How Do Judges Cope with Multilevel Regulation?

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“And so the vision granted to your world
Can no more fathom Justice Everlasting
Than eyes can see down to the ocean floor.
While you can see the bottom near the shore,
You cannot out at sea; but nonetheless
It is still there, concealed by the depths too deep.”

Dante Alighieri, *La Divina Commedia*, Paradisio, Canto XIX, 58

1. Introduction

This short analysis diagnoses a jurisprudential disease, which has manifested itself in several symptoms perceptible in judicial reasoning. The cause of this painful malady is a bureaucratic bug, innocuously called “multilevel regulation”. And it appears that the courts may not be in possession of an immune system hardy enough to defend their competences. As a result, this new virus is eating away at judicial credibility. The prognosis is bad for human rights claims too, which are fatally imperilled by a stratified executive that wields enormous power without coextensive accountability. The author, without being so bold as to speculate as to a nostrum, sets out some preventative insights designed to arrest the further deterioration of judicial reasoning and halt the concomitant dwindling of the chances of human rights claimants.

Now, the central contention of this collection is that the regulatory, governmental process must now be recognised for what it is, a multilevel phenomenon that

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may render anachronistic the classical mechanisms for ensuring accountability, legitimacy and the protection of human rights. The focus of this contribution is on the (inadequate) responses provided by the courts to the new challenges posed by the interplay between global, European and National normative regimes.

This paper proceeds by examining three case studies, pointing out along the way the symptoms of multilevel regulation that have begun to manifest themselves in judicial decision-making. It is not the contention here that judges are ill-equipped (or unwilling) to deal with and confront the various trappings of multilevel regulation. Rather the concern is to alert the reader to the inherent dangers to the courts posed by multilayered executive stratification. In so doing it is hoped that benchers and members of the academy will be able to avoid (rather than unwittingly topple into) some potential pitfalls of the new global terrain.

The three case studies emanate from different European Courts. They have been chosen not because they represent trends (a much more extensive empirical study would be required for this contention), but by virtue of the fact that they are exemplary in that they demonstrate how unfortunate juridical techniques may operate to the detriment of claimants asserting their fundamental freedoms. The cases are linked by two major themes. First, in each case the court is presented with a trade-off between human rights and a public interest; and second, each court must confront the interplay between national, supranational and international normative imperatives. Unavoidably therefore, each case, though it involves a very personal story of individual rights, also makes claims about the world in which we live, or, more precisely, about the nature, content and structure of the global legal order.

2. Case Study I: Human Rights on a Global Plane

In Bosphorus Airways v. Ireland, the European Court of Human Rights was landed with a Yugoslav-owned, Turkish-chartered aircraft that had been impounded by Irish authorities. The Irish Government had denied the aircraft flight clearance for three years pursuant to obligations owed under European Community (EC) Regulation 990/93; a measure adopted to implement United Nations (UN) Security Council Resolution 820 designed to expedite the cessation of violence in the former Federal Republic of Yugoslavia, (FRY). The Resolution required states to impound, *inter alia*, all aircraft in their territories, “in which a majority or controlling interest is held by a person or undertaking

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