



Regulatory Waves

Comparative Perspectives on State
Regulation and Self-Regulation Policies
in the Nonprofit Sector

Edited by Oonagh B. Breen,
Alison Dunn and Mark Sidel

CAMBRIDGE

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COMPARATIVE PERSPECTIVES ON STATE
REGULATION AND SELF-REGULATION POLICIES IN
THE NONPROFIT SECTOR

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REGULATORY WAVES

All governments, in various ways, regulate and control nonprofit organizations. Nongovernmental organizations (NGOs), while hopeful of supportive regulatory environments, are simultaneously seeking greater autonomy both to provide services and to advocate for policy change. In part to counter increasing statutory regulation, there is a global nonprofit sector movement toward greater grassroots regulation – what the authors call self-regulation – through codes of conduct and self-accreditation processes. This book drills down to the country level to examine both sides of this equation, examining how state regulation and nonprofit self-regulation affect each other and investigating the causal nature of this interaction. Exploring these issues from historical, cultural, political, and environmental perspectives, and in sixteen jurisdictions (Australia, Brazil, China, Ecuador, England and Wales, Ethiopia, Ireland, Israel, Kenya, Malawi, Mexico, Scotland, Tanzania, Uganda, United States, and Vietnam) the authors analyze the interplay between state control and nonprofit self-regulation to better understand broader emerging trends.

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Alison Dunn is an independent researcher, having recently retired from the position of Senior Lecturer at Newcastle Law School, Newcastle University. Her research interests are in charity law and the law relating to nonprofits, particularly governance and the regulation of political activities of charities and nonprofit organizations, on which she has published widely. She is editor of *The Voluntary Sector, the State and the Law* (2000).

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Oonagh B. Breen is a senior lecturer at the Sutherland School of Law, University College Dublin where she teaches NGO law. A Yale Law School graduate and a qualified barrister, her research focuses on comparative charity law regulation and governance and the development of more structured legal relationships between the state and the nonprofit sector. A former Fulbright Scholar and Government of Ireland Research Fellow, Oonagh holds an ARNOVA Emerging Scholar Award (2006) and an International Center for Not-for-Profit Law (ICNL)/Cordaid Distinguished Research Award (2008). She has been a Research Fellow at Harvard's Hauser Center for Nonprofit Organizations (2009) and an Ian Potter Foundation Fellow at the Australian Centre for Philanthropy and Nonprofit Studies (2016) and currently serves on the boards of both International Society for Third-Sector Research and ICNL. Oonagh has published extensively in the field of charity regulation both nationally and internationally and has participated actively in policy processes leading to the reform of charity law in Ireland.

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Foreword

This volume meets the hopes of every author: it is authoritative, timely, and groundbreaking. Since the latter half of the twentieth century, members of the charitable sector, regulators, and scholars have been increasingly interested in the operations of the sector, its marked growth worldwide, questioning the purpose of regulation, and attempting to devise optimum systems of regulation that are geared to the needs of a specific country. In some instances, that perceived need may be to gain or keep control of the sector; in others, it may be to provide greater freedom to the sector to permit it to better meet the needs of society. To date there has been no attempt to study the interplay of state and voluntary regulation in one country, let alone the sixteen that this volume provides. Furthermore, no study has succeeded in analyzing the relationship of the size and extent of government regulation with the size and extent of self-regulation, nor considered the relationship of these two components of the regulatory framework as their respective power and influence fluctuate over time. Finally, no study has attempted to look at the extent of regulation vis-à-vis self-regulation as a series of waves that ebb and flow over time within specific jurisdictions as well as among others, some geographically adjacent, others aligned by the nature of their governing structure. In short, there is enough material in Chapter 1 to provide scholars with subjects for many years of research and analysis.

Among the country- and region-specific studies of regulation and self-regulation in sixteen jurisdictions, Chapter 2, on the waves of regulatory power in Britain, provides a vivid picture of the shifting powers of the chief regulators, the Charity Commissioners, over centuries – historically, the waves of regulation. The chapter contains a description of what is categorized as fairly sudden changes in the powers of the Commissioners during the last twenty years, with self-regulation expanding while the power of the Commissioners was declining and, within the last ten years, the emergence of what is described as “co-regulation.” This is a new form of cooperation between state

regulators and organizations created to provide self-regulation. The change in roles has led to a division of powers, permitting the Charity Commission to conserve resources and focus on enforcement, rather than providing advice on compliance, matters which the self-regulators will in turn provide.

Co-regulation also appears to be developing in China where the government is supporting nonstate actors to coordinate data gathering. It appears that the Israeli government may also be considering using nonprofit self-regulators for state purposes. Co-regulation is one of the subjects delineated in this study that warrants greater attention in all countries, not just those noted in the study in which government regulation has been notably strong and co-regulation appeared to be the only choice when the political will was aimed at reducing the scope of central government regulation.

“We do not yet know whether this will be a receding wave or what might be designated a tidal wave.” One of the unique contributions of the studies in this volume is the manner in which the authors address the overriding question posed in its title. And one should approach the volume with this in mind. If, in fact, the case studies do not help one to predict the answer to the question of what kind of a wave is about to reach the shore, they do indicate that one of the most important factors may be the political one. And if the political situation in a particular jurisdiction is the overriding factor determining the nature and scope of government regulation, charitable nonprofits may not be able to control outcomes. Nonetheless, the final sets of recommendations are ones that will prepare the nonprofit sector for what is to come, strengthening its responses to attempts to preempt its autonomy and thereby preventing it from carrying out its essential role in meeting the needs of society.

The authors and editors are to be commended for these groundbreaking studies. Readers will be rewarded by the insights on regulation, self-regulation, and co-regulation. In addition, the descriptions of the shifting waves of power between regulators and nonprofit organizations regarding the degree of state control of the sector within individual countries and among common geographical areas are invaluable. The concluding chapter contains suggestions for improving self-regulation. They reflect a distillation of the information gathered in the individual case studies. Even for one who might disagree with the conclusion that self-regulation is the answer to the future of all-encompassing regulation, this book is a milestone in research on the nonprofit sector, one that warrants attention and, one hopes, inspires broader and more in-depth studies of its kind.

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Acknowledgments

This project was conceived and began life in the midsummer heat of Siena, Italy, in July 2012. During a coffee break between sessions at the biennial conference of the International Society for Third-Sector Research (ISTR), the conversation of the co-editors of this book turned to the notion of regulatory cycles in the nonprofit arena. As we shared updates from each other's jurisdictions, our curiosity grew as we began to ponder whether the transitions and links we were witnessing between state regulation and self-regulation in our home countries were being replicated in other parts of the world and, if so, how these changes between regulatory forms could be explained or perhaps even predicted. The ebb and flow of what was to become the *Regulatory Waves* project that started at ISTR was to continue over the following four years as we invited nonprofit scholars in eleven other jurisdictions to come on this journey of discovery with us.

We are indebted to ISTR for providing us with the reflective space to start this conversation in Siena and then in allowing us to present two sessions of workshop papers at the 2014 conference in Muenster, Germany, and a progress update on the work at the ISTR Latin American Regional Conference in Puerto Rico in 2015. We are equally grateful to the Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA) for facilitating conference sessions on the *Regulatory Waves* project at its annual conferences in Hartford, Connecticut, in 2013 and Denver, Colorado, in 2014. The value of international collaborative forums such as ISTR and ARNOVA should not be underestimated in their bringing together nonprofit lawyers and academics from many disciplines and allowing a natural sharing of learning to occur. For us, these academic gatherings provided an opportunity to convene our team of collaborators, allowing us to keep the momentum going. They also introduced us to new scholars who, intrigued by our research question, came to our workshops, joined our ranks, and subsequently became valued members of our team as this project took shape.

We are extremely grateful not only to the contributors to this volume but to our many unnamed but much appreciated colleagues in both ISTR and ARNOVA who attended our sessions, plied us with constructive and critical questions, and continued to support us in the completion of this project long after the conference banners had been taken down and the circus had left town for another year.

We also gratefully acknowledge support from our universities and other institutions. In this regard, Oonagh Breen's attendance at ISTR and ARNOVA meetings was made possible by the generous support of both University College Dublin (UCD) Seed Funding and UCD Sutherland School of Law research awards. Alison Dunn's attendance at ISTR and ARNOVA meetings was made possible by generous funding support from Newcastle Law School, Newcastle University, and the funding attached to her Vice Chancellor's Distinguished Teaching Award (2013). Mark Sidel's participation at the ISTR and ARNOVA meetings and research in China and Vietnam was made possible by generous support from the University of Wisconsin-Madison, University of Wisconsin Law School, International Center for Not-for-Profit Law (ICNL), United Nations Development Programme (UNDP), and the Luce Foundation (via a grant to Indiana University).

We are honored that one of the founding figures in nonprofit law, Marion Fremont-Smith, graciously agreed to write the Foreword to this volume. Marion's long career focusing on the regulation and governance of nonprofit organizations and her expertise not just in US regulation but also her abiding interest in Asian and Anglo/Irish nonprofit regulatory regimes made her a perfect choice. We thank her sincerely for her kind comments.

We are grateful for the interest in this project and the strong support provided by Matt Gallaway, Finola O'Sullivan, and the exceptional law team at Cambridge University Press. We offer our sincere thanks, too, to the peer referees who reviewed our book proposal and made excellent constructive suggestions.

We hope that this work will provide a solid foundation from which to continue the important task of theorizing the regulation of the nonprofit sphere. We believe that the insights into the interactions between state regulation and self-regulation of nonprofit organizations in this work provide a useful basis for reexamining the nature and longer-term policy implications of such regulatory waves not just in the area of nonprofit law but in the broader area of regulatory governance more generally. We look forward to continuing this conversation with policymakers, academics, and stakeholder organizations in both the nonprofit sphere and beyond.

Oonagh B. Breen
Alison Dunn
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Regulatory Waves

An Introduction

OONAGH B. BREEN, ALISON DUNN, AND MARK SIDEL

1.1 INTRODUCTION

The same water – a different wave.

What matters is that it is a wave.

What matters is that the wave will return.

What matters is that it will always return different.

What matters most of all: however different the returning wave,
it will always return as a wave of the sea.¹

Regulatory intervention in the nonprofit sphere tends to come in waves. Such intervention often takes the form of statutory regulation and, in recent decades, frequently includes self-regulatory initiatives as well. In more recent years, combinations of self-regulation and statutory regulation – sometimes referred to as “hybrid” or “co-regulation” – have also begun to emerge. Academic scholarship has tended to focus on these forms of regulation as distinct entities, examining their strengths and weaknesses in the context of individual models of regulatory governance.² To date, however, there has been no scholarly attempt to undertake an examination of both kinds of nonprofit regulatory frameworks with a view to discerning the contributing factors that might cause a state to switch between one form of regulatory regime (for example, statutory regulation) and another (for instance, self-regulation or co-regulation), or to combine them. Neither has there been a comparative analysis of the possible environmental factors that inform or perhaps influence the frequency, timing, or degree of switching between nonprofit regulatory regime types, nor how they influence each other in practice.

¹ Marina Tsvetaeva, “Poets with History and Poets without History,” (1934), first published as “Pesnici sa istorijom i pesnici bez istorije,” *Ruski Arhiv* 26–27 (1934): 104–142.

² Mary Kay Gugerty and Aseem Prakash eds., *Voluntary Regulation of NGOs and Nonprofits: An Accountability Club Framework* (Cambridge: Cambridge University Press, 2010).

A short word on terminology, as used in this book, is perhaps merited here. Statutory regulation is concerned with a government-driven process resulting in either primary or secondary legislation giving effect to the regulatory goals. The regulation, developed with or without nonprofit sector input, applies universally to those entities covered by the legislation. In the case of non-statutory regulation, the sector rather than the state takes up the role of developer and enforcer of the regulatory regime. The democratic nature of nonstatutory regimes depends on the sector's composition and its commitment to collective action. Once initiated, unlike statutory regulation, non-statutory regimes are normally dependent on voluntary adherence and compliance. Enforcement and sanction imposition generally lack state imprimatur and may be dependent on a contractual enforcement basis. Between the polar ideals of pure statutory and nonstatutory regulatory regimes lies the emerging sphere of co-regulation or hybrid regulation. This regulatory form tends to be developed by or on behalf of the sector (like self-regulation) but with the active funding or participation of the state (like statutory regulation). While compliance and enforcement in the first instance lie with the sector, co-regulation is often viewed as complementary or supplementary to statutory regulation such that ineffective enforcement of co-regulation may result in the triggering of the state's default power to regulate statutorily.

This book explores whether there is an underlying relationship between statutory and nonstatutory regulation models in the context of nonprofit regulatory frameworks and sets out to investigate the extent to which the nature of the regulatory conversations occurring in sixteen jurisdictions inform the resulting regulatory models, influences, and regulatory relationships. By delving into the regulatory narrative and analyzing the factors that inform the interaction between statutory and nonstatutory regimes, we seek to glean a better understanding of the catalysts for regulatory change. Exploration of the country narratives at hand allows us to highlight the common trends emerging in these country case studies. Drawing on these shared experiences, we can begin to articulate policy principles that may assist decision makers to choose the best options for effective facilitation and management of the third sector from among the array of regulatory tools on offer.

This work posits that there is an ongoing causal relationship existing between statutory and nonstatutory regulation of the nonprofit sector. As with the ebb and flow of the tide, so with the ebb and flow of statutory and nonstatutory regulation; in some cases, one form growing in strength as the other lessens its hold over the sector, or the two co-existing in some uneasy or easy form. An initial hypothesis might be to view the relationship between regulatory forms as a zero sum game. When statutory regulation is in the