



Legality as a Principle of Global Constitutional Law (Abstract)

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The principle of legality is an invention of European enlightenment. It was first codified in Art. 4 of the French Declaration of the Rights of Man and Citizen of 1789, stating that “[t]he limits of liberty can only be determined by law”. With regard to the strict version of the principle governing the criminalization of forbidden behaviour, the enlightened criminal and international lawyer Franz von Liszt wrote in 1893 that this principle constituted the ultimate fortification of the citizen against the Leviathan.

What is the principle’s legal basis? The principle of legality is today enshrined in 162 state constitutions, and it is thus a worldwide constitutional standard. But is it also a principle in international law? In order to qualify a general principle in the sense of Art. 38 lit. c) ICJ Statute, a rule need not only be widespread but must also be structurally suited for application in the international sphere, it must “fit” into international law.

The “fit” of a rule last not least depends on its rationale. The principle’s ultimate purpose to safeguard human liberty is satisfied with the help of two constitutional principles: the rule of law and democracy. Both the ultimate rationale and these two related principles are recognized in the international sphere. They do not relate to states but to individuals, but the wellbeing of individuals is also a concern of international law.

Hence, the principle of legality is relevant on both “levels” of law (domestic and international). There are different vocabularies for describing this relevance: as a multi-level principle, as a transnationalized, or as a global principle. The fundamental character (the material importance) of the principle of legality warrants its qualification as belonging to the (scattered) body of global constitutional law.

What is the substantive and personal scope of the principle of legality? *Ratione personae* its beneficiaries are humans, and the entities which have to respect it, its obligors, are states. From a normative perspective, the principle should also be respected by those international organisations which have the power to affect individuals’ lives. *Ratione materiae*, the requirement of a legal basis does not only govern the imposition of a criminal penalty on individuals, but more broadly, it also governs the imposition of direct other duties on individuals by international law. Examples would be the prohibition to pollute the environment, duties to respect international labour conventions, duties to respect certain precepts of international humanitarian law, e.g. with regard to prisoners or civilians, or duties to respect the human rights of others (which is relevant for business actors).

The next question then is whether (and under what conditions) international norms may serve as a sufficient legal basis for imposing duties on individuals. The answer crucially depends on whether (and which types of) norms stemming from international sources may (to a sufficient degree) serve the principle’s rationale which is to guarantee liberty and democracy. In principle, treaty law, customary rules, case-law made by judges, and even secondary international law, such as resolutions of the Security Council, could impose international legal obligations on individuals. These forms in which international law comes are not *a priori* unable to satisfy the principle of legality. But all international law suffers from a democratic handicap and is often less transparent than many types of domestic law. The demands of democracy and of the rule of law have been operationalised in the case-law of the ECtHR. This case law spells out the requirement of a legal basis for the limitation of (any) fundamental rights guaranteed by the European Convention on Human Rights. The two key conditions are, according to this case-law, foreseeability and accessibility. This case-law on the limitations of fundamental rights is relevant for our broader question, because the restriction of a fundamental right is just one type of duty imposed on the individual: the duty to tolerate a limitation of his or her freedom.