

# INTRODUCTION:

## The Regulatory State at the Crossroads

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### 1 Introduction

If there has ever been a time in which regulation, or more specifically, legislation could be seen as the exclusive product of a sovereign legislator, the legendary Rex, issuing orders, commands, decrees and laws to be received and obeyed by his subjects, this time is over. Conversely, if there has ever been a time in which citizens and institutions could be regarded only as 'norm-addressees', as the passive receivers of law, who played no significant role in the way the law is framed, interpreted, applied, and received, that time is over too.

In recent history, the face of government has undergone several dramatic changes (cf. Braithwaite 2000, 223). The Nightwatchman State of classical liberal theory had functions more or less limited to protecting its citizens from violence, theft, fraud and promulgating a law of contract. However, this model of government changed significantly with the New Deal and similar policies in Europe, which assumed a large degree of central state control of formerly unregulated activity. This, of course, marked a shift from the Nightwatchman State to the Welfare State (or: the Keynesian State). '[T]he mentality of the Keynesian state was general belief that the state could do the job' (Braithwaite 2000, 224) At the end of the period of reconstruction of the national economies shattered by World War II, redistribution and discretionary macroeconomic management emerged as the top policy priorities of most Western European governments. The market was relegated to the role of providing the resources to pay for government largesse, and any evidence of market failure was deemed sufficient to justify state intervention. 'Indeed, centralisation and unfettered policy discretion came to be regarded as prerequisites of effective governance.'(Majone 1997, 141)

However, the consensus about the beneficial role of the state – as planner, direct producer of goods and services, and employers of last resort – began to crumble in the 1970s and 80s. Rising unemployment, rising rates of inflation, discretionary public expenditure and generous welfare policies were increasingly seen as part of the problem of poor economic performance. Following the lead of the Thatcher government in Britain, during the 1980s and 90s thousands of privatisations of public organizations occurred around the world. Moreover, this period was characterized by a 'regulatory crisis', which included a growing disillusionment with state regulation and calls for a dismantling or 'rolling back' of the state. Both in the United States and Europe there was a strong deregulatory rhetoric, centering on claims of overregulation, and legalism (Hutter 2006, 1). From the mid 1990s onwards this eventually lead to the development of a new, third model of government which a number of scholars have

described as the rise of the *(New) Regulatory State* (Majone 1994; Loughlin and Scott 1997; Moran 2002; Levi-Flaur and Gilad 2004).

According to Majone (1997), three major functions are ascribed to the modern state: redistribution; stabilization (for example, in the form associated with Keynesianism); and regulation (meaning promoting efficiency by remedying market failure). The rise of the regulatory state consists of the rise of this third function at the expense of the other two (Moran 2002, 402). This new model of governance has a number of characteristics, prominent amongst them is the decentering of the state (Hutter 2006, 1). This involves a move from public ownership and centralised control to privatised institutions and the encouragement of market competition. It also involves a move to state reliance on new forms of fragmented regulation, increasingly involving self-regulatory organizations and independent regulatory agencies operating at arm's length from central government. During the last two decades all Western European governments have adopted these strategies, though the timing, speed, and determination of their choices varied a great deal from country to country (Majone 1997, 148). The rise of the regulatory state was partly European catch-up with the New Deal, partly a fresh phenomenon shaped by the adaptation of domestic policies and institutions to deepen European integration (Majone 1997; Braithwaite 2000, 224).

What does this past imply for the future? What will be the dominant face of government in the decades to come? Will it be a continuation of the Regulatory State, or will this mode of governance be replaced by yet another approach? Although most authors agree that the practice of governance is constantly evolving, and that it is therefore unlikely that the Regulatory State will remain unchanged in the coming years, there is no consensus on what this state of the future will look like. The answer, of course, also depends on one's attitude towards the present Regulatory State. Although this concept has become increasingly important both in academic writings and policy documents, the international literature also reflects a growing number of critiques. In general terms, this criticism can be divided into both normative and empirical concerns about the concept. While the normative concerns primarily focus on the question whether the present Regulatory State (still) sufficiently meets the public interest, the empirical concerns question whether the concept of the Regulatory State (still) captures the most recent developments in the regulatory landscape. Based on both types of concerns, we may now construct three potential scenarios for the future of the Regulatory State. In all three scenario's empirical observations are accompanied with or inspired by theoretical/normative concerns.

#### *Scenario 1: The Re-Instated State*

In the scenario of the Re-Instated State the central state regains its central position. Contrary to the Regulatory State, this scenario is characterized by a re-installment of the state. Self-regulation is a prominent feature of the present Regulatory State. However, according to those authors who promote the scenario of the 'Re-Instated State', self-regulation should be considered the 'end point of regulatory capture and incompatible with the public interest' (Bartle and Vass 2007, 886). This type of argument has been most clearly voiced against the background of the recent worldwide banking crisis. Starting in 2008, major banks and other financial corporations in the US and elsewhere have suffered major losses or even gone bankrupt. Moreover, this financial crisis has also lead to considerable problems in the 'real' economy and has prompted an international recession. In response to these dramatic events,

national governments have stepped in, buying out bad loans and bailing out banks. In some countries banks have also been nationalized by their governments. According to a number of authors, this illustrates that self-regulation (and with it the concept of the Regulatory State) is no longer able to meet the public interests (see, eg., Vonk 2008; Levi-Faur 2009). In their view, this argument is not limited to the financial sector but also applies to, for instance, public health, public transportation, the energy sector, etc. Consequently, the Regulatory State should be transferred (back) into the Re-Instated State, in which (not unlike the Welfare State) the process of privatization is stopped and the national state reclaims direct control of all vital sectors of the economy.

### *Scenario 2: The Post-Regulatory State*

The scenario of the Post-Regulatory State focuses on a further de-centring of the national state. This is the exact opposite of the first scenario. According to this scenario, future governance will be increasingly governance beyond the nation-state. According to several authors, the Regulatory State concept fails to capture the characteristics of the current (and future) regime because it neglects well established and growing trends to enlist non-state actors in regulatory governance (Grabosky 1994; Black 2001; Scott 2003; Hutter 2006). In their view, regulation can no longer be regarded as the exclusive domain of the state and governments. Instead they point at the increasing role of ‘civil society sources of regulation’ (Hutter 2006, 7) such as (international) NGOs, standards organizations (like the National Standards Body of the UK), and professional organizations (like the Law Society and the Pharmaceutical Society in the UK). Moreover, there are important sources of regulation in the economic sector which include (self-regulation in) companies themselves, industry or trade organizations, insurance companies and auditors (see Hutter 2006). Based on a review of the literature – in particular the legal theory of autopoiesis (Teubner 1993; 1998), the governmentality literature (Foucault 1991) and the theory of responsive regulation (Ayres and Braithwaite 1992) – Scott (2003, 21) concludes that the Regulatory State concept needs to be amended in three major ways. In the scenario of the Post-Regulatory State the law is less concerned with setting down rules and powers, but it focuses more on several types of ‘Meta-Regulation’ instead. Moreover, there is greater recognition to other types of legal and non-legal norms in processes of control. And finally, the hierarchical control dimension to regulation is displaced by control processes built on community, competition and design. In this scenario there is a shift from regulation based on hierarchies towards regulation based on networks.

### *Scenario 3: The Hybrid State*

The third and final scenario of the Hybrid State is a combination of the two previous scenarios. Typical for this scenario is a ‘loosening of the sharp distinction between states and markets and between the public and the private’ (Scott 2003, 3). It focuses on the increasing significance of a ‘regulatory mix’ (Hutter 2006, 14), embracing both state and non-state sources of regulation, to maximise the potentials of each sector. On the one hand, this scenario recognizes that future state regulation is only likely to be effective when linked to other ordering processes. On the other hand, it stresses that regulation beyond the state will often take place in the shadow of state activity (Hutter 2006, 15).

## 2 A Continuum of Governmental Interference

In order to assess the quality of the three scenarios, it is however of the utmost importance to study and to characterize first the features of the regulatory landscape that exists in the current Regulatory State. As we noted above this landscape is marked by a variety of new forms of regulation. Commonly, these forms are brought under the banner of 'self-regulation', a term which sounds both sympathetic and clear, but which is in fact an umbrella-term for very different kinds of regulatory arrangements.

This book sets out to study, from various angles, at least some of these intermediate and mixed forms of regulation, that can be identified. Although initially the group of contributors to this volume, most of them based at the department of legal theory at the University of Groningen, planned to publish a joint volume on 'pure' self-regulation, we soon stumbled upon ambiguous forms of regulation such as 'conditional self-regulation', 'co-regulation', or 'commissioned self-regulation'. To analyze these and other regulatory forms, a continuum can be construed between traditional regulation and self-regulation, depending on the degree in which the central legislator is involved, and the degree in which it is left to the field to regulate itself.

Following Black's (1996, 27) definition, self-regulation may be described as 'the situation of a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority' (Black 1996, 27). As Black notes, no particular relationship with the state is implied by the term self-regulation. Outside traditional regulation, Black (1996, 27) broadly identifies four types of possible relationships between the state and the 'self'. In mandated self-regulation, a collective group (an industry or profession for example) is required or designated by the government to formulate and enforce norms within a framework defined by the government, usually in broad terms.

Especially in the European context, this is also referred to as 'co-regulation'. The term 'co' suggests a joint enterprise which invites us to investigate what exactly is done by whom. It should be noted however that this 'co' does not always imply voluntary cooperation. In some cases norm-addressees are told that if they refuse to take measures and to report on what has been achieved, central government will resume its traditional task and will regulate matters in a traditional top-down manner. This is what Black refers to as 'sanctioned' and 'coerced' self-regulation.

In cases of sanctioned self-regulation, the collective group itself formulates the rules, which is then subjected to government approval. Coerced self-regulation refers to a case in which the industry itself formulates and imposes regulation, but in response to threats by the government that if it omits to do so the government will impose statutory regulation instead.

Finally, in cases of voluntary self-regulation there is no active state involvement, direct or indirect, in promoting or mandating self-regulation. As Black (1996, 27, fn. 21) points out, however, this does not mean that the government may not implicitly or explicitly rely on the body's regulatory function. Yet the key is that the collective group itself takes the initiative in the formation and operation of the regulatory system.

If we want to locate a given example of regulatory activity on our continuum between ‘pure’ (traditional) regulation and ‘pure’ (voluntary) self-regulation, we should also keep in mind that the amount of governmental interference often depends on the degree of abstraction of the aims that are issued from a central level. If these aims are phrased in very abstract terms (e.g. ‘provide for a healthy environment’), there is some room for the addressees to shape them as they see fit. The activity in which they engage is concretisation of abstract aims into more workable and more concrete ones and there is some room of choice between different ways to concretise these abstract aims. If, however, the aim of the legislator is more concrete, the field can only hope to fill in the details. Their job is then merely to implement the requirements of the central regulator.

### 3 Dimensions of Regulation

For an analysis of the various forms of regulation it is not sufficient to analyse them in terms of ‘more’ or ‘less’ central steering or ‘more’ or ‘less’ room for self-regulation. It is equally important to determine the *kind* of activities and tasks that are involved. In this introduction, we will focus on three dimensions of regulation drawn from Hood et al’s (2001) work on regulatory regimes, namely the three control components of information gathering, standard setting and behaviour modification (see also Hutter 2006, 3).

Information gathering involves the collation and provision of information about policy issues and problem areas. In the legislative process, for example, representatives of the norm-addressees are consulted at different stages. They may be consulted long before bills are drafted, or they may be consulted about the effects of law long after the act has been passed.

Standard setting refers to the process of setting goals through standards and targets. Sometimes, experts or other groups of professionals are not merely required to draft the rules in order to meet a given aim. Rather, they are required to determine, on a case to case basis, the applicable norms. Their job can more appropriately be compared to that of a (common law) judge: by applying some rough standards to concrete cases it is hoped that more specific and more refined norms can be developed. An additional way to develop rules and standards is by negotiation. The social dialogue that takes place at the European level is an example in point. Here, the rules are not the product of some kind of legislation nor of some kind of case-to-case (judge-like) decision-making, but can be more aptly compared to the kind of rules that are established by contract. Finally, we should not forget that rules can be developed in order to facilitate control and supervision. In order to develop criteria by means of which performances can be judged and assessed, extensive lists of performance-indicators as well as minimum-standards have to be drawn up. These activities can be delegated to supervisory boards but they can also be entrusted to the field of norm-addressees itself, as is the case with a system of peer-review amongst professionals.

Finally, behaviour modification refers to changing individual or organizational behaviour, for example, through compliance, deterrence or hybrid enforcement approaches.

In all these activities, the government can adopt a more interventionist attitude or it can practice abstinence. In order to bring some clarity in our mixed bag of regulatory arrange-



ments, we thought it useful to draw a preliminary regulation matrix, capturing the various theoretical possibilities (Table 1). It combines both Black's (1996) typology of self-regulation and Hood et al's (2001) typology of different dimensions of regulation.

**Table 1. The Regulation Matrix**

	Information Gathering	Standard Setting	Behavior Modification
Traditional Regulation			
Mandated Self-Regulation			
Sanctioned Self-Regulation			
Coerced Self-Regulation			
Voluntary Self-Regulation			

#### 4 Complex Entities

A survey of the many possibilities suggested by the matrix above makes clear that relations cannot be characterized as pertaining between 'legislators' and 'norm-addressees'. Although the practices of self-regulation studied by Sally Moore (1978) were less equivocal than the many intermediate forms that can be witnessed today, and although the groups that engaged in these practices (the garment-industry is an example in point) were closely knit together, one of the advantages of Moore's concept of semi-autonomous social fields is that it is a functional term. It is not demarcated by organisational characteristics but by its ability to make rules and to enforce compliance. As such, the social fields that are engaged in the various activities listed above can also be constituted in different ways. More 'voluntary' forms of self-regulation are often produced by groups that have emerged relatively independently from governmental interference. But just as such 'pure' self-regulation is frequently a rather marginal phenomenon compared to all the intermediate and mixed forms of regulation, such 'indigenous' and closely knit groups are rare in comparison to the many social fields that engage in some of the above-mentioned regulatory roles.

This is not surprising. In view of the fact that many forms of co-regulation or conditional regulation are prescribed by central government, groups are either actively constituted by the government to that very end, or they are formed in reaction to the governmental obligation to self-regulation. So we find representative bodies of single groups (e.g. representatives of fishermen, or of museum-directors), we may come across more or less permanent combinations of (different) representative groups (e.g. a committee consisting of a representative of the trade-union together with a representative of a professional body as well as a cluster of companies) or we may find that a temporary committee has been instituted by the government with no other aim than to draft a specific code or protocol (e.g. Code Tabaksblat in the Netherlands). In virtually all such semi-autonomous social fields, the hand of the central legislator is visible. In the case of special committees this hand is very clear, but also in cases where a certain set of institutions and / or representatives have gathered themselves, this is often done as response to a certain piece of (imminent) legislation and in these instances we

may regard the composition of the social field a direct consequence of the way the central legislator has ordered and categorized the state of affairs to be regulated. The composition of the group then mirrors the constitution of regulatory reality. Perhaps an exception to this is formed by the groups who regulate the Internet. The group that has access to all kinds of open source software is literally unlimited and cannot be said to be constituted by any more central regulator.

Terms like 'central legislator' or 'regulator' are equally misleading by their simplicity. The central government of a nation-state is only a central government in relation to the citizens of such a nation-state. But in relation to the European Commission the same legislator may equally be regarded as a field of norm-addressees who are obliged to take measures and adopt legislation in order to meet the aims of the European Commission. Conversely, a committee consisting of social partners who develop rules while negotiating on the terms of adequate working conditions may decide to agree on just some main targets, and to delegate further rule-making to individual employers.

All this may suggest that regulation can be captured as a chain of delegation and may evoke a hierarchical picture in which higher echelons delegate further rulemaking to lower echelons. Such a hierarchical picture is, however, a distortion. In reality, also the European Commission is informed by experts and influenced by lobby-groups. The topics on the agenda, the ordering of the regulating landscape may therefore very well and to a large extent be determined by the very people that one expects to find at work at the bottom-end of such a hierarchical picture.

## 5 Overview of the Book

Most previous publications on self-regulation depart from one disciplinary or theoretical angle. They draw from theoretical insights developed in studies of public administration, public management or political science. This volume is different in its attempt to bring together not only different forms of regulation, but also different perspectives. Sociological investigations (Hertogh, Weyers) are combined with philosophical and conceptual analysis of regulation (Westerman). Political analysis (Hoogen/Nowak and Zeegers) is accompanied by analysis of information technology (Dijkstra and Mifsud Bonnici) and finally the academic perspective is complemented with a more practical point of view (Van Beuningen). This leads to a highly diverse picture, if not to eclecticism. In our view, however, eclecticism is not a vice but a virtue. In the many discussions that preceded the publication of this book, we usually felt that we had learned more of each other than we had expected.

[Brief introduction of all chapters to follow]