Multilevel Regulation and the EU: A Brief Introduction

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1. Multilevel Regulation: First Impressions of a Complex Reality

This book starts out from the finding that international regulatory processes are having an ever-increasing impact on European and national regulatory activities. It is difficult, though, to gain a comprehensive insight into these processes and the manifold interactions between legal orders. Let us therefore give some first impressions of this complex reality, in order to indicate that international regulatory activity takes place in a great variety of forums and in many different forms, which are often poorly understood.[1]

There appears to be, in the first place, a broad range of international regulatory *forums*, from intergovernmental organisations with a broad mandate (e.g. the United Nations, the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development) to intergovernmental bodies with very technical and specific mandates (e.g. the International Civil Aviation Organisation, the International Telecommunication Union, the Codex Alimentarius Commission), treaty-based conferences that do not amount to an international organisation (e.g. Conferences of the Parties under the main multilateral environmental agreements, such as the Framework Convention on Climate Change and the Kyoto Protocol), informal intergovernmental co-operative structures (e.g. the G-8, the Financial Action Task Force on Money

[1] There is as yet no comprehensive overview of these processes. For a recent collection of analyses regarding multilevel environmental regulation, see G. Winter (ed.), *Multilevel Governance of Global Environmental Change: Perspectives from Science, Sociology and the Law,* Cambridge, UK, Cambridge University Press, 2006. For an excellent overview of the law-making activity of intergovernmental organisations, see J.E. Alvarez, *International Organizations as Law-makers,* Oxford, UK, Oxford University Press, 2005.

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Laundering, the Basel Committee on Banking Supervision), and even private organisations (e.g. the International Organisation for Standardisation, private regulation of the internet).

The *decision-making processes* that result in regulatory activity in these forums likewise seem to be very diverse. They differ, for instance, on the issue as to who can take the initiative and formulate proposals for decisions (governments, organs of the organisation, interest groups, independent experts), the format wherein proposals are discussed (organisation of negotiations, formal and informal sessions, caucuses, negotiating groups, amendments, etc.), and the actual decision-making mode (consensus, voting by unanimity or by a certain type of majority, equality or inequality of voting power, methods of voting), including the question of which actors and stakeholders (e.g. organs of the organisation, governments, civil society organisations, businesses, parliamentarians, etc.) are involved – directly, or indirectly, formally or informally – in the decision-making.

At least as diverse seem the *instruments* used within these various regulatory forums. These range from "hard law" to "soft law", exchange of best practices and benchmarking, to mutual recognition and even to tools that at first sight may not seem normative in nature but that can have such effects, such as policy programmes, modes of assessment, reporting and monitoring systems, and loan conditionality.[2] The degree to which such international regulatory regimes are binding is linked with both the character of the instruments and procedures aimed at implementation and compliance. Rules, standards and principles can be included in traditional, legally binding conventions, negotiated between States or in the framework of an international organisation, or can have the status of technical annexes to such conventions, to be amended through simplified procedures; but they can also take the form of mere recommendations, policy guidelines or political declarations. A normative impact can even result from exchanges of best practices among States and the setting of benchmarks for good policies.

What is clear is that the *impact*, direct or indirect, of such international regulatory activities upon citizens and businesses is as yet poorly understood. It is well known that international organisations may take binding decisions in respect of their Member States. Thus, apart from the EU, organisations with the power to take binding decisions include the Council of Europe, the United Nations, the World Health Assembly of the WHO, the Council of the ICAO, the OAS, the WEU, NATO, OECD, UPU, WMO and IMF. What has been much less studied is the impact of these and other organisations' regulatory activities

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[2] J.E. Alvarez, *ibid.*, p. 217.

on subjects within those Member States, and the mechanisms through which such effects occur. A prominent example of forceful, direct regulatory power in this respect is the use the UN Security Council is increasingly making of "smart sanctions" – sanctions directed at certain individuals, businesses or groups of persons – and the Council's use of lists of terrorist suspects since "9/11". The binding force of Chapter VII resolutions means that these far-reaching measures work through in all domestic legal systems, including the EU legal order. The WTO is another international organisation whose activities have a powerful regulatory impact upon the EU and its Member States. For instance, the binding effect of decisions taken by the WTO's Dispute Settlement Body (DSB) reaches beyond the WTO Members involved in the dispute in the first place and may have considerable implications for business operators. Apart from the fact that the WTO lacks facilities by which it can be accessed by businesses or individuals via a judicial procedure, such as those available at EU and Member State level, it may itself be bound by international regulation set by other international organisations, from the Security Council to the Codex Alimentarius Commission. Similar examples may be found in the interlinkage of EU and global regulation regarding health, the environment and financial transactions, to name just a few prominent examples.

2. Time to Take Stock

As the contribution of Wessel and Wouters indicates, scholars of political science and public administration have focused extensively on "multilevel governance" over the past decade. Their main field of study has hitherto been the relation between the EU and its Member States. Due to the developments described above we feel there is a need to broaden the scope to take more prominent account of the global regulatory dimension as well as the mutual interactions between global, European and national regulatory processes. Legal studies have only recently come to recognise the phenomena connected to "multilevel

governance".[3] Nevertheless, an increasing number of studies start from the notion that the national (and even the EU) legal order is part of, and subject to, a multilevel normative process, recognising that the creation, interpretation and application of national, European and international norms must take account of the multilevel structure of the system. With the development of the international legal order we have grown accustomed to legal norms being created outside the national legal systems. What seems to be a novel development, however, is the *extent* to which international institutions and forums engage in standard-setting activities, which increasingly not only affect the EU Member States but also their citizens and businesses.

Faced with these developments, the instruments available to the judiciary for judicial protection, especially of fundamental human rights, and those allowing democratic control by the legislature and/or the executive, may be inadequate to protect the citizen when the strict dividing lines between international, European and national law become blurred. So far, legal theory and practice have not been able satisfactorily to address the emerging issues of legitimacy, accountability and human rights. They have at best offered partial solutions. A combination of insights from other disciplines is needed to be able to enhance the legitimacy of international regulation, to provide the necessary accountability and legitimacy of standard-setters and to cope with the multilevel nature of what has traditionally been viewed as separate national, European and international legal spheres.

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[3] See *inter alia,* apart from the studies mentioned *supra* notes 1 and 2, M. Bothe, "The United Nations Framework Convention on Climate Change: an Unprecedented Multilevel Regulatory Challenge", *Zeitschrift für ausländisches öffentliches Recht und* Völkerrecht, Vol. 63 2003, pp. 239-254; W.W. Burke-White, "Complementarity in Practice: the International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo", *Leiden Journal of International* Law, Vol. 18 2005, pp. 557-590; T. Hervey, "Regulation of Genetically Modified Products in a Multi-level System of Governance: Science or Citizens?", *Review of European Community and International Environmental Law*, Vol. 10 2001, pp. 321-333; S. Oberthür and T. Gehring (eds.), *Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies*, Cambridge, MA, MIT Press, 2006; E.U. Petersmann, "From 'Member-driven Governance' to Constitutionally Limited 'Multi-level Trade Governance' in the WTO", in: G. Sacerdoti, et al., (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System*, Cambridge: Cambridge University Press, 2006; D. Zacharias, "Cologne Cathedral versus Skyscrapers: World Cultural Heritage Protection as Archetype of a Multilevel System", *Max Planck Yearbook of United Nations* Law, Vol. 10 2006, pp. 273-366.

The present book aims to contribute to this debate by examining and reflecting upon the extent to which the EU and its Member States are confronted with "international regulation" by international organisations and bodies. Moreover, as both the EU (as a crucial level between the international and national legal orders) and national regulatory activities become increasingly dependent on rules enacted by international organisations and bodies operating on a global level, the contributions in the book highlight how the classical mechanisms for ensuring accountability, legitimacy and the protection of human rights may need to be amended. The book brings to light even more challenges, though. The phenomenon of multilevel regulation leads to problems such as the question of safeguarding coherence between legal systems in terms of substantive normative harmony, but also of upholding regulatory trade-offs made at a certain level of policy making (e.g. trade and non-trade values). Last but not least, a serious issue arises regarding the influence of private (commercial) actors on normative processes at various levels to which states do not always have access.

3. Structure of the Book

In the light of the considerations set out above, the contributors to this book look beyond the EU and take the influence of other international organisations or global regulatory forums/regimes into account. The phenomenon that regulation is increasingly left to (or in fact takes place in) international organisations and other global or regional forums leaves its mark on the (traditional) freedom of States to establish their own rules, as well as on their ability to hold on to checks and balances (democracy, legitimacy, the rule of law) that form part and parcel of their domestic legal system. The contributors investigate the consequences of "regulation beyond the State" for established systems of governance and for their legitimacy, including democratic accountability and human rights within states. The chapters aim to display the various relations that may exist between regulatory regimes at different levels of governance.

The first part of the book embarks on a general exploration and sets out the development of a research agenda regarding the phenomenon of multilevel regulation. *Ramses Wessel* and *Jan Wouters* examine the phenomenon of multilevel regulation in greater detail, linking it to the scholarly debates on regulation and multilevel governance and exploring the responses to this phenomenon that the legal community has produced to date. They conclude with reflections on an agenda for future research in a multidisciplinary perspective. The second part, *"mapping the unmappable"*, provides a number of case studies as – obviously non-exhaustive – examples of the phenomenon of multilevel regulation and the problems it entails. *Bärbel-Dorbeck Jung* analyses the challenges to the

legitimacy of international regulation in the area of pharmaceuticals. *Caroline Bradley* examines financial trade associations and the impact of their activities on multilevel regulation on financial services. *Bart De Meester* takes a closer look at the phenomenon of multilevel regulation in the area of banking services from the EC's point of view. *Robert Uerpmann-Wittzack* analyses multilevel regulatory governance of the internet. *Erling Johannes Husabø* studies the normative processes at various levels that define the notion of terrorism. Finally, *Mirjam Kars* and *Helen Stout* take a closer look at the transatlantic common aviation area as a case study of multilevel regulation.

The third part of the book deals with the implications of multilevel regulation for human rights, judicial control and the rule of law. Focusing on the question of how judges cope with multilevel regulation, *Rory Stephen Brown* provides us with a thorough analysis of three human rights cases which feature multilevel regulatory regimes. *Clemens A. Feinäugle* analyses the problems involved with multiple jurisdictions for human rights review of Security Council sanctions in Europe. The contribution by *Christina Eckes* highlights the divergent ways in which the different European courts maintain human rights protection for terrorist suspects. *Mielle Bulterman* discusses the manner in which international economic legal rules impact individual rights under European Community law. *Andrea Keessen* investigates how the judicial deficit in multilevel environmental regulation can be reduced, taking plant protection products as an example. *Andrea Ott*'s contribution on multilevel regulations reviewed by multilevel jurisdictions analyses the manner in which European and national courts are trying to come to grips with the phenomenon of multilevel regulation. Finally, *Nikos Lavranos* elaborates the argument that a system of hierarchy of norms, as practised in European Community law, is not static but flexible, differing depending on the area of the law and the specific circumstances of the case under consideration.

In the epilogue to this book *Andreas Follesdal* considers seven steps toward more legitimate multilevel regulation.