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,
Acknowledgements

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
Contents

2.1. Interpretations of individual liberty and autonomy .......................... 36
2.2. Individual liberty and autonomy in criminal law .......................... 38
3. The principle of democracy ...................................................... 43
  3.1. Features of the principle of democracy .................................. 43
  3.2. Procedural and substantive democracy ................................. 45
4. Separation of powers ............................................................... 48
  4.1. Montesquieu's theory ......................................................... 48
  4.2. Montesquieu's three models of state ................................... 50
5. Rechtsstaat and Rule of Law .................................................. 54
6. Other principles ................................................................. 58
  6.1. Principle of legal certainty ................................................. 58
  6.2. Principle of guilt ............................................................. 61
7. Conclusion ................................................................. 64

Chapter IV
The Application of the Principle in three National Systems ................. 65

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
## Contents

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

Selected Bibliography ......................................................... 325
Summary ................................................................. 349
ABBREVIATIONS

AC
AG
All ER
App.
BGH
BVerfG
Cr App R
CS
DCC
EAW
EC
ECHR
ECJ
ECLI
EComHR
ECtHR
EPPO
ER
EU
EWCA Crim
EWHC
EWHC Admin
GCC
HR
KB
Law Com
LJN
NJ
NJW
OJ
OLG
Para.
QB
RG
RGSt
Stb
TEU
TFEU

Appeal Cases
Advocate General
All England Law Reports
Application
Bundesgerichtshof
Bundesverfassungsgericht
Criminal Appeal Reports
European Coal and Steel Community Treaty
Dutch Criminal Code
European Arrest Warrant
European Community
European Convention of Human Rights
European Court of Justice
European Case Law Identifier
European Commission of Human Rights
European Court of Human Rights
European Public Prosecutor’s Office
The English Reports
European Union
Court of Appeal Criminal Division
High Court of Justice
High Court (Administrative Court)
German Criminal Code
Hoge Raad
Law Reports King’s Bench Division
Law Commission (UK)
Landelijk Jurisprudentie Nummer
Nederlandse Jurisprudentie
Neue Juristische Wochenschrift
Official Journal
Oberlandesgericht
Paragraph
Law Reports Queen’s Bench Division
Reichsgericht
Entscheidungen des Reichsgerichts in Strafsachen
Staatsblad van het Koninkrijk der Nederlanden
Treaty on European Union
Treaty on the Functioning of the European Union
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</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>