

# COMMENTS

## Does the principle of legality require statutory crimes to have specific penalty clauses? A critical analysis of the decisions of the High Court and the Supreme Court of Appeal in *DPP, Western Cape v Prins*

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### 1. Introduction

The decision in *Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 67 (WCC) temporarily pulled the rug out from under the National Prosecuting Authority regarding its endeavours to institute prosecutions against offenders in the vast majority of offences in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the 'Sexual Offences Act'). Prins was charged with a contravention of s 5(1) of the said Act (the crime of sexual assault) for allegedly having touched the breasts of the complainant without her consent. It was contended on his behalf that the charge did not disclose an offence because the Act contained no penalty clause for the particular offence. The regional magistrate upheld the objection and quashed the charge. The Director of Public Prosecutions, Western Cape, appealed against this decision. The Western Cape High Court rejected the appeal, which resulted in a further appeal to the Supreme Court of Appeal, which expeditiously delivered judgment in *Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 183 (SCA).

In this case note we briefly consider the essential elements of the principle of legality, before considering the judgments in the high court and the Supreme Court of Appeal in greater detail.

## 2. The principle of legality as applied in South African law

In the context of criminal justice, the essence of the principle of legality was that a person should not be convicted of an offence unless it was quite clear, at the time of the commission of the offence, that the relevant conduct was a crime and, therefore, subject to criminal punishment by a court. It is often expressed in the following two maxims: *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). The principle is a basic element of justice and is recognised in virtually all current democracies, as well as in various international documents.

The principle of legality is of ancient origin. It was known in Roman law; it is often cited as having been recognised in the Magna Carta; it is generally considered one of the core values of the French Revolution; it became part of the German Constitution in 1870 (cf J Hall 'Nulla poena sine lege' (1937) 47 *Yale LJ* 165-170; EM Burchell et al *South African Criminal Law and Procedure: Vol I* 2ed (1983) 54-59). While it is true that the principle did not have 'a clear, unbroken line of development' (Hall op cit 165), it is deeply ingrained in legal thinking for more than a century now. Since Roman, Roman-Dutch law and English law served as sources for South African law, it is not in the least surprising that the principle of legality has always been considered part of our law, (see *S v Western Areas Ltd* 2004 (1) SACR 429 (W) at para [13]: the principle 'has always been part of our common law'; HR Hahlo & E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 133-134). It is now also included in the Constitution of the Republic of South Africa, 1996. Section 1(c) declares the rule of law as one of the core values of the Republic as a democratic state and the Constitutional Court has developed its jurisprudence on the legality principle mainly in terms of this value (M Chaskalson et al 'Constitutional litigation' in S Woolman et al *Constitutional Law of South Africa* 2ed (2007) 3-10). Amongst the important principles of this jurisprudence are that all laws must be rational (cf *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para [25]), and that 'rules of law must be stated in a clear and accessible manner' (Chaskalson et al op cit 3-11). The Constitution also prohibits retrospective declaration of conduct as criminal or retrospective increases in prescribed punishment (s 35(3) (l) and (n)). With respect to sentencing, Van Zyl Smit concludes that the legality principle requires at least that the punishments be defined with reasonable precision, and that 'the imposition of such penalties should be governed by clear legal rules...' (D Van Zyl Smit 'Sentencing and punishment' in S Woolman et al *Constitutional Law of South Africa* 2ed (2007) 49-4; see also HD Armstrong 'Rogers v Tennessee: An assault on legality and due process' (2002) 81 *North Carolina LR* 317-355 at 322).

A number of cases deal specifically with the *nullum crimen sine lege* principle, but the *nulla poena sine lege* principle has received very little attention, if any. The cases which address the *nullum crimen sine lege* principle typically deal with instances where it was not clear whether the conduct charged was in fact punishable as a crime or crimes were challenged on the basis of being defined in too vague terms. These cases are discussed by writers mainly in the context of substantive criminal law (e.g., CR Snyman *Criminal Law* 5 ed (2008) 41-48; J Burchell *South African Criminal Law and Procedure Vol 1: General Principles of Criminal Law* 4ed (2011) 37-42; JRL Milton and MG Cowling *South African Criminal Law and Procedure Vol III: Statutory Offences* 2ed (1999) 1--20; Rabie et al (*Punishment: An Introduction to Principles* 5ed (1994) 83-89; see also *S v Smit* 2007 (2) SACR 335 (T) at 378; *S v Western Areas Ltd* 2004 (1) SACR 429 (W) at 437; *S v Friedman* 1996 (1) SACR 181 (W); *S v Lavhengwa* 1996 (2) SACR 453 (W); *Masiya v Director of Public Prosecutions, Pretoria* 2007 (2) SACR 435 (CC)). Given the long history of the principle of legality as it developed in South African law it is surprising that greater clarity did not exist on the question whether every statutory criminal offence needs to be accompanied by a penalty clause. Prior to the enactment of the Sexual Offences Act the issue did not arise. Most commentators held the view that there should not be a problem with the legality of such provisions. For example, Rabie et al (op cit at 82) explains:

'If it [a penalty clause] is omitted, it would seem obvious that the nature and degree of such punishment is intended to be left to the discretion of the court, subject, of course, to the court's penal jurisdiction and to other legislation such as the Criminal Procedure Act 51 of 1977.'

Several subsequent writers have agreed that this should be the position (cf the authorities cited in SS Terblanche *A Guide to Sentencing in South Africa* 2ed (2007) 29 fn 60), but our courts never addressed the issue (cf Rabie et al op cit at 87 – neither of the two cases cited in this work as exceptions to the general approach, namely *S v La Grange* 1991 (1) SACR 276 (C) and *R v Mills* 1927 CPD 133 insisted that a *penalty clause* was essential). Even the broad statement by E Du Toit *Straf in Suid-Afrika* (1981) xxiv, where he summarised the position as 'Geen strafbepaling, geen straf', does not necessarily mean that each single statutory offence needs its own individualised penalty clause.

Although the omission of penalty clauses in the Sexual Offences Act has been noted by some authors, most explicitly maintained the position as noted above (see, e.g., Snyman op cit 355). However, Burchell (op cit 37 fn 224) expressed his concern that most sections of the said Act 'fail[ed] to refer specifically to a range of potential punishments for these offences or even to refer to 'punishment' in the abstract and leave the degree of punishment to the discretion of the courts'. In his

view, the particular provisions ‘would fall foul of the *nulla poena sine lege* and legality principle because of failure to identify ‘punishment’. Be that as it may, the lack of judicial pronouncement on the issue probably resulted in the different approaches to the validity of the prohibitions in the Sexual Offences Act, by the courts a quo and the Supreme Court of Appeal. This does not mean that the issue was completely new, as *S v Mchunu* 2012 (2) SACR 56 (KZP) was decided in September 2011 and there the court held (at para [38]) that the Sexual Offences Act did not offend the principle of legality, as there was no greater uncertainty about the crimes and the potential sentences after the enactment of the Act than there used to be before it had been passed. A similar conclusion was reached in two judgments that were decided after the judgment in the Western Cape High Court, but before that in the Supreme Court of Appeal (*Matwa v S* unreported case (A443/2011) [2012] ZAGPPHC 129 (NGP) (13 June 2012; and *S v Rikbotso* unreported case (SS105/2011) [2012] ZAGPJHC 106 (SGJ) (15 May 2012).

Against this background, it is appropriate to consider the judgments of the different courts in the matter of *Prins* in more detail.

### 3. The judgment in the High Court

#### 3.1 An overview of the legislation

At the beginning of his judgment in *Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 67 (WCC), Blignaut J noted with apparent surprise that none of the offences contained in chapters 2, 3 and 4 of the Sexual Offences Act (including crimes such as compelled rape, sexual assault, compelled sexual assault, various sexual offences against persons older than 18 years, consensual sexual offences against children and other sexual offences against children) were accompanied by a penalty clause. The only exception was rape (a contravention of s 3 of the Act) that has been explicitly penalised in terms of the minimum-sentences legislation in s 51 of the Criminal Law Amendment Act 105 of 1997 (at para [12]). The surprise expressed by the judge provides further proof of the fact that the legislature does not normally omit penalty clauses.

#### 3.2 The essence of the legality principle

Blignaut J embarked on a lengthy discussion on the application of the *nulla poena sine lege* principle (at para [7]), ‘with its concomitant, *nullum crimen sine lege*’ which together ‘constitutes essential elements of the doctrine of legality in criminal law’ (at para [16]). First, he cited (at para [16]) Burchell *Principles of Criminal Law* 3ed (2005)

99, where it is said that ‘to render any act criminal in our law, there must be some punishment affixed to the commission of the act and where no law exists affixing such punishment there is no crime in law’. Secondly, he referred to *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), where the Constitutional Court explained the rule-of-law principle with reference to Dicey, emphasising its expression in the principle of legality. Next, he noted that courts have no inherent power to create new crimes or to ‘invent a new kind of penalty such as, for example, physical detention under lock and key at some place other than a prison’ (at para [21], citing *S v Malgas* 2001 (1) SACR 469 (SCA) at para [2]). Blignaut J continued (at para [22]) that the *nullum poena sine lege* rule was reaffirmed in *S v Dodo* 2001 (3) SA 382 (CC), (2001 (1) SACR 594 (CC)) at para [13], where the Court had noted that ‘the nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law’.

The discussion of the recognition of the principle of legality in South African common law was followed by an overview of the principle as applied in other common-law jurisdictions (English, Canadian and Australian law), as well as its application in terms of article 7 of the European Convention on Human Rights (at paras [24]–[30]). The court concluded (at para [31]) that ‘the *nulla poena sine lege* principle, as an integral element of the legality doctrine, is firmly established as part of the South African legal system’. This finding is beyond doubt, as accepted by the Supreme Court of Appeal (at para [8]).

### 3.3 The principle of legality as a constitutional requirement

The next point to be considered was whether the principle of legality is also part of the Constitution of the Republic of South Africa, 1996. Burchell (op cit at 106) was cited again (at para [34]), this time in support of the thesis that the principle of the Rule of Law determines the application of the principle of legality and the ambit of such application of the principle of legality (‘any aspects of the principle of legality not specifically referred to in the Constitution could be read into the Constitution by an interpretation of the ambit of the Rule of Law’). Blignaut J (at para [35]) indicated that the provisions of subss 35(3)(l) and (n) of the Constitution also support an interpretation that the *nulla poena sine lege* principle is an implied provision of the Constitution. Section 35(3)(l) provides that the right to a fair trial includes the right ‘not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted’ and, s 35(3)(n), ‘to the benefit of the least severe of the prescribed punishment if the prescribed punishment

for the offence has been changed between the time that the offence was committed and the time of sentencing'. The court pointed out (at para [36]) that these provisions, read together, are similar to those of article 7(1) of the European Convention and that, in terms of the interpretation of that provision by the European Court of Human Rights, it prohibits not only the retrospective application of the offence and the punishment but 'also sets forth the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nullum poena sine lege*)'. Bignaut J reasoned that subsections 35(3)(l) and 35(3)(n) of the Constitution must be interpreted in the same manner. His argument boils down to the following: Subsection 35(3)(l) is in actual fact broader than a mere rule against retroactivity. It provides that if conduct is not 'described' as a crime, it would not be 'an offence under either national or international law at the time it was committed' (at para [37]). Again, subsection 35(3)(n) requires that a comparison be made between the 'prescribed' punishment at the time when the offence was committed and the 'prescribed' punishment at the time of sentencing. This means 'prescribed by law' at both stages (at para [38]). If a punishment is not prescribed *by law* for an offence, the provision would not be capable of implementation. The court ruled that because there was no specific punishment prescribed in the Sexual Offences Act for the offence charged there was no punishment 'prescribed by law' and the accused could therefore not be prosecuted for the offence charged.

#### 3.4 The legal principles applied

Counsel for the state argued that this approach was in conflict with the approach followed in the common law that where a statute has no penalty clause, it is at the discretion of the judge to impose the appropriate sentence (*R v Forlee* 1917 TPD 52). But Bignaut J rejected the *Forlee* decision and the notion that punishment could be left to the discretion of the judge as 'the antithesis of the *nulla poena sine lege* principle' (at para [43]). In his view, even if the Act had stipulated that the punishment for the offence should be at the discretion of the court this would 'also contradict and totally undermine the *nulla poena sine lege* principle' (at para [50]). Because of this conclusion the court stated that even s 55 of the Sexual Offences Act, which deals with participants such as accomplices with respect to sexual offences and which provision does actually contain a penalty clause, is meaningless. This is so because it refers to 'the punishment to which a person convicted of actually committing that offence would be liable' (at para [52]).

The state appealed against this judgment to the Supreme Court of Appeal, which delivered its judgment in this matter with remarkable speed, on 15 June 2012.

#### **4. The judgment of the Supreme Court of Appeal**

At the beginning of his judgment in *Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 183 (SCA), Wallis JA took cognisance of the plight of women and children who are subjected to sexual abuse and the dire consequences of the high court's judgment on the protection of victims of sexual violence (at para [2]). He emphasised the importance of effective prosecution of those who infringe the rights of women and children, also noted by the Constitutional Court in *S v Acting Regional Magistrate, Boksburg: Venter* 2011 (2) SACR 274 (CC) at para [23]. However, it was conceded that the effective prosecution of those sexually abuse woman and children cannot, alone, be decisive of the appeal since the High Court's decision emanated from a fundamental constitutional principle, the principle of legality (at para [6]). Wallis JA then turned to the main issue namely, whether the absence of a penalty clause in the Sexual Offences Act necessarily meant that a crime had not been created, as ruled by the High Court. He explained that when a court has to decide whether a statutory provision that prohibits particular conduct is a crime, the absence of a penalty clause is an important factor in determining whether a crime has in fact been constituted thereby (at para [15]). However, it was not an essential factor since it may otherwise be very clear from a statute that a crime was in actual fact created. It may be so clear that it would not even be necessary to invoke the controversial *Forlee* principle, namely that 'an inference of an intention to criminalise the prohibited conduct could be drawn from the language of the statute...' (at para [16]). The Supreme Court of Appeal was not asked to draw an inference that s 5(1) and the other relevant provisions of the Sexual Offences Act rendered the conduct described therein criminal but to determine whether the provisions of the Act made it clear that crimes were created (at para [17]). In order to answer this question, the Supreme Court of Appeal considered the objectives of the Act as set out in s 2. These were identified as, amongst others, to 'afford complainants of sexual offences the maximum protection that the law can provide ... by: (a) Enacting all matters relating to sexual offences in a single statute; (b) criminalising all forms of sexual abuse or exploitation; (c) repealing certain common law sexual offences and replacing them with new, and in some instances, expanded or extended statutory sexual offences ....' (s 2 of the Sexual Offences Act, cited at para [18]). The purpose of the Act was also made clear in its

long title. Wallis JA was of the view that the offence charged, namely, sexual violation in terms of s 5(1) clearly created a criminal offence and that the same was true in respect of the other provisions that define criminal offences in chapters 2, 3 and 4 of the Act. Therefore, this was not a case where the intention to criminalise the conduct needed to be inferred: the language was 'unequivocal and the context provided by the need to protect vulnerable people against sexual attacks in the light of the Constitution...reinforce[d] the construction that each of the relevant sections create[d] a criminal offence' (at para [20]). The contention that a statutory offence can only be created by parliament if it includes a penalty clause in the enacting legislation was also found to be 'unsupported by authority' (at para [38]).

Having made a clear distinction between the *nulla crimen sine lege* rule (no crime without a law) and the *nulla poena sine lege* rule (no punishment without a law) and having found that the former rule had been complied with, the court then turned to the question whether the latter rule had been violated. The court explained that the *nulla poena sine lege* rule requires that the imposition of a sentence by a court must have its justification in either the common law or statute (relying on *S v Dodo* 2001 (3) SA 382 (CC) at para [13]). Wallis JA noted that before the coming into effect of the Sexual Offences Act, the accused (Mr Prins) would have been charged with the common-law crime of indecent assault and, if convicted, sentenced by the regional magistrate to a sentence within the court's statutory powers. But the problem was that the statutory offence that replaced the common-law offence of indecent assault was created without specifying a penalty. However, this did not mean that the *nulla poena sine lege* rule had not been complied with. The Sexual Offences Act also made it clear that the *courts* are empowered to impose an appropriate sentence on the accused. Reference was made, *inter alia*, to s 56(7) of the Act where it is stated that, if a person is convicted of an offence under the Act, 'the court that imposes the sentence shall consider [certain specified aggravating circumstances] ...'. (at para [21]). Various other provisions in the Act were cited by the Supreme Court of Appeal as making it clear that the imposition of sentences *by the courts* for offences committed in terms of chapters 2, 3 and 4 of the Act was contemplated by the legislature (at para [21]). Wallis J stated that the courts' powers to impose particular sentences were founded in s 276(1) of the Criminal Procedure Act 51 of 1977. The opening words of this section provides: 'Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence ...'. This section was explained as having a twofold purpose: first, to empower courts to impose sentences on persons convicted of crimes 'which is the embodiment of the principle

of *nulla poena sine lege*' (at para [30]). Second, it limits the punishments that courts may impose to those set out in the section and so prevents the courts from devising new punishments. The language of s 276(1) did not restrict its field of operation to common-law crimes. In the court's view the section embodies the principle of legality in relation to common-law crimes as well as statutory crimes where the legislature has, for whatever reason, not incorporated a specific penalty provision in the statute creating the offence (at para [34]). The court added that the statutory offence of which the accused was charged (s 5(1) of the Sexual Offences Act) in fact 'mimics' the common-law offence of indecent assault (at para [35]). Wallis JA observed that 'the courts will have a pattern of sentencing in past cases to guide them in fixing an appropriate sentence for the equivalent statutory offence' (at para [35]). The application of s 276(1) to the statutory crime would therefore not place the accused in a less advantageous position than he would have been in had he been charged of indecent assault. For these various reasons, the court rejected the argument that the principle of legality was infringed because penalties were not prescribed in the Act.

## 5. The main value of the SCA judgment

The value of the decision of the Supreme Court lies in the fact that a clear distinction is made between the two components of the principle of legality: first, that crimes ought to be clearly created (the *nullum crimen sine lege* principle) and secondly, that punishment may not be imposed unless it is recognised by the law in clear terms (the *nulla poena sine lege* principle). The High Court conflated these different principles. The High Court referred to the application of the *nulla crimen, nulla poena sine lege* principle in the case law of the European Court of Human Rights as discussed in the English case of *R v Rimmington, R v Goldstein* [2005] UKHL 63. Closer scrutiny of these cases (*Kokkinakis v Greece* (1993) 17 EHRR 397; *S.W. v United Kingdom: C.R. v United Kingdom* (1995) 21 EHRR 363; *Sunday Times v United Kingdom* (1979) 2 EHRR 245 and *G v Federal Republic of Germany* (1989) 60 DR 256) reveals that the principles that only the law can define a crime (*nullum crimen sine lege*) and prescribe a penalty (*nulla poena sine lege*) and the principles of accessibility and foreseeability (which include the *ius praevium*; the *ius certum* and the *ius strictum* rules) were endorsed in general terms. These cases related to an art 7 challenge on the ground that the definitions of crimes ought to be clear and that provisions which create crimes ought not to be extensively construed to an accused's disadvantage (*Kokkinakis v Greece* supra). In one of these cases, *S.W. v United Kingdom: C.R. v United Kingdom* (supra) the European Court even ruled that the

latter principle does not prohibit the development of the criminal law through judicial decisions.

## 6. Residual value of the High Court judgment

There is an aspect of the High Court judgment that is nevertheless of value, namely the emphasis placed on the broader Rule of Law principle. In substantive criminal law, the principle of legality as informed by the broader Rule of Law principle means more than a mere prohibition on the creation of crimes with retroactive effect (the *ius praevium* rule). It includes the principle of certainty (the *ius certum* rule) and the principle of strict construction of penal provisions (the *ius strictum* rule) although the latter two rules are not expressly recognised in the legality guarantee in the Constitution (s 35(3)(1)). All these rules also apply to the imposition of punishment which in essence means that the punishment must be *prescribed by law* in clear terms at the time the offence was committed. Some might argue that in terms of the Rule of Law principle, legislation creating offences would best comply with the principle of legality if penalties were specifically prescribed for each offence created.

The Supreme Court of Appeal did not require such a strict construction of the principle of legality. However, the court did take into consideration the fact that a similar offence to the new offence created in the Sexual Offences Act existed previously and that there existed some sentencing guidelines for the courts in respect of this offence. The accused would therefore not be placed 'in a less advantageous position than he would have been in had he been charged of indecent assault' (*Prins* (SCA) *supra* at para [35]). Be that as it may, the court stated unequivocally that in the absence of a penalty clause, the power of the courts to impose a sentence and the various sentences that may be imposed for contravention of the provisions of the Sexual Offences Act are to be found in s 276 of the Criminal Procedure Act. A court may impose a sentence which it deems appropriate. In terms of the principle of legality as informed by the Rule of Law principle this means that (1) only a form of punishment may be imposed that is recognised by the law in clear terms and (2) the discretion exercised by the court in imposing a sentence cannot be exercised arbitrarily but according to the law, whether in terms of the guidelines laid down by higher courts, or legislative guidelines. It is submitted that this is what the Constitutional Court had in mind in *Dodo* *supra* at para [13], where it said that 'the nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law; the principle of legality *nulla poena sine lege* requires this'. The court in *Dodo* explained in no uncertain terms that this means

that the exercise of the court's normative judgment 'in determining the nature and severity of the sentence within the options permitted by law has to be judicially exercised' (at para [13]).

Another point made by the court a quo that might have to be revisited in the future is the following: In answer to the argument by counsel for the state that the absence of a penalty clause meant that the punishment was in the discretion of the court, Blignaut J stated that 'The concept of conferring such a discretion on the court would also contradict and totally undermine the *nulla poena sine lege* principle' (at para [50]). The main problem with this view is that our courts have forever been sentencing offenders in terms of 'such a discretion'. Common-law crimes have no penalty clauses, but this does not prevent our courts from convicting and sentencing offenders for crimes like housebreaking on a daily basis. Statutory penalty clauses sometimes provide for even wider discretion. For example, magistrates' courts may normally not exceed three years' imprisonment with their sentences, but for some drug offences they may impose up to 25 years' imprisonment, without any useful guidance as to the exercise of this extensive discretion. Many hold the view that the widest possible discretion ensures the best chance for fair sentencing. The opposite view is that it is a recipe for arbitrary sentencing, and that it violates the constitutional right to equal treatment. It is hoped it will not take another century or more before these basic questions are authoritatively answered.

It should be noted in closing that the Sexual Offences Act has been amended, with effect from 26 June 2012, by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012 (see D Matlala 'The law reports' (Oct 2012) *De Rebus* 39 et seq). Section 56A(1) of the Sexual Offences Act now expressly provides that, if an offence created in the Act does not contain a penalty clause, the court 'shall' impose an appropriate sentence as provided for in s 276 of the Criminal Procedure Act, within the court's penal jurisdiction. Of course, this provision does not in any way change the law as interpreted by the Supreme Court of Appeal in *Prins*.