Epilogue:
Toward more Legitimate Multilevel Regulation

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1. Introduction

International regulations are central to the multilevel interdependence often referred to as “Globalisation”, “Europeanisation” and the like.¹ The rules span hard and soft law, authored by a range of intergovernmental, transnational and private organisations, including UN and EU bodies with wide or narrow mandates.

Such multilevel regulation often has drastic effects on individuals’ life plans and life chances, albeit indirectly and surreptitiously.² Their impact, and even the mere suspicion thereof, raises a fundamental issue of normative legitimacy. With what right can these multifarious authorities expect subjects to comply? More precisely: can these new modes of regulation be justified, as a whole or separately, to all subjects regarded as equal members of the political order of which they find themselves a part? The present reflections address this question of normative legitimacy, and points out ways to improve multilevel regulation in this regard.

After a brief discussion of the “multilevel governance” (hereafter, MLG) that gives rise to such regulations, section 2 surveys the wide ranging discussions on the legitimacy deficits of the EU in order to extrapolate some insights about MLG. Section 3 lays out a particular conception of the contested concept of “legitimacy” that allows a distinction between a) whether an arrangement is

¹ This contribution has benefited from the CONNEX network. Thanks in particular to audiences at ECPR in Budapest, a NEWGOV workshop in Florence, and CONNEX workshops at Katholieke Universiteit Leuven and at the Hague.
² Cf. in this volume the contributions by Bradley, De Meester, Uerpman; Husabt, Brown, and Bulterman.
democratic and b) whether it is normatively legitimate. This account of normative legitimacy draws on the “assurance game” literature to argue three points. Justified, long term support for a political and legal order requires a) present compliance and support, but also b) long term trust in the general compliance of other citizens and officials, and c) shared acceptance of the legality and normative legitimacy of the regime. Suggestions to enhance the legitimacy of the EU and other forms of multilevel regulation may be assessed in the light of how well they contribute to such trustworthiness. Section 4 points to seven areas where multilevel regulation might be modified or supplemented to enhance trust, trustworthiness and hence legitimacy, using the EU as an example. The institutions should

- facilitate political discourse in civil society;
- be simple and transparent;
- be sufficiently effective and efficient;
- socialize to overarching loyalty;
- monitor problem solving;
- monitor compliance by citizens and authorities;
- sanction non-compliance.

Sections 5 and 6 briefly discuss two forms of multilevel regulation: democratic hierarchical arrangements, and modes of MLG, e.g. in the forms of networks, to elaborate the challenges of trustworthiness that each of these face. Four issues in particular require attention for MLG: the jurisdiction and authority of various issue-specific regulations must be clarified, both where they overlap and where they leave gaps. Greater transparency is important, partly to avoid collusion and hidden controversial choices. Monitoring mechanisms would reduce the risk that such regulations over time yield bad and ineffective solutions, and would increase their trustworthiness in this regard. To increase their normative legitimacy they may have to be supplemented by, or nested within, institutions that are democratically accountable.

1.1. Multilevel Governance

“Multilevel Governance” is a term often used to describe a plurality of decision making modes, frequently referring to the EU. “Multilevel” may refer to the “vertical” dispersal of political authority from the state upward to a supranational level and/or downward to sub-national/regional levels. Bodies at geographically
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higher levels may regulate activities at lower levels, vice versa, and in complex interplay. “Multilevel” may also refer to “horizontal” dispersal of authority where non-state actors are brought into the process. “Governance” likewise has multiple uses. One usage is quite broad, including, first, when organisations govern or regulate issue areas mainly based on hierarchical control by the state in the shadow of coercion – “government” – but also, secondly, on the basis of co-operation, mutual acceptance or consent without ultimate resort to force. So government is but a special case of governance. Consensus, rather than coercion, is taken to be characteristic of “non-governmental” forms of governance. Such alternatives to a hierarchy of legal norms with clear rules of supremacy “may or may not derive from legal and formally prescribed responsibilities and … do not necessarily rely on police powers to overcome defiance and attain compliance.”

Such modes of governance have several alleged benefits, including efficiency and respect for sovereignty and autonomy.

These vertical and horizontal forms of governance raise different normative challenges about such issues as democratic representation and accountability. Some have argued that legitimate modes of governance must be democratically accountable. Symptomatically:

“In our Western view, only democratic systems, advocating the values of liberty, equality and community, deserve the loyalty of the citizens. Hence, the notions legitimacy and democratic legitimacy must be considered as interchangeable …”

The present contribution questions this presumption. Should modes of multilevel regulation be visibly and trustworthily subject to democratic control and human rights constraints, and if so how? This requires an answer to the more fundamental question of how to assess standards of legitimacy that should be brought to

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3 Discussed in this volume e.g. by Bradley and Bulterman.
4 Cf. De Meester in this volume.
5 Cf. Ott and Husabø, both in this volume.
6 Cf. Uerpmann in this volume.
bear on multilevel political orders. What are the normative requirements on these institutions as a whole, and how might institutions such as democratic rule make multilevel governance become more normatively legitimate? On the other hand, non-hierarchical modes of governance are not as unproblematic as is sometimes argued. Consent by all present might seem to provide a satisfactory answer to the question of normative legitimacy: the regulations are to be complied with because the parties agree to do so. But these benefits may come at the cost of transparency, circumscribed competencies, and non-accountable uses of authority and other influence. In the following we explore these worries, arguing that institutions may enhance normative legitimacy in at least seven ways, by both democratic and “non-democratic” means.

2. Legitimacy Deficit of the EU: Concepts and Issues

Reflective, well informed authors disagree on the diagnosis of an alleged legitimacy deficit in the European Union, as well as how to solve it. Some deny that the EU faces a legitimacy deficit. Others diagnose this deficit in one or more of four ways: a lack of social compliance, lack of legality, lack of problem solving ability, or lack of normative justifiability. The choice among these four different concepts of legitimacy naturally affects the diagnoses and recommendations.

The present reflections take as their starting point a normative concept of legitimacy. This is now often expressed in terms of justifiability among political equals, for instance by appeals to hypothetical acceptance or hypothetical consent. The legitimacy of a political order such as the EU is thus an issue of whether affected parties would have or could have reason to accept it, under appropriate choice conditions.

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This question of legitimacy arises for those who are under an obligation to obey and whose co-operation is required for workable institutions and practices. In intergovernmental arrangements the immediate concern will be mechanisms of legitimation that can confer such legitimacy in the eyes of various governments and - when appropriate - the populations. In multilevel forms of regulation the willing compliance by citizens takes on increased urgency, especially insofar as the rules enjoy direct regulatory power over them. EU citizens must thus daily comply with legislation that originates from the EU. The normative legitimacy of the EU in the eyes of citizens is therefore a salient concern, not least because citizens and their representatives are sometimes asked to ratify new agreements.

From this vantage point of normative legitimacy the three other concepts of legitimacy are all relevant, related, and often required. Legal legitimacy in the form of constitutionalism and the rule of law is often regarded as a necessary condition for a justifiable political order. For the inter-governmentalist, it would even appear that the sole form of legitimacy the EU can enjoy, and needs, would stem from the legal agreements among its Member States. On its own, general compliance is insufficient for normative legitimacy: people may comply with unjust regulations solely out of fear of sanctions, lack of alternatives or unreflective habit. Yet compliance often requires a widespread belief that the institutions and regulations are normatively legitimate. Therefore, perceived normative legitimacy may also bolster the problem-solving capacity of governments, since such beliefs may increase general compliance. And vice versa: normatively legitimate institutions and regulations must often be seen to solve the problems they were created to solve.

2.1. Mechanisms of Legitimation

Scholars and politicians of good faith often disagree about prescribed medications for legitimacy deficits in the EU and elsewhere. Ironically, even democratic accountability mechanisms of legitimation are hotly contested since they are sometimes not regarded as part of the solution, but rather as part of the problem. Some insist on more “input” legitimacy, understood as democratic electoral accountability. They may want to strengthen the European Parliament, or want a stronger role for national parliaments. One reason may of course be that citizens of the Member States are accustomed to democratic accountability.

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mechanisms, and assume that similar mechanisms must be in place if the EU is also to be legitimate. While some reasons in defence of this view may be misguided, others seem sound. Arguments below will defend democratic arrangements insofar as they help ensure that the authorities remain sufficiently responsive to the citizens’ best interests.

Some authors are more sceptical of democratic accountability, since such “input” legitimation mechanisms may hamper the EU’s “output” legitimacy, i.e. its ability to identify and implement solutions to otherwise unattainable goals. Explicitly non-accountable EU regulatory agencies may bolster the legitimacy and credibility of Member States, which can use such mechanisms to more credibly commit to common regulations. Examples include the single market, harmonisation of product standards and monetary policy. These are more credible because governments are isolated from domestic “majoritarian” governments, which might be tempted to cheat or free ride, partly due to suspicion of others’ noncompliance. Democratic accountability would reduce such credibility and threaten output legitimacy. Majone thus warns that some decisions should be insulated from majoritarian political bodies for reasons of credibility. I agree, and submit that there are similar good reasons to protect human rights by non-accountable courts, namely to bolster the credibility of governments in the eyes of the citizenry. Yet such arguments have their limitations. Against Majone’s wholesale dismissal of democratic mechanisms in the EU, we may note that such accountability might still be suited to many areas of multilevel regulation. In particular, as section 3 argues, citizens need evidence that EU institutions reliably identify, pursue and secure the requisite output. This is one “output”-oriented reason in favour of democratic mechanisms of legitimation.

Service-Fachverlag, 1995, warn against letting national parliaments control votes of ministers in the Council of Ministers.


3. Legitimacy and the Need for Assurance

How can multilevel governance bodies ensure that citizens have a moral duty - a political obligation - to abide by their multilevel regulations, standards and principles? Efforts to ensure and enhance such normative legitimacy may be assessed by whether they increase trustworthiness: whether they give citizens reasons to believe that the regulatory institutions will continue to remain responsive to the best interests of citizens, and that others are generally complying with these regulations. These conditions, I submit, are crucial to sustaining a political order over time. Citizens must trust their fellow citizens and authorities to comply with legitimate decisions and regulations even when such are counter to their individual interests. We should therefore welcome devices that bolster such assurance among citizens and toward their authorities.

Institutions can build trustworthiness in several ways. In particular, several mechanisms of accountability can give citizens reasons to trust that their fellow citizens and authorities will comply in the future. Thus many will hold that citizens have better reason to trust a democratically accountable government and comply with its regulations. But other accountability mechanisms than democratic rule may also give citizens reason to trust their authorities and fellow citizens. Why is this?

The need for trust and trustworthiness arises under circumstances of complex mutual dependence. Co-operation from each participant depends on their conscious or habitual expectation of the co-operation of others. Such mutual assurance is central to the long-term stability of any political order. A multilevel political order faces added challenges of trust, among authorities and citizens of different member units. One challenge is that such regulations require citizens and authorities to act in ways that put their own interests at risk for the sake of common benefits, which may often mainly accrue to non-citizens. They must then trust others to do likewise in turn. Such assurance has become more important with increased global and regional interdependence. Consider, for instance, the gradual shift within the EU from unanimity to Qualified Majority Voting (hereafter, QMV), wrought by a shared sense that too many veto points had proved collectively irrational. Under QMV, governments can no longer protect their citizens against disadvantageous arrangements. Instead, citizens and governments must trust that a qualified majority will not abuse its power. Likewise, the rule of “Mutual Recognition of Member States’ regulations increases the need for trust and trustworthiness. Authorities and citizens must have reason to believe that the officials in each state establish and maintain acceptable standards, and that others allow free movement of products across borders. In these cases, each state may prefer to be subject to QMV and to respect the rule of Mutual Recognition, but only if it can be confident that others do
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likewise. Such mistrust is sometimes visible, as when it comes to implementing EU legislation. What sort of assurance is needed to avoid mistrust and maintain such co-operation, and how can institutions provide it?

We can get a helpful sense of the various forms of trustworthiness by considering game theoretical accounts of “assurance games” among “contingent compliers”. Contingent compliers are prepared to comply with common, fair rules as long as they believe that others do so as well. They may be motivated by what John Rawls called a Duty of Justice: to “comply with fair practices that exist and apply to them when they believe that the relevant others likewise do their part.”

For contingent compliers the standard answer to when one has political obligations has two distinct conditions: 1) The commands, rulers and regime must be normatively legitimate; and 2) each person must have reason to trust in the future compliance of other citizens and authorities with these commands and regimes.

I submit that many concepts of legitimacy – normative, legal, social – and various institutional arrangements of legitimation and accountability can enhance political trust and trustworthiness among people who are “contingent compliers” in this sense. In particular, institutions can provide several forms of important assurance to contingent compliers.

4. Contributions of Institutions

The assurance problems among contingent compliers have already been addressed by Jean-Jacques Rousseau and James Madison. Recent work on the theory of games and research on social capital shed further light on the contributions of institutions. They can promote trust and trustworthiness by shifting the trusted’s incentives, or by reducing the costs of failed trust.


Institutions can provide assurance of at least seven relevant kinds that address the two conditions mentioned above.
Consider the first condition – a perception that the government pursues normatively legitimate policies.

1. Institutions may sustain opportunity spaces for the development of a public political theory appropriate for that multilevel system of governance. Civil society and debates among political parties can foster, discuss and disseminate certain objectives and normative standards of the regulatory bodies, such as democracy, economic growth, subsidiarity, solidarity, and human rights.

2. Institutions must be simple and transparent enough to allow assessment of whether they secure these objectives and standards reasonably well.

3. The institutions must be seen to be sufficiently effective and efficient by the normative standards of the appropriate political theory mentioned in 1 above.

Institutions may also help satisfy the second condition, when they provide public assurance of general compliance.

4. Institutions may socialize individuals to be contingent compliers. This may happen intentionally in educational institutions, but also as a welcome effect of political party interaction as they seek somewhat consistent and responsive policy platforms.

5. Institutions can include mechanisms to monitor the effectiveness of a piece of regulation, to help determine whether it solves the problems as effectively as the authorities claim.

6. Institutions can monitor, or enable independent agencies to monitor whether citizens and authorities comply with the laws and regulations.

7. Institutions can sanction non-compliers, to decrease the likelihood of defection and thereby increase the likelihood that others will choose to comply.

5. Legitimacy, Assurance and Democratic Accountability

Let us now consider how representative democracy can help provide these forms of assurance. In a democracy, citizens hold rulers accountable by selecting among competing candidate parties on the basis of informed discussion of their relative merits and the objectives to be pursued. Rulers must offer an account to
citizens, and face the consequence of removal from office. A modest definition of
democratic rule might include:  
1. institutionally established procedures that regulate  
2. competition for control over political authority,  
3. on the basis of deliberation,  
4. where nearly all adult citizens are permitted to participate in  
5. an electoral mechanism where their expressed preferences over alternative candidates determine the outcome,  
6. in such ways that the government is responsive to the majority, or to as many as possible.

There are good reasons to support democratic arrangements of this kind. A central claim is that, compared to the alternatives, these arrangements are more reliably responsive to the best interests of the citizenry. While flawed and imperfect, democratic arrangements are arguably often better than the alternatives in this regard. However, the seven points above suggests that these benefits can be expected mainly under certain conditions. Only then will democratic accountability contribute to several of the seven forms of assurance needed among contingent compliers. One upshot is that competitive elections and free media scrutiny are crucial.

One important factor in promoting several forms of assurance is the existence of opposition parties. With regard to opinion formation about the normative

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political theory that should guide assessment of the EU institutions (number 1), this is part of what competing party ideologies offer.

As to the requirement of transparent institutions (number 2): to provide assurance, the decision structures must be sufficiently transparent, and it must be possible to place responsibility for policy decisions with sufficient clarity. 22 Alas, within the European Union – and even more so for international regulation generally – the plethora of decision making authorities and procedures makes for too much opacity.

Party competition prompts legislatures to consider citizens’ future preferences and the risk of being turned out of office encourages governments to account for past deeds and choices made. This mechanism makes the institutions reasonably effective (number 3). Contestation among parties, a critical opposition, and media scrutiny are crucial to such monitoring. Another benefit of opposition parties is that they help voters understand how they can affect policies. Only when there are visible, viable alternatives can people discern the impact of their votes and understand how institutions work.

Party contestation is also important for socialization, especially in multilevel political orders such as federations (number 4). Federation-wide parties foster political debate and the formation of public opinion about the best means and objectives of policies, and seek to accommodate the interests of citizens across the sub-units. These debates allow voters to form their preferences on complex policy issues on the basis of alternatives that claim to be committed to the interests of others in the union in overarching loyalty. 23

The fifth form of assurance concerns whether particular policies and authorities are good ways to solve the problems, as claimed. Competition among parties fosters rival policy ideas and candidates for political office. This competition helps voters realize which choices may be made, and gives them alternatives. Assurance among citizens about the actual impact of policies requires that the information flow should not be controlled by the government in power. Opposition parties, critical media and independent research help reduce the opportunities for deception about underperformance, and may alleviate the information asymmetry between the government and voters.

Similar arguments support credible monitoring of authorities’ compliance, and by citizens generally (Number 6). Opposition parties vying for votes can

be expected to watch for signs of bad behaviour by government, and other indications that policies are not working well.

Finally, institutions may provide credible sanctions against non-compliance (Number 7). Opposition parties and free media allow citizens to provide credible “sanctions” against a government, since it will lose office if it fails to convince citizens of its past performance and promises.

I conclude that credible responsiveness by governors to the real interests of citizens by means of democratic accountability may help provide assurance of several kinds. The EU and some other multilevel systems of regulation lack the conditions that would make democratic accountability bolster normative legitimacy. There is little room for a rival set of leadership candidates and a rival policy agenda, and absent meaningful electoral competition at the European level, the Commission and the governments have few incentives to change these policies. The upshot is that arrangements, even if formally democratically indirectly accountable, cannot be expected to help resolve the assurance problems facing EU citizens.

Long term pessimism about European level democracy is nevertheless unwarranted. There are signs of more party organisation and competition in European Parliament, and more policy contestation within the Council of Ministers. There are therefore openings for contestation about the EU’s policy agenda, and for critical scrutiny of performance. In turn, I submit that the requisite public debates and forums are likely to develop if political contestation increases.

We may draw at least two conclusions for the prospects of legitimacy of multilevel regulation in general. First, by extension, we may seek to implement more mechanisms of democratic accountability of multilevel regulation, even thought this will not do enough to enhance trustworthiness and hence normative legitimacy in the absence of political contestation and media scrutiny.

Secondly, these arguments do not preclude non-democratic arrangements. Responsiveness by an accountable legislature to citizens’ expressed preferences is one feature that makes legislatures valuable. But there may be other ways to protect and further the best interests of citizens, such as “non-democratic” constraints and checks on parliament and government of various kinds. So in principle, multilevel regulation and various forms of non-democratic regulation may bolster the requisite forms of assurance. In the concluding section we turn to consider some of the central challenges to make multilevel regulation normatively legitimate in this sense of engendering trust among contingent compliers.

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24 A. Follesdal and S. Hix (see supra n. 18).
6. Legitimacy, Assurance and Multilevel Regulation

Recall that the overriding concern is to ensure that important decisions are in accordance with justifiable normative standards, and that they are generally complied with – and that these features are publicly confirmed. So in principle, even non-democratic arrangements might be normatively legitimate. Be that as it may, multilevel forms of governance face several challenges with regard to the seven needs for assurance. To help fix ideas, consider a recent sophisticated argument in defence of networks: that they might provide both effective and legitimate multilevel regulation.

Anne Marie Slaughter has defended the value of certain global or European government networks.\(^{25}\) She envisions, but does not aim fully to defend, networks such as that of courts that protect human rights. She argues that such international networks can solve certain dilemmas of globalisation, in particular the collective problems that require trans-border co-operation and even coercive sanctions. At the same time she suggests that such coordinated action by a network of government officials across states avoid the risks wrought by truly global government.

Some have criticized Slaughter for claiming that such networks are more effective and more legitimate than they really are:

"A New World Order's innovative uses of vertical government networks mostly – though perhaps not always – involve endowing democratically unaccountable supranational entities with the coercive powers of democratically unaccountable national institutions so as to allow such powers to be used against the democratically accountable institutions of the state."\(^{26}\)

What are we to make of such claims and criticisms? Let us assume for the sake of argument that such networks and other modes of multilevel governance are indeed sometimes effective, by some appropriate standard. What can we say on the basis of the account presented above of normative legitimacy related to assurance among contingent compliers?

1. With regard to the need to discuss and maintain a public political theory about such decisions. Are there arenas of the requisite kind open to contributions from all affected parties? One obvious risk of multilevel regulation, e.g. as decided


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by networks, is clearly that they often operate without transparency, so that only the participants know what is at stake. Some veto players are included, while other affected parties are left without either insight or voice on any arena that could entertain informed discussions of standards of legitimacy for such activities. In response, defenders may plausibly hold that international networks, at least of courts, may contribute precisely to domestic public debates about the normative standards appropriate for the multilevel political order, e.g. as stated in various (quasi-) constitutional agreements.

2. With regard to the simplicity and transparency of institutions, this is a challenge to (quasi-) federal arrangements in general, as well as to multilevel regulation by networks of private and public actors. It is often difficult to determine who bears ultimate responsibility for a particular policy decision when more than one level is involved in making and implementing that decision, and when each level of authority can pass the blame to others. Given such a complex structure, no formal system of “multilevel diplomacy” may be capable of satisfying the democratic requisite of “accountability for acts in the public realm” and of bringing the necessary sanctions to bear on those who operate in the interstices of the various levels.

3. To determine whether the institutions are sufficiently effective and efficient, citizens must be assured that the institutions can reliably be expected to perform better than alternative arrangements. As an example consider the benefits of independent agencies. Some proposed accounts seem plausible for some cases, thus we saw above how Majone provides good reasons why certain EU policies such as competition policy or food safety regulation should be delegated to independent, non-majoritarian, institutions. This enhances the credibility of governments’ commitments. But these arguments do not apply to policies which have distributive or redistributive effects, or when several alternative decisions may be made which divide the gains differently among parties. It is not clear why these can be expected to yield fair results when isolated from contestation, democratic or otherwise, by responsive and accountable decision makers.

Similar concerns might arise with regard to the multilevel regulation of financial services where financial trade associations are heavily involved; in the banking sector; in the pharmaceutical industry; or in internet regulation. Typically, consumers and other concerned citizens are effectively excluded from participation and even insight. At best, democratically accountable actors are included at such a late stage that the issues have been framed, to the possible

27 Bradly, De Meester, and Uerpmann, this volume, respectively.
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detriment of the interests of those not around the table. Consider, for instance, the International Conference on Harmonization of Technical Requirements for the Registration of Pharmaceuticals for Human use (ICH). This is aimed at improving the speed of development and registration of new medicinal products for the benefit of patients—and companies. Their regulations become de facto international standards, replace competing national regulations, and are often incorporated in national law without detailed national scrutiny. However, the regulatory power is largely exercised by unelected industry experts with technical expertise but no democratic authority, achieving a consensus with regional authorities. This process occurs without much in the way of transparency and democratic oversight. Patients and other payers do not participate, and are unlikely to have sufficient insight and voice to protest ex post.

Considerations of consistency amidst fragmentation are highly relevant here. One concern is that MLG is often issue-specific, and the competence and weight of the various bodies of regulation are not harmonized against one another. The result is multiple standards that are developed by separate institutions and that turn out to conflict in practice—e.g., between the accounting standards of the Basel Committee and those of the International Accounting Standards Board; or conflicting definitions of terrorism at the global and regional levels—both of which must be enforced by states. One response could be multiple legal orders, existing side by side, covering separate issue areas, where no clear hierarchy is needed. However, this solution does not often work in practice. Strikingly, the same issue areas are sometimes addressed by parallel MLG regimes—such as aspects of international aviation services. In principle, other mechanisms for securing harmony might avoid obvious conflicts, but at the cost of fragmentation and transparency. For instance, some argue that there may be a hierarchy of norms for each issue area, but that the hierarchy differs among issue areas.

28 Cf. Bradley and De Meester, this volume.
29 Dorbeck-Jung, this volume.
31 Cf. De Meester, and Husabi, this volume, respectively.
32 Cf. Kars and Stout, and Ott, this volume.
33 Cf. Ott, this volume.
34 Cf. Lavranos, this volume.
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So with regard to the need for transparent, simple and effective institutions, networks and other forms of MLG would seem to fall short on several points: with regard to their reason for existence, their compositions, objectives, mandate, as well as their effectiveness. In particular, there should be institutional mechanisms that ensure that network and other decision structures remain reasonably responsive to the best interests of citizens. Importantly, there must also be arrangements to provide assurance of this. To return to the network of courts: precisely these factors seem open to doubt with regard to the network of national courts within Europe and the European Court of Justice (ECJ). The ECJ seems to have a self-conception that it is the summit of a hierarchy of courts, while national constitutional courts may see themselves as part of a network. The observed centralization of competences toward the EU similarly gives rise to concern that conflicts about jurisdiction and supremacy must be addressed in trustworthy ways. Whatever its potential, it seems clear that the multilevel system of courts still falls short, as is also witnessed in the fight against terrorism.35

4. Concerning socialisation, both arenas of coordination and networks may socialize participants through processes of learning and deliberative preference formation. Multilevel parties may also help socialize citizens toward “overarching loyalty” in multilevel forms of governance. It remains to be seen and argued whether such socialisation takes place, and that it will reliably yield normatively desirable results, rather than groupthink or “in-group” solidarity at the expense of those not included yet affected. For instance, the power of ideas may be significant, but may still merit scrutiny. Consider, for instance, how definitions of “terrorism” affect regulatory choices far beyond the original setting, to include several international and regional bodies.36 Networks may contribute to socialization in important ways: members’ attitudes, beliefs and practices may well be shaped by such interaction. However, the networks run perennial risk of being used and abused. At best, their decisions may reflect the bargaining power of those around the table, and at worst the networks may be arenas for collusion for the members’ gains, rather than the benefits of citizens at large. Added transparency and political or legal scrutiny would be one way to reduce such mistrust.

5. Assurance of effective and efficient decisions. In several areas even “soft law” in the form of non-binding standards has great influence, simply because

35 Cf. Brown, Feinäugle, and Eckes, this volume.
36 Husabø, and Eckes, in this volume.
some dominant actors adopt them. They are thus “effective” in one sense. But a central challenge to multilevel regulation remains: to provide assurance that the decisions are indeed effective and reasonably efficient with regard to legitimate objectives – as compared to other arrangements with more accountable officials. In democratic arrangements media and opposition parties monitor and challenge such claims. Other institutional bodies may have to fill this monitoring function for the multilevel networks, public-private partnerships etc.

6. Monitoring of compliance. In democratic arrangements media, police and opposition parties monitor whether other citizens and the government comply with the rules. Multilevel regulatory bodies need functionally equivalent institutions to remain trustworthy. Courts may contribute to this function, under certain conditions. For instance, the regulations must be sufficiently clear, as must principles for handling conflicts among them. Thus international human rights may be secured by supranational courts and committees, such as the European Court of Human Rights. Currently at least two limitations on such judicial control can be discerned. First, there are competing regulations that stem from alternate legal sources – e.g. from the UN treaty bodies, the UN Security Council, international economic regulation and the EU. Their relative weight seems unclear. Secondly, the multiple sources of regulation may create new needs for legal protection as yet unmet, where courts will simply be insufficient.

7. Sanctions against violations of trust. A democratically accountable government may lose office if citizens find that it has abused their trust and fails to be sufficiently responsive. Public knowledge of this helps assure citizens that policy makers to some extent seek to promote the best interests of citizens. Similar assurance is harder to come by for some of the multilevel regulations insofar as neither independent agencies nor private-public partnerships are accountable. Yet the risks of abuse are obvious, and if unchecked are likely to erode trust among the citizenry.

Another central issue that threatens to corrode compliance is suspicion of “variable implementation”, that only some parties are living up to their obligations. One case where this concern is acute is the EU, where implementation is largely left to Member States. This is also often the only stage at which real democratic oversight is possible, and this creates the risk that popular opposition

37 E.g. for financial regulation see Bradley; for banking regulations see De Meester; both this volume

38 Brown, Bulterman, and Feinäugle, all in this volume.

39 Brown, this volume.
to the regulation takes the form of non-implementation. Such suspicion is one reason to favour centralization of enforcement.\textsuperscript{40}

To sum up: multilevel regulation may be created by single-issue networks with participants from many territorial levels, possibly with non-accountable parties, and without public contestation. Many exemplars of such multilevel regulation stand in dire need of clarification of their jurisdiction and authority – both when they overlap and where they leave gaps. Such non-democratic and opaque modes of decision making may easily paper over controversies and hide political choices. In the absence of monitoring mechanisms there is also a serious risk that over time they yield even worse, and even less “effective” solutions that democratic mechanisms. Moreover, even if they as a matter of fact do secure fair and effective outcomes, the absence of oversight renders them less trustworthy. To increase their normative legitimacy we should require more transparency, and require that they be supplemented by, or nested within, institutional arrangements that can provide public assurance that they are jointly sufficiently responsive to the best interests of citizens.

6.1. Two Constructive Suggestions

One upshot of this brief survey is that for multilevel regulation to be normatively legitimate there must be mechanisms that monitor, sanction and possibly hold members to account; and arrangements that secure consideration of the interests of the less powerful.

One fairly obvious, but also insufficient element is to ensure that some of the participants in the multilevel regulations are democratically accountable, and that their conduct is sufficiently transparent to allow meaningful ex post scrutiny. The challenges of “capture”, collusion, opacity and differential bargaining power remain, but it does seem necessary to have at least some mechanism of accountability in place for some of the participants. In conclusion, consider two additional arrangements that illustrate how some forms of assurance may be achieved, at least in the European Union but possibly elsewhere as well.

Clearer allocation and use of competences. One of the most vexing sources of mistrust in multilevel territorial regulation concerns the formal (usually constitutional) allocation and use of competencies across levels. One way to avoid such contestation is by a very clear delineation of authority. But that still leaves conflicts about the principles for such allocation. Clarity about such principles may help focus and resolve these conflicts. Within the EU, the

\textsuperscript{40} Bradley, this volume.
principle of subsidiarity purports to resolve some of these issues, by placing the burden of argument with those who seek to centralize authority.\textsuperscript{41} The underlying idea seems to be that Member States pool sovereignty in certain issue areas to regain effective governing capacity. Central authorities may thus only act when they can achieve certain objectives better than the sub-units acting alone. Such a principle of subsidiarity may indeed seem to reflect similar normative ideals as democratic rule: that policies must be controlled by those affected, to ensure that institutions and laws reflect the interests of all. Only when these considerations counsel joint action is central authority warranted.

The Reform Treaty for the EU\textsuperscript{42} would include a new procedure for applying a Principle of Subsidiarity that merits mention here.\textsuperscript{43} It would grant national parliaments access to legislative proposals, and let them appeal legislative proposals and suggested Treaty reforms for suspected violations of subsidiarity. This mechanism could promote assurance of several valuable kinds. It would facilitate public discussion and deliberation about the ends and alternative effective means of the European Union, thus providing assurance of types 1, 2 and 3. It does so in at least two ways: it first of all promotes openness and arguments among Member States and the Union institutions about comparative effectiveness. Secondly, these discussions prompt public reflection within the Member States themselves about the ends and means of common action. Such discussions may be crucial to citizens' long-term support for any political order, and for authorities' ability to govern.

Another form of assurance that the subsidiarity mechanism would provide concerns socialization. Discussions within political parties would occur at executive and legislative arenas at the national and European level about the common objectives of the Union and requisite measures to obtain them. This may foster the requisite "overarching loyalty" among all Europeans, to both accommodate concerns for citizens of one's own member state, and concerns for other Union citizens. These debates would be aided by the increased transparency of the legislative process laid out by the Reform Treaty.


The Reform Treaty would also reduce the opacity surrounding EU decisions: it would require public, substantiated arguments for comparative effectiveness of central action, where opposition parties may be expected to scrutinize the claims of comparative efficiency.

A central problem remains, namely that these objectives and their relative rank are contested. Member States presently disagree about which common ends are to be pursued by the EU, about the shared standards, and about the likely results of separate and common action. The Reform Treaty does not detail the objectives of this political project to the requisite degree. Within a more democratic EU this might be as it should, since these politically contentious issues might best be left to such democratic processes as there are.

**Human Rights constraints.** The Reform Treaty will also underscore human rights constraints on the EU, including a statement that the EU should sign the European Convention on Human Rights. These human rights mechanisms are not obviously directly democratic, and thus illustrate “non-democratic” mechanisms of legitimation.

The increased attention to human rights might enhance assurance of several kinds in the EU, with similar benefits and weaknesses as other forms of multilevel regulation. The Reform Treaty will not include the Charter itself. A separate declaration will make clear that the Charter will have legally binding force, but only over EU institutions. While hitherto not legally binding, the Charter provided a much-needed clarification of the legal human rights obligations of Member States. The Reform Treaty also strengthens the accountability aspect of a mechanism intended to foster human rights compliance within Member States. This procedure addresses suspicions that a member state engages in systematic violations of the Union’s values (Art I-59). The procedure already includes fact-finding, but the new version would include dialogue, to allow the target government to give an account of its policies to the EU. This component was notoriously absent in the “Reactions against Austria”.

The increased visibility of human rights in the Reform Treaty would bolster several forms of legal accountability that secure important forms of assurance. Indeed, the strengthening of human rights seems to have occurred in response to The German Constitutional Court. That Court found earlier treaties compatible with the constitution, but it insisted on its own right to protect fundamental rights, and its right to review whether European institutions acted within their limits. Similarly, the Danish Supreme Court also insisted that Danish courts

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44 Art I-9. Cf. Brown, this volume, and Bulterman, this volume, on current human rights protection in the EU.
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retain the authority to determine the constitutionality and hence applicability in Denmark of EC laws, regardless of the findings by the European Court of Justice.

The human rights provisions make union authorities and regulations more clearly accountable to European courts, which should monitor and ensure respect for individuals’ rights. Such human rights constraints, duly enforced, provide assurance that majorities in the Union bodies will not ignore the fundamental interests of those in the minority; and that the Union’s administration will respect all citizens’ rights. This serves to bolster assurance in several ways. Human rights protections reduce the likelihood of failed trust, by altering the trusted’s incentives to make it in her interest to do what the trustor expects. The protections also reduce the costs of failed trust by limiting the scope of valid majority rule. The simplification and visibility of human rights bolsters assurance regarding condition 2, and the courts provide assurance with regard to conditions 5, 6 and 7. They may also serve a socializing effect, as some have claimed with regard to the political elites.45

At least two weaknesses of these human rights protections merit mention. They may be common to many other human rights constraints on multilevel regulations. First, it remains to be seen to what extent the European Court of Justice would grant priority to human rights obligations when such requirements conflict with other important objectives of the Union. Will such constraints be sufficient to check executive power within MLG in general?46 Secondly, it remains to be seen how the “network” of national courts, the various European courts and UN bodies will handle the manifold human rights regulations, when they conflict among themselves and when they challenge other important policies such as fights against terrorism.47

7. Conclusion

The present reflections have explored how multilevel regulation may be made more normatively legitimate. I have brought to bear an account of legitimacy that


46 Cf. Brown, this volume.

47 Cf. Ott, Husabö, Brown, Feinläugle, Eckes, and Bulterman, all in this volume.
focuses on citizens political obligations as "contingent compliers" – willing to
do their share in just schemes, if they are assured that others act likewise. First,
the commands, rulers and regime must be normatively legitimate, and secondly,
citizens must have reason to trust in the future compliance of other citizens and
authorities with such commands and regimes. To merit obedience, institutions
must address at least seven assurance problems faced by such "conditional
compliers" under complex structures of interdependence. Democratic arrangements
provide several mechanisms that foster such trustworthiness to some degree. I
suggest that this perspective helps identify some of the areas where modes of
multilevel regulation often seem to fall short. The jurisdiction and authority
of various issue-specific regulations must be clarified, in terms both of where
they overlap and what is the status where they leave gaps. Greater transparency
will also bring out collusions and hidden controversial choices. Monitoring
mechanisms would reduce the risk that such regulations over time yield bad and
ineffective solutions, and would increase their trustworthiness in this regard.
To increase their normative legitimacy they may have to be supplemented by,
or nested within, institutions that are democratically accountable.

In conclusion, I suggested two kinds of mechanisms that might enhance the
requisite assurance: a principle of subsidiarity – or some other principle – that
helps identify the appropriate allocation and use of competences among levels
of authority. And arrangements to monitor the human rights compliance of
such multilevel regulations may serve to enhance their trustworthiness, that
their overall effects are indeed sufficiently responsive to the best interests of
individuals.