

## ■ BOOK REVIEW

*Thomas Jaeger*

**Andreas Follesdal, Ramses A. Wessel, Jan Wouters (eds.),  
Multilevel Regulation and the EU –  
The Interplay between Global, European and National  
Normative Processes, Martinus Nijhoff Publishers,  
2008, ISBN 978-90-04-16438-3, XXI + 420 pp.**

The title of the book discussed here is programmatic: It seeks to grasp and discuss the phenomenon of multilevel regulation in relation to the EU ('...and the EU'). The book by Follesdal/Wessel/Wouters thus embarks on a comprehensive and multi-faceted undertaking as compared to a simple recount and description of instances of EU-multilevel regulation (which could possibly be indicated by a title ending with '...in the EU'). Follesdal/Wessel/Wouters, therefore, take an ambitious approach to a complicated topic, which, in turn, may be the only approach to master that subject. Legal studies have only recently begun to recognize the phenomena connected to multilevel regulation and this book is apparently the first to provide a comprehensive analysis in relation to the EU.

The term 'multilevel regulation' refers to interacting and partly overlapping policy spheres and regulatory processes. 'Multilevel' indicates that a variety of forms of decision making, authority, policy making, regulation, organization, ruling, steering and so on, are involved in a given regulatory process or push for regulation. The actors involved come from different levels of formal jurisdictional or administrative authority and have different backgrounds, yet start to interact complexly in relation to specific issues. 'Multilevel regulation', in other words, combines a broad range of international fora, diverse decision-making processes and instruments ranging from hard law to soft law and, accordingly, diffuse impacts of multilevel regulatory activities upon citizens and businesses. For many of them, especially in horizontal cooperative settings, consensus rather than coercion is a typical characteristic. In this understanding, (state) government, as one of the authors of the book puts it, is but a special case of governance.

Against this background, the book by Follesdal/Wessel/Wouters deals with two dimensions of multilevel regulation in the international legal order. One dimension is the multitude and legitimacy of actors involved, i.e. the sources of multilevel governance which are largely non-governmental; the other dimension is the complex functioning and legal impact of multilevel regulation. This book, which consists of sixteen individual contributions on the topic, by seventeen scholars from Europe and the US, is essentially divided into three parts: the first embarks on a general exploration, i.e. explains (although technically this section does not belong to part one but forms a sort of second prologue) the terminology and background of the topic of multilevel regulation and sets out the development of a general research agenda for approaching the phenomenon of multilevel regulation; the second part offers a number of case studies (pharmaceuticals

standardization, financial trade associations, banking regulation, internet governance, regulation on terrorism, transatlantic aviation) for 'mapping the unmappable', as the editors put it; a particularly interesting third part combines some very different perspectives on judicial control in a multilevel regulatory setting (individual case studies; legal protection against UN sanctions in general and in the case of terrorism allegations in particular; EU fundamental rights protection; judicial protection in multilevel environmental regulation; a comparative view on the approaches of the ECJ, national courts and the ECHR to multilevel regulation cases; the problem of a possible hierarchy of multilevel regulation norms in the EU system), with a view to exploring the implications of multilevel regulation for human rights, judicial control and the rule of law. Finally, an extensive epilogue wraps up the main findings of the book against the background of the ever-salient legitimacy issue in international multilevel decision-making and offers proposals for a clearer allocation and use of competences and more sophisticated human rights constraints in EU multilevel regulation.

From among the many issues dealt with in the book, only some of the findings and propositions of the epilogue and resume shall briefly be discussed here. Interestingly, this resume, on the basis of all of the book's discussions on multilevel governance, starts by heretically re-questioning the presumption often seen as quasi-axiomatic: that legitimate modes of governance must be subject to democratic control and human rights constraints. If multilevel regulation, as one form of governance, was subject to a different standard for assessing legitimacy, this presumption would probably have to be re-considered or at least fine tuned. However, what should that different standard be and how would it be justified? Can trustworthiness be enough of a legitimacy standard for a given mode of regulation simply because more stringent factors for legitimacy-assessment cannot effectively be applied? The resume takes a middle ground in this discussion by arguing that institutions should strive to enhance normative legitimacy and may do so in at least seven ways, which include both democratic and non-democratic means in the classical sense.

The starting point for this consideration is a view on the long-standing discussion on the democracy deficit of the EU. Although writings on this issue are abundant, authors essentially disagree on the diagnosis of an alleged democracy deficit, the factors by which to measure it, and, of course, on how to solve it, with the latter being a result already of the differences in factors used. This suggests that the most important task in approaching and remedying the phenomenon of legitimacy, also in international regulation, is to find workable factors to apply to the concept beforehand. Here unfortunately, in spite of the ample examinations undertaken throughout the book, the resume fails to add anything new to the general legitimacy discussions or to come up with a convincing selection of factors to be applied to measure the legitimacy of multilevel regulation. Instead, a normative concept of legitimacy is chosen without substantiation and the subsequent analysis and problem-solving proposals built upon that selection. Even though those proposals are, as discussed below, essentially convincing, the lack of explanation of the normative approach towards which those proposals are catered represents a major conceptual deficit.

Those proposals start from a definition of normative legitimacy in the multilevel regulatory context which combines three factors: compliance of decisions with

justifiable norms, assurance of compliance and public confirmation of these two factors. As the resume correctly points out, applying these factors in an international setting (where, in particular, norms are typically not directly justified by popular will) suggests that even non-democratic multilevel regulatory arrangements may be legitimate. However, multilevel forms of governance have to find other ways to assure popular trustworthiness. The resume defines seven such components of assurance: 1) A facilitation of public political discourse by fostering a continued discussion about the decisions of a given authority; 2) simplicity and transparency of institutions; 3) sufficient effectiveness and efficiency of institutions as measured by their ability to perform better than alternative arrangements; 4) socialization of participants to secure overarching loyalty; 5) sufficient effectiveness and efficiency of decisions as measured by the general ratio of compliance; 6) monitoring of compliance; and finally, 7) the presence of sanctions against violations of trust. The first three of these activities are seen as substituting the normative legitimacy of decision-makers for the international and multilevel context, the latter four as building individual trust in the need for and likelihood of compliance with those norms by oneself and the general public. The resume suggests that where institutions in an international multilevel regulatory context strive to fulfil these seven factors, they and their decisions will be accepted as legitimate by their peers and the general public.

The definition of these legitimacy-enhancing factors, on the basis of the broad conceptual approach by Follesdal/Wessel/Wouters and the numerous case-studies for multilevel regulation, is certainly a major contribution to the discussions of modern problems of international governance and regulation. The factors defined and the recommendations to implement them in order to overcome actual or perceived legitimacy-deficits for international state and non-state players are simple and workable. It is also a pragmatic approach to the legitimacy problem, which does not seek to address formal aspects of legitimacy (such as legitimization by popular vote etc.), but substantive legitimacy aspects, i.e. popular perception of a given institution as being legitimate or not. In popular discourse over issues like economic, political and cultural globalization, EU integration and the like, the substantive approach is probably also the more promising one. As experience with that discourse shows, e.g. in the context of the recent referenda on the European Constitution and the successive Lisbon Treaty, and as is also underscored by the findings of this book, formal questions like an institution's composition, legal bases or decision-making processes tend to have a lesser impact on the way that popular discourse takes than the perception of a given institution or process as generally trustworthy or not. Albeit lawyers and state theorists may find this approach conceptually dissatisfactory and maybe even flawed from a Kelsenian 'Grundnorm'-point of view, the proposals made here may be practically far more effective to enhance legitimacy than volumes of legal theory on the matter. In turn, the popular appeal of these solutions may also be a curse, where the pragmatic approach and the lack of solid legal or political theory concepts at the base of the proposals raise some suspicion that the illegitimate could be legitimized, i.e. that profoundly non-democratic decision-making processes, e.g. such that are strongly influenced by representatives of non-democratic regimes or private lobbyists, may have recourse to these seven legitimacy-enhancing factors to strengthen their legitimacy, public appearance and profile. However,

from a more optimistic point of view, applying particularly the first three of the seven recommendations may also have the effect of nudging even such manifestly illegitimate actors towards more legitimacy, as applying them would entail more discourse over their role, more transparency and, perhaps, eventually have a greater involvement of the citizenry.

Yet for the EU as the focus of the book's analysis of multilevel regulation, where scores of formalistic solutions to address the legitimacy-problem have been applied in the past and have always failed in connecting the institutions to citizens (cumulated in the rejection of the Lisbon Treaty, which would have brought the broadest range of direct democratic mechanisms ever), the substantial, perceptive approach may be the right thing to try in order to fill in the existing void. In particular, it is suggested for the EU to counter popular mistrust in its regulation by a clearer allocation and use of competences along the lines of the subsidiarity principle. The subsidiarity principle essentially functions as an obligation to state reasons for individual decisions by the EU regulator, thus enabling control of the act by those affected (citizens and member states). Popular discourse over the respect of the subsidiarity principle in EU decisions involves member states and citizens in the decision-making process, thus enhances transparency and eventually creates overarching loyalty of the citizenry with the EU regulator. In that sense, the resume suggests that the subsidiarity principle reflects similar normative ideals as democratic rule and thereby strengthens the legitimacy of a given, subsidiarity-checked decision. Apart from the subsidiarity principle, increased visibility of human rights constraints in EU regulation is recommended for the EU as a means to bolster legal accountability and, therefore, assurance of popular trustworthiness.

All in all, the book by Follesdal/Wessel/Wouters provides a profound, detailed and well-balanced broad-scale analysis of instances of multilevel regulation relevant to the EU and, on that basis, some lucent thoughts and recommendations for dealing with multilevel regulation in the EU's downstream political relations with member states and, most importantly, citizens. Those recommendations are, in spite of the aforementioned conceptual flaw in justifying the normative approach taken for the book, generally convincing and would merit broader discussion in the academic arena and certainly seem fit for a tryout in the international political sphere. After all, the book by Follesdal/Wessel/Wouters provides profuse valuable reflections and rich food for thought to scholars and institutional players active in the international regulatory field well beyond the EU. This concerns, in particular, the research agenda for multilevel regulation sketched out in the book, which identifies and structures pressing research questions well beyond what the book undertakes to cover. Although drawn up by legal researchers, the book by Follesdal/Wessel/Wouters will be useful and readable for audiences with other backgrounds, such as political science, philosophy, contemporary history, sociology or the like. Apart from a concise introduction to the problem of multilevel regulation and a synoptical outline of the book, readers will particularly come to value the detailed index, all of which allow a quick identification of sections of individual interest and for a good start into the subject.

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