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

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13.1 THE RESEARCH QUESTIONS REVISITED

In the present study we have analysed the national legislature's contribution to the realisation of international law. In particular, we have analysed its role in the implementation of international law in the national legal system in order to formulate an answer to the following research question:

To what extent is domestic implementing legislation regulated by international law and to what extent is this regulation adequate?

In our attempt to formulate an answer to this question we have adopted an international and institution-oriented approach which has specifically focused on the national legislature's role as an institution in the implementation of international law in the domestic legal order. It also means that we have looked beyond the particular characteristics of individual national legal orders and their legislatures. Neither have we discussed how specific international legal instruments have been implemented in one or more national legal orders. Instead, we have analysed several international legal regimes in order to determine to what extent they provide for standards which should be observed by state parties in the adoption of implementing legislation in their respective domestic legal orders.

Our findings can be summarised as follows. As a point of departure we have formulated an answer to the question why implementing legislation is an essential precondition for the realisation of international law. As we have seen in Part I, even though there are some indications that their shared border is becoming increasingly permeable, the international and national legal orders can still be largely seen as distinct systems; 'law' of the international legal order often does not possess the quality of law in national legal orders. As a consequence, it is not capable of regulating the conduct of legal subjects *directly*. It means that an act of implementation is indispensable if international policy makers intend to realise the formulated policy objectives. Subsequently we have explored the sources of international law which may give rise to national implementing legislation, as opposed to implementation through the executive or judicial branch of government. In quantitative terms, it seems justified to conclude that the lion's share of obligations to adopt implementing legislation derives from treaty law. However, those obligations could also be derived from binding decisions of international organisations and, in exceptional circumstances, from customary international law.

The obligation to adopt the necessary legislative measures to implement a binding international legal instrument is firmly engrained in international law. Nevertheless, in Part II we have established that there is no rule of *general* international law which prescribes how such implementation should be performed. Our analysis of various *special* international legal regimes, however, has revealed a diverse practice with regard to the regulation of implementing legislation: whereas some regimes stipulate in much detail the standards that national legislatures should comply with, other regimes provide hardly any guidance in this regard. Whenever international policy makers have considered it feasible to include legislative standards in the regime at hand, they tend to refer to the same standards. In other words: although there may not be a uniform practice with regard to the question *whether* legislative standards should be included in the regime, there seems to be consensus on *which* legislative standards should be included in case the regulation of implementation is deemed desirable.

Most regimes seem to adhere to the standard of effectiveness, which essentially prescribes that national implementing legislation should be able to bring about a desired change in behaviour. It is complemented with what we have labelled 'subsidiary elements of effectiveness'. They are separate legislative standards, but are often treated as necessary preconditions for effectiveness. Under the ECHR, for instance, observance of the requirement of legal certainty was considered a *sine qua non* for 'effective protection'. Therefore, it seems justified to describe the relation between the overarching standard of effectiveness and its subsidiary elements as hierarchical.

As we have derived from the international legal regimes we have discussed in Part II, the subsidiary elements of effectiveness include the following eight standards: consistency with other applicable national and international law, including the prohibition of non-discrimination; consultation with stakeholders; provision of information to the public; monitoring of compliance; enforcement; remedies; evaluation; and legal certainty.

The standard of consistency with applicable law demands that national implementing legislation is consistent with other norms applicable to the same subject matter, of national and international origin. In some cases, the international legal regime allows national legislatures to 'fill in' parts themselves. As we have seen under the CCTMW, for example, national legislatures are at liberty to label certain categories of waste as 'hazardous', thus bringing them under the treaty's scope of application. In other cases, the international legal regime prescribes that national implementing legislation should not infringe on national laws of higher rank in order to prevent a national law to remain without effect. We have found similar references to applicable *international* law. Again, there are regimes which rely on other international norms (in a more or less compulsory manner) to fill in aspects of national implementing legislation. As we have seen in section 4.2.3.4, national legislatures which perform their implementing obligations under article 12 ICESCR on sexual and reproductive health, should observe 'international guidelines and protocols established by UN agencies'. In

other cases, international law prescribes that national legislatures have to ensure that implementing legislation respects certain established norms of international law, such as the principles of territorial integrity of states or the principle of non-intervention. We have also found a legislative standard to perform consultation with relevant stakeholders. Which stakeholders are considered relevant, depends on the substance of the regime at hand. On the basis of our examination we may conclude that the purpose of consultation is to improve the substance of national implementing legislation and to facilitate support after its entry into force. Furthermore, we have identified a legislative standard which demands that governments provide information on the newly adopted implementing legislation. This information should be aimed at groups which are particularly affected by the legislation. The legislative standard to monitor compliance with national implementing legislation requires states to establish mechanisms for compliance monitoring and ensure that state bodies entrusted with compliance monitoring are competent and independent. Once a violation of national implementing legislation has been established, another legislative standard comes into play: enforcement. It requires the appointment of national enforcement authorities and the adoption of a legal framework for the imposition of effective and proportionate penalties or other enforcement measures in response to violation of domestic implementing legislation. In addition to these regulatory matters, this legislative standard also requires enforcement *in practice*. Another legislative standard requires states to provide for remedies available to individuals or entities affected. Such remedies provide them with the tools to challenge national implementing legislation and to enforce their rights. Furthermore, after its entry into force, states should engage in a periodic *ex post* evaluation of national implementing legislation. This enables them not only to assess whether national implementing legislation is in conformity with the applicable international legal regime, but also how it could be improved. Finally, we have discerned the legislative standard of legal certainty. It requires national legislatures to draft national implementing legislation in sufficiently clear and precise terms and to ensure its accessibility and foreseeability.

Our analysis has demonstrated that the regimes explored in Part II do not consistently refer to every single one of the aforementioned legislative standards; those standards differ in scope of application. Even within a specified international legal regime, a legislative standard's scope of application may differ from one provision to the other. Moreover, the standards' substance is not identical under the various regimes of which they are part; it would be inaccurate to state that 'effective protection' under the ECHR has the same substance as the principle of effectiveness under EU law. As a consequence, it would go too far to claim that the enumeration of the legislative standards mentioned above and the meaning attributed to them are *in its entirety* part of positive law to which the national legislature is bound. On the other hand, it would be equally inaccurate to ignore their common features. We have seen that the legislative standards do emerge

under several regimes, which may indicate that international policy makers somehow consider them relevant elements of domestic implementing legislation or legislative procedure. If we are aware of their limitations, our overview of the legislative standards inferred from international legal practice provides us with valuable insight in the way international law regulates national implementing legislation, as we have seen in Chapter 10.

Subsequently we have asked to what extent observance of the legislative standards discussed above will lead to 'good legislation' as part of an assessment of the legislative standards identified under international law. What constitutes 'good legislation' is highly contested. In Chapter 11 we have explored the various perspectives on this controversial subject. To this end we have analysed the legislative quality policies of the OECD, the EU, the United Kingdom and the Netherlands in more detail, in particular with regard to legislative standards. They represent four approaches to what legislative quality entails and how it should be achieved. In some respects they differ. Whereas some policies have been codified in documents widely used by national policy makers, other policies rely on the specialisation of highly trained legislative lawyers. And while some policies apply to regulation in general, other policies concern a specific form of regulation: legislation. We can also discern similarities, in particular with regard to the legislative standards which are considered indispensable elements of legislative quality.

We have seen that the notion of 'effectiveness', or the extent to which a piece of implementing legislation is able to bring about a desired change in behaviour, is central not only to many international legal regimes (which we have already argued above), but also to policies on legislative quality. It can be viewed as the overarching objective, the realisation of which is supported by observance of legislative standards of a subsidiary nature. However, this state of affairs does not warrant the conclusion that 'legislative quality' and 'effectiveness' are synonyms. As we have seen in Chapter 11, this understanding of legislative quality is too narrow, because it exclusively addresses the instrumental function of legislation, while ignoring other functions which could be attributed to legislation. For this reason, we have proposed the following definition of 'quality of implementing legislation': the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. Subsequently we have established the relevance of legislative standards for the assessment of a law's quality. Three categories of legislative standards can be distinguished: standards with regard to legislative substance, standards with regard to legislative form and standards with regard to legislative procedure.

As the next step in our assessment of the regulation of domestic implementing legislation under international law, we have relied on the OECD's legislative quality policy. This choice can be justified by the fact that it constitutes the only coherent policy on legislative quality with truly global aspirations, even though 'western' states are over-represented in the OECD

membership. In order to operationalise our comparison of the OECD's legislative quality policy on the one hand, and our overview of international legal practice with regard to the regulation of national implementing legislation on the other hand, we have looked at three aspects in particular: the scope, substance and binding character of the legislative standards.

What are the results of our endeavour? With regard to the legislative standards' *substance*, international legal practice largely coincides with the OECD's legislative quality policy: the legislative standards that we have identified under the international legal regimes discussed in Part II also emerge in the legislative quality policy of the OECD. They are not identical, however. For instance, while we have identified obligations to observe other relevant international legal norms in the adoption of national implementing legislation, the OECD emphasises the need for 'global coherence', i.e. consistency between various international regimes, in the regulation of the same subject matter. Other legislative standards may be less relevant in the adoption of national implementing legislation and, as a result, receive far less attention under the international legal regimes discussed in Part II than under the OECD's legislative quality policy. Examples are the standard to perform *ex ante* impact assessments and the standard to perform a consultation process. Aside from these differences, the picture that emerges is one of consensus on the quality criteria that should be observed in the adoption of national (implementing) legislation; standards on the law's clarity, *ex post* evaluation, compliance monitoring, enforcement and remedies, are part of both the international legal regimes discussed in Part II and of the OECD's legislative quality policy.

Our comparison of the legislative standards' *character* warrants the conclusion that legislative standards often possess a non-binding character, since they are laid down in soft law documents, such as implementing guidelines, legislative guides etc. In this respect, their character resembles the OECD's legislative policy character, which is laid down in a non-binding recommendation. Nevertheless, other legislative standards are firmly established in binding legal instruments, very often the international legal instrument that needs to be implemented on the national level.

Finally, with regard to the legislative standards' *scope*, we have demonstrated that international legal practice is highly fragmented. This fragmentation has two dimensions. First, legislative standards which are part of international legal regimes, often do not apply to the regime in its entirety, but only to specific provisions. For instance, we have seen that the Guidelines for Implementation under the FCTC stipulate that domestic implementing measures 'should identify the authority or authorities responsible for enforcement, and should include a system both for monitoring compliance and for prosecuting violators'.¹²²⁵ This requirement, however, is limited to articles 9 and 10 FCTC on the regulation of the content of tobacco

1225 WHO, *Guidelines for implementation* (n 177) 45. The Guidelines contain an identical statement with regard to article 8 of the Convention. *Ibid.*, 26.

products, including the publication of information about their content. It may lead to a situation in which legislative standards should be observed by the national legislature with regard to specific parts of national implementing legislation only. This state of affairs cannot be justified from a legislative quality perspective. Second, no codification of legislative standards applicable to implementing legislation exists under general international law. As a result, policy makers involved in the formulation and negotiation of a new international legal regime should 'invent' the legislative standards which they consider useful and include them in the regime at hand. This has led to the situation, as we have seen clearly in Part II, in which international legal regimes differ significantly in the way they prescribe the standards that should be met in the adoption of national implementing legislation. In contrast, the legislative quality policy adopted in the framework of the OECD applies to an unlimited number of regulations or laws in their entirety (even though they do not apply to implementing legislation in particular).

In sum, whereas international legal practice with regard to national implementing legislation is highly fragmented, the legislative quality policy developed under the auspices of the OECD can be said to improve, or at least seek to improve, coherence between member states' legislative quality. This discrepancy is a gap to bridge, as we have argued in Chapter 12, if we accept that state parties not only have an interest in making the international regime to which they have committed themselves work in practice, but also that the pursuit of legislative quality has an important role in ensuring the regime's effectiveness.

13.2 THE GAP TO BRIDGE

Given this state of affairs, we have proposed to codify legislative standards applicable to national legislation which is adopted in order to implement international legal obligations. This document should not be applied rigidly, however, in the sense that it should prescribe a 'one size fits all' path to legislative quality. On the contrary, it should respect differences between national legal systems and the legislation they produce. In other words, our international codification of legislative standards should leave room for the national legislature to make the legislative choices which suits it the most (provided, of course, that those choices are in conformity with the state's international commitments). This flexibility could be achieved by the adoption of a non-binding document in which the various legislative standards are formulated in a sufficiently broad manner, which would make compliance by a large number of states more likely. This ambition could be realised in a relatively short period of time, if this task is taken up by a group of experts (such as the ILC). In this way, we can contribute to the improvement of national implementing legislation, and thus to the effectiveness of international law, without eroding the democratic underpinnings of national decision making.

13.3 THE INTERNATIONAL PURSUIT OF HIGH QUALITY IMPLEMENTING LEGISLATION

Now we are approaching the end of the present study, it may be useful to briefly reflect on the pursuit of legislative quality on a more abstract level. As we have seen in Chapter 11, national, regional and international political communities have endeavoured to improve the quality of legislation or implementing legislation in particular, each of which has specific priorities and features.

The question arises how these various developments relate to each other. Can we observe a convergence? Of the regimes discussed in Part II, one regime stands out because of its seniority: the EU. Its origins can be traced back to the 1950's, which makes it significantly older than most of the other international legal regimes that we have discussed in Part II. Its development has been overseen on the basis of compulsory jurisdiction of the CJEU. Most importantly, the EU has proved to be able to produce a vast body of legislation which affects many aspects of the EU citizens' lives. Arguably, the sheer size of the body of EU legislation and of its interpretation by the CJEU has made the quality of implementing legislation more pressing within the framework of the EU than under the other regimes that have been discussed in Part II. It may therefore not be a coincidence that the development of EU law is accompanied by a continuous elaboration of EU policies on the quality of legislation, as we have seen in Chapter 11. In this respect, it could be argued, the EU is 'ahead' of other international legal orders.

Is this point of view correct? Perhaps. On the one hand, national and international actors that are involved in the development of new ideas and policies aimed at the improvement of the quality of national implementing legislation, may wish to inform themselves about existing ideas and policies on the subject. To this end, they may turn to the EU's or OECD's legislative quality policy. In Chapter 12 we have made exactly that assumption, when we proposed the formulation of a non-binding policy document on the topic, with a view to enabling national and international policy makers across the globe to ensure legislative quality in their national or regional legal orders. On the other hand, there are reasons to believe that the quest for legislative quality does not necessarily point in one single direction. As we have seen in Chapter 11, controversy exists with regard to the question how the concept of legislative quality must be understood, and which legislative standards should play a role in its achievement. Arguably, as long as nation states remain the most prominent political entities in the international environment, theories and practices with regard to the quality of (implementing) legislation will be tailored to their particular needs. This also means that a legislative quality policy developed in a national legal order may not necessarily serve the needs of another legal order in which it is bluntly duplicated. Against this background, we find it difficult to imagine that one day, all legal communities will agree on one single binding

and highly detailed policy to enhance the quality of national implementing legislation. Until that day comes, if ever, national and international policy makers may prefer to borrow ideas and policies developed across their legal orders' boundaries and attempt to reconcile them with their legal orders' characteristics. The importance of this has been underlined by Karpen, who has stated that:

'[i]f we understand why and how, in applying common standards, others legislate differently than we do, we are encouraged to compare and learn, and to improve our methods or retain our own legislative style'.¹²²⁶

To this process, the present study may be a modest contribution.

¹²²⁶ Karpen, 'Introduction' (n 13) 2.