

RETURNING TO THE ORIGINS OF MULTILEVEL REGULATION

INAUGURAL LECTURE OF DR. BARBARA WARWAS AS LECTOR (PROFESSOR) IN MULTILEVEL REGULATION AT THE HAGUE UNIVERSITY OF APPLIED SCIENCES (THUAS)



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Preamble

Where it all began



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This is the District Court of Justice in my hometown of Wrocław, Poland. It's where I began my legal training. One of my first "assignments" was to help a judge draft a legal reasoning in a case convicting a relatively young citizen for stealing a shopping cart from a supermarket parking lot, a conviction that would result in a year and half behind bars, with no chance of parole. I remember not understanding why such a stiff sentence would be applied to an offence with relatively minor social harm—especially one

involving a person with no prior criminal record. I was equally puzzled by the lack of any "rehabilitative" element of the punishment in question (at least in my eyes). This experience inspired me to search for the essence of justice elsewhere: beyond court walls, black letter legal codes, and conservative or simply incidental legal interpretations.

That is when I turned to *alternative dispute resolution*, a concept I studied and practiced in Poland (University of Wrocław), Austria (University of Salzburg), Italy (European University Institute, General Electric Oil & Gas, and the SLCG legal practice), the UK (Brunel University through the study on arbitration commissioned by the European Parliament), and now here at the THUAS in the Netherlands. I have been extremely fortunate to meet inspiring practitioners, professors, and colleagues along the way. And today, I work with a great group of colleagues at the THUAS, all of whom helped me arrive at the arguments presented in this lecture today through theoretical discussions, shared practical projects, or simply thoughtful debates over a cup of coffee or glass of wine.

What is ADR?

First things first, what is alternative dispute resolution?

Alternative dispute resolution, often referred to as ADR, is any means of solving disputes outside of the court room.¹ One of the most popular examples of ADR is arbitration, in which two or more parties submit their disagreement to a private arbitrator, who then determines the result in a form of a binding award. Another example is negotiation, which means that parties negotiate the result among themselves. Still, another example is mediation, in which a neutral third party helps with negotiations and communications between disputing parties. There are other examples of ADR, including facilitation, early neutral evaluation, conciliation, expert determination, executive tribunal/mini trial, and mediation-arbitration (med-arb), to mention a few. What all those processes have in common is that they are legal processes developed, practiced, and studied in the context of access to justice.

When was ADR popularized and why?

ADR was popularized in 1970s in the US in the context of a debate over access to justice. ADR was reintroduced in the modern American justice system as a solution to issues with the



administration of justice expressed by Roscoe Pound, one of the most prolific legal scholars in the American history. In 1976, then-Chief Justice of the US Supreme Court Warren E. Burger convened the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice" known today as the "Second Pound Conference".² Although the conference itself was organized after the death of Roscoe Pound, it was based on his life-long legacy: the criticism of the formal justice systems which Pound saw as needlessly archaic and complicated, serving only to feed the competitiveness of lawyers rather than uphold the rule of law, a phenomenon he called "the sporting theory of justice".³

Source: Legal Dictionary –
The Free Dictionary

1 In fact, a clear-cut definition of ADR does not exist. On that note see Barbara Warwas, "The State of Research on Arbitration and EU Law: Quo Vadis European Arbitration?," *EUI Working Paper LAW 2016/23*, 2016, 6; Barbara Warwas, "Current State of the Scholarship on Arbitration and EU Law: From Absolute Exclusion to Cautious Inclusion," *Transnational Dispute Management* 15, no. 1 (January 2018): sec. 1.3 with further references to Christopher Hodges, Iris Benöhr, and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart, 2012).

2 Lara Traum and Brian Farkas, "The History and Legacy of Pound Conferences," *Cardozo Journal of Conflict Resolution* 18 (2017): 684.

3 Traum and Farkas, 681–82.

In the 1970s, Pound's ideas inspired some practical steps to improve the American justice system. The first step was the so-called "multidoor courthouse" reform by Harvard Law Professor Frank Sander.⁴ Although having limited applicability today, the reform reintroduced ADR in the context of the American litigation. The multidoor courthouse concept assumed that court serves as a resource center offering information and advice to disputants on the most appropriate dispute resolution process to be determined on a case-by-case basis, including discussions through the community center, mediation, or arbitration.⁵

Around the same time in Europe, prominent Italian jurist Mauro Cappelletti was drafting his seminal work on access to justice. In his "Florence Access to Justice Project", Cappelletti (together with Bryant Garth) saw the role for ADR and the so-called privatization of justice as part of the broader access to justice movement, which was supposed to increase welfare.⁶ Some commentators view Cappelletti's approach to access to justice and public sector as "activist, redistributive, democratizing, public-service-minded", and we may claim that this is how he also perceived the potential of ADR to unburden courts and "(do) justice" to citizens.⁷



In the 1970s, ADR was seen on both sides of the Atlantic as a refreshing alternative to overloaded and procedurally complex public court proceedings. ADR was then seen as tool for achieving the public good, which could help increase the legitimacy of public justice systems through which the whole welfare state system could be preserved.

What ADR really is

This enthusiasm has faded. ADR has become just another legal tool to increase the workload (and profit) of lawyers. Indeed, in many respects, the problems have become worse. In the US, the process of "vanishing trials" has continued, and ADR has been criticized for favoring multinational

Source: European University Institute

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- 4 Levin Russell and A.Leo Wheeler, eds., *The Pound Conference Perspectives on Justice in the Future* (West Publishing Co. St Paul Minnesota, 1979).
- 5 Carrie Menkel-Meadow, "The History and Development of 'ADR (Alternative/Appropriate Dispute Resolution),' *Völkerrechtsblog* (blog), July 1, 2016, <https://voelkerrechtsblog.org/the-history-and-development-of-a-dr-alternativeappropriate-dispute-resolution/>. Accessed 5 October 2020.
- 6 Bryant G. Garth and Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," *Buffalo Law Review* 27 (1978): 181–292; Mauro Cappelletti, "Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement," *The Modern Law Review* 56 (1993): 282–96; Barbara Warwas, "Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice," in *Privatizing Dispute Resolution: Trends and Limits*, ed. Loïc Cadiet, Burkhard Hess, and Marta Requejo Isidro, Studies of Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law 18 (Nomos, 2019), 325–51.
- 7 Ugo Mattei, "Access to Justice. A Renewed Global Issue?" *Electronic Journal of Comparative Law* 11.3 (December 2007): 2.

corporations and more powerful disputants.⁸ In the EU, a new legal framework for ADR was implemented in 2015 that promoted ADR and online dispute resolution in the context of the EU internal market.⁹ But ADR was incorporated into public, formal frameworks of justice and was treated as yet another formal (legal) tool serving elite lawyers rather than citizens.

But ADR goes far beyond *formal law* and access to justice debates. ADR has been used by communities throughout history to prevent and solve disputes, but also to preserve social harmony and peace, ensuring sustainable community growth even before states were created. As such, ADR goes to the core of multilevel regulation.

Cappelletti, Pound, and their followers were on to something very important, but largely limited their analyses to the legal aspects of ADR. What I want to do—and this is the core of my argument—is wind the clock back even further and show how the study of historical ADR practices can help us to return to origins of multilevel regulation. This way, we can learn for our contemporary times.

8 On vanishing trials and ADR see for example Thomas J. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,'" *Journal of Empirical Legal Studies* 1, no. 3 (2004): 843–912; On the criticism of arbitration and ADR see Jessica Silver-Greenberg and Michael Corkery, "In Arbitration, a 'Privatization of the Justice System,'" *New York Times*, November 1, 2015, <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> accessed October 5, 2020; and Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *New York Times*, October 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> accessed October 5, 2020.

9 "Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)," OJ L 165/63; "Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on Online Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)," OJ L 165/1.

Welcome Address and the Puzzle

It is my great pleasure to deliver my inaugural speech as lector in Multilevel Regulation at THUAS.

The topic of my address is "Returning to the Origins of Multilevel Regulation."

Before I start, I would like to express my gratitude to those who helped me to arrive where I am now: the Board of THUAS for appointing me as lector in multilevel regulation, the BRV Faculty Dean for being instrumental in developing and supporting the research group, my colleagues at THUAS and beyond, students, family and friends.

You are all great and inspiring supporters! Thank you!

I want to advance the following argument today: by returning to the origins of multilevel regulation through the study of historical ADR practices, we can try to improve contemporary multilevel regulation.

My project unfolds in three steps: describing the problem, rethinking the historical context, and considering new ways forward. I will present each one in turn.

But let me pause to explain what I mean by multilevel regulation first.

How I understand multilevel regulation

Multilevel regulation refers to the networks of rules, actors, and practices that regulate our professional and private lives, as well as legal and public affairs at national, local, and global levels.

In contemporary society and professional practice, such networks are more prevalent and complex than we may think. Regarding the network of rules, almost every single aspect of our lives is subject to hard or soft rules (with hard rules bearing legal obligations that can be enforced in courts, and soft rules concerning non-binding rules, principles, or standards). We live by rules, whether we like it or not. Cooking, eating, drinking, travelling, working, studying, surfing the Internet, writing, talking... all are subject to regulation, usually without us even realizing it.

In legal scholarship, the complexity of rules in contemporary societies is called a "regulation jungle".¹⁰ This tangle of rules is meant to respond to social and legal problems, but it can also lead to regulatory disasters, as described by Julia Black.¹¹

10 Maurits Barendrecht et al., "Trend Report Rulejungling. When Lawmaking Goes Private, International and Informal" (HilL, 2012).

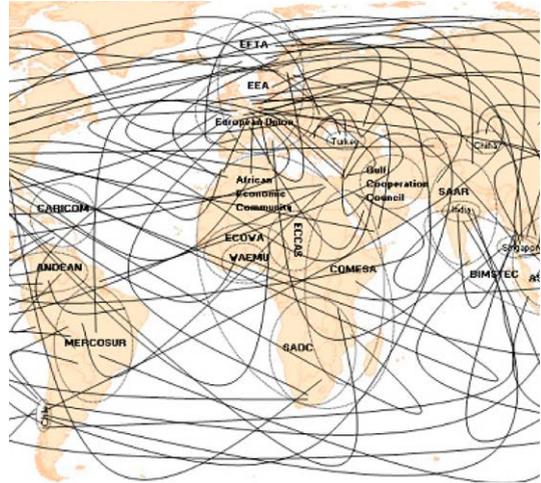
11 Julia Black, "Learning from Regulatory Disasters," *LSE Legal Studies Working Paper* 24 (2014).

In trade economics, this jungle is also seen in the so-called “spaghetti bowl effect”, which refers to the high number of trade agreements between states.¹² This can be interpreted as a positive sign aiming to maximize the competitive advantage of states and offer citizens cheaper goods. But it can also undermine international efforts to liberalize international trade.



“I need someone who is comfortable in the regulatory jungle.”

Source: Adobe Stock



Source: ResearchGate

Notably, the network of actors making rules today is also increasingly broad. That was not the case for most of modern human history. Roughly speaking, from the Treaty of Westphalia and the spread of the first modern constitutions, rulemaking has always been associated with states. Indeed, it has been associated with the orthodox “features” of modern states such as coercive powers, administrative functions, and—as democratic ideas became more prevalent—principles such as the rule of law, accountability, transparency, and access to justice. With time, the discussion of who makes rules expands into actors other than states. This concerns international and regional organisations such as the European Union (EU), the United Nations (UN) or the World Trade Organisation (WTO) (which still derive their authority from states), and increasingly also so-called “non-state” actors such as multinational companies, non-governmental organisations (NGOs), standardization bodies (for example, “the International Standardisation Organisation setting so-called “ISO standards” including for child seats for cars, format for date and time, or currency codes), experts, media, and many more. As one commentator states, “now, all you need to create rules is a well-organised group of people and a website.”¹³ It’s a snide remark, but there is some truth to it. Scholars

12 Jagdish N. Bhagwati, “US Trade Policy: The Infatuation with FTAs,” April 1995.

13 Barendrecht et al., “Trend Report Rulejungle. When Lawmaking Goes Private, International and Informal,” 3.

increasingly study the phenomenon of public and private (and public-private) regulation.¹⁴ Take, for example, Fabrizio Cafaggi's studies of transnational private-public regulation,¹⁵ the Architecture of the Postnational Rulemaking study conducted at University of Amsterdam between 2011-2016, the work of Paul Verbruggen on private regulation,¹⁶ the work of Rebecca Schmidt on "regulatory integration across borders,"¹⁷ or the work of Hans Micklitz on European regulatory private law.¹⁸

Regarding the level of regulation, all those actors and rules have spread into national, regional, and international levels. Due to the fact that different types of rules are made by different actors, we no longer focus only on national (state-led) rulemaking. Contemporary multilevel regulation moves "upwards to the supranational level, downwards to subnational jurisdictions and sideways to public/private networks" and contemporary multilevel practices are often performed at all those levels, being somewhat blurred.¹⁹

In summary, while in the past rulemaking was seen as monocentric—with its main center in the state—multilevel regulation has been developed as a polycentric field, meaning that more actors than states are involved in making rules that are dispersed into national, regional, international, and global levels.²⁰

This brings me to the first step of the general argument I want to make: describing the problem.

14 For studies directly or indirectly dealing with multilevel regulation see Nupur Chowdhury and Ramses A. Wessel, "Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?," *European Law Journal* 18, no. 3 (2012): 335–57; Andreas Follesdal, Ramses A. Wessel, and Jan Wouters, eds., *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes*, (Brill/Nijhoff, 2008); Linda A.J. Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?," *Electronic Journal of Comparative Law* 9, no. 1 (January 2005); online; Liesbet Hooghe and Gary Marks, "Types of Multi-Level Governance," *European Integration Online Papers (EIoP)* 5, no. 11 (December 10, 2001): online publication; Liesbet Hooghe and Gary Marks, "Unraveling the Central State, But How? Types of Multi-Level Governance," *American Political Science Review* 97, no. 2 (May 2003): 233–43.

15 Fabrizio Cafaggi, "A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement," EUI Working Paper LAW 2014/15, 2014; Fabrizio Cafaggi, "Comparative Report. A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement," 2014, <https://www.eesc.europa.eu/en/documents/comparative-analysis-transnational-private-regulation-legitimacy-quality-effectiveness-and-enforcement> accessed October 5, 2020; Fabrizio Cafaggi, Andrea Renda, and Rebecca Schmidt, "International Regulatory Co-Operation: Case Studies, Vol. 3 Transnational Private Regulation and Water Management," *OECD Publishing*, 2013, 9–58; Fabrizio Cafaggi, "The Architecture of Transnational Private Regulation," *Osgoode CLPE Research Paper* 20 (2012).

16 Paul Verbruggen, *Enforcing Transnational Private Regulation. A Comparative Analysis of Advertising and Food Safety* (Edward Elgar, 2014).

17 Rebecca Schmidt, *Regulatory Integration Across Borders. Public-Private Cooperation in Transnational Regulation* (Cambridge University Press, 2018).

18 Hans-W. Micklitz, "The Internal vs. the External Dimension of European Private Law - A Conceptual Design and a Research Agenda," *EUI Working Paper LAW 2015/35 ERC-ERPL-13*, 1–17.

19 Hooghe and Marks, "Types of Multi-Level Governance," 4.

20 On the development of the concept of polycentricity and its pros and cons see Paul D. Aligica and Vlad Tarko, "Polycentricity: From Polanyi to Ostrom, and Beyond," *Governance: An International Journal of Policy, Administration, and Institutions* 25, no. 2 (2011): 237–262.

What is the current problem with multilevel regulation?

The issue is that the study of the contemporary multilevel regulation does not reflect this necessary polycentricity. Despite the complex network of rules, actors, and multilevel practices, formal rules originating in *states* are still a starting point in the study of multilevel regulation. That is, the field is seen—by outsiders and insiders alike—as part of the traditional legal order. In fact, multilevel regulation is mostly a domain of legal scholars.

Even when non-state actors engage in rulemaking, we often speak about them as “new” actors that “started to appear on the scene”, even if some of those actors—such as the multinational companies—were established decades ago.²¹ Similarly, when we speak about non-state actors making contemporary rules we often speak about a *delegation* from public (state) to private (non-state) actors, not the other way around. This also refers to the usual vocabulary used by scholars such as “post-national” through which it is implied that states lost their prominence in the academic and practical discourse towards the new players (again, non-state actors). Finally, scholars often speak about the lack of trust in the “new” non-state actors who “try to gain legitimacy”, understood as the checks and balances generated by a modern state.²² Consequently, the study of multilevel regulation is a very technical and monocentric field and the “public”, formal, and legal aspects of multilevel regulation are its dominant “faces”.

Take, for example, the perceptions of The Hague. The Hague is the city of international law with formal, legal institutions being at the core of its peace and justice agenda. This concerns institutions that are located in monumental buildings such as Binnenhof or the Peace Palace. The local and global “perceptions” of The Hague are based on the traditional understanding of multilevel regulation, where states play the most prominent role. But is peace and justice only the matter of laws, in particular formal laws?

A further problem is that although multilevel regulation is still largely focused predominantly on states, states and many formal rules concentrated around states and state-sanctioned institutions are seen by citizens as illegitimate and impractical. People and activists go to the streets to protest against current formal structures, institutions, and rules, which are no longer able to protect citizens and minority groups, help societies grow, or advance the social values these institutions were created to safeguard.

Take, for example, the recent Black Lives Matter movement in the US (and increasingly elsewhere), which contests the authority of formal institutions, such as the Police, due to its brutality against black communities. The violence inflicted on black communities has

21 Barendrecht et al., “Trend Report Rulejungling. When Lawmaking Goes Private, International and Informal,” 3. See, especially: “This changed when international organisations started to appear on the scene; it changed even more dramatically in the age of globalisation, where private, informal and international rulemaking is becoming more and more prevalent. Now, all you need to create rules is a well-organised group of people and a website. Such a body can set rules for others and try to gain legitimacy, often with rather minimal control by national lawmakers.”

22 Barendrecht et al., 3.



Source: Black Lives Matter movement's website



Source: Shutterstock

bushfires in Australia are just a few examples of the lack of sustainable visions of some states. As a result, we have experienced an enormous awakening of the youth environmental activism, with Greta Thunberg at the forefront of this movement. Youth activists point to the inability of states and politicians to take responsible and collaborative actions to try to save our planet from collapse.



Source: Shutterstock

been associated with the state's failure to offer (racial) justice and security to its citizens by supporting illegitimate, unrepresentative, and dangerous institutions. This is not only the case in the US. The problem extends into other developed and developing countries, including but not limited to authoritarian states such as Belarus.

Another example is the politics of climate change. Many leaders fail citizens when it comes to their global vision of climate change action or the actual policies and rules aiming at cutting local emissions in different sectors. The US's withdrawal from the Paris Agreement on climate change and mitigation, the Amazon rainforest deforestation by Jair Bolsonaro, or the Australian government's failure to prevent and manage the historical

Finally, rules made by states and state-sanctioned institutions are increasingly seen by (future) street level professionals as impractical. In many state-sanctioned institutions—as well as regional and international organizations including the UN, the EU, the WTO—the rules, policies, and regulations are made by highly specialized experts who speak a language that is too sophisticated

and complex for a non-specialist to understand. The complex governance, policy, and rulemaking by international institutions and organizations—and the technocracy inherent in their actions—make it hard for street-level professionals, students, and citizens to understand the purpose of the rules and policies they need to study and apply in individual cases, be it at the exam, in an internship, or in professional practice.

These are big and far-reaching examples, and my point is certainly not to dig deep into any of them; my point is merely to show one common thread: a widespread lack of perceived social legitimacy and practical understanding of the contemporary formal rules centered on states.

Are the “new solutions” working?

So far, I have tried to show that multilevel regulation still focuses mostly on states, which are increasingly seen as illegitimate. What is even more puzzling is that if we flip the coin and look at the “new solutions”, the picture also looks rather dire, for many of the same reasons.

As briefly described in the preamble, in the 1980s ADR was seen as one of the “new solutions” to increase the legitimacy of state-made rules. Today when we hear about ADR from academics and professionals, we only hear about it in the context of access to justice or court proceedings.²³ This is often a critical discussion pertaining to similar problems of illegitimacy and technocracy of ADR rules as presented above, in the context of contemporary multilevel regulation.²⁴ ADR is not seen by citizens or minorities as a legitimate means of solving social issues, because it has been “consumed” by the public system that is seen as corrupt and serving elites, or at least representing the formal justice principles that are detached from the actual needs of individuals. The same problem concerns the education in the field of ADR. Arbitration, negotiation, or mediation—although increasingly appearing in university curricula—are treated as a specialized field, reserved for a very small group of lucky students who happen to make it into a tight-knit arbitration practice of white-collar lawyers.

In summary, arbitration and ADR are seen as litigation-like processes, relevant for about 1% of students, professionals, and citizens. Yet, recall why ADR was introduced into formal state systems: it was intended to fix the state’s incapacity to provide welfare and justice to all, hence to emphasize the social function of ADR. Paradoxically then, the whole social function of ADR promised by Pound has not been realized.

²³ Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press, 2015); Jaroslav Kudrna, “Arbitration and the Right to Access to Justice: Tips for a Successful Marriage,” *NYU Journal of International Law and Politics Online Forum* (blog), April 27, 2020, <http://nyujilp.org/wp-content/uploads/2013/02/Jaroslav-Kudrna-Arbitration-and-Right-of-Access-to-Justice-NYU-JILP-Feb-2013.pdf> accessed October 5, 2020; Warwas, “Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice”; “Global Pound Conference Series,” accessed October 5, 2020, <https://immediation.org/research/gpc/2020>, Stefan Wrška, *European Consumer Access to Justice Revisited* (Cambridge University Press), 2015

²⁴ See for example Norbert Reich, “A ‘Trojan Horse’ in the Access to Justice – Party Autonomy and Consumer Arbitration in Conflict in the ADR-Directive 2013/11/EU?,” *European Review of Contract Law* 10, no. 2 (June 2014): 258–80.

The puzzle

On one side we have multilevel regulation, which is not seen as legitimate and practical by citizens and professionals due to states' and state-sanctioned institutions' incapacity to address an array of social and practical problems. On the other side, most attempts for change (such as the ADR movement) fail, because they do not meet the vision of the idealized state, which is still a dominant vision of multilevel regulation. From each perspective, the other side looks illegitimate and inefficient—and there is some truth to both. But the very nature of this comparison makes the improvement of multilevel regulation impossible.

Part of the problem, I believe, is how we have been thinking about contemporary multilevel regulation, its origins, and its social capital. By social capital, I mean a shared understanding of rules and values through which citizens connect with society, and professionals connect with professional practice. These include trust, cooperation, and reciprocity, just to mention a few.

The problem is that today we rarely look at rules in isolation from their legal function. And we rarely *return* to the origins of rules before the nation state was even created, which is where the actual social capital underlying rules can be found. What I want to do is to reframe the debate, which will hopefully allow us to think about multilevel regulation and ADR in a new and productive way. Put another way, I think Pound was right in his critique, but too limited in his scope of analysis.

Here we arrive in the second step of the argument: what is the larger historical perspective?

I argue that we have an enormous reservoir of history, practices, and ideas ready to help us think through contemporary legitimacy problems: namely all those practices which preceded the capture of law by the modern state-system. That is, the dominant conceptual frame today: that is, state representing formal rules and then multilevel regulation is misleading. Instead, we need to think in terms of a larger historical frame: that is, historical ADR practices representing social values, then state, and then multilevel regulation.

Which brings me to the third, normative step.

I think—and this is how I would like us to look forward—is that we can learn a lot about what multilevel regulation is today, and how it could be improved, by going back to those historical ADR practices.

In a nutshell: by *returning* to the origins of rules before (and under) nation states through the study of historical ADR practices in their various forms, we can try to improve contemporary multilevel regulation.

So what was the function of ADR before nation states and multilevel regulation?

A brief history of ADR in early societies and the origins of multilevel regulation



Source: Shutterstock

Source: UNESCO



The history of ADR traces back to the practices of early societies. When we look at the ancient history, the roots of ADR can be found in the Confucian philosophy, which promotes social harmony based on diversity rather than individual perceptions of justice.²⁵

Similarly, the traditional African philosophy and community dispute resolution systems like Ubuntu and gacaca promote grassroot solutions to advance dialogue, peace, and restitution.

Here, the prominent role is for community elders who either facilitate a dialogue within the community to end a dispute or make decisions on their own with a view on the values and goals of the community as a whole.²⁶

In the literature, the development of commercial arbitration is strongly linked with its use by medieval merchants, who aimed to create a private, internal system of dispute resolution that could correspond to the basic principles of natural justice.²⁷ To this extent,

commercial arbitration also came to support the medieval *lex mercatoria* (law of merchants) through which private, commercial norms could be enforced.²⁸ We learn about the resolution of trade disputes through arbitration from as early as Marco Polo's caravans and in disputes between Greek and Phoenician traders.²⁹ This continues in medieval times where arbitrators solved trade disputes based on commercial usages rather than black letter laws.

²⁵ Menkel-Meadow, "The History and Development of 'A' DR (Alternative/Appropriate Dispute Resolution)."

²⁶ Menkel-Meadow.

²⁷ This section is reprinted from: Barbara Warwas, "The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research," sec. 2.1. Questions of International Law, September 2020, <http://www.qil-qdi.org/the-application-of-arbitration-in-transnational-private-regulation-an-analytical-framework-and-recommendations-for-future-research/>, accessed October 5, 2020

²⁸ Ibid.

²⁹ Daniel Centner and Megan Ford, "A Brief History of Arbitration," *American Bar Association*, September 19, 2019.

Moving forward to the 17th century, arbitration was used by various communities as a means of informal, communitarian justice based on trust. The communities using arbitration were rather diverse, with participation from various religious, geographical, ethnic, or commercial communities.³⁰ As noticed by Auerbach, the rule for the application of non-judicial dispute resolution was rather simple: the tighter the community, the lesser the involvement of lawyers and adversarial procedures.³¹ Also, the nature of arbitration differed when used in the 17th century. Arbitration was used as a tool to further preserve communitarian values. For business communities, those values involved: participation, performance, and moral sanctions.³²



Source: Shutterstock

ADR in its original forms served, let's say more noble or communal goals, rather than 1-to-1 resolution of a dispute; it aimed at both resolving and preventing the (escalation of) disputes to achieve social harmony and preserve the very existence of early communities.³³

Only afterwards did we see the legalization and professionalization of communitarian practices. Together with the development of a modern state, "modern systems of justice" started resembling the more medieval trials of ordeal, where disputants were dropped into water given an opportunity for God to determine the righteous party, rather than relying on communitarian ADR.³⁴

Following Carrie Menkel-Meadow, this means that the state and its formal rules of justice began focusing on winners and losers, rather than social harmony promoted through early ADR.³⁵ Nevertheless, ADR existed before the formalization of rules. As such, it can be perceived as the origins of contemporary multilevel regulation.

30 Jerold S. Auerbach, *Justice Without Law?* (Oxford University Press, USA, 1984), 19.

31 Auerbach, 19.

32 Barbara Warwas, *The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses* (Springer, 2016), 168.

33 Menkel-Meadow, "The History and Development of 'A' DR (Alternative/Appropriate Dispute Resolution)."

34 Menkel-Meadow.

35 Menkel-Meadow.

To summarize, if we return to those early ADR mechanisms and study their historical role in maintaining social and communitarian harmony in early societies, we can learn a lot that can easily be applicable today.

ADR's potential for contemporary multilevel regulation

How could this longer view help us to move things forward? I would like to consider a few examples of how these historical ADR practices can help us think through multilevel regulation and ADR today.

As noted, because ADR has been “reintroduced” into contemporary multilevel regulation as a legal tool, it’s traditionally been considered a highly specialized field reserved only for lawyers and businesses. But law is not the only field where ADR is used today.

ADR is increasingly found in professional practice, the daily lives of citizens, and also in attempts to address profound social or political challenges. This trend is widespread and increasing. The following examples show how ADR can help us move away from states and reconnect with non-state actors who use their (historical) social capital to make the multilevel regulation more practical and socially informed.

ADR and professional practice

Many contemporary organizations—including companies, international organisations, and universities—hire ombudspersons to solve internal disputes, use ADR as a model for organizational change in the management structures (so-called “change management”), or even invest in their own conflict management systems, known as dispute system design. Moreover, if we look at the historical ADR practices of early communities that existed before states (that is, examining how those communities were organized around shared values) we can see similar patterns of organisational behavior and compliance in many contemporary professional communities. Take, for example, organizations dealing with internet governance such as the Internet Corporation for Assigned Names and Numbers (ICANN) (and other private regulators), or even the history of the internet itself, which was built on shared values of technology specialists and programmers. The point is that ADR can help the contemporary professional practice improve collaborative behavior and increase compliance by placing social capital at the core of those goals. Yet again, professionals and professional communities do not have enough knowledge of ADR, which prevents it from being effectively used.

What is more, at a more individual level, ADR skills correspond to the 21st century skills of adaptive and forward-looking professionals that are in high demand in the labour market today. Although it is hard to provide an exhaustive list of all skills for ADR professionals, the core skills can be listed as follows: active listening, good communication skills, ability to generate trust, capacity to deal with and manage emotions, ability to focus on interests and values rather than positions, and a collaborative attitude.

Those skills are required in many professions. Obviously, ADR skills are required for mediators, arbitrators, and negotiators but also for social workers and municipal employees, psychologists, historians, anthropologists, cultural and communications experts, and many more. There are also practitioners whose professional and organisational culture indirectly follows (historical) patterns of ADR, such as private regulators—including the already mentioned community of internet regulators, ICANN, employees of companies, or management.

When we research those actors and how they connect with their social capital based on (historical practices of) ADR, we can use ADR to refocus the study of multilevel regulation from states to non-state actors and build more collaborative multilevel regulation for (future) practitioners.

ADR and everyday activities of citizens

As noted, ADR has been recently introduced by authorities such as the EU, or private companies, like online platforms. Because of globalization, daily activities of citizens transcend national borders. E-commerce platforms registered in one country can have branches all over the world—companies like Alibaba, Amazon, or Zalando often use ADR to address customer complaints over products and related small claims. ADR can be used in the context of disputes relating to a delayed, cancelled or otherwise disrupted flights. EU residents using air carriers registered in the EU and participating in ADR programs can submit their contractual disputes to ADR (or Online Dispute Resolution, if they bought a ticket online). The problem is that citizens have little knowledge of and trust toward those “publicly sponsored” systems, and use them rather scarcely. That is the critical insight.

The constructive insight is that ADR has enormous potential in the context of citizen lives. Take, for example, (community) mediation or negotiations that can address misunderstandings with neighbors or even family conflicts. Those negotiations proceed according to different cultural models, in which different people emphasize different social values, such as taking control of problems, trust building, restoration, moving things forward, etc. In sum, ADR practices, once reconnected with their early social and cultural models can be used to help to improve the quality of lives of many citizens empowering them with social tools to solve their problems on their own.

ADR and social and political challenges

It should not be surprising that ADR has been used to solve political conflicts for centuries. We hear about negotiation or mediation quite often when it comes to discussing political agendas, establishing international or regional organisations, ending political relationships, dealing with civil conflicts, or negotiating peace treaties and ending wars. For example, between 1946 and 2015 mediation was used to solve around 50% of civil and inter-state

conflicts.³⁶ Some countries officially promote social harmony through mediation, sometimes even in unusual ways such as through TV shows like in China.³⁷

Increasingly, and this is rather a novel development, ADR is also used to address serious social (or socio-political) challenges such as family violence, administrative procedures in the context of migration, the marginalization of youth from disadvantaged communities, or racial discrimination in the context of the Black Live Matters movement.

More specifically, ADR—which has been frequently used in the context of divorce proceedings—has recently been encouraged to address family violence.³⁸ ADR is also increasingly used—still mostly as a pilot—in refugee camps.³⁹ Here, ADR has great potential in helping to reduce the current social gap in domestic violence programmes and administrative migration procedures that are largely based on patriarchal and formal principles, often favoring the oppressors and state authorities rather than the weaker parties.

Some authors suggest that ADR, while used in divorce proceedings involving domestic violence, can help reshape the whole fundaments on which formal divorce proceedings still take place.⁴⁰ ADR can offer reparatory language (calling abused women or men survivors rather than victims) and alternative principles to help abused women or men get through the divorce in a forward-looking manner, using reconciliation techniques. Similar guiding principles relate to the increasing use of ADR in refugee camps, where mediators are seen as facilitators rather than representatives of state authorities.

Also, since 1980s ADR, in a form of peer mediation, has been used in about 25% of American schools to help pupils address their conflicts and develop their collaborative skills.⁴¹ Regarding racial discrimination, most recently, different ADR bodies issued calls for funding to develop programmes promoting better dialogue through ADR between citizens and governmental authorities including the Police.⁴²

36 Andra Curutiu, "Mediation in an Armed Conflict: The UN Mediation Support Unit," MLR Student Projects Blog (blog), June 26, 2020, <https://mlrstudentprojects.squarespace.com/blog/2020/6/26/mediation-in-an-armed-conflict-the-un-mediation-support-unit>; accessed 5 October 2020 with references to, Christian Nünlist, "Mediation in Violent Conflict" (CSS Analyses in Security Policy, No. 211, June 2017), 1, <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse211-EN.pdf>, accessed October 5, 2020.

37 Lauriane Eudeline, "China Promotes Harmony within the Country through Mediation TV Shows," MLR Student Projects Blog (blog), June 12, 2020, <https://mlrstudentprojects.squarespace.com/blog/2020/6/12/china-promotes-harmony-within-the-country-through-mediation-tv-shows>.

38 Dafna Lavi, *Alternative Dispute Resolution and Domestic Violence: Women, Divorce and Alternative Justice* (Routledge, 2020).

39 See the ODR app for refugees: "The ODR 4 Refugees," ODR Europe, accessed October 5, 2020, <http://www.odreurope.com/odr4refugees>.

40 Lavi, *Alternative Dispute Resolution and Domestic Violence: Women, Divorce and Alternative Justice*.

41 "Peer Mediation Online," accessed October 5, 2020, <http://www.peermidiationonline.org/peer-mediation-online-about.html>.

42 "AAA-ICDR Foundation Responds to Need for Conflict Resolution Amid Pandemic and Racial Injustice," AAA-ICDR Foundation, accessed October 5, 2020, <https://www.aaaicdrfoundation.org/grants>.

Of course, there are risks that ADR will also be used to the disadvantage of said individuals and researchers like us need to be well aware of those risks. This is why, we need a systematic study of those ADR practices, to monitor their development and formulate best practices in the context of socio-political challenges.

General relevance of ADR today

These are only selected examples of the potential use of ADR in the daily activities of citizens, local communities, the workplace, and in the context of human and professional development of pupils and students, and contemporary social and political problems. Readers of this lecture can surely think of at least one example of a similar use of ADR in their own backyard: be it as a lecturer, student, practitioner, manager, or just a human being.

In sum, my normative claim is that historical ADR practices can help us to:

- Increase the inclusiveness of multilevel regulation by shifting from its traditional monocentric (state-dominant) focus into a polycentric (multi-actor) focus.
- Draw models of collaboration for professional practice.
- Reconnect with the social values lying at the core of multilevel regulation, equipping citizens and vulnerable groups with effective means of solving social and political problems.

Conclusion

In conclusion, although multilevel regulation has been designed to move away from states in the study of how rules are made, it is still largely focused on states. And states are increasingly seen by citizens and practitioners as inefficient, because the formal rules coming from states are lacking the social capital that should lie at the core of multilevel regulation.

Part of the problem is how we have been thinking about contemporary multilevel regulation, its origins, and its social capital. Today, we rarely look at rules in isolation from their legal function, and we rarely *return* to the origins of rules—particularly rules that were created before the nation state was even formed. ADR existed before the formalization of rules and as such it can be perceived as the origins of contemporary multilevel regulation.

If we return to those early ADR mechanisms and study their historical role in maintaining social and communitarian harmony in early societies, we can learn a great deal that is applicable today. We can use ADR to refocus the study of multilevel regulation from states into non-state actors, build more collaborative and practical multilevel regulation for (future) practitioners, and create more socially informed multilevel regulation for citizens and vulnerable groups. This is what our research group is focusing on.

How We Do It: On Returning to the Origins of Multilevel Regulation in Our Research and Teaching Agenda

The arguments I have outlined above are very broad and historically deep. They are not conclusions in the least; instead they are introductions to the kind of research our group will pursue. And there is a lot of work to do! In conclusion, I want to draw attention to the kind of work we are doing.

The organisation and the positioning of the research group at THUAS

The lectoraat Multilevel Regulation is a new research group at THUAS, established in August 2018. The lectoraat consists of researchers-lecturers and students affiliated with different study programs, including but not limited to the International and European LAW, HBO-rechten (Dutch LAW Programme) and European Studies. Since April 2020, the lectoraat has its home at the Centre of Expertise Global Governance. We also collaborate with external partners based locally and internationally, be it practitioners or academics.

Manifesto of the research group

We really see ourselves as being on a mission. And like all groups on a mission, we have a motto and a manifesto!

Our motto is **"ADR for the 99%!"**

First, who are the 1%?

As noted, contemporary multilevel regulation is still centred on states, on elites, on technocrats, and what is more, these are mostly Western states, Western elites, and Western technocrats.

But for the majority of the world's population, for students and practitioners, those regulatory orders and technocratic rules that we think about, that we practice, and that we prepare students for are not the rule, they are the exception, the 1%!

We don't see ADR as an alternative to the current solutions, rather we see it as a tool that is inherent in our contemporary society, education, and public and professional fields. So far, ADR has been studied and practiced mostly by the 1% of those who were lucky to get into the ADR field. **We focus on the "missing" 99%!**

What do we mean by that?

We mean the 99% in the sense of a protest against the dominant study of contemporary multilevel regulation originating in Western states and the need to speak to the vast majority of those who are excluded. Here, we work with students, lecturers, professionals,

and citizens from different fields and levels of expertise (including layman) to increase the diversity of contemporary multilevel regulation through the study of ADR.

We mean the 99% as the missing “practical” part of contemporary multilevel regulation. Here, we investigate whether, and if so, how, ADR can serve as a model for collaborative practices in contemporary multilevel regulation.

Finally, we mean the 99% as the missing “social” part of contemporary multilevel regulation. By studying the history of ADR practices and the social values lying at the core of those practices we want to reconnect the contemporary multilevel regulation with social values offering tools for contemporary social and socio-political problems.

Research and teaching themes

Based on our main argument that contemporary multilevel regulation is informed by the historical ADR practices, the research group focuses on three main research lines:

1. Increasing the diversity of contemporary multilevel regulation.
2. Drawing models of collaboration for the professional practice.
3. Reconnecting with the social values lying at the core of multilevel regulation.

Below I consider each in turn.

1. Increasing the diversity of contemporary multilevel regulation

Commonly, multilevel regulation is seen as originating in states, and the role of private actors in multilevel regulation is subordinate to the legal functions of states and the democratic principles associated with states. Moreover, private actors are often seen as endangering multilevel regulation because they are not equipped with similar democratic safeguards as states and state-sanctioned entities. While there is some evidence for this kind of criticism, it is limited, predictable, and not particularly constructive. Our research group takes a fundamentally different approach and starts with a different hypothesis: private, non-state actors who use ADR or ADR-like techniques are equipped with the tools necessary to *improve* traditional multilevel regulation. Why? Because they have ready-made solutions to reconnect multilevel regulation with the communitarian values lying at its core such as collaboration, participation, and personal trust. Studying those actors and their ADR techniques and values is necessary to increase the polycentricity and inclusiveness of multilevel regulation.

Research questions (to be studied also with students) within **research line 1**:

- What non-state actors shape multilevel regulation through ADR and in what fields?
- What are the historical ADR practices in those fields?
- Do those actors in fact increase the diversity and inclusiveness of multilevel regulation through ADR, contributing to its improvement, or rather endanger it?

2. Drawing models of collaboration for the professional practice

This research line investigates ways in which public authorities (i.e. municipalities, governments, judges) can *cooperate* with private actors in policy and rulemaking by learning from differences rooted in private and public regulation. The research aims to offer practical solutions on how to effectively bridge the work of private and public actors in the field of multilevel regulation, applying it in the broadly understood workplace so as to exploit the advantages of both systems, helping practitioners in their daily professional practice.

Research questions (to be studied also with students) within **research line 2**:

- Which new governance structures (cooperation frameworks) can be developed to connect private and public actors in the field of multilevel regulation and how (e.g. through experimentation and innovation)?
- What professional values and skills are relevant for increasing cooperation and compliance in the workplace today?
- How can we draw from historical ADR values to increase cooperation and compliance in the workplace?

3. Reconnecting with the social values lying at the core of multilevel regulation

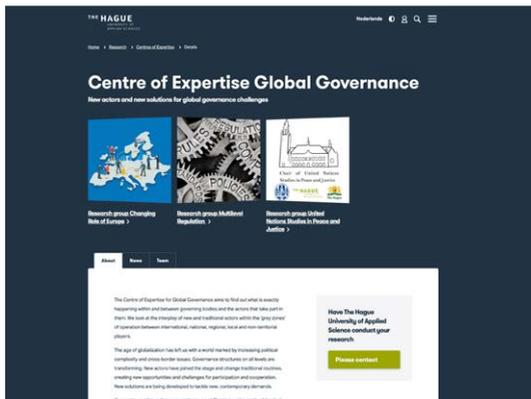
Most recent developments in the field of dispute resolution are progressing without citizens and vulnerable groups even noticing them, except as intermittent and unwelcome surprises. The lack of public awareness of the increasing role of ADR in everyday activities and in important socio-political issues hinders the effectiveness of ADR. Our research group aims to disseminate the knowledge on ADR to the public through research, public events, and practical toolkits.

Research questions (to be studied also with students) within **research line 3**:

- How does ADR affect the everyday lives of citizens and vulnerable groups?
- What are the risks and benefits of using ADR for citizens and vulnerable groups?
- How to increase the use of ADR by citizens and vulnerable groups, equipping them with effective means of solving social problems?

Our research group and the Centre of Expertise Global Governance

As I mentioned earlier, our research group is positioned within the Centre of Expertise Global Governance. At the Centre, we study global governance as a network of local practices of different state and non-state actors who shape global problems from the bottom up such as street level practitioners in municipalities, ministries, or other state agencies, (youth) activists, or simply citizens engaged in community building.



Source: THUAS website

Studying ADR with a historical view to contemporary problems, couldn't be more relevant in the context of global governance today.

ADR can help us reconnect with the social capital of contemporary global governance which is essential in reforming global governance by giving it its rightly deserved human face.

Research group and THUAS' goals

That is our research group, but what is really special here are the attachments of the group to THUAS.



THUAS is an excellent place for our research. Our core educational and research goals at THUAS are: inclusiveness, diversity, and internationalization. These goals go to the core of ADR, allowing us to explore the origins of contemporary multilevel regulation with students (and lecturers) from around the world, representing a diversity of geographical, ethnical, and national backgrounds.

Highlights of Projects

The question of multilevel regulation opens up rather fundamental puzzles regarding law and society today. Our projects aim to understand those puzzles, situate them in a broader historical context, and work through some of their contemporary manifestations. As noted, there is a lot of work to do, and I want to conclude by outlining some of the work we have done in the last year.

MLR Student Projects

Since the establishment of the research group, student engagement is at the core of our research activities. Students developed their own website dedicated to their projects.

Those included a podcast series, blog posts, and the section on internships in the field of ADR. Although we have many students who occasionally get involved in the work in the

context of the research group, the following students took the lead on our sub-projects: Carla Loghin (alumna), Simona Jansonaite, Delilah van Tol, Mimi Oosterveen, Suela Dervishi, Andra Curutiu, Hanna Falkiewicz, Nadia Farwati, and Bianca Oprea (alumna).

Many thanks to all of you for your commitment and hard work!

Trust MEdiators: Developing a student-driven mediation lab to learn and practice how to be trustworthy mediators

Comenius Senior Fellowship awarded to Dr. Barbara Warwas

Trust MEdiators will develop a training model in soft mediation skills through a mediation lab. This lab differs from role play, simulations, and mediation clinics through which mediation is currently taught in that it is primarily student-driven, shifting the experiential focus from experienced mediators to students.

The added value of the proposed lab is that it allows students to proactively replicate professional mediation in their own educational environment by learning intercultural mediation skills and developing new mediation models based on “traditional” virtues of communitarian mediators. Consequently, students develop as people, professionals, and researchers and they establish sound connections with the labor market.

The project will be conducted by a team including Barbara, Marike Hehemann (co-applicant), and students.

TRIIAL

In 2019-2020, the lectoraat joined an international consortium for the project on “TRust, Independence, Impartiality and Accountability of judges and arbitrators under the EU Charter (TRIIAL)”. Project no. 853832, JUST-JTRA-EJTR-AG-2018



The project, for which the research group was a co-applicant, was awarded funding from the European Commission (Horizon 2020).

Quoting from the project proposal: “TRIIAL provides training activities and tools for judges, lawyers, arbitrators and other legal professionals in areas of salient importance for the application of the EU Charter of Fundamental Rights (CFR): trust, independence, impartiality, accountability of judges

and arbitrators. Its main objective is to explain and disseminate knowledge of the CFR potential for ensuring and improving the fundamental rights standards, ultimately benefiting the rule of law in the Member States.”

As part of the project (and among other educational and training activities), the lectoraat MLR Regulation will organise training for arbitrators on the Charter of Fundamental Rights. Research team on this project consists of Dr. Barbara Warwas and Dr. Luca Pantaleo.

For more information on the project see the project [website](#).

Call for action!

Thank you for reading the lecture!

If you have comments, questions, and ideas for collaboration, we want to hear from you. Contact us and hopefully we will be able to work together towards improving the quality of our daily lives, our society, and professional practice!

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For more information about projects [see here](#).

For more information about MLR student-centered projects (including the application form to join the students' team) [see here](#).