1 Introduction: Law and compliance at different levels

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Is law – understood as a normatively meaningful form of social regulation – conceivable or indeed possible beyond the nation-state? This is the guiding question that informs our inquiries in Law and Governance in Postnational Europe: Compliance beyond the Nation-State. It is based on the conviction that governance beyond the nation-state must contain elements of law if it is to be considered legitimate. The focus therefore is on compliance as an element of social order, not only as a means of effective problem-solving. We will demonstrate that a record of good compliance in multilevel systems does not depend on an agent that is generally able to enforce rules on the basis of a superior availability of material resources. Our case studies show that with respect to some regulations the EU displays better compliance records than comparable regulations in the Federal Republic of Germany. Even compliance with WTO regulations can be compared favorably with compliance with German regulations. A high degree of legalization, combined with well-functioning verification and sanctioning systems, seems to be more important. However, smart institutional designs can cause their own problems. If the intrusions into the constituent units of a multilevel system are too strong and compliance works too well, then compliance crises may result, which involve an open, normatively-driven rejection of the regulation. This is especially true if social integration lags behind and a common public discourse is absent.

Our project on law and governance in postnational Europe can be distinguished from two international, multi-disciplinary research programs which in many ways have inspired and shaped our work. One important strand of research on international environmental politics looks into the conditions necessary to ensure effective environmental policies, i.e. policies that succeed in doing what they were intended to do. “Effective regimes cause changes in the behavior of actors, in the interests of actors, or in the policies and performance of institutions in ways that contribute to positive management of the targeted problem” (Young and
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This strand of research also focuses on the implementation of international commitments as well as on those actors whose behavior the relevant accord ultimately aims to change (Victor, Raustiala and Skolnikoff 1998: 4). It includes studies in which rule compliance is seen as one aspect, or even a fundamental criterion, for the effectiveness of a rule. The other strand of research investigates the problem-solving capacity of the EU. Our approach differs from these research strands in the following two ways:

- Apart from the simple “effectiveness” or “problem-solving capacity” of international regulations, our focus is also on the process – or to be more precise, the normative integrity – of regulatory creation (as an independent variable) and regulatory application (as a dependent variable).
- Our interest is not so much in the problem-solving capacity of a specific international regulation, but rather in the potential of constitutional political orders in general. The aim is to identify the central elements of a democratically legitimate and effective multi-level form of governance beyond the nation-state and we do this by raising the question that is crucial to all political systems – why do the addressees of regulations comply with them?

In this introductory chapter, we develop in section 1.1 two principal answers to our guiding question – is law possible beyond the nation-state. One states an unconditional ‘No’, the other a conditional ‘Yes’. These two principal hypotheses have a foundation in both the theory of law and the theory of international relations. In section 1.2 we discuss the selection of cases across levels and why the study and comparison of those cases is appropriate to help answer the questions that drive this project. Section 1.3 differentiates the second hypothesis by introducing four theoretical perspectives on the sources of non-compliance and the conditions for good compliance records beyond the nation-state. The four theoretical perspectives are labeled “rational institutionalism,” “management,” “legalization,” and “legitimacy.” In this way, section 1.3 identifies the major variables that have to be taken into account when studying compliance issues. Finally, in section 1.4, the substance of the ensuing chapters

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1 See especially the edited volume by Young (1999b) and the recent work of Møes et al. (2002) for major contributions to this field of study. See Levy, Young and Zürn (1995) for a survey on concepts and research strategies.


will be outlined, thereby carefully unbundling the empirical and normative aspects of the project.

1.1 The principal contest

Although there are different notions of what sets legal norms apart from non-legalized social norms, all concepts of law adhere to the principle of legal equality, according to which like cases are treated alike. The very notion of the rule of law is based on norms that are public, relatively stable, consistent, and prospective, thus guaranteeing legal equality and legal certainty.\(^4\) The rule of law requires that the authors of law are bound by the law as well as ordinary people. It protects people from the arbitrary (ab)use of power and is thus a core principle of any notion of constitutionalism within and beyond the nation-state (see Petersmann 2002). In that sense, the rule of law demands less than democracy, which in addition requires that the objects of law are also the authors of that law. Although the rule of law does not require democracy, it does presuppose legal equality. Law thus requires that like cases are treated in a like manner. This, in turn, requires a high compliance rate with any given regulation. Without an adequate compliance rate, it is hardly possible to speak of law. Although sufficient compliance is not enough on its own to turn social norms into legal norms, it is certainly a necessary component of law.\(^5\)

This leads directly to the most fundamental objection to the notion of law beyond the nation-state: legal equality and high compliance rates require an agent that can generally enforce rules on the basis of a superior availability of material resources and can cast a shadow of hierarchy. In this view, law is distinct from moral and ethical norms by the method of sanctioning by which compliance is fostered. The formulation of Hans Kelsen (1966: 4) is famous: “The antagonism of freedom and coercion fundamental to social life supplies the decisive criterion. It is the criterion of law, for law is a coercive order. It provides for socially organized sanctions and thus can be clearly distinguished from religious and moral order.” Whereas Kelsen and Max Weber (1980: 18), who subscribe to

\(^4\) See Böckenförde (1969) and Peters (1991: Chapter 4) on the use and development of this concept.

\(^5\) To consider sufficient compliance as an integral part of law runs counter to the view of many international lawyers who, understandably, often argue that compliance is external to law and that the occurrence of non-compliance does not devalue international law. Nevertheless, the lack of compliance has led to doubts about the lawfulness of international law from Hobbes through Spinoza to Hegel. Arend (1996), for instance, is one of those international lawyers who also argue that compliance is a prerequisite for law.
coercion theories of law, see the potential for a law-like use of sanctions in the international sphere and thus do not completely deny the notion of international law, many others see a monopoly of legitimate force as a necessary condition for law (see Koskenniemi 2002: Chapter 6). To cite, for instance, one introductory textbook, written by a continental lawyer: governing in the form of law is the “embodiment of the state-guaranteed general norms to regulate human interactions and to resolve interpersonal conflicts through decision” (Horn 1996: 3). This ‘decisionist’ point of view is also reflected in “Realism” as a theory of international relations (Morgenthau 1949, Waltz 1979, Mearsheimer 2002). Realism regards international politics as structured by an anarchic environment that is defined by the absence of a superior agent with the authority to enforce agreement, thus necessitating self-help strategies on the part of the units of the system – in other words, the states. Realism views legal constraints beyond the nation-state as non-existent or at best very weak. In so far as international rules appear to be legal, they emanate from dominant powers and represent their interests. While those norms may be normatively justifiable, they are “in themselves” not founded on the principle of legal equality (see e.g. Krasner 1999 on human rights). The constitutional reflection of the dichotomy between domestic and international contexts is the notion of final decision. In national political systems an ultimate decision-making authority stands above all the other actors at the central level – either a parliament or a supreme court (Mayer 2000). In the international system the final decision-makers are decentralized and territorially fragmented.

It is not only Decisionists and Realists who are very skeptical about law beyond the nation-state. Those authors who point out that questions of law and justice can only meaningfully be dealt with in communities whose members share common values and ideas (Goodin 1988; Miller 1995) are equally doubtful about the feasibility of law beyond the nation-state. The existence of such communities is, however, closely bound up with nations with shared memories and traditions (Kielmansegg 1994: 27). Such national identities are required before individuals are prepared to subordinate their interests to collectivities and regularly comply with inconvenient commitments. The compliance-pull of rules beyond the nation-state thus becomes unlikely, since they cannot build on state-like polities that are consolidated internally as communities.

Against this background it is easy to understand why many writers doubt whether law is possible beyond the nation-state. Law requires that like cases are treated in a like manner. This, in turn, requires a high compliance rate for any given regulation. A high compliance rate, however, is believed to depend on two conditions that are scarcely available outside
the institutionalized framework of the developed nation-state: an established monopoly of legitimate force, and a national identity that determines the consent of those who are the targets of a regulation, even if they consider the rule inconvenient. In this sense, it seems fair to describe the question of compliance as the Achilles’ heel of international regulations (see Werksmann 1996: xvi; Young 1999a: Chapter 4).

Those who challenge the skeptical view of law beyond the nation-state start with the observation that at least some international norms and rules are complied with to an astonishingly high degree. “Almost all nations observe almost all principles of international law and all of their obligations almost all of the time” is the frequently cited conclusion that is drawn by Louis Henkin (1979: 47). This observation – which against the background of the previously mentioned arguments of the skeptics is not necessarily inexplicable, even if it is to some extent puzzling – has been revived by those scholars who endeavor to understand how international regulations in the environmental field work. According to their findings, it is not so much powerful coercion, but rather good legal management that leads to a satisfactory level of compliance. In the words of Abram Chayes and Antonia Handler Chayes (1993: 205): “Enforcement through these interacting measures of assistance and persuasion is less costly and intrusive and is certainly less dramatic than coercive sanctions, the easy and usual policy elixir for non-compliance.” It is the power of the legitimacy of legal norms, the way legal norms work once they are established, and the smart management of cases of alleged non-compliance, which in this view lead to compliance.

In general terms, one may thus distinguish between two competing principal hypotheses. The first one holds that law requires centralized coercion administered by an agent with superior resources and can take place only within an established national community, otherwise compliance with inconvenient commitments becomes a question of opportunism – a notion that is alien to any concept of law. Following this hypothesis, high compliance rates with regulations beyond the nation-state are per se impossible, at least as long as they require powerful signatures to a treaty to do things that they would otherwise prefer not to do. High compliance rates with international environmental regulations are

6 Keohane (1997: 487) puts it eloquently: “Governments make a very large number of legal agreements, and, on the whole, their compliance with these agreements seems quite high. Yet what this level of compliance implies about the causal impact of commitments remains a mystery.”

7 See especially the work of Bothe (1996); Chayes and Chayes (1993, 1995); Haas (1998); Mitchell (1994); Underdal (1998); Victor et al. (1998); Weiss and Jacobson (1998); Young (1999a: Chapter 4). See also Young (1979).
put down to shallow treaties, which involve little “depth of co-operation” (Downs et al. 1996). Accordingly, the first principal hypothesis is as follows: Any given regulation, and especially those with significant incentives to defect (deep co-operation), enjoys better compliance within a national political system, with a material hierarchy and an established national community, than it does within a system beyond the nation-state.

The counter-hypothesis points to the possibility that the institutionalization of law enforcement among territorially defined political units, that is in a horizontal context, may develop in parallel to the horizontalization of law making. The notion of the institutionalization of horizontal law enforcement encapsulates two separate processes. First, the role of coercive sanctions of external origin, with the role of communality becoming relatively less important than other forms of compliance-generation such as incentives, capacity-building, dispute settlement, legitimacy-building, shaming, the internalization of law etc. This focus on the softer means of inducing compliance, that are based on rational consent rather than on a sense of community, is typical of the so-called managerial school and those who focus on the link between legitimacy and compliance. Secondly, to the extent that coercive sanctions are used as a legitimate means of compliance-generation, they need not only be applied in a national context but, in order to be effective, may also be used in an institutionalized horizontal setting. This aspect of horizontal enforcement is typical of the institutionalist approach within the rationalist tradition that seeks to explain co-operation and legalization. The principal hypothesis that emerges from this combination is: Compliance with regulations varies with, among other things, the legitimacy, the legalization, the reflexivity and the availability of institutionalized horizontal coercion, and is not dependent on the existence of a national context. A process of horizontalization of law enforcement takes place to the extent that we move from cell one to cell four in table 1.1.

The first principal hypothesis expects sufficient compliance rates only within the nation-state. The second principal hypothesis points to a

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8 According to Black’s Law Dictionary “enforcement” is defined as “the compelling of obedience to law.” In our study the use of the term “enforcement” is more generic, and is closer to its use in the citation of Chayes and Chayes. Enforcement is thus the process by which addressees of a regulation are induced to act in compliance with it. It is the process of compliance-generation, independent of the means chosen. The use of negative sanctions to generate compliance – the compelling of obedience – is termed “coercion” (see also Hurd 1999: 383).

9 This is different from the traditional notion of counter-measures, according to which “the injured state enforced its own rights through self-help” (O’Connell 1995: 2).

10 The juxtaposition of these two principal hypotheses is not identical with Keohane’s (1997) two optics of international law. The second principal hypothesis contains elements of the instrumentalist as well as the normative conceptualization of law.
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1.2 Comparing compliance across levels

The juxtaposition of the two principal hypotheses leads to two more concrete questions that guide our study in empirical and analytical terms.

- Who is right? Is it true that compliance is generally lower beyond the nation-state than it is within nation-states?
- If material hierarchy and communality are not the only determinants of compliance, what else motivates norm-compliance and the regulated treatment of cases of non-compliance?

In order to answer these questions, it is best to conduct a systematic comparative survey of different sets of regulations that exist in very similar ways both within and beyond nation-state boundaries. In this way, the case selection is based on variations in the independent variable and thus approaches the notion of a quasi-experiment (King et al. 1994). In order to conduct such a study, it is necessary both to find regulations that are effective at different levels, but which are nevertheless similar in number of mechanisms that can also be found beyond the nation-state, which might substitute for the compliance-generating mechanisms of the shadow of hierarchy and communality that are only available to the nation-state.

One could add “privatization” as a third dimension, that is, the increased importance of private actors in law making and law enforcement, as can be observed in the so-called public-private partnerships. See e.g. Reinicke (1998) from an international relations point of view, and contributions in Applebaum, Felstiner and Gessner (2001) from the point of view of the sociology of law. As to the general theory of law, the debate on private governance regimes and the role of private law is most interesting (cf. Gerstenberg 2000; Teubner 2000).

The managerial school argues mainly in the context of a horizontal setting. However, it focuses primarily on means and much less on the other dimension, and is thus compatible with new approaches of governance in the national context, which also emphasize soft and participatory forms of steering societal relations.

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Table 1.1 Enforcement mechanisms in a vertical and horizontal setting

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<thead>
<tr>
<th>Setting</th>
<th>Hard</th>
<th>Soft</th>
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<tbody>
<tr>
<td>Vertical within a community</td>
<td>Principal hypothesis 1: shadow of hierarchy within a national community</td>
<td>Managerial school12</td>
</tr>
<tr>
<td>Horizontal between communities</td>
<td>Co-operation under anarchy</td>
<td>Shaming, reputation and ideas</td>
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Compliance needs to be distinguished from other areas of study that are related to the effects of regulations, especially their implementation and effectiveness. Of course, there are many points of contact, overlaps and links between these different areas. The focus of implementation research is, however, the analysis of the difference between legislative enactments and how they are actually put into practice (see Victor, Raustiala and Skolnikoff 1998: 4). In contrast, the focus of effectiveness research is the capacity of political regulation to solve commonly perceived problems (Young 1999b).

Compliance research is distinct from both these approaches in that it examines the extent to which rules are complied with by their addressees. “Compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior” (Young 1979: 3; Mitchell 1994: 430). Hence, “compliance is a noun that denotes a particular type of behavior, action or policy within a specific regulatory or situational context” (Simmons 2000b: 1). It does not refer to the willingness of the actors to comply. The main object of our empirical study is therefore the directly ascertainable actions of actors rather than their attitudes or motives. The intrinsic ambiguity of law always necessitates application and interpretation and thus makes it hard to assess objectively whether or not compliance is taking place. As a “living being,” law is not constant over time, but is subject to changing interpretations of its meaning and to new case law, which interprets and changes the meaning of statutory law (Dworkin 1986). Nevertheless, it seems possible to assess compliance from an external perspective by systematically using indicators of internal estimates of compliance: “the point is to compile objective evidence of subjective socially-based interpretations of behavior” (Simmons 2000b: 24).

Compliance cannot, however, be reduced to a one-dimensional concept, assessed simply by calculating the disparity between obligations and actual behavior. It is necessary to bring in a second dimension of compliance without setting apart the focus on behavior. In line with Jacobson and Weiss (1998a: 4), who distinguish the procedural from the substantial dimension of compliance, we look at the treatment of accusations of non-compliance in the second dimension. Compliance and non-compliance are, at least at the margins, perpetually contested concepts, the meaning...
Law and compliance at different levels of which develops over time once a rule is put into practice. Charges of non-compliance can, for instance, arise out of the ambiguity of a rule, without any desire of either side to cheat or to challenge the validity of the rule. In such cases, it is to be expected that compliance is no longer problematic once any differences about the correct interpretation of the rule have been settled. These complexities in the concept of compliance cannot be disregarded. Compliance, therefore, comprises, in addition to the (perceived) differences between obligation and actual behavior, the way those differences are dealt with once they are on the table. Compliance is thus assessed by dealing with two related questions: (1) What are the demands made on the behavior of the addressees and to what extent do the addressees comply with these demands (the first dimension of compliance)? (2) How are accusations of non-compliance handled (the second dimension of compliance)?

In combining these two dimensions of compliance, we use four values for (non-)compliance: every single rule-related action by the addressee of a rule may be categorized in decreasing order of compliance as:

- “good compliance” if the difference between the prescriptions and proscriptions of a norm is non-existent or negligible and its addressees do not publicly voice their discontent with a rule;
- “recalcitrant compliance” if the difference between the prescriptions and proscriptions of a norm is non-existent or negligible but nevertheless its addressees publicly voice their discontent with it;
- “initial non-compliance” if we observe both a significant difference between the prescriptions and proscriptions of a norm and a change in the behavior of its addressees due to allegations of non-compliance and the activities following the allegation;
- “compliance crisis” if we observe both a significant difference between the prescriptions and proscriptions of a norm and no change in the behavior of its addressees although the practice has been detected, alleged and/or outlawed by a decision of an authorized dispute settlement body or court.

In each case study we also use two different lenses to look at compliance. On the one hand, the overall rate of compliance is assessed with the help of this categorization and, on the other hand, specific cases of alleged non-compliance are analyzed. The aggregate record of compliance is then assessed on the sum of this information.

1.2.2 Similar regulations at different levels

Studies that suggest good compliance with international agreements and interpret such findings as evidence of a compliance-pull by international
agreements are often challenged on methodological grounds. The most significant objection to the finding of a remarkable compliance with, for instance, international environmental agreements in horizontal settings has been those arguments concerning the type and depth of the regulation in question. On the one hand, some regime analysts have argued that some malignant problems are more difficult to solve at the international level than benign problems (see Underdal 2002). This observation has led to a so-called problem-structural approach, which contends that the properties of issues (or conflicts) predetermine the ways in which they are dealt with (see e.g. Rittberger and Zürn 1991: 26). To the extent that problem structure accounts for the variation in co-operation and compliance, it is necessary to hold the effect of problem structure constant when inquiring into the role of other factors. In the words of Arild Underdal (2002: 23), the problem-solving capacity of different settings “can be determined precisely only with reference to a particular category of problems and tasks.” On the other hand, George Downs and colleagues (1996) challenge what they call the managerial school by pointing to an endogeneity problem. According to them, the managerial school focuses on co-operative agreements with little depth, that is measured in terms of “the extent to which it requires states to depart from what they would have done in its absence” (ibid., 383) and it is only for this reason that they discover a correlation between a managerial approach to co-operation and a low degree of defection from the agreement. Raustiala and Victor (1998: 662) support this theoretical observation with a large empirical project: “Whereas many analysts have seen high compliance as a sign that commitments are influential, our cases suggest that compliance often simply reflects that countries negotiate and join agreements which they know they can comply with.”

The obvious solution to these problems is to be selective about the kind of agreements we spend time researching. A major challenge in designing this project has therefore been to identify comparable cases in three different issue areas, across three levels of politics. In order to control for the issue area, the type of problem, and the policy type, we employed, in a first step, the distinction between policies termed by Lowi (1972) as constitutive (market-making), regulative (market-correcting) and (re-)distributive (market-breaking). For each policy type we looked, as a second step, at specific policies that are implemented at different levels. In this way, we controlled for problem type as well as the underlying interest

13 See also Raustalia and Slaughter (2002) for a good discussion on this issue.
14 See Streeck (1995) and Zürn (1998: Chapter 7) for more recent attempts to use and modify this typology.