

Odysseus and the Sirens: Legal Perspectives of Self Regulation (ABSTRACT)

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I. A few random examples

- Medicine/clinical and pharmaceutical research
- Press
- Advertising
- Banking sector
- Standards of the International Chamber of Commerce (ICC)
- United Nations Global Compact (2000)
- Professional norms
- Ethical guide-lines
- Industrial or technical standard-setting
- Within firms: Codes of conduct

II. Regulation

= Creation of norms

Norms = general in scope; abstract terms (not relating to a concrete single case).

Authors of regulation: Government or private entities.

III. Self regulation (in a normative perspective)

1. Norms created by persons or entities in order to bind themselves

(And/or eventually the members of an association; employees).

Promise/offer not to a partner, but vis-à-vis general public.

- “Standards”
- “Code of conduct”
- “Corporate responsibility code”
- “Agreement on best practices”
- “Network-etiquette”
- Etc.

2. Authors of self regulation: Private Entities

- Firms
- Industry associations
- Industry branches
- Private organizations providing standardization services (DIN, ISO, CEN etc.)

Consequently:

| | | |
|-------------------------------|---|-----------------|
| State/governmental regulation | ↔ | self regulation |
| Public | ↔ | private sphere |
| State government | ↔ | society |

3. Distinctions

a) Contract/Covenant/Treaty

Legally binding agreement.

(Meeting of the minds, offer and acceptance).

Party A ↔ Party B

b) Legislation

Government

↓↑ Act

Public (electorate, the sovereign)

“Heteronomous”

c) Self regulation

“Autonomous”

4. Government involvement in (industrial) self regulation

No involvement at all ↔ Governmental mandate to engage in self regulation.

In between:

- Governmental participation in the **drafting** process.
- Governmental formal and **procedural** requirements.
- Governmental final **approval**, supervision, compliance **control**.
- Governmental ex post **incorporation** of private into State law.
- **References** in State law to private regulation (e.g., to industry standards).

Most often: Governmental **incitements**.

In particular: The governmental “threat” to legislate.

Problem: Disfunctional or failed States.

5. “Hard” and “soft” self regulation

“Hard”: Legally binding.

“Soft”: Not in itself legally binding. Grey zone between law and politics.

A code of conduct may have only “soft”-outside effects, but “hard” internal effects (e.g. by incorporation into terms of contract with employees).

IV. Background: Policy issues

1. State – civil society (markets)

- Public – private split
- Privatization/delegation of governmental tasks?

- State failure?

Ultimately: What is the sphere of government? Which tasks are incumbent on the State? What is the proper role of government at the beginning of the 21st century?

2. Steering instruments and their limits

- Finances (subsidies, penalties)
- Raw power
- Law

V. Functions of self regulation

1. Why (government) regulation?

Threshold question whether regulation itself is required.

- Law and order/"steering" of society
- Solution of problems in society
- Settlement of conflicts
- Legitimacy/justification

2. Specific functions of self regulation

- May **prepare** governmental regulation.
- May **complement** governmental regulation.
- May forestall (prevent) governmental regulation. Self regulation as a **substitute**.

3. Particularly suitable fields for self regulation

- Issues **too minute** for satisfactory governmental control.
- Highly **technical** issues in which government lacks technical expertise.
- **Rapidly evolving** subject matters, in which extreme regulatory flexibility is needed.
- Issues of **ethics and morality**, in which a consensus in society is lacking.

VI. Policy assessment: Pros and cons of self regulation

The assessment depends on the context, the specific type of self regulation, its function, and finally on the perspective.

1. Specific advantages of private (self) regulation as opposed to governmental regulation

a) Overall regulatory perspective/benefits for social order

- **Flexibility**
Adaption to new developments in the economy, technics, science. Chance for experimenting.

But: Controlling groups may have an interest in preserving the status quo.

- **Responsivity**

- **Expertise provided by industry**

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- Better acceptance/compliance

- Peer pressure → high degree of **compliance**
- Nurturing the ethical sense within an industry
- De-regulative effect (?)
- Eases the "regulatory burden" of government
- Lower costs (financial and political) (?)
- **Internationalization**/legal harmonization:
Industrial self regulation must not stop at national borders, but can easily transgress them.

b) Advantages for the industry itself

- Publicity and sales argument for the industry.
Competitive advantages

2. Drawbacks for society

- Less predictability (?)
- Less transparency (?)
- Less **coherence**. Confusing regulation; even regulatory overkill; overlapping regulations.
- "Putting the fox to guard the henhouse."
Narrow regulatory concerns
Self-interested results
Neglect of the "common good"
One-issue perspective
Lower (too low) standards
- **Less effectiveness?**
Less authority
No binding obligations
No enforcement with legal means. Lower degree of compliance (?)

- Mere **window-dressing?**

- May veil the need for more stringent governmental regulation.
→ Under regulation

- **Anti-competitive effects**

- By limiting entry (e.g. raising standards accompanied by "grandparenting" of existing members) or restricting competition among members (e.g. by restricting advertising).

- **Favouritism**

- Discrimination against smaller firms.
Control of the process by larger firms.

- **Loss of know-how** in the governmental sphere.

3. Factual conditions contributing to success of industrial self regulation

Success = problem-solving

Appropriate contents and good compliance

- Small number of firms in industry (easier to reach consensus)
- No significant imbalance of power among the players in the industry (less danger of discrimination and favouritism)
- Large and mature firms (long term view on self interests and not short term considerations)
- Sensitivity to opinion of peers
- Sensitivity to consumer or public opinion
- Elements of democracy in internal structure of enterprises
- When there is a significant import and export potential: International standards needed, otherwise competitive disadvantage or undermining of the national industry's standards.
- Problems whose solution requires a radical shift in policy (e.g. a strict prohibition) may be less suitable to industrial self regulation.

VII. Legal assessment of self regulation

1. Legal arguments in favour of self regulation

- **Principle of subsidiarity** (Society ↔ government)
- **Principle of proportionality**
Less intrusive form of government?

2. Legal limits on self regulation

a) Indispensable governmental functions?

- Protection of fundamental rights, such as right to health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights [ICESCR 1966]).
- Providing public goods (e.g. clean air)

But: Who should regulate in **failing States**?

b) Equality before the law

- Distortion of competition
- Equal protection in public contracting

c) Democracy

The democratic principle includes:

- Consent of the governed
- Transparency
- Accountability

d) Rule of law

The rule of law includes:

- Transparency
- Legal certainty
- Predictability
- Stability

- Just solutions
- Access to courts

3. Strategies to alleviate democratic and rule-of-law deficiencies

Work only in functioning, democratic States.

a) Governmental oversight of self regulation

With public participation or consultation.

b) New accountability regimes

- Access to courts
- Peer review committees
- Regular reporting
- Independent audits
- Consumer responses taken up by industrial ombudsman
- Sanctions on members of industry association (e.g. debarring from use of logo)
- Internal sanctions towards employees
- etc.

c) Other

- Call-back mechanisms
- Publication requirements
- Residual governmental enforcement powers

→ Self regulation as a **complement** to governmental regulation. Normally **“in the shadow of the law”**.

→ No abdication of governmental responsibilities.

This, however, presumes a functioning State.

VIII. Self regulation in failed States

Self regulation better than anarchy?

Or rather regulation by International Organizations?

(= International *public law*).