Chapter 2
An Approach to Autonomous Regulatory Regimes

Abstract The chapter represents the core of the theoretical part of the study. Its objective is to seize the characteristics leading to the emergence of autonomous regulatory regimes. These alternative forms of regulation are common. They correspond to distinctive, modern systems of interest representation. The chapter approaches the basics of these regulatory regimes. It first discusses how alternative forms of regulation interact within the existing state regulatory framework. A distinction is made between the possible inclusion of these regimes in state regulatory concepts and the opposite, their emergence from civil society. The next characteristic considered is the functional and historical dimension. The core of the chapter concentrates on institutional structure. It is argued that the source of alternative forms of regulation is the theory of interest. Regulatory regimes always emerge from collective action. With the formalization of the relationships these regimes acquire another quality. Thus, different aspects of institutional structures of these regimes are discussed.

The first chapter discussed the regulatory framework and departed from the traditional point of view, that is, state regulation. It set a frame that might contextualize other forms of normative ordering or such used regularly when examining the nature of non-state, autonomous regulatory regimes. Based on state regulation, the goal was to better understand possible rationales that may lead to the emergence of non-state, autonomous regimes. This chapter focuses on the conceptualization of these regimes as well as the initial discussion of their mode of operation.

The attempt to comprehend the concept of alternative forms of regulation, self-regulation, or autonomous regulatory regimes is not new. A number of studies already exist. These are worthy contributions to the discussion and often deal with specific aspects.[1] However, as Berman formulates, one of the most important tasks of international law remains

[1] P. S. Berman, The Globalization of Jurisdiction (2002) 324; see also as cited in A. Fischer-Lescano and G. Teubner, Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit (2007) 46. Some studies are for instance: A. Ogus, Rethinking Self-Regulation (Spring 1995) 97–108; J. Black, Constitutionalising Self-Regulation (1996) 24–55; A. C. Page, Self-Regulation: The Constitutional Dimension (March 1986) 141–167; M. Koskenniemi, Fragmentation of International

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> 'recognizing and evaluating non-state jurisdictional assertions that bind sub-, supra-, or transnational communities. Such non-state jurisdictional assertions include a wide range of entities, from official transnational and international regulatory and adjudicative bodies, to non-governmental quasi-legal tribunals, to private standard-setting or regulatory organizations.'

Indeed, capturing the genuine nature of these forms of regulation is a difficult task. Such difficulty is partly due to the meshing of centralized and decentralized regulatory solutions, state and non-state as well as statutory and self-regulatory elements, negotiations and scientific approaches. It is also a challenge to overcome the divide, not least because these alternative regimes are the product of non-linear dynamics.[2] It is a subtle and complex concept.

Methodologically, the process of conceptualizing alternative forms of regulation can be visualized through the image of a chain. Where the first chapter sought to embrace characteristics determining state regulation, this chapter concentrates on core features of private and non-state forms of regulation as they appear when originating from the background of civil society. A sequential process is applied. Some general hypotheses are set forth to explain the probable context of their emergence, evolution, and persistence. As a result, they are conceptualized explicitly as a multi-facetted, iterative, evolutionary, and continuous process. To develop the concept, identify its structure, and discuss its appearance either as an autonomous regime or in relation to a state regulatory regime, approach is devoted to specific aspects, each contributing to explain these forms of regulation. It also produces a conceptual chain.

Within that chain, two main sources of contemporary, alternative forms of regulation are identified and differentiated: the state source and the civil society source. While the state source is characterized by a delegation of regulatory competences from the state authority to private actors, the civil society source corresponds to a sectoral and functional, often historically motivated development of alternative forms of regulation. To effect the passage from one source to the other, the state approach is first narrowed by focusing on the public policy debate and regulatory strategies. Then, the core of the passage to the civil society optics is accomplished through a decentred analysis of regulation. The next point examines the historical or evolutive aspects of these regulatory regimes, including the temporal and sectoral ones. This matters since various self-regulatory rules and structures that finally led to the constitution of modern private autonomous regimes can be traced to the medieval ages while others are contemporary sectoral ones.[3] The institutional structure of these forms of regulation is then explored, forming the core of the whole chapter. Institutions are the most important feature, contributing to the

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Law: Difficulties Arising from the Diversification and Expansion of International Law (2006); B. de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Age of the Paradigmatic Transition (1995) 114 et seq.

[2] J. Braithwaite and P. Drahos, Global Business Regulation (2000) 23–24; A. Fischer-Lescano and G. Teubner, Regime-Kollisionen, Zur Fragmentierung des globalen Rechts (2006) 128.

[3] For a basic study, see A. Black, Guild & State (2003).

explanation of the emergence and persistence of autonomous regulatory regimes. The approach adopted here is multisequential. Sequences leading from the theory of interest to legal pluralism and networks as regulatory institutions are analyzed as a continuous and iterative process of transformation and evolution, all characterizing their appearance.

1 Embedding Autonomous Regulatory Regimes

To approach forms of normative ordering different from state regulation, or non-state autonomous regimes, it is necessary to take into account that they cannot merely be included in a linear concept of regulation. Traditional conceptions of regulation are inadequate to capture the complexity of these regulatory forms or, as it appears, non-state regulation. Moreover, as already stated, the approach is characterized by a dichotomy between regulatory regimes emerging from the state on the one hand, and from civil society on the other. Alternative forms of regulation can be the product of state regulation as a form of regulation resulting from a delegation by the state. These are then the result of public policy choices or can be classified as the outcome of political and legal decisions. They represent non-spontaneous regimes, that is, steered regulation. They can also emerge from civil society, arising from an evolutive development from societal norms to private autonomous regulatory regimes. These bodies of rules constitute regimes abiding by their own logic and dynamics. Some can be described as spontaneous global law, as discussed by Teubner, which have their roots at the periphery of the state legal regime within the optic of a state-centred perspective.[4]

1.1 Traditional State Approach

Within the inherent dichotomy of the sources of alternative forms of regulation, the state approach allows for capturing part of the complexity of the concept of alternative forms of regulation. Hereinafter, the focus is on two aspects connected to the emergence of this form of regulation and that exercise a major influence on its possible appearance: the public policy debate and state (regulatory) strategies.

From the point of view of the state, alternatives forms of regulation, non-state and self-regulatory measures belong to the public policy debate on whether to regulate or not. They have a political capacity and may exert an impact in relation to other existing forms of governmental activities and administrative structures.

[4] G. Teubner, Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors? (2004) 71–87. On the concept of civil society, see: M. Foucault, Naissance de la biopolitique (2004), Leçon du 4 avril 1979, 295–320; A. Ferguson, An Essay on the History of Civil Society (1767) http://www.constitution.org/af/civil.htm (last visited 15 December 2009), Part first, Section I; see also: M. Kaldor, Global Civil Society, An Answer to War (2003).

They are based primarily on state delegation. Delegation means an authoritative decision that transfers policy-making authority away from established, representative organs to a non-majoritarian institution, whether public or private. Defined thus, delegation is largely used as a policy method.[5] The opposite of a delegation of state powers is the concept of the subsidiarity of state intervention. In this case, an existing alternative form of regulation, non-state or self-regulatory solution can subsist as a regime as long as it is not replaced by state regulation.

The discussion of state (regulatory) strategies shows that diverse regulatory and non-regulatory strategies can be distinguished. The goal of that passage is to better understand the delimitation of private and non-state autonomous regulatory regimes from other forms of state strategies that should determine behaviour. As will be discussed, within that framework, alternative forms of regulation and in particular self-regulation themselves constitute a strategy, based on civil society playing an active role.

1.1.1 Public Policy Debate

The public policy debate is about choosing policies to be applied in the public sphere in pursuit of the public good. Besides the evolutive view, according to which themes and issues prevail at a certain point in time and constitute public policy issues, many other criteria can exercise a decisive influence on the definition of issues and lead to the question of the choice of the policy instrument to be applied. Within that debate, a crucial question when a public policy issue arises, resides in the decision whether the issue at stake should be regulated or not. A range of strategies should be evaluated first, independently from the fact that the result can be either a state or a private solution. In fact, the debate often implicitly considers two opposed regulatory alternatives: the imposition of industry-wide regulation by the state or allowing unconstrained markets to determine the allocation of scarce resources themselves. Thus, the argument concentrates on the requirements or claims of power, that is, the decision to opt for either a solution based on governmental intervention or private initiative.[6]

Should a regulation already exist, the question is thus whether it should be replaced, abolished, or adapted to new circumstances to render it more adequate and efficient. Depending on the interests in the matter, different points of view can be taken into account and may prompt controversial debate. In particular, criteria justifying a regulatory solution will have to be evaluated. In case the debate results in the conclusion that no regulation is needed to find a solution to a policy issue, it

[5] On the concept of delegation, see Chapter 1, point 5 Decentred Analysis of Regulation, n 59.

[6] I. Ayres and J. Braithwaite, Responsive Regulation, Transcending the Deregulation Debate (1992) 133. For a broader discussion of public policy, see: M. Moran, M. Rein and R. E. Goodin, The Oxford Handbook of Public Policy (2006).

should then be necessary to follow Montesquieu's maxim: 'When it is not necessary to enact a law, it is necessary not to enact any law.'[7]

Once it is generally admitted that a regulation is needed and a decision has been taken to regulate, a host of questions arises: who should regulate, what should be regulated, and how (in both formal and substantive terms).[8] In this respect, it should first be mentioned that within the debate about the choice of regulatory form, this occurs against the background of the leading idea in a democratic state, which is that all exercise of power should take into account the principles of liberty, fairness and good administration.[9]

The analysis of public policy issues is insofar important in relation to non-state, alternative forms of regulation as it allows for focusing on pivotal factors influencing a policy decision as well as justifying the choice of a form of regulation. However, public policy is an extremely complex, subtle, and rich process. Policies are based on a blend of economic, legal, and public management principles. There is no single unified doctrine. The relevant literature shows that not only the term but also its meaning differs according to the author.[10] Hood, for example, covers three conventional strands employed in the public policy literature to analyze governmental instruments: the interests or ideas approach, the institutional approach based on state organization, and the institution-free approach based on the tool kit used.[11] Harrison, Morgan, Verkuil try to simplify the approach to public policy and suggest addressing the issues from three equivalent perspectives, not least to help preserve the richness of the debate: public interest, public administration, and public choice.[12] In fact, both Hood's and Harrison, Morgan, Verkuil's approaches are similar and useful, because they cover the main aspects of public policy. Their categorizations are adopted below with a view to better describe the situation and role of the state as a regulator. At the same time, its limited scope of intervention should also become apparent, such as possible causes for autonomous regulatory regimes emerging from the public policy debate.

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[7] 'Lorsqu'une loi n'est pas nécessaire, il est nécessaire de ne pas faire de loi.', attributed to C. L. de Secondat, Baron de La Brède et de Montesquieu, De l'esprit des lois (1748).

[8] S. A. Shapiro and J. P. Tomain, Regulatory Law and Policy: Cases and Materials (2003) 73 et seqq.

[9] For instance, Black, supra note 1, 29, with further references.

[10] For instance, Ayres and Braithwaite, supra note 6, 133 seq.; see also G. Majone, The Rise of the Regulatory State in Europe (July 1994) 77 seq.; Moran, Rein and Goodin, supra note 6; OECD Reviews of Regulatory Reform, Regulatory Polices in OECD Countries, From Interventionism to Regulatory Governance (2002) 28; J. Freeman, The Private Role in Public Governance (June 2000) 543–675.

[11] C. Hood, The tools of government in the information age (2006) 470–471.

[12] J. L. Harrison, T. D. Morgan, P. R. Verkuil, Regulation and Deregulation, Cases and Materials (2004) 19.

Public Interest

Public interest is decisive when selecting a form of intervention. According to Hood, the key question is which political, ideological, scientific, or other processes lead to the choice of a policy instrument in the public interest.[13] Public interest can adopt many different meanings and there is no general consensus on what public interest is.[14] Baldwin and Cave distinguish between public interest theories, interest group theories, private interest theories, and institutional theories. While they consider that public interest theories centre on the idea that those seeking to institute or develop regulation do so in pursuit of public interest related objectives rather than group, sector, or individual self-interests,[15] other versions of interest theories attempt to cast some light on the behaviour leading to policy choices or regulatory solutions. These theories often base their approach on economics. Economic rationalism is generally seen as a leading motivation for the choice of policy measures.[16] Harrison, Morgan, Verkuil define the path of public interest analysis as concentrating on the application of economic theory alone. From an economic point of view, the efficiency[17] of the measures taken is important. In reality, however, markets are imperfect and present disparities. There are market failures. Based on the assumption that state intervention should provide some benefit, the point is the possible and adequate use of public resources and powers to improve economic outcomes. Emphasis will hence be placed on identifying distributive goals and how they should be realized.[18] In particular, when attempting to intervene in a market, different forces, each representing another interest, clash. Two considerations arise here: firstly, numerous interests, possibly constituting specific groups of interest, exist; and secondly, the power of the interests represented will have a determining influence on the outcome of a debate.

A distinction should be made as far as state interests are concerned. Their representatives argue that in order to preserve or save public interest, state regulation is necessary. In other words, state regulation should aim at covering public interest. With regard to the political process, this argument represents a rationale justifying the introduction of a state regulation while other forms of regulation

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[13] Hood, supra note 11, 470.

[14] For a discussion of the concept with a focus on its democratic credentials, see M. Feintuck, 'The Public Interest' in Regulation (2004).

[15] R. Baldwin and M. Cave, Understanding Regulation, Theory, Strategy, and Practice (1999) 18–20.

[16] Ibid. 26, who consider it an expression of ideas.

[17] A discussion of this term lies beyond the scope of this passage as much as an indepth consideration of the abundant literature on efficiency. For the purpose of this study, it is assumed that efficiency applies to competitive markets, which should adjust the supply and demand for goods.

It should be noticed, however, that some authors claim that 'As efficiency becomes the objective, it tends to replace or function as a stand-in for the public interest.', S. Sassen, Territory, Authority, Rights, From Medieval to Global Assemblages (2006) 196.

[18] Harrison, Morgan, Verkuil, supra note 12, 19–32.

should be avoided. According to this point of view, another possibility would be to tolerate other forms of regulation as far as they take into account the interests of the public and the responsible organizations are not allowed to solely promote specific group interests. Hence, the state may take measures to prevent self-regulatory organizations (SROs) from adopting private or self-regulatory measures solely in their members' interest. These SROs should then be made generally responsible towards the public.[19] On their side, the interested autonomous groups or SROs involved in the political process may exercise a determining influence.[20] Such groups constitute a form of self-management, control their members, and have to represent their interests, although they should not be limited to solely pursue their own interests.[21] Their possibilities to be active and exercise influence as well as the attention afforded them will largely be based on the prevailing notion of democracy and its practice within a state as well as on hegemonic forces. Depending on the interplay of these forces, different rule-making and rule-enforcement priorities and scenarios will be made out. Thus, the approach does not only represent a choice between governmental or non-governmental or state and non-state and private regulation. On the contrary, it is also part of a choice among different regulatory possibilities to either exercise or renounce governmental influence. Traditionally, however, the focus is first on statutory regulation as the product of state activity, as legitimized by public interest.

If private interests dominate and a general rule is not needed, but a specialized one would be sufficient, which should apply to determined cases or groups, a policy decision might favour the introduction of private, non-state regulation. The choice of that regulatory form will be based on the rationales exercising a determining influence and the expectations about the envisaged behaviour. The choice may be reinforced by the adequacy and efficiency of measures already taken by individuals or the economy on an informal basis. Based on the experiences made, it should then be possible to convince the public and the regulator that state intervention is not needed.

Yet another view of the public interest theory lies in the assumption that those who attempt regulation to solve a policy issue are considered to be disinterested expert regulators acting as agents in the public interest. However, this theory is not easily applicable in practice. There is not only no consensus on the notion of public interest, but the independency and disinterestedness of the regulatory experts is also questioned. The problem of capture should not be ignored and expert regulators are not always efficient.[22]

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[19] For more details, see W. Streeck and P. C. Schmitter, Community, market, state – and associations? The prospective contribution of interest governance to social order (1985) 1–29.

[20] Ibid. 1–4; Black, supra note 1, 30, with further references.

[21] Streeck and Schmitter, supra note 19, 1–2.; Black, supra note 1, 30, with further references. See also for an American view: F. I. Michelman, Foreword: Traces of Self-Government (1986); C. R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (1990).

[22] Baldwin and Cave, supra note 15, 22–25; G. J. Stigler, The Theory of Economic Regulation (Spring 1971) 3 seq.

Finally, in relation to public interest, it should also be taken into account that the role of the state as a regulator is characterized by recurrent, continuous processes of regulation and deregulation. Depending on the prevailing political power, the role of governments as regulators changes. While some governments have a bias towards less intrusive forms of policy instruments, others do not. In some countries, proper waves of privatisation of whole industries or sectors can be made out. The main goal of such privatisation is to promote private initiative. Privatisation can also result from the fact that it represents a discharge for a state. The concessions accorded to private companies through statute to conduct and assume determined tasks or the delegation of supervisory functions to private bodies are cases in point. On the contrary, waves of nationalisation and re-delegating responsibilities to the state can be identified, in particular following crises. Hybrid forms can be encountered, too. Narrowly linked to these debates is the significance given to self-regulation as an alternative form of regulation. Based on a delegation by the state, it may attract more attention or experience a revival with some political forces. It is then a popular policy approach whether driven by a government philosophy to have minimal involvement in the structuring of the private sector or because it is adopted as an efficient method of regulation. On the contrary, it may be replaced by governmental regulatory solutions when other forces dominate.

Public Administration

The public administration approach recognizes that regulatory measures are necessary to solve problems within society. However, there is an inherent duality within every such measure taken: there is a need to intervene and protect private market actors whilst every such measure has the potential to either improve or damage economic development. Administration is considered to be a burden in any case. In the course of time, practices become irrelevant and cumbersome, and generate unnecessary charges, so-called 'red tape'. There is then a call to restore common sense. The public administration approach concentrates on the search for ways out of government 'red tape', and a simplification of governmental activities in order to act more effectively.[23] The aim is to reduce the number and complexity of government formalities and paperwork. For instance, possibilities to simplify the granting of licenses and permits by the state, introduce other tools, delegate some functions (that is, create room for alternative solutions), and so forth, are studied and evaluated. In the long run, it would be better to set an appropriate regulatory course or determine a framework for the development of regulation with general implementation goals. On its side, the OECD already analyzed this situation in the mid-1980s. It has reviewed the policies and commonly used tools in OECD countries as part of the efforts undertaken to systematically address administrative burdens in

[23] Harrison, Morgan, Verkuil, supra note 12, 32–34; Ayres and Braithwaite, supra note 6, 4–5.

response to regulatory inflation and the increasing complexity of public administration.[24]

This discussion has been ongoing in a range of countries for several years. It concentrates on technical and organizational aspects, including the idea that management techniques and practices drawn from the private sector should be transferred to the public sector, that is, governmental bodies and administration. It is generally admitted that public administration and the implementation of public programmes does not work in practice, and that these are poorly managed and fail to satisfy individual expectations. A well-known form of this critique is New Public Management (NPM). NPM emerged in the late 1970s from the neo-liberal movement, the development of information technology, and the use of management consulting firms to introduce reforms. It is constituted by a set of techniques and practices epitomizing administrative doctrines dominating public administration reforms. Best practices should be developed. The goal is not to suppress regulation or change the institutions concerned but to render the functioning of governmental bodies more efficient.[25]

With regard to public administration, Hood focuses on the forms of organization or institutions at the disposal of the state to exercise its role. There may be public corporations, independent or private sector contractors, and various forms of public-private partnership. This does not exclude opting for new, ad-hoc public-private institutional forms, and leaves room for the adoption and introduction of non-state or alternative forms of regulation, in particular when there is the promise of more efficient solutions. As such, these forms of regulation are one policy issue among others within that debate,[26] and the approach could actually be broadened.

To analyze a situation under the public administration approach, regulatory solutions should be evaluated before opting for the right remedies. Two well-known methods are generally used to assess regulation[27]: cost-benefit testing or cost-benefit analysis (CBA) and regulatory impact analysis (RIA). CBA takes into account that regulation is costly. The intrinsic costs of regulation, however, should be compensated by future gains in efficiency obtained following the introduction of a new regulation. Hence, a governmental measure should only be adopted when

[24] From Red Tape to Smart Tape, Administrative Simplification in OECD Countries, OECD publication, 14–15, 65; see also OECD Reviews of Regulatory Reform, supra note 10, 57–65; Harrison, Morgan, Verkuil, supra note 12, 32–34 and: S. Breyer, Regulation and Its Reform (1982) on the resulting 'mismatch' between an economic problem and the type of regulatory process used to address it.

[25] For a basic reference, see: D. Osborne and T. Gaebler, Reinventing Government, Reading (1992). See also, for example, M. Power, The Audit Society, Rituals of Verification (2002) 43–44; C. Parker, The Open Corporation, Effective Self-regulation and Democracy (2002) 13–17; Harrison, Morgan, Verkuil, supra note 12, 32–34.

[26] Hood, supra note 11, 470, with further references.

[27] The OECD mentions the following regulatory quality tools used in OECD countries to assess regulatory measures: regulatory impact analysis, assessment of regulatory alternatives, consultation with affected parties, plain language drafting requirements, evaluation of the results of regulatory programmes. See OECD Reviews of Regulatory Reform, supra note 10, 31.

a superior outcome is guaranteed. However, how analysis and evaluation should be conducted is very controversial. Many methods of cost-benefit testing of regulation have been developed. Indeed, cost-benefit analysis consists in evaluating regulatory measures, but the assessment of potential regulatory effects cannot always be quantified. It is part of a risk assessment system that seeks to identify the problem and the harm involved, estimates the risk associated with the harm, identifies regulatory options, evaluates the impact of the options on the risk, places a monetary value on expected benefits of each option, compares the costs with the benefits, and identifies any important issues of equity or other considerations.[28] This risk assessment system is combined with appraisals. However, there is no consensus on the way appraisals should be conducted. The methods used are imperfect and it is difficult to estimate non-efficiency values like accountability or expertise.[29] However, CBA is regularly used in practice – one of the motives may be because there are no better or more reliable methods – to submit rules and regulatory programmes to critical examination and to introduce corrective measures if judged necessary.

The goal of the second method, RIA, is to foster efficiency. RIA estimates the quality of regulation in function of the cost-effectiveness of its results or impact. It is based on the assumption that policy issues involve trade-offs between different uses of resources. The effects on innovation, trade, and competition should be taken into account. RIA attempts to embrace dynamic effects. It should apply before a regulatory measure or statute is passed and serves as a benchmark to decide whether a regulatory measure should be adopted and implemented.[30] RIA belongs to a trend towards more empirically based regulation. However, it does not replace political accountability, as is sometimes implied.

Public Choice

The third perspective, public choice, is based on the assumption that individuals or groups act in their own interest to maximize their welfare. They will take decisions based on political motives in their favour. Public Choice Theory or New Political Economy, an economic theory developed by James A. Buchanan, analyses how the collective process of decision-taking by politicians, governments, and individuals takes place under economic aspects and how far self-interest and non-economic forces influence politicians and governments. Such comparative analysis studies the working of institutions. The concept of a political system as an exchange process for the achievement of mutual advantages is applied. The state is considered to be

[28] Baldwin and Cave, supra note 15, 88; Harrison, Morgan, Verkuil, supra note 12, 422 et seqq.

[29] Baldwin and Cave, supra note 15, 88–95; Harrison, Morgan, Verkuil, supra note 12, 422 et seqq.; E. A. Posner, Law and Social Norms (2000) 184–202.

[30] Baldwin and Cave, supra note 15, 86–87, with reference to the Executive Order 12291 issued by President Ronald Reagan in 1981, which continues to this day, consolidated under the Executive Order 12866. On the RIA, see also OECD Reviews of Regulatory Reform, supra note 10, 44–51.

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