

Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 31

From the Judge's *Arbitrium* to the Legality Principle

Legislation as a Source of Law
in Criminal Trials

Edited by
Georges Martyn, Anthony Musson
and Heikki Pihlajamäki



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GEORGES MARTYN

Introduction: From *Arbitrium* to Legality? Or Legality and *Arbitrium*?

I. Presentation of the general theme: the legality principle

The legality principle rules modern criminal law: all laws are to be clear, ascertainable and non-retrospective. The principle prohibits criminal sanctions for acts or omissions that were not criminal at the time of their commission or omission. Likewise, the legality principle demands that the sanctions for a particular crime cannot be increased with retrospective effect. The principle is central to all western legal systems,¹ up to the point that it is enshrined,

¹ E.g. Constitution of the Kingdom of *Belgium* (Art. 14): No punishment can be made or given except in pursuance of the law. Constitution of the Republic of *Cyprus* (App. D, II, Art. 12): 1. No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed. (...) 3. No law shall provide for a punishment which is disproportionate to the gravity of the offence. Constitution of the *Czech Republic* (Art. 39): Only the law shall determine which acts constitute a crime and what penalties or other detriments to rights or property may be imposed for them. Constitution of the Republic of *Estonia* (Art. 23): No one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed. No one shall have a more severe punishment imposed on him or her than the one that was applicable at the time the offence was committed. If, subsequent to the commission of an offence, the law provides for a lesser punishment, the lesser punishment shall apply. (...) Constitution of *Finland* (Art. 8): No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an act at the time of commission of the offence. Constitution of the *French Republic* – Declaration of the Rights of Man and of the Citizen (Art. 7): A person may be accused, arrested or detained only in the cases specified by law and in accordance with the procedures which the law provides. Those who solicit, forward, carry out or have arbitrary orders carried out shall be punished; however, any citizen summoned or apprehended pursuant to law must obey forthwith; by resisting, he admits his guilt; (and Art. 8): Only penalties which are strictly and clearly necessary may be established by law, and no-one may be punished other than pursuant to a law established and enacted prior to the offence, and applied lawfully. Basic Law of the Federal Republic of *Germany* (Art. 103): (...) An act can be punished only where it constituted a criminal offence under the law before the act was committed.

as part of international human rights law, in the major instruments such as the Universal Declaration of Human Rights (1948),² the European Convention

Human Rights Act (*Great Britain*) (Art. 7): 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations. Constitution of the Hellenic Republic (*Greece*) (Art. 5.3): No person shall be prosecuted, arrested, imprisoned, or otherwise restricted, save when and in the manner specified by law; (and Art. 7.1): No offence shall exist, nor shall any punishment be imposed, unless a law determining the details has been in force prior to the commission of the act. Punishment can never be heavier than provided by the law in force when the act was committed. (...) Constitution of the Republic of *Hungary* (Art. 57.4): No one shall be declared guilty and subjected to punishment for an offence that was not a criminal offence under Hungarian law at the time such offence was committed. Constitution of the *Italian* Republic (Art. 25): (...) No one shall be punished save on the basis of a law which has entered into force before the offence has been committed. Constitution of the Republic of *Lithuania* (Art. 31): A person shall be presumed innocent until proven guilty and must be declared guilty by an effective court judgment in accordance with the procedure established by law. Constitution of the Grand Duchy of *Luxembourg* (Art. 14): No penalty may be fixed or applied except in pursuance of the law. Constitution of *Malta* (Art. 39.8): No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed. Constitution of the Republic of *Poland* (Art. 42.1): Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law. Constitution of the *Portuguese* Republic (Art. 29): 1. No one shall be convicted under the criminal law except for an act or omission made punishable under existing law; and no one shall be subjected to a security measure, except for reasons authorized under existing law. (...) 3. No sentences or security measures shall be ordered that are not expressly provided for in existing laws. 4. No one shall be subjected to a sentence or security measure that is more severe than those applicable at the time the act was committed or the preparations for its commission were made. Criminal laws that are favourable to the offender shall apply retroactively. Constitution of the *Slovak* Republic (Art. 49–50): The law shall define all offences, the punishment or the measure restricting personal or property rights to be imposed on the offender in particular cases. (...) Any criminal conduct shall be determined by, and punished under, the law effective at the time of the act. The law passed after the commission of the offence shall apply only if the law is more beneficial to the offender. Constitution of the Republic of *Slovenia* (Art. 28): No one may be punished for an act which had not been declared a criminal offence under law, or for which a penalty had not been prescribed, at the time the act was performed. Acts that are criminal shall be established and the resulting penalties pronounced according to the law that was in force at the time the act was performed, save where a more recent law adopted is more lenient towards the offender. Constitution of the Kingdom of *Spain* (Art. 9.3): The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that

on Human Rights (1950),³ the International Covenant on Civil and Political Rights (1966)⁴ and the Charter of Fundamental Rights of the European Union (2000).⁵ As the history of ideas in criminal law is concerned, the principle of legality is normally traced back to enlightened jurists, such as Cesare Beccaria (1738–1794) publishing his *Dei delitti e delle pene* in 1764,⁶ and to social contract thinkers such as Charles de Secondat de Montesquieu (1689–1755),⁷ according to whom judges were to act only as the mouthpiece of the statutory

are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities; (and Art.25.1): No one may be convicted or sentenced for actions or omissions which when committed did not constitute a criminal offence, misdemeanour or administrative offence under the law then in force. (...) Constitution of the Kingdom of *Sweden* (II, Art. 10.1): No penalty or other penal sanction may be imposed in respect of an act which was not subject to any penal sanction at the time it was committed. Constitution of the *United States of America* (III.2): (...) The trial of all crimes, except in cases of impeachment, shall be by jury; (...); (and Amendment VI): In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

² Article 11.2: Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

³ Article 7.1: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

⁴ Article 15.1: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

⁵ Art. 49: Principles of legality and proportionality of criminal offences and penalties: 1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. 2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognized by the community of nations. 3) The severity of penalties must not be disproportionate to the criminal offence.

⁶ See, amongst many others, the article by Meccarelli in this book.

⁷ See, amongst many others, the contributions of Schmoeckel and Soleil further in this book.