THE RULE AGAINST RETROACTIVE CRIMINAL LEGISLATION

REFLECTIONS BASED ON AN EARLY SWEDISH CASE

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THE LEGAL EXPRESSION "*ex post facto* law" is well known in all English-speaking countries. Originally it referred to legislation that retroactively made criminal an act which could previously be done without incurring any penalty at all. But the meaning of the expression was extended so as to cover legislation which, with retroactive effect, introduced a penalty more severe than that prescribed by an earlier law.

Retroactive legislation outside the province of criminal law does not lie within the scope of this essay. The question whether —and, if so, to what extent—constitutional prohibitions of *ex post facto* law may also apply to other branches of the legal system will therefore be ignored.

A rule prohibiting *ex post facto* law will often be encountered in connection with the maxim *nulla poena sine lege*. The two rules do not, however, cover exactly the same ground. In most jurisdictions there will be found one basic rule that no court may sentence a person except by the authority of written law, and an additional rule that legislation should not be retroactive. It might even be said that a legal system does not provide the citizens with complete protection against arbitrary punishment unless these rules are both recognized. It is quite possible, however, for a legal system to recognize one of the rules, but not the other. In particular, it has quite often happened that a country adopts retroactive criminal legislation without sacrificing the rule that its courts must not inflict punishment unless they have statutory authority. On the other hand, a country which has not introduced the rule *nulla poena sine lege* but accepts extension of the law both by legislation and by judicial decisions may yet recognize the rule that statutory law should not be retroactive. Another difference between the two rules may be noted. The rule *nulla poena sine lege* is chiefly the concern of the courts and puts a limit to their powers. A prohibition of *ex post facto* law, however, is primarily an injunction to the legislature and limits its freedom of action. Only in the second place will the prohibition be of interest to the courts, namely when the text of a statute omits to state its applicability in time and it falls to the court, guided by general

principles of law, to decide whether the old or the new law should prevail.

Blackstone in his famous work *Commentaries on the Laws of England,* which was first published in the years 1765–69, made an unambiguous and forceful pronouncement on our subject: "There is still a more unreasonable method ... which is called making of laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro,* and be notified before their commencement."[1]

The only reference Blackstone makes (in a footnote) is to certain statements by Cicero.[2] He does not mention any source closer to his own times. Nor does he say whether he had any particular instances of abuse in mind. It has not been possible to find any direct and clear prototype for Blackstone's pronouncements either in Anglo-Saxon or in Continental legal literature. It is true that the principle that criminal statutes should not have retroactive operation had already been propounded by one of the Fathers of the Church, viz. Ambrosius (d. 397), and later–either in its unlimited form or with some modification–by a great number of jurists in the Middle Ages.[3] But these pronouncements may well have been overlooked by later writers and may thus have been unknown to Blackstone. Bracton (d. 1268) and Coke (1552–1634) had both pronounced on the operation of statutes in point of time, but neither had done so with reference to any problem of criminal law.[4] Francis Bacon (1561–1626) did, however, enter the

[1] Quoted here in accordance with the 8th ed., Oxford 1778, vol. I, p. 46.

[2] The pronouncements by Cicero alluded to, which, however, contain very important modifications, have been closely examined by Roubier, *Les conflits de lois dans le temps (Théorie dite de la non-retroactivité des lois),* Paris 1929–33, vol. I, pp. 64 f., vol. II, pp. 507–9.

[3] On this point, see the instructive summary by Roubier, *op. cit.,* vol. II, pp. 509–11, which, in turn, is based on Seeger, *Ueber die rückwirkende Kraft neuer Strafgesetze,* Tübingen 1862, p. 57, and Gabba, *Teoria della retroattività delle leggi,* 3rd ed., Turin 1891–98, vol. II, p. 312, 314.

[4] Bracton, *De Legibus et Consuetudinibus Angliæ,* London 1569, lib. IV, fol. 228 r.; Coke, *Second Part of the Institutes of the Lawes of England,* London 1642, p. 292.

Both Bracton and Coke quoted the Latin maxim *Nova constitutio futuris*

province of criminal law in his writings and closely approached the topic under discussion in this essay. He did not really concern himself with *ex post facto* laws, however, but with something which might be called *ex post facto* facts, i.e. the effect of fresh factual circumstances arising after the commission of the criminal act.[5]

Blackstone in all probability was not aware that he had in Sweden a colleague, slightly older than himself, who had made a clear pronouncement on the subject of retroactive criminal laws. This was David Nehrman, also known as Ehrenstråle, the name he assumed when he was raised to the nobility. He was professor of law at the University of Lund between 1720 and 1753. An outstanding legal writer, his famous textbook on criminal law was published in 1756. Nehrman stressed that anything done or omitted before legislation was passed penalizing such an act or omission should not be punished or be regarded as a crime. If the act had been forbidden, but a more severe punishment was prescribed after the commission of the act, then the criminal ought to be sentenced according to the old and not the new law. For, Nehrman said, one reason for punishing the criminal was that he had attached too little importance to the very punishment prescribed compared to the pleasure he derived from doing or omitting what was forbidden or commanded by the law.[6] In his text Nehrman quoted two cases, viz. a case of 1688, of which the facts will be set out here, and also another case of 1691, which is of less interest in this connection. He also referred to a Royal Ordinance of 1749, which will be commented on below.

With the publication of his *Commentaries* Blackstone's ideas on *ex post facto* law spread rapidly both in England and in the North American colonies. Shortly afterwards, these ideas found expression in the Constitutions adopted in 1776 by the States of North Carolina, Maryland and Delaware. The Bills of Rights of North Carolina and Maryland both lay down "that retrospective laws, punishing acts committed before the existence of such laws are

formam imponere debet, non praeteritis, which corresponds to the opening words of the so-called Theodosian rule. This rule, however, goes on with the reservation, ... *nisi nominatim etiam de præterito tempore et adhuc pendentibus negotiis cautum sit.* The rule accordingly allowed the legislator to make legislation retroactive, provided this was done by express words. On this point, cf. Roubier, *op. cit.,* vol. I, pp. 67–71.

[5] Bacon, *Maxims of the Law,* regula VIII (see *The Works of Francis Bacon,* ed. by James Spedding *et al.,* vol. 14, Boston 1861, pp. 221 f.).

[6] Nehrman, *Inledning til then swenska jurisprudentiam criminalem,* Stockholm & Uppsala 1756, pp. 21 f.

oppressive, unjust, and incompatible with liberty, wherefore no *ex post facto* law ought to be made". The text of the Bill of Rights of Delaware is almost identical. After some re-phrasing, the same idea recurred in 1780 in the Bill of Rights of Massachusetts.

When the rules just mentioned were formulated in these young states yearning for freedom, it was in fact for the first time in history that express prohibitions of retroactive legislation were introduced into constitutional documents. Unfortunately, such *travaux préparatoires* as have been preserved give no indication who took the initiative in, and what external circumstances gave occasion to, the formulation of these articles and their incorporation in the Constitutions of these particular four States. Be that as it may, the idea spread from the Constitutions of the four States to the Constitution of the United States (1787), in which Art. 1, sec. 9, para. 3 reads: "No bill of attainder or *ex post facto* law shall be passed." This rule concerns Federal legislation. With regard to State legislation, Art. 1, sec. 10, para. 1 provides: "No state shall... pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,..."

The prohibition of *ex post facto* law later found clear expression in the famous Declaration of Human Rights, made in France in 1789 and confirmed as recently as 1946 in the introductory part of the French Constitution of that year. Art. 8 of the Declaration stated: "... no one ought to be punished but by virtue of a law promulgated before the offence, and legally applied". It is of course conceivable that the authors of the Declaration knew and made use of the passage from Blackstone reproduced above. A French translation of his treatise had been published in 1774–76. But the most probable explanation is that the contents of Art. 8—like so much else in the Declaration—were taken from the North American constitutional documents and thus brought back across the Atlantic. It is well known that Lafayette took a great interest in the social organization of the North American states, and it is a fact that the French projects were discussed in his correspondence with Jefferson. The French Constitution of 1793 also put strong emphasis on the prohibition of *ex post facto* law. On the American model it was declared that "a statute that prescribes punishment for wrongs committed before it was passed, would be tyrannical; the retroactive effect given to such a statute would be a crime".

The prohibition has since been introduced into the constitutions of many nations. Of the Scandinavian countries, however, only Norway has an express enactment: Art. 97 of the Norwegian

Constitution of 1814 provides that "No law shall be given retroactive effect".[7] In Finland, the prevalent opinion is that the general provisions of the Constitution designed to protect the rights and liberties of the citizens in effect make it impossible for Parliament legally to pass an *ex post facto* law except by the procedure prescribed for an alteration of the Constitution. That this is so is quite clear as regards a statute that makes criminal an act which formerly involved *no* punishment. The position is slightly more uncertain with respect to legislation which merely *increases* the punishment prescribed for an act already regarded as criminal.[8]

If we turn to Sweden, a draft Criminal Code issued by a Committee in 1923—but never enacted—is of interest. It shows that Swedish lawyers at that time considered that there existed no constitutional obstacle to the adoption of an *ex post facto* law. It was regarded as a matter for the legislature in each particular case to weigh the reasons for and against such legislation and, if it was found desirable, to prescribe how far the new and more severe punishment should be applicable. The members of the Committee themselves, in the report to which the draft was annexed, expressed rather advanced views. Their opinion was indeed that a new criminal statute ought not to apply to previous acts which had formerly been free from punishment, nor should it apply if the time limit for a prosecution under the old law had expired. But if the act was punishable both according to the old and the new statute, then the new statute ought to be applied. Only if the act must be regarded as predominantly of a political character, should the old statute, if more lenient, be resorted to.[9] This attitude was criticized by writers on criminal law,[1] and it is not adopted in the new draft Criminal Code, published in 1953. This draft Code lays down that a new criminal statute shall only be

[7] For further information, see Andenæs, *Statsforfatningen i Norge,* Oslo 1948, pp. 278–80.

[8] On this point, cf. the *Opinion* of the Supreme Court of Finland, dated August 28, 1945, and addressed to the Constitutional Committee of the Parliament, *1945 Rd.—U. B.—Prop. N:o 54,* p. 16. Cf., too, Kastari, "The Constitutional Protection of Fundamental Rights in Finland" (1960) 34 *Tulane Law Review* 701.

[9] See the official Swedish series of committee reports and opinions, *S. O. U.,* 1923: 9, pp. 3, 68–73.

[1] Stjernberg, *Straffrättsliga studier,* Uppsala 1928, pp. 25–7, and Agge, *Den svenska straffrättens allmänna del i huvuddrag,* fasc. 1, Stockholm 1944, pp. 96–102.—The Norwegian Attorney-General, Kierschow, in a review of the Swedish project, went even further than the Committee. He wanted to make criminal legislation retroactive with regard to political crimes as well. See *T. f. R.* 1925, pp. 9–11.

applicable if it does not provide for any punishment at all, or i it prescribes one more lenient than that decreed by the legislatio in force when the act was done.[2]

In Denmark opinion against a constitutional prohibition of th passing of an *ex post facto* law has been particularly strong. Prominent Danish lawyers have expressed the view that it would be undesirable thus to tie the hands of the legislature. It has also been said that such a prohibition would not be effective, for it would necessarily be disregarded in certain circumstances.[3] Shortly after the second world war retroactive criminal legislation was in fact adopted both in France and in Norway in spite of constitutional prohibitions, as well as in Denmark, where there was no such obstacle. In Finland, where the situation differed considerably from that prevailing in other countries in post-war Europe, Parliament, in accordance with the wishes of the victorious Powers, reluctantly passed retroactive legislation designed to punish those "responsible" for the War.

A few years after the War the United Nations was prepared both to accept and back up the idea of prohibiting retroactive criminal legislation—a fact which, in view of post-war events, must be regarded as somewhat surprising. Art. 11, sec. 2, of the Universal Declaration of Human Rights, adopted by the General Assembly in 1948, states: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed." This passage, which even verbally shows a remarkable resemblance to what Nehrman wrote in his textbook of 1756, will probably be guiding as regards criminal legislation in the member states. It is true that the Declaration does not possess the force of law. But it has great moral and educational significance. Any attempt to force through legislation contrary to what the Declaration terms "a common standard of achievement for all peoples and all nations" will in future undoubtedly be rendered more difficult. It is noticeable that the Declaration presupposes the possibility of international criminal legislation. Such legislation or comparable international conventions or declarations may fill at

[2] *S. O. U.* 1953: 14, pp. 67, 422–32.

[3] Hurwitz, writing in *Sv. J. T.* 1944, pp. 835–45. See also the same author's *Den danske kriminalret, almindelig del,* fasc. 1, Copenhagen 1950, pp. 118, 174–6, 194–7.

least part of the vacuum that exists and was temporarily filled with retroactive criminal legislation in the post-war years.[4]

The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in 1950, in fact creates a legal obligation binding on the ratifying powers.[5] Art. 7, sec. 1, of the Convention repeats word for word Art. 11, sec. 2, of the Universal Declaration, the only difference being that the Convention has "criminal offences" in place of "penal offences". Art. 7, sec. 2, however, contains an important modification: "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." The fact that this rider was considered necessary shows that the rule of non-retroactivity was recognised by the framers of the Convention as the leading principle even in a field where the rule *nulla poena sine lege* has not in practice been fully applied.

To some extent the following statement, forming part of the Conclusions adopted at the International Congress of Jurists in New Delhi in 1959, also reflects the widespread opinion against retroactive criminal legislation among lawyers all over the world. The statement is contained in clause I of that part of the Conclusions which is concerned with the criminal process and the rule of law—a subject assigned to Committee III of the Congress—and reads as follows: "It is always important that the definition and interpretation of the law should be as certain as possible, and this is of particular importance in the case of criminal law, where the citizen's life or liberty may be at stake. Certainty cannot exist in the criminal law where the law, or the penalty for its breach, is retrospective."[6]

Constitutional prohibitions of retroactive criminal legislation do not prevent the application of a new criminal statute to acts done previously, in so far as the new statute is more lenient to the offender. The victim of a crime has nowhere been granted any constitutional guarantee that the offender will in fact be punished

[4] Cf. Palmgren, writing in *Sv. J. T.* 1958, pp. 91 f.

[5] It may be mentioned that the existence of this convention, which has been ratified by Sweden, was referred to as one of the reasons for the rejection in the draft Criminal Code of 1953 of the idea which was inherent in the 1923 project. See *S. O.U.* 1953: 14, pp. 425 f.

[6] *Newsletter of the International Commission of Jurists,* No. 6, March–April 1959, p. 4, and *The Rule of Law in a Free Society,* The Hague 1960, p. 9. See also pp. 102 f., 248 and 276 of the last-mentioned publication.

with the severity prescribed by the law at the time when the crime was committed.

There is a need for transitional provisions not only when the legislature intends the more lenient statute to apply, but also when the purpose of a reform is to abolish old forms of punishment or to introduce new ones. The need is particularly great in a country whose constitution contains no provisions on the point. Many countries solve the difficulties inherent in transitional situations by general provisions in their criminal codes, and these will also be applicable outside the scope of the general criminal code, in so far as a special statute does not otherwise provide. Nowadays such general provisions mostly give expression to the principle that the more lenient statute should prevail. It is only occasionally—e.g. at the transition from war to peace, or from times of economic crisis to normal conditions—that the legislature allows an old and more severe statute to remain applicable to acts committed when the statute was still in force.

Contrary to this approach, which is the more modern one, a few countries still adhere to the general rule that the statute in force at the time of the act should be decisive, even if a new and more lenient statute has since come into operation.

Legal history demonstrates that it is only in comparatively recent times that legislators have paid attention to the need for express transitional provisions when a statute is adopted. From Sweden and Finland—at that time united in one realm—there may be mentioned as an example the Royal Ordinance of June 7, 1749. This Ordinance, also referred to by Nehrman, was designed to suppress certain unfair bargains concluded with young persons. Art. 10 laid down that everything prescribed by the Ordinance should also be applicable to earlier events—but only in so far as private rights were concerned. With regard to the penal provisions of the Ordinance, the offender was to be sentenced in accordance with what was law at the time of the act.[7]

The most advanced view, viz. that the more lenient statute should always prevail, was early put forward in legal literature and was embraced by many jurists in the Middle Ages. However, only in very recent times did this idea find expression in legislation. From Finland there may be mentioned an Act of 1812 for the clarification of the law in certain respects in connection with the reunion of the County of Viborg with Finland. It was laid down

[7] See Modée, *Utdrag ur publique handlingar,* vol. IV, Stockholm 1754, p. 2872.

that all pending criminal cases should be decided in accordance with the statute prescribing the more lenient punishment. In the course of the nineteenth century this rule was introduced into the criminal codes of a great many nations.

Finally, it may be mentioned that the principle *nulla poena sine lege* is adopted in the Soviet Criminal Code of 1958. That Code further provides, in Art. 6, that a criminal statute shall not have retroactive effect, unless this would be to the advantage of the accused.

The general survey given above has furnished examples both of successes and reverses for a fundamental legal principle of great importance to society. After the severe setbacks that came in the wake of the second world war, the tide has again turned, and the principle is now in a stronger position than ever before. But there is no doubt that much informational work and, in many places, more tangible measures, will yet be required before the principle has a firm and assured foothold in the world.

It is now time to consider the early case that is the occasion for writing this article. The case was decided at a time when no legislator had yet been concerned with the subject of retroactive criminal legislation and when it was not easy to find applicable pronouncements in the available legal literature. It is possible to make a detailed study of the facts of the case from original documents preserved in the County Archives at Lund, in the Record Office of the Court of Appeal at Jönköping, and in the National Archives in Stockholm.[8]

Let us move to Christianstad in north-eastern Skåne, i.e. to the territory yielded by Denmark to Sweden by virtue of the Peace of Roskilde in 1658. On Sunday, August 26, 1686, the congregation assembled for divine service in the stately City Church. There was an altercation between two women as to their seats. Bengta Brockmöller, the wife of Hans Brockmöller, a merchant and a freeman of the city, had been married longer than her adversary. But the other woman's husband was Alderman Claus Frijs, who could boast of a more exalted position in society. Bengta Brockmöller felt slighted by the alderman's wife, because the latter had allowed the wife of another freeman to pass and to take up a more distinguished seat in the pew. This act of kindness made Bengta ambitious and jealous. She followed the other woman and pushed the alderman's wife back to a seat below. The whole incident was

[8] See Palmgren, "Ett märkligt rättsfall om äldre och nyare strafflag", *Sv. J. T.* 1952, pp. 685–95.

accompanied by words which were far from pleasant and which caused a woman near by to rise and tell Bengta Brockmöller to hold her tongue.

Nine days later Hans Brockmöller and Claus Frijs, as guardians by law of their wives, were convened to the Lower City Court ("kämnärsrätten"). To enable witnesses to be summoned, the hearing of the case was postponed first until September 7, and then again till September 30, when the Court gave judgment. For her disorderly behaviour in church Brockmöller's wife was sentenced, as a warning to others, to submit to the discipline of the Church and to acknowledge her sins publicly or, if she wished to avoid this punishment, to pay a fine of 50 "daler silvermynt" (Swedish silver dollars). Both parties appealed to the City Court. The case was tried on November 24 and December 1, and the Court passed judgment on December 8. The fine imposed by the Lower City Court was reduced to 20 daler.

The case went on further appeal to the Court of Appeal at Jönköping, which was faced with a particularly hard nut to crack: for on December 22, 1686, there had been issued a Royal Ordinance concerning fighting, noise and disorderly conduct in church. Therein it was decreed that any person who pushed, shoved or jostled other people should be liable to a fine of 100 daler, and that any person who otherwise quarrelled or entered into disputes in the house of God should be fined 50 daler. The judges of the Court of Appeal now had to make up their minds whether the new legislation should be applied to a crime which had been committed before the issuing of the new Ordinance. The problem was not ignored, but given express attention. Different opinions were expressed and a vote was taken. The following information can be gathered from the record of the Court of Appeal for November 17, 1687.

Mr Justice Örnwinge, who prepared and presented the case to the Court, wanted Brockmöller's wife to be fined 50 daler.

Mr Justice Swanhals pointed out that the disorderly act had occurred before the Royal Ordinance was issued, but that the latter ought nevertheless to be applied, as there was no other statute applicable to such a case. Moreover, precedents showed that previously penalties of even greater severity than that prescribed by the Royal Ordinance had been inflicted. He accordingly proposed that Brockmöller's wife be fined 100 daler.

Mr Justice Häger proposed a fine of 50 daler.

Mr Justice Aschling said that it was not new but old law that

all persons ought to keep the peace in church. As Brockmöller's wife had pushed the other woman and sat down on her lap and had thus given offence, she ought *by reason of* the Royal Ordinance to be fined 100 daler and make a public apology in church.

Mr Justice Torpadius said that no statute had been published previously. But as a *scandalum* had occurred, the woman should be fined 50 daler *ex arbitrio*.

Mr Justice Cederschiöld said that customary law was in fact law, but a statute when published ought to be observed. Hence, Brockmöller's wife should be fined 100 daler, *by reason of* the Royal Ordinance.

Mr Justice Adlerberg said that the woman should be fined 100 daler for her disorderly behaviour in church *by reason of* the *constitutio regia*.

Mr Justice Leijonsteen was of the same opinion.

The Deputy Chief Justice, Falkenberg, found that Brockmöller's wife ought to be fined 100 daler and make public apology in church on account of her behaviour.

The Chief Justice, Ståhlarm, considered that she ought to pay a fine of 100 daler and make public apology in church on account of her behaviour and *by reason of* the Royal Ordinance.

Thus the Court of Appeal, by seven votes to three, increased the punishment to the amount prescribed by the new statute. In accordance with this, the judgment of the Court was formulated and engrossed on November 19. But both the record and the draft judgment show that the wording was carefully and deliberately chosen. This wording might be regarded as expressing the idea that under the previous law it was open to the Court to impose a discretionary punishment based on an assessment as to what would be reasonable in the actual circumstances of the case, but that the Court, after the issuing of the new legislation, should adhere to the amount fixed thereby.[9]

The case went on appeal to the highest instance in the land, i.e. to the King himself, who, in his capacity as fountain of justice, had to decide the issue in the division of the Council of the Realm known as the *Justitierevisionen* (the Judicial Division).

The case was presented to this body for the first time on January 9, 1688. Unfortunately, the minutes of the Council for that day

[9] The majority opinion corresponded, at any rate on the main points, with the view expressed in the Middle Ages by Bartolus de Sassoferrato (1314–57) and later by several other writers. On this view see Roubier, *op. cit.*, vol. II, pp. 510 f.

were among the documents lost when the old Palace of Stockholm burned down in 1697. But the decision reached on this occasion may be gathered from the official document issued as a result of the meeting, viz. the Order in Council of January 9, 1688, the original of which is preserved in the archives of the Court of Appeal at Jönköping. It is signed by King Charles XI himself and countersigned by Lars Mörling, a judge assigned to the Chancery of the Judicial Division, who was responsible for the preparation and presentation of the case. The document makes amusing and interesting reading. As was the custom of the time, the King speaks to his Court of Appeal at Jönköping in a fatherly tone, both benevolent and stern:

"... It appears from these documents that the altercation and the ensuing pushing in church took place at a time, to wit, in the month of August, considerably before the publication in December of Our Ordinance directed against such disorderly behaviour. We accordingly feel called upon to call for your humble explanation as to how you have come to adjudge a case in accordance with a statute that was not enacted until after the act was done, particularly as you have not in your judgment touched on or remembered to mention this circumstance of the case. It is therefore Our Royal Pleasure and Command that you do speedily submit this explanation and also return the documents attached hereto ..."

The explanation of the Court of Appeal is dated February 5. It is very long and detailed and gives a complete picture of the choice with which the Court was faced: either to look to the new legislation for support, or else to inflict a discretionary punishment according to the previous law, in which no statutory provision could be found that would fit the case exactly. The explanation ends with a statement that the Court of Appeal had been well aware that it was not obliged to apply new legislation to events occurring before the legislation was made and published. But the Court had thought that previous case law—which varied considerably—and its own discernment would not provide such a firm basis for its decision as if the Court resolved the case (as indeed the wording of the judgment indicated) not *according to,* but *by reason of* what His Royal Majesty had been pleased to decree in this most just and gracious Ordinance, which was published while this case was still being argued in the courts of first instance.

The case was presented for final determination in the Judicial Division of the Council of the Realm on March 21, 1688. There were present, apart from the King, Count Bengt Oxenstierna,

Count Hans Wachtmeister, Baron Lars Fleming and Count Gustaf Adolf De la Gardie. As on the previous occasion, Lars Mörling was responsible for the presentation of the case. Between them these men represented statesmanship, knowledge of the law, and long judicial experience. The minutes contain the following interesting items:

"*Mörling*: This woman, wife of Brockmöller, petitions to be excused making apology in public and paying the fine according to the Royal Ordinance, as this occurrence took place before its publication.

"*De la Gardie*: I do not understand why the Court of Appeal has imposed this punishment according to the Ordinance for an act done before the publication thereof.

"*His Majesty*: Previously no fixed punishment was prescribed for such outrages in church, but only so much by way of fine as was collected at the same time in bag and box.[1]

"*Mörling*: Yes, this applied in certain places, and otherwise some other discretionary punishment was applicable.

"*Fleming*: It would probably be best to settle for a fixed amount, either 50 or 100 daler.

"*His Majesty*: It is true that the Ordinance mentions 100 silver daler and apology in public, but she cannot be sentenced in accordance with that, so it had better be simply 50 daler and the judgment of the Court of Appeal to be annulled completely.

"*Resolved* that Bengta Brockmöller this time be relieved of the fine of 100 daler and also of the order to make apology in public as ordered by the Court of Appeal, and that she shall now only give to the Church 50 silver daler."

Thus a case concerning *ex post facto* law was tried, and the express decision was that the new, and more severe, legislation was inapplicable to an act done previously.

It remains to consider what significance this case might have had in an age when there were no printed collections of reports.

Early in his career as a lawyer David Nehrman served for a time in the Court of Appeal at Jönköping. He had made a note of the Order in Council of January 9, 1688, in his private list of cases and he made a copy of it in his "book of extracts", both of which

[1] I. e. collection-bag and poor box. The King was probably thinking of Letters Patent of 1647 concerning quarrels and disputes about seats and pews in church. The Letters prescribed a fine amounting to the aggregate sum of the money given by the whole congregation in all poor boxes put out on the next Sunday or holy day.

have been preserved and are kept among his manuscripts in the Diocesan and County Library at Linköping. And he did not fail to quote the case in his textbooks. He did so for the first time in his book on private law, which was printed in 1729. This work, however, may be said to show Nehrman as still holding an earlier view, which on the whole corresponded to the ideas developed by Cicero and his followers.[2] Thus at this time Nehrman had not yet arrived at the fully developed and quite modern point of view that he later expressed in his textbook on criminal law.

The precedent was also quoted by Arnell in his annotated edition of the General Urban Code. This edition, which was published in 1730, became very popular. Arnell clearly and unambiguously summed up the essence of the case: "If a new statute or ordinance is made concerning some particular set of circumstances, and an actual case involving those very circumstances has previously arisen, then that previous act cannot be adjudged according to the statute or ordinance made and published afterwards."[3]

These facts are quite sufficient to support the view that the case of Brockmöller's wife became a leading one in practice and theory and that it supplied the foundation for a legal conception which has found expression in the legislation of more modern times. The case itself soon lapsed into oblivion and was only recently brought to light once more. But the rule of law that criminal legislation of increased severity does not have retroactive effect—unless the legislature within the scope of its constitutional powers expressly and in due manner provides to the contrary—may be said to be incorporated with the existing body of law, in Sweden and Finland at any rate, since the decision in this case.

Thus a petty quarrel touched off by human vanity, an occurrence insignificant in itself, is the manifest starting point of the development of a valuable and indeed essential rule of law. That this should be so is bizarre and, if you will, moving, but it shows how the machinery of justice operates.

[2] Nehrman, *Inledning til then swenska jurisprudentiam civilem,* Lund 1729, p. 39. As to Cicero's views, see Roubier, *op. cit.,* vol. II, pp. 507–9. Cf. *supra,* p. 98.

[3] Arnell, *Swerikes Stadz-Lagh,* Stockholm 1730, p. 655.