The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres

Towards a Research Agenda

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1. Introduction

Over the past decade globalisation and global governance have become central themes, not just in international relations and politics, but also in the study of international and national law. The reason may well be, as some observers hold, that “central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rule-making are ever more widespread, the sovereign equality of states is gradually undermined, and the basis of legitimacy of international law is increasingly in doubt.” Indeed, many of these themes feature in current research programmes. Domestic legal systems — traditionally by definition caught in national logic — increasingly recognise the influence of international and transnational regulation and

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Law-making on their development. Legal scholars attempt to cope with the proliferation of international organisations and other entities contributing to extra-national normative processes.

While the notion and consequences of globalisation are the subject of debate, common denominators seem at least to include a profound transformation of the traditional Nation State and the inability of sovereignty to protect the State against foreign interference. The proliferation of international organisations and the expansion of international law as well as the related need for national legal systems to implement ever more international rules are commonly considered to go hand in hand with globalisation. Apart from challenging some of the foundations of international law, globalisation raises questions in particular about to the negative effects it may have on the rule of law, democracy and legitimacy (infra, 4.1.).

The interactions between national and international legal spheres, including the European legal sphere for EU Member States, have intensified and gained increased visibility over the last few years. It is becoming ever more difficult to draw dividing lines between legal orders: international law is increasingly coming to play a role in national (and EU) legal orders, whereas national (and EU) legal developments are exerting a bottom-up influence on the evolution of

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6 A. von Bogdandy (see supra n. 4), p. 889.
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the international legal order. In political science and public administration, the phenomenon of interacting and partly overlapping policy spheres is often referred to as multilevel governance. Two dimensions of this concept are particularly relevant to the present book. The first one, “governance without government”, points to the phenomenon that a number of public tasks are increasingly assumed and carried out by actors other than the classical government institutions of the Nation State (and its subdivisions). The second dimension, “governance beyond the State”, refers to the complexity of governance at distinct but increasingly intertwined levels. “Multilevel” then refers to a variety of forms of decision making, authority, policy making, regulation, organisation, ruling, steering, etcetera, characterized by a complex interweaving of actors operating at different levels of formal jurisdictional or administrative authority, ranging from the local level, via the national level, to the macro-regional and global level. These phenomena involve important questions concerning the location of power, the sharing of responsibility, the legitimacy of decisions and decision takers, and the accountability to citizens and organisations in different national, sub-national and international settings. From a legal perspective, the interactions between global, European and national regulatory spheres lead to what one could refer to as the phenomenon of “multilevel regulation”. We understand


10 See R.A. Wessel, The Invasion by International Organizations. De toenemende samenhang tussen de mondiale, Europese en nationale rechtsorde [The Increasing Interrelatedness between Global, European and National Legal Orders], Inaugural Lecture, University of Twente, 12 January 2006, p. 26, available at <www.mb.utwente.nl/ces/research/other_publications_including_i/oticewessel.pdf>. The term, however, is quite common in biochemics, see for instance I. Olson, et al., “Multilevel Regulation of Lysosomal Gene Expression in Lymphocytes”, Biochemical and Biophysical Research Comunications, 1993, pp. 327-335; or V.
“regulation” in a broad sense here, referring to the setting of rules, standards or principles that govern conduct by public and/or private actors. Whereas “rules” are the most constraining and rigid, “standards” leave a greater range of choice or discretion, while “principles” are still more flexible, leaving scope to balance a number of (policy) considerations.

The purpose of the present contribution is to introduce and further analyse this relatively new phenomenon. We examine two questions: what are indications of interactions between normative processes at global, European and national level; and what consequences do these interactions have for the research agenda related to the further development of the global and European legal order? In section 2 we first of all attempt to map and further define the phenomenon of multilevel regulation. This is followed in section 3 by an analysis of the responses from the legal community to this phenomenon. In section 4 we try to set out an agenda for further research, including legal and non-legal approaches.

2. The Phenomenon of Multilevel Regulation

2.1. The Invasion of International Organisations

As the contributions to this book indicate (see also infra, 2.4.), international organisations and international regimes are increasingly engaged in normative processes which, de jure or de facto, impact on States and even on individuals and businesses. Since decisions of international organisations are increasingly coming to be considered a source of international law, it is quite common to regard them in terms of international regulation or legislation. Whereas regulation, as stated above, is the more comprehensive term used in this book, “legislation” has a more narrow connotation as “legislative power” has been said to have three characteristics: (1) a written articulation of rules that (2)
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have legally binding effect as such and (3) have been promulgated by a process to which express authority has been delegated \textit{a priori} to make binding rules without affirmative \textit{a posteriori} assent to those rules by those bound.\textsuperscript{13} An even more distinguishing element, perhaps, is that such rules imply future application to an indeterminate number of cases and situations.\textsuperscript{14}

It is undisputed that international organisations may take binding decisions vis-à-vis their Member States and that they may even exercise sovereign powers, including executive, legislative and judicial powers.\textsuperscript{15} Thus, apart from the EC and the UN\textsuperscript{16}, organisations with a competence to take legally binding decisions include the World Health Assembly of the WHO, the Council of the ICAO, the OAS, the WEU, NATO, OECD, UPU, WMO and IMF.\textsuperscript{17} As Alvarez notes, more and more technocratic international organisations “appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making. They also often


\textsuperscript{15} See quite extensively on this issue D. Sarooshi (see supra n. 3).


engage in law-making by subterfuge.” Thus, Alvarez’s survey includes standard setting by the IMO, the FAO, the ICAO, the ILO, the IAEA, UNEP, the World Bank, and the IMF. In addition, many international conventions – including UNCLOS (on the law of the sea) and a number of WTO agreements – incorporate generally accepted international “rules, standards, regulations, procedures and/or practices” (UNCLOS). Alvarez points to the fact that this may effectively transform a number of codes, guidelines and standards created by international organisations and bodies into binding norms. Indeed, while in most cases standard setting is accomplished through softer modes of regulation, this may leave the subjects of regulation “with as little effective choice as some Security Council enforcement actions”. Nevertheless, most types of law making by international organisations are generally directed towards the organisation’s own members, viz., States. But what if decisions by international organisations either de jure or de facto become part of the domestic legal order of the Member States and directly or indirectly affect citizens and/or businesses within those States?

While in most States the decisions of international organisations and bodies typically require implementation in the domestic legal order before they become valid legal norms, the density of the global governance web has caused an interplay between the normative processes at various levels. For EU Member States (and their citizens) this can imply that the substantive origin of EU decisions (which usually enjoy direct effect in, and supremacy over the domestic legal order) is to be found in another international body. In many areas, ranging from security to food safety, banking, health issues or the protection of the environment, national rules find their basis in international and/or European decisions (see also infra, section 2.4.). In those cases decisions may enter the domestic legal orders as part of European law. But international decisions may also have an independent impact on domestic legal orders. This is not to say that international decisions have a direct effect in the sense we are familiar with in EU law. From the point of view of international law, while “primacy is a matter of logic as

18 J.E. Alvarez (see supra n. 3), p. 217.
19 Ibid, Chapter 4.
20 Ibid., at p. 218.
21 A number of international organisations also contain other international organisations as members: for instance, the WTO has the European Community as one of its founding members.
international law can only assume its role of stabilizing a global legal order if it supersedes particular and local rules”, at the same time it “allows for an undefined variety of combinations based either upon the doctrine of monism or the doctrine of dualism”. However, the fact that many domestic legal orders do not allow their citizens to directly invoke international norms before national courts does not mean that these norms are devoid of impact. As the norms are usually based on international agreements and/or decisions of international organisations, States will simply have to follow the rules of the game in their international dealings. This implies that even domestically they may have to adjust to ensure that the rules are observed by all parts of the administration. The de facto impact of the – often quite technical – norms and the need for consistent interpretation may thus set aside more sophisticated notions of the applicability of international norms in the domestic legal order.

The United Nations Security Council forms a good example of an international body that is increasingly active in the creation of “international regulation” or “international legislation”, although its legal competence to engage in these activities has been questioned. Thus, in the area of anti-terrorism measures for

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24 For a recent survey of the different legal systems in Europe see: A. von Bogdandy, P.M. Huber and P. Cruz Villalón, (eds), Ius Publicum Europaeum; Band I: Staatsliches Verfassungsrecht im Europäischen Rechtsraum, Heidelberg: C.F. Müller Verlag, 2007.
example, Security Council Resolution 1390 (2002) was no longer directed at
the Taliban regime but at individuals (Osama bin Laden, the Al-Qaeda network
and the persons and entities associated with them). In that respect the resolution
seems to herald a new development, as any connection with the territory of a
State is omitted. Perhaps Resolution 1373 (2001) already pointed to something
new when, in reaction to the terrorist attacks of 11 September, the Council
determined “that such acts, like any act of international terrorism, constitute
a threat to international peace and security”, thus referring to terrorist acts in
the abstract. The Council then imposed on all States duties to “prevent and
suppress the financing of terrorist acts”, inter alia by criminalising conduct
aimed at financing or supporting terrorist acts.

Whereas its Charter presents the United Nations as an intergovernmental
organisation dealing with the relations between its Member States (compare
Arts. 1 and 2), taking decisions that entail obligations on those Member States
(Art. 25), and extremely hesitant to interfere in the domestic jurisdiction of any
State, the Security Council recently took a number of decisions that directly
affect citizens within Member States. Key examples include the establishment
of the Tribunals for the former Yugoslavia and for Rwanda, the cases in which
the UN has taken over the interim administration of a region or State (UNMIK
in Kosovo and UNTAET in Timor Leste) and the replacement of traditional
sanctions directed at States (e.g. Iraq) by “smart sanctions” directed at certain
individuals or groups. Thus the Security Council placed greater emphasis


28 Smart sanctions are also referred to as “targeted” or “designer” sanctions. While the Afghanistan/Al-Qaeda sanctions renewed academic attention to this issue, comparable smart sanctions were for instance already established by Res. 1127 (1997) and 1173 and 1176 (1998) against UNITA (Angola); by Res. 1132 (1997)
on its ability to take decisions with a great impact on intra-state issues rather than being involved merely in relations between States. Of course, even this development is not entirely new. By now we are used to the Council’s occasional determination of (the effects of) domestic conflicts as threats to (international) peace and security. Moreover, the discussion on military intervention for humanitarian reasons highlighted the possible (and in the eyes of some even necessary) role of the Security Council in this area.\(^\text{29}\) In this sense it could be argued that the Security Council is no longer dealing with a particular situation between States or within a State, but with a more abstract situation that does not involve a particular dispute. Another example of an abstract danger could be Resolution 1422 (2002). By exempting certain “acts or omissions relating to a United Nations established or authorized operation” from the jurisdiction of the International Criminal Court, even though no ICC investigation was imminent, the Council in effect held the abstract possibility of such an investigation to be a threat to peace. A particularly clear example is Resolution 1540 (2004), in which the Council again identified an abstract danger – the proliferation of weapons
of mass destruction to non-State actors – as a threat to peace, and it again laid
down a general obligation on all States that they shall refrain from assisting
non-State actors in acquiring weapons of mass destruction, to criminalise the
behaviour of non-State actors aimed at acquiring such weapons, etc.30 Earlier
examples of resolutions attempting to “regulate” a certain area without any
relation to a specific conflict include the protection of civilians in armed conflicts
and the spread of HIV/AIDS, as well as certain methods employed by terrorist
groups. However, in this context the Council had not (yet) invoked its Chapter
VII powers to lay down binding norms.31

The World Trade Organization is another body whose decisions have been
labelled international regulation.32 While one may debate whether the decisions
taken by the WTO’s Dispute Settlement Body (DSB) are to been seen as proof
of the organisation’s “legislative” or “adjudicative” powers, the fact remains
that they reach beyond the WTO Members involved in the dispute and may even
have serious consequences for individuals (including enterprises in particular).33
A similar phenomenon may be discovered in another dimension of the WTO:
intellectual property, regulated in the so-called TRIPs,34 which may affect the
producers of HIV/AIDS medicines, in that an international decision ensures that
their products may be sold under the market value in developing countries. Apart
from the fact that the WTO has no facilities for individual access to a judicial
review procedure such as those applicable within the EU, it may nevertheless

30 B. Eberling, (see supra n. 26), pp. 337-360. On “abstract” or “thematic” decisions
see also: C. Denis, Le Pouvoir normatif du Conseil de sécurité des Nations unies:
Portée et limites, Brussels: Bruylant, 2004, paras. 118-130 en paras. 171-181; as
well as J.E. Alvarez, (see supra n. 3), 2005, pp. 173-176.
31 B. Eberling, (see supra n. 30).
32 See in particular N. Lavranos: Decisions of International Organizations in the
European and Domestic Legal Orders of Selected EU Member States, Groningen:
33 This forms one of the reasons for the debate on the constitutionalisation of trade
Norm-Generation as the Engine of Constitutional Development in International Trade”,
European Journal of International Law, 2001, pp. 39-75; as well as Cass, op. cit.,
2005. On the impact of the WTO on the international legal order see the interesting
book by J.H. Jackson, Sovereignty, the WTO and the Changing Fundamentals of
34 On TRIPs see e.g. S.K. Sell, Private Power, Public Law: The Globalization of
find itself bound by Security Council resolutions, which may have a conclusive impact on the outcome of a WTO dispute settlement procedure.

Other examples of international regulation can be found with the UN High Commissioner for Refugees (in relation to the fixing of standards regarding the establishment of a refugee status of the governance of refugee camps), the World Health Organization (in establishing global health risks), the so-called Financial Action Task Force of the OECD (in the area of money laundering), WIPO (in the area of intellectual property) and the World Bank (in setting criteria for obtaining financial support).

International norms do not always reach States’ domestic legal order directly: they may have followed a route through other international bodies. In the European Union the relation between EU decisions and decisions taken by other international bodies is indeed quite obvious. Whereas this has been particularly apparent in the area covered by the internal market, the Union recently made clear that there is also an interplay between its decisions and United Nations anti-terrorism measures. In the Yusuf and Kadi cases, citizens of the Union did not succeed in having their names removed from UN and EU sanctions lists. The Member State in question (Sweden) was faced with the supremacy of EU law, whereas the European Court of First Instance held that the European Community is bound by UN law and the Court was in no position to judge the legality of UN Security Council Resolutions. At the same time the relationship between the European Community and the WTO may be regarded from a multilevel perspective. While the WTO is in no way comparable to the UN where questions of hierarchy and primacy are concerned, the ECJ has indicated the necessity that Community law be interpreted in conformity with WTO law. In that sense similar arguments to those used by the Court of First Instance in the Yusuf and Kadi cases could appear in cases where individuals claim to be a victim of a WTO (DSB) decision, in which case they would add to the already difficult position of individuals under WTO law.

35 See also Hoffmeister (see supra n. 22).


37 So far the direct effect of WTO law has not been accepted by the European Court of Justice. See for instance Case C-149/96, Portugal/Council. For examples in the area of international trade see: S. Shapiro, “International Trade Agreements, Regulatory Protection and Public Accountability”, Administrative Law Review, 2002, p. 435.
There thus seems to be a need to investigate the interplay between regulatory powers of international organisations. The close relationship between norms enacted by the World Health Organization, the World Trade Organization and the European Union, for instance, is quite obvious. The new International Health Regulations (IHR) as well as the WHO Framework Convention on Tobacco Control (FCTC) may be seen as examples. One could also point to the International Codex Alimentarius Commission, a subsidiary common body of FAO and WHO which develops international standards on food safety. It cannot be denied that – in particular through the WTO’s Agreement on Sanitary and Phytosanitary Standards – these standards have an effect in other legal orders, including in those of the EU and its Member States. The fact that the European Community has been a Member of the Codex Alimentarius Commission since 2003 reinforces the multilevel nature of this field of regulation. Similar examples may be found in the area of environmental protection, where international standards are set that are not only binding on States but also on the European Community and which – in any case through the latter – are also relevant to individuals. Heldeweg points to some examples in the area of tradable


40 Art. 3.4 and Annex A.3.a) SPS Agreement.


allowances. Regulation 2037/2000 on substances that deplete the ozone layer, implementing the Vienna Convention and Montreal Protocol, contains a system of trade through licences to import or export controlled substances from other countries (which may or may not be parties to the Montreal Protocol). More important, and certainly more innovative, may be the Directive establishing a scheme for greenhouse gas emission allowance trading within the Community. This scheme precedes the obligations under the first commitment period of the Kyoto Protocol (2008-2012) and aims to prepare the Community for allowances trading. Finally, the effects on individuals are particularly evident in the framework of the so-called “Aarhus regime”. The Aarhus Convention is an important multilateral environmental treaty to which the Community is a signatory and which is underpinned by three basic legal requirements in the area of openness and participation: a) access to environmental information; b) public participation; c) access to judicial review in environmental cases. Each of these requirements, also referred to as the “Aarhus pillars”, has given rise to legislation or proposals based thereon. In other cases, too, the EC is a party to international environmental treaties, or is involved in their implementation on behalf of EU Member States.

44 OJ L 244/1, 2000.
2.2. The Expansion of Regulation: from Government to Governance

In their interdisciplinary survey of research on regulation, Baldwin, Scott and Hood developed three definitions of regulation. In the first, most stringent definition, regulation refers to the promulgation of an authoritative set of standards and rules accompanied by some mechanism for promoting and monitoring compliance with these rules and standards. A second, broader definition refers to all the efforts of State agencies to steer individual and organisational behaviour. This approach takes account of other policy instruments which a State may use to influence behaviour, such as taxation, disclosure requirements, procurement policies, etc. A third approach to regulation considers all mechanisms of social control, including non-State processes. In recent times, in addition to the standard setting practice of international organisations referred to above, it is especially this third type, with new forms of social or “privatised” regulation that is on the rise and is even proliferating. This evolution is taking place in a context of trends such as the weakening of national governments, the rise and professionalisation of multinational corporations and supply chains, and the proliferation, diversification and internationalisation of new social movements and their strategies. This shift is often referred to as a shift from government to governance in regard to policy making.

Traditionally, social problems or public policy issues were governed by States via a regulatory framework consisting of bureaucracies (departments, ministries) and legislation. This top-down, command-and-control approach aimed

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at setting and implementing standards which are/were applicable to all parties involved in the same way. From the 1980s on, though, the deficiencies of this approach started to emerge in both old and new policy fields, leading to the development of new policy instruments and arrangements. A major policy shift constitutes a move away from the State as the sole actor in policy making. The State traditionally acted in a top-down, command-and-control fashion. However, apart from an increasing role of international organisations and bodies (supra, 2.1.), new modes of policy making are characterised by a greater role for private actors, either via intensive negotiation, consultation, interaction, and even self-regulation, or via increasing economic and market-oriented strategies and instruments. This broadening of the “spectrum of intervention” implies a fundamental redefinition of the role of the State: the State should no longer row but steer, focus more on means than on ends and concentrate more on organisation and direction rather than provision. The new policy catchwords


are bottom-up policy processes, empowerment, the importance of learning processes, (open methods of) co-ordination, co-operation, consensus, flexibility, tailor-made solutions, self-regulation, public-private partnerships, participation and benchmarking. Tatenhove, adopting a European perspective, identified the following major policy changes: “(a) the traditional divides between state, market and civil society are disappearing, while (b) the interrelations between these spheres increasingly exceed the nation state, (c) resulting in new coalitions between state agencies, market agents and civic parties both on local and global levels”.58 The overall result is a policy style characterized by plurality in terms of policy instruments, coalitions between parties, the allocation and distribution of power and new forms of co-operation. In the United States, too, legal scholars and political scientists describe the emergence of a new democratic model: “The emergent model, which we call democratic experimentalism, combines the virtues of localism, decentralization, and direct citizen participation with the discipline of national coordination, transparency, and public accountability.”59 According to some American scholars these new models try to combine the virtues of localism, decentralisation, and direct participation with the discipline of international or national co-ordination and public accountability.60 “In contrast to conventional hierarchical regulation in which subordinate private actors answer to the authoritative command of a central regulator, the practical core of the new model is centrally monitored local experimentation.”61

These new forms of governance are considered superior to existing policy making strategies because they are assumed to improve the substantive quality of decisions and policy making by incorporating new and more information obtained from the different participants; increase learning processes among the participants (educating the actors involved) and in this way generate new knowledge; with better incorporation of public values into decisions; they are supposed to resolve, contain or reduce conflict among competing interests and the actors involved, integrate local knowledge and context in decision making, hence tailoring it to local circumstances; they achieve cost-effectiveness; and they increase compliance via greater commitment to and support for the implementation of decisions. Existing policy practices are criticised for being overly rigid (rules that hold across a nation and nations) and for their limitations in being able to incorporate local and specific information in the design of solutions.

As a result of this policy shift one can observe, both nationally and internationally, the emergence of new co-operative policy initiatives and new forms of governance, such as public and stakeholder participation in decision...
making, voluntary agreements and covenants, self-regulation by companies via the introduction of management systems and codes of conduct, stakeholder partnerships for the management of ecosystems or the monitoring of human rights issues and labour conditions on a global scale, collaborative pragmatism, the development of corporate social responsibility models and the rise and proliferation of accreditation and certification bodies such as the Forest Stewardship Council, Fair Labour Association or Marine Stewardship Council.


2.3. Governance and Regulation as a Multi-actor Game

What has been set out above already indicates that governance, and by the same token regulation, has become a multi-actor game: apart from intergovernmental organisations, non-governmental and transnational actors are playing an increasing role in global governance.\(^{68}\) In some issue areas there is intense co-operation between State and non-State actors. Apart from the obvious example of the International Labour Organization, one could point to the Codex Alimentarius Commission (\textit{supra}, 2.1.) or to ICANN,\(^{69}\) which governs the internet. In some areas States have even ceased to play a role and transnational actors have taken over. A prime example is the International Standardization Organization (ISO), which by now has produced some 13,000 rules on the standardisation of products and processes.\(^{70}\) These rules are often adopted by other international organisations, such as the WTO, which allows them to indirectly affect national legal orders.\(^{71}\) A similar situation arises in relation to the norms set by the World Anti-Doping Agency. It is clear that individuals or companies may be confronted by rules that were adopted without any direct influence by the national legislator or that simply have to be adopted at the national level in order to be able to participate in international co-operation. Something like global law without the State\(^{72}\) does exist and in some areas States do not play any role in global regulation. What one witnesses is a transnational co-operation that has already led to a complete set of rules on the use of the internet: the \textit{lex digitalis}, comparable to the \textit{lex mercatoria} related to transnational trade.\(^{73}\) Other examples include the Basel

\(^{68}\) Anne-Marie Slaughter regards these networks as a better way of world governance than the traditional statecentric approach. See her \textit{A New World Order}, 2004, Boston MA: Princeton University Press. Another relevant dimension is not addressed in this contribution. Apart from transnational networks, the international legal order is also challenged by “hegemonic international law” (HIL). On the influence of hegemons see also J.E. Alvarez, (see \textit{supra} n. 3), pp. 199-217 as well as G. Simpson, \textit{Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order}, Cambridge: Cambridge University Press, 2004.

\(^{69}\) Internet Corporation for Assigned Names and Numbers.


\(^{72}\) For the contribution to the fragmentation of law see Fischer-Lescano and Teubner, (see \textit{infra} n. 104), p. 1009.

\(^{73}\) On the \textit{lex digitalis} see for instance H.H. Perritt Jr., “Dispute Resolution in Cyberspace: Demand for New Forms of ADR”, \textit{Ohio State Journal on Dispute Resolution}, 2000,
Committee, in which the central bank directors of a limited number of countries harmonise their policies in such a way as to result in a *de facto* regulation of the capital market\(^{74}\), and the International Organization of Securities Commissions (IOSCO), which deals with the transnationalisation of securities markets and attempts to provide a regulatory framework for them.\(^{75}\) National agencies thus participate in global (or regional) regulatory networks as independent, autonomous actors and are, in turn, often required to implement international regulations or agreements adopted in the context of these networks at the national level.\(^{76}\) As early as a decade ago, Slaughter termed this phenomenon the “nationalization of international law”.\(^{77}\) According to Jayasuriya these new regulatory forms have three main features: 1. they are governed by networks of State agencies acting not on behalf of the State but as independent actors; 2. they lay down standards and general regulatory principles rather than strict rules; and 3. they frequently contribute to the emergence of a system of decentralised enforcement or the regulation of self-regulation.\(^{78}\)

Apart from non-governmental bodies and national agencies making their own international deals, a relatively new development is the proliferation of international bodies that are not based on an international agreement but on a decision by an international organisation. According to some observers these

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\(^{75}\) Ibid.; and Jayasuriya (see supra n. 3), p. 449.


new international entities even outnumber the conventional organisations. The phenomenon of Multilevel Regulation
International regulatory co-operation is often conducted between these non-conventional international bodies. The tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other international organisations and agencies, which sometimes leads to the creation of common bodies, such as the Global Environmental Facility (GEF, created by the World Bank and joined by EBDP and UNEP) and UNAIDS, the Joint United Nations Programme on HIV/AIDS (instituted by UNICEF, UNDP, UNFPA, UNESCO, WHO and the World Bank). Whereas traditional international organisations are established by an agreement between States, in which their control over the organisation and the division of powers is laid down, the link between newly created international bodies and the States that established the parent organisation is less clear. In a recent study Martini points to fundamental sectors, such as environmental protection and public health, where the Global Environmental Facility (GEF, created by the World Bank and joined by EBDP and UNEP) and the Joint United Nations Programme on HIV/AIDS (UNAIDS, instituted by UNICEF, UNDP, UNFPA, UNESCO, WHO and the World Bank) “demonstrate how the entity’s will does not simply express the sum of the Member States’ positions, but reformulates them at a higher level of complexity, assigning decision-making power to different subjects, especially

82 On the different dimensions of the relationship between states and international organizations cf. D. Sarooshi, (see supra n. 3).
to the international institutions that promoted the establishment of the new organization.\textsuperscript{84} Martini’s study reveals that the loss of States’ influence – and hence the autonomous position of international agencies – is reflected in at least three phenomena:\textsuperscript{85} (i) the fact that the new entities emerge from the regular decisions of other organisations, rather than through the treaty-making process, compromises States’ ability to influence not only their creation but also their further development; (ii) States may lose some powers to the parent organisations, such as the power to appoint the new entity’s executive heads; moreover, they might have to share the power to define and manage the organisation’s activities; and (iii) in the non-State-created organisations the international secretariat plays a greater role. This is not to say that all these international bodies can readily be compared with each another: “In fact, these institutions are established in different ways, have different institutional structures and relationships with their parent organizations, and different areas of activity and functions”.\textsuperscript{86} However, the need for collaboration between international agencies and the subsequent creation of common organisations has resulted in a global regulatory sphere in which States are more often confronted with a decrease in the influence they have on global normative processes.

2.4. The Case Studies in this Book

The different case studies contained in the second part of this book aim to illustrate and analyse – obviously not exhaustively – the diversity of the phenomenon of multilevel regulation and the interactions between global, European and national regulatory spheres. In a first, in-depth contribution, Bärbel-Dorbeck Jung analyses the challenges to the legitimacy of international regulation in the area of pharmaceuticals by studying the standardisation activities of the International Conference on Harmonisation of Technical Requirements for the Registration of Pharmaceutical for Human use (ICH). She provides a fascinating case study of the increasing interactions between the regulatory activities of the EU, its Member States, other countries and international organisations. Secondly, Caroline Bradley examines financial trade associations and the impact of their activities on multilevel regulation of financial services, thereby likewise pointing out important issues of legitimacy in such standard-setting processes and very clearly laying out some of the causes of legitimacy deficits in multilevel regulation. In a third contribution, Bart De Meester examines

\textsuperscript{84} Martini, \textit{op. cit.}, p. 25.
\textsuperscript{85} Ibid., p. 24.
\textsuperscript{86} Ibid., p. 2.
the phenomenon of multilevel regulation in the area of banking services from an EC perspective, thereby considering not only the interactions between the rules developed at the international level (in particular in the context of the Basel Committee referred to supra, 2.3.) and the European one, but also the mechanisms through which the EC tries to influence the standard setting at the international level. This raises a variety of questions related to the input from the various stakeholders, whether democratic control is ensured and whether the policy preferences of the EC at international level enjoy sufficient legitimacy. Fourthly, Robert Uerpmann analyses multilevel regulatory governance of the internet and in doing so investigates the respective roles of the EU, nation states and private actors. As indicated above (supra, 2.3.), internet regulation provides a fascinating field of involvement of purely private organisations and, increasingly, national and EU authorities, though in a setting governed by the law of California. Uerpmann’s contribution demonstrates the complex interactions between private and public authorities and other actors with regulatory clout in multilevel governance, but it also reveals some of the problems to which a “participatory” and “consensus oriented” approach gives rise. In a fifth case study, Erling Johannes Husabø looks at an entirely different example of multilevel regulation, viz. the interactions between the international, macro-regional (both Council of Europe and EU) and national normative processes that serve to define the notion of terrorism. His contribution offers an interesting illustration of the “power of ideas/concepts” as a mode of influence among the various governance levels. It likewise points to the role played by epistemic communities in helping to define such concepts. Finally, in a sixth contribution, Mirjam Kars and Helen Stout take a closer look at the transatlantic common aviation area as a case study of multilevel regulation, situating the EU’s efforts at liberalisation in its broader international framework and highlighting the various (bilateral and multilateral) tracks used for this purpose, as well as the manner in which such actors as the European Commission and the EU Member States make use of the room for manoeuvre left under international rules in order to further the European or the national interest, respectively.

3. The Response from the Legal Community

Legal studies have only recently started to recognise the phenomena described above. After all, the international legal system is formed on the basis of legally autonomous national legal orders, which are in principle exclusively competent to create, implement and enforce legal norms. Nevertheless, an increasing number of studies depart from the notion that the national legal order is part of a multilevel international legal order and that the creation, application and
interpretation of national as well as international norms should 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 developed outside
the national legal orders. The proliferation of rule makers at the international
level poses new challenges to the coherence of this order. While treaties and
custom remain the primary sources of international law, we have seen above
that decisions of international organisations are playing an ever larger part in
the development of international law. As national governments have become
increasingly dependent on international institutions, a large part of national
policy is influenced by and depends on international decisions. Although States
do not cease to exist by becoming a member of an international (integration)
organisation, it becomes very difficult to regard their national legal order as
existing in complete isolation from the legal system of the organisation. The
“constitutional setting” in which they operate may depend in large part on
general international law, and at least clearly includes the arrangements to
which they agreed in the context of the international organisation in question.
Conversely, the international organisation has to deal with the Janus-faced
identity of Member States: on the one hand Member States are an integral part
of the international organisation they set up among themselves; on the other
hand the States are the counterparts of the same international organisation, in
the sense that both occupy independent positions within the international legal
order and even have obligations towards each other.

The legal community has developed a variety of approaches to deal with
this complexity: (i) constitutionalism, (ii) global administrative law, (iii)
fragmentation of international law.⁸⁷

3.1. Constitutionalism

The combination of the phenomenon of multilevel governance and the
related declining ability of States to achieve the realisation of human rights,
fundamental freedoms and democratic procedures, has led a number of legal
scholars to view constitutionalism in multilevel terms. On the one hand it is

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⁸⁷ Interestingly, almost all the legal scholars in question have a background in interna-
tional law. Scholars active in the areas of constitutional law and legal theory seem to
be more prone to adopt a comparative approach, continuing to see the State as the
central reality and not really focussing on normative processes in the international
legal order. See e.g. W. Twining, *Globalization and Legal Theory*, 2000, Cambridge
UK: Cambridge University Press. An author who does pay attention to developments
at the global level is B. Tamanaha, *On the Rule of Law: History, Politics, Theory*,
assumed that globalisation may strengthen the protection of fundamental values at the national level, e.g. through a constitutionalisation of human rights (as experienced for instance in Europe with the European Convention on Human Rights and Fundamental Freedoms and the extensive case law of the European Court of Human Rights). On the other hand, global processes may undermine these values, as a result, for instance of the limited (democratic or otherwise) legitimacy of international decisions and deficits in accountability, the rule of law (e.g. the lack of a possibility for review by an independent judiciary) and transparency. In the words of Petersmann, “the inevitable ‘democratic deficit’ of worldwide organisations for the collective supply of ‘global public goods’ must be compensated for by subjecting their multilevel governance to multilevel constitutional restraints at both international and domestic levels.” While the trend towards approaching international organisations from a constitutional perspective started in relation to the European Union, other international


organisations have become subject to academic constitutional scrutiny as well. In fact, as one observer holds: “If anyone were to propose a pairing of phrases to characterize current developments in international law, the smart money would surely be on constitutionalisation and fragmentation. [M]any international lawyers propose that treaty regimes be constitutionalized, and voice such proposals in particular in the context of international organizations”. 

Important parts of the changing nature of the international legal order are studied in what is frequently referred to as “international constitutional law”. One of the questions in international constitutional law is whether a so-called domestic analogy is useful and to what extent one has to take account of the

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fact that global governance acknowledges no single government but rather numerous different actors at various levels, all in their own manner influencing policy making and, for our purpose, rule making through complex, often interrelated processes.

### 3.2. Global Administrative Law

Another manner in which global governance and regulation is being tackled by legal scholarship is the so-called “global administrative law” approach. The term was introduced by Kingsbury, Krisch and Stewart when they launched a project under this title at New York University. They define global administrative law as “comprising the structures, procedures and normative standards for regulatory decision-making, including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards, that are applicable to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks; to regulatory decisions of national governments where these are part of or constrained by an intergovernmental regime; and to hybrid public-private or private transnational bodies.”

The focus in the global administrative law project is on the administrative components and functions of international and transnational regulatory regimes. At the same time, however, quite a broad scope is adopted as “much of global governance can be understood and analyzed as administrative action: rule making, administrative adjudication between competing interests, and other forms of regulatory and administrative decisions and management.” The project thus addresses many of the questions posed in the present contribution with a view to a possible emergence of global administrative law. In doing so, many contributions focus on specific regulatory regimes, ranging from the OECD to accounting, the global garment industry, investment treaty arbitration, procurement rules, urban water service delivery, development co-operation, the environment, or the UNHCR. At the same time,

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96 The discussion on global governance does, however, fuel the older debate on a possible world government. See recently for instance B.S. Chimni, “International Institutions Today: An Imperial Global State in the Making”, *EJIL*, 2004, pp. 1-37.


98 Ibid., p. 5.

99 For an extensive overview see the Global Administrative Law Bibliography available at <www.iilj.org/global_adlaw/> as well as the special issues of the *EJIL on Global*
contributions draw a comparison with domestic administrative law systems.\textsuperscript{100} The domestic analogy flows from the fact that the “real addressees of … global regulatory regimes are now increasingly the same as in domestic law: namely, individuals …, and collective entities in regulated spheres including corporations and in some cases NGOs”.\textsuperscript{101} This calls for the recognition of a global administrative space in which international and transnational administrative bodies interact in complex ways. The notion that this global administrative space can be distinguished from both the space of inter-state relations governed by international law and from the domestic regulatory space governed by domestic administrative law is underlined by the findings in the present contribution in relation to multilevel regulation. In fact, one may state that nowadays the term “global law” better represents the characteristics of the international (global) legal order than “international law”.\textsuperscript{102}


\textsuperscript{101} B. Kingsbury, N. Krisch and R.B. Stewart, (see supra n. 97), p. 10.

\textsuperscript{102} Cf. also D. Lewis, (ed.), Global Governance and the Quest of Justice. Volume I: International and Regional Organizations, Oxford: Hart Publishers, 2006. That this could also be seen as a step towards a “world government” was recently argued by B.S. Chimni, (see supra n. 96).
3.3. Fragmentation

The discussions of the “fragmentation of international law” took a high flight at the end of the 20th and the beginning of the 21st century. The International Law Commission considered the issue serious enough to be taken up and its study group dealing with this matter recently issued a report on the matter. A great variety of scholars have meanwhile written on the phenomenon of the fragmentation of international law. The name refers to the increasing

multitude of regulatory regimes and international dispute settlement systems, the jurisdiction of which may be partly overlapping or at least in conflict with other specialized fields of international law and policy. Although the notion of fragmentation is also closely connected to an international regulatory order in which “an ever-increasing number of regulatory institutions with overlapping jurisdictions compete for influence”,105 the scholarly research on this phenomenon is mainly conducted at a horizontal and global level. The fragmentation debate focuses on possible or real inconsistencies and conflicts between the various international regulatory regimes and dispute settlement mechanisms. It does not therefore specifically consider the legal and political consequences of multilevel governance and regulatory activities, as is the case in this book.

This having been said, the fragmentation debate provides us with valuable insights as far as the problem of conflicting norms is concerned. The aforementioned report of the study group on fragmentation of the International Law Commission addresses this problem, which it sees as a normal result of the development of “new rules and legal regimes as responses to new preferences, and sometimes out of conscious effort to deviate from preferences that existed under old regimes”.106 One of the general conclusions of the report is that there is “no homogenous, hierarchical meta-system realistically available to do away with such problems [of coordination at the international level]”.107 Therefore, “increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions”.108 The report notes that further attention needs to be paid to these methods and techniques. The use of conflict clauses may be one technique, but these clauses are often unclear and ambivalent. Furthermore, conflict rules like lex posterior and lex specialis may need further study and may be insufficiently

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107 Ibid., para. 493.

108 Ibid.
The Phenomenon of Multilevel Regulation

sophisticated to address the conflicts that can occur in the present international legal order.\textsuperscript{109}

If the ordinary conflict rules are already inadequate in the present international legal order, this applies \textit{a fortiori} to multilevel regulation: the rules of international treaty law on the relationship between various treaties are not adjusted to the complex interactions between global, macro-regional and domestic legal systems. Rather, one could hold with Fischer-Lescano and Teubner that

“… the unity of global law is no longer structure-based, as in the case of the Nation-State, within institutionally secured normative consistency; but is rather process-based, deriving simply from the modes of connection between legal operations, which transfer binding legality between even highly heterogeneous legal orders.”\textsuperscript{110}

3.4. The Contributions in this Book

The third part of this book focuses on the implications of multilevel regulation for human rights, judicial control and the rule of law. Asking himself 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. In so doing he illustrates the challenges, not just of competing courts and/or the absence of jurisdiction for courts, but also the need for judges to be vigilant in the face of changing and ever more densely layered and unwieldy governmental powers and to reconceive their role in the contemporary legal order. In his contribution on legal protection against UN Security Council resolutions, Clemens A. Feinäugle depicts the problems involved with multiple jurisdictions for human rights review of Security Council sanctions in Europe, pointing at the possible tensions between the jurisprudence of the Luxembourg and Strasbourg European courts, and highlighting the various options open to the United Nations with a view to improving due process and legal protection of affected individuals. Christina Eckes’s contribution, too, brings to the fore the divergent ways in which the different European courts maintain human rights protection for terrorist suspects and the problem of lack of judicial


protection in certain policy areas, in this case the EU’s Common Foreign and Security Policy. Similar concerns arise in Mielle Bulterman’s contribution, albeit from the viewpoint of multilevel economic regulation and the manner in which international economic legal rules impact individual rights under European Community law. Andrea Keessen takes a closer look at the question of how to reduce the judicial deficit in multilevel environmental regulation, taking the example of plant protection products. Andrea Ott’s contribution on multilevel regulations reviewed by multilevel jurisdictions (the European Court of Justice, national courts and the European Court of Human Rights) analyses the manner in which European and national courts are trying to come to grips with the phenomenon of multilevel regulation. She is a convincing advocate for a system of pluralism of jurisdictions, or multilevel jurisdiction, requiring a shift away from a strict hierarchy of norms or legislative systems to the prevention of conflicts and preventing gaps in the legal protection of individuals against infringements of their individual rights: such pluralism may result in parallel legal orders which overlap and interconnect but without clear hierarchies established between them. Finally, Nikos Lavranos makes the point that a system of hierarchy of norms, as practised in European Community law, is not static but flexible and differs depending on the area of the law and the specific circumstances of the case under consideration.

4. An Agenda for Research

4.1. Combining Different Legal Perspectives: Accountability, Democracy, Legitimacy, Rule of Law

An interesting further contribution to the study of multilevel regulation, in line with the global administrative law project outlined above (supra, 3.2.), could be the emphasis on the need to rethink domestically based notions of democracy, legitimacy and the rule of law. After all, “[e]very European system acknowledges the primary function of administrative law as being the control of public power”,111 or “bounded government”.112 Harlow lists a number of principles as forming the basis for administrative law: accountability, transparency and access to information, participation, the right of access to an


independent court, due process rights, including the right to be heard and the right to reasoned decisions and reasonableness. European legal systems have added proportionality and legitimate expectations to this list. This calls for a linking of procedural and substantive norms.\textsuperscript{113}

We submit that a further conceptual refinement and extensive comparative research into these concepts and principles should be high on the research agenda. In this context, it is particularly the subject of accountability that seems to us to be of major importance, since it feeds back into issues of legitimacy and democracy.\textsuperscript{114} Little is known about accountability systems in international organisations and the similarities and differences between international organisations \textit{inter se} and between them and national agencies.\textsuperscript{115} Even less research has been conducted on accountability in other international bodies and forums. Especially crucial issues – such as control over executive decisions, leadership selection mechanisms, control over the formulation of strategic and operational goals of international organizations and control over standard-setting competences – are in need of further investigation and analysis. With regard to the latter, more research should be devoted to the question of what regulatory standards should be focused on by different levels of governance and actors in the policy arena (standards of physical design, standards of performance or organisational decision procedures).

The aforementioned research, albeit legal in nature, can contribute to a more comprehensive analysis of the quality of regulatory work by international organisations and bodies (including the use of regulatory tools designed to achieve better regulation, such as regulatory impact assessments) and an assessment of the concept of (international) rule precision. Colin S. Diver\textsuperscript{116} distinguished three qualities of regulatory rules, namely transparency, accessibility and congruence, and has developed criteria to determine the appropriate degree of regulatory precision. An assessment of international rules from this perspective

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\textsuperscript{115} With regard to the EU see D. Curtin, “Holding (Quasi-)Autonomous EU Administrative Actors to Public Account”, European Law Journal, 2007, pp. 523-541.
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could contribute to a better understanding of the impact of international rules on lower levels of regulation.

4.2. A Public Policy Perspective on Multilevel Regulation

A second set of questions that is assuming increasing importance with regard to multilevel regulation concerns the evaluation of these multilevel regulatory interventions from a public policy perspective.\(^{117}\) In assessing multilevel regulation from a public policy perspective, several theoretical arguments have been developed related to its possible benefits and drawbacks. Many of these arguments need further investigation. For example, some authors argue that dispersion of governance and regulatory practices across multiple jurisdictions is more flexible than the concentration of governance in one jurisdiction. This allows decision makers to adjust to diversity, reflect heterogeneity and stimulate competitive standard-setting dynamics.\(^{118}\) These arguments are closely related to the evolution from government to governance discussed above (supra, 2.2.). Identified drawbacks of multilevel regulation include incomplete information, inter-jurisdictional co-ordination, interest-group capture and corruption due to ineffective systems of checks and balances.\(^{119}\) Most of these arguments about the drawbacks and benefits are, however, more hypotheses than established facts. Hence, more empirical research should focus on whether these claims are valid and, if so, under what conditions. Much of this research can build on existing studies that focus on intra-state dynamics or intra-regional dynamics with regard to regulation. Let us briefly explore each aspect.

4.3. Rule Dynamics, Co-ordination and Co-operation in Multilevel Regulation

First, with regard to the issue of the beneficial consequences of flexibility and competitive dynamics in regulatory standard setting, research can build on existing studies that focus on lowest common denominator outcomes in collaborative standard setting. Some authors, in the context of international environmental policy making, have argued that the fears of lowest common


\(^{119}\) Ibid., especially p. 236.
denominator outcomes ("race to the bottom") are sometimes unwarranted in international collaborative standard setting and that under certain conditions a "race to the top" can occur.\textsuperscript{120} In this context, other authors have pointed to the problem of being stuck at the bottom and the inability and/or reluctance of weak actors to participate in dynamic, co-operative standard setting initiatives.\textsuperscript{121} Most research in this context has been conducted on environmental or pollution control standards.\textsuperscript{122} This line of research can be extended to other areas. The present book clearly illustrates that multilevel regulatory standard setting is expanding into a great variety of policy areas such as, inter alia, pharmaceuticals, banking and aviation. Additional research should focus more on the dynamics of multilevel regulation at the international and national levels. A dynamic research perspective on standard setting should focus on questions related to the emergence of new rules (lowest common denominators), the development of new and existing related rules (convergence versus divergence; upward or downward dynamics) and the impact of these rules (implementation and effectiveness of rules).

Secondly, with regard to possible drawbacks, several issues need further investigation. The issues of imperfect information and inter-jurisdictional co-ordination are best placed in the overall context of co-ordination and co-operation problems in policy making. With regard to co-ordination problems, game theorists, institutional economists and political scientists have devoted much attention to the issue (and sometimes dilemma of) co-ordination.\textsuperscript{123} Multilevel regulation further extends and complicates this issue. As Hooghe and Marks observe, the co-ordination and transaction costs increase exponentially as the

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The number of relevant jurisdictions increases. Several strategies can be followed to deal with the problem of co-ordination. The most prominent one is to limit the number of autonomous actors who have to be co-ordinated. Reducing the number of actors can be done via pooling actors in core groups or by excluding actors from negotiations on rules. The first is increasingly happening and research should focus on the issue of international core group formation, comparing different multilevel policy arenas in this respect.

The latter strategy – excluding actors – can generate problems of co-operation. In his classic work *Exit, Voice and Loyalty. Responses to Decline in Firms, Organisations and States*, Hirschman introduced two types of responses or strategies related to problems arising in collaborative settings, namely exit or voice. Exit occurs when an actor’s response to problems with other actors is to withdraw. Voice occurs when an actor’s response to problems with other actors is to work with the other actors until the problem is corrected. An interesting question about multilevel regulation is which strategy is used by actors in different multilevel policy arenas. Secondly, research can focus on explaining differences in the use of these strategies. Especially interesting in this context is linking the use of strategies to the design of multilevel governance institutions with regard to the design of co-ordination procedures. For example, in the context of international automobile firms, Helper found that firms used different strategies (exit/voice) towards suppliers (other actors). This was partially explained by the degree of administrative co-ordination that existed between parties. Administrative co-ordination, in essence, referred to the nature and amount of information that flowed between actors. As a result, depending on the design of co-ordination infrastructure (supra) multilevel regulation might nurture exit or voice strategies. In other words, the interrelated issues of

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125 Ibid., especially p. 239

126 A clear example of the core group formation issue concerns the involvement of the EU as one actor in WTO trade negotiations. The issue of core group formation is gaining ground in the EU itself, too. On this see S. Keukeleire, “EU Core Groups. Specialisation and Division of Labour in EU Foreign Policy”, *CEPS Working Document*, No. 252, 2006.

co-ordination and co-operation deserve special research attention in the context of multilevel governance.

4.4. Accountability, Democracy and Social Justice in Multilevel Regulation

Another set of issues, related to possible drawbacks of multilevel regulation, draws attention to issues related to accountability; and ultimately democracy and the ability of States to govern according to autonomously chosen, fundamental principles of governance (e.g. on issues of social justice and culture).

With regard to accountability, a crucial issue for research concerns the question of who is held responsible for actions and by whom. In a recent review article Bovens defined accountability as “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.” This definition builds on a principal-agent approach to accountability and highlights this important challenge to research on multilevel governance. In a simple principal-agent model an agent reports directly to the principal who delegated to the agent the freedom to act on his/her behalf. However, as Benz, Harlow and Papadopoulos stress, systems of multilevel governance do not easily fit into this conceptual framework. “By complicating and obscuring straightforward ‘chains of delegation’ … they make it hard to identify a principal.” The latter, the identification of principals in multilevel systems, constitutes a major research topic for scholars studying international organisations. Comparative research designs might highlight striking differences between and within international organisations across policy domains/arenas.

The issue of accountability feeds into the issue of democracy and democratic control of multilevel governance. The issue of democracy poses another challenge: research needs to be conducted into the underlying models of democracy that underpin multilevel governance. It is important that this type of research focuses not only on a comparison of multilevel regulation arrangements vis-à-vis normative ideal types of democracy, but also takes into account the day-to-day

reality of democracy. As Moravcsik argues, with regard to the democratic deficit debate in the European Union, purely philosophical assessments can be interesting but run the danger of narrowing down conceptions of democracy:

“Comparisons are drawn between the EU and an ancient, Westminster-style or frankly utopian form of deliberative democracy. While perhaps useful for philosophical purposes, the use of idealistic standards no modern government can meet obscures the social context of contemporary European policy-making – the real-world practices of existing governments and the multilevel political system in which they act. This leads many analysts to overlook the extent to which delegation and insulation are widespread trends in modern democracies, which must be acknowledged on their own terms. The fact that governments delegate to bodies such as constitutional courts, central banks, regulatory agencies, criminal prosecutors, and insulated executive negotiators is a fact of life, one with a great deal of normative and pragmatic justification.”

Besides models of democracy underpinning multilevel governance, a related set of questions points to the issue of what models of social justice and cultural diversity are incorporated in international rules. In the context of social justice models it is important to assess whether international rulemaking follows standard economic optimisation rules or includes more egalitarian perspectives. The analysis of social justice models embedded in policy making and governance structures at the level of the nation State has a very long tradition.

In the context of the EU, too, some attention has been paid to this topic in the context of the debate on the European social model. Issues of convergence or divergence between governance structures promoting market efficiencies vis-à-vis governance structures promoting social protection and equality have been analysed. However, less research is being conducted on what models of justice are incorporated, implicitly and explicitly, in international rule making and what the effect is on national models of justice. This requires an assessment of the redistribuitional equity principal in international policy making (who pays, who gains and what compensating measures are in place). For example,


international rules on pharmaceuticals might stipulate the degrees of freedom for national healthcare policies with regard to medication and in this way feed back into policies closely related to social protection and redistributive sensitivities. Finally, in a globalising context, a cultural assessment – i.e. the conformity of rules to general morality within different countries – becomes increasingly important. The late Clifford Geertz\textsuperscript{135} highlighted the importance of the cultural context in which rules are made and implemented. As a result, problems arising from a mismatch between international rules and cultural norms need further investigation.

5. Concluding Observations

The phenomenon of multilevel regulatory processes and, more particularly, the various interactions between global, EU and national levels of policy and rule making are gradually becoming recognised in both the legal and political scientific communities. However, knowledge remains scattered, fragmentary and in many cases punctual or even anecdotal. There is clearly a need for a more comprehensive, thorough analysis of multilevel regulation and its ramifications. In the present contribution we have both tried to identify and sketch the phenomenon with a variety of illustrations, go through the responses of legal scholarship thus far, and set out an agenda for further research, including both legal and non-legal approaches. One thing seems certain: we are confronted with an arena with plentiful, rich themes for interdisciplinary research for many years to come. Faced with multilevel regulation, the old categories and dividing lines between international, European and national legal orders no longer work satisfactorily. The shifts may not yet be clear, nor may they come to full fruition, but a number of criteria on how to adapt, such as transparency, democratic control of regulatory power, legitimacy, rule of law and judicial protection of fundamental human rights, become apparent in the contributions to this book.