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Lawmaking in Multi-level Settings

Legislative Challenges in Federal Systems and the European Union

Nomos

Chapter 2: How Upper Levels Strive to Influence Law-Making at the Lower Levels and Why Lower Levels Can't Have Cake and Eat It

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I. Introduction

In this chapter, I ask whether there are commonalities of how various upper levels attempt and often succeed in ensuring legislative implementation at the lower levels and what this means for the complex situation in which domestic legislators find themselves in today's multi-level settings. I claim that it is possible to discern four groups of approaches that upper levels employ to assert legislative implementation. My starting point is the inevitable challenge of every legal system to allocate competences and responsibilities and to employ at least some mechanisms by which the upper level can secure the actual observance of its legal sources – ideally while accommodating the competing interests of autonomy of legislative actors situated at a lower level. I am exclusively concerned with obligations that require lower level legislators to engage, i.e. legislative obligations rather than obligations to execute. Why this choice? Legislative obligations are particularly salient for the purpose of this book as they raise thorny questions in relation to the autonomy of those making laws at the lower level. As soon as we have multiple normative levels, the need to secure the effectiveness of upper level legal sources at the lower level raises the question of how and under what circumstances upper levels can take steps to achieve such effectiveness. As a corollary, questions of the separation of power at each level and between levels emerge. Moreover, legislative obligations are also particularly interesting because they are a consequence of political communities entrusting upper levels with additional tasks. In a domestic jurisdiction, for instance, legislative obligations arise notably when we demand that the state is taking some sort of positive action to protect natural or legal persons and other interests (such as the environment) against risks or abuses. Similarly, states have created additional international or region-

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al legal sources because they concluded that certain goals can best be pursued by regulating at the upper level. This increased normative density at upper levels naturally increases the relevance and political and legal salience of the question of how, and at what price, upper level legal sources can be rendered effective at the lower levels.

In terms of methodology, I look at the tools available to each upper level vis-à-vis lower level. When referring to upper levels, this chapter takes the perspectives of public international law, EU law and federal law in federal domestic legal systems as three relevant variants of upper levels. I thus look at the tools available for the federation vis-à-vis the lower level of the sub-units; the EU vis-à-vis Member States and public international law vis-à-vis states.

Legislative studies have so far usually analysed upper level perspectives within a single set of relations between two levels, e.g. the implementation of public international law at the national level, EU law in Member States or federal law in a federal system. Moreover, when international lawyers have been concerned with implementation in national legal systems, they have disproportionately focused on domestic courts to the neglect of domestic legislators.[1] The traditional approach to look at upper level perspectives in isolation is not entirely unjustified. Indeed, to a large extent it makes sense to look at the various sets of interactions in isolation, let alone because of the complexity of each of them and the inherent difficulties of comparative attempts. Yet, by considering various upper levels in the same chapter, we gain a better understanding of the idea that many of the dilemmas in ambitious multi-level settings are shared and sometimes unavoidable. Such a macroscopic view shows that we cannot have the cake and eat it. When normative ambitions increase at the upper levels, the strive for effectiveness and the associated use of upper level mechanisms almost axiomatically increase as well and potentially limit legislative autonomy at the lower levels. Against this background, the present chapter does not intend to outline a deterministic meta-theory that would necessarily fit all multi-level interactions between any upper level and any legislator situated at a lower level. Nonetheless, I claim that it is still possible to identify some commonalities and that these commonalities reveal something about the inherent challenges of law-making in a multilevel setting.

The chapter is structured as follows. In a first step, I explain the selection of three variants of normative levels that can play the role of upper

1 E Schmid and T Altwicker, 'International Law and (Swiss) Domestic Law-Making Processes' (2015) SRIEL 501.

levels: 1) federal law in a federal country, 2) EU law and 3) public international law and I sketch the argument that all three of these upper levels – through a variety of conceptual manifestations – strive to ensure the effectivity of their legal sources at the lower level (section II). If they would not do so, we would consider them dysfunctional. Based on this premise, I then present, in section III, four groups of mechanisms and instruments that these upper levels employ in order to increase the chances that lower level legislators comply. For each group of approaches, I identify the most common concerns from the perspective of the lower level. The chapter concludes with some reflections on this state of affairs and its relationship with the current backlash against international and regional law.

Complexity, terminology and limitations

A few remarks on terminology are required. Readers of this chapter will have to bear with terminological simplifications in this paper. A few points must be made. First, as Felix Uhlmann and Patricia Popelier point out in their contribution, the term 'upper level' does not necessarily denote a hierarchically superior level but refers to the entity with the community of the larger size.[2]

Second, one and the same normative level can simultaneously be upper and lower depending on the legal question or the perspective one takes. For instance, federal law in a federation can be situated at the upper level vis-à-vis sub-national legislators but at the lower level vis-à-vis European or international law.

Third, the term 'level' comes with the inaccurate connotation that there are neatly separated 'zones' of norm creation and subsequent legislative engagement. In reality, the norms of one level can originate conjunctively at upper and lower levels with the participation of actors from both.[3] Moreover, as far as international law is concerned, domestic legal systems can decide to treat international legal sources as 'the land of the law', and therefore as a part of lower level law, as soon as they acquire domestic legal validity (monism), or they can conceive them as two separate legal spheres

2 F Uhlmann and P Popelier, 'Multi-Level Law-Making: Form, Arrangement and Design in Theory and Practice' in P Popelier and others (eds), *Law-Making in Multilevel Settings* (Hart 2019) 25, 28.

3 Uhlmann and Popelier (n 2),37.

(dualism), each time with many possible nuances between these two basic options.

Fourth, the chapter maintains distinct vocabulary for multilevel governance and federalism. I use the term federalism to apply exclusively to a polity that encompasses several territorial jurisdictions within a single nation state whereas I use the term multilevel governance independently of whether or not the territorial lower levels operate within a single state.

Fifth, it is beyond the scope of this chapter to debate to what extent EU law as a sui generis legal order constitutes international law. Those who argue that EU law is essentially part of public international law (rather than some sort of entirely self-contained regime) shall be reassured that I do not wish to take issue with their point of view. Nevertheless, it is justified to consider EU law as a separate level in the analysis of this chapter, be it because it is regional law and thus 'in-between' international law and national law, or because EU law is particularly relevant if we want to assess whether there are commonalities in upper level approaches.

II. The three upper levels and their strive for effectiveness

This section sketches the following three selected variants of upper level perspectives, namely A) federal level in a federal country, B) EU law and C) public international law. For each of them, the major manifestations of how they seek effective legislative implementation at the lower level(s) is briefly outlined.

1. The federal level in federations

The first upper level considered in this contribution is federal law in a federal (or devolved) country. In any federal legal system, some issues are governed by upper level law that the sub-units (Länder, states, cantons etc.) are expected to comply with. Of course, the extent to which matters are governed at the level of federal law is very variable across systems. The default competence can be situated either at the lower level (as, for instance, in the US, Germany or Switzerland) or at the upper level (as with devolution in the UK or in India for residual subjects).

That said, generalisations across federal systems are almost taboo. There is a wide variety of the upper levels within federal states, each with different histories, forms, mechanism, procedures, legal cultures and constituencies. Moreover, there is variation across domains and political salience of one and the same pattern of interaction even within a single jurisdiction.[4] Yet, it seems permissible to conclude that some sort of pre-eminence of federal constitutional and other federal law is shared across federal systems. Even if the concrete arrangements and practices vary considerably, and existing research has largely focused on a U.S.- and Western-centric perspective in examining supremacy as exercised by domestic constitutional courts in federal systems,[5] it is safe to observe that federal upper levels rely on pre-eminence to ensure the effectiveness of upper level legal sources. Such pre-eminence is sometimes combined with commitments to subsidiarity.

2. European Union law

The second upper level to be considered is EU law. As is well known, EU law depends to a significant extent on lower level (national) law-making, especially when it comes to the implementation of EU Directives. Directives are the primary instrument when an ambition is placed upon the 'EU upper level' in scenarios in which there is widespread agreement that a one-size fits all solution is not desirable or not acceptable to Member States. At least as conceptually conceived, directives thus leave discretion to Member States as to *how* a certain objective is best reached but leave no discretion as to *whether* to legislate and very little when it comes to the question of *when* to legislate given that directives contain a timeframe within which states must have implemented it.

As in federal states, a combination of supremacy and subsidiarity are the bedrock concepts of how EU law interacts with the lower levels, i.e. the Member States. As is well-known since *Van Gen den Loos*, EU law – or at least how it has been interpreted by the Court of Justice of the European Union (ECJ) – must be treated as superior to any national legal sources.[6] At the same time, in the spheres of non-exclusive powers, the Treaty on

4 For an overview, T Hueglin and A Fenna, *Comparative Federalism* (2nd edn, Toronto University Press 2015).

5 M Mate, 'Judicial Supremacy in Comparative Constitutional Law' (2017) 92 Tul L Rev, 395.

6 Including national constitutions. Case C-11/70 *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970], ECR 1125. Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (1963) ECR 1.

European Union (TEU) explicitly requires subsidiarity as a general constitutional principle of the EU. The 'Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States'.[7]

3. *Public international law*

Contemporary international law regularly requires domestic legislators to change existing or adopt new domestic legislation. International human rights law, in particular, contains ambitious obligations that require the engagement of domestic legislators, such as legislative measures to eradicate discrimination or measures to allocate competences and resources to fully realise rights. This situation implies that domestic legislators have a decisive influence – and clear obligations – shaping the extent to which international legal ambitions translate into tangible outcomes.

Yet, one of the thorny problems that international law continues to face is precisely its limited ability to influence the behaviour of domestic legislators and the 'relative impermeability of national systems to international legal imperatives'.[8] If 'the future of international law is domestic', as Slaughter and Burke-White claim, legislative implementation at the domestic level becomes even more decisive.[9]

International law places obligations upon domestic legislations in essentially two ways. I distinguish international legislative obligations that arise directly at the international level from other legislative obligations that arise in the interaction with the domestic constitutional framework. The former are obligations for which international law itself says that the domestic legislator must take action (sometimes it does so explicitly, sometimes implicitly). The latter are obligations that might or might not require domestic legislative engagement depending on the domestic division of competences.[10]

7 Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 5.
8 A Cassese, 'Towards a Moderate Monism: Could International Rules Eventually Acquire the Force to Invalidate Inconsistent National Laws?' in A Cassese (ed), *Realizing Uotpia: The Future of International Law* (OUP 2012) 187, 188.
9 A-M Slaughter and W Burke-White, 'The Future of International Law Is Domestic (or, The European Way of Law)' (2006) 47 HarvInt'l LJ 327.
10 For a more detailed explanation of this classification and examples, see E Schmid, 'The Identification and Role of International Legislative Duties in a Contested Area: Must Switzerland Legislate in Relation to «Business and Human Rights»?' (2015) SRIEL 563.
11 ILC Articles on State Responsibility, Annex to GA Res. 56/83, 12 December 2001, art 12 in conjunction with arts 1 and 2 [subsequently cited as ARSIWA].
12 ARSIWA, art 2.
13 ARSIWA, art 4; J Crawford, *State Responsibility: the General Part* (Cambridge University Press 2013) 120.
14 Uhlmann and Popelier (n 2), 38.

The central manifestation of how public international law operates in relation to lower level law-makers is state responsibility. International law leaves it to each domestic legal system to decide how precisely international legal sources are treated within the national system. What counts is the state's compliance with international obligation. Failure to conform with what is required by an international obligation by a state results – in the absence of circumstances precluding wrongfulness – in the responsibility of the state for internationally wrongful acts.[11] It does not matter whether the breach is caused by an act or an omission.[12] The conduct of a domestic legislator – whether national or sub-national – is squarely attributable to the state.[13]

4. *What all three upper levels share: A common appetite for effectiveness*

As an intermediary finding of this short outline of the three selected upper levels, it is warranted to note that the three upper levels share a common strive for effectiveness. All three upper levels depend to some extent on lower level legislators and all three of them therefore need to ensure that the lower levels comply with upper level legal sources.[14]

There is, however, a qualification to be made. The assumption that upper levels seek to achieve the effectiveness of their legal sources does not always need to hold true. Consider a new upper legal source that resulted from a hard-fought compromise. At least some of the actors at the upper level may not fully back the new legal norms and might be rather indifferent or even spoil the implementation of the new legal source at the lower level. Similarly, a federation may decide to ratify an international treaty that requires legislative implementation at the sub-national level. If a treaty was ratified with 'mixed feelings', it is well possible that federal actors will not push for implementation at the lower level in their state but rather adopt a 'wait-and-see-approach', notably if there is no international institution that can make a binding legal finding of non-compliance. Hence, the

assumption that upper levels unequivocally strive for legislative implementation at the lower level is a friendly oversimplification. Despite this qualification, if all goes well, an upper level normally does and should strive for the effectiveness of its legal sources at the lower level(s). In the next section, we thus consider the types of instruments and mechanisms upper levels can employ and how these tools lead to at least some concerns from the lower levels.

III. What upper levels can do to secure effectiveness and the common concerns at the lower levels

Upper levels dispose of various mechanisms to incentivise, push or otherwise influence law-making at 'their' respective lower levels. I propose to classify these mechanisms into four groups: (1) substitute performance by the upper level, (2) court enforcement, (3) financial liability and (4) a fourth group containing a range of oversight and cooperation measures. The following sections sketch each of these groups of mechanisms. I then examine to what extent a group of mechanisms exists in all three upper levels and I then present each time the main concerns that are raised when an upper level resorts to one of the mentioned mechanisms.

Before I begin, I must explain why I do not consider supremacy/pre-eminence as a mechanism. Supremacy (or the absence thereof) is an intervening factor that plays out in relation to almost any of the mechanisms discussed below. In addition, even where pre-eminence exists, pre-eminence alone will not be sufficient to secure the effectiveness of lower level legal sources without concrete mechanisms. Hence, supremacy is not a mechanism but a transversal factor that influences interactions in multi-level settings.

1. Vertical[15] substitute performance

In some cases, upper levels can resort to substitute performance and legislate *in lieu* of the lower level legislator. Some federations foresee or at least do not exclude the possibility of vertical substitute performance by the federal level for failures of the sub-units to implement federal law.[16] In a number of federations, the federal level as the 'mid-level' between sub-units and international law installs a substitute mechanism for the implementation of international or EU law by the sub-national legislators. In Austria, for instance, art 16(4) of the federal constitution allows the federation to legislate on behalf of the Länder. Failure to comply 'promptly' with the obligation to implement international treaties results in the passage of the competence for such measures, 'especially the enactment of the necessary laws', to the Federation.[17] In Belgium, the Constitution foresees that the federal state can (or could) exceptionally take over and carry out obligations of a sub-national unity that fails to carry out Belgium's international obligations within the federated entity's sphere of competence.[18] But a high threshold must be met and the process has apparently not yet been used.[19] It does not require much imagination to note that this is an exceptional mechanism that is unfriendly towards lower level federal interests. In the Indian Constitution, the federal parliament even has the power to legislate for any part of India in order to 'implement any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body'.[20] Note that the provision is not limited to treaties in the sense of the Vienna Conventions on the Law of Treaties (between states or with international organisations) but includes international decisions as well. The Indian constitutional provision has the advantage to provide a powerful safeguard for the federal level for the legislative implementation of upper (international) level norms at all levels of the Indian domestic legal system. The provision, however, comes with obvious disadvantages from the point of view of the autonomy of the subnational level. Given the contemporary density of in-

15 As mentioned in the introduction, horizontal mechanisms are not discussed here. Suffice it to say that substitute performance at the same level is perceived as less problematic and is an option in many systems (e.g. legislative competence temporarily passing to the executive level if the sub-national legislator fails to comply with an upper level obligation).

16 But at least in Switzerland, the eventuality of such a substitute performance by the federal level substituting cantonal legislators has little to no practical significance. E Schmid, 'Völkerrechtliche Gesetzgebungsaufträge in den Kantonen' (2016) 135 ZSR 3, 15-16.

17 Austrian Federal Constitution (Bundes-Verfassungsgesetz) of 19 December 1945, art 16(4).

18 Belgian Constitution, Belgian Official Gazette of 29 November2017, Art. 169.

19 C Panara, *The Sub-national Dimension of the EU: A Legal Study of Multilevel Governance* (Springer 2015), 29 n 50. G Hernández, 'Federal States' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017), 40, n 92.

20 The Constitution of India of 26 November 1949, art 253.

ternational law, the lower level must – at least in theory – nearly always expect that the federal level asserts some legislative competence. These few examples aside, federations in many systems constitutionally lack competence to implement international law on sub-unit matters without the cooperation of the lower units.[21] Yet, the absence of explicit provisions on such substitute performance does not necessarily mean that the federal level does not – in some extreme cases – dispose of (implicit or emergency) powers to legislate *in lieu* of the lower level legislator.

In the other two types of upper levels, vertical substitute performance in the area of law-making is equally perceived as a tool of last resort, if it is available at all. The only conceivable and contested constellation that comes close to a substitute performance at the level of public international law vis-à-vis states would be situations in which the UN Security Council (UNSC) adopts a resolution under Chapter VII of the UN Charter if it has previously determined the 'existence of any threat to the peace, breach of the peace, or act of aggression' in accordance with art 39 of the Charter. With the exception of the 15 members of the UNSC, the lower level does not participate in the law-making at the upper level. But it is only an approximation to vertical substitute performance because the UNSC does not legislate in the Member States. But the last word has probably not yet been spoken on the controversy as to what extent the UNSC has the power to take legislative action interfering with domestic legal systems. In the aftermath of the 9/11 terrorist attacks, and beginning with Resolution 1373 of 28 September 2001, the UNSC has exercised quasi-legislative functions that led to arguably compulsory legislative changes by domestic legislators by virtue of the interpretation that articles 25 and 103 of the UN Charter leave states no choice.[22]

In the EU, upper level institutions cannot adopt legislation on behalf of the Member States. If the legislative competence is with the Member States (and thus the lower level), the EU institutions cannot resort to a vertical substitute performance *in lieu* of the Member States' legislators. For shared competences, the Member States can legislate as long as the EU level has

21 For an overview, W Rudolf, 'Federal States' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (MPIL 2011) para 30.

22 Suffice to refer to some scholarly analyses: S Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175. A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011).

not done so, but not vice versa.[23] For supporting competences, there is also no vertical substitute performance.[24]

Despite the largely unavailable vertical substitute performance in international law and EU law, both of these upper levels – with the participation of the lower levels – can, however, adopt statute-like norms that are so precise that the lower level legislator is essentially bypassed or arguably degraded to a simple executioner.[25] EU Regulations are the commonly used tool in the EU. International law provisions usually leave considerable discretion to national law-makers and other domestic actors but there are significant exceptions. Some obligations leave almost no discretion to the national legislator.[26] Jacob Katz Cogan argues that the number of such obligations is increasing.[27] In any event, the phenomenon of adopting precise statute-like norms at the upper level must be clearly distinguished from substitute performances as these situations concern the nature of the upper level norm and not the mechanisms to implement the norm at the lower level, albeit both phenomena lead to similar concerns.

The major worries with substitute performance are rather obvious. Vertical substitute performance of the lower level legislator dramatically reduces or even eradicates the autonomy of the lower level legislator and constitutes a harsh form of interference into the areas of competence of the lower level. The use of quasi-legislative wording in UNSC resolutions is perceived as problematic as only few countries are members of the UNSC and some provisions in some resolutions stand in tension with states' other international obligations.[28] In any case, lower level law-making in these circumstances is by-passed or does at least not correspond to the ideal of parliamentarism in which democratically accountable representatives deliberate and then make choices.

Compared to substitute performance, the enforcement of legislative obligations in courts, considered next, is more common but also raises concerns.

23 Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1, art 4.

24 TFEU (n 23), art 6.

25 S Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss* (Mohr Siebeck 1999) 300.

26 Maritime Labour Convention (adopted 23 February 2006, entered into force 20 August 2013), 2952 UNTS I -51299, Standard A1.1 (hat tip to Anna Petrig for bringing this example to my attention).

27 JK Cogan, 'The Regulatory Turn in International Law' (2011) 52 HarvInt'l LJ 321.

28 See (n 22).

2. *Vertical court enforcement*

Under what circumstances can upper level courts enforce legislative implementation at the lower level? This section discusses the basic issues with enforcing upper level legislative obligations through upper level courts. Court enforcement through financial sanctions is discussed separately in sub-section III.3. As with the other mechanisms, a basic methodological problem concerns comparability. As Ran Hirschl has persuasively argued, it is impossible to compare the roles of courts in different polities without fully understanding the social, economic and political context in which those courts operate.[29] Yet, even if we cannot 'compare' mechanisms, we can arguably identify – in broad brushstrokes – the types of approaches most commonly invoked.

2.1. The importance of admissibility rules

Admissibility rules, and particularly rules on standing, are crucially important to help secure effectiveness of upper level norms through court enforcement: if private individuals or upper level institutions have standing in courts[30] to challenge lower level law-makers because of normative conflicts with upper level law, this is a powerful tool to support upper level law. This is even more powerful if the admissibility rules also foresee standing to invoke negative conflicts, i.e. the absence of lower level legislation on a certain point of law.[31]

Domestically, private individuals may be given standing to support upper level law in (upper and lower level) courts. Given that this chapter focuses on upper level mechanisms, it is particularly important to note that the principle of supremacy of federal law over subnational law in federal states is sometimes treated as a fundamental right, which implies that individuals can challenge subnational legislation in any procedure, including at the upper level courts. An individual can therefore claim that a subnational piece of legislation is in conflict with upper level (federal) law, as is

29 R Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007) 151.

30 For reasons of simplicity, this chapter primarily looks at upper level courts but such standing can also be granted at lower level courts (e.g. federal authorities having standing in state court cases).

31 And such standing may ultimately form the basis for a ruling on liability, see section III.3.

the case in Switzerland.[32] The limitation of this arrangement on standing rules, while powerful, is that it is difficult to use if the conflict is negative in nature, i.e. if the lower level fails to engage in law-making in a given area (as opposed to 'positive' conflicts in which the lower level adopts legislation that infringes upper level principles). Rules of procedure in court proceedings tend to be better equipped to deal with 'bad' legislation at one and the same level rather than with the lack of legislation required by an upper level.

EU law and the ECJ sometimes require Member States to set aside national rules on standing in order to grant individuals access to court and remedies foreseen at the upper level.[33] As with other mechanisms, this approach is in a way at the crossroads between delegating tasks to secure effectiveness to lower level courts against lower level legislators while it is backed up with infringement procedures at the upper level.

Public international law does not dictate admissibility rules at the lower level, i.e. at the domestic level of states. However, states have themselves recognised in some cases that they should grant individuals standing in national courts in order to increase the effectiveness of international law in their own legal order and in order to avoid state responsibility.[34] States have also sometimes accepted supervisory mechanisms at the international level that provide standing for individuals. The European Court of Human Rights currently goes farthest in this regard (although the actual admissibility of applications is low, and the overwhelming majority of applications do not reach the merits stage). With the exception of art. 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, the Inter-American and the African human rights system 'filter' applications at the level of a commission who decides whether a case can reach the regional court. Supervisory mechanisms at the United Nations (treaty-bodies) to various extents also provide for standing of individuals at the international level.[35] Although the outcomes of proceedings before treaty bodies (so

32 Uhlmann and Popelier (n 2), 45.

33 M Eliantonio and others, *Standing up for Your Right(s) in Europe: A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts* (Intersentia 2013).

34 As was, for instance, the case in Switzerland. Decision of the Swiss Federal Tribunal of 26 July 1999, 125 II 417.

35 For an overview of regional human rights systems and UN supervisory mechanisms, see, e.g., D Moeckli, S Shah and S Sivakumaran (eds), *International Human Rights Law* (OUP 2018) 369-481.

called 'views') are not legally binding, the provision of standing to bring claims at the upper level can influence the decision-making at lower levels and increase the effectiveness of upper level norms.[36]

2.2. Direct applicability and vertical direct effect

In all our three upper levels, courts[37] at any level can sometimes stipulate that upper level norms are directly applicable or have direct effect. I hope EU lawyers will not be shocked by my discussion of these two concepts in one and the same section. Direct applicability and direct effect are not the same and the criteria to identify them can vary across systems. Direct applicability refers to the idea that upper law legislation becomes part of the law of the lower level without the need for implementing legislation. As is well-known, this is the case for EU regulations because the treaties so provide (art 288(2) TFEU). Vertical direct effect on the other hand refers to the function of allowing a court to protect an upper level right without being dependent on prior or subsequent lower level legislation pertaining to that particular right.[38] In EU law, direct applicability is thus a consequence of the legal *classification* of an EU act while direct effect can only be ascertained by looking at the nature of the provision on a case-by-case basis. This is why EU lawyers insist on the need to keep these two concepts separate.[39] In domestic legal systems, however, direct applicability and direct effect (of international law or of federal law vis-à-vis lower level law) are sometimes one and the same or at least very close relatives.

In one way or another, the tool of direct applicability/direct effect exists at all of the three upper levels: in a federal domestic legal system, domestic courts at all levels can and sometimes must directly apply federal law (e.g. state courts applying directly applicable provisions of the federal constitution). If domestic courts conclude that an upper level norm is directly applicable/has direct effect, they examine whether the upper level law can be used as a direct basis for a decision. Although the precise criteria to identify direct effect (or direct applicability in the sense used outside EU law) vary in nuance, the common criteria is the level of concreteness and unconditionality of the concerned norm and its relationship with individual rights, i.e. whether the norm is sufficiently precise to solve a concrete legal question about the conferral of rights.

Courts in EU Member States must directly apply EU regulations. If an EU provision is not directly applicable, vertical direct effect is a powerful tool to secure the effectiveness of upper level sources. If the implementation period for Member States has ended and if a provision is sufficiently clear and precisely stated; unconditional and not dependent on any other legal provision; and it confers a specific right upon which a citizen can base a claim, an individual can obtain a remedy based on the upper level legal source.[40] In other words, when the lower level (Member State) lawmaker fails to do its job, vertical direct effect attenuates the law-making failure in support of the upper level legal source.

As far as international law is concerned, domestic courts in monist jurisdictions can directly apply at least some international legal provisions. If courts find international norms directly applicable or directly effective, this is one way in which they can pave the way to arrive at an outcome that is compatible with the upper level norm.[41] In the interaction between public international law and national law, this association is particularly relevant in monist countries in which courts recognise the supremacy of international law over national law.[42]

2.3. Invalidation by upper level courts

When a court finds an upper level norm to be directly applicable, it has sometimes the power to set aside conflicting lower level laws. If an upper level court can invalidate lower level legislation, the upper level legal

36 For the most recent addition to the empirical research on this claim, see C Conrad and E Hencken Ritter, *Contentious Compliance: Dissent and Repression Under International Human Rights Law* (2019).

37 Direct applicability can also function as a tool outside courts. If an upper level norm is directly applicable at the lower level, the authorities at the lower level can (or should) base administrative decisions directly on that upper level norm, notably when supremacy is affirmed.

38 A Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 EJIL 105, 108.

39 For the argument that the ECJ 'wrongly alluded to the idea that direct effect without direct application was possible', see R Schütze, *European Constitutional Law* (1st edn, Cambridge University Press 2012) 324.

40 Case 41-74 *van Duyn v Home Office* [1974] ECR 1337, para 13. Case 148/78 *Publico Ministero v Ratti* [1979] ECR 1629, para 24.

41 And can use direct applicability as a 'sword' in the sense of Nollkaemper (n 38).

42 But see Nollkaemper for the ways in which in this constellation national courts can and regularly do also use direct applicability as a 'shield' to control, i.e. limit, the relevance of international law in the domestic legal system. Nollkaemper (n 38).

source is rendered effective through a harsh and powerful mechanism.[43] Federal supreme courts can often invalidate lower level legislation if incompatible with federal law to enforce pre-eminence. The mechanism of invalidation is, however, not directly available at the level of EU law and PIL, although the practical effects of some alternative approaches at the EU level resemble invalidation: In *Simmenthal* in 1978, the ECJ famously stipulated the duty of Member States not to apply a national provision conflicting with EU law. Although the EU courts cannot invalidate national legislation, the combination of the *Simmenthal* finding on supremacy, the enforcement actions against Member States and the remedies available for non-implementation attenuate (or maybe even eradicate) the need for EU institutions to dispose of the delicate power to invalidate lower level (Member States) legislation. What about public international law? The short answer is that international tribunals such as the ICJ cannot invalidate national laws. We should not necessarily view this state of affairs as negative but, in Nollkaemper's words, 'as a strategy that provides checks and balances that are lacking at the international level, and which supports the system of international law and its overall legitimacy'.[44] In any event, invalidations of legislation at lower level are certainly difficult to reconcile with federal interests of autonomy.

2.4. If norms are not directly applicable

Even if a norm is not deemed directly applicable, several types of court enforcement are conceivable.

a) Between appeals to the legislator and judge-made law

If direct applicability and direct effect are not an option (or not one that courts prefer to seize),[45] upper level courts can 'tell' lower level legislators to legislate and they can do so with various degrees of deference. Courts may appeal to legislators by 'merely' identifying the obligation, or courts

43 The exception being complete legislative omissions. Invalidation is not useful if there is no lower level law to invalidate.

44 Nollkaemper writes about national practices that limit the direct effect of international law, but the same remark is useful to discuss the absence of the ability of international courts to invalidate national legislation. Nollkaemper (n 38) 121.

45 In other words, if direct effect is used as a 'shield': ibid 115.

can outline the precise scope of such obligations, they can sometimes render a declaration of incompatibility as in the British legal system in cases of contravention with the Human Rights Act. Sometimes courts recommend or prescribe precise guidelines, sometimes courts set a time-frame, courts may sometimes be involved in monitoring the enforcement of a judgment in a follow-up process or they may at times conclude that there is a gap that the courts can legitimately fill with judge-made law.[46] On this spectrum, we find domestic courts in federations, the ECJ as well as international tribunals who have all, with highly variable degrees of specificity, at least requested lower level legislators to make laws in accordance with obligations from an upper level.

b) Requiring consistent interpretation

Another tool at the disposal of upper levels is the prescription or encouragement of consistent interpretation. Consistent interpretation occurs when lower level authorities or courts interpret lower level law consistent with upper level law. While the exercise of consistent interpretation happens at the lower level, consistent interpretation can be an upper level mechanism if the upper level prescribes or otherwise incentivises such consistent interpretation, again with supremacy as an intervening factor. Despite the lack of teeth, consistent interpretation can go a long way to avoid normative conflict in favour of upper level norms.[47] Let us look at the three selected upper levels in turn:

Federal law can prescribe the principle of consistent interpretation either explicitly or it can follow as a corollary from the supremacy of federal law vis-à-vis the law adopted at the level of the sub-units.[48] Upper levels can notably incentivise consistent interpretation through the deterrent of invalidation or federal oversight. In EU law, consistent interpretation is

46 For a comparative overview, see European Commission for Democracy through Law (Venice Commission), *Special Bulletin: Legislative Omission - General Report of the XIVth Congress of the Conference of European Constitutional Courts on Problems of Legislative Omission in Constitutional Jurisprudence* (Council of Europe Publishing 2008).

47 And should therefore not be (mis)understood as a technical doctrine. A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' (2008) 6 ICON, 398.

48 For examples, see A Gamper, 'Constitutional Courts, Constitutional Interpretation, and Subnational Constitutionalism' (2014) 6 Special Issue: Re-Exploring Subnational Constitutionalism, A Special Issue of Perspectives on Federalism 24.

mandatory under the doctrine of indirect effect developed by the ECJ. The doctrine of indirect effect requires national courts to interpret the domestic law of the Member States consistently with EU Directives.[49]

In public international law, consistent interpretation has no special vocabulary but is equally known. It can be viewed as a corollary of primary obligations and the idea that any non-compliance with an obligation – in the absence of circumstances precluding wrongfulness, amounts to a breach of international law. If states achieve compliance by interpreting their national laws consistently with international law, states avoid state responsibility. Public international law also incentivises consistent interpretation though the customary norm that a state may not invoke its national law as a justification for non-implementation of an international obligation.[50]

2.5. Common concerns with court enforcement

Of course, court enforcement regularly causes concerns for the lower levels. The critiques focus on separation of powers arguments (courts being ill-suited to 'replace' democratically legitimised legislators) as well as arguments of subsidiarity and legitimacy. Even with presumably 'softer' mechanisms such as consistent interpretation, upper level courts are essentially asking the lower level courts to perform tasks which arguably belong to law-makers at the lower level. Particularly in cases in which positive obligations must be fulfilled by the legislator, the intervention of courts is viewed with suspicion given the potential resource implications of court decisions in polycentric cases and such concerns arise even if we are not in a multi-level setting.[51]

49 Case 14/83 *von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891, para 26.

50 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), art 27. ARSIWA, art 3.

51 For arguments on both sides of this debate, the literature on social rights is particularly recommended. Against judicial review e.g. J Waldron, *Law and disagreement* (OUP 2004). For opposing views, e.g. A Nolan, *Children's socio-economic rights, democracy and the courts* (Hart 2011). D Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 Oxford Journal of Legal Studies 733. J King, *Judging Social Rights* (Cambridge University Press 2012).

3. *Financial liability (as a sub-type of court enforcement)*

If courts cannot always make legislators act, they can sometimes impose financial liability as a replacement option that often aims to operate as a deterrent against non-implementation of the upper level legal sources with the idea that lower level law-making will happen more swiftly if the stick of a financial sanction is present.

Financial liability is most famously known at the level of EU law. As is well-known, directives have no horizontal direct effect.[52] In the absence of national law implementing the directive, the individual cannot rely on EU law against a private actor as this would undermine the idea that directives require the engagement of the lower level legislator. As is known to any student of EU law, the ECJ famously decided in the *Francovich* case that national courts must provide the individual with compensation for the non-implementation of a directive in order to mitigate against the rejection of horizontal direct effect from the point of view of the affected individual.[53]

In public international law, financial compensation is a possible consequence of state responsibility. Art 36(1) of the Articles on State Responsibility foresees that a state responsible for an internationally wrongful act 'is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution'.[54] However, financial compensation as a form of reparation under the law of state responsibility is only available between states – and to a less well-established extent – in the relationship between states or international organisations.[55] International law moreover contains obligations of states to provide individuals with reparation. Such obligations at times explicitly require financial compensation for non-compliance. The right to a remedy in international human rights law sometimes contains an explicit financial compensation aspect.[56] Yet, it is generally fair to say that access to financial remedies is very difficult for victims of human rights violations (or violations of interna-

52 Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

53 Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italy* [1991] ECR I-5357, para 33.

54 ARSIWA (n 11).

55 Articles on the Responsibility of International Organisations, Annex to A/RES/66/100 of 27 February 2012 art 38.

56 E.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 14(6). A bit dated but still an excellent overview: D Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2005).

tional humanitarian law) and even more so when the problem is the lack of implementation by law-makers.

At the domestic level, financial liability for non-implementation of federal law in a federation seems to be hardly existing but it is not entirely unheard of. Where there is domestic state liability, it tends to concern infringements of the state and less so omissions and even less so omissions by legislative actors.[57] That said, it would at least seem legally conceivable to see courts provide remedies for law-making failures based on the logic of '*effet utile*' in domestic legal systems. Yet, we don't see such cases often. There are procedural hurdles to litigate omissions and many judges and lawyers are more familiar with cases of state interference with human rights (negative obligations) rather than with positive obligations requiring the state to adopt a certain conduct. Moreover, it is almost needless to say that financial liability is controversial notably for its consequences of public spending and because of the fact that courts and law-makers may sometimes choose a different political emphasis when interpreting legal sources. In sum, financial consequences are available at least to some extent in all three upper levels while they clearly play the most prominent role in EU law.

In addition to substitute performance, court proceedings and financial sanctions, a range of mechanisms are available that rely on some forms of oversight and cooperation exercised by the upper level vis-à-vis the lower level.

4. *Oversight and cooperation*

The fourth group of mechanisms regroups approaches that use oversight and cooperation with an aim to induce, motivate or otherwise enhance the lower level law-makers' zeal to implement upper level sources. Many of these mechanisms are cooperative in nature, but there are others that rely on sticks rather than carrots. We will see that a vast range of them is available at all three upper levels.

57 E.g. A-C Favre, 'Le droit de la responsabilité de l'État: les enjeux' in A-C Favre, V Martenet and E Poltier (eds), *La responsabilité de l'État* (Schulthess 2012) 9, n 21. T Jaag, 'La responsabilité de l'État en tant que législateur en Suisse' in Institut Suisse de droit comparé (ed), *Rapports suisses présentés au XVème Congrès international de droit comparé* (Schulthess 1998) 255, 228, concluding that financial liability against legislative omissions in the Swiss legal system cannot be ruled out even in the absence of cases.

4.1. Approval requirements

A very direct approach to oversight is one that requires the lower level to seek permission from the upper level before enacting law. Approval requirements can be designed as vetoes or as a requirement of a positive level of support from the upper level. Of course, approval requirements are only helpful if the upper level – at the time of approval – recognises the inadequacy of the lower level legislation. If the (positive or negative) conflict only arises later on, this mechanism is no longer helpful – unless a system would foresee periodic approvals and re-evaluations over time. In practice, approval requirements exist in federal domestic systems but not in EU law or public international law. In federations, there are approval requirements for sub-national law (e.g. state constitutions) as well as approval requirements for international and interstate/intercantonal agreements (and potentially other forms of cooperation) concluded by sub-units.

4.2. Loyalty principles, duties to consult, inform and involve

Loyalty principles are a common feature of domestic federal systems. They usually contain a duty for both upper and lower levels to take into account how the exercise of their own competences affects the other entities. Outside of domestic federal states, we also find loyalty principles in the EU in the form of the 'principle of sincere cooperation'[58] and – with some creativity and to a less-well established extent – we also find the idea in public international law, notably if we combine good faith,[59] the principle of non-interference[60] and the idea of *erga omnes* obligations that states owe towards the international community as a whole. In all of these, there is at the core a bi-directional idea of mutual respect of one level towards the other which implies that upper levels can legitimately exercise some oversight and seek cooperation for the implementation of their legal sources at the lower level.

As corollaries of the loyalty principle, probably all federal or multi-level systems foresee some duties to consult and inform the respective other lev-

58 4 (3) TEU. For an analysis M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

59 Charter of the United Nations, 1 UNTS XVI, 26 June 1945 (entered into force 24 October 1945), art 2(2).

60 UN Charter (n 59) art 2(7).

el of law-making developments. Some approaches go further than informing and consulting and formalise the involvement of the lower level in the decision-making. The deepening of the involvement of the EU Member States' parliaments in EU law-making is the prime example of this approach.[61] In domestic federations, the lower level parliaments often have a say in the upper level law-making by representation in an upper chamber or by the provision of specific rights for the sub-units (such as parliamentary participation or state initiatives).

4.3. Financial and other incentives

This chapter would be incomplete without a mention of the financial incentives the upper level can employ to spur law-making at the lower level. If the upper level offers money to incentivise law-making at the lower level, this is a presumably lenient mechanism. But one should not underestimate the fact that de facto autonomy hinges to a large extent on financial arrangements (and upper level financial aid is always tempting and can be difficult to turn down), as has been noted in Germany during the reform on federalism.[62] Financial and other incentives are also important at the level of EU law and public international law where they are, however, more relevant horizontally given the absence of a central enforcement system (i.e. between states, reciprocity, diplomatic consequences, reputational incentives) rather than between international institutions and nation states.

4.4. Oversight mechanisms

In any multi-level setting, some oversight mechanisms aim to ensure that lower-level law-making takes place as the upper level would like it to happen. Oversight mechanisms can range from friendly educational information to friendly reminders, bulletins, ombudspersons, manuals or guidelines to supervision in a more formal sense of the term. As the 'guardian of

61 C Hefftler and others (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave Macmillan 2015).

62 See the new wording of art 104a of the German Grundgesetz, 'Änderung Artikel 104a GG' (1 September 2006) <http://www.buzer.de/gesetz/5041/al1813-0.htm> accessed 15 July 2019.

the Treaties', the EU Commission is vested with supervisory powers vis-à-vis the lower level, i.e. the Member States.[63] Oversight mechanisms also exist in public international law, e.g. in international and regional human rights law, environmental law, anti-corruption or other fields. Non-binding mechanisms such as treaty bodies, committees or other types of groups or individual experts monitor law-making at lower levels and sometimes have the right to undertake country visits or make investigations or inspections.

4.5. Common concerns with oversight and cooperation

Even though mechanisms based on cooperation and oversight tend to raise less concerns than substitute performance, financial liability or some court enforcement mechanisms, it is fair to say that even oversight and cooperation can lead to common concerns. These concerns usually relate to interrogations on how far the mechanism should go and how paternalistic they may legitimately be without eroding lower level autonomy.

IV. Conclusions

We have examined the various types of approaches that upper levels can use to influence legislative implementation at the lower level(s). I sketched four types of approaches, most of them with sub-groups of mechanisms. Almost all of them are available to all three upper levels, albeit with a lot of variation of the relative weight, acceptance or prominence both at the various upper levels and within federations at the domestic level.

We also considered how the use of each group of mechanisms raises a group of common, or at least similar, concerns from the perspective of the lower levels. No matter what relationship we look at, the common worry pertains to the reduction of autonomy left to the lower level. Such reduction is unequal for each legal source and in relation to each of the mechanisms, of course, but from the perspective of lower levels, attempts to influence legislators' choices at the lower level are viewed with suspicion. This finding implies that concerns of reduced federalism should not be seen in isolation from international and European normative developments and vice-versa. From the point of view of the lower levels, any assertion of the

63 TFEU (n 23), art 258.

upper levels is met with at least some concerns. It would be wrong, however, to only mention concerns without also noting that upper level assertiveness is not just a concern but, depending on the perspective, also a cause of celebration. Andrea Franchovich, his colleagues and the many who benefit from upper levels' struggles for effectiveness would certainly agree.

Where does this leave us and how do these findings relate to the current backlash against EU law, other regional and international law? This chapter argued that upper levels inevitably strive for implementation at the lower levels and that this situation leads – equally inevitably – to some concerns at the lower level. Lower levels cannot 'have cake or eat it'. It is not possible to effectively pursue higher normative ambitions at the upper level without expecting some reduction of autonomy at the lower level. Yet, does this conclusion explain the current pushback against international law and notably against international and regional human rights law? I do not believe that it does. It is one thing to say that more upper level law raises autonomy concerns at the lower level but it is quite something else to suggest that this state of affairs explains Brexit or the opposition to human rights law and its institutions as is sometimes suggested. I do not want to deny that a relationship exists and that this relationship deserves to be analysed more seriously but I do not believe that such deterministic and monocausal shortcuts are permissible.[64] As additional or alternative explanations for the current backlash, we need to consider several other possibilities. Actors at the lower level might not have secured sufficient legitimacy for delegating certain issues towards the upper level, the gains from the benefits of cooperation may not be evenly distributed at the lower levels,[65] these benefits may not be sufficiently visible and palpable or there may be actors who do not support the goals pursued by upper level sources and therefore choose to undermine them.

If anything, the observation that there are common mechanisms and common associated challenges and concerns should provide caution

64 C Kaempfer, S Thirion and E Schmid, 'Switzerland Rejects a Popular Initiative 'Against Foreign Judges'' (*OpinioJuris*, 17 December 2018) <http://opiniojuris.org/2018/12/17/switzerland-rejects-a-popular-initiative-against-foreign-judges/> accessed 13 March 2019.

65 As economic theory on free trade arrangements suggests (B Ohlin, *Interregional and International Trade* (Harvard University Press 1933)), gains from trading and arguably other exchanges that require some upper level regulation can be unevenly distributed within communities even if the overall size of the pie increases. How we deal with these effects is a political question.

against the idea that a fruitful debate can be held whether one is 'in favour' or 'against' legal sources of any upper level. Upper level legislative obligations exist because a political community had reasons to believe that solutions should be found at an upper level. This is usually the case when 'we' (or some of us) see cooperation at the upper level as necessary or desirable to solve problems that cross the boundaries of the community at the lower level, be it in relation to trade, environmental problems, criminality, values, the coordination of viewpoints in foreign affairs or anything else that sub-units in a federation, Member States in the EU or states at the international level entrust the upper level to take care of. The benefits of such higher-level cooperation come at the price of a certain loss of autonomy for law-making at the lower level. It would be an oversimplification to state that this relationship is entirely axiomatic – it is not.[66] But in the big picture of things, it should not come as a surprise that higher expectations at the upper level will also require at least some mechanisms to secure effectiveness.

66 See section II.4.