

MYRIAM SENN

Non-State Regulatory Regimes

Understanding
Institutional
Transformation



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PD Dr. Myriam Senn, LL.M.

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Preface

This book grew out of an attempt to gain a better understanding of the conceptual basis of self-regulation. Like most books, the original intention evolved and was quickly replaced by a broader scope of investigation. The decision was to approach forms of ordering different from state regulation or non-state regulatory regimes. Then, it rapidly became evident that traditional methodological and analytical legal paths were not sufficient to explain the emergence and subsistence of forms of regulation that are either not originated in the state (non-state) or either that propose an alternative to state regulation. The optic had to be enlarged. The interplay of state regulation, non-state, and private regulation can best be studied when departing from public policy approaches. In comparison to other books on regulatory issues, this is also the most innovative element of this book. Public policy allows understanding the emergence of regulatory regimes and explaining how they coalesce and how they form a working system. As such, the book is a cross-disciplinary study.

Concentrating on structural issues about regulatory regimes, the book draws extensively on examples from the financial sector. It reflects my background in that sector. At the same time, it is a predestined sector for the purpose of this book, because not least following the 2007–2009 financial crisis one witnesses the emergence of a number of institutional arrangements and regulatory regimes both at the national and at the international or global levels.

The ideas underlying this book have been discussed in a range of fora. I am grateful to all those who have contributed in a variety of ways to the completion of this book and who have made comments and suggestions at various points of the development of the book. I would like to mention in particular:

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colleagues and fellows were motivating. I am particularly grateful to Imre Kondor and Philippe C. Schmitter for their support and constructive discussions.

My participation in the Eurocores research program on The Evolution of Cooperation and Trading of the European Science Foundation (TECT), in particular in the group focusing on the Dynamic Complexity of Cooperation-Based Self-Organizing Commercial Networks in the First Global Age (1400–1800) proved to be fruitful as well. I am very indebted to Jack Owen and Rüdiger Klein for inviting me to participate in that multi-disciplinary research project for it gave me important insights to develop the concept of my own book.

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July 2010

Myriam Senn

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Switzerland

Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 08) from SwissBanking, Swiss Bankers Association, of 7 April 2008

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Federal Act on Money Laundering of 10 October 1997 (FAML) SR 955.0

Federal Act on Securities Exchanges and Securities Trading (Securities Exchange Act, SESTA) of March 24, 1995, SR 954.1

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Abbreviations

AIMA	Alternative Investment Management Association
BCBS	Basel Committee on Banking Supervision
BYBIL	British Year Book of International Law
CBA	Cost-Benefit Analysis
CDB	Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence
CGFS	Committee on the Global Financial System
Circ.	Circular
CRA	Credit Rating Agency
DNS	Domain Name System
DSU	Dispute Settlement Understanding
ECAI	External Credit Assessment Institution
ECE	Economic Commission for Europe
ECGI	European Corporate Governance Institute
ECOSOC	Economic and Social Council of the United Nations
EFTA	European Free Trade Association
et al.	et alii, and others
etc.	et cetera
EU	European Union
FAML	Federal Act on Money Laundering of 10 October 1997, SR 955.0
FAO	Food and Agriculture Organization
FINMA	Swiss Financial Market Supervisory Authority
FINMASA	Federal Act on the Swiss Financial Market Supervisory Authority (Financial Markets Supervision Act) of 22 June 2007, SR 956.1
FNRA	Financial Industry Regulatory Authority
FSA	Financial Services Authority
FSAP	Financial Sector Assessment Program
FSB	Financial Stability Board
FSF	Financial Stability Forum
G7	Group of Seven

G20	Group of Twenty
GAPP	Generally Accepted Principles and Practices of 11 October 2008
GATT	General Agreement on Tariffs and Trade
IAB	Internet Architecture Board
IAEA	International Atomic Energy Agency
IAIS	International Association of Insurance Supervisors
IANA	Internet Assigned Numbers Authority
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IATA	International Air Transport Association
IBM	International Business Machines
ICANN	Internet Corporation for Assigned Names and Numbers
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
ICCA	International Council of Chemical Associations
ICGN	International Corporate Governance Network
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IEC	International Electrotechnical Commission
IESG	Internet Engineering Steering Group
IETF	Internet Engineering Task Force
IFRS	International Financial Reporting Standards
IGO	Inter-governmental organizations
IIF	Institute of International Finance
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
Inc	Incorporated
IOSCO	International Organization of Securities Commissions
IRSG	Internet Research Steering Group
IRTF	Internet Research Task Force
ISA	International Federation of the National Standardizing Associations
ISDA	International Swaps and Derivatives Association
ISLA	International Securities Lending Association
ISO	International Organization for Standardization
ISOC	Internet Society
IT	Information technology
ITU	International Telecommunications Union
IWG-SWF	International Working Group of Sovereign Wealth Funds
JMLSG	Joint Money Laundering Steering Group
LMA	Loan Market Association
MNC	multinational corporation
MOU	Memorandum of Understanding

NASD	National Association of Securities Dealers, Inc.
NGA	Non-governmental association
NGO	Non-governmental organization
NPM	New Public Management
NRSRO	Nationally Recognized Statistical Rating Organizations
NYSE	New York Stock Exchange
OECD	Organization for Economic Cooperation and Development
PCAOB	Public Company Accounting Oversight Board
PIG	Public interest group
RFC-Editor	Request for Comments – Editor
RIA	Regulatory Impact Analysis
RMP	Risk Management Plan
SBA	Swiss Bankers Association
SEC	Securities and Exchange Commission
SESTA	Federal on Securities Exchange and Securities Trading of 24 March 1995 (SR 954.1)
SESTO	Ordinance on Securities Exchanges and Securities Trading of 2 December 1996 (SR 954.11)
SFA	Swiss Funds Association
SGS	Société Générale de Surveillance
S&P	Standard & Poor's Corporation
SR	Systematische Sammlung des Bundesrechts
SRA	Self-regulatory association
SRO	Self-regulatory organization
SWF	Sovereign Wealth Fund
UDRP	Uniform Domain Name Dispute Resolution Policy
UK	United Kingdom
UN	United Nations
Uncitral	UN Commission on International Trade Law
Unctad	United Nations Conference on Trade and Development
UNEP	United Nations Environmental Programme
UNRISD	United Nations Research Institute for Social Development
UNSCC	United Nations Standards Coordinating Committee
US	United States
VCLT	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986
VOC	Vereenigde Oostindische Compagnie
W3C	World Wide Web Consortium
WIPO	World Intellectual Property Organization
WSC	World Standards Cooperation
WTO	World Trade Organization

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Introduction

This study explores the understanding of the concept of regulation. The purpose is to approach forms of ordering different from state regulation or non-state regulatory regimes. The main premise lies in the recognition that regulation does not only mean state regulation or the product of a state activity as legitimated authority. On the contrary, it is based on the assumption that regulation is also a domain of civil society. Regulation occurs in many spheres. Diverse regulatory regimes can be encountered. They lead to a fragmentation of regulation whereas the phenomenon of globalization adds to that process. Not surprisingly, we are now experiencing a considerable growth in academic studies on regulation in a range of fields: international relations, political science, law, sociology, or also economics. International organizations such as the OECD and other authorities analyze the process of regulation and may submit proposals for 'better regulation' or alternatives to regulation that may represent adequate forms of governance.

Non-state regulatory regimes raise a number of issues. Addressing and delineating these issues poses diverse challenges. The regimes are concretized by alternative forms of regulation. In practice, these forms of regulation are more common than seems initially apparent. They may appear in a number of forms, and play an important role in fields such as the financial and securities markets, the press and media, the pharmaceutical industry, the professions, or digitization, to mention a few. Hence, this study is an essay to outline the concept underlying these regimes. It will explore their various aspects, using a multifocal lens. As will be discussed, it is mainly an institutional issue. Non-state, autonomous regulatory regimes or alternative forms of regulation are driven by diverse, often private forces. The presence of epistemic communities, networks and private associations, or non-governmental, self-regulatory organizations as distinctive systems of interest representation taken in relation to the state is examined as steps leading to the substantiation and formalisation of the emergence of these regimes.

Seizing and defining the concept of regulation necessitates an interdisciplinary approach. It includes legal, political, international relations', economic, and sociological perspectives. The theoretical construct used as the backbone of the study consists in the discussion of the theoretical foundations and concrete examples, the analysis, and evaluation. Methodologically, the point of departure is an enlarged

definition of regulation. This study begins with setting the framework of traditional state regulation and then opens the field to private, alternative forms of regulation. The framework of state regulation revolves around the debate on whether and how to regulate as well as possibilities to negotiate the forms of regulation among the groups of interest concerned. It will lead the way to the possible emergence of alternatives to regulation and autonomous regulatory regimes. In that regard, the inclusion of the process of globalization is important. It appears to be essential to take the transnational aspects of regulation into account. Regulation is no longer only national or international, but largely subject to and dependent on global developments. Regulatory practices of national governments or regulatory agencies shaping national regulatory frameworks have striven to be inclusive of not only national but also multiple, international interests in the ways in which the rules of governance constitutive of transnational markets are shaped. At the same time, transnational regulation is emerging and constitutes non-state, autonomous regulatory regimes. It is based on global epistemic communities and networks that might set standards and define regulation efficiently. Thus, relationships between the factors shaping these regulatory forms are sought and their characteristics are examined.

This study draws extensively – although not only – on the regulatory developments within the financial markets. Financial markets have always made extensive use of alternative and also private regulatory solutions. Financial services are a prominent case of the emergence of non-state autonomous regulatory regimes. They also play a determining role in relation to the process of globalization and the constitution of epistemic communities and networks. Another reason for focusing on financial markets is that they are a most foundational domain.

The first chapter deals with the concept of state regulation. Its goal is to set the scene to introduce the core of the topic. Departing from the concept of state regulation assuming the form of classic command and control regulation, it first explores the rationales underlying it. Then, the impact of public policy issues and the debate on whether and how to regulate are discussed. The public theories underlying regulation are briefly cited and the role of the institutions involved in the process of regulation is examined. Based on these elements, the concept of regulation is broadened through the elaboration of the decentred analysis of regulation. It is no more understood solely in the sense of a state activity. A meta-regulatory approach is possible. Fragmentation and legal pluralism are the hallmark of regulation. Within that enlarged framework, autonomous regimes and alternative forms of regulation will appear.

The second 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. Contrary to what is generally admitted, these forms of regulation are common. They correspond to distinctive, modern systems of interest representation. This 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