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organises a two-day expert seminar on

Multilevel Regulation

The Interrelation between Regulatory Activities of the European Union and other International Organizations and its Effect on the State – Legal, Political and Philosophical Dimensions of Legitimacy, Accountability and the Rule of Law

The Hague, 26-27 June 2006

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Call for papers
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The question addressed in this project is to what extent European Union Member States are confronted with what has been coined 'international legislation' or 'international regulation' by international organizations either through their EU membership or directly. The working hypothesis is that the international (legal) order is increasingly to be seen in multilevel terms, with the European Union as a crucial link between national legal orders and the international legal order. As decisions taken by the European Union are becoming increasingly dependent on rules enacted by international organizations on a global level, regular systems dealing with legitimacy, accountability and the protection of human rights may need to be adjusted.

‘Legislative power’ (or in a more executive fashion ‘regulatory power’) has been said to have three characteristics: (1) a written articulation of rules that (2) have legally binding effect as such and (3) have been promulgated by a process to which express authority has been delegated *a priori* to make binding rules without affirmative *a posteriori* assent to those rules by those bound. But, a perhaps even more distinguishing element would be that such rules imply future application to an indeterminate number of cases and situations and state as well as non-state actors (including citizens). In that sense, both decision-making and adjudication may be viewed in terms of ‘international legislation and regulation’.

It is undisputed that international organizations may take binding decisions vis-à-vis their Member States. Thus, apart from the European Union, organizations with a legal competence to take binding decisions include the Council of Europe, United Nations, the World Health Assembly of the WHO, the Council of the ICAO, the OAS, the WEU, NATO, OECD, UPU, WMO and IMF. A different situation occurs when these decision not only bind the states, but have a direct effect on subjects within those states. A prominent example of novel legislative power can be found in the replacement of traditional sanctions of the UN Security Council that were directed at the state as a whole (e.g. Iraq) by ‘smart sanctions’ directed at certain individuals or civil groups (Taliban/Afghanistan in particular) seems to fit into this development. The latter became popular in particular in reaction to the terrorist attacks of September 11, 2001 in the United States. Thus the Security Council placed more emphasis on its ability to take decisions with a large impact on intra-state issues rather than being involved merely in relations between states. In that sense it could be argued that the Security Council no longer deals with a particular situation between states or within a state, but with a more abstract situation not involving a particular dispute. Another example of an abstract danger could be Res. 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 although no ICC investigation was imminent, the Council in effect held the abstract possibility of such an investigation to be a threat to the peace. A particular clear example is Res. 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 the peace, and it again laid down a general and abstract obligation for all states to refrain from assisting non-state actors in acquiring weapons of mass destruction, to criminalize behaviour of non-state actors aimed at acquiring such weapons, etc.

In some cases the Member States are directly affected by these international decisions, but with the increasing number of competences of the European Union not many exclusive national competences remain. The European Union has turned out to form a link between what is being regulated at the global level and what is needed or possible at the national level. This complex situation follows from the fact that problems of multilevel governance are not only releted to the national (and perhaps subnational) level and the European level, but increasingly involve the global level. More in particular, available instruments for legal protection may fall short in protecting the citizen when the strict dividing lines between international, European and national law becomes blurred. Although it may be said to form part of a new development in international law – in which the notion that states mainly consist of citizens is increasingly recognized – the increasing power of the UN, the European Court of Human Rights and other international institutions in intra-state situations poses new questions as the system starts to reveal some serious shortcomings when fundamental human rights run the risk of being violated.

Indeed, by now there are enough indications that the legislative and regulatory functions of the UN do not stand by themselves and that there may even be a complex relationship between the European Union and these organizations when their accountability vis-à-vis affected citizens is concerned. The recent (September 2005) Yusuf and Kadi judgments of the European Court of First Instance reveal serious accountability deficits whenever international organizations can hide behind each others decisions and when states have no choice but to live up to their international obligations even when this is at the cost of individual legal protection.

The World Trade Organization (WTO) is another organization of which the decisions have been labeled as international legislation, or at least international regulation. While one may argue whether the decisions taken by the WTO’s Dispute Settlement Body (DSB) are to been seen as prove of the organizations ‘legislative’ or ‘adjudicative’ powers, the fact remains that their a binding effect reaches beyond the states which had the dispute in the first place and that they may even have serious consequences for individuals (including in particular enterprises). Similar situations as in the CFI’s

Yusuf and Kadi cases may therefore occur. Apart from the fact that the WTO lacks the possibilities for individual access to a judicial procedure such as the ones we are familiar with in the EU, it may nevertheless find itself bound by Security Council resolutions, which may have a conclusive impact on the outcome of a WTO dispute procedure. 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.

While political science and public administration have extensively focussed on 'multilevel governance' over the past decade, their main field of study was the relation between the European Union and its Member States. With a view to the developments described above there seems to be a neeed to broaden the scope and to take into account the global level of decision-making more prominently. In legal studies the phenomena connected to 'multilevel governance' have only recently been recognized. 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 in the creation, interpretation, and application of national as well as international norms the multilevel structure of the system should be taken into account. With the development of the international legal order we have grown accustomed to legal norms being developed outside the national legal orders. What seems to be a novel development, however, is the extent to which international institutions engage in legislative and regulatory activities, which increasingly not only affect the EU Member States, but also their citizens.

So far, legal, political and philosophical solutions have not been able to tackle these problems or have – at best – offered partial solutions. It seems that a combination of disciplinary insights is needed to be able to enhance the legitimacy of international regulation and to cope with the multilevel nature of what has traditional been viewed as separate national, European and international legal spheres.