RETURNING TO THE ORIGINS OF MULTILEVEL REGULATION:

THE ROLE OF HISTORICAL ADR PRACTICES

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The article engages with the recent studies on multilevel regulation. The starting point for the argument is that contemporary multilevel regulation—as most other studies of (postnational) rulemaking—is limited in its analysis. The limitation concerns its monocentric approach that, in turn, deepens the social illegitimacy of contemporary multilevel regulation. The monocentric approach means that the study of multilevel regulation originates in the discussions on the foundation of modern States instead of returning to the origins of rules before the nation State was even created, which is where the actual social capital underlying (contemporary) rules can be found, or so I wish to argue.

My aim in this article is to reframe the debate. I argue that we have an enormous reservoir of history, practices, and ideas ready to help us think through contemporary (social) legitimacy problems in multilevel regulation: namely all those practices which preceded the capture of law by the modern State system, such as historical alternative dispute resolution (ADR) practices.

Keywords: multilevel regulation, rulemaking, ADR, historical ADR practices, social legitimacy

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I. INTRODUCTION

Increasingly, there have been discussions about law as a driver of social change, innovation and sustainability. Law, especially private law, has always been responsive (for better or worse) to societal, economic, and technological challenges. Today, however, those challenges seem even more prevalent and urgent due to the complexity of contemporary regulatory processes, meaning the multilevel rulemaking by different State and non-State actors. The complexity stems from the rapidly changing economic and business models (e.g., circular economy or knowledge economy), the intricacy of global challenges (e.g., global pandemics), and the role of new technologies, including artificial intelligence, in different sectors. All this requires a more polycentric, inclusive approach to rulemaking. Polycentricity is here understood as a multilevel network of State and non-State actors who shape the rulemaking within specific sectors together.[1] Increasingly, the goal of this polycentric rulemaking is to promote sustainability by serving those whose interactions are being regulated: citizens.[2]

There is a broad and deep academic discussion regarding the interplay between rulemaking involving different actors at different levels in this

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[1] 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' (2011) 25 Governance: An International Journal of Policy, Administration, and Institutions 237. My understanding of polycentricity in the context of multilevel regulation is further explained in section II.1 'The Development of the Concept of Multilevel Regulation' below.

[2] See, for example, Tilburg University, 'Connecting Organizations: Private, Fiscal and Technology-Driven Relations in a Sustainable Society (Signature Plan)' <https://www.tilburguniversity.edu/about/schools/law/departments/pbll/research-test/connecting-organizations> accessed 24 August 2022; ERC Starting Grant, Principal Investigator: Dr. Marija Bartl, 'Law as a Vehicle for Social Change: Mainstreaming Non-Extractive Economic Practices (N-EXTs)' <https://www.nonextractivefuture.eu> accessed 24 August 2022.

rapidly changing reality. This debate concerns a variety of core concepts regarding the relationship between private and public law, the nature of law and legal pluralism, globalisation and privatisation, to mention just a few.[3] Most recently, there have been studies on postnational rulemaking addressing the increasing role of non-State actors in regulatory processes.[4] Within this literature, scholars have developed the concept of multilevel regulation.[5] Although there is no uniform definition of multilevel regulation, it can be summarised as the network of rules, actors, and practices at national, regional, international, and global levels, by placing the 'new' non-State actors in multilevel regulatory processes in the spotlight.[6] The

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[3] See, for example, Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Aldershot; Brookfield, USA: Dartmouth 1997); Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction' (2013) 11 International Journal of Constitutional Law 125; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

[4] See Elaine Fahey (ed), *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (Routledge 2017); Beate Sissenich, 'Postnational Rulemaking, Compliance, and Justification: The New Europe' (2008) 6 Perspectives on Politics 143.

[5] See, for example, Nupur Chowdhury and Ramses A Wessel, 'Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?' (2012) 18 European Law Journal 335; 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).

[6] Barbara Warwas, 'Inaugural Speech of Dr. Barbara Warwas as Lector in Multilevel Regulation at The Hague University of Applied Sciences: Returning to the Origins of Multilevel Regulation' 9–10 <https://www.thehagueuniversity.com/docs/default-source/documenten-onderzoek/lectoraten/multilevel-regulation/booklet-inaugural-lecture-barbara-warwas.pdf?sfvrsn=4cd068c1_4> accessed 12 August 2022. For different scholarly understandings and definitions of multilevel regulation, see section II.1 on 'The Development of the Concept of Multilevel Regulation' below.

Hague University of Applied Sciences developed a research group to exclusively study multilevel regulation.[7] This article sets the framework for the research agenda of this group, including the general argument underlying our studies and recommendations for future research. Hence, I focus more on hypotheses and preliminary evidence to be explored in future research rather than offering conclusive findings. In view of this, in this article, I take a somewhat experimental and exploratory approach to the study of multilevel regulation. I point to the need for a new, broader and more inclusive societal approach to the rapidly changing contemporary regulatory processes, including the rethinking of the current historical perspective of multilevel regulation.

The starting point for the argument is that contemporary multilevel regulation--as most other studies of (postnational) rulemaking--is limited in its analysis. The limitation concerns its monocentric approach that, in turn, deepens the social illegitimacy of contemporary multilevel regulation. The monocentric approach means that the study of multilevel regulation originates in the discussions on the foundation of modern States instead of *returning* to the origins of rules before the nation State was even created, which is where the actual social capital underlying (contemporary) rules can be found, or so I wish to argue.

My aim in this article is to reframe the debate. I argue that we have an enormous reservoir of history, practices, and ideas ready to help us think through contemporary (social) legitimacy problems in multilevel regulation: namely all those practices which preceded the capture of law by the modern State system such as historical ADR practices. That is, the dominant

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[7] For more information about the research group see <https://www.thuas.com/research/research-groups/multilevel-regulation> accessed 16 February 2023. Some parts of this article are taken directly from my previous work including in Warwas, *Inaugural Speech* (ibid) and the internal documents concerning the research group at The Hague University, such as the Annual Plan of the Research Group Multilevel Regulation of 2019, 2020, and 2021-22, unpublished.

conceptual framework of today, **that multilevel regulation originates in States representing formal rules, is misleading**. Instead, we need to think in terms of a wider historical framework: historical ADR practices representing social values, then State, and then multilevel regulation. In other words, instead of a two-step conceptual framework for multilevel regulation, we need to adopt a three-step conceptual framework by including the historical ADR practices as the origins of States and State-made rules and subsequently also of multilevel regulation. Such a broad approach will help us to address the social legitimacy gap in contemporary multilevel regulation.

The article is organised as follows. In the first part of the article, I focus on describing the problem with contemporary multilevel regulation. In the second part of the article, I propose to rethink the historical context of the origins of multilevel regulation. In the third part of the article, I turn to normative arguments regarding the potential of historical ADR practices in contemporary multilevel regulation. Recommendations for future research and conclusions follow.

II. THE PROBLEM

This section begins with an explanation of the concept of multilevel regulation. Furthermore, I discuss the limitations of contemporary studies of multilevel regulation, the relationship between multilevel regulation and the new solutions incorporated therein to address the contemporary limitations of multilevel regulation, and the main puzzle.

1. *The Development of the Concept of Multilevel Regulation*

Multilevel regulation can be defined as the networks of rules, actors, and practices that regulate professional and private lives of citizens around the globe, as well as legal, public, and social affairs at national, regional, international, and global levels. In the section below, I explain the relevance and complexity of such networks for contemporary society and professional

practice. Towards the end of this section, I proceed with a review of literature on multilevel regulation to point out its limitations.

Regarding the network of rules, almost every single aspect of human behaviour is subject to hard rules (often referred to as 'laws' or 'public regulation') or soft rules (often referred to as 'private regulation'), with hard rules bearing legal obligations that can be enforced in courts, and soft rules concerning non-binding (voluntary) rules, principles, or standards.[8] Use of the Internet and social media, safety of food and drinkable water, waste disposal, employment relationships, social interactions all are subject to rules and regulations, often without people even realising it. The Covid-19 pandemic demonstrated this breadth of laws and regulations (often called 'measures') particularly clearly, including the interplay between those two, in private and professional spheres.[9]

The network of actors making rules today is broader than was 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.[10] In the words of Hooghe and Marks 'in

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[8] For the sake of consistency, I refer in this article to rules in the meaning of hard rules coming from State actors and to regulations as all forms of private regulation by private actors. Multilevel regulation encompasses a tangle of rules and regulations, by both public and private actors, and is also referred to as 'rulemaking'.

[9] For a discussion on complex governance including legality problems in view of the Covid-19 pandemic see a blog post (being a summary of a webinar of the same title): Jan van Zyl Smit, 'Power and the COVID-19 Pandemic: Beyond the Separation of Powers?' (*RECONNECT*, 24 March 2021) <https://reconnect-europe.eu/blog/power-and-the-covid-19-pandemic-beyond-the-separation-of-powers/> accessed 24 August 2022.

[10] In this article, I mean the modern-State system roughly as being the period from the Treaty of Westphalia onwards.

modern times, the ship of government became the ship of state'.[11] Indeed, rulemaking 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.

In 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), standardisation bodies (for example, the International Standardisation Organisation setting 'ISO standards' including for child seats for cars, formats for date and time, or currency codes), experts, media, civil society organisations promoting youth and citizens' participation in rulemaking, and many more. As one commentator observes, 'now, all you need to create rules is a well-organised group of people and a website'.[12] It is a sarcastic but accurate remark, speaking to the increasing polycentricity of contemporary regulatory actors. Multilevel regulation has been developed to address and critique this polycentricity.

Regarding the level of regulation, all regulatory actors and rules have spread to 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

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[11] Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of Multilevel Governance' (2020) 22 The British Journal of Politics and International Relations 820, 821.

[12] Maurits Barendrecht, David Raič, Ronald Janse, Sam Muller, 'Trend Report Rulejungling. When Lawmaking Goes Private, International and Informal' (HiiL 2012) 3.

and sideways to public/private networks' and contemporary multilevel practices are often performed at all those levels, the distinction being somewhat blurred.[13]

In summary, while in the past rulemaking was seen as monocentric—with its main centre in the State—multilevel regulation has been developed as a polycentric field, meaning that more actors than only States are involved in making rules that are dispersed at national, regional, international, and global levels.[14] For example, in the field of food safety, multilevel regulation can be described in the following way. At the national level, the safety of food is regulated by manufacturers (to be understood as food producers) and national authorities such as the Food and Consumer Product Safety Authority in the Netherlands.[15] At the regional level, there are applicable standards developed by the EU through its General Food Law. At the international level, there is the UN's work in the field of food safety (in particular, relating to the Sustainable Development Goal 2). Finally, at the global level, there exist global food standards developed by the Codex Alimentarius Commission.

These complex regulatory processes have been increasingly studied by legal scholars, who directly or indirectly refer to them as 'multilevel regulation'. In the literature review section below, I briefly present the emerging studies of multilevel regulatory processes (rulemaking) beyond the State involving non-State actors. In those studies, rulemaking concerns the interplay between regulations developed by private actors and formal rules originating

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[13] Liesbet Hooghe and Gary Marks, 'Types of Multi-Level Governance' (2001) 5 European Integration online Papers (EIoP) online publication, 4; Liesbet Hooghe and Gary Marks, 'Unraveling the Central State, But How? Types of Multi-Level Governance' (2003) 97 American Political Science Review 233.

[14] On the development of the concept of polycentricity and its pros and cons, see Aligica and Tarko (n 1).

[15] 'The Website of Netherlands Food and Consumer Product Safety Authority' <https://english.nvwa.nl> accessed 24 August 2022.

in States, hence they attempt to illustrate the increasing polycentricity of multilevel regulation. Ultimately, however, all those studies adopt a State-centric approach to the origins of multilevel regulation. In other words, they are constantly oriented towards States and/or (public) law when explaining the emergence of the phenomenon of multilevel regulation. For example, Nupur Chowdhury and Ramses Wessel define multilevel regulation as follows:

'Multilevel regulation is a term used to characterise a regulatory space, in which the process of rule making, rule implementation or rule enforcement is dispersed across more than one administrative or territorial level amongst several different actors, both public and private. The relationship between the actors is non-hierarchical and may be independent of each other. Lack of central ordering of the regulatory lifecycle within this regulatory space is the most important feature of a multilevel regulation.'[16]

This definition of multilevel regulation at first glance points to some important features of multilevel regulation such as the necessary non-hierarchical relationships between regulatory actors at different administrative levels and the lack of central ordering.[17] At the same time, however, the further analysis of the concept of multilevel regulation by the authors in their article suggests that multilevel regulation will always have 'direct or indirect reference to formal legal processes' at different regulatory levels as it only covers the activities that 'would directly or indirectly have a legal effect'.[18] Moreover, the authors derive their definition of multilevel regulation from the concept of regulatory space by Hancher and Moran, which still has the State as a traditional regulatory entity as its starting point,

[16] Chowdhury and Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?'* (n 5) 346 (citations omitted).

[17] Ibid 346–347.

[18] Ibid 346.

even though it assumes that the regulatory power moves away from the State, public authority.[19]

In *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes,* Andreas Follesdal, Ramses Wessel, and Jan Wouters also focus on the concept of multilevel regulation, trying to grasp complex relationships between different regulatory orders involved, especially in the context of the EU, together with their impact on legitimacy and legal protection that the multilevel rulemaking should offer.[20]

Linda Senden discusses the emergence of 'alternative' forms of regulation in the EU, including soft law, self-regulation, and co-regulation, as instruments of diversification of European regulation originally seen as rooted in more traditional, top-down regulatory actions of the EU, which Senden calls 'command-and-control legislation'.[21] This traditional approach by the EU largely resembles the coercive powers of States, specifically their legislative authorities.

At the global, transnational level, scholars such as Fabrizio Cafaggi discuss the concept of transnational private regulation (TPR), which investigates the increasing shift from the national (domestic) to the global level and from public to private actors in regulatory processes.[22] TPR can be seen, inter alia,

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[19] Ibid 347.

[20] Follesdal, Wessel and Wouters, *Multilevel Regulation and the EU: The Interplay Between Global, European and National Normative Processes* (n 5).

[21] Linda AJ Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9 Electronic Journal of Comparative Law online version.

[22] Fabrizio Cafaggi, 'A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement' (2014) EUI Working Paper LAW 2014/2015 <https://cadmus.eui.eu/handle/1814/33591> accessed 19 October 2022; Barbara Warwas, 'The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research' (2020) Zoom-out 73 Questions of International Law 33.

in food safety, forestry management, or trade, where private actors such as the Forest Stewardship Council set private standards to be complied with voluntarily (with the reservation that once private regulatory regimes join in, compliance with private standards becomes mandatory subject to legal sanctions).[23] Here again, Cafaggi's notion of TPR develops from a State-centric understanding of regulatory power.

The work of Paul Verbruggen on private regulation concerns questions of the enforcement of TPR and most recently of the constitutionalisation of private regulation denoting an interplay between private law and private actors on one side and the fundamental principles of law on the other side.[24] Those questions regarding constitutionalisation of private regulation, especially at the EU level go to the heart of multilevel constitutionalism developed by Pernice and De Witte and discussed by Chowdhury and Wessel when explaining their definition of multilevel regulation, which yet again is rooted in more traditional discussions on national constitutionalism.[25]

Rebecca Schmidt has worked on the private-public cooperation in TPR where she explores how private actors interact with international

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[23] Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement* (n 22) 10–11; Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 Journal of Law and Society 20, 22; Warwas, *The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research* (n 22) 33.

[24] Paul Verbruggen, *Enforcing Transnational Private Regulation. A Comparative Analysis of Advertising and Food Safety* (Edward Elgar 2014); Paul Verbruggen, 'Private Food Safety Standards, Private Law, and the EU: Exploring the Linkages in Constitutionalization' in Marta Cantero Gamito and Hans-Wolfgang Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts, and Codes* (Edward Elgar 2020).

[25] Chowdhury and Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?* (n 5) 349.

organisations including the International Labor Organisation.[26] Among other things, Schmidt examines the questions of authority and legitimacy in the context of the regulatory frameworks beyond State yet still largely focusing on the State-sanctioned organisations alongside private actors.

Finally, there has been some important work by Hans Micklitz on European regulatory private law (ERPL) through which it is hypothesised that ERPL has emerged as a new legal order representing its own values in the European legal sphere in contrast to the more traditional, nationally oriented private law.[27] What all those studies have in common is that they embed the discussions on multilevel regulation in the discussion of State as a traditional source of regulatory authority and legitimacy. This State-centric approach entails serious limitations to the study of contemporary multilevel regulation.

2. *The Limitations of Contemporary Studies of Multilevel Regulation*

In this section, I argue that the study of contemporary multilevel regulation does not sufficiently express the necessary polycentricity it is designed to reflect on. This, in turn, largely undermines the social legitimacy of contemporary multilevel regulation.

Regarding the lack of polycentricity, despite the complex network of rules, actors, and multilevel practices, formal rules originating in States are still a starting (and end) point in the study of multilevel regulation. Even when non-State actors engage in rulemaking, scholars often speak about them as 'new' actors that 'started to appear on the scene', even if some of those actors-

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[26] Rebecca Schmidt, *Regulatory Integration Across Borders. Public–Private Cooperation in Transnational Regulation* (Cambridge University Press 2018).

[27] Hans-W Micklitz, 'The Internal vs. the External Dimension of European Private Law - A Conceptual Design and a Research Agenda' (2015) EUI Working Paper LAW 2015/35, European Regulatory Private Law Project (ERPL-13) <https://cadmus.eui.eu/handle/1814/36355> accessed 19 October 2022.

-such as multinational companies--were established decades ago.[28] Similarly, when analysing the ways through which non-State actors make contemporary rules, scholars often speak about how private actors complement public rulemaking, which entails some form of delegation of authority from public (State) to private (non-State) actors, and not the other way around.[29] This also refers to the usual vocabulary used by scholars such as 'postnational' through which it is implied that States lost their prominence in the academic and practical discourse to the new players (again, non-State actors).[30] Finally, scholars often speak about the lack of trust in the 'new' non-State actors who 'try to gain legitimacy', understood in the orthodox manner, as the system of checks and balances generated by a modern State and largely focused on legal power as a source of regulatory authority.[31] 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'.

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[28] Barendrecht and others (n 12) 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.'

[29] Even when private actors exercise regulatory powers autonomously, such as in the TPR regimes studied by Cafaggi, there is always a discussion about the 'reallocation of authority' from public to private actors and from national to international or transnational. See Cafaggi, *New Foundations of Transnational Private Regulation* (n 23) 20–21; Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* (n 21).

[30] See, generally, the discussions on the 'new' actors in postnational rulemaking in: Fahey, *The Actors of Postnational Rule-Making: Contemporary Challenges of European and International Law* (n 4); Chowdhury and Wessel, *Conceptualising Multilevel Regulation in the EU: A Legal Translation of Multilevel Governance?* (n 5) 357.

[31] Barendrecht and others (n 12) 3.

This translates into problems with the social legitimacy of contemporary multilevel regulation. By 'social legitimacy' I mean (1) trust by citizens in institutions (be they public or private) in which the rules and regulations applicable to citizens originate, (2) the actual understanding (or the lack thereof) of rules and regulations by citizens, and finally (3) a 'meaningful participation of citizens in rulemaking'.[32] In this sense my understanding of social legitimacy proposed in this article is broader than the one developed in the context of State-centred multilevel regulation, where social legitimacy is still safeguarded by features of a modern State such as the need for public authorities to observe the rule of law, or the need for checks and balances rooted in public accountability and transparency of modern State-sanctioned institutions.[33] Those are certainly important characteristics but they are top-down, understood through the perspective of democratic legitimacy of a system, not through a more bottom-up, citizen-driven understanding of social values underlying the rulemaking processes. Rather, my understanding of social legitimacy goes to the core of rulemaking *for* and *with* the people, hence to the core of social values as seen by citizens. Although those social values are certainly hard to be addressed universally, they find their roots in the theory of social capital that goes to the core of human interactions based on relational trust.[34] I return to this term later, in sections II.4, III, and IV. Let me now focus on the lack of social legitimacy in contemporary multilevel regulation.

First, regarding public trust, figures show that this is in decline in both Europe and in the US. Specifically, I refer here to the Edelman Trust Barometer Global Report 2017 ('the Report'), analysed by Hosking, which

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[32] Ibid 5.

[33] See generally Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* (n 21) s 2.4.

[34] This understanding reads in line with Putnam's theory of social capital. Robert D Putnam, *Bowling Alone. The Collapse and Revival of American Community* (Simon & Schuster Paperbacks 2000).

focused on public trust in four societal institutions: government, business, NGOs, and the media.[35] Although not directly linked with legal regulatory processes, the Report suggests that both public and private actors who are leading in contemporary multilevel regulation (such as the four mentioned above) face similar problem of distrust by citizens, which is quite relevant for the present discussion. The most recent version of the Edelman Trust Barometer Global Report of 2022 also points to the distrust as the society's default emotion and to the role of government and media in fuelling a cycle of distrust.[36] It can be hypothesised that the actions' of private actors (e.g., businesses) and public actors (e.g., governments) are seen by citizens as interconnected within multilevel regulation, which has effects on the overall perceptions of distrust in multilevel regulation as a whole by those citizens.

This leads to the second aspect of social legitimacy of multilevel regulation, the one relating to the actual understanding of rules and regulations by citizens. It seems that rules made by States and State-sanctioned institutions are increasingly seen by citizens and professionals, especially professionals that translate those rules at local levels, as impractical. In many State-sanctioned institutions – as well as regional and international organisations including the UN, the EU, and the WTO – rules, policies, and regulations are made by highly specialised experts who speak a language that is too sophisticated and complex for a non-specialist to understand. The complex rulemaking by international institutions and organisations – and the technocracy inherent in their actions – make it hard for professionals and citizens to understand the purpose of the rules and policies they need to apply in individual cases.

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[35] Geoffrey Hosking, 'The Decline of Trust in Government', *Trust in Contemporary Society* (BRILL 2019) online version.

[36] 'Edelman Trust Barometer. Global Report.' (2022) <https://www.edelman.com/sites/g/files/aatuss191/files/2022-01/2022%20Edelman%20Trust%20Barometer%20FINAL_Jan25.pdf> accessed 18 October 2022.

The third concern with social legitimacy of contemporary multilevel regulation relates to the need for more civic participation in regulatory processes. There are limited studies in the field of multilevel regulation that support this claim, mostly because the contemporary studies of multilevel regulation are still quite monocentric, as demonstrated in the literature review above.[37] However, if we expand the analytical scope to include the literature on the participation gap in global governance—and there are good conceptual reasons why we should do so—there is a wealth of evidence to support this argument.[38] The literature on the participation gap in global governance concerns, among other things, calls for more polycentricity and collective action in climate governance, the need for more democratic participation in global governance be it by citizens or NGOs, to mention a few bottom-up actors, or a multistakeholder model of global governance.[39] Those claims seem to translate into the select academic postulates for the meaningful involvement of citizens in multilevel regulation, which appear

[37] For the somewhat isolated calls for a 'meaningful participation of citizens and end-users' in regulatory processes, see Barendrecht and others (n 12) 5.

[38] Global governance and multilevel governance are not the same concepts, but at least in regard to the particular point at hand there are good reasons for treating them alike. For example, some scholars argue that global governance can be seen as a form of multilevel governance. See Michael Zürn, '51 Global Governance as Multi-Level Governance' in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford University Press 2012); the definition of which is in turn often used interchangeably with the definition of multilevel regulation, as demonstrated by Chowdhury and Wessel in: Chowdhury and Wessel (n 5) 341. The overlap between those concepts and definitions allows to expand the conceptual framework of analysis into the literature on global governance and the participation gap in this section.

[39] Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' (2010) 20 Global Environmental Change 550; Saskia Sassen, 'The Participation of States and Citizens in Global Governance' (2003) 10 Indiana Journal of Global Legal Studies 5; Dana Brakman Reiser and Claire R Kelly, 'Linking NGO Accountability and the Legitimacy of Global Governance' (2011) 36 Brooklyn Journal of International Law 1011; Jan Aart Scholte, 'Multistakeholderism: Filling the Global Governance Gap' (Global Challenges Foundation 2020).

even more timely now due to the most recent emergence of the complex regulatory and business models requiring sustainable solutions for their end users, namely citizens.[40] On a more activist level, citizens (including youth movements) increasingly seek to have a say in the regulation of local and global challenges. In the field of climate change regulation, citizens point to the inability of politicians, (local) governments, and private actors (such as multinational companies) to take responsible and collaborative actions to cut local emissions in different sectors or to protect wildlife and nature. The recent judgment of 26 May 2021 by The Hague District Court in the so-called Shell climate case demonstrates that citizens and civil movements can significantly shape regulatory policies.[41] The case was brought against Royal Dutch Shell on behalf of over 17,000 Dutch citizens (alongside a few environmental groups) and resulted in the Court's order for Shell to reduce CO_2 emissions by 45% by 2030.[42] Despite the success of this legal action, the involvement of civil society in regulatory processes appears to be still rather limited.

In sum, the above examples show one common thread: the insufficiency of contemporary multilevel regulation due to a widespread lack of social legitimacy of the contemporary formal rules centred on States. 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.

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[40] See Barendrecht and others (n 12); ERC Starting Grant, Principal Investigator: Dr. Marija Bartl (n 2); Tilburg University (n 2).

[41] Jan Jakob Peelen and Dieuwke Kist, 'The Shell Climate Case; a Precedent Setting Judgment?' (1 June 2021) <https://www.dentons.com/en/insights/alerts/2021/june/1/the-shell-climate-case-a-precedent-setting-judgment> accessed 24 August 2022; *Shell Climate Case* [2021] Rechtbank Den Haag/The Hague District Court C/09/571932 / HA ZA 19-379.

[42] Peelen and Kist (n 41).

3. *Are the 'New Solutions' Working? On the Relationship Between Multilevel Regulation and ADR*

Multilevel regulation entails the use of different regulatory tools developed mostly by private, non-State actors in the context of public regulation. I call these private tools 'new solutions' through which the polycentricity of contemporary multilevel regulation is supposed to be emphasised, (paradoxically) to address the (social) illegitimacy of contemporary multilevel regulation. One example of such 'new solutions' is ADR. The discussion below will show that—although ADR has been popularised to increase the legitimacy of multilevel regulation—eventually it did not succeed. Analysis of the sources of this failure will lead us towards an understanding of the puzzle underlying this article.

A. What Is ADR, When Was It Popularised & Why Did It Not Work?

ADR refers to any means of solving disputes outside of the court room.[43] One popular example of ADR is arbitration, in which two or more parties submit their disagreement to a private arbitrator, who then determines the result in the form of a binding award. Another is negotiation, which means that parties negotiate the result among themselves. Yet 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

[43] 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?' (2016) EUI Working Paper LAW 2016/23 <https://cadmus.eui.eu/handle/1814/44226> accessed 19 October 2022; Barbara Warwas, 'Current State of the Scholarship on Arbitration and EU Law: From Absolute Exclusion to Cautious Inclusion' (2018) 15 Transnational Dispute Management online publication, s 1.3; Christopher Hodges, Iris Benöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart 2012).

that they are *legal processes* developed, practised, and studied in the context of *access to justice*.

ADR was popularised 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 American history. In view of this, the ADR referred to in this section is to be understood as modern ADR.[44] In 1976, then-Chief Justice of the US Supreme Court Warren E. Berger convened the 'National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice' known today as the 'Second Pound Conference'.[45] Although the conference itself was organised after the death of Roscoe Pound, it was based on his life-long legacy: 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'.[46]

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.[47] Although

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[44] Please note that given that there is no uniform definition of ADR and that different types of ADR can share similar characteristics in practice, I distinguish here the term 'modern ADR' only to differentiate it from the historical ADR practices explained in section III below. Those two types of ADR are then stylised for the purpose of the argument developed in this article.

[45] Lara Traum and Brian Farkas, 'The History and Legacy of Pound Conferences' (2017) 18 Cardozo Journal of Conflict Resolution 677, 684.

[46] Ibid 681–682.

[47] Levin Russell and A Leo Wheeler (eds), *The Pound Conference Perspectives on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (West Publishing Co St Paul Minnesota 1979); Gladys Kessler, Linda J. Finkelstein, 'The Evolution of a Multi-Door Courthouse' (1988) 37 Catholic University Law Review 577, 577-578.

having limited applicability today, the reform reintroduced ADR in the context of American litigation. The multidoor courthouse concept assumed that the court serves as a resource centre 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 centre, mediation, or arbitration.[48]

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 privatisation of justice as part of the broader access to justice movement, which was supposed to increase States' and citizens' welfare.[49] Some commentators view Cappelletti's approach to access to justice and the public sector as 'activist, redistributive, democratizing, public-service-minded' meaning bringing justice to people as a form of communitarian action, and we may claim that this is how he also perceived the potential of ADR to unburden courts and 'do justice' to citizens.[50]

In the 1970s, ADR was seen on both sides of the Atlantic as a refreshing alternative to overloaded and procedurally complex public court

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[48] Carrie Menkel-Meadow, 'The History and Development of "A" DR (Alternative/Appropriate Dispute Resolution)' (*Völkerrechtsblog*, 1 July 2016) <https://voelkerrechtsblog.org/the-history-and-development-of-a-dr-alternativeappropriate-dispute-resolution/> accessed 24 August 2022.

[49] Bryant G Garth and Mauro Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buffalo Law Review 181; Mauro Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 The Modern Law Review 282; Barbara Warwas, 'Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice' in Loïc Cadiet, Burkhard Hess and Marta Requejo Isidro (eds), *Privatizing Dispute Resolution: Trends and Limits* (Nomos 2019) 335.

[50] Ugo Mattei, 'Access to Justice. A Renewed Global Issue?' (2007) 11.3 Electronic Journal of Comparative Law 1, 2.

proceedings. ADR was then perceived as tool for achieving the public good, aiming to increase the legitimacy of public justice systems through which the whole welfare state system could be preserved.

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 criticised for favouring multinational corporations and more powerful disputants.[51] 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.[52] But ADR was incorporated into public, formal frameworks of justice and was

[51] On vanishing trials and ADR see for example Thomas J Stipanowich, 'ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"' (2004) 1 Journal of Empirical Legal Studies 843; Jessica Silver-Greenberg and Michael Corkery, 'In Arbitration, a "Privatization of the Justice System"' *New York Times* (1 November 2015) <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> accessed 24 August 2022; Jessica Silver-Greenberg and Robert Gebeloff, 'Arbitration Everywhere, Stacking the Deck of Justice' *New York Times* (31 October 2015) <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?auth=login-email&login=email> accessed 24 August 2022.

[52] 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); 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).

treated as yet another formal (legal) tool serving elite lawyers rather than citizens.[53]

Hence, although in the 1980s ADR was seen as one of the 'new solutions' to increase the legitimacy of State-made rules generally speaking, it did not succeed as planned. Today when we hear about ADR from academics and professionals, we only hear about it in a narrow way, in the context of access to justice or court proceedings.[54] This is often a critical discussion pertaining to similar problems of the illegitimacy and technocracy of ADR rules as presented above, in the context of contemporary multilevel regulation.[55] ADR is not seen by citizens as a legitimate means of solving social issues, because it has been 'consumed' by the public system that is seen as serving the elites, or at least representing the adversarial principles of formal justice systems that are detached from the actual needs of citizens. The same problem concerns education in the field of ADR. Arbitration, negotiation,

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[53] See European Commission, 'COM(2019) 425 Final. Report on the Application of Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes and Regulation (EU) No 524/2013 of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes' 9, which revealed the general perception by consumers of ADR as a tool developed by and serving traders often being biased towards the latter (a similar perception has been revealed the other way around, by traders towards consumer ADR).

[54] Stefan Wrbka, *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*, 27 April 2020) <http://nyujilp.org/wp-content/uploads/2013/02/Jaroslav-Kudrna-Arbitration-and-Right-of-Access-to-Justice-NYU-JILP-Feb-2013.pdf> accessed 24 August 2022; Warwas, *Access to Privatized Consumer Justice: Arbitration, ADR, and the Future of Value-Oriented Justice* (n 49); 'Global Pound Conference Series' <https://imimediation.org/research/gpc/> accessed 19 October 2022.

[55] 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?' (2014) 10 European Review of Contract Law 258.

or mediation – although increasingly appearing in university curricula – are treated as specialised fields, 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 to perhaps 1% of 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, and hence, to emphasise the social function of ADR. Paradoxically then, the whole social function of ADR promised by Pound has not been realised.

But ADR goes far beyond formal law and access to justice debates. ADR has been used by communities throughout history not only 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 and thus informs all rules and processes that regulate human interactions today.

4. *The Puzzle Restated*

The foregoing discussion leads us to the main puzzle underlying this article. On the one side, we have multilevel regulation, which is not seen as legitimate or practical by citizens and professionals due to States' and State-sanctioned institutions' incapacity to address an array of social and practical problems as mentioned in section II.2. On the other side, most attempts at change (such as the modern ADR movement) fail, because they do not meet the formal vision of State-sanctioned rules, 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 argue, is how we have been thinking about contemporary multilevel regulation, its origins, and its social capital.[56] 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 (relational) trust, cooperation, and reciprocity, just to mention a few.[57]

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 propose 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, Pound was right in his critique, but too limited in the scope of his analysis.

Here we arrive in the second step of the argument: what is the wider 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 that preceded the capture of law by the modern State system. That is, the dominant conceptual framework today: the State representing formal rules and then multilevel regulation is misleading. Instead, we need to think in terms of a wider historical framework: that is, historical ADR practices representing social values, then State, and then multilevel regulation.

Which brings me to the third, normative step. I argue 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.

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[56] By 'we' I mean here legal scholars and practitioners.

[57] Again, the concept of social capital is largely based on Putnam's social capital theory, with an important twist concerning the need for an even broader perspective, turning us back to human interactions in pre-modern societies. Compare: Putnam (n 34).

In a nutshell: by *returning* to the origins of rules before (and under) nation States through the study of historical ADR practices in its various forms, we can try to improve contemporary multilevel regulation. Before sketching proposals in this regard in section IV, let us now move towards an analysis of the function of ADR before nation States and multilevel regulation, in early societies.

III. Rethinking the historical context: a brief history of ADR in early societies and the origins of multilevel regulation

As stated in the Introduction, this article takes an experimental approach to the study of multilevel regulation. In this vein, in the section below, I take a very large step back from the theoretical debates on contemporary multilevel regulation described in the literature review above, exploring the potential of historical ADR practices for contemporary rulemaking.[58]

The history of ADR can be traced back to the practices of early societies. When we look at ancient history, the roots of ADR can be found in Confucian philosophy, which promotes social harmony based on diversity rather than individual perceptions of justice.[59] According to Jay Folberg, mediation was used frequently in Ancient China, in line with the Confucian approach to dispute resolution which emphasised 'moral persuasion and

[58] Regarding the terminology, the term ADR did not exist in pre-Westphalian times but I use it here anachronistically for the sake of consistency. The purpose of this section is to point to the functions of ADR before nation States and this is why I refer to ADR here as 'historical ADR practices.' Those practices cover the timeframe from ancient history until early modern times in line with the historical approach in the article that the modern State roughly originates in the Treaty of Westphalia. In this section, I present only select examples of historical ADR practices. More systematic research is needed to further explore the argument underlying this section of the article.

[59] Menkel-Meadow (n 48).

agreement, not […] sovereign coercion'.[60] Similarly, the traditional African philosophy and community dispute resolution systems like Ubuntu and gacaca promote grassroots 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.[61]

In a similar vein, Jay Folberg emphasises the historical role of 'moots' or neighbourhood meetings led by a 'notable man' acting as a mediator to facilitate interpersonal disputes in different parts of Africa.[62] ADR has also been historically used in Nordic countries. In pre-modern times, most disputes of different types (legal, administrative, interpersonal) were solved through a local assembly called 'ting' operating through 'consensual negotiation of local people' which was a form of a decision-making process.[63] Some authors have already identified similarities between those conflict resolution practices in Norway and their late-modern variants.[64] Hence, conciliation boards rooted in the regulation of 1795 composed of laymen and dealing with civil cases, defamation, marital disputes, and debt (among the others) are still operational in Norway solving around 80,000 cases per year.[65] Another example concerns the citizens of the Dutch

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[60] Jay Folberg, 'A Mediation Overview: History and Dimensions of Practice' (1983) Mediation Quarterly 3, 4.

[61] Ibid.

[62] Folberg (n 60) 4.

[63] Kaijus Ervasti, 'Past, Present and Future of Mediation in Nordic Countries' in Anna Nylund, Kaijus Ervasti and Lin Adrian (eds), *Nordic Mediation Research* (Springer 2018) 226.

[64] Ibid 226–227; Pia Tellervo Letto-Vanamo and Ditlev Tamm, 'Adjudication or Negotiation - Mediation as a Non-Modern Element in Conflict Resolution' in Anita Roenne, Lin Adrian and Linda Nielsen (eds), *Fred, forsoningn og maegling : Festskrift til Vibeke Vindeloev* (Jurist- og Økonomforbundets Forlag 2017).

[65] Ervasti (n 63) 226–227.

Republic (Leiden) of the sixteenth century who could choose from a variety of dispute resolution means to advance societal bonds and ensure social cohesion. This concerned the aldermen's Commission for Neighbourly Disputes and the civil guard, among others.[66]

In the literature, the development of commercial arbitration is strongly linked to 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.[67] To this extent, commercial arbitration also came to support the medieval *lex mercatoria* (law of merchants) through which private commercial norms could be enforced.[68] 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.[69] This continues in medieval times, where arbitrators solved trade disputes based on commercial usage rather than black letter laws.

Moving forward to the seventeenth 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.[70]

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[66] Griet Vermeesch and Aries Van Meeteren, 'In Hope of Agreement: Norm and Practice in the Use of Institutes for Dispute Settlement in Late-Seventeenth-Century Leiden', *The Uses of Justice in Global Perspective, 1600-1900* (Routledge 2019), specifically 147-151.

[67] This and the following paragraph are directly reproduced from my previous work in Warwas, *The Application of Arbitration in Transnational Private Regulation: An Analytical Framework and Recommendations for Future Research* (n 22) 36-38 with further references.

[68] Ibid.

[69] Daniel Centner and Megan Ford, 'A Brief History of Arbitration' *American Bar Association* (19 September 2019) <https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration/> accessed 19 October 2022.

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

As noted by Auerbach, the rule for the application of non-judicial dispute resolution was rather simple: the tighter the community, the higher the involvement of ADR based on trust and the lesser the involvement of lawyers and adversarial procedures.[71] Also, the nature of arbitration differed when used in the seventeenth century. Arbitration was used as a procedural (yet informal) tool—developed outside the law by the traders themselves—to further preserve communitarian values. For business communities, those values involved *participation*, meaning the individual affiliation of traders with the broader community of traders and the relevant arbitral institution, *performance* understood as the voluntary preservation of communitarian values by individual traders, and *moral sanctions* serving as the informal enforcement means of both arbitral awards and the shared communitarian values of traders.[72] Notably, arbitrators and arbitral institutions functioned not only as decision-makers and administrators of the early individual disputes but also as guarantors of the social legitimacy of the then business exchange among traders.[73]

Arguably, ADR (including arbitration) in its original, historical forms served more noble or communal goals, rather than the one-to-one resolution of a dispute; it aimed at not only resolving but also preventing the (escalation of) disputes to achieve social harmony and preserve the very existence of early communities.[74] Consequently, it can be further argued that the historical ADR did not only serve dispute resolution or adjudicatory functions, but it also operated as a form of regulation of early communities.[75] As such, the historical ADR practices can be characterised as sets of informal procedures, collaborative skills, and models of social organisation based on relational

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[71] Ibid.

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

[73] Ibid 155–185.

[74] Menkel-Meadow (n 48).

[75] I thank the reviewer for proposing this language.

trust, participation, and informal enforcement systems and together representing the social capital that is currently missing from contemporary multilevel regulation.[76]

Only afterwards did we see the legalisation and professionalisation of communitarian practices. Together with the development of the modern State, 'modern systems of justice' started resembling the more medieval trials of ordeal, where disputants were plunged into water, giving an opportunity for God to determine the righteous party, rather than relying on communitarian ADR.[77] According to 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 historical ADR.[78] This can also be seen in the modern mainstream models of mediation called 'pragmatic models' that promote individualistic approach to problem solving directed towards settlement in an individual dispute rather than more socially oriented functions of mediation.[79] Hence, modern ADR can be characterised by its more individualistic, adversarial functions in one-on-one disputes as opposed to the more social functions of ADR in its historical variant.

To summarise, we can conclude that historical ADR existed before the formalisation of rules. As such, it can be perceived as the origins of

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[76] Please note that although I distinguish here some characteristics of historical ADR as opposed to modern ADR, this is done in a generalised manner for the purpose of clarifying the main argument developed in this article. That being said, some characteristics of historical ADR can be seen also in modern ADR and vice versa. More systematic research, which I propose in section V, is needed to distinguish more specific characteristics of ADR falling within those categories together with their impact on contemporary multilevel regulation.

[77] Menkel-Meadow (n 48).

[78] Ibid.

[79] William Ury and Roger Fisher, *Getting to Yes: Negotiating an Agreement without Giving In* (Houghton Mifflin 1981); Michal Alberstein, 'Forms of Mediation and Law: Cultures of Dispute Resolution' (2007) 22 Ohio State Journal on Dispute Resolution 321, 326–29.

contemporary multilevel regulation. What is more, historical ADR practices embody the social capital that is now missing from contemporary multilevel regulation. If we return to those historical ADR practices and study their role in maintaining social and communitarian harmony in early societies and the traces of those practices in modern ADR and multilevel regulation, we can potentially improve contemporary multilevel regulation by increasing its social legitimacy.[80]

IV. The potential of historical ADR practices for increasing the social legitimacy of contemporary multilevel regulation

As noted, because modern ADR has been reintroduced into contemporary multilevel regulation as a legal tool, it has traditionally been considered a

[80] This is not a purely speculative point. Take, for example, the new concept of a "restorative city", referring to "a process that aims to shape both community life as well as urban space through the lens of restorative justice philosophy, values, and standards." Anna Matczak, 'What Is a Restorative City?' (2021) 43 Archives of Criminology 399, 399. Here, the restorative practices lying at the core of the concept of the "restorative city" are based on the strong societal importance of restorative justice values for regulating and building both community life and governance structures within cities. As such, using the concept of a "restorative city" relies on the importance of respectful and trusted relationships in the neighbourhoods, participatory processes that include residents, and the close involvement of all relevant rulemaking stakeholders in the city. The concept of the "restorative city" is treated as something new and cutting-edge, and in many regards it is. However, these ideals and practices have a striking resemblance to the historical ADR as discussed in this article. As such, they demonstrate how an understanding of historical ADR could help to increase trust in institutions, the understanding of citizens of rules that apply to their daily conduct, and the meaningful participation of those citizens in rulemaking, by opening up a world of historical practical knowledge and insights. The question remains to what extent modern societies, which are increasingly heterogeneous, can, in fact, rely on shared communal values—that lie at the core of historical ADR—in their various interactions today (such as those within the restorative cities). This question will need to be tested and answered in future research on this topic. I thank the reviewer for this remark.

highly specialised field reserved only for lawyers and businesses. But law is not the only field where ADR is used today.

ADR, especially in its pre-modern, societal variant, is increasingly relevant in the everyday lives of citizens, professional practice, and also for addressing profound social or political challenges. This trend is widespread and increasing, and it reflects the evolving need for more polycentric, democratic, and inclusive rulemaking in line with new models of sustainable society and economy as mentioned in the Introduction.

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 multilevel regulation socially informed and legitimate.

1. *ADR and the Everyday Activities of Citizens*

As noted, ADR has recently been introduced by authorities such as the EU, or private companies, such as online platforms. Because of globalisation, the daily activities of citizens transcend national borders. E-commerce platforms registered in one country can have branches all over the world; companies such as Alibaba, Amazon, or Zalando, often use ADR to address customer complaints over products and related small claims.[81] ADR can be used in the

[81] The applicable ADR/ODR schemes and platforms differ depending on the location of the consumer and trader. See the complaint system based on negotiation used by Alibaba: 'How Does Alibaba.Com Help If I Have Submitted the Offline Dispute Case?' (*The website of Alibaba: Help Center for Buyer.*) <https://service.alibaba.com/page/knowledge?pageId=128&category=1000083500&knowledge=20111775&language=en> accessed 24 August 2022; and the references to the EU's ADR and ODR platform by Amazon.de: 'Help & Customer Service: About the Online Dispute Resolution Platform (ODR)' (*The website of Amazon.de*) <https://www.amazon.de/-/en/gp/help/customer/display.html?nodeId=G9NMDH46UFNMFNKN> accessed 24 August 2022; and the references to the EU's ADR and ODR platform by Zolando.ie: 'Standard Terms and Conditions (T&Cs) for Orders Placed Online at

context of disputes relating to delayed, cancelled or otherwise disrupted flights. EU residents using air carriers registered in the EU and participating in ADR programmes can submit their contractual disputes to ADR (or online dispute resolution, if they bought a ticket online).[82] The problem is that citizens have little knowledge of and trust in those 'publicly sponsored' systems and use them rather scarcely.[83] That is the critical insight.

The constructive insight is that ADR has enormous potential in the context of citizens' lives. Take, for example, (community) mediation or negotiations that can address misunderstandings with neighbours or even family conflicts.[84] Those negotiations proceed according to different cultural models, in which different people emphasise different social values, such as taking control of problems, trust building, restoration, and moving things forward. For example, the neighbourhood mediation in the Netherlands with its long tradition in the form of the aldermen's Commission for Neighbourly Disputes was revived in 1990s and is used today by 88% of

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Www.Zalando.Ie' (*The website of Zolando.ie*) <https://www.zalando.ie/terms/> accessed 24 August 2022.

[82] This is in line with the EU's regulatory framework under 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); 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); 'Out-of-Court Procedures for Consumers' (*Your Europe*) <https://europa.eu/youreurope/citizens/consumers/consumers-dispute-resolution/out-of-court-procedures/index_en.htm> accessed 24 August 2022.

[83] See European Commission (n 53) 9.

[84] For the analysis of the concept of community mediation including its history see Timothy Hedeen and Patrick G Coy, 'Community Mediation and the Court System: The Ties That Bind' (2000) 17 Conflict Resolution Quarterly 351.

municipalities across the Netherlands.[85] This form of mediation emphasises such principles as participation and responsibility of neighbours for the prevention and resolution of their own disputes, advancement by neighbours of social cooperation models with local stakeholders (e.g., police, welfare workers, and municipal employees) and overall safety in the neighbourhood.[86] 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.

2. *ADR and Professional Practice*

On a more organisational level, many contemporary organisations – including companies, international organisations, and universities – hire ombudspersons to solve internal disputes, use ADR as a model for organisational change in 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 organised around shared values) we can see similar patterns of organisational behaviour and compliance in many

[85] To the knowledge of the author, no study so far identified linkages between the aldermen's committee and the contemporary neighbourhood mediation in the Netherlands. However, due to the preliminary resemblances of those initiatives, I propose that those linkages should be studied in future research. On neighbourhood mediation see 'The Website of the Centre for Crime Prevention and Safety, Neighborhood Mediation (in Dutch)' <https://hetccv.nl/onderwerpen/buurtbemiddeling/buurtbemiddeling-in-nederland/> accessed 29 August 2022.

[86] 'The Website of the Centre for Crime Prevention and Safety, Neighborhood Mediation (in Dutch), 25 Years of Neighborhood Mediation' <https://hetccv.nl/fileadmin/Bestanden/Onderwerpen/Buurtbemiddeling/InfoGraphic_25jaarBuurtbemiddeling.pdf> accessed 29 August 2022.

contemporary professional communities. Take, for example, organisations 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.[87] The point is that ADR can help the contemporary professional practice improve collaborative behaviour 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 used effectively.

At a more individual level, ADR skills correspond to the twenty-first century skills of adaptive and forward-looking professionals who are in high demand in the labour market today. Although it is hard to provide an exhaustive list of all skills of 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

[87] See, for example, ICANN's multistakeholder model in: 'Find Your Place at ICANN' (*ICANN*) <https://www.icann.org/community> accessed 24 August 2022. For the history of the Internet see: John Naughton, 'The Evolution of the Internet: From Military Experiment to General Purpose Technology' (2016) 1 Journal of Cyber Policy 5.

States to non-State actors and build more collaborative multilevel regulation for (future) practitioners.

3. *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.[88] Some countries officially promote social harmony through mediation, sometimes even in unusual ways such as through TV shows, as is the case in China.[89]

Increasingly, and this is a rather novel development, ADR is also used to address serious social (or socio-political) challenges such as family conflicts, administrative procedures in the context of migration, the marginalisation of youth from disadvantaged communities, peacekeeping, or racial discrimination in the context of the Black Lives Matter movement. More specifically, ADR – which has been frequently used in the context of divorce

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[88] Andra Curutiu, 'Mediation in an Armed Conflict: The UN Mediation Support Unit' (*MLR Student Projects Blog*, 26 June 2020) <https://mlrstudentprojects.squarespace.com/blog/2020/6/26/mediation-in-an-armed-conflict-the-un-mediation-support-unit> accessed 24 August 2022; Christian Nünlist, 'Mediation in Violent Conflict' 1 <https://css.ethz.ch/content/dam/ethz/special-interest/gess/cis/center-for-securities-studies/pdfs/CSSAnalyse211-EN.pdf> accessed 24 August 2022.

[89] Lauriane Eudeline, 'China Promotes Harmony within the Country through Mediation TV Shows' (*MLR Student Projects Blog*, 12 June 2020) <https://mlrstudentprojects.squarespace.com/blog/2020/6/12/china-promotes-harmony-within-the-country-through-mediation-tv-shows> accessed 24 August 2022.

proceedings – has recently been encouraged to address family violence.[90] ADR is also increasingly used – still mostly as a pilot – in refugee camps.[91] 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 favouring the oppressors and State authorities rather than the weaker parties.

Some authors suggest that ADR, when used in divorce proceedings involving domestic violence, can help reshape the whole fundaments on which formal divorce proceedings still take place.[92] 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 the 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.[93] When it comes to the use of ADR in the context of peacekeeping, the founders of a project on social mediation have been working on its use for social transition within the Cypriot socio-political reality.[94] Regarding racial discrimination, most recently, different ADR bodies issued calls for funding to develop programmes promoting

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

[91] See the ODR app for refugees: 'The ODR 4 Refugees' (*ODR Europe*) <http://www.odreurope.com/odr4refugees> accessed 24 August 2022.

[92] Lavi (n 90).

[93] 'Peer Mediation Online' <http://www.peermediationonline.org/peer-mediation-online-about.html> accessed 24 August 2022.

[94] See the project on 'Social Mediation in Practice' <https://www.social-mediation.org> accessed 24 August 2022.

better dialogue through ADR between citizens and governmental authorities, including the police.[95]

Certainly, there are risks that ADR will also be used to the disadvantage of said individuals, and researchers and practitioners need to be well aware of those risks. Therefore, we need a systematic study of ADR practices to monitor their development and formulate best practices in the context of socio-political challenges.

4. *General Relevance of ADR Today*

The abovementioned examples are only select cases of the potential use of ADR in the daily activities of citizens and local communities, in the workplace and classroom, and in regard to contemporary social and political problems. In sum, my normative claim is that historical ADR practices can help us to: (1) increase the inclusiveness of multilevel regulation by shifting from its traditional monocentric (State-dominant) focus into a polycentric (multi-actor) focus; (2) draw models of collaboration for professional practice; and (3) reconnect with the social values lying at the core of multilevel regulation, equipping citizens and representatives of different vulnerable groups with effective means of solving social and political problems.

V. RECOMMENDATIONS FOR FUTURE RESEARCH

Based on my main argument that contemporary multilevel regulation is informed by historical ADR practices, I identify the following three lines for future research.

(1) increasing the diversity of contemporary multilevel regulation;

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[95] 'AAA-ICDR Foundation Responds to Need for Conflict Resolution Amid Pandemic and Racial Injustice' (*AAA-ICDR Foundation*) <https://www.aaaicdrfoundation.org/grants> accessed 15 July 2021.

(2) drawing collaboration models for professional practice;

(3) reconnecting with the social values lying at the core of multilevel regulation.

Below I consider each in turn, including specific research questions aimed at investigating if, and if so how, concretely (historical) ADR informs multilevel regulation.

1. *Increasing the Diversity of Contemporary Multilevel Regulation Through Historical ADR Practices*

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. As demonstrated in section II.2 on 'The Limitations of Contemporary Studies of Multilevel Regulation', while there is some evidence for this kind of criticism, it is limited, predictable, and not particularly constructive.[96] I propose a different approach that starts with the following hypothesis: private, non-State actors who use ADR or ADR-like techniques are equipped with the tools necessary to *improve* traditional multilevel regulation. This is because they have ready-made solutions to reconnect multilevel regulations with the communitarian values lying at

[96] For example, in section IV.2 I demonstrated the dual critical and constructive perspective regarding the application of ADR to the everyday activities of citizens. On the one hand, there are certain critical approaches to the use of modern ADR including for instance the distrust by citizens to ADR in the context of e-commerce platforms. This is an important perspective that needs to be further studied in future research. At the same time, ADR can be beneficial in other aspects of citizens' lives, as well as in the context of various professional fields, and social and political challenges. In view of all those benefits, the criticism of ADR and its use by private actors, even though justifiable in specific situations, seems generally limited.

their core such as collaboration, participation, and personal trust. Studying those actors and their (historical) ADR techniques and values is necessary to increase the polycentricity and inclusiveness of multilevel regulation. The following are some research questions that could be studied (also with students) within **research line 1**:

- Which 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 Collaboration Models for Professional Practice Based on Historical ADR Practices*

This research line investigates ways in which public authorities (municipalities, governments, judges, to mention a few) can *cooperate* with private actors in policy and rulemaking by learning from differences rooted in private and public regulation, mostly through (historical) ADR practices. 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. Workplace is to be understood at both the organisational and individual level, investigating cooperative governance structures and cooperative behaviour of individuals involved in those structures. The following are some research questions which could 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 today?

3. *Reconnecting with the Social Values Lying at the Core of Multilevel Regulation Through Historical ADR*

Most recent developments in the field of dispute resolution are progressing without citizens and representatives of vulnerable groups even realising they exist, except as an intermittent and unwelcome surprise. 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. This line of inquiry aims to disseminate knowledge on ADR to the public through research, public events, and practical toolkits. The following are some research questions that could be studied (also with students) within **research line 3**:

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

VI. Conclusions

In this article, I took a somewhat experimental and exploratory approach to contemporary multilevel regulation with a view to the increasing need for multilevel regulation to reflect the rapidly changing contemporary regulatory processes that call for more social legitimacy. Such an approach also implied a proposal for a wider historical perspective to multilevel regulation, through which we can try to rethink the social origins of contemporary rules and regulations and learn for our contemporary times.

In conclusion, I have argued in this article that, 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, mostly because the formal rules coming from them 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. This largely affects the social legitimacy of contemporary multilevel regulation. I have argued that since ADR existed before the formalisation of rules, it can be perceived as an origin of contemporary multilevel regulation.

Furthermore, I have argued that if we return to those early ADR mechanisms and study their historical role in maintaining social and communitarian harmony in early societies, we can try to improve multilevel regulation by increasing its social legitimacy and by making it more inclusive, and in fact polycentric. We can use ADR to refocus the study of multilevel regulation from States onto 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. The article contained proposals for future research in line with these arguments.