Part I

Introduction: Legality and Transformation of Society in Europe

Chapter 1

Introduction: Legality in Multiple Legal Orders

Leonard Besselink, Frans Pennings & Sacha Prechal

1. Plurality of Legal Orders

Public law in Europe is characterized by the simultaneity of multiple overlapping, colluding and competing norms and legal orders within single jurisdictions. In this collection of essays, we focus on the consequences that this has for the operation and concept of legality.

The simultaneity of multiple overlapping, colluding, competing and sometimes colliding norms and legal orders within single jurisdictions is most evident in the European Union (EU). The Member States are each based on national constitutional premises that are the foundation of their respective political and legal orders. The very aim and purpose of their membership is that these national legal orders participate in the broader legal order of the EU. It is, moreover, a condition of their membership that they also have formally and substantively bound themselves to observe the human rights standards contained in the European Convention of Human Rights, a treaty which the European Court of Human Rights has repeatedly referred to as 'a constitutional instrument of European public order'.

These three legal orders are mutually anchored: one cannot do without the other. Most Member State constitutions refer formally or substantively to the EU to express the participation of their national constitutional orders in that of the EU. In turn, the Treaty of the EU has declared the constitutional principles of liberty, democracy, and the respect of human rights, which are common to the Member States, to be the foundation of the Union itself – principles which the Union is bound to respect.[1] The EU Treaty has now incorporated the Charter of Fundamental

[1] Previously Art. 6 (1) EU Treaty as interpreted by the ECJ in *Kadi* (Court of Justice 3 Sep. 2008, Joined Cases C-402/05 P and C-415/05 P), para. 303; now in Art. 2 EU Treaty, which expands the list of principles to 'the values of respect for human dignity, freedom, democracy,

Rights into its primary sources, which makes it explicit that the EU institutions or the Member States must never fail to meet the substantive minimum European Convention on Human Rights (ECHR) standards, and also that EU fundamental rights must be interpreted in accordance with the rights common to the constitutional traditions of the Member States.[2] Moreover, the EU Treaty carries the obligation of formally acceding to the ECHR.[3]

While once upon a time the political order and liberty of citizens could largely be delimited in terms of legal orders that coincided with national boundaries, this is no longer the case. The very fact of EU membership implies that public decision-making no longer mainly takes place within the boundaries of the State political system, either in the national, regional or local contexts, but now also takes place in the multitude of EU arenas formed by the institutions and their political environments that impact directly on the national and sub-national contexts at which their decision-making is, in most cases, ultimately targeted.

2. Legality in Europe

These three legal orders have consequences for legality within Member States and each of them imposes requirements regarding legislation and legality. The reason for taking a closer look at legality as an object of study is twofold. Firstly, legality has played a central role in our understanding of the Rule of Law in Europe, and must be considered one of its pillars. Secondly, legality is rooted in the idea and concept of the nation-State as it arose in the French Revolution. Its importance as a principle at the basis of modern European States crucially hinged on the idea of the sovereignty of the nation and of the State embodying that nation.

Clearly, the nation-State is no longer the mainstay of political communities. This is not so much because of the fact that in few European States the nation and the State coincide (some important EU Member States are, to a greater or lesser extent, socially, culturally and linguistically multi-national States, and even States which ostensibly think of themselves as embodying a nation in a socio-cultural sense in reality have significant minorities in their midst, minorities which enjoy a constitutionally entrenched formal status). A much more important reason is precisely that EU membership has created a situation in which the State is no longer the

---

equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.

[2] Article 52(3) and (4) of the Charter.

[3] Article 6(1) and (3) TEU.

only source of legality. Apart from other factors (such as the development of the Welfare State aimed at protecting citizens from welfare risks), it is the multiplicity of legal orders claiming simultaneous validity and application that has arguably contributed to the diminished role of the principle of legality. This, then, leads to the question of whether the principle of legality as a cherished foundation of the democratic State, based on the rule of law, has been eclipsed in the overlapping multiple legal orders of Europe. To what extent has legality as we knew it from within the State context been obscured behind and within other legal orders, especially the EU? What has been offered in return, and can that compensate for the functions and purposes which legality served?

Before we embark on the route towards answering such questions, we need to take a step back and make some introductory remarks regarding the concept of legality and its status as a constitutional principle common to the Member States of the EU. Firstly, it is not self-evident that legality is, at its core, a concept that is, common to the constitutional orders of the EU Member States. Secondly, we need to distinguish the various functions of the principle of legality, in particular the requirement that the exercise of public authority be based on an act of parliament. These functions are manifold. Confusing them can easily create misunderstandings when assessing the scope and meaning of current developments.

3. A Constitutional Principle Common to the Member States

First then, an introductory remark on the commonality of the notion of 'legality'. The notion of legality in public law is very much the product of the French Revolution. The *Déclaration des Droits de l'Homme et du Citoyen* of 1789 starts with the liberty of the citizens and declares that the limits imposed on liberty *ne peuvent être déterminé que par la Loi* (Article 4). This requirement is explained by that other fundamental tenet of the *Déclaration*:

4. *La Loi Est L'expression de la Volonté Générale*[4]

Based on ideas of popular sovereignty, legality has taken shape as a distinctly European concept: to be more precise, it has taken shape as a particularly continental European concept. In the UK

[4] The Act is the expression of the general will. Arts 4 and 6 of the *Déclaration*, which is still a valid part of the French Constitution via its preamble, on the basis of its interpretation by the *Conseil constitutionnel*, CC, 16 Jul. 1971, Decision no. 71-44 DC, *Liberté d'association.*

the ideas of the French Revolution never took root, if only because Napoleon never passed by. This may explain why in the British constitutional doctrine there is no 'principle of legality' which prescribes that the exercise of public authority over citizens, whether in the form of administrative acts or as a form of binding regulation, requires a basis in an act of parliament. The idea of the common law, as established through the courts of law, has been too strong for there to be an articulation of a principle of legality in these terms. In the French Revolution, on the contrary, is was precisely the resistance against this lawmaking role of the courts that resulted in the articulation of the primacy of the legislature. And it is this, in continental legal orders, that gives the principle its fundamental constitutional nature, albeit with a different scope in different systems and particular branches of the law.

And yet the British courts and legal doctrine would fully assent to the principle that the liberty of citizens can only be restricted by act of parliament. It has been a fundamental tenet that the common law assumes the liberty of citizens. Indeed, for many decades this has been the very reason why the British have resisted the idea that they need to incorporate the bills of rights from human right treaties into national law, as this would be based on the false assumption that the liberty of British citizens depends on and extends no further than those bills of rights determine, which would contradict liberty as regulated by the common law . The constitutional basis of the idea of legality is not popular sovereignty, but the liberty as regulated by common law liberty and the doctrine of the sovereignty of Parliament.

This may go a long way to explaining why in British doctrine 'legality' does not quite have the specific and pregnant connotation it has had in continental Europe, but more easily dissolves into the broader notion of 'lawfulness' than in continental European understanding. We must, on the other hand, immediately add that in continental countries – and several contributions in this volume testify to this – it is precisely the multiplicity of legal sources of constitutional nature and rank which has made the idea of legality as embodied in the legislative decisions of the democratic representative bodies more relative. Many lawyers on the continent would argue that lawfulness is the prime category of the rule of law, not legality.

Be this as it may, for the purposes of this collection of essays we focus on legal developments with regard to the notion and principle of legality in Europe. As one of the contributions in this

volume proves, this does not preclude its relevance for the United Kingdom, since all of the functions of the legality requirement are shared there with the rest of Europe.[5]

5. Functions of Legality

We distinguish here three types of function of the concept of legality:

- the democratic function of *legitimating* the existence of public authorities, their powers and the exercise thereof within the limits of the set legal rules;
- the instrumental function of *attributing* public authorities with powers and responsibilities in line with preferences and the local situation, and in accordance with a prevalent distribution of powers;
- the normative function of *regulating* the use public authorities can make of such powers.

The *legitimating* function is highly prominent as the original function of legality. Starting off from the French Revolutionary idea of the sovereignty of the people, it went through different historical phases. One such phase is the German distinction between a substantive and formal concept of *Gesetz*, originating in the nineteenth century discussion on the nature of the relation between the Monarchy and Parliament in Prussia: when is the government empowered to act autonomously? What rules can it set? What is the power of Parliament in this respect? Can the government do without its cooperation? When does it need parliamentary authorization, and what things can Parliament only do in terms of setting the law? All these questions were discussed in nineteenth century Germany, and they still dominate the constitutional framework and practice of the EU Member States today, now a matter discussed in the context of EU legislative powers.[6] At least potentially, the matter has been complicated due to the fact that the sources of legislative authority derive legally from different legal orders, from the EU as well as from national institutions. This raises some intricate questions on the relationship between the legitimacy of legislative measures as they become operative in the national context but that originate from outside that context. Where does the power to exercise public authority come from? Who has legitimate power to perform legislative acts, and through these to create the basis for the exercise of public power over citizens?

[5] See the contribution by Verhoeven, Willems and Jurgens in this volume.
[6] See Alexander Türk, *The Concept of Legislation in European Community Law: a Comparative Perspective*, (The Hague: Kluwer, 2006).

The issue is closely connected with, but distinct from, the attributive function of the concept of legality – that the function of legislation is to designate the public authorities and determine which powers are attributed to them. It is this type of legislative act that makes for the legality of the exercise of such powers by public authorities. It articulates the basis of the authority, what the scope of the power is, and who can exercise it lawfully. It is through this function of legality that responsibility is allocated and, hence, it makes it possible for mechanisms of accountability to operate.

Legality also serves a normative, regulatory function in as much as it regulates the exercise of public authority. It creates legal certainty, and prevents arbitrariness and other forms of abuse of power. It makes the exercise of power foreseeable, and the requirement of a basis in enacted laws makes it possible in principle for citizens to create transparency.

The question of whether these various functions are still fulfilled by the principle of legality within legal orders, whether they are still operative in the context of the EU, and in the context of the overlapping, interacting and mutually dependent legal orders of Union and Member States, is at the background of all essays contained in this volume.

6. Structure of the Book

The book is in five parts. This introductory chapter of Part I is followed by a contextual chapter of a theoretical nature (Chapter 2). Developments with regard to legality are determined not merely by one legal order influencing the other. Legality is too fundamental a concept to escape from other societal developments. One of these is the development of what has come to be known as the risk society. The authors illustrate the interdependency between social developments (risks) and legal developments (the changing perspectives on legality) through the prism of the principle of precaution as this is used in EU decision-making.

Among the prime functions of legality are the attribution of specific powers to public authorities and, next, the conditions under which these powers may be exercised. These are discussed in a variety of legal orders in Part II of this book. It starts with a contribution on the scope of the principle that the exercise of public authority must rest on an act of Parliament in Germany and the United Kingdom, countries with very different historical backgrounds as regards the concept and principle of legality (Chapter 3). The comparative look at two different

national legal systems in the EU illustrates how different the issues already may be at national level

Chapter 4 discusses the attribution and regulation of powers across the EU and national legal orders and analyses the extent to which the EU can provide a legal basis for action of Member State authorities in the absence of such a basis within Member State legal orders. Chapter 5 looks more specifically at the position of independent regulatory authorities, an area that is, profoundly influenced by EU law and its interpretation by the European Court of Justice (ECJ). This (case) law has sparked off a lively debate on the constitutional position of independent 'regulators' and the tensions between European and national constitutional principles, the legality principle included.

Part III of the book contains three essays that focus on legality in relation to the qualitative requirements applying to legislation. Regulatory functions of legality are prominent in these three essays. Requiring a basis for the exercise of public authority can become an empty formality if the legal basis is mere an empty shell empowering any institution to make any legislation or exercise authority otherwise.

Chapter 6 (Woltjer) investigates the requirements that the case law of both the ECJ and the European Court of Human Rights imposes in this regard. The ECJ guarantees the observance of 'the law', as the EU Treaty puts it. The European Convention allows for restrictions to be provided 'by law'. In both cases this is a European concept that had to abstract from the concrete forms and status of legislation that exist in the European States that are a party to the Convention. Nevertheless, the case law analysed makes it clear that 'law' which affects and curbs the exercise of rights, including fundamental rights, must live up to substantive requirements.

Chapter 7 (Burri) is a case study of EU equality treatment legislation. This is a field of EU law which has had a primary impact on Member State law in the sensitive area of equal treatment. Starting from a more limited field of equal pay and sex discrimination, it has developed into an encompassing sector of EU law in which it has been necessary to come up with repeated attempts at codification and consolidation. This chapter looks into the question of whether the legislative results are coherent, as would be one of the main virtues of legality.

Chapter 8 (Jaspers and Meyers) also is a case study. It analyses the legislative quality, in terms of technical quality, transparency, legal certainty, enforceability and implementation of EC Directives in the field of workers' involvement.

Part IV of the book deals with legality and non-legislative instruments. Government of citizens and other private parties was, throughout the nineteenth century, conceived of as mainly a matter of legislation, and ideally in the form of commands and prohibitions. Newer forms of governance have been seeking alternative methods of seeking compliance to norms by its addressees. Often these are non-legislative, soft law instruments. Resorting to these instruments evidently raises questions on the impact these instruments have on the functions of and the requirements that ensue from the legality principle. Chapters 9 to 11 study in this context the so-called Open Method of Coordination, the Social Dialogue, and also the expanding use of supervisory agencies. The three contributions show, *inter alia*, how the use of these instruments may result in the extension of competences and may affect the quality of the provisions at issue, which, under certain circumstances, at least *de facto* if not *de jure*, impose obligations.

The fifth and last Part of the volume gathers contributions on mechanisms that, particularly at EU level, contribute to a more or less silent extension of powers. Chapter 12 looks into the matter of how the ECJ, through interpretation of a number of key concepts and by extending its own mandate, broadens the scope of EU law. This, in turn, often results in various forms of competence creep. The principle of attributed powers – which might be considered the counterpart of the principle of legality in the EU law context – is apparently not able to stop this process. Chapter 13 imports additional problems by concentrating on the law in the context of the areas of Freedom, Security and Justice, more particularly the consequences for public prosecution offices. The chapter shows, *inter alia*, that what is going on in relation to public prosecutors is a *de facto* harmonization and considerable impact on the national criminal justice systems. However, the legitimation of the process in particular is very weak. The last chapter (Chapter 14) takes the prominent role of the EU in the field of data protection as its focus and, more particularly, looks at the role of the principle of purpose limitation, the function of which is similar to legality in restricting the exercise of power, and in particular its erosion, thus providing public powers to expand.

Parallel to the extension of powers, the mechanisms of competence creep also seem to undermine the principle of legality and its attributive, regulatory and legitimizing functions. Due to the reality of multiple legal orders these processes also have an impact on national and sub-national levels, and at the end of the day, on private individuals.

This volume winds up with a concluding chapter providing a *synthesis and the main findings* concerning the main theme: the eclipse of legality in Europe.