

Principle of Legality and the Hierarchy of Norms

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I. LEGALITY AS THE CORE OF THE RULE OF LAW

THE RULE OF law and its counterparts in other languages (such as *Rechtsstaat*, *état de droit* or *prééminance de droit*) have been described as ideas of a ‘programmatic character’,¹ as ‘compelling candidates for teleological understanding’,² or ‘open-ended concepts which are subject to permanent debate and have to be constantly redefined’.³ A recent article called the rule of law ‘one of the most elusive legal concepts’,⁴ and another one found it ‘in trouble’ as it ‘has been defined in so many ways that it has become fuzzy and confused’.⁵

However, even if it is difficult to say what the rule of law actually is and what it comprises, everyone will easily agree that legality is a core element of it. Legality, one might think, is in principle self-evident and undisputed. And legality is situated in the overlapping area of different conceptions of the rule of law and its equivalents.⁶ So we seem to be on safe ground here.

¹ R Grote, ‘Rule of Law, Rechtsstaat and “Etat de droit”’ in C Starck (ed), *Constitutionalism, Universalism and Democracy: a Comparative Analysis; The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (Baden-Baden, Nomos, 1999) 271.

² M Krygier, ‘Rule of Law’ in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 240.

³ Grote (n 1) 271. Similarly CD Classen, *Nationales Verfassungsrecht in der Europäischen Union* (Baden-Baden, Nomos, 2013) 61–62.

⁴ A von Bogdandy and M Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it is, What has been Done, What can be Done’ (2014) 51 *CML Rev* 59, 62.

⁵ D Beatty, ‘Law’s Golden Rule’ in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Oxford and Portland, Hart Publishing, 2009) 99.

⁶ eg M Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74 *Southern California Law Review* 1307, 1318.

II. LEGALITY AS A COMPLEX CONCEPT

Legality may be simple compared to the entirety of the rule of law. But what is true for the rule of law as a whole is true for legality, too: the closer you look at it, the more blurred the image becomes.

Legality is a complex concept for a number of reasons. I will mention just three of them: first, legality may be an express constitutional requirement⁷ or an implicit precondition of legal systems. Paradoxically enough, it may, at least in some respects, be an extra-legal, that is, political and/or moral standard.⁸ It may be partly the one and partly the other;⁹ and in a certain sense, it may be both at the same time if a constitution expressly demands compliance with general principles of natural law.^{10,11} Second, legality may be a rule and it may be a principle.¹² A given act will be either legal or illegal. If legality prohibits retroactive criminal legislation the prohibition can only be respected or ignored. So, in these contexts, legality is a rule. But, if legality requires a certain determinacy of statutes, it is a matter of degree. And when assessing a whole legal system one might find it more or less in conformity with legality. So, in these contexts, legality is a principle. Third, in a conceptual perspective legality describes a multi-polar

⁷ Some constitutions use the term 'legality'—eg Art 9 para 3 of the Spanish Constitution; most prescribe what legality stands for—eg Art 20 para 3 of the German *Grundgesetz*. On the European level, legality is part of the rule of law requirements laid down, in Art 3 of the Statute of the Council of Europe, the preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and in the preamble, Art 2 and Art 49 of the Treaty on European Union (TEU). In addition, the constitutions as well as the European instruments allow limitations on the exercise of fundamental rights only if provided for by law (eg Arts 8–11 para 2 ECHR, Art 52 para 1 Charter of Fundamental Rights (CFR)); for specific cases, see eg, Art 7 ECHR and Art 49 CFR.

⁸ See the case of the UK until the Constitutional Reform Act of 2005 which mentions 'the existing constitutional principle of the rule of law' came into force.

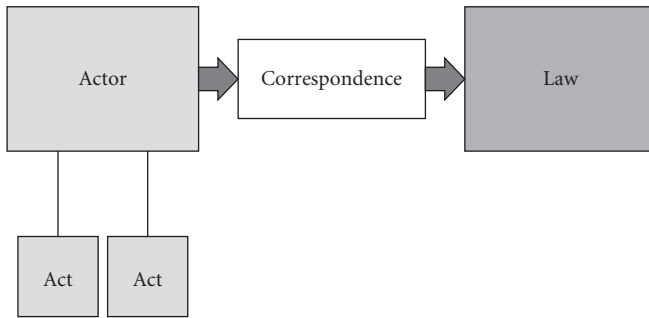
⁹ The Austrian Constitution expressly provides for the legality of the executive branch (Art 18) and did not find it necessary to do the same for the judiciary.

¹⁰ See the preamble of the French Constitution.

¹¹ For other countries, see the overviews in R Hofmann and others (eds), *Rechtsstaatlichkeit in Europa* (Heidelberg, CF Müller, 1996); A von Bogdandy, PC Villalón and PM Huber (eds), *Handbuch Ius Publicum Europaeum* vol 1 (Heidelberg, CF Müller, 2007); Classen (n 3); JR Silkenat, JE Hickey Jr and PD Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Cham, Heidelberg, New York, Dordrecht, London, Springer, 2014).

¹² For the EU it is a 'value' too (Art 2 TEU); this should not make a difference, though: L Pech, 'A Union founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *European Constitutional Law Review* 359, 366–67.

relation, a relation of correspondence between certain acts of a certain actor and a certain legal standard:



Each of these elements is a variable, and, correspondingly, turning to each of the boxes in the graphic one can ask a number of questions. For the ‘actor’ box on the left: which actor—all persons and organisations, just powerful organisations, or only the state? For the ‘act’ boxes below the actor: which acts—factual or legal, internal or external? For the ‘correspondence’ box in the centre: obeying a rule or attaining a goal? Respecting the law or applying the law? For the ‘law’ box on the right: which law—statutory law, parliamentary law, constitutional law, domestic law or international law, general principles of law, even the rule of law or the principle of legality itself?

It does not take a permutation of the variables to see a certain complexity here. However, I will try to simplify matters instead of complicating them. The graphic may help to explain a few points when I turn to the meaning of legality in a step-by-step analysis starting at zero.

III. THREE MEANINGS OF LEGALITY

A. Legality as Compliance with the Law

At the most basic level, the focus in the diagram is on the correspondence (the box in the centre): legality simply means compliance with the law. In other words: the rule of law requires that the law rules.¹³

This is a trivial aspect of legality, yet a very important one both theoretically and practically. Theoretically, the claim to be observed stands for the normative character of law and thus denotes the law’s essence. Under most definitions, unless

¹³ Krygier (n 2) 233–34. Similarly J Raz, *The Authority of Law* 2nd edn (Oxford, Oxford University Press, 2009) 212; Classen (n 3) 63.

being observed at least by and large, a legal system is not even law.¹⁴ And without law there is no rule of law. This is a conceptual consequence, of course, but it is also a practical observation available in any failing state. And the experience of the new democracies in Central and Eastern Europe as well as the difficulties of the EU to get the Member States to do what they are supposed to do¹⁵ and to convince them of the legality of some of its own actions¹⁶ remind us of the importance of having law,¹⁷ equally, applying the law and taking the law seriously. This last aspect, in turn, teaches us that legality is to a considerable extent a matter not just of legal instruments, enforcement and control, but also of attitude, of a certain habitus and thus a central element of a legal culture.¹⁸ In Europe, this includes diverging ways of interpreting and following the law and various degrees of the necessary belief in the law's capacity to bind.¹⁹

B. Legality as Duty of the State

On the next level, the focus is on the actor (the left box). Here legality means a compliance with the law which is expected specifically of the government or the state and its agents. The concentration on the actor 'government' obviously results from the function of the rule of law as an instrument of control of political power.²⁰ Legality is a means to restrain and to make predictable the exercise of

¹⁴ eg HLA Hart, *The Concept of Law* (London, Oxford University Press, 1961) 113.

¹⁵ von Bogdandy and Ioannidis (n 4).

¹⁶ See, eg, the reasoning of the German *Bundesverfassungsgericht's* reference to the ECJ to rule on the validity of the European Central Bank's measures to save the Euro, BVerfG, 2 BvR 2728/13 of 14 January 2014, registered at the ECJ as Case C-62/14 *Gauweiler and others*, English translation available at www.bverfg.de/en/decisions/rs20140114_2bvr272813en.html; or, more generally, S Prechal, S de Vries and H van Eijken, 'The Principle of Attributed Powers and the "Scope of EU Law"' in L Besselink, F Pennings and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Alphen aan den Rijn, Kluwer, 2011) 213. In respect of international law as part of the rule of law see Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 81.

¹⁷ For instance not only private law, but also law on the execution of judgments and law enforcement. For the complicated relationship between economic development and the existence, importance and certainty of law in the Central European countries see B Schönfelder, *Vom Spätsozialismus zur Privatrechtsordnung. Eine Untersuchung über die Interdependenz zwischen Recht und Wirtschaft am Beispiel von Gläubigerschutz und Kredit* (Berlin, Berliner Wissenschafts-Verlag, 2012).

¹⁸ M Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Palombella and Walker (n 5) 45–69; BZ Tamanaha, 'The History and Elements of the Rule of Law' (2012) *Singapore Journal of Legal Studies* 232, 246–47.

¹⁹ From a theoretical perspective A Somek, 'Legalität heute: Variationen über ein Thema von Max Weber' (2008) *Der Staat* 428; on national cultures of EU Law A Hatje and P Mankowski, "'Nationale Unionsrechte"—Sprachgrenzen, Traditionsgrenzen, Systemgrenzen, Denkgrenzen' (2014) *Europarecht* 155; on the importance of practical reasoning and procedural elements of the rule of law in the light of the inevitable indeterminacy and the argumentative character of law Rosenfeld (n 6) 1337–45; N MacCormick, *Rhetoric and the Rule of Law* (Oxford, Oxford University Press, 2005); J Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 54–61.

²⁰ eg R Hofmann, 'Die Bindung staatlicher Macht' in Hofmann and others (n 11) 3–12; Grote (n 1) 305; Lord Bingham (n 16) 78–80.

political power. Therefore, legality requires that not only private actors but also the state itself be subordinated to the law—in general, and in particular when making rules.²¹ The rule of law is more than a rule by law.²²

Such a conception presupposes that there is law which can be applied to the state. And under modern conditions of functional differentiation, it at least strongly suggests that there is law which is specifically made for and directed at the state. If Dicey still thought that one judge-made law should bind all,²³ today legality entails the existence of public law, and, taking into account that the law-making function of the state should not go unchecked, either, it demands a constitution²⁴ or at least an international instrument as a functional substitute for it.²⁵

C. Legality as Dominance of Parliamentary Law

On a third level, the focus is on the law (the right box). Here legality means compliance with parliamentary law and, what is more, dependence on parliamentary law. The executive and the judicial branches are not only to act in conformity with parliamentary law. They are bound in a stricter way as they must not act at all unless authorised by parliamentary law. This gives parliamentary statutes a dominant role which of course is owed to their democratic character: they are publicly discussed in the presence of the opposition and decided upon by persons whom we elected, and that is why we are expected to accept them.

However, this third meaning of legality is not as universally shared as the other two aspects. It makes sense only in a democracy, and even in the democracies of Europe, you will find a great variance.²⁶ Details and exceptions notwithstanding, the necessity of a specific parliamentary decision may extend to all essential questions of politics (including limitations of fundamental rights but also, for instance, important decisions at EU level or in international relations),²⁷ to all burdens imposed by sovereign right, in particular to interferences with

²¹ The big exception in this last respect, the UK, has been undergoing a remarkable change: see TRS Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 *International Journal of Constitutional Law* 155.

²² Krygier (n 2) 234.

²³ AV Dicey, *Introduction to the Study of the Law of the Constitution* 9th edn (London, Macmillan, 1948) 193–95, 202–03. For a critical commentary from a comparative perspective see Krygier (n 2) 237.

²⁴ For the constitutionalisation of the rule of law in modern legal systems see Grote (n 1) 286, 288, 294, 301, 305–06. For remaining differences see Krygier (n 2) 245–46.

²⁵ eg for the UK and the Netherlands: Classen (n 3) 107–08.

²⁶ For an overview, see Hofmann and others (n 11); von Bogdandy, Villalón and Huber (n 11); Classen (n 3) 226–30. For a more detailed comparison G Jurgens, M Verhoeven and P Willemsen, 'Administrative Powers in German and English Law' in Besselink, Pennings and Prechal (n 16) 37; for a choice of cases, see N Dorsen and others, *Comparative Constitutionalism. Cases and Materials* 2nd edn (St Paul, Minnesota, West, 2010) 265–84, 317–45.

²⁷ Germany: F Ossenbühl, 'Vorrang und Vorbehalt des Gesetzes' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* vol V, 3rd edn (Heidelberg, CF Müller, 2007) § 101 paras 35–70.

fundamental rights,²⁸ just to major curtailments of basic rights²⁹ or, to the contrary, the legislative powers of parliament may be limited to enumerated questions.³⁰ The differences are less in substance than in the scope of application. The common European standards cannot be very strict under these circumstances. The European Convention on Human Rights (ECHR) and perhaps the EU Charter of Fundamental Rights, too, are concerned with accessible and clear, but not parliamentary, law; the EU treaties in the Lisbon version attribute most, but not all important matters to a legislative procedure.³¹

As a preliminary result, we can say that legality, understood in this threefold way, if observed, secures first the effectiveness and thus the very existence of law; secondly, legality allows the control of political power and thirdly, legality furthers the democratic legitimacy of its exercise. However, to achieve these goals, legality demands a certain quality of the law.

IV. LEGALITY AND THE QUALITY OF LAW

In notable agreement with specific constitutional provisions and the practice of constitutional courts,³² comparative lawyers and legal philosophers spell out a list of requirements: that ‘laws be made public, general, clear . . . , not retrospective but prospective, and consistent; that laws do not demand impossible conduct’³³ and that they are precise enough to make the exercise of power predictable.³⁴ ‘If the laws are secret, retrospective, contradictory, impossible to know, to understand, to perform, . . . they do not add up to the rule of law,’³⁵ and neither do statutes that lack the determinacy which is necessary to avoid arbitrariness and to allow a compliance control.

²⁸ Austria: F Merli, ‘Rechtsstaatlichkeit in Österreich’ in Hofmann and others (n 11) 92–93.

²⁹ This seems to be, if not the theory which recognises areas of original executive power and allows very broad or even implied statutory delegations, the result of the recent court practice in the UK: Allan (n 21).

³⁰ Art 34 of the French Constitution or Arts 289, 294 of the Treaty on the Functioning of the European Union (TFEU).

³¹ For the ECHR system see, eg, *Sunday Times v UK* App no 6538/74 (1979) Series A no 30; *Kruslin v France* App no 11801/85 (1990) Series A no 176; *Şahin v Turkey* App no 44774/98 (2005); for the EU S Peers and S Prechal, ‘Art 52’ in S Peers and others (eds), *The EU Charter of Fundamental Rights* (Oxford, Hart Publishing, 2014) 1470–76. See also below at n 37.

³² For an overview see Classen (n 3) 65–67. For the jurisprudence of the ECtHR see A Woltjer, ‘The Quality of Law as a Tool for Judicial Control’ in Besselink, Pennings and Prechal (n 16) 99.

³³ Y Hasebe and C Pinelli, ‘Constitutions’ in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (London, Routledge, 2013) 15; more elaborate L Fuller, *The Morality of Law* 2nd edn (New Haven, Connecticut, Yale University Press, 1969) 33–94; Raz (n 13) 214–16.

³⁴ eg Grote (n 1) 290, 291; Lord Bingham (n 16) 69–70; Allan (n 21) 158, 159; von Bogdandy and Ioannidis (n 4) 71.

³⁵ Krygier (n 2) 235. To be noted, this could be a problem for a vague rule of law (understood as a rule of law), too: it could ‘run afoul of its own requirements’: Pech (n 12) 376.

Of course, here like elsewhere, the devil is in the detail, and in particular the degree of the required elaborateness of parliamentary acts may vary depending on whether the focus is on the foreseeability of implementing acts or rather on the democratic accountability of the decision,³⁶ depending also on the subject matter and in accordance with the respective legal culture. In the EU framework, if a matter is attributed to a legislative procedure, ‘essential elements’ entailing ‘political choices’ should be decided there, but that does not preclude delegating considerable discretionary power especially to agencies.³⁷ In addition, most EU legislation is followed by implementing acts of the Member States, and in such a situation one has to take into consideration the combined effects and quality of EU and domestic rulemaking and double legality standards alike.³⁸

Many authors, among them the members of the Venice Commission making its checklist for evaluating the state of the rule of law,³⁹ categorise these requirements not as legality but legal certainty.⁴⁰ I think, though, that unlike other qualities of law like stableness over time or respect for legitimate expectations they cannot be separated from legality because of the normative nature of law and compliance: law is an instrument to influence the will of its addressees. Law cannot be complied with if it does not exist, if it is unknown at all, unknown at the relevant time or to the relevant persons or not understandable to them, if it is contradictory, or if it demands the impossible. One cannot have legality without some minimum requirements of the quality of law, and therefore one should consider these requirements as parts of legality.

V. LEGALITY AND THE HIERARCHY OF NORMS

In a similar way, legality necessarily entails a hierarchy of norms. If parliamentary law has to respect a constitution and if the remaining law must comply with parliamentary statutes there are at least three levels of a hierarchy.⁴¹ Considering

³⁶ For this distinction see Ossenbühl (n 27); T von Danwitz, ‘Verfassungsrechtliche Herausforderungen in der jüngeren Rechtsprechung des EuGH’ (2013) *Europäische Grundrechte Zeitschrift* 253, 257–58; E Schmidt-Aßmann, ‘Das Demokratieprinzip’ in F Bultmann and others (eds), *Allgemeines Verwaltungsrecht. Festschrift für Ulrich Battis* (München, CH Beck, 2014) 99.

³⁷ See Case C-355/10 *European Parliament v Council of the European Union (Frontex)* [2012] ECR I-0000 on the one hand, and Case C-270/12, *UK v Council of the European Union and European Parliament (Short-selling)* [2014] ECR I-0000 on the other hand.

³⁸ cf H Eberhard, ‘Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht’ (2008) 63 *Zeitschrift für Öffentliches Recht* 49, 72–77, 83–111. On problems and shortcomings see Besselink, Pennings and Prechal (n 16).

³⁹ European Commission for Democracy through Law, ‘Report on the Rule of Law’ CDL-AD(2011)003rev, 15.

⁴⁰ See also A Gamper, in this volume.

⁴¹ cf PC Villalón, ‘Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich’ in von Bogdandy, Villalón and Huber (n 11) § 13 paras 66–72; Classen (n 3) 104, 226.

that under modern conditions some rulemaking power of the executive branch is inevitable, one more level is joined to the pyramid. Of course in reality in each developed legal system there are even more levels,⁴² and, to add some complexity, one can and must in some instances combine or even double hierarchies: in local government, in federal states, in the EU, in the Council of Europe. But a three-level hierarchy seems to be a conceptual necessity for any legal system that includes law-making and wants to adhere to the legality principle. The hierarchy is then the basis for judicial review.⁴³

VI. THE VALUE OF LEGALITY

At last, a word on the value of legality. Legality is a formal concept, the required features of the law are formal ones, and the hierarchy of norms as such is just a formal structure.

Formality sometimes is discredited as ‘mere’ formality, and so-called ‘thin’ conceptions⁴⁴ of the rule of law are often criticised.⁴⁵ I disagree. Of course legality cannot substitute morality, of course it needs court control to be effective, and of course it is less than a rule of law ‘thickened’ by fundamental rights. But we should not underestimate it, and neither should we take it for granted. First, legality is the basis of any ‘thicker’ rule of law: one can have legality without fundamental rights but one cannot have fundamental rights without legality.⁴⁶ Secondly, legality may be formal but it has substantive effects:⁴⁷ by expecting them to comply with the law, legality takes people seriously as persons with their own will, their own capacity to self-determination, and thus in their own dignity, and by making the exercise of power foreseeable, it reduces arbitrariness and provides some equality

⁴² For EU law, P Craig and G De Búrca, *EU Law* 5th edn (Oxford, Oxford University Press, 2011) 108–19, identify five levels of norms; but they do not include individual decisions and Member States’ implementing measures.

⁴³ The logical order is not always the order of discovery, though: in reality we sometimes recognise the hierarchy only by analysing the rules of review.

⁴⁴ On the distinction and for examples of corresponding positions see P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467.

⁴⁵ eg Grote (n 1) 305: ‘The formal concept of the rule of law has been discredited by the political catastrophes of the twentieth century.’

⁴⁶ In this sense it is true that the ‘theoretical divide between formal and substantial approaches’ to the rule of law is ‘largely artificial’: Pech (n 12) 368.

⁴⁷ For the following, see eg Rosenfeld (n 6) 1326–27; Raz (n 13) 219–23; S Shapiro, *Legality* (Cambridge, Mass, The Belknap Press of Harvard University Press, 2011) 392–400; Krygier (n 2) 237–38, 242; see also Fuller (n 33) 209–24 for the implications of the described qualities of the legal rule for a ‘relatively stable reciprocity of expectations between lawgiver and subject’; and Tamanaha (n 18) 241–43 for the downside of formal legality.

and security for their lives. It is not a coincidence that there has never been a bad government that respected legality in the described, 'merely' formal sense.⁴⁸ And finally, legality is an important practical concern: there are many states, in Europe and elsewhere, which still have ample room to improve their legality performance.

For the EU, legality might be even more important than it is for states: lacking both a self-evident existence and coercive means, it needs trust. Legality is one of the foundations of trust.

⁴⁸ In particular and contrary to common myths, the Nazi regime did not respect (formal) legality: B Rütters, *Entartetes Recht* 3rd edn (München, CH Beck, 1994).