The Principle of Legality in European Criminal Law

Christina Peristeridou
ACKNOWLEDGEMENTS

I have found almost everything ever written about completing a PhD to be true. Most people describe it as a lonely, difficult and humbling endeavour, while those who are more optimistic call it challenging and exciting. My supervisor once said that I would only have to do it once – this I sincerely hope is true. Those who reach the end finally admit that, amidst the lonely academic research, they met great people. This I know to be true.

I would like to thank Gerard Mols, Taru Spronken, Monica Claes, Tineke Cleiren and Klaas Rozemond for reading and approving the manuscript, and their valuable feedback. I also thank Maastricht University for creating such an enjoyable atmosphere, and the NWO for generously financing my research, and the publication of this book. The criminal law department has, most hospitably, given me a home throughout my academic endeavours for which I am grateful.

I have been blessed with supervisors of exceptional calibre and spirit, namely André Klip and David Roef. I thank André for trusting me with this challenging research, which is part of a project close to his heart. His straight-to-the-point view of law has shaped my legal thinking and writing. André’s approach to European criminal law, often dynamic and against dogmatic stagnation, has been inspiring. I thank him for giving me the opportunity to be part of academia and for teaching me everything there is to know about it. Every single time I knocked his door I found a calm and supportive force – with an often wicked sense of humour – and he remained supportive even after I left his office. This gave me the confidence to continue.

I want to express my gratitude to David for his astute comments and sharp feedback which had a defining influence on my research. His passionate pursuit of reason(s) in law, and his intellectual ability to carve windows into the cement walls of legal doctrine are an inspiration. The early suggestion to get myself acquainted with legal philosophy and, later on, to use the models of justice have had an immense impact on the approach I chose in the following pages. And despite my difficulties in successfully achieving this, I will always remain indebted to him for pushing me to explore well outside my comfort zone.

I would like to thank Erik Claes for his comments on my presentation at a conference in Maastricht, and for his work that has been very instructive for my understanding of the legality principle. I am thankful to Peter Alldridge, Andrew Ashworth and John Spencer for their help with English criminal law. At Oxford,
Andrew Ashworth's insightful comments on my report on English law gave me much needed confidence. I also appreciate the warm welcome and excellent tour of Oxford University's grounds. The stimulating discussion that I had with John Spencer at Cambridge was most useful as it helped me draw comparative connections between civil and common law systems that transcend the legality principle.

I am happy to have been part of a research team with Jeroen Blomsma, Johannes Keiler and Anne-Sophie Massa. I found teachers and friends in them. I am grateful for the great sense of humour, support and contribution in my development as a researcher. Though often unconsciously done, each one helped me improve in different ways.

I owe my deepest gratitude to my friend Gabriela Belmar-Valencia for editing and proofreading with admirable patience an earlier version of the manuscript and kindly sparing the reader from some exotic vocabulary. My thanks should also go to Craig Eggett for proofreading my manuscript towards the end and giving me great tips. I also thank the different language centres in Maastricht, Düsseldorf and Frankfurt that helped me reach the desired level of Dutch and German.

I am indebted to all my friends and colleagues here and in Greece who helped me through difficult times and especially to Kei Hannah Brodersen, Liesbeth Baetens, Dorris de Vocht, Marrelle Attinger, Eleni Mantziou and Constantina Mitliagka.

I am awed by my parents’ faith in me, and their unflinching support in helping me to continue doing what I love. My brother, Kostas, has been a solid, calm force by my side, enduring long phone calls and never uttering the slightest criticism, even when deserved.

Michael, your devotion and patience for a seemingly never ending project has been remarkable, despite all the untravelled trips that I kept promising. Thank you for sharing with me a love for creativity, for generously allowing me the space to exercise it in silence, and for always showing me, with kindness, the bigger picture whenever I lost sight of it.

Düsseldorf,
4 September 2015
CONTENTS

Acknowledgements ................................................................. v
Abbreviations ................................................................. xiii

PART 1
SETTING THE SCENE

Chapter I
Introduction ................................................................. 3
1. The principle of legality and the criminal law ....................... 3
2. A European ius puniendi .............................................. 7
3. The need for a European legality principle ....................... 9
   3.1. The legitimacy of the European ius puniendi ............... 9
   3.2. An autonomous European legality or national concepts? 11
4. Research questions ................................................... 13
   4.1. General research question .................................. 13
   4.2. Limitations of the research ................................ 15
   4.3. Outline .................................................. 16
       4.3.1. The application of the principle in national law . 16
       4.3.2. A European legality principle ...................... 19

Chapter II
Methodology ................................................................. 21
1. Legal transplants, cross-fertilisation and Europeanisation of
   legal doctrines .................................................... 22
2. National legal research: the national nucleus of the legality principle . 23
3. European research: fragments of the principle of legality ........ 27
4. Internal adaptation: parameters ................................ 28
5. Conclusion .................................................. 30

PART 2
THE LEGALITY PRINCIPLE IN NATIONAL CRIMINAL LAW

Chapter III
Theoretical Rationales of the Legality Principle .................... 33
1. The Enlightenment era as the source for the legality principle 34
2. Individual liberty and autonomy ................................... 36
Chapter IV
The Application of the Principle in three National Systems

1. Preliminary remarks .............................................. 66
2. Theoretical rationales ............................................. 67
3. The normative role of the legality principle ....................... 71
   3.1. Sources of criminal liability ............................... 71
   3.2. Statutes and court judgements ............................. 73
4. The aspects of the principle of legality .......................... 78
5. Lex scripta and the English statute-reservation .................... 79
6. Lex praevia, presumption of non-retroactivity and precedence .... 82
7. Lex certa and maximum legal certainty .......................... 85
8. Lex stricta, precedence and strict interpretation ................. 90
9. The principle of legality and the ECHR .......................... 95
   9.1. The ECtHR approach ...................................... 96
   9.2. The influence of the ECtHR jurisprudence on national law .... 101
10. The erosion of the legality principle ............................ 103
    10.1. Lex stricta ............................................. 104
        10.1.1. Can analogical reasoning be distinguished from interpretation? ..... 104
        10.1.2. Is analogical reasoning used in practice? .................. 106
        10.1.3. Will courts update norms to new circumstances? ............ 108
        10.1.4. Does the prohibition of analogy protect from judicial arbitrariness? ........ 109
    10.2. Lex certa ............................................ 115
        10.2.1. Who checks the compliance with lex certa? ................ 115
        10.2.2. Are there any specific criteria to determine precision? .... 117
        10.2.3. Is maximum certainty attainable? ........................ 119
    10.3. Lex scripta ............................................ 121
        10.3.1. Is case law a source of criminal liability? ................ 121
10.3.2. Is jurisprudence an organism of law? ................................. 123
10.4. Lex praevia ............................................................................. 124
11. Conclusion ................................................................................. 126

Chapter V
Three Models of Criminal Justice ..................................................... 129

1. Formalism, realism and relational theory ........................................ 130
2. Sword and Shield: two finalities of criminal law .............................. 132
3. Three models of criminal justice .................................................. 134
4. The classical model of criminal justice .......................................... 137
   4.1. Characteristics and theoretical rationales ................................. 138
   4.2. Characteristics of the legality principle ................................ 141
   4.3. Criticism .................................................................................. 142
5. The instrumentalist model of criminal justice .................................. 147
   5.1. Main characteristics and theoretical rationales ....................... 149
   5.2. The legality principle within this model ................................. 152
   5.3. Criticism .................................................................................. 155
6. The relational model of criminal justice ......................................... 159
   6.1. Main characteristics and theoretical rationales ....................... 159
   6.2. The legality principle is a ‘principle’ .................................... 164
   6.3. Application of the legality principle ..................................... 166
   6.4. Criticism .................................................................................. 169
7. Conclusion ..................................................................................... 172

PART 3
THE PRINCIPLE OF LEGALITY IN EUROPEAN CRIMINAL LAW

Chapter VI
Fragments of the Legality Principle in European Criminal Law .......... 177

1. The status of the principle of legality ............................................. 178
2. Sources of criminal liability ......................................................... 179
   2.1. Statutory criminal liability ...................................................... 180
   2.2. Jurisprudence and criminal liability ..................................... 183
   2.3. Nuremberg exception ........................................................... 187
3. Non-retroactivity of criminal liability .......................................... 187
   3.1. Theoretical rationales: the principle of legitimate expectations .... 188
   3.2. The application of non-retroactivity .................................... 190
      3.2.1. Tempus legis ................................................................. 193
      3.2.2. Tempus delicti ............................................................. 193
   3.3. Amendments of criminal liability ....................................... 194
# Contents

4. Precision and accessibility of criminal liability .......................... 195  
   4.1. Theoretical rationales: the principles of legitimate expectations and legal certainty .......................... 196  
   4.2. Accessibility of criminal legislation ........................................ 196  
   4.3. Precision of EU criminal legislation ......................................... 199  
   4.4. Problems of ambiguity in EU legislation .................................... 200  
   4.5. Precision of national implementing legislation ............................ 204  
   4.6. Methods of implementation .................................................... 207  
5. Interpretation of criminal liability ............................................. 209  
   5.1. Methods of interpreting EU law .............................................. 210  
   5.2. Is the ECJ bound by the principle of legality? ............................ 212  
   5.3. The obligation of conform interpretation .................................. 215  
6. Conclusion ................................. 219  

Chapter VII  
The Legitimacy of European Criminal Justice .............................. 221  
1. Three mind-sets for understanding the EU ..................................... 222  
2. Nature and legitimacy of the EU ................................................. 225  
3. Tendencies in legitimising European criminal law ............................ 228  
   3.1. The spill-over theory ............................................................ 229  
   3.2. A default European instrumentalism ........................................ 232  
   3.3. Anti-instrumentalist tendencies and their limitations .................... 237  
4. Interlocking legal orders: the relationship between European and national legal orders .......................................................... 243  
   4.1. The theory (and principle) of EU supremacy ............................... 245  
      4.1.1. General characteristics ................................................... 245  
      4.1.2. The theory of EU supremacy in European criminal law ............ 246  
   4.2. The theory of democratic statism .......................................... 250  
      4.2.1. General characteristics ................................................... 250  
      4.2.2. The theory of democratic statism in European criminal law ....... 252  
   4.3. The theory of constitutional pluralism ..................................... 256  
      4.3.1. General characteristics ................................................... 256  
      4.3.2. Constitutional pluralism in European criminal law ................. 258  
   4.4. Conclusion ................................................................. 261  
5. A relational model for European criminal justice ............................ 262  
   5.1. The insufficiency of the instrumentalist model ............................ 263  
   5.2. The anachronistic nature of the classical model ......................... 266  
6. Characteristics of a relational model for European criminal law .......... 268  
   6.1. The Rechtskarakter of European criminal law ............................. 269  
   6.2. The principle of legal certainty ............................................ 271  
   6.3. Counterfacticity of legal principles ....................................... 272
7. Protection of individuals in European criminal law ........................................ 273
8. Individual autonomy, democracy and separation of powers .......................... 278
   8.1. Individual autonomy, human dignity and liberty ................................. 278
   8.2. A European democratic principle .................................................. 280
   8.3. Separation of powers in the EU .................................................... 283
      8.3.1. Vertical separation of powers ................................................. 283
      8.3.2. Horizontal separation of powers .......................................... 285
9. Conclusion ......................................................................................... 287

Chapter VIII
The Principle of Legality in European Criminal Law ........................................ 289
1. Theoretical rationales of the European legality principle ............................... 289
   1.1. Rechtskarakter and European criminal justice .................................. 290
   1.2. European demos and democracy .................................................. 291
   1.3. Separation of powers ................................................................. 293
   1.4. Legal certainty and foreseeability .............................................. 294
2. Legitimising and distributive roles of the European legality principle .......... 295
   2.1. Legitimation of European competences in substantive criminal law .... 296
   2.2. Distribution of powers in the two-level European criminal justice system 298
3. Normative role: the aspects of the European legality principle .................... 300
   3.1. Lex scripta .................................................................................. 300
      3.1.1. Should case law be a source of criminal liability? ...................... 301
      3.1.2. Lex parliamentaria and lex nationalis .................................... 303
   3.2. Lex praevia .................................................................................. 304
   3.3. Lex certa ...................................................................................... 304
      3.3.1. Accessibility of legislation ...................................................... 305
      3.3.2. Precision of Directives and annulment proceedings ............... 307
      3.3.3. Implementation, infringement proceedings and the supervisory role of the ECJ .............................................................. 309
      3.3.4. Is a European criminal code necessary? .................................. 310
   3.4. Lex stricta .................................................................................... 312
      3.4.1. Preliminary reference procedure .......................................... 312
      3.4.2. Obligation of conform interpretation ..................................... 313
4. Final conclusions ................................................................................. 315
   4.1. Reflection on the chosen methodology ........................................... 315
   4.2. Comparative analysis .................................................................... 316
   4.3. Theoretical rationales .................................................................... 318
   4.4. Relational model of criminal justice ............................................. 319

xi
## Contents

4.5. Principle of legality ............................................. 320  
4.6. Future perspectives .......................................... 322  

*Selected Bibliography* .................................................. 325  
*Summary* ................................................................ 349  

xii
### ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
</tr>
<tr>
<td>AFSJ</td>
<td>Area of Freedom Security and Justice</td>
</tr>
<tr>
<td>AG</td>
<td>Advocate General</td>
</tr>
<tr>
<td>All ER</td>
<td>All England Law Reports</td>
</tr>
<tr>
<td>App.</td>
<td>Application</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof</td>
</tr>
<tr>
<td>BVerfG</td>
<td>Bundesverfassungsgericht</td>
</tr>
<tr>
<td>Cr App R</td>
<td>Criminal Appeal Reports</td>
</tr>
<tr>
<td>CS</td>
<td>European Coal and Steel Community Treaty</td>
</tr>
<tr>
<td>DCC</td>
<td>Dutch Criminal Code</td>
</tr>
<tr>
<td>EAW</td>
<td>European Arrest Warrant</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention of Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>ECLI</td>
<td>European Case Law Identifier</td>
</tr>
<tr>
<td>EComHR</td>
<td>European Commission of Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>EPPO</td>
<td>European Public Prosecutor's Office</td>
</tr>
<tr>
<td>ER</td>
<td>The English Reports</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EWCA Crim</td>
<td>Court of Appeal Criminal Division</td>
</tr>
<tr>
<td>EWHC</td>
<td>High Court of Justice</td>
</tr>
<tr>
<td>EWHC Admin</td>
<td>High Court (Administrative Court)</td>
</tr>
<tr>
<td>GCC</td>
<td>German Criminal Code</td>
</tr>
<tr>
<td>HR</td>
<td>Hoge Raad</td>
</tr>
<tr>
<td>KB</td>
<td>Law Reports King’s Bench Division</td>
</tr>
<tr>
<td>Law Com</td>
<td>Law Commission (UK)</td>
</tr>
<tr>
<td>LJN</td>
<td>Landelijk Jurisprudentie Nummer</td>
</tr>
<tr>
<td>NJ</td>
<td>Nederlandse Jurisprudentie</td>
</tr>
<tr>
<td>NJW</td>
<td>Neue Juristische Wochenschrift</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal</td>
</tr>
<tr>
<td>OLG</td>
<td>Oberlandesgericht</td>
</tr>
<tr>
<td>Para.</td>
<td>Paragraph</td>
</tr>
<tr>
<td>QB</td>
<td>Law Reports Queen’s Bench Division</td>
</tr>
<tr>
<td>RG</td>
<td>Reichsgericht</td>
</tr>
<tr>
<td>RGSt</td>
<td>Entscheidungen des Reichsgerichts in Strafsachen</td>
</tr>
<tr>
<td>Stb</td>
<td>Staatsblad van het Koninkrijk der Nederlanden</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
</tr>
</tbody>
</table>
# Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Charter</td>
<td>Charter of Fundamental Rights of the European Union.</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>UKHL</td>
<td>House of Lords</td>
</tr>
<tr>
<td>WLR</td>
<td>Weekly Law Reports</td>
</tr>
<tr>
<td>ZaöRV</td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</td>
</tr>
<tr>
<td>ZIS</td>
<td>Zeitschrift für Internationale Strafrechtsdogmatik</td>
</tr>
<tr>
<td>ZStW</td>
<td>Zeitschrift für die gesamte Strafrechtswissenschaft</td>
</tr>
</tbody>
</table>