The principle of legality in European criminal law

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This book is about the principle of legality in European criminal law. It is divided into three Parts and eight Chapters. The first Part is introductory and it is comprised of two Chapters, where the research topic and the methodology are set out (Chapter I and II respectively).

Chapter I introduces and explains the central topic of this research. The principle of legality is a keystone doctrine of national criminal justice systems. In short, the principle means that there is no crime without law. It has two functions; it legitimises the use of criminal law powers by the state (legitimising function) and it influences the operation of criminal law normatively (normative function). This principle legitimises the use of state powers by defining the concept of law as opposed to state force. It concretises the application of other important values or principles, which are often considered the theoretical rationales of the principle of legality. These include the Rule of Law, the separation of powers, democracy, and the principle of individual liberty and autonomy. Chapter I highlights that this principle may elicit different interpretations, depending on how one defines its legitimising role. Normatively, the principle of legality defines the sources of criminal liability and it guides the use of the discretionary powers by state actors. Four prohibitions stem from it, namely the prohibition of customary criminal liability, of retroactive criminalisation, of vaguely prescribed behaviour and finally, the prohibition of extensive interpretation by courts.

Whereas the legality principle is fundamentally important for the criminal justice systems, its interpretation and application in European criminal law is incoherent and incomplete. European criminal law is an area still in progress and increasingly more criminal law powers are entrusted to European state actors. Chapter I explains further the realm of European criminal law. The existence and nature of these powers demand that they are employed legitimately. The current application of the principle of legality in EU law is fragmentary. Many of its normative functions have already been developed judicially but these do not apply coherently at all instances. More importantly though, there has been very little discussion on the legitimation of the European criminal justice system and the conditions under which European criminal law is distinguished from state violence. The research question is, therefore, to examine the interpretation and application of the principle of legality in European criminal law. In particular, the research aims at examining the possible legitimising and normative functions of the European legality principle. It is to be noted that this research does not aim at replacing national doctrines, albeit a degree of influence should be expected. Furthermore, some limitations of this research are addressed. In this book, I examine the principle of legality as applied to courts and the legislator and not to the executive. Its application to sanctions is also excluded.
Chapter II deals with the methodology, which follows the nature of this principle in EU law. The legality principle is a human right codified in Article 49 of the Charter but it is also a general principle of EU law. These are distinctive European principles that have a double pedigree; they stem from national constitutional traditions and standards from international instruments (mainly the ECHR). General principles of EU law are frequently built in a bottom-up manner while they are also seen as open doctrines that can be adapted to the European system. Essentially this approach is also followed in this book. To translate this approach into methodological terms, I employ the concept of legal transplant. This is a phenomenon where a principle, a norm or an institution is transplanted in another system and thereby adapted. In this Chapter, I concretise further this process by referring to the concept of cross-fertilisation. The latter is similar to legal transplants but as a methodological concept it focuses more on the adaptation of legal concepts and their dynamic evolution within the new legal order. I argue that by employing the concept of legal transplant, or the process of cross-fertilisation, the analysis of the legality principle at the EU level becomes transparent and open to critical analysis.

Next to this, I distinguish three methodological steps. The first step is the national comparative research, which includes three national systems: the English, the Dutch and the German. The aim of the first step is to identify how the normative and legitimising functions of this principle operate in the national systems. The modus operandi, problems, and different existing approaches are to be analysed. The second step is the examination of the existing fragments of the EU system. In this step, the principle of legality is expected to be fragmentary and therefore a more critical analysis of the lacunae and the existing questions is necessary. The third and final step is the internal adaptation, where the principle of legality is adapted to the European legal system. This step requires that one respects certain parameters that define this system, which conclude Chapter II.

Part II deals with the national comparative research and it includes three Chapters. In Chapter III, the theoretical rationales of the principle of legality are analysed. The principles of individual autonomy and liberty, democracy, separation of powers, the Rule of Law, legal certainty, and guilt are examined. The aim of this Chapter is two-fold. Its goal is to explain the foundations of the legality principle but also to explore their different interpretations. Different interpretations of these concepts may change the legitimising and normative role of the principle of legality.

Different theories regarding individual liberty and autonomy are presented, the most central being the distinction between positive and negative liberty. Negative liberty means the absence of obstacles, while positive liberty entails the presence of something, i.e. elements that improve the capacity of the individual to act. Negative liberty represents the traditional understanding of liberty, and criminal law is therefore a threat to liberty. The relationship between positive liberty and the state are difficult to regulate, however, I argue that balancing them is essential. The
concepts of predictability and legal certainty are further discussed. Additionally, the vertical and horizontal dimensions of criminal law are discussed.

The analysis of the democratic principle focuses on the elaboration of its assumptions, such as equality and political autonomy, and the expositions of two modern approaches. The procedural concept of democracy means that democratic procedures suffice to secure political autonomy and self-determination of individuals and communities. The substantive concept holds that, next to procedures, a substantive respect of human dignity and minimum respect of individual rights is also important. Essentially a similar conflict is also presented for the Rule of Law, where there have been various substantive and formal theories. I argue that both practically and dogmatically a strict formalistic or procedural approach cannot be reconciled with modern legal systems.

For the notion of separation of powers, I present the theory of Montesquieu and its different interpretations. A strict approach of separating the powers cannot be reconciled with modern legal systems but also the theory of Montesquieu itself. A system of checks and balances, on the other hand, where no power gains overall control reflects better the doctrine of the separation of powers. I conclude that a model where courts have a moderate dynamism is preferable to systems where courts have no discretion at all, or absolute control.

This Chapter ends with the principle of guilt and legal certainty. Regarding the principle of guilt, which has been frequently mixed with the principle of legality, I argue that instead of trying to strictly demarcate these two principles, an appraisal of their doctrinal interaction is more pragmatic. It also prevents the distortion of the concept of foreseeability, which both principles essentially safeguard at different levels. Regarding the principle of legal certainty, I analyse its different interpretations and subdivisions. What should be highlighted is that this principle may be understood as requiring predictability (e.g. non-retroactivity or clarity of norms) but it may also require acceptability, namely that criminal law is what is expected and accepted to be.

In Chapter IV, the focus is on the interpretation and application of the principle to national law. The three different systems are presented in an integrative manner, as the aim is to identify the *modus operandi* of this principle in national law. The Chapter is divided into two main sections. In the first one, the differences and similarities of continental and common law countries are presented. It becomes evident that this principle did not exist as such in common law, however, this did not prevent this system from developing functionally equivalent notions. What is also striking is that arbitrariness is conceptualised differently in both traditions, next to key rationales such as the separation of powers. Regulating the sources of criminal liability is an important function of the principle in the continental traditions. However, this element was absent in the traditional common law. Having said that, it is also shown that both traditions have come closer together, especially under the influence of the ECHR. In particular, continental systems have developed
certain de facto common law trends and the principle of legality is currently a doctrine of English law.

Analysis of the ECtHR's jurisprudence shows that it brought the traditions closer to each other, and most importantly, it advanced a novel interpretation of the principle of legality, which is also prevalent in national law. The ‘rights-conception’ brings to the foreground the human right nature of this principle. As a human right, its application depends on a variety of factors that are further explained in this Chapter, the most important being that the principle is weighed with other rights. This essentially brings within this principle a substantive connotation as foreseeable criminalisation depends on the individual rights that are protected with criminal law. In addition, the sources of criminal liability are less important in the ‘rights-conception’ of the legality principle where the focus is shifted to qualitative elements such as foreseeability. Evidently, the ECtHR's ‘rights-conception’ has been partly incorporated in national law influence in different ways the interpretation of this doctrine.

In the second section, further research of the current application of the legality principle is conducted. The analysis reveals that in national law the principle of legality is eroding as its different aspects do not consistently comply with their dogmatic expectations. Much attention is paid to the lex certa and lex stricta elements. It is shown that courts have much more powers than what the traditional interpretation of this principle would allow. In addition, the courts’ activity demands further guarantees be established against possible abuse. This becomes especially evident in the prohibition of analogy. It appears that courts make use of different techniques to legitimate their decisions, such as an appreciation of legal interests involved and their proper balance within the legal order. In short, it appears that the principle of legality is lacking tools to properly address certain dangers. This problem is further traced to the theoretical construction of this doctrine.

In Chapter V, the principle of legality is critically discussed in the light of three models of justice. These models as analytical tools to reconstruct the doctrine of the principle in order to compensate for its failures as discussed in the previous Chapter. Each takes a different approach to the interpretation of the theoretical rationales as presented to in Chapter III and the function of the legality principle as presented in Chapter IV. The models reflect roughly the traditional conflict in legal philosophy between formalism, pragmatism, and relational theories.

The classical model of criminal justice adheres to legal formalism, i.e. the legitimacy of the law is found in past decisions. Law should not be adapted to current developments because legal certainty is important. Principles and rules are separate concepts. In the classical model, a strict separation of powers and a formalistic understanding of the Rule of Law and democracy apply. Criminal law is legitimate when the vertical relationships between the individual and the state are regulated. Therefore, it is mainly through its protective finality that criminal law finds legitimacy. In the instrumentalism model, criminal law finds legitimacy in its pragmatic contemporary relevance. The instrumental goals of criminalisation are
the main source of legitimacy and the protection against arbitrariness does not play a role in the legitimacy of criminal law. Substantive interpretation of the Rule of Law and democracy apply, while courts have increased powers. Finally, in the relational model of criminal justice the legitimacy of criminal law is found in the mediation between the instrumental and protective finalities of criminal law. Transparency and controllability of decision-making is important so that decisions are tested for arbitrary balancing of rights. In this model, a less strict separation of powers doctrine is favoured.

The legality principle in these three models functions differently. A comparison between the three models shows that the relational model is a more defensible approach for criminal law’s legitimacy. In a relational model the character of this doctrine as a principle is accentuated, as principles remain open doctrines that must be concretised. It is a steering principle that guides construction and interpretation of criminal liability. This entails that as a principle it includes the weighing of the relevant interests of criminalisation. Its functions are enriched with further elements, such as a claim towards transparency during interpretation where courts must follow a transparent reasoning by differentiating between principles, policies and rights. The masking of opportunistic policies as more legitimate elements is therefore avoided. In addition, within a relational model the principle of legality addresses the problem of casuistry of jurisprudence. It is further explained that courts can methodically improve their interpretation to avoid casuistic development of criminal liability. The Chapter concludes with a general evaluation of the legality principle in the chosen relational model and the usefulness of the models of criminal justice as analytical tools.

In the third Part the focus is shifted to EU criminal law. The aim of this last part is to analyse and reconstruct the principle of legality in EU law. Part 3 is divided into three Chapters. Chapter VI follows an analysis similar to Chapter IV where the modus operandi in EU law is assessed. It is important that one establishes the current nature and application of the legality principle but also pin-point its lacunae. The Chapter is structured following the different aspects of the legality principle. One of the main problems is the lack of appropriate theoretical support. The principle of legality is often associated with or considered a part of other broader doctrines, such as legal certainty or legal expectations. Some of its function cannot be explained without further theoretical analysis. For example, why would this principle apply also to Directives when these are not addressed to individuals?

Normatively there are some important lacunae and inconsistencies. For example, there is no unified approach regarding the sources of criminal liability in EU law, whilst there are certain elements such as implementation guidelines that are not yet developed. For example, the principle of conform interpretation presents certain dogmatic difficulties especially due to the contra legem requirement. What is also pointed out in Chapter VI is that this principle must function in a two-level system, which is rather challenging as the way in which national and European legal orders interact is not too clear. Special attention is paid to the dissemination of tasks
between European and national institutions, namely the ECJ and national courts, and the European and national legislators.

After laying down the current problems of this doctrine in the inventory of Chapter VI, the analysis is taken at the theoretical level in Chapter VIII where the legitimation of EU criminal law and justice system is examined. The aim is to understand the constitutional and theoretical elements of the criminal justice systems within which a European legality principle should operate. Chapter VII is divided into two main sections. In the first section the legitimacy of the EU criminal justice system and its relationship to the national legal orders are discussed. In the second section, a relational model for European criminal justice is advocated. The Chapter begins with an analysis of the current legitimation patterns of the EU criminal justice system. Instrumental motivation plays an important role in the legitimacy of this system as its nature and justification is politically annexed to the internal market. This is shown through an analysis of the spill-over theory; namely that the AFSJ is necessary because the internal market had a spill-over on crime control. Essentially, crime control and security are of importance for such EU system. What is missing is the protective finality of EU criminal law. This has been slowly emerging and evidences are presented from the ne bis in idem principle and other areas of EU criminal law. Some problems of the protective dimension of EU criminal law are also presented. If there is such an aspect to this system, then what short of protection will the EU afford to its citizens?

The Chapter continues with an analysis of the interaction between the EU and national legal orders where three existing theories are presented. Within these theories several other relevant doctrines, such as European citizenship, democracy and the legitimation of criminal law are discussed. The theory of EU supremacy supports the superiority of the EU legal order over the national one. The theory of democratic statism advances the importance of national legal orders as the sole basis for criminal law legitimacy. They theory of constitutional pluralism suggests that both European and national legal orders have a claim of legitimacy. The latter theory values a relational approach of European citizenship where EU law becomes the means to mediate between excessive nationalism and excessive unification.

In the second section, the impact of the classical and the instrumentalist models is discussed and a relational model for European criminal justice is presented. Such model is based on an assumption of pluralism of legal orders and of sources of legitimacy and it represents a furthering of the ECtHR’s ‘rights-conception’, an approach prevalent amongst EU and national legal orders. The main characteristics of this model are presented. The European protective dimension of EU criminal law is reconstructed. It involves a strengthening of the vertical aspect, where individuals are protected from arbitrariness from both the EU and the national authorities, and a horizontal aspect, where the crime control element is reinterpreted in the light of the European demos. Further elements, such as legal certainty and the justification of harmonisation of criminal offences are examined. The Chapter concludes with
an appreciation of the theoretical rationales of the legality principle in EU law and
the general features of such principle.

The function of the European legality principle within such EU criminal justice
system (based on a relational model of justice) is further developed in the last part
of this book. Chapter VIII focuses exclusively on the legitimising and normative
function of the European legality. An additional element, the distributive function,
is added as explained in Chapter VII. The legitimising function consists of
guidelines regarding the use of criminal law competences by the European
legislator. It highlights the steering character of this principle. Focus is paid to the
currently opportunistic character of the systems. What is suggested from this is that
the EU legislator must assess substantially the principles of subsidiarity and
proportionality and make a distinction between policies and rights. EU policies are
not excluded from the legitimation of EU criminal law but they should be
distinguished and their possible translation to rights addressed.

The distributive function addresses the problem of justifying the current multi-
level system and how the European and national authorities should divide their roles
in constructing and interpretation criminal liability. The normative function delves
deeper to the function of the aspects of the legality principle. Key questions raised
in Chapter VI are answered here. An important feature is that the European legality
principle supports the statute as a source of criminal liability, but it also recognises
case law as an active participant. As a tool against casuistry, a form of precedence
is suggested for the ECJ. Transparency in judicial interpretation is essential for both
the ECJ in preliminary rulings and national courts. Especially with the principle of
conform interpretation, the suggestion is to delete the problematic contra legem
element. Finally, the aspects of lex certa are further analysed. A solution for the
requirement of precision of Directives is suggested. In addition, the pressing need
of harmonising rules on jurisdiction is analysed. The Chapter ends with conclusions
that summarise key points of the book but also reflect upon certain choices made,
such as the methodology of this book and the use of models of justice. Final
conclusions include possible directions for further research in this field.