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The implementation of international law in the national legal order : a legislative perspective

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Citation

Beenakker, E. B. (2018, June 5). *The implementation of international law in the national legal order : a legislative perspective*. Meijers-reeks. s.n., S.l. Retrieved from <https://hdl.handle.net/1887/63079>

Version: Not Applicable (or Unknown)

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Issue Date: 2018-06-05

12.1 INTRODUCTION

In the present chapter we bring together our examination of international legal practice and our findings with regard to legislative quality. It enables us to establish whether the international legal regulation of implementing legislation can be considered adequate, which, as we have already explained, coincides with the question to what extent the regulation of implementing legislation ensures legislative quality. Thus, the purpose of the present chapter is, first and foremost, to assess whether the features of national implementing legislation, which are prescribed under international law, live up to the legislative standards which can be considered part and parcel of the notion of legislative quality. This question will be answered in section 12.2.

Our assessment of the international regulation of implementing legislation requires a systematic approach, which means that the objects of comparison should be *relevant* from the perspective of the regulation of implementing legislation and of the policies aimed at legislative quality. Furthermore, given the fact that the international legal regimes discussed in Part II do not perfectly reflect international legal practice in its entirety, but are merely an indication of that practice, we propose to look beyond the detailed features of one particular legal regime. Therefore, in section 12.2 we focus on three elements of the regulation of implementing legislation: its scope, character and substance. ‘Scope’ points to the scope of application, i.e. to the norms to which the regulation of implementing legislation applies. ‘Character’ refers to the extent to which a legislative standard can be considered binding on the national legislature, which is closely related to the question whether a legislative standard is codified and if so, in what form or instrument. The ‘substance’ of the regulation of implementing legislation covers the various features of national implementing legislation and legislative standards respectively. The three elements combined will provide us with a clear indication of the adequacy of international legal regulation of implementing legislation.

At the other end of the balance we need a yardstick that could be used to conduct our comparative analysis. To this end, we will resort to the OECD’s policy with regard to legislative quality. The selection of the policy with regard to the quality of national legislation developed under the guidance of the OECD could be justified with the argument that it is the single *global* regime on the topic, although it is acknowledged that the OECD membership has a ‘western’ bias; of the 35 member countries, 29 are located in Europe, North-America and Oceania. In this respect, it differs

from the legislative quality policies developed in the framework of the EU, the United Kingdom and the Netherlands. The policy developed by the EU's institutions does not apply to national legislation, but to supranational legislation, i.e. the EU's legislative instruments. The British and Dutch policies to increase legislative quality are *national* regimes which apply to one state only. Therefore, they may be less suitable to serve as the yardstick that we are seeking. For these reasons, the OECD's policy with regard to the quality of national implementing legislation is best suited to serve as the normative framework for our assessment.

Finally, on the basis of our assessment, in section 12.3 we suggest a possible way to enhance the quality of national implementing legislation.

12.2 QUALITY STANDARDS PERTAINING TO IMPLEMENTING LEGISLATION AND INTERNATIONAL LEGAL PRACTICE: A COMPARISON

12.2.1 Scope of the regulation of national implementing legislation

A comparison of current international legal practice with regard to the regulation of national implementing legislation and the OECD legislative policy, reveals two fundamental differences and one similarity with regard to their respective scope.

First of all, in the absence of rules under general international law, the international regulation of implementing legislation has a rather narrow scope; it exclusively applies to national legislation which serves to implement the legal instrument at hand, very often a treaty. Overall, as we have seen in Chapter 10, this has resulted in a highly fragmented regulation of national implementing legislation, *between* regimes and *within* regimes. Of course, this state of affairs is a direct consequence of the absence, under general international law, of legislative standards governing national implementing legislation. In contrast, the legislative quality policy developed under the guidance of the OECD aspires to govern an unlimited number of laws to be adopted by the national legislature in the future.¹²¹⁶ In our view, the aforementioned fragmentation is the most problematic aspect of current international legal practice from a legislative quality viewpoint, since it prevents international policy makers to systematically take into account the elements which determine the effectiveness of national implementing legislation.

¹²¹⁶ More accurately, the OECD's policy to enhance regulatory quality applies to 'policies, institutions and tools' (OECD Guiding principles p. 3). Since our comparison is limited to legislative standards, as we have discussed in the introduction to Part II, other aspects of the OECD's legislative policy, such as the recommendation that 'regulatory policy should be carried out at the highest level by the office of the President or Prime Minister', are left out of the equation.

Second, contrary to the current international legal practice with regard to the regulation of national implementing legislation, the OECD legislative quality policy concerns national legislation in general; it does not particularly focus on national *implementing* legislation.

We can also discern a similarity. Often, legislative standards that are part of the regulation of national implementing legislation under international legal regimes are not limited to implementing legislation only; instead, they apply to the broader category of national implementing *measures*. Similarly, the OECD's 'regulatory reform' policy in principle concerns any form of government intervention in society, not only those laid down in legislation.

12.2.2 Character of the regulation of national implementing legislation

With regard to the character of the regulation of national implementing legislation, there is one principal difference, which on a more positive note may also be considered a partial similarity: whereas the legislative policy propagated by the OECD has a non-binding character, the legislative standards which we have identified under the international legal regimes discussed in Part II have a partially binding and partially non-binding nature.

The 2012 Recommendation on regulatory policy and governance has been adopted pursuant to article 5, sub b, of the Convention on the OECD, which provides the OECD with the power to make recommendations to its members with a view of achieving its aims. The chosen wording and legal basis thus imply a non-binding character. As we have seen in Part II on current international legal practice, some legislative standards have been included in binding legal instruments, most notably treaties. As such, those legislative standards possess the force of law. Other standards have been codified in supplementary documents such as guidelines for implementation and handbooks. They must be labelled 'soft law' instruments which lack formal legal power.

However, the distinction between binding and non-binding legislative standards may not be as relevant in practice as one might think. Whereas, of course, a standard's legal force is stronger if it is included in a binding legal instrument, the precise legal consequences it produces may not be clear from the outset. Thus, the formulation of binding legislative standards in open terms may still provide a considerable measure of latitude to the national legislature in drafting the national implementing law.

12.2.3 Substance of the regulation of national implementing legislation

To what extent do the legislative standards under current international legal practice and the OECD legislative policy coincide? Above we have made a distinction between three categories of legislative standards: standards with regard to legislative procedure, standards with regard to legislative substance and standards with regard to legislative form. Although this

distinction is not expressly made in the 2012 Recommendation, all three categories come to the fore.

With regard to legislative form, the 2012 Recommendation provides that regulations should be 'comprehensible and clear'. To this end, states are called upon to use 'plain language', which enables legal subjects to understand their rights and obligations.¹²¹⁷ In Chapter 10 we have identified similar requirements under the current international legal practice, in particular under the heading of legal certainty. In the context of the ECHR's positive obligations, as we have seen, the ECtHR has treated the observance of legal certainty as a crucial condition for the provision of 'effective protection'. Formal requirements can also be derived from the conditions under which the ECHR's rights may be restricted. However, the observance of formal criteria in the adoption of national implementing legislation may be most firmly established under EU law, which demands 'specificity, precision and clarity'.

On matters regarding legislative procedure, the 2012 Recommendation stipulates that states should:

'[a]dhere to principles of open government, including transparency and participation in the regulatory process [...] This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis'.¹²¹⁸

Furthermore, it is recommended that states conduct regulatory impact assessments for the development of new legislative proposals. It entails, *inter alia*, the clear formulation of policy objectives and the various options to achieve them, including options which do not require the adoption of legislation.¹²¹⁹ It also stipulates that states continue to review their existing body of legislation to make sure that 'regulations remain up to date, cost justified, cost effective and efficient, and deliver the intended policy objectives'.¹²²⁰ In short, states should consult relevant organisations and should perform *ex ante* and *ex post* impact assessments. To what extent do these requirements emerge under international legal practice?

As we have seen in section 10.3.3.3, the legislative standard of consultation can be found under the CDWDW, the FCTC and the ICESCR. Under those regimes, consultation serves the purpose of creating support for the adopted legislation and to improve the quality of legislation. We have also seen that the requirement of *ex post* evaluation of legislation can be identified under the ICESCR and the FCTC. Compared to truly autonomous national legislation, one legislative standard that is part of the OECD's regu-

1217 OECD, 'Recommendation of the Council on Regulatory Policy and Governance' (n 1122) section I, sub 2, and section 2.6 of the annex.

1218 Ibid, section I, sub 2.

1219 Ibid, section I, sub 4.

1220 Ibid, section I, sub 5.

latory quality policy may be less relevant for implementing legislation: the clear formulation of policy aims and the consideration of various options to achieve those aims, i.e. an *ex ante* impact assessment. Very often, once an international legal regime has been established, that ship will have sailed. Whether a state party is at liberty to consider multiple options to obtain the policy objectives agreed upon in the international instrument, will depend largely on the level of specificity of the applicable international norm. The same point could be made with regard to the standard of consultation. Since at this stage the state has already contracted an international legal obligation to adopt implementing legislation, consultation partners can merely attempt to improve national implementing legislation; their advice cannot, however, lead to the conclusion that the national legislature should refrain from the adoption of legislation altogether.

The 2012 Recommendation also provides guidance on matters of legislative substance. A law's legality and procedural fairness should be subject to effective systems of review, which means that citizens should have access to remedies against sanctions imposed upon them. As we have seen, the provision of 'effective' remedies to challenge national implementing legislation is firmly established in article 13 the ECHR. Also in the context of the CDWDW, MLC and ICESCR the need for domestic remedies has been emphasised, which under the latter regime should meet the criteria of 'availability, accessibility and quality'. Without doubt the most elaborate requirements with regard to domestic remedies can be found in EU law, which in several respects has circumscribed the national procedural autonomy of member states.

Furthermore, the OECD regulatory quality policy demands that legislators consider 'how regulations will be given effect and should design responsive implementation and enforcement strategies'. In sections 10.3.2, 10.3.3.5 and 10.3.3.6 we have seen that the standards of effectiveness, of compliance monitoring and of enforcement could be derived from current international legal practice. Together, they can be said to meet the standard formulated by the OECD.

The 2012 Recommendation also emphasises the importance of 'regulatory coherence' between the various levels of government, which means that duplication and conflicts between regulations should be avoided.¹²²¹ As such, this particular standard cannot be identified in international legal practice. However, we have seen that several international regimes stipulate that national implementing legislation should be adopted in accordance with other domestic legal provisions of higher rank in order to ensure its effectiveness.

Also, according to the OECD, national legislatures should observe 'all relevant international standards' in order to foster 'global coherence'.¹²²² The annex to the Recommendation emphasises the need to act in accordance

1221 Ibid, section I, sub 10.

1222 Ibid, section I, sub 12, and section 12.2 of the annex.

with treaty obligations. It particularly stresses the obligation to treat foreign products and services no less favorable than domestic products and services, which once again reveals the economic perspective engrained in the OECD's regulatory policy.¹²²³ Under the international legal regimes that we have discussed in Part II, similar requirements can be found. Examples include, *inter alia*, the CITES, the ICSFT and the CTOC which in brief prescribe that states' national implementing legislation should comply with other relevant, existing international legal norms. In doing so, this standard's codification stresses the importance of 'global coherence'.

In view of the above, there seems to be a discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality. However, this discrepancy is related primarily to the scope and, to a lesser extent, character of the legislative standards which govern national implementing legislation. With regard to the legislative standards' substance, on the other hand, the similarities are striking; every single requirement applicable to legislation under the OECD legislative policy, can be found under at least one of the international legal regimes discussed in Part II. It does not mean, however, that they are perfectly identical. It warrants the conclusion that international policy makers seem to be aware of the legislative standards that could be included in any special international legal regime that requires implementation through legislation on the national level. It has, however, not resulted in a consistent entrenchment of those standards in international legal practice.

12.3 A GAP TO BRIDGE?

In the previous section we have identified a discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality. It begs the question: is there a gap to bridge? In other words, does the quest for legislative quality demand a change in attitudes in international legal practice? If so, what should this change in attitudes entail? In the present section we explore the fundamental considerations which determine the answers to these questions.

First of all, the question arises whether there is a problem that needs to be solved. Some may argue that the discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality, to which we have referred above, may justify an affirmative answer. Proponents of this standpoint may argue that we are confronted with the problem that the regulation of national implementing legislation

¹²²³ Ibid, section 12.3 of the annex.

under international law is, from a legislative quality viewpoint, not as good *as it could be*. Therefore, they would add, current international legal practice needs improvement. Others may adhere to the view that the regulation of legislation in whatever form in order to improve legislative quality is a policy aim not worth pursuing. They may submit, for instance, that the absence of such regulation is not perceived as a problem in a specific political community or they may assert that legislative quality may be achieved in other ways than through the formulation of mandatory standards applicable to legislation. In both cases, the identified problem is considered as purely theoretical, which may not justify an allocation of public resources. In other words, to supporters of this line of reasoning the fact that the regulation of national implementing legislation under international law demonstrates some flaws may not be problematic at all.

Let us assume that the discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality constitutes a problem that needs to be solved. Should the solution be found on the international level?

One may argue that international cooperation between states should be reserved for problems which have a transboundary character (such as transnational crime, international trade in wildlife and the international spread of infectious diseases, to mention only a few examples that we have discussed in Part II). Only in those cases the watering down of the democratic legitimacy of state policy could be justified. Why should a policy to remedy an alleged lack of quality of national (implementing) legislation possess international dimensions? Even under international law, it could be argued, the power to adopt legislation is considered to be inherently linked to the notion of state sovereignty. This fact is neither altered by the finding that legislative quality is aspired in several or even many countries around the globe, nor by the fact that some legislation serves to implement international legal obligations of the state. As a corollary, any attempt to enhance legislative quality should be undertaken first and foremost at the national level. Perhaps even more importantly, legislation must be seen in the light of its context, which consists of the national legal culture in its broadest sense. Therefore, a policy which aims at the improvement of legislation could only be successful if it pays heed to the particular context of the national legal order in which it is to be applied. For this, a national legislative policy is much more suited. It follows that any legislative policy has better odds at obtaining its objectives if it is formulated at the national, instead of the international, level. In sum, we may conclude, the statement that the improvement of legislation, including national implementing legislation, should be pursued primarily at the national level, is not without merit.

Others may defend the position that the divergence between international legal practice in respect of the regulation of implementing legislation and theories and practices which seek to enhance legislative quality, is a

problem that should be solved at the international level. They may point to the fact that national implementing legislation finds its origin in an international regime to which the state has committed itself on the international level. All the state parties involved have an interest in making the regime work in practice, of which high quality national implementing measures constitute an indispensable element. In this view, legislative quality is closely related to the regime's effectiveness, a standpoint which, as we have seen in Chapter 11, is widely supported. Therefore, they may submit, the quality of national implementing legislation is a matter of international concern, which justifies the codification of standards for domestic implementing legislation on the international level.

Both viewpoints contain elements of truth and both are part of the solution. In our view, it basically consists of a balancing act between the protection of state sovereignty on the one hand and the international legal regime's effectiveness on the other hand. In particular, it entails the codification of the requirements pertaining to the quality of implementing legislation in the meaning we have attributed to this concept in Chapter 11: the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. As we have explained, the notion of quality essentially coincides with the regime's effectiveness, provided that we adhere to a broader notion of effectiveness than effectiveness purely in an instrumental sense; a law's quality can only be established in the light of its function or functions. The solution that we envisage is based on the assumption that our definition of legislative quality is one that should be encouraged by any state seeking compliance with the regime, as it makes a truly effective international legal regime more likely.

The codification of legislative standards could only be successful if it respects the broad variety in national legal systems and national legal practices with regard to the adoption of implementing legislation. In other words, it is of paramount importance that the international codification of quality requirements for implementing legislation is *flexible*. This flexibility could be strived for in two ways.

First, the quality requirements should be laid down in an authoritative and non-binding instrument. Or, more accurately, they should *not* be laid down in a *binding* instrument. The adoption of a non-binding instrument could not only be reconciled more easily with the protection of the national legislature's powers, which derive from the state's sovereignty. Also, ironically, the non-binding character of legislative standards pertaining to implementing legislation may increase the document's potential to significantly influence international legal practice. Were it codified in an international treaty, for instance, the document runs the risk of becoming subject to fierce negotiations, which may result in the codification of a hollow and meaningless collection of legislative standards. Ideally, therefore, the quality of national implementing legislation should be discussed and elaborated by

the ILC, the authoritative UN body entrusted with the task of 'encouraging the progressive development of international law and its codification'.¹²²⁴

Second, the quality requirements should be formulated in a way that leaves room for the national legislature to consider their correct application when preparing a specific legislative proposal that serves to implement an international legal regime to which the state is bound. Again, it is a safeguard for the protection of a state's sovereignty. Thus, the legislative standards should be formulated in a sufficiently broad manner. For the same reason, they should be formulated as recommendations instead of mandatory instructions.

What should such a document look like? As we have seen, the discrepancy between current international legal practice with regard to the regulation of national implementing legislation on the one hand, and theories and practices which aim at the achievement of legislative quality, as codified in the framework of the OECD, on the other hand, largely concerns the legislative standards' scope. Thus, the solution that we envisage should primarily address the fact that international policy makers do not systematically take into account the elements which determine the effectiveness of national implementing legislation, thereby also jeopardising the international regime's effectiveness. This could be achieved by making clear that the legislative standards which, albeit irregularly, have already emerged in international legal practice, should be applied by the national legislature whenever it adopts national implementing legislation.

It raises the question how the international non-binding codification of legislative standards relates to the inclusion of legislative standards in the various binding international legal regimes, for instance those discussed in Part II, which require implementation on the national level. While the former should be taken into account by *national* policy makers involved in the preparation of national implementing legislation, the latter are the product of decision making by *international* policy makers involved in the preparation of the international legal regime. In our view, there seems to be no reason why the international non-binding codification of legislative standards applicable to national implementing legislation should be reserved for national policy makers; indeed, it may provide assistance to international policy makers as well, who may consider their inclusion in the international legal regimes at hand. In short, it may not only increase international policy makers' interest in the quality of national implementing legislation, but may also provide them with practical instructions to achieve it.

In theory, our international codification of legislative standards may be accepted by decision makers to a varying degree. Each reference to our document, whatever its nature, contributes to the spread of knowledge on the quality of national implementing legislation. At the one end of the spectre, our document may serve as an *inspiration* for international and

1224 ChUN art 13, first paragraph, sub a; UNGA res 174(II) (21 November 1947).

national policy makers. At the other extreme, decision makers may choose to codify our solution in a binding legal instrument, thus completely *harmonising* the international legal regulation of national implementing legislation. In between, policy makers of specific international legal regimes may refer to our document or may prescribe it as mandatory.

If legislative standards applicable to national implementing legislation could be internationally codified along the lines described above, this may increase the quality of implementing legislation to the advantage of political communities across the globe, while at the same time respecting the democratic underpinnings of national decision making.

12.4 CONCLUSION

In this chapter we have formulated an answer to the question whether the features of national implementing legislation, as prescribed under international law, live up to the legislative standards which can be considered part and parcel of the notion of legislative quality. This analysis has drawn upon our findings included in Chapters 10 and 11 and has looked particularly into the scope, character and substance of the legislative standards that we have identified under international law and as part of theories and practices with regard to legislative quality respectively.

In short, there seems to be a discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality. It mainly concerns the scope and, to a lesser extent, character of the legislative standards which govern national implementing legislation. With regard to the legislative standards' substance, we have found a large measure of overlap with the standards codified in the framework of the OECD. These findings justify the conclusion that current international legal practice, as represented by the regimes that we have discussed in Part II, is only partly adequate in ensuring the quality of national implementing legislation.

In section 12.3 we have analysed whether the established inadequacy or partial adequacy is a problem that should be addressed on the international level. We have argued that there is a gap to bridge, for which the codification of legislative standards on the international level, preferably in a non-binding instrument, may be an appropriate solution.