. In that case there is beyond the immediate and direct victim who has been wronged, an unknown group of 'indirect' sufferers, who, if only because they are unascertainable, cannot have pecuniary compensation for the suffering that has been caused to them. Finally there are a great many kinds of actions which do not injure any specific person at all, or at all events injure all persons equally, and for these there are no private remedies, for the excellent reason that they are not private wrongs. If the State does not take measures to suppress them, nobody else will or can.

In all such cases the suppression of wrongdoing which thus injures the community at large must be controlled by the Public Authority as the guardian of law and order, and such control is supplied by Criminal Law very efficiently.

This 'public' aspect of crime, that is, that it injures the community as a whole is the dominant characteristic of Criminal Law in all modern societies. It injures the community either because, as we have said, it attacks tho person or property or other rights of indivtduals in such a manner as to cause alarm to other individuals; or because it attacks some vital part of the organisation of tha State. In addition, there are a large number of acts, chiefly but by no means all in the nature of 'contraventions' which are inexpedient and, theretore, penalised becuase they interfere with some part of the State machinery. There may be many reasons, economical, political, administrative, cultural, hygienic which make such acts undesirable: and as the machinery of Government becomes more reticulated, it can be mada effective only by creating numerous penalties for non-compliance with it.

The traditional view of the English Law insisted much on this public aspect of crime. We have already seen that this aspect plays a prominent part in Blackstone's classification of legal wrongs. It features again very prominently in the following definition given by **W. Blake Odgers** : "*A crime is a wrongful act of such kind that the State deems it necessary, in the interest of the public, to repress it, for its repetition would be harmful to the community as a whole....A crime, then, is a breach of a duty imposed by law for the benefit of the community at large, -- the breach of a duty owed to the public and, therefore, a wrong done to the public*". (The Common Law of England, Vol. I. Pp. 101-4). And in **Halsburys'** 'Laws of England', a crime is likewise defined as "*an unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment. While a crime is often also an injury to a private person who has a remedy in civil action, it is as an act or default contrary to the order, peace and wellbeing of society that a crime is punishable by the State*".

All this does not mean that Criminal Law is not concerned with the rights of the individual. It

clearly is. Indeed the State exists and all law is intended better to ensure the safety and promote the prosperity of the individual members. These objects the law seeks to achieve by the threat of punishment. But once the offence is committed and the harm is done, the duty which the law vindicates, in inflicting the punishment on the offender, is not the duty to restore the specific right of the victim of the offence -- a restoration which, in the nature of things, is often impossible -- but the duty not to behave in a certain manner which is prejudicial to order and peace and the wellbeing of the community.

This indirect mischief to society (danno mediato) is also a vital element in **Carrara's** conception of crime. He says; "Il fatto che danneggiasse un solo cittadino senza menomare neppure nell' opinione la sicurezza degli altri non potrebbe essere dichiarato delitto" (Programma p. 27). The eminent jurist, therefore, defines a crime as follows :-

> "***The violation of the law of the State, promulgated for the protection of the safety of the subjects, by an external act of man whether of omission or of commission for which the agent is morally responsible.*** *(L'infrazzione della legge dello Stato, promulgata per proteggere la sicurezza dei cittadini, risultante da un atto esterno dell'uomo, positivo o negativo, moralmente imputabile*").

This definition introduces to us in a readily apprehensible manner, certain fundamental notions which will be elaborated in the course of the coming chapters. It would, therefore, be well to make a brief analysis of its elements. But before doing so, it is important to point out that hitherto, in this and in the preceding chapters, the terms 'crime' and 'criminal offence' have often been used synonymously of all acts or omissions entailing liability to punishment: the two terms are especially so used in our quotations from English text-books. Later on, we shall see that in our system of positive law the term 'crime' designates a species of the genus designated by the term 'criminal offence': it is appropriated to the more serious criminal wrongs. And it is in this restricted sense that the word crime is used in the translation of Carrara's definition. Venial offences in the nature of contraventions or breaches of 'Police' laws (trasgressioni di leggi di buon governo), which are not in themselves morally reprehensible, do not enter into Carrara's theory of Criminal Law (V. Prologomeni). However this may be, the important thing for the moment is that Carrara's doctrine confirms the point we have been stressing upon, namely that the dominant function of criminal justice is the repression of wrongs which are injurious to the community at large in such a manner that they cannot be effectually restrained otherwise than by the infliction of penal sanctions. Thus, although the element of 'public mischief ' cannot alone, as we have seen, enable us to determine 'a priori' whether an act is a criminal offence or merely a civil wrong, inasmuch as there are also some civil wrongs which injure the community, still there can be no doubt that it is, as it has always been, the chief factor of importance in causing an act to be made punishable.

Analysis of Carraras' Definition.

Violation of the Law.

The general concept of every criminal offence is that it is a violation of a rule of law: for no act of man can be charged against him unless it is prohibited by the law. An act becomes a criminal

offence only if and when it goes counter to the law. It may be morally reprehensible or mischievous or both: but if the law does not forbid it, it cannot be set up against the doer.

Of the State.

But it is not the infraction of every kind of law that constitutes a criminal offence. There must be an infringement not of moral law, or of the (improperly called) laws of etiquette, or of honour, but a violation of the positive law enforced from time to time by the State in an organised system of society.

Promulgated.

It would be unjust and absurd to require the subjects to conform to a law which has not been enacted and published in due form. But once so enacted and published the law is presumed to be known by all those to whom it applies and, as we shall see more fully in due course, it does not avail the transgressor to say that he was not aware of it. (Ignoratia legis neminem excusat.)

For the Protection of the Safety of the Subjects.

These words, in Carrara's view, connote the special characteristic of crime. The non-fulfilment of a civil obligation is a legal wrong, a breach of the law of the State intended to regulate the private transactions between individuals: but it is not a crime. An act is a crime when it violates the law which is designed to ensure the safety of the subject. And the word 'subjects' is used precisely to convey that crime is punished by the State because it injures also the community at large. An act which hurts one individual without at least alarming the others to their own safety cannot be made a crime.

External Act.

In Ethics, an evil mental condition would of itself suffice to constitute guilt: but in law no punishment can be inflicted upon mere internal feeling or mental condition. These are not amenable to positive criminal justice: "cogitationis poenam in fore nemo patitur". Mere thoughts or desires however wicked cannot injure any person unless there be some external act which shows that progress had been made towards maturing and effecting such thoughts or desires.

Of Man.

Only man can be guilty of violating the law. It was an aberration when, in by-gone days, mere blind association of ideas, drove the tribunals into the excess of punishing 'crimes' committed by non-ethical agents. Instances occur in the Mediaeval Ages, of punishments inflicted on animals for homicide and in the 'piacularity' attached in ancient Greece to even inanimate instruments of death that had accidentally slain a man (V. Robson: 'Civilisation and the Growth of Law', p.84 et seq.).

Of Commission or of Ommission.

A man may become guilty of a criminal offence whether because he did that which the

law forbids or because he failed to do that which the law enjoins.

For which the Agent is Morally Responsible.

Man is subject to the laws of the State inasmuch as he is endowed with the faculties of will and understanding. No man can, therefore, incur criminal liability for his act unless this is accompanied by the mental element required to constitute guilt. It does not suffice that the wrong-doer knows that he is doing wrong, unless also he can 'help' doing wrong, for a man ought not to be punished for acts which he was not, both physically and mentally, capable of avoiding.

From this brief analysis we can deduce the following propositions: -

1. There cannot be a criminal offence without a violation of a rule of positive law. (This will form the subject of the chapters on the notion of penal laws and their operation)

2. There cannot be a criminal offence unless man is the cause thereof. (With this we shall deal in the chapter on 'The Subject of a Criminal Offence').

3. There cannot be a criminal offece unless man is the cause thereof as a free and intelligent agent. (This matter will be dealt with in our studies of the elements of a criminal offence and the theory of criminal liability).

4. Every offence must be viewed not in the abstract but in its concrete form, regard being had to all the circumstances which may aggravate or extenuate the responsibility of the agent. Such circumstances are inherent either in the act itself or in the person of the offerder. (This will complete our studies of the subjects included in Part I of the syllabus).

The Classification of Criminal Offences.

It is not necessary to mention all the various divisions and sub-divisicris thought out by Continental jurists and text-writers: it is sufficient to notice the most important: -

1. Offences of Commission and offences of Omission. A wrong-doer either does that which he ought not to do or leaves undone that which he ought to do.

2. Formal (Formali) and Material (Materiali). A formal offence is one which is completed by the mere act or omission which constitutes the violation of the law (Carrara, Programma p.50): such act or omission is sufficient in itself to complete the offence (Manzini, 'Trattato' p.563). In other words, it is not necessary for the consummation of a formal offence that the injurious event intended by the offender should ensue or that the object desired by him should be accomplished. In such cases the act or omission is wrongful by reason of its mischievous tendency as recognised by law, irrespective of the actual issue. Thus, for example, calumnious accusation (Section 101, Criminal Code) is a formal offence because the crime is complete as soon as the offender maliciously lays infamation against another person

whom he knows to be innocent, and it is not necessary that the person against whom the accusation is made be in fact proceeded against or convicted. Other familiar instances of formal offences are defamation (Sec. 252), the forgery of public instruments (Sec. 179.), and generally all offences in which the achievement of the criminal purpose of the agent or the event of the injury is not an essential ingredient of the offence.

The offence is on the other hand, material if it cannot be completed without the actual happening of the injurious event which alone constitutes the material violation of the law. (Carrara. ibid.). Here, the completion of the offence requires the accident of the event which, though the offender may have done all that he could to bring it about, may not materialise in consequence of circumstances independant of his will (Mazini, ibid). Thus a homicide is a material offence because it cannot be said to have been perpetrated unless a man has in fact been killed. Other instances of material offences are bodily harm (Sec. 214), carnal knowledge with violence (Sec. 198), and similar offences, in respect of which liability for the complete offence depends on the actual accident of the injurious event. This distinction has practical importance in connection with the doctrine of criminal attempts. (V. Criminal Appeal 'The Police vs. Said', 23.1.1939; also Law Reports, Vol. XXVI, Part.IV, p.768).

3. Simple (Semplici) and Complex (Komplessi). An offence is said to be simple when it violates one single right; it is complex when it violates more than one right, as for instance, when the same act or omission constitutes an offence under two or more provisions of the same law, or under two or more different laws, or when acts constituting in themselves criminal offences are considered by the law as ingredients or aggravating circumstances of another offence (V. Carrara, p.52).

Other writers, however, (e.g. Manzini Op.Cit. p.564) designates as a simple offence that which can be executed by one single act: 'qui unico actu perficiuntur' (e.g. oral defamation); and as complex that the perpetration of which requires a more or less complex series of acts forming together one single transact ion.

This distinction as defined by Carrara is of practical importance in connection with the theory of concurrent offences; and, as defined by other writers, it has practical importance in relation to the doctrine of criminal attempts. As Manzini says "the notion of an attempt is inconceivable in respect of a simple offence (as defined by him).

But it should be noted that the term 'simple' offence is also used to denote the offence as primarily contemplated by the law, without aggravating circumstances: as when, for instance, our Criminal Code speaks of 'simple theft' (Section 284).

4. Instantaneous (Istantanei) and Continuing (Permanenti). This distinction has considerable practical importance both in relation to substantive law as well as in relation to adjective law, that is, Law of Procedure, and especially in connection with the applicaton of trarsitory provisions, with the age of the offender and with prescription. Our Code, like all other codes, does not give a definition of either an 'instantaneous' or of a 'continuing' offence. It merely mentions continuing offences in Section 691. But text writers give various definitions which, in these notes, we cannot follow up in detail; and our case-law has noticed and dealt with the

distinction on several occasions. It is essential for a clear notion of a continuing offence, as contrasted with the nature of an instantaneous offence, that we should not confuse the continuance of the effects of an offence with the continuance of the offence itself: There may be the former even if the offence is definitely instantaneous. Thus, for instance, homicide, bodily harm, theft, etc., are instantaneous offences, although the effects produced by them are permanent.

Nor should the concept of a continuing offence be mixed up with that of a continuous offence (reato continuato). The definition of a continuous offence is given in Section 18 of the Criminal Code and the relative doctrine will be expounded in due course. For the noment it is sufficient to point out that whereas a continuing offence pre-supposes an uninterrupted state of things which prolongs, over a more or less protracted period of time, the original violation of the law, a continuous offence postulates two or more violations of the same provision of the law committed at the same time or at different times, that is, in other words, a series of acts which may be regarded as apart, but which by a 'fictio juris' are considered by the law as forming one single transaction on account of the one and the same criminal determination or design which links them together.

Bearing this in mind, it is possible to make a clear, if not concise, distinction between the two forms of offence under discussion.

An offence is instantaneous if the violation of the right or interest protected by the law is entirely completed so soon as all the elements constituting the offence actually concur. The effects of the offence may or may not continue after the perpetration of the act or omission constituting the offence: but if they continue, it is not because of any further act or omission on the part of the offender or of the permanence of his original act or omission, but merely as a result of such original act or omission: in other words, the continuance of the effects is not occasioned by the repetition or the continuance of the wrongful act or omission which gave rise to the violation of the right or interest protected by law. Instances of instantaneous offences are homicide, bodily harm, defamation, rape, theft, wilful damage, etc.

A continuing offence, on the other hand, is one which consists in a state of things subjectively and objectively and uniformly contrary to law in every moment of its duration. Here the injury or the violation of the right or interest protected by the law continues and is repeated uninterruptedly even after the completion of the act or omission giving rise to the offence, so long as the said state of things continues. Thus the ingredients of a continuing offence are two.-

(a) A wrongful conduct (that is, act or omission) protracted uninterruptedly and without any change in its constituent elements for a length of time;

and (b) A state of things controry to law or the violation of a right or duty likewise continuing without interruption and uniformly, co-extensively with the continuance of such wrongful conduct.

Instances of continuing offences are illegal arrest or detention (Section 86), certain contraventions against the laws relating to the erection of buildings, etc.

In order to determine in a particular case whether an offence is an

instantaneous or a continuing one 'the soundest criterion' - as Mr. Justice Harding puts it – "*is that of adverting to the fact which the law intends to repress and of deciding the issue according to the nature (instantaneous or continuing) of that fact*". (V. 'Recent Criminal Cases Annotated' p. 91; V. also ibid. 83, and the precedents therein quoted).

5. By far the most important distinction is that made with reference to the nature and gravity of the offence. Some Codes divide offences into three classes. Thus the French Code classifies them into 'crimes', that is, grave offences triable in a Court of Assize and punishable by 'peines afflictives ou infamantes'; 'delits', that is, less serious offences triable by the Correctional Court and punishable by 'peins correctionelles', and 'contraventions', that is, petty offences tried by professional magistrates and punishable by 'peines de police'.

In English. Law, offences are divided into 'indictable offences', that ie, those which admit of trial by jury, and 'non-indictable offences', that is, those which can be tried summarily by justices of the peace or other magistrates sitting without a jury. To some extent, however, these two classes overlap, as some indictable offences may be tried summarily and vice~versa. (V. Harris, Op. Cit. p.10). Indictable offences are subdivided into Treasons, Felonies and Misdemeanours.

Our Criminal Code (Section 2) divides offences, according to their degree of importance, into Crimes and Contravontions: the more heinous offences are crimes, the less heinous contraventions. But no definition or explanation is contained in the Code to distinguish the one group of offences from the other. In practice no difficulty arises where the offence is expressly contemplated in the Criminal Code itself; for in the Code crimes are dealt with in Part II of Book First separately from contraventions which are dealt with in Part III. So, from the place which the offence occupies in the Code, it can be decided whether it is a crime or a contravention. Nor can any difficulty arise in respect of offences created by special laws (that is, penal laws other than the Criminal Code) where the law itself determines the nature of the offence thereunder., as, for instance, the Food, Drugs and Drinking Ordinance (Cap. 54), which provides that all offences against its provisions are to be considered as contraventions, irrespective or the punishment applicable and the Spirits Ordinance (Cap.64) which lays down that all offences under its provisions are to be considered as crimes. The doubt arises where the special law creating the ofrence is silent as to its character. In such cases it may be most important in practice to decide to which of the two classes the offence properly belongs, for several reasons of which the most important are the following:-

i) Forfeiture of the 'corpus delicti' etc. is a conseouense that necessarily ensues upon the infliction of any punishment for a crime, but cannot be ordered except in the cases expressly laid down by the law in respect of contraventions. (Section 23).

ii) An attempt to commit a contravention is not punishable except in the cases expressly determined by law, whereas in respect of crimes the rule is that an attempt is always punishable. (Section 41 (2)).

iii) The previous conviction of a crime precludes the application of the

Probation of Offenders Act (Chap. 152.) previous convictions of contraventions do not.

iv) A previous conviction of a contravention does not make the offender a recidivist on a subsequent conviction of a crime. (Section 53).

v) The prescriptive period, that is the time within which Criminal action can be taken is of three (3) months in respect of contraventions, but ranges between two (2) and twenty (20) years in respect of crimes. (Section 688).

But how is one to decide? One theory, very prevalent among continental jurists, is that regard must be had to the intrinsic character of the act itself forming the subject matter of the incrimination. According to this theory those acts which are inherently wrongful and produce an actual injury to a private or a public right are crimes, whilst those acts which, though in themselves are harmless and are committed without malice, are yet made punishable to prevent an apprehended danger to public peace and order or the rights of others, are contraventions. It may happen that the private or public right has not in fact been actually hurt: nevertheless, if the act directed to the injury of such right has actually exposed the same to a real and imminent danger, the act is still a crime. On the contrary, an act which merely gives rise to a potential and indeterminate danger, is a contravention. In the case of crimes, the law says, for instance, "do not kill"; in the case of contraventions, the law says: "Don't do anything which may expose other peoples life to danger"; in the former case, the law say: - "do not injure other peoples' property"; in the latter case it says; "Do not do anything from which injury may derive to such property".

But this test is not conclusive. The doctrine is, no doubt, useful as a guide to legislators, in the sense that, in the enactment of the laws, those acts which are morally wrongful and cause actual injury of a grave nature, should be classified as crimes, whilst those which merely represent a potential danger and are not inherently reprehensible should be allotted to the class of contraventions. Yet legislators may sometimes find it expedient for reasons of social utility or expediency to depart from this rule, and therefore, enacted law does not always follow any invariable 'a priori' principle of separation. Which means that 'de jure conditio' any distinction based exclusively or even primarily on the nature or natural consequences of the act itself is fallacious. And in fact in the category of crimes there are facts which are not immoral by ethical standards (for example, Section 84) while, conversely, in the class of contraventions there are facts which are positively morally blameworthy (for example, Section 338 (x) and (y) and Section 339 (k) and (1). Again, there are crimes which do not injure nor expose to actual danger any subjective right (for example, Section 300) while there are contraventions which do cause an actual injury (for example, Section 340). Lastly, there are acts which are dealt with by the law both as crimes and as contraventions, the difference being only one of degree, for example, slander. (Section 252 and Section 339 (e)).

This last observation recalls another theory which found favour with some other writers (Impallomeni, Florian). These make the distinction between crimes and contraventions not one of nature, but one of degree, that is to say, they found the basis of distinction upon the respective importance of the individual or social conditions of existence which the offence affects.

There are offences which directly impinge upon primary and essential conditions of existence (life, liberty, etc.) and occasion a serious disturbance of the legal system: while there are other offences which merely imperil and in a slight degree disturb the legal establishment, or cause only a

negligible damage and interfere with conditions of existence that are of minor secondary importance (comfort, amenities). The former offences constitute crimes, the latter contraventions.

But it is not difficult to see that this second theory is even less conclusive than the first. Every one, of course, senses in his own way that there are conditions of life which are more important than others: but the criterion is much too arbitrary and indeterminate to be made the basis of a legal distinction.

(For other theories, see: Manzini, 'Trattato di Diritto Penale'. 1933, Vol. I, p.535 et seq: Lucchini, 'Ancora e Sempre contro la tripartizione dei reati, in Riv. Pen. Vol.XXII: Impallomeni, 'Il Sistema Generale delle Contravvenzioni, ecc.' In Riv. Pen. Vol.XXVIII: Rocco, 'L'Ogetto del Reato', p.349 et seq.).

The truth would seem to be that in relation to positive law no decisive distinction of principle can be made. The most reliable test is the quality or degree of the punishment which the particular offence attracts, on the reasonable assumption that the legislature has imposed the harsher penalties on those offences which are more serious and the less heavy punishments on those offences of a venial nature of slight importance. In order to avoid all questions, some Codes (for example, the Italian Code of 1931) laid it down expressly that, in case of doubt, the distinction is to be made on the strength of the punishment applicable: "Il progetto assume a criterio distintivo, tra delitti e contravvenzioni, la specie di pena comminata. Adottando tale criterio non ho creduto disconoscere la diversita' ontologica delle due categorie di reati, ne' rinunziare a classificare i fatti antigiuridici nell' una o nell' altra categoria secondo il loro sostanziale carattere; ma ho creduto mettere in evidenza il criterio piu' sicuro' per identificare le contravvenzioni tenuto presente che la lunga ed interessante elaborazione dottrinale e giurisdizionale, che ha seguito l'attuazione del codice del 1889, non e' anocra riuscita a suggerire una formula di distinzione che raccolga adesioni tali da farla ritenere almeno prevalente. In verita' e' da riconoscere che il legislatore classifica i fatti nell' una o nell' altra categoria di reati, non solo in base a principii di scienza giuridica, ma anche secondo necessita' di politica criminale: cosi' che spesso non e' possibile riportare la classifica nell'orbita di una teoria preordinatamente accettata ed applicata". (Relazione Ministeriale sul progetto del Codice Penale, I, p.82).

Our Criminal Code does not lay down any express rule. But at Section 7 it specifies the punishments which are applicable to crimes and the punishments which are applicable to contraventions. If the criterion of punishment is relied upon, it will be easy to judge from the punishment attaching to the particular offence in question whether it should be c~nsidered a cri~e or contravention. It is true that even this test is, in some exceptional cases, negatived in the Criminal Code itself; there are therein offences, being crimes, which are, in certain specified circumstances, made liable to the punishments established for contraventions (for example, Section 237(d), Section 288 and Section 252 (2)). But, as a rule, the distinction based on the kind of punishment can be relied upon.

And it has, in fact, been adopted by our Courts in all cases, one may say[1] in which the question arose for decision. Thus, in re Francesco Azzopardi P.L. vs. Enrico Mizzi (Law Reports, Vol.XXIII, P.1, p.570) His Majesty's Court of Appeal said:

[1] In the case 'Rex vs. Salvu Vella' (28.10.1943) H.M.'s Criminal Court held offences against Regulation 26 of Government Notice No. 223/1940 (combined with Section 24 of the Criminal Code) to be a contravention, notwithstanding the nature of punishment prescribed in Section 10 of Ordinance VII of 1936.

"Il criterio pratico indicato della dottrina e seguito nella giurisprudenza, sia locale che estera, per distinguere i delitti dalle contravvenzioni, e' appunto la qualita' della pena comminata per i vari titoli di reato."

The same rule was followed in the learned judgement delivered by Mr. Justice Camilleri L.A. in re 'The Police vs. Charles Gatt '. (Criminal Court of Appeal, 27.3.1942) where it was decided, on the strength of the punishment applicable, that offences against the Malta Defence Regulations were crimes. (See also decision in re 'The Police vs. Cataldo Vella', Criminal Court of Appeal, 26.11.1943,) Finally, in re 'The Police vs. Joseph Mifsud' (Criminal Court of Appeal, 9.2.1944, per Mr. Justice Harding), a review is made of all previous judgements and the whole matter of the distinction between the two classes of offences is again fully discussed.

PENAL LAWS.

Contents - Necessity - Interpretation.

We have seen that perhaps the most important function of the State is that which it discharges as the, guardian of order, preventing and punishing all injuries to itself and all disobedience to the rules which it has laid down for the common welfare. In the discharge of these functions, the State proceeds by an enumeration of the acts which it considers injurious to the maintenance of order and the common welfare, coupled with an intimation of the penalty to which anyone committing such acts will be liable.

Such enumeration and intimidation form the contents of the Substantive penal laws of the State.

Every penal law, thus, consists of two elements, that is to say, the 'precept' ('preceptum legis') whereby the State prohibits or comands the doing of a certain act, and the 'sanction' ('sanctio legis') whereby a punishment is threatened against the transgressor. Very often - not to say as a rule - the precept, that is, the command or prohibition, is implied in the sanction. Thus, for instance, in the provisions concerning offences against the person, the penal code does not premise the prohibition "Do not.kill" or "Do not cause bodily harm". It defines what constitutes homicide (Section 211 (2)) and what constitutes bodily harm (Section 214) and determines the penal consequences thereof. In all such cases the rule of conduct "Do not kill", "Do not cause bodily harm", to which the law attaches the sanction; is implied in such sanction.

Now, a great body of theoretical writers have maintained that Criminal Law should have its source in Natural Law or Moral Law which supplies the universal rules for the governing of the external conduct of mankind and is said to be written in mans own heart, commanding what is right and prohibiting what is wrong. "Crimimal Law", says Blackstone, "should be founded upon principles that are permanent, uniform and universal, and always conformable to the dictates of truth and justice, the feeling of humanity and the indelible rights of mankind". (4.Comm. 14).

On these principles it might appear that the necessity of the enactment of formal penal laws by the States is not the obvious truism it looks. Man might be left to be guided by tradition and custom and by his own instinctive appreciation of the promptings of reasons and of the general principles of right; and the tribunals might be trusted to dispense justice according to what is naturally right and just in the case in their own eyes.

In simple and primitive communities it is no doubt possible that rulers and magistrates execute judgements in such a manner as best commends itself to them. Early law is conceived as 'Jus' (the principles of justice) rather than as 'lex' (the will of the State). The.function of the State in its earlier conception is to enforce the law, not to make it. The rules to be enforced are those of right which are found realised in the immemorial customs of the people or which are sanctioned by religious faith and practice, or which have been divinely revealed to man.

But as the State grew up and the machinery of Government became more complex, things became different; and in almost all modern countries, legislation by the State has asserted its exclusive claim. This is true of all branches of the law, but is particularly important in respect of Criminal Law.

And, in fact, on the one hand the principles of justice are not always clearly legible by tha light of mere reason: and, therefore, for the sake of uniformity and certainty, it is now universally admitted that Moral Law has no claim to recognition as an independent source of Criminal Law, except in so far as its principles have been recognised as fit for compulsory enforcement by the State through the instrumentality of its laws.

On the other hand, as we have already seen, the State finds it often necessary in the general interest of the community to prohibit or command actions which have nothing to do with. intrinsic rightfulness or wrongfulness. As Professor Malinowski says: "there must be in all societies a class of rules too practical to be backed only by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency." "Crime and Custom in Savage Societies", pp.67-68), These rules must be sanctioned by a definite machinery of binding force.

Hence the necessity of positive enactments by the State whereby it authoritatively declares the rules which it intends to enforce and intimates the penalties which the breach of those rules will entail.

The enactment of such laws is a guarantee of the rights of the individual. Every member of the community has complete freedom of action so long as he does not unjustly interfere with any rights of others protected by the State. And he cannot therefore, be subjected to punishment for anything done by him except in as much as he knew the action to be a violation of a rule of conduct which the State required to be observed. On the other hand, the State cannot have the proof of such guilty knowledge unless it has previously authoritatively declared the rules which it intends to enforce. Such formal declaration is a condition precedent to the application of the sanction in the Courts of justice.

Thus legislation satisfies the requirements of natural justice that laws should be known before they are enforced.

Moreover, the State has the duty of preventing offences before resorting to punishment. The threat of a pre-determined penalty for every breach of the rules of right recognised by the State furthers the interests of social secutity by denying to every potential offender all hopes of a light penalty and thus preventing the commission of offences by operating as an effective restraint.

Finally, such pre-determined penalties safeguard the interests of the offender himself by securing him against the unlimited and uncontrolled discretion of the individual judge.

From what we have been saying, the following basic principles emerge:-

1. No act or omission can be considered as a criminal offence unless it has been so declared by the law of the State. "Nullum crimen sine lege" - "Nullum crimen sine praevia lege poenali".

2. No punishment can be inflicted which is not prescribed by the law: "Nulla poena sine lege". This means: -

a. That the form of punishment imposed by the Court must be one of those which the law permits;

and b. That the offence cannot attract a punishment which is higher than, or different from, that which the law expressly provides.

Thus, enacted or statutory law, that is, the law made by the formal and express declaration of the legislative authority, is - at any rate in our system - the only legal source of Criminal Law. Here, usages and customs have not, as in Civil matters, the force of a subsidiary law. "Consuetudo" in the sense of judicial precedents may still be 'optima legum interpres'; in other words, the "auctoritas rerum similiter judicatarum" may be a helpful guide to the interpretation of enacted law: but custom, as custom, can have no value as an independent source of Criminal Law.

It is now, likewise, the universally accepted doctrine that a law does not become operative through desuetude or obsolescence: these can never accomplish the abrogation of a law in force however old or out of date it may appear to be. Nothing but repeal can disembarass the law of any matter which has become obsolete.

Interpretation.[1]

The operation of enacted law is not automatic. It has to take effect through interpretation, for, in order that the appropriate legal rule may be applied, it is necessary that the law shall be properly construed and interpreted.

The object of all interpretation is to determine the exact meaning of the legal rule, that is to

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say to ascertain the real will and intention of the law in relation to a determinate case. In other words, the purpose of interpretation is to determine what intention is conveyed, either expressly or impliedly, by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it. It was well said: "The law is the will of the legislature and the most furdamental rule of interpretation, to which all others are subordinate is that a statute is to be expounded according to the intent of them that made it."

This being the essential object of interpretation, that is, to ascertain the true meaning of the law, it is clear that from an objective point of view, that is to say, considering it in itself, -apart from the means used and the results obtained, - there cannot be different kinds of interpretation. This can only be good or bad, true or false.

From a subjective point of view, that is, in relation to the interpreter, continental text-writers distinguish three kinds of interpretation which they describe as:

(i) Doctrinal
(ii) Authentic, and
(iii) Judicial

I.Doctrinal Interpretation

"Doctrinal" interpretation has nowadays but an indirect influence on the application of the law. In Roman days, on the contrary, the theoritical opinions of jurists were a direct and objective source of law; and in medieval times effect was given to them to supplement and integrate the rues of law.

One must not confuse, however, this kind of interpretation derived from the writings or opinions of one or more Jurists with those canons of, construction which though indeed collected in text-books ad treatises, have been constantly recegnised and applied by, the Courts and now constitute a 'jus acceptum', legal norms of binding effect.

Authentic Interpretation.

The "authentic" interpretation is that provided by the legislature itself as in what are called "interpretation clauses" of an enactment, or in a comprehensive interpretation law (e.g. the Interpretation Act, of 1975, Chap. 249), or in an opposite subsequent enactment where doubts have arisen as to the meaning or effect of a previous enactment. This kind of interpretation is binding on all: in fact it is hardly strictly speaking a form of interpretation. It is rather a rule of law, the imperative effect of which can completely override and exclude even the obvious and logical meaning of the words or expressions defined. It can give to such words or expressions the meaning it chooses "and not that which would naturally be assigned to them. In the light of this it is - Manzini says - that it, is vain to attempt to fix 'a priori', as certain writers have tried to do, rules for this kind of interpretation, the only limit of which are the powers of the legislature.

A special characteristic of an "authentic" interpretation made by a subsequent law is that,

in so far as it does not change pre-existing law, it has, unlike other laws generally, a retrospective effect, even without any express declaration for the purpose by the legislature. The subsequent law, declaring the meaning and purpose of the previous law, consolidates itself with it without creating any new legal rule. As Tolomei says: - "Nella interpretata e' gia' compresa la interpretativa" (Diritto Penale, p.92). Consequently it applies to all facts and transactions in regard to which there has not been in the meantime a "res judicata" or other irrecovable conclusion. All this of course holds good unless the interpretation law itself provides otherwise. Also it is quite clear that if the interpretation law does not limit itself to declaring the meaning, of the pre-existing law but proceeds to provide for supplying the deficiencies of that law, then in such a case new rules are created which do not by themselves have retrospective effect.

Judicial Interpretation.

But here we are concerned especially with the 'interpretatio judicialis', that is, the interpretation to be give by the courts in the application of the law to the particular cases coming before them.

The chief characteristic of enacted law is its, embodiment in authoritative foramulae. The very words in which it is expressed - the litera legis - constitute an essential part of the law. Hence it is that a process of interpretation is necessary in order that the Court may ascertain the meaning of the legislature through the medium of the authoritative form in which it is expressed. Although at times the meaning, of the law may appear evident, a process of interpretation is always requisite, in so far as the formula, conveying the will of the legislature, has necessarily a general and abstract character and, to adapt it to the individual concrete case, it is in the first place, necessary to determine its precise meaning and import.

This interpretation of enacted law is a science in itself, and we cannot here attempt anything like, an exhaustive survey of it. Some considerations especially applicable to criminal law will be discussed later. But first we will glance at some general leading principles.

Unfortunately, it cannot be pretended that we have any complete, stable and consistent system of principles of statutory interpretation in our law or jurisprudence. Our Courts apply Continental or English rules. The matter is a difficuit one and such rules are not always clear, categorical, stable and consistent. With regard to the English rules, Allen ("Law in the Making",5th ed. p.494) observes: "*This branch of our law exhibits inconsistencies which suggest radical weakness somewhere. This is evident in any of the standard treatises on the subject. There is scarcely a rule of statutory interpretation, however orthodox, which is not qualified by large exceptions, some of which so nearly approaching flat contradictions, that the rule itself seems to totter on its base.*" Complaints of a like kind are not unoftenly also made by continental jurists as to the formulation and applicatien of principles by the Courts: "Generale e' il lamento per l'instabilita' e per la contraddittorieta' della giurisprudenza della Corte di Cassazione, alla quale si e' assegnato il carattere di corte regolatrice", (Manzini, op. cit. Vol. I, p.275).

Nor is there any uniformity in juristic doctrine, because the subject is not easily capable of being resolved by absolute rules: "*Intorno alla interpretazione della legge penale sono discordi le dottrine..... Forse il problema e' arduo a risolversi con una forma assoluta.*"

In spite of these difficulties inherent in the subject, it is perhaps possible to trace some principles regarding which there is, generally speaking, a wide measure of agreement.

Literal and Logical Interpretation.

Literal Interpretation.

We have already said that, of interpretation considered in itself, there cannot be various kinds. But having regard to the means or method used in the process of interpretatation, we may distinguish two kinds which continental writers described as literal or grammatical and logical. The former is that which regards exclusively the verbal expression of the law. It does not look beyond the "litera legis". Logical interpretation on the other hand, is that which seeks beyond the letter of the law for evidence of the true intention of the legislature, or in other words, seeks to determine the actual intention enshrined in this law in relation to the apparent intention resulting from the letter.

Now there is no doubt that the literal interpretation must precede every other, for it must be presumed that the legislature has said what it meant and meant what it said: "nam quorum nomina, nisi ut demonstrarent voluntatem dicentis", "Ita scriptum est" is the first principle of interpretation.

In the process of grammatical interpretation words are primarily to be construed in their ordinary and popular sense unless there should be strong indication that some other meaning was intended by the legislature. "Nec aliter a propria verborum significatione recedendum, quam cum manifestum est id sensisse legislatorem" (Leg. 69 D). In other words, if there is nothing to modify, nothing to alter, nothing to qualify the language which the law contains, the words and sentences must be construed in their ordinary and natural meaning, given to them by usage, regard being had to the time of the enactment of the law. This is particularly applicable to Criminal Law which lays down rules of conduct for all, which all must understand, and where, therefore, it is usual to use ordiary language intelligible to all rather than legal or technical language. As was said by an English Judge: "*In dealing with matters relating to the general public, laws are presumed to use words in their popular sense; "uti loquitur vulgus.*" Sometimes of course, unusual and tecinical meanings of words must be adopted if it is clear that such meanings were intended by the legislature. In the case "Unwin v. Hansen" (1891, 2 Q.B.p.119) **Lord Esher** observed: "*If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.*"

In general it is to be assumed that, no word in the law is meaningless or superfluous, unless this should appear absolutely evident.

Also, unless the contrary intention appears, words importing the masculine gender include females, and words in the singular include the plural and words in the plural include the singular. (Interpretation Act 1975, Chap 249 Sec. 4)

But words are meaningless in isolation, and their context must always be taken into account. "Words", writes **Professor H.A. Smith**, "*are only one form of conduct, and the intention which they convey is necessarily conditioned by the context and circumstances in which they are written or spoken. No word has an absolute meaning, no word can be defined "in vacuo" or without reference to some context. The practical work of the Courts is very largely a matter of ascertaining the meaning of words, and their function therefore, becomes the study of contexts*". Words used with reference to one subject matter or set of circumstances may convey a meaning quite different from that which the same words used with reference to another set of circumstrances and another subject matter would convey. General words admit of indefinite extension or restriction according to the subject to which they relate and the scope and object in contemplation. That is why it is so necessary to interpret the words according to their context having regard to the subject matter being dealt with. Moreover the provision to be interpreted must be examinated as a whole, having regard to the other provisions of the law: "incivile est, nisi tota lege perspecta, una alicua particula eius proposita iudicare vel respondere" (L. 24 Dig I,3). As was said by **Du Parcq L.J.** in "Butcher vs. Poole Corporation" (1942) (2 All E.R. 572): "*It is, of course, impossible to construe particular words in a statute without reference to their context and to the whole tenor of the Act.*"

Now, if upon the literal analysis of the provision according to the rules just outlined, the language is not only plain but admits of but one meaning, the task of the interpreter is clear. Such language must be accepted, without more, as declaring the intention of the lawgiver and to be decisive of it – "index animi sermo". It matters not in such a case what the consequences may be, for, where by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd or mischievous. The duty of the Court is not to make the law but to expound it as it stands, according to its plain and unequivocal meaning: "Non de legibus sed secundum legis judicandum". As Allen remarks (op. Cit. p. 491): "*When the sense gathered frorn the actual words is plain and unambiguous*", - the French rule, and indeed the rule of nearly all countries, is the same as the English – "*the words must be loyally accepted and the law applied accordingly, however inconvenient the consequences*". This principle is well established in our jurisprudence. In re, "The Police vs. Vella" (Cr. App. 27 xi. 1943) the Court said: "*Where the language of the enactment is clear, no interpretation is permissable which is inconsistent with the clear meaning of the expression: for the Court cannot substite its own judgement for the will of the legislature*".

Logical Interpretation.

But language is rarely so perfect as to be absolutely "plain and unambiguous". To adhere to the literal and primary meaning of the words in all cases would be to miss their real meaning in many. As is remarked in **Maxwell** ("On the Interpretation of Statutes" 10th Ed, 1953, p. 17): "*If a literal meaning has been given to the laws which forbade a layman to 'lay hands' on a priest, and punished all who drew blood in the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a person in the street to save his life would have been liable to punishment. On a literal construction of his promise, Mohamed II's sawing the Venetian governor's body in two was no breach of his engagement to spare his head*".

The literal construction then, has in general, but prima facie preference. There are cases in which the "litera legis" need not be taken as conclusive and in which the true intention of the law may be sought from other indications. This happens when the letter of the law is logically defective on account, for instance, of its ambiguity (the word of the law instead of meaning one thing may mean two or more

different things), or its inconsistency (the law instead of having more meanings than one, may have none at all, the different parts of it being repugnant so as to destroy each other's significance), or its incompleteness (the text though neither ambiguous nor inconsistent, may contain some "lacuna" which prevents it from expressing any logical complete idea). It may also happen that the text leads to a result so unreasonable that it is self-evident that the legislature could not have meant what it has said.

In all such cases it is obviously necessary to determine the true intention of the legislature. To arrive at this, continental practice[1] - which we generally follow in the matter - permits inquiry to be made into: -

(a) the aim and object of the law (ratio legis), that is, the principles inspiring it and the mischief or defect for which it is intended to provide (which must not be confused with the transient contingencies of fact which may have occasioned the enactment of the law);

(b) the historical legal background, in particular the state of the law before the enactment to be interpreted was passed;

(c) the parliamentary history of the law or what, in France, are called the "travaux preparatories", (lavori preparatori), that is, the projects or Bills and the expositions of their objects and reasons, the reports on such projects and Bills, and the debates in the Legislative Chambers;

(d)the study of comparative law, that is, the study of those foreign laws which may have had a direct or indirect influence on the law to be interpreted, or deal with the same matter (though it is recognised that this study has but a subordinate and merely complementary importance for the purpose of interpretation.

Now, in general, when the true intention of the law has been duly ascertained, such intention ought to prevail over any inadequacy or imperfection of the letter of the law: "scire leges non est verba earum tenere, sed vim ac potestatem". In Civil matters, no doubt, the Courts of Justice supply these defects in order to give effect to the intention of the law. The rule may be stated to be that, unless the langunse used is absolutely intractable, the Court will reject a strict literal and grammatical construction which leads to manifest contradiction of the purpose of the enactment, or to some inconveniences or absurdity, hardship or injustice not intended. But in Criminal Law the position is somewhat different in certain important respects.

Rules Peculiar to Criminal Law.

In bygone times the Courts allowed themselves the greatest freedom of construction and application even in regard to Criminal Law. Under the guise of satisfying the "spirit" of the law and the true intention of the legislature, they not only often extended the defetive letter of the enactment to cover cases not falling within it, but they also, in the total absence of an express provision of law concerning the

[1] As to the position regarding this in England, see Allen, op. Cit. P. 487 et. Seq. Even continental writers do not consider the practice as always a blessing and advise great caution in the use of that means of interpretation.

matter of inquiry, supplemented the omission by themselves creating new rules of law on the strength of real or fancied analogy. This unlimited licence, which was a real and serious danger to the liberty of the subject, naturally alarmed the philosopher reformers of the eighteenth century. But the reaction carried some of these to an opposite extreme. Thus Beccaria wanted to proscribe every form of interpretation: he preferred the inconviences arising out of a rigid and uncompromising adherence to the letter of the law to those arising out of a lax and variable application of it according to the personal judgement of the individual judge. If the letter of the law left any doubt whatsoever as to its true meaning, it was not for the Court - Beccaria said - but for the legislature to put the matter right.

But it is clear, as we have already said, that to deny to the Courts the right and the power properly to interpret the abstract formula of the statute would amount in many cases to denying them the power and the duty of applying the law. The truth is merely that in criminal matters the freedom of interpretation should be more carerully regulated and that, as Pessina put it, "l'interpretazione deve aggirarsi nel riconoscere che un dato fatto speciale puo' categorizzarsi come realta' concreta sotto l'ipotesi generale ed astratta della legge". (op.cit.p.79).

Modern doctrine and modern practice would seem to follow the rules hereunder.

Interpretation in case of Doubt.

It may happen that the examination of the literal meaning of the word combined with the examination of the intention, leaves the matter in doubt. In such case it is commonly taught that the solution to the problem is provided by the principle "in dubio pro reo", so that a construction is to be applied which appears more favourable to the accused. As **Humphreys, J.**, put it in "Binns v. Wardale" (1946 - K.B. 451) "if an Act of Parliament is so drawn that it is really difficult to say what the legislature intended and what facts came within it, the benefit of that obscurity should be given to the accused person." The rule may be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to express itself clearly. This solution is founded on the excellent consideration that the liberty of the subject is the rule and the restrictions of such liberty represent exceptions to such rule: consequently only such restrictions can be admitted as result without any doubt from the law. If they do not so result, the Court is bound to declare that the law does not contain them.

"Declaratory" Interpretation.

But though the word of the law may be by itself indefinite or capable of more than one meaning, yet the canons of interpretation may establish that one of such meanings, rather than any of the others, answers the intention of the legislature. The resulting interpretation, in such cases, is described by Italian jurists as merely declaratory. Such an interpretation may be narrow (stretta) or wide (lata) and, inasmuch as it arises exclusively out or the indefiniteness or ambiguity of the expression, it must not be confused with the "restrictive" or "extensive" interpretation to which we shall presently refer and which has for its subject matter words or expressions having a definite and precise meaning but which do not exactly correspond to the intention of the legislature.

The expressions of a given provision are to be interpreted in a narrow or a wide sense according as to whether the law intended to use them in the one or the other, independently of the nature of the provision: "Si statum fiat per verbum quod habet plures significationes, intelligitur secundum significationem quae convenit subiectae materiae". As Manzini affirms (op. cit. Vol.I, p.296), this rule holds good even in regard to Criminal Law. "The proposition that penal laws must be construed narrowly is", he says, "wholly mistaken, because it confuses the declaratory interpretation with the question of the extensive or restrictive interpretation".

Of course the choice as between the wide and narrow meanings is possible only where both meanings fairly fit the expression. In other words the Court ought not to do violence to the language to bring the case within it by attributing a meaning which the words do not have. But, conversely, if the wider of the two meanings of which the language is fairly capable better effects the clear purpose of the law, then the Court ought to adopt that wider meaning.

This is not only the modern doctrine on the Continent but appears to have been the general tendency in England for over one hundred years. As far back as 1864, **Pollock, C.B.** said: "*The distinction between a strict construction and a more free one has, no doubt, in modern times, almost disappeared, and the question now is: What is the true construction of a statute? If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law*". (Att. – 'Gen. v. Sillem and others', 2 H.C. 431, pp.509, 510).

Again in "Dyke v. Elliot" (1872) **James L.J.**, delivering the judgement of the Judicial Committee, said: "*Where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument*".

Mr. Sidgwick, in his book on Statutory and Constitutional Law (p.326) says: "*The rule that (penal statutes) are to be construed strictly is far from being a rigid and unbending one; or rather it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment: the Courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced by them, and on the other, equally refusing, by any verbal nicety, forced construction or equitable interpretationn, to exonerate parties plainly within their scope*".

While, therefore, the rule remains that no case must be held to fall within a penal provision which does not fall within the reasonable meaning of its language as well as within the scope and purpose of the enactment, it by no means imposes that a restricted meaning should be imposed on the words to withdraw from the operation of the provision a case which falls both within its scope and the fair sense of the language. This would be to defeat, not to promote, the object of the legislature, to misread the statute and misunderstand its purpose. The sense to be adopted is that which best harmonises with the context and promotes in the fullest manner the object and policy of the legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent and to permit the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.

The modern trend of construction is thus summed up in Maxwell ("On the Interpretation of Statutes", 10th Ed. (1953), p. 284) on the strength of the judicial authorities therein cited: "The tendency of modern decisions, upon the whole, is to narrow materially the differene between what in called a strict and a beneficial construction. All, statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind for it in required by the spirit of our free institutions that the interpretation of all statutets should be favourable to personal liberty and this tendency is still evinced in a certain reluctance, to supply the defects of language or to make out the meaning of an obscure passage by strained or doubtful influences. The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.

Extensive and Restrictive Interpretation.

The question we have just considered must be distinguished from that relating to extensive and restrictive interpretation (interpretazione estensiva a restrittiva). Whereas the former concerns language which, *apart* from the intention of the legislature, is indefinite and capable of various meanings, the latter concerns language which in itself conveys a definite idea and is capable of only one certain meaning but which does not faithfully represent the true intention of the legislature. In any such cases there is a divergence between what the law expresses and what it intended to have expressed. If the letter of the law is stretched, that is to say, given a wider than its natural signification in order wholly to cover what appears to have been the intention of the legislature, the interpretation is said to be "extensive"; if, on the contrary, the full literal meaning is not given to the language of the law in order not to go beyond the intention of the legislature, the interpretation is said to be "restrictive".

Now although divergent opinions have been from time to time propounded by even authoritative writers, the rule commonly accepted is that an extensive interpretation, as above defined, is not permissable in regard to penal provisions, that is, any provisions creating liability or providing punishments. It is not allowable to extend the provision of any such law so as to bring within it any case which is not covered by the reasonable meaning of its language. As we have already said, the liberty of the subject should *have* no limits other than those fixed by the law and, therefore, a provision of law which imposes any such restrictions must *not* be extended beyond the cases which it expressly contemplates. In other words, if the legislature, though intending to cover the case in question, uses language which, in fact, leaves the case uncovered, the Court should refuse to correct the language or supply the defect.

It does not follow that the interpretation must always be "restrictive" as is sometimes very wrongly said. As Manzini says: "Fallace e' la regola, tanto diffusa nella pratica, per cui le leggi penali..... dovrebbero sempre essere interpretate restrittivamente". As we have already said, the Court is not bound to, indeed must not, narrow down the natural and ordinary meaning of the words; but must, as a general principle, accept the meaning which is consonant with the ordinary use of language, having

regard to the intention of the legislature. Should there be sufficient indications that the words used are in their natural meaning wider than what the legislature intended, then, indeed, the interpretation must be restrictive. In other words, a penal enactment cannot be extended on the strength of the "spirit of the law" to cover cases which do not fall within the express language; but it must be narrowed down if this should appear to be in accordance with the spirit: "*Non si punisca l' azzione che non e' colpita dalla lettera della legge, quantunque a voi sembri essere nello spirito, perche' manca nell' agente la volonta' criminosa; non si punisca l' azione che il legislatore non vuole calpire, quantunque essa cada sotto la lettera, perche' vi manca la volonta del legislatore*".(Carrara, "Programa". para. 890n).

But the rule that an "extensive" interpretation is not permitted must not be understood as preventing the extension of a provision to other cases which, though not expressed therein, must 'a fortiori' be considered as comprised in the case expressly mentioned. Otherwise the law would be brought to obviously illogical and absurd conclusions. Thus, for intance, Section 203 of our Criminal Code deals with the crime of bigamy which is committed by a person who, being still lawfully married, contracts a second marriage. But no one will doubt that this provision extends also, and with stronger reason, to the case of a person who, while the first marriage still subsists, contracts a third or other marriage. It is clear that the word "bigamy", which properly signifies being married twice is used in the law synonimously with the word "polygamy".

Analogy.

In particular a penal law cannot be applied by analogy.

Analogy must be distinguished from an extensive interpretation. In fact, it presupposes that the case in hand is not, even impliedly, covered by a legal provision. Strictly speaking, analogy is not a form of interpretation at all.

In spite of the fact that legislative techniques suggest the use of the most general and comprehensive formulae and avoid casuistry, it is inevitable, owing to the limitations of human foresight and the ever increasing complexities and developments of social relationships, that certain cases which, indeed, require to be piovided for, remain in fact out of the contemplation of the legislature. These omissions in the law are usually described as "lacunae" or "casus omissi ". Now analogy seeks to supply these omissions and to provide a rule to govern a case which has not been either expressly or implicitly dealt with by the 1aw, by relating it to a similar case which is governed by a legal rule and applying to it the principle on which such legal rule is based.

This method of supplying omissions in the law is generally accepted without question in civil matters. If a dispute cannot be decided with reference to a precise provision of law governing the case, regard is had to provisions which regulate analogous cases, and, indeed should there not be any such provisions or should they not provide a solution, the dispute may be decided in accordance wtth the general principles of law. The judge in a civil action is called upon to determine the rights and obligations of the contending parties and he cannot abstain from deciding the issue merely because the written law is silent. Clause 37 of Chapter VIII, Book I of the Code De Rohan expressly laid down: "Ne' potranno (i giudici) servirsi di veruna potesta' arbitraria quante volte non sara' regolata da quello che si dispone dalle leggi municipali, ed in loro difetto dalle leggi comuni, e nei casi controversi e nei' dubbi dalle opinioni abbracciate nei supremi e piu' accreditati Tribunali". it has been held that this provision is still aptilicable

(v. Law Reports, Vol. XVIII, P.II, p.120; Vol. XXVI, P.I, p.181).

In Roman times analogy played a most important part in the formation even of Criminal Law, precisely because penal legislation remained for many centuries scant and rudimentary. *We* have already seen what use and abuse of analogy in regard to criminal matters was made by the Courts in most countries up to, say, the eighteenth century. And yet **Farinaccio** had already written: "*Statuta et constitutiones poenales ultra eius verba non extenduntur nec trahuntur ad casus similes*" (Cons. LXV, n.23). In modern times the application of penal laws by analogy is proscribed in all civilised systems of positive law. If the case before the Court has not occured to the mind of the legislator and is not dealt with by the law, the Court cannot supply the deficiency by invoking a rule of law laid down in respect of a similar case. The maxim "ubi eadem ratio ibi idem jus" has no application in such cases. Thus, if an enactment makes provision as to sheep which, in common sense, ought to have been extended to goats also, this is the affair of the legislature, not of the Courts. The reason for this is the already quoted principle that penal laws cannot be extended beyond the cases expressed therein, in consequence of the other fundamental principle: "nullum crimen sine loge", "nulla poena sine lege".

But, of course, not every provision contained in the Criminal Code or other law containing provisions of Criminal Law, is to be considered a "penal law" in respect of which analogy is prohibited. That expression in this connection refers only to those provisions of Criminal Law which create offences or prescribe restrictions or punishments. "Il divieto dell' applicazione della legge penale per analogia deve non prendersi alla lettera, bensi' intendersi dentro confini razionali. Rispetto alla dichiarazione dei reati e delle pene il divieto deve funzionare in modo completo ed assoluto: ma le lacuna diverse da codeste, che eventualmente si riscontrino nella legge, possono essere colmate in quanto il sistema della legge lo comporti". (Florian, op. cit. Vol.I, p.162; v. also Manzini, op. cit. Vol.I, p.309). Instances of application of provisions of the Criminal Code (not being "penal provisions" as above defined) by our Courts are the judgements which extended to H.M.'s Criminal Court and to the Court of Magistrates as a Court of Criminal Judicature, the power to order evidence to be taken abroad on commission which expressly is conferred, only on the Court of Magistrates as a Court of Enquiry.

The elaboration of our doctrine of "formal concurrence" of offences was also, in effect, an application by analogy of doctrinal principles and legislative precedents followed in other countries.

Finally, it must be observed that the prohibition of analogy does not prevent the application of even penal provisions of old laws to new things which, for the excellent reason that they did not then exist, could not have been contemplated by the legislature, but can yet be brought within the language of the old law. "*New social conditions of scientific discoveries may create new judicial requirements for which it is certainly permissible to provide by adapting the existing laws, but not beyond the limits permitted by the text of the laws themselves*" (**Manzini**, ibid. p.278). In such circumstances, although the particular case arising for decision was not, indeed could not have been, specifically included, yet it is possible to apply the law to it if it falls within its general indication. In England, for some time the view was that, while remedial laws may extend to new things not "in esse" at the time of making the statute, penal laws may not. But, as **Maxwell** observes, (op.cit. p.272), "*this degree of strictness may be regarded as extreme. It could hardly be contended that printing a treasonable pamphlet was not an offence against the Treason Act, 1351, because printing was not invented until a century after it was passed, or that it would not be treason to shoot the monarch with a pistol*". As illustrations of the more reasonable view he quotes the case in which it was held that the repealed Engraving Copyright Act, 1734, which imposed a penalty for piratically engraving, etching, or otherwise,

or in any other manner copying prints and engravings, applied to copying by photography, though that process was not invented till more than a century after the Act was passed; and the case in which bicycles were held to be "carriages" within the provision of the Highway Act, 1835, against furious driving, and tricycles propelled by steam to be "locomotives" within the Locomotives Act, *1865*, though not yet invented when those Acts were passed.

Operation of Criminal Law.

- Limitations by time.
- Limitations by territory.
- Extradition.
- Exemption of certain persons.

Positive law is not, like the principles of Natural Justice on which it is largely founded, immutable, universal and absolute. Its force is limited by time (because human laws are altered from time to time), and by territory (because as a general rule it applies only in the country in and for which it is enacted). Moreover, certain exceptions are made to the principle of the equality of all men in the eyes of the law.

I. Limitations by Time.

The life of every penal law, like that of any other law runs from the date of its commencement to the date of its expiration or repeal. Its binding force is limited within the span of its period or validity.

A law comes into being as soon as it is enacted in due form by the authority in which the function of legislation is vested. In England, the present rule is that a Statute, as soon as it has received the Royal Assent, unless a future date is fixed for the commencement of its operation (as is frequently done), is at once applied by the Courts; it is binding on all the, Kings' subjects at once. The same rule applies in Malta. In fact, under our Letters patent of 1947, Bills passed by the Legislative Assembly become law as soon as the Governor assents thereto in the name and on behalf of His Majesty and signs the same in token of such assent, or as soon as His Majestys' assent is given by an Order in Council or through the Secretary of State. Any *law* enacted by the Governor comes into operation on the date on which the said assent is given unless another date is appointed for its commencement.

But natural justice requires that the law should not be enforced before it has been made known. This is why continental theory requires that every law passed by the legislature and declared a law in due form, must be ordered to be published before it comes into operation. In England and in Malta, publication of the law is not a condition precedent to its operation; but it is, of course, well known that arrangements are all the same made for giving publicity to every law newly enacted. Section 38 of our letters patent used to provide that the Governor shall cause every law enacted thureunder to be published in the Government Gazette for general information. (In this connection it is not amiss to mention that Acts of the British Parliament and Orders-In-Council applicable to Malta did not require any special publication in the Maltese Islands in order to be effectual therein. V. "Rex vs. Joseph Abdilla et", 4.XII.1943, which quotes with approval "Dr. Parnis vs. Arpa" reported on pages 36-37 of Vol. XIII of our Law *Re*ports.

Once having come into operation, the law is presumed to be known to all those who owe obediance thereto and it remains effectual until it either expires or is repealed. We have already seen that modern doctrine does not recognise to custom any power to derogate from a Statute in force: a Statute does not go into disuse by a posterior contrary custom or through obsolescence; it cannot be set aside or modified except by another law which repeals or amends it. The repeal may be expressed or implied: the latter takes place when the new law is inconsistent with the existing law: "lex posterior derogat priori".

Now from the rule that a law is binding when its existence is presumed to be known, there follow two principles: -

1. Ignorance of the law is no excuse for breaking it: "ignoratia juris neminem excusat";

2. The law operates for the future, and not retrospectively: "lex non habet oculos retro".

These two principles which are common to all kinds of law have a particular importance

and receive special application in the field of criminal law. Let us examine them further.

1. We said that the law is presumed to be known when it has been duly brought into operation. The extent to which in criminal matters this presumption should apply has formed the subject of a wide discussion by both old and modern writers. Roman jurists made a distinction between what they called 'probrum natura' and what they termed 'probrum civiliter et quasi more civitatis' whence arose the notion of 'delictum juris gentium', that is, of those crimes which naturally, according to the dictates of reason, are considered everywhere and at all times inherently wrongful. Later writers (**Donello** "De jure Civili", Lib. I, tit.22; -- **Cremani**, "De jure Crimini" Lib. I, C 3, p. 9) taught that an exception to the rule that "ignorance of the law is no excuse" should be admitted in respect of those offences which are merely an infringement of the positive law of the State and not also of the rules of Natural Justice.

Modern legislations either make no exception at all, or make exceptions in very special cases of minor importance and apply the rule to every individual subject to the law of the State. The exceptions that are made in some systems of law concern offences consisting in the breach of local or police laws when committed by foreigners who are newcomers to the place.

In English legal practice, the above mentioned rule is absolute, and the presumption irrebuttable (Juris et de jure) no inevitable ignorance or error will serve for justification. An alien who commits a criminal offence is punishable in the same way as a British subject, and his ignorance of English Law is no defence, though it may be a ground for mitigation of punishment (**Harris**, op. Cit. P. 35.) this rule, while in general sound and plainly necessary as a matter of utility, does not seem, in its full extent and uncompromising utility, to admit of any sufficient justification.

We shall revert to this subject in considering Mistake, generally as a ground of defence. (See Mistake of Law & Mistake of Fact).

2.Already in Roman days it waslaid down that the laws provide for the future, and not for the past (L. 7, C. 'De Legibus,' and with particular reference to criminal liability, Ulpian wrote that that wrongs should not be subjected to the punishment imposed by the law in force at the time of the trial, but to the punishment prescribed by law at the time of the commission of the wrong (L. 1. Pr. 'De Poenis'). Canon law applies the same principles which have since been substantially accepted by the great majority of modern authorities and in almost all systems of positive law.

In fact, legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and not to change the character of acts done upon the faith of an existing law. In England, says Allen, ('Law in the Making,' 2nd Edition, p. 216), there is no principle known to the law which actually prohibits such legislation: but an Act to make that act unlawful which was lawful when it was done would be regarded so unfavourably that it may be considered for all practical purposes prohibited.

An apparent exception to the rule that a penal law cannot have retrospective effect occurs where a new law enacted after the commission of the offence is less severe or more advantageous to the offender than the law in force at the time the offence was committed. The hypothesis is twofold: -

(i) the law against which the offence was committed is subsequently repealed, so that the act is no longer criminal;

(ii) the law against which the offence was committed is subsequently amended or changed so that, though the act is still criminal, the punishment or the conditions of liability and prosecution are varied.

i. The principle accepted in continental doctrine and practice, which we follow in this matter, is that, if the law on which the charge is framed is repealed without any qualification while the proceedings are still pending, such proceedings fall and no sentence against the accused may be pronounced. If before the man is tried the legislature cancels the criminal character of the act with which he stands charge, there is no longer any justification for inflicting punishment upon him. The action of the State, in repealin the former law which prohibited the act, clearly shows that the public welfare are no longer endangered or harmed by such type of act, and that therefore , the State has no longer any interest in repressing it, and consequently it has no right to punish it.

Older writers took the view that the principle constitutes an exception to the rule that penal laws should be exclusively prospective. Their doctrine was that the repealing law is given retrospective application to the matter of inquiry arising under the repealed law, by way of an indulgence to the accused. But modern writers do not accept this explanation, and contend that the principle in question has a true juridical foundation. Their argument is that, rother than an exception to the rule of non- retroactivity with regard to the new law, the said principle is an affirmation with regard to the former law, of the other rule that a law cannot operate after its repeal. In fact, in the hypothesis under discussion, though the liability was contracted while the former law was still in force, the prosecution and sentence would be carried on and pronounced after such law was repealed. So that, if such law were to be applied to such prosecution and sentence, it would be given an effect beyond its legal limit of operation. It is thus not by way of an equitable retrospective application of the new law, but rather on the grounds that the operation of the old law cannot extend beyond its repeal (divieto di ultra-attivita'). In this hypothesis, criminal proceedings cannot be maintained in respect of the act which, at the time of the trial, has ceased to constitute a criminal offence.

Now, 'quid juris' if the law on which the charge was framed is repealed after the offender has already been tried and sentenced? There is no unanimity as to the reply to be awarded to this question. There are those who maintain that even in such case the repeal should have the effect of cancelling the effects of the conviction and of remitting automatically any unexpired or outstanding portion of the sentence or penalty. Thus, Article 3 of the Italian Code of 1889 expressly laiddown that "if a new law cancels from the class of criminal offences an act which was considered as an offence by the previous law, all the effects of the trial and of the sentence shall cease ipso jure"[1]. It is stated in support of this view that it would be unjust to continue to punish the prisoner for his act at a time when the State does not consider it any longer necessary to attach any penal sanction to that kind of act.

The opposite view is that the repeal should have no legal effect on the result of a final and absolute judgement. This solution appears to be more acceptable and is more commonly adopted in modern systems of law. In the absence of an express provision in our Criminal Code on the lines of Section 3 of the aforementioned Italian Code of 1889, we are bound to say that, in Malta, the repeal of a law does not in any way affect, as of right, any judgement passes thereunder which has become a 'res judicata'. The only remedy the prisoner can have in such circumstances is the exercise in his favour of the

[1] Vide Article 2 of the Code of 1930.

Prerogative of Mercy (Section 515 of The Criminal Code).

If on the date of the repeal, an appeal from the sentence or conviction is still pending, then the principle above stated concerning the effect of repeal on pending proceedings, applies.

We shall presently see that though this principle is not expressed in terms of any provision of our law, it can be inferred from, and has been applied by our Courts on the strength of Section 27 of the Criminal Code which contemplates the hypothesis we are now proceeding to consider.

ii. This concerns the effect of a subsequent law (that is, a law enacted subsequently to the commission of the offence) which does not canccel the criminal character of the act, but alters the law on which the charge is framed by varying the penalty or the conditions of liability or prosecution in respect of that act.

The 'communis opinio' among continental writers is that where the law in force at the time of the commission of the offence and the subsequent law are different, the offender should be dealt with according to the law which is more favourable to him. This means that if the law in force at the time of the trial is less favourable to the accused, than the law in force at the time of the commission of the offence, it is the latter law that should be applied retrospectively to his prejudice. If, on the contrary , the new law is more fovourable to the accused than the law which was in force at the time the offence was committed, then it is the new law that should be applied, for if the old law were to be applied, it would have as to the excess of punishment or other aggravation, an effect beyond its limits of valid operation.

Section 27 of our Criminal Code provides that "if the punishment provided by the law in force at the time of the trial is different from that provided by the law in force at the time when the offence was committed, the less severe kind of punishment (Old Italian Text: "pena di qualita' meno grave,") shall be awarded.

In practice it is sometimes difficult to decide which of the two punishments is 'less severe'. In this connection, regard must chiefly be had to the nature or quality of the two punishments, rather than to their duration. Every punishment causes a suffering and deprives the offender of some right: therefore, of two punishments, that one is less severe which causes less suffering and deprives the sufferer of a less important right. It is only when both punishments are of the same nature or quality that the longer or shorter termtherof is a truly decisive factor in comparing their severity. An interesting point arises where the subsequent law lowers the 'maximum' of the other: such a procedure would be an infringement of both laws and not the application of the more favourable law. What should be done is to assess the penalty which under each of the two laws would be adequate to the fact as proved with all its circumstances, and then to decide which is the less severe on a comparison of two results. (v. **Pessina**, op. cit. P. 87; **Canonico**, 'Del Reato e della Pena in Genere', p. 96; **Roberti**, 'Corso Completo di Diritto Penale', Vol. II, p. 31, §312n)

The above quoted provision of our Criminal Code applies 'expressis verbis' where the difference is between the punishment as at the time of the commission of the offence and the punishment as at the time of the trial. This means that if, when the new law reducing the punishment comes into force,

proceedings in respect of the offence have already been definitely concluded, such new law does not affect the sentence already awarded: saving, of course, even in this case, the Prerogative of Mercy (s. 515). If however, when the new law comes into operation, an appeal from the sentence is still pending, then the accused is entitled to the benefit of the less severe punishment. (v. Criminal Appeal 'The Police vs. S. Chircop et', 13.XI.1943; Roberti, op. cit. Vol. II, § 315).

An interesting judgement, explaining the true meaning and effect of the said Section 27 of our Criminal Code was delivered by H.M.s' Criminal Court in its appellate jurisdiction in the case 'The Police vs. Agostino Bugeja', Vol. XXIV, P. IV, p. 941). It was there held that, although the said section contemplates only the case in which the punishment provided by the law in force at the time of the trial is different from that provided by the law at the time of the commission of the offence, and no express provision exists concerning the case in which, at the time of the trial, the act complained of has ceased to be an offence, nevertheless, 'arguendo a fortiori', from the section, it is clear that the accused should go free from all punishment in the latter case (as we have already seen). Sir M.A. Refalo C.J. said: "*L'interpretazione del principio sanzionato col detto articolo 27 delle nostre Leggi Criminali, che cioe', quando vi ha differenza fra la legge penale anteriore e la nuova, un' azione commessa prima dell' attuazione della legge nuova va sottoposta a giudizio posteriormente, deve essere giudicata con quella fra le due leggi che nel confronto appare piu' mite, non deve intendersi letteralmente ristretta al solo caso in cui la legge posteriore commini in una pena meno grave, ma di logica, e di giustizia deve intendersi anche al caso in cui la legge posteriore dichiari che il fatto punibile sotto la antica legge non costituisce piu' reato: di logica perche' moggior mitezza puo dirsi non solo per riguardo a quella legge che commini una pena minore, ma eziandio per riguardo a quella che non commini alcuna; di giustizia perche', la legge non puo contraddire se stessa per dare efficacia retroattiva alla legge posteriore solo quando questa stabilisce una pena meno grave e negare di tale efficacia retroattiva alla legge posteriore la quale, piu che diminuire, elimina qualsiasi pena*".

Now the principle we have stated, namely, that as between the law in force at the time of the trial and the law in force at the time of the commission of the offence, that which is the morefavourable to the accused shall be applied, holds good also – according to the most generally accepted writers – where the conflict is between more than two succeeding laws. In other words, if between the law in force at the time of the commission of the offence and the law in force at the time of the trial, there has been another law dealing with the same offence, which was more favourable to the accused then either of the other two laws, then it is that intermediate law which must be applied. (**Pessina**, ibid; **Canonico** ibid.) the reason usually given in support of this solution is that if the accused had been brought to trial with greater despatch, he would have benefitted from that milder law; he cannot therefore be deprived of that benefit through the slow motion of the machinery of justice. But this reason is far from convincing. Infact it is probably true to say that there is not any true juridical justification for the application of the intermediate law, and that this is merely a concession granted to the accused solely 'humanitatis causa'.

In conclusion it needs hardly be said that the principles above set forth concerning the application of the most favourable law may be set aside by an express provision in the repealing or amending law. This is, in Malta, commonly done, especially in respect of enactments which operate for a short period at a time, and are at short intervals amended or repealed, or re- enacted. In such cases the necessity is obvious of leaving unprejudiced any liability or proceedings incurred or instituted under the law so amended or repealed.

In England, the general rule is now, that the repeal of a Statute has no effect upon pending proceedings. Prior to 1889, by the unqualified repeal of the Statute on which an indictment was framed, the proceedings fell and no judgement could be pronounced. A prisoner indicted for an offence against an Act which was repealed after the offence was committed, but before the prisoner was tried, could not be sentenced under the repealed Act. But as to Statutes passed since 1889, the Interpretation Act, 1889 (52 & 53 Vict. C. 63, S. 38, § 2) provides that where an Act "repeals any other enactment, then, unless the contrary intention appears, the repeal shall not.....(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding or remedy in respect of any such.....penalty, forfeiture or punishment as aforesaid" and that "any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed". Particular clauses to the like effect were common in prior Statutes. (**Archibold**. "Pleading, Evidence and Practice in Criminal Cases", 1931)

The scope of operation of Adjective Criminal Laws or laws of Criminal Procedure will be considered more fully in the chapters concerning that subject directly. It is here sufficient to say that in matters of procedure, the general rule is that the law to be applied is always that in force at the time of the trial, notwithstanding that at the time of the commission of the offence, the mode of proceeding may have been governed by a different law, and irrespective of whether such former law was more, or less favourable to the accused.

II. Limitations by Territory.

According to modern ideas, a system of law applies not to a given race, but to a given territory. We speak not of the Law of the Maltese or the Law of the English, etc. but of the Law of Malta and the Law of England. The proposition that a system off law is in force in, and belongs to a defined territory, means that normally, in the absence of special circumstances, it applies to all persons, things, acts and events within that territory and does not apply to persons, things, acts and events elsewhere. This refers to every system of law generally. The general rule is that "extra territorium jus dicenti impune non paretur". With reference to Criminal Law in particular, the above principle means that it normally applies to all offences committed within the territory, and does not apply to offences committed elsewhere. To this general rule there are many exceptions: there are several offences with which the Courts of the State will deal and to which they will apply the law of that State, although committed elsewhere. These exceptions however, do not affect essentially the the general principle that Criminal Law is territorial in its nature and application.

While this general principle is now universally accepted, the question as to which exceptions to it should be admitted has been the subject of controversey and has been variously settled in practice. Indeed, one school of thought would have it that criminal jurisprudence of each State should be absolutely and exclusively 'territorial' withoutany exception. The slogan of this school of thought, of which **Beccaria** was the chief exponent, is that *"the place of punishment should be the place of the commission of the offence, and no other"*. It denies to the State any jurisdiction to deal with and punish offences committed outside its territory, under whatever circumstances.

Now it is clear that this theory of territorial jurisdiction, in this rigid and uncompromising form, is inadequate to secure the due punishment of crime. Its insufficiency to provide for the punishment of criminals who have escaped from the territory in which their offence was committed is only partially redressed by Treatises of Extradition, under which such offenders are returned to the 'forum delicti patrati'. Moreover, it fails to provide for the punishment for certain offences which one State may have, to the exclusion of all others, a sole interest in repressing or punishing, although committed outside its territory.

The 'territorial' theory, therefore needs supplementing by other principles. Three main theories have been propounded with a view to supplementing the deficiencies of the 'territorial' theory: -

1. The first of these, which may be described as that of 'Cosmopolitan Justice' looks merely at the 'forum deprehensionis', ascribing to each State, the right of punishing any criminal who may come within its power. It is founded on the principle that a criminal offence is a wrong everywhere, and that therefore, the offender ought to be punished wherever he takes refuge, because it is the duty of all the States to aid each other in the maintenance of the universal law of order. An eminent exponent of this doctrine was Carrara who, affirming the solidarity of all States in their obligation of maintaining law and order and the rules of right, observed that it is indifferent whether the sacred mission of vindicating such rules of right is carried out by this or that State, as all States are equally the instruments of Supreme Law of Order which requires the punishment of wrong- doing.

This theory has long found favour with reference to pirates on the ground that they have thrown their subjection to any political authority. Persons guilty of piracy 'jura gentium' are treated as the common enemies of all mankind, and any nation that can arrest them may exercise jurisdiction over them, whatever their nationality and wheresoever their crime may have been committed, even if within the territorial waters of some other nation. (Vide Kenny, op. cit. p. 417).

But the exponents of the theory under discussion claim for it a far wider application. **Vattel**, for instance, extends it at all "*ces scelerants qui, pour la qualite' et la frequence habituelle de leurs crimes, violent toute surete' publique et se declarent les ennemis du genre humain*". (Droit de Gens, I, § 233). Others, as we have said, wish to see it applied in respect of all serious crimes generally. The Italian Code of 1889 contains a provision for the punishment of serious offences committed abroad by aliens in case the State to which the alien belongs or in which the offence was committed shall have refused to take him inextradition, with a view to punishment (Art. 6, paragraph 3). A more or less similar provision is contained in the Italian Code of 1930 (Art 109.)

Now, the theory of 'Cosmopolitan Justice' for the purposes of general application, belongs to the ideal, rather than to the real. Its adherents do not disguise the serious practical difficulties which, at the stage civilisation has reached, or will ever reach, impede its general application (V. Canonico, op. cit. p. 101). The laws of the different States vary considerably as regards both substance and procedure: and in any case, the function of the social punishment in accordance to modern ideas – as we shall see more fully hereafter – is not merely, if at all, to satisfy the demands of retributive justice by causing a suffering to the wrongdoer on the grounds that he has done wrong. So that the social punishment may be justified, it is essential that it should be necessary for the maintenance of law and order within the State whose laws

have been violated.

2. According to the second theory, which may be described with Professor Holland as the 'Personal Theory of Jurisdiction', ('The Elements of Jurisprudence', p. 401), each State has a right to the obedience of its own subjects, wheresoever they may be. It follows that a subject may be tried on his return to his own country, or even in his absence, for an offence against its laws committed while within the territory of another State. This theory is variously applied in practice. England and the United States use it but sparingly as introducing a very limited list of exceptions to the standard principles of territorial jurisdiction. It is thus provided by Act of Parliament that a British subject may be indicted for murder, manslaughter or bigamy whether within the Kings dominion or without. Besides these, there are a few other exceptions made by modern Statutes, empowering the Courts in England to exercise jurisdiction over English subjects who commit certain specified offences even upon foreign soil. (For a list of these, vide. Kenny, op. cit. p. 419). But as a general rule, England and the United States prefer in nearly all cases, to adhere to the principle that crimes are local matters to be dealt with where they are committed.

The Continental States agree in punishing offences committed abroad by a subject against the Government or Coinage of the country to which he belongs, but differ widely in their treatment of offences of other kinds. Thus, the French Code of 1808 punished offences committed abroad by Frenchmen against Frenchmen. The Italian Code of 1889 punished acts of its subjects committed abroad when they constituted offences of a certain gravity. We shall see that this 'Personal Theory of Jurisdiction', has, to a limited extent, been adopted also in Maltese Law.

3. the third theory, described by Professor Holland as the 'Theory of Self- Preservation', is in some Continental Systems, considered in certain cases to confer a jurisdiction which, since it is neither 'territorial' nor 'personal', has been called 'quasi territorial'. It allows that the Courts of a State may punish offences, although committed not only outside its territory, but also by persons who are not its subjects. Such jurisdiction is usually asserted with reference to offences against the Government of the State, or against its public credit.

The French Code, as revised in 1866, provided for the trial and punishment of any alien who, having committed abroad, an offence against the safety of the State, or the offence of counterfeiting the States Seal, or an offence against the French Coignage or Paper Money, came afterwards, voluntarily or by means of extradition, within the French territory. The Italian Code of 1889 contained similar articles.

At its Brussels session in 1879, the 'Institut de Droit International', after much discussion, adopted a resolution to the effect that every State has the right to punish acts committed outside its territory and by foreigners against its Criminal Laws, when such acts constitute an attempt upon the social existence of the State concerned, or endanger its security, on condition that such acts are not provided for by the Criminal Law of the State in whose territory they have been committed. The 'Institut' rejected a resolution extending the right to other cases. The substance of the said resolution was again affirmed by the 'Institut' at its meeting in Munich in 1883. The question was again studied by the League Codification Committee in 1926. As we shall see, this theory finds no application under Section 5 of our Criminal Code.

Now it is obvious that the adoption by a State of one or another of these theories of jurisdiction, or of a combination of several of them, will determine not only the exercise of its own criminal jurisdiction with reference to a given set of acts, but also its recognition of the rightfulness of the exercise by other States of their jursidiction with reference to the same set of acts. In cases where it recognises the concurrent competence of several States, it may or may not regard the decision of the Court of any one of them as final, so as to give the offender the benefit of the maxim 'ne bis in idem'. (Section 527 of the Criminal Code). Provisions to this effect arenot uncommon in Continental Codes. (v. Article 8 & 9, of the Italian Code of 1889 and corresponding articles in the Code of 1930. In English Law there is authority for saying that an aquittal by a competent jurisdiction outside England, is a bar to indictment for the same offence before any tribunal in England – v. Archbold, op. cit. p. 163).

Let us now examine the system adopted by Our Law. Section 5 of our Criminal Code provides that: -

> 5.Criminal proceedings may be instituted in the Island of Malta and its Dependencies, according to the laws thereof: -
>
> (1) Against any person who shall commit an offence in the Island of Malta and its dependencies, or upon the sea in any place within the territorial jurisdiction of the Island of Malta and its Dependencies;
>
> (2) Against any natural born or naturalised Maltese, who shall commit an offence upon the sea beyond such limits, on board any vessel or boat belonging to the said Island of Malta and its Dependencies;
>
> (3) Against any natural born or naturalised Maltese, who shall have in any other country committed an offence against the safety of the Government, or the offence contemplated in Section (63, 64, 65 and 131), or forged any Government Debentures mentioned in Section 203 of this Code, or any other offence against the person of a subject of His Majesty, provided that he shall not have been tried for the same out of the Island of Malta and its Dependencies;
>
> (4) Against any person who, being in these Islands, shall become a co-principal or an accomplice in any of the crimes mentioned in Section 312, although committed outside of these Islands.

It will be seen at once that the basis of this system is naturally the 'territorial' theory: but in paragraph 3, important concessions are made to the personal theory of jurisdiction.

Before proceeding to examine the above provisions in some detail, it is not amiss to point out that they enumerate only the cases in which proceedings can be taken in these Islands, in respect of offences against the laws of these Islands, that is, all laws whether of the local legislature or of the Imperial Government or Order-In-Council in force in these Islands. They do not include those other cases

in which the local Courts may exercise jurisdiction in pursuance of powers vested in them by or under certain Imperial enactments.

Section 5, Paragraph 1.

In accordance with the principles of the territorial nature of Criminal Law, it is here provided that criminal proceedings can be instituted in these Islands, according to the laws thereof, against any person who commits an offence in these Islands or upon the sea in any place within the territorial jurisdiction of these Islands. This provision implies that: -

a) within these Islands, there is no place which is not subject to the operation of our Criminal Law, and to the jurisdiction of our Criminal Courts. The right of 'Sanctuary' enjoyed by certain sacred places, by retiring to which the offender was sacred against arrest, was abolished from these Islands by Proclamation No. VI of 1828, which laid down that "no local privilege or immunity whatever shall be in any manner available to prevent due execution of the law in criminal matters". In any case, in which a person who has committed, or is suspected to have committed, an offence shall seek refuge in any place formerly considered as affording sanctuary, any officer of the Executive Police, shall demand the fugitive at the outer door or gate of such place of refuge, and if the fugitive is fortwith given up, the said officer shall not pass within such outer door or gate; but if the fugitive is not given up on demand, then the Police Officer can enter and search the place and remove the fugitive with the least possible scandal and disturbance;

b) no person within these Islands – saving the exeptions to be mentioned later on – is exempt from the operation of our Criminal Law and from the jurisdiction of our Courts by reason of his occupation or profession, or by reason of his rank, whether civil or ecclesiastical, military or naval, or by or on account of any other privilege (v. Proclamation No. V of 1928, which, however, provided that "if it shall become necessary to execute any temporal process against any ecclesiastical person, all due regard shall be had to the sacred character of such person.

c) Foreigners or non- Maltese British Subjects, whether domiciled in these Islands or resident therin or merely in transit, are amenable to the Criminal Law and jurisdiction of these Islands, in respect of offences committed within these Islands or the territorial waters therof, in the same manner and to the like extent as natural- born or naturalised Maltese,

d) It makes no difference whether the person injured or aggrieved by the offence be a Maltese, or a non- Maltese British subject, or an alien.

e) Where the offence is committed at sea within the territorial waters of these Islands, no distinction is made as to the nationality or port of registration of the ship. (The special treatment accorded to ships of war under International Law will be mentioned presently).

As to territorial waters, the Statute 41 & 42 Vict., C. 73, passed by the British Parliament on August 16, 1878, provides that an indictable offence committed by a person, whether he be or be not a subject of Her Majesty, on the open sea, within such part of the sea adjacent to the coast of the United Kingdom, or to the coast of some other part of Her Majestys dominions, as is deemed by International Law, to be within the territorial sovereignty of Her Majesty, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who has committed such offence may be arrested, tried and punished accordingly by British officials.

"Within the jurisdiction of the Admiral", means, for the purposes of this Act, any part of the open sea within the marine league of the coast, measured from low- water mark.

Subsequent Statutes transferred to the Common Law Courts, the jurisdiction formerely possessed by the Admirality. (Halleck's, 'International Law', Vol. I, p. 159; and V. The Colonial Courts of Admirality Act, 1890).

Finally, in connection with the first paragraph of Section 5 of our Criminal Code, it is relevant to notice the last paragraph in Section 225, where it is laid down that, "in any case in which the offender shall have within the limits of the territorial jurisdiction of the Island of Malta and its Dependencies, given cause to the death of the said person (i.e. a person wilfully killed), the homicide shall be deemed to have been wholly committed within the limits of the said jurisdiction, notwithstanding that the death of the said person shall have occurred out of such limits". As pointed out in 'Annotazioni alle Leggi Criminali' (per cura di un giovane avvocato Maltese), this paragraph was added by Ordinance No. V. of 1868, in pursuance of the Imperial Act 23 & 24 Vict. C. 122 passed in the United Kingdom on April 2, 1860, entitled the "Admiralty Offences (Colonial) Act, 1860, whereby the legislatures of her Majestys possessions abroad, were enabled to enact a law similar to the provisions contained in Section 8 of the Imperial Act 9 Geo. IV, C. 31. This section briefly provided that when a person has been feloniously stricken, poisoned or otherwise hurt in the United Kingdom, dies of such stroke, poisoning or hurt, upon the sea or at any place out of the United Kingdom, every offence committed in respect of any such case, whether the same ammounts to murder or manslaughter, or to the offence of being accessory to murder, or manslaughter, may be dealt with, enquired of, tried, determined and punished in the country or place in the United Kingdom, in which such stroke, poisoning or hurt has happened, in the same manner in all respects, as if such offence had been wholly committed in that country or place.

Now a last word about ships of war. The more commonly accepted doctrine of International Law is that such ships, even when within the territorial water or in the ports of a foreign State, are nevertheless exempt from the local jurisdiction: and that, therfore any offence committed on board any such ships must be tried by the authorities and in accordance with the law of the State to which the ship belongs. (For a full and clear statement of the position of these ships in International Law, v. Oppenheim, "International Law", 7th Edition. 1953, Vol. I, p. 764.

Paragraph 2.

Under this paragraph, our Courts have jurisdiction to try and punish, in accordance with our law, offenders being natural-born, or naturalised Maltese, who commit an offence against our Criminal Law beyond the limits of the territorial jurisdiction of these Islands on board a vessel or ship belonging to these Islands. Thus, in respect of offences committed on the high seas, the jurisdiction of our Courts is dependant on the nationality of both the offender and the ship.

Normally, according to the principles of International Law, private ships belonging to Sovereign States are, on the high seas, subject to the jurisdiction to which they belong. But as regards Colonial ships, the English rule is that they are subject to the local colonial laws, only so long as they are within the limits of the territorial jurisdiction of the colony to which they belong, but become subject to the British Merchant Shipping Laws, as soon as they go beyondsuch limits. But referring to the provisions under discussion, the commissioners of the draft code of 1842 wrote, at page 11 of their report, that it was

inserted in pursuance of an opinion given to the Secretary of State for the Colonies by the Law Officers in England, to the effect that a local law could extend the jurisdiction of our Courts to offences committed on the high seas, provided the offender was a Maltese and the ship on which it was committed was likewise Maltese.

Here the enquiry suggests itself : what happens where the offence is committed outside the limits of our territorial jurisdiction –

a) by a person who is not a natural-born or naturalised Maltese, on board a ship which belongs to the port of Malta; or

b) by a person who is a natural-born or naturalised Maltese, but on board a ship which does not belong to the port of Malta?

The matter is regulated by the Merchant Shipping Act 1894 of the United Kingdom, in Section 686 providing that, "*where any person being a British subject, is charged with having committed any offence on board any British ship on the high seas, or any foreign port or harbour, or on board any foreign ship to which he does not belong – or not being a British subject, is charged with having committed, any offence on board any British ship on the high seas, and that person is found* (that is to say is found to be at the time of his trial...V. Archibold, op. cit. p. 34) *within the jurisdiction of any Court of His Majestys dominions, which would have had cognizance of the offence, if it had been committed on board a British ship, within the limits of its ordinary jurisdiction, that Court shall have jurisdiction to try the offence, as if it had been so committed*". This provision ends with the following words: "Nothing in this Section shall affect the Admiralty Offences (Colonial) Act, 1849". This Act was made to solve the difficulties of dealing with offences committed at sea where the ship did not put into port in England immediately, but touched at some port in a British Colony. To avoid the unsatisfactory process of bringing the prisoner to England, to be tried by the Central Criminal Court – or, at the time, by the Court of Admirality, -- the said Act (12 & 13 Vict. C. 96) laid down that all persons charged in any colony with offences committed on the sea may be dealt with in the same manner as if the offences had been committed upon water within the local jurisdiction of the Courts of the Colony. The Act of 1849 also contained provisions for the trial of murder and manslaughter where death ensues in the colony or at sea, following injuries inflicted on the sea, etc.; in such cases, the offender may be tried as if the offence had been wholly committed in the Colony.

Finally, the Courts (Colonial) Jurisdiction Act 1874 (37 & 38 Vict. C. 27) provided in Section 3 that when, by virtue of an Act of Parliament, a person is tried in any Court of any Colony, for any crime or offence on the high seas or elsewhere out of the territorial limits of such colony, and of the local jurisdiction of such Court, or if committed within such local jurisdiction, made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him, if the crime or offence had been committed within the limits of such colony, and of the local jurisdiction of the Court; provided that, if the crime or offence, is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction be liable to such punishment (other than capital punishment) as shall seem to the Court most nearly to correspond to the punishment to which such person would have been liable, in case such crime or offence had been tried in England.

Paragraph 3.

By this paragrap, the operation of our law and the jurisdiction of our Courts are extended to certain offences (which we shall now specify) committed abroad by a person who is a natural-born or naturalised Maltese, provided such person shall not have been tries for the out of the Islands.

We have already pointed out that if the principle of the territorial nature of Criminal Law and Criminal Jurisdiction were absolute, the consequence would have been that a State could never try and punish any person who, outside the limits of its territorial jurisdiction, became guilty of an offence against its Criminal Law. But, as it has already been remarked, there are cases in which the State is justified in taking punitive action in respect of such offences. Evidently, we are here not referring to any punitive action carried out by the State concerned outside its own territory, as, for instance, by forcibly removing the criminal from the foreign State in which the offence was committed, or by following him and arresting him in the State in which he may have taken refuge: any such action would clearly be a violation of the territory andsovereignty of such other State. Here we are speaking of the punitive action exercised by the offended State within its own territory, when the offender returnsto, or is found in such territory.

The right of each State to prosecute offences committed on foreign soil in certain well defined circumstances, is nowadays commonly recognised: but, in determining those circumstances, the various systems of positive law, and text-writers differ considerably.

1. According to one school of thought, the question whether an offence committed abroad should or should not be punished by the State in which the offender is found, depends on whether the State in which it was committed, would or would not, in like circumstances, have punished the same, if it had been committed in the former State. The basis of this doctrine is 'reciprocity'.

2. A second school of thought seeks to apply by analogy the maxim of civil law, "ubi te invenio, ibi te convenio". These writers argue that if a person can sue everywhere for a civil debt, he would 'a fortiori' beable to prosecute for a criminal offence. Therefore, when the offender and the person injured or aggrieved meet in the same country, it should be possible for the latter to move for the institution of criminal proceedings before the local tribunals, against the offender who injured him abroad.

3. A third theory relies on the nationality of the person injured by the offence. The argument is that wherever the persons, for whose protection the laws of the State to which they belong are intended, betake themselves, they should continue to enjoy the benefit of such protection. The foreigner who injured a subject abroad is not entitled to any exception in the State of such subject: nay, his impunity in such State would add insult to injury in the face of the victim of the offence.

4.A fourth theory considers Criminal Law as part of the personal Statute of the offender. The subject remains, wherever he goes, amenable to the laws of his country: therefore, wherever he offends against such laws to which, as a subject, he owes obedience, he contracts a liability for which he must account on his return to his country.

5.Finally, there are those who found the right of the State to punish offences committed abroad on the nature and gravity of the offences themselves: and recognise such right in respect of those offences which seriously endanger the political or economic life of the State, or profoundly shock public opinion.

Our own system is a combination of the three last mentioned doctrines; that is to say, it extends the jurisdiction of our Courts to offences committed abroad in consideration of the Maltese Nationality of the offender, as well as in consideration of the nature and gravity of the offence, and, in regard to oneclass of offences, of the British Nationality of the victim of the offence.

Let us now consider our provisions in some detail under the two following headings: -

1. Offences in respect of which jurisdiction is exercisable.
2. Essential conditions for the exercise therof.

These offences are the following: -

1. Offences in respect of which jurisdiction is exercisable.

(a) Once it is granted that the principle of the territotial nature of Criminal Law must admit of certain exceptions in those cases in which over-riding considerations of public expediency justify the action of the State in repressing offences committed abroad, surely the first of such exceptions should be in respect of those offences which jeopardise the very political life of the State. This has the right and the duty to defend itself against any attempt directed against it even outside its territory, and such right appears even more legitimate when it is considered that the State in which the offence was committed may either not have any interest at all in punishing the offence, or, worse still, may have a political interest in abetting or concealing it.

(b)The offence under Section 131, that is, the offence of any public officer or functionary who divulges or disclose or in any manner facilitates the disclosure of documents or facts possessed by or known to him by reason of his office, and which should havc been kept secret.

Here again the exception is dictated by the paramount interest which the Government has that its official secrets should not be improperly divulged, especially outside these islands.

It is interesting to note in this direction that up to 1914, the reference in the part of the paragraph under discussion was to "the offences contemplated in Articles 63, 62 and 65 and in Article 130". When the said sections 63, *64* and 65 were repealed by Section 13 of Ordinance No. VI of 1914 (since repealed and re-enacted by the Official Secrets Ordinance, 1923) and substantially reproduced in that Ordinance, the reference to those articles in Section 5 was not deleted. But in the reprint of the Laws of Malta and in the separate reprints of the Criminal Code in 1925, the said reference was omitted. Such

reprints, however, never became and had no authority as a revised authentic text of the law: and it is, therefore, submitted that the old reference to Articles 63, 64 and 65 of the Criminal Code should now be construed as a reference to the corresponding sections of the said "Official Secrets Ordinance.

(c.) The offence of forgery of Government debentures mentioned in Section 174 or of any of the documents mentioned in Section 175.

These offences directly undermine the economic life of the State: they violate the public faith which is attributed by the Government itself to those documents.

(d) The Offence of Bigamy. Bigamy is a crime which involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law intended to be applied only to a legitimate union. Moreover, the offender might have gone outside these Islands, precisely to be able with greater facility to commit the crime, and in any case, it is within these Islands that the evil effects of the crime make themselves more directly felt. Even in England, which , as we have seen, prefers to adhere to the principle that crimes are local matters to be dealt with where they are committed, bigamy is one of the few statutory exceptions to such rule.

(e) Any other offence against the person or a subject of his Majesty.

This last exception is founded on the consideration that the local laws should, *as* far as possible, continue to extend their protection to the vital rights of His Majestys subjects wherever they may be.

2. Essential Conditions for the Exercise thereof.

The essential conditions for the institution of criminal proceedings in and according to the laws of these Islands in respect of the offences above-mentioned committed abroad, are: -

(i) That the offender is a natural-born or naturalised Maltese,
and (ii) That he has not been tried for the same offences outside of these Islands.

As we have already said, many States hold the view that a State may not try foreigners for offences committed outside its territorial jurisdiction.[1] But International Law leaves to the States an unlimited right to punish their own subjects. Such right is justified not only by the fact that the State is fully authorised to require that its subjects shall respect its laws wherever they may be and, especially, such laws as it deems most essential to its safety, and to the public good, but also by the fact that, if the subject, on his return to his own country, after having committed the offence abroad, were to be left unpunished, such impunity would be in itself a threat to the public peace and a scandal. This explains why our Code extends the operation of this provisions above quoted and the jurisdiction of our Courts in respect of offences under those provisions committed abroad, when such offences have been so committed by persons who are natural-born or naturalised Maltese.

[1] The exception regarding piracy which is universally allowed, has already been noted.

But the taking of proceedings in these Islands is rightly made dependant on the condition that the offender shall not have already been tried for the offence outside these Islands, that is, presumably in the place where the offence has been committed. This is a proper concession to the general principle of the territorial nature of Criminal Law and Criminal Jurisdiction, in as much as the State in whose territory the offence was committed has a prior claim to deal with the offender if it so choses. Therefor, if such offender has already been tried once, whether he was aquitted or, if convicted, whether or not he has served his sentence, no further proceedings can be taken against him in these Islands. Thus, rather than an application of the rule 'ne bis in idem', this is an affirmation of the said principle of the prevalence of the territorial jurisdiction, as against which the jurisdiction of our Courts is merely subordinate and supplementary.It is thus clear that under these provisions, our Courts have no jurisdiction to try foreigners for offences committed abroad.

Paragraph 4.

Under this paragraph criminal proceedings may be instituted in these Islands, according to the laws thereof, against any person who, being in these Islands, shall become guilty, whether as co-principal or as an accomplice, in any commercial or industrial fraud contemplated in Section 312 of the Criminal Code, although the crime is committed outside these Islands. It is immaterial for the purpose of this paragraph, whether the person who is thus a co-principal or an accomplice, is a Maltese, or a non-Matese British Subject, or an alien.

General Observation

It is, in conclusion, to be noticed that when proceedings are instituted in these Islands under Section 5 in respect of offences committed abroad, the punishments to be applied on conviction, shall be those prescribed by our law. Some systems provide in similar cases that the punishment applicable shall be the lesser punishment between that prescribed by the law in force in the country in which the offence was committed, and that prescribed by the law in force in the of the trial. But, however laudable in theory it may be, the desire to avoid inflicting on the offender a higher punishment than that which he might have incurred if he had been tried in the country in which the offence was committed, it is clear that in practice this doctrine cannot be very often, applied without serious inconveniences. Each country has its own body of penal laws, not merely because they have been enacted by its legislative authority, but also because they best conform to the social conditions and peculiar characteristics of its people. One State cannot, therefore, apply in its own territory the penal laws of another State without disturbing the legislative and judicial order in such territory. And above all, a State punishes acts committed in a foreign State not because such acts constitute an offence against the law of the foreign, but solely because they constitute an offence against its own laws.

III. EXTRADITION[1]

- Definition
- History
- Basis
- Individuals subject to extradition
- Crimes in respect of which extradition may be granted
- Some common rules
- In Malta
- Surrender of fugitive offenders between different parts of the British Commonwealth.

Definition

Extradition is the delivery of an accused or a convicted individual by a State, on whose territory the alleged criminal happens for the time to be, to another State in order that such individual may be tried or suffer the sentence. It is a system of common action and reciprocal assistance among States against criminals which, to some extent, takes the place of the system of cosmopolitan justice which, as we have seen, is in practice inapplicable, desirable though it may be theoretically. As Beccaria wrote, the conviction that there is no place conferring immunity from the consequences of crime is a most effective means of preventing it. The interest is common both to the requesting State as well as to the extracting State: if the interest of the first is the supreme one of punishing the crime committed on its territory, the interest of the second is that of reciprocity. What it does today in favour of the requesting State, this will do tomorrow in its favour in like circumstances. And yet writers are not lacking who deny every justification for this institution. They are ready to recognise a right in the State where the criminal has taken refuge to punish him; but such State is not justified in extraditing him because, as these writers say, the right of asylum is sacred and inviolable. Now the answer to this sort of reasoning is, of course, clear. The right of asylum is indeed sacred but on two conditions:

(a) that the person seeking it is worthy of it

(b) that it does not endanger or harm the State in which asylum is sought.

Criminals are not the sort of people entitled to this benefit and their impunity in any State is not only undesirable but injurious.

Notwithstanding this, however, States in practice always uphold their competence to grant asylum to foreign individuals as an inference from their territorial supremacy; and there is no universal rule of customary international law which commands extradition. The rule of Grotius that every State has the duty either to punish, or to surrender to the prosecuting State, such individuals within its boundaries as have committed a crime abroad, although there is as regards the majority of such cases an important interest of civilised mankind that this should be done, has never been adopted by the States, and has, therefore, never become a rule of the Law of Nations.

History

Since, however, modern civilisation categorically demands extradition of criminals as a rule, numerous treaties have been concluded between the several States, stipulating the cases in which extradition shall take place. According to these treaties, individuals prosecuted for the more important crimes, political crimes excepted, are in fact always surrendered to the prosecuting State, if not punished locally. But this solution of the problem of extradition is the product of the nineteenth century only. It is true that vestiges of extradition arrangements may be traced even in ancient times. Some practice of extradition (*deditio*)

[1] Vide Oppenheim, International Law (7th Edition) Vol I, P 643 et seq. from which large extracts are included.

existed also in Roman days. But history shows that the development of the institution was obstructed by the right of asylum on the one hand and an exaggerated sense of territorial sovereignty on the other. In the Middle Ages extradition was practically unknown. Before the eighteenth century, extradition of ordinary criminals hardly ever occurred, although some States used then to surrender to each other political fugitives, heretics and even emigrants, either in consequence of special treaties stipulating the surrender of such individuals, or voluntarily without such treaties. Matters began to undergo a change in the eighteenth century, for then treaties between neighbouring States frequently stipulated for extradition of ordinary criminals besides that of political fugitives, conspirators, military deserters, and the like. Vattel (ii. P 76) is able to assert in 1758 that murderers, incendiaries, and thieves are regularly surrendered by neighbouring States to each other. But special treaties of extradition between all the members of the Family of Nations did not exist in the eighteenth century, and there was hardly a necessity for such general treaties, since traffic was not so developed as nowadays and fugitive criminals seldom succeeded in reaching a foreign territory beyond that of a neighbouring State. When, however, in the nineteenth century, with the appearance of railways and transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then, and in consequence of this, that the conviction was forced upon the States of civilised humanity that it was their common interest to surrender ordinary criminals regularly to each other. Special treaties of extradition became, therefore, a necessity, and there is a tendency towards the conclusion of general extradition treaties.

Basis

But the institute of extradition is not founded solely upon the obligations deriving from treaties. It is true, as has already been stated, that apart form treaty, extradition is not obligatory upon any State. But there is a higher and fundamental principle legitimising the treaties themselves, that is, the common interest of the States to give mutual assistance for the
suppression of crime. It is therefore commonly accepted that, while extradition treaties bind the States between which they are concluded to the reciprocal delivery of criminals, such delivery may be granted and is sometimes granted even without any treaty obligations, and it can be so granted because extradition is above all an act of sovereignty, though in modern times the procedure has assumed a prevalently jurisdictional character.

Some States, however, were unwilling to depend entirely upon the discretion of their Governments as regards the granting of extradition, the conclusion of extradition treaties and the procedure in extradition cases. They have therefore enacted laws, which enumerate those crimes for which extradition shall be granted and asked in return, and which at the same time regulate the procedure in extradition cases. These Municipal Laws furnish the basis for the conclusion of extradition treaties. The first in the field with such an extradition law was Belgium in 1833, which remained, however, for far more than a generation quite isolated. It was not until 1870 that Great Britain followed the example given by Belgium. British public opinion was for many years against extradition treaties at all, considering them as a great danger to individual liberty and to the competence of every State to grant asylum to political refugees. Great Britain possessed, therefore, before 1870 a few extradition treaties only, and they were in many points inadequate. But in 1870 the British Government succeeded in getting Parliament to pass an Extradition Act. This Act, which was amended in 1873, in 1895, in 1906 and in 1932, has furnished the basis for extradition treaties between Great Britain and a very large number of other States. Such States as possess no extradition laws, and whose written constitution does not mention the matter, leave to their Governments to conclude extradition treaties according to their discretion. And in these countries the Governments are usually competent, as we have said, to extradite an individual, even if no extradition treaty exists.