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## Meta-regulation

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### 1. Introduction

Among scholars of regulation, the term ‘meta-regulation’ has meant different things to different people. Its explicit use in regulatory studies appears to date back at least as far as 1983. Early uses of the term embraced one of two meanings, each referring to the oversight or governance *of* regulation. Political scientist Michael Reagan (1983: 165) referred to cost–benefit analysis of regulatory activity as ‘a kind of meta-regulation of regulation’. This connotes a kind of performance monitoring of regulatory institutions. Reagan’s conceptualisation was reflected in Bronwen Morgan’s later use of the term to refer to a ‘*set of institutions and processes that embed regulatory review mechanisms into the every-day routines of governmental policy-making*’ (Morgan 1999: 50, emphasis in the original).

About the same time as Reagan’s article, Gupta and Lad (1983: 146) referred to ‘the meta-regulatory role that some agencies might play in *regulating self-regulation by the industry*’ (emphasis in the original). This observation was preceded by Braithwaite’s work on enforced self-regulation, which described this form of meta-regulation without using that specific term (Braithwaite 1982).

There is, however, much more to the regulatory process than the activities of governments. A second, much broader conception of meta-regulation would embrace activities occurring in a wider regulatory space, under the auspices of a variety of institutions, including the state, the private sector and public interest groups. These institutions may operate in concert or independently. Ayres and Braithwaite (1992) broke new ground when they adopted this more expansive conception of meta-regulation—one that embraces a diversity of state and non-state institutions. They explicitly refer to their work as meta-regulatory theory, observing that regulation can be delegated, and such delegation can be monitored, by the state (Ayres and Braithwaite 1992: 4). They offer glimpses of the rich diversity of regulatory space and its cast of characters, actual and potential. At one point, the authors muse about a model for the regulation of the sex industry that might involve representatives of the women's movement, churches and sex worker trade unions (Ayres and Braithwaite 1992: 60). They envisage a constructive role for public interest groups and other non-governmental actors to monitor the behaviour not only of businesses, but also of government regulatory agencies. Ayres and Braithwaite demonstrate how an active public interest sector can energise state regulatory authorities and thereby reduce the likelihood of capture by the private sector. Third parties can also bring influence directly to bear on companies, by mobilising adverse publicity in the aftermath of a significant violation or by dealing in a constructive manner with the firm, beyond the regulatory gaze of government.

Reliance on non-state institutions to assist in achieving the objectives of government is hardly a new idea. The ancient Chinese philosopher Lao Tzu (1963) refers to governing by 'making use of the efforts of others' and 'not being meddlesome'. Before the rise of the modern state, many activities that today are widely regarded as core government functions were undertaken in whole or in part by private interests. These included defence, tax collection, the provision of health services, education and social welfare, overseas exploration and colonisation and the major institutions of criminal justice: policing, prosecution and imprisonment (Grabosky 1995b).

One issue that appears to have been overlooked in contemporary discussions of meta-regulation is the extent to which a regulatory system is (or could be) coordinated and, if so, by whom. One might envisage a regulatory system involving a variety of public and private institutions, tightly scripted and closely monitored by state authorities. Such an

extreme interpretation of Ayres and Braithwaite's state-centric model is more an ideal type rather than a real-world experience; one doubts that even the world's archetypal command economies ever really functioned in this manner. Other scholars, before and since, have observed less choreography in regulatory systems. Hayek (1991) observed that while some orderings are designed and coordinated, others are spontaneous. More recently, Scott (2004) observed that regulatory power can be widely dispersed, and that the state is no longer the main locus of control over social and economic life (if it ever was). Black (2008) speaks of 'polycentric' regulatory regimes that may be ungovernable.

## 2. Regulatory pluralism

The concept of regulatory pluralism is derived from that of *legal* pluralism, which is based on the recognition that the law exists alongside a variety of lesser normative orderings. Galanter (1981: 20) observed that the legal system is often a secondary rather than a primary locus of regulation. Griffiths (1986: 4) referred to legal reality as not monolithic, but rather an 'unsystematic collage of inconsistent and overlapping parts'. Black (2001) referred to a 'postregulatory world' in which governments no longer monopolise regulation, and later noted the complexity and fragmentation of regulatory systems (Black 2008).

Ayres and Braithwaite were acutely aware of these 'inconsistent and overlapping parts'. Despite the state-centric nature of their model, they observed a wider number of actors involved in influencing the social control of organisations. Mindful of the corporatist policymaking models characteristic of Northern Europe, they acknowledge the work of Streeck and Schmitter (1985), referring to the power wielded by markets, communities and associations, as well as by states. They quote Michael Porter's (1985: 16) observations on the power of markets, suggesting that sophisticated buyers will demand products of a higher standard and sophisticated firms will achieve a competitive advantage by heeding these signals.

Ayres and Braithwaite saw an important role for regulatory tripartism, devoting an entire chapter to the concept. Tripartism had become a feature of some regulatory settings, most notable of which was occupational health and safety. In this regulatory domain, trade union safety representatives in some jurisdictions were empowered

to accompany state inspectors and to report safety violations. These were, however, but one manifestation of third-party involvement in the regulatory process. A key message of *Responsive Regulation* is the potential role of third parties more generally, and specifically the role of public interest groups. To the extent that self-regulation and markets function in a positive manner, state intrusion is unnecessary. It is nevertheless clear to Ayres and Braithwaite that the state remains at the centre of the regulatory space. They thus set the stage for those who would explore the wider variety of participants in the regulatory space, and the ways in which they interact with each other.

The location and role of the state in this pluralistic regulatory space can vary. At one extreme, the state can be an active director. Private actors may be commanded by law to assist in the regulatory process. In most Western nations, banks have been transformed into agents of the state and have become instruments of policy to combat tax evasion and money laundering generally. To this end, banks are required by law to routinely report transactions over a certain threshold and those transactions that are of a suspicious nature, irrespective of their amount, to a governmental authority.

In addition to mandating certain conduct on the part of the regulated entity, the state may require that it engage with a number of external institutions that are in a position to exercise a degree of vigilance and control over its behaviour. These might include, for example, requiring the company to obtain certification by an independent auditor or requiring that the company be insured.

Less coercively, the state can proffer rewards and manipulate incentives to induce compliance by a regulated entity. Incentives may be conferred on a specified target of regulation or on third parties for assistance in achieving compliance on the part of the regulatory target (Grabosky 1995a).

States may also delegate regulatory authority to private parties. In many common law jurisdictions, the investigation and prosecution of alleged cruelty to animals are conducted not by government employees, but by societies for the prevention of cruelty to animals. Licences to practise medicine or to deal in securities may be conferred and revoked by professional associations. Regulatory activity, from motor vehicle inspection to tax collection, may also be contracted out to private institutions.

A less state-centred approach would see the state acting as a facilitator or a monitor of corporate social control exercised by non-governmental institutions. Governments have begun to 'steer' rather than to 'row', structuring the marketplace so that naturally occurring private activity may assist in furthering public policy objectives. The term 'leverage' can be employed to refer to this approach. For example, through their own purchasing practices or by the strategic use of industry subsidies, governments may create markets for recycled products. Governments may confer standing on private citizens to sue polluters or fraudulent contractors (Coplan 2014).

At the other extreme, the role of the government would be one of a passive observer, where regulatory functions are performed to a greater extent by non-state institutions. The role of the state may be limited to constituting a playing field on which non-state regulatory institutions can operate.

For example, the state may play a role in ensuring the integrity of information that is conducive to the functioning of a healthy market. Governments may develop or authorise labelling and organic certification schemes and allow consumer preferences to dictate producer behaviour. Securities regulators, for example, require disclosure of significant information to stock markets.

Market forces may themselves be powerful regulatory instruments. Consumer preferences for certain products may dictate corporate behaviour. Large retailers are in a position to register their product and process preferences with suppliers, and the very substantial purchasing power that large retailers command often carries considerable influence. A buyer for a large supermarket chain may, for example, seek to examine the pesticide application audit records of a winery's contract grape growers. If the buyer is not satisfied with the nature of chemicals applied to the vines, the concentration in which they were used and the duration between application and harvest, they will go to another winery. The buyers are thus in a position to wield more regulatory power than are government officials. Vandenberg (2007: 1) reports that 'more than half of the largest firms in eight US retail and industrial sectors impose environmental requirements on their domestic and foreign suppliers'. Such private contractual requirements trump state regulatory activity. Vandenberg (2007) referred to this form of private regulatory power as 'the new Wal-Mart effect'.

Similarly, large fast-food chains are in a position to assess their suppliers and to refuse to purchase meat products that have been administered hormones or antibiotics for purposes of growth promotion. Industry associations can withdraw accreditation or certification from a member who does not conform to required performance standards. In industries such as organic agriculture or meat export, certification may give a producer a competitive edge. Indeed, where certification is a sine qua non of access to a market, denial of such certification by an industry self-regulatory regime can put a company out of business.

Institutional investors, such as banks, insurance companies and pension funds, may require standards of corporate governance, employee relations and environmental management by the companies in which they invest. In addition to their activities as institutional investors, banks and insurance companies may exercise considerable influence over their clients. Lenders and insurers now recognise the risk to their own commercial wellbeing posed by questionable practices on the part of a borrower or policyholder. Beyond the lender's obvious interest in the commercial viability of the borrower, banks must now be concerned about the environmental risks posed by any assets that they might hold as security for a loan. In the event of foreclosure, banks could end up owning a liability rather than an asset. The pressures the banking and insurance industries can exert in furtherance of corporate citizenship can be considerable. An environmental audit report is increasingly becoming an integral part of a loan application. Banks may refuse to lend to a prospective borrower with a poor record of health, safety or environmental performance; insurers may refuse to insure them against loss.

Entire industries have developed to assist businesses in achieving compliance. Many can justifiably claim that they can increase profit as well. Susan Shapiro (1987: 205) refers to 'private social control entrepreneurs for hire', while Reinier Kraakman (1986) refers to 'gatekeepers'. This is perhaps nowhere more evident than in the environmental services industry, where consultants are able to assist clients in reducing the use of raw materials and energy, and in reducing emissions and waste. Not only do they help client companies achieve a better bottom line, they can also contribute to a positive corporate image that may in turn be valuable in its own right.

### 3. The rise of meta-regulation

Three general trends—themselves interrelated—have emerged or intensified over the past half-century. The first is the weakening or, at the very least, symbolic withdrawal of state regulatory activities, in both developed and developing countries. Whether driven by ideology, voter resistance, fiscal constraint or some combination of these, governments around the world have been seen to shed or devolve activities that they once monopolised. In addition, many, if not most, states have sought to reduce impediments to domestic economic activity. One of the most prominent departments of state in Australia's federal government is the Department of Finance and Deregulation, renamed as such by a Labor government.

Second—and arguably a reaction to the emergence of an apparent regulatory vacuum—is the increase in the number and activity of non-governmental participants in the regulatory process. Bartley (2007) observed that non-state initiatives are often inspired, if not provoked, by state inaction. At the same time, governments may seek to govern at a distance by actually encouraging compensatory initiatives of a quasi-regulatory nature on the part of private actors. Bartley attributes the rise of private certification schemes (such as those operating under the auspices of the Forest Stewardship Council or the Marine Stewardship Council) to the failures of governments and intergovernmental organisations. However, he observes that, in some instances, governments have provided financial assistance to non-governmental organisations (NGOs) to facilitate the development of private certification programs (Bartley 2003, 2007). When the visible hand of the state is absent or weak, the once invisible, but now quite apparent, hand of the market may compensate.

The third general trend may be seen in the growth and diffusion of technology that has significantly increased the regulatory capacity of non-state actors, no less than of governments. Means of surveillance, information storage and retrieval and product testing that were once exclusive instruments of the state (if they existed at all) are now within the reach of ordinary citizens. Mobile telephones now serve as video cameras. Private testing of forest products was noted above. Satellite remote sensing can detect unauthorised land clearance (Bartel 2005). DNA testing can determine the provenance of marine, forest or agricultural products. Global positioning system (GPS) devices can track

the movement of waste materials. Chemical analysis can identify product content with increasing specificity (Auld et al. 2010). Conservation activists use unmanned aerial vehicles to monitor endangered species (McGivering 2012).

We are now well into the information revolution, and one is beginning to see the enormous potential for digital technology to enhance the regulatory capacity of ordinary citizens. The potential of social networking to build social capital has been noted by Ellison et al. (2007). As envisaged by Ayres and Braithwaite, before the onset of the digital age, citizens can exercise vigilance directly over the performance of regulatory agencies or over the behaviour of corporate actors. Digital technology has empowered individual citizens in a manner that was unimaginable three decades ago. Among the more dramatic manifestations of the democratisation of technology is the emergence of social media. Technology greatly facilitates communications between widely dispersed individuals, without editorial or governmental mediation. Communication has become democratised and information made accessible to an unprecedented extent, and the potential for citizen involvement in the regulatory process is greater than ever.

The environmental impact of Chinese economic development has led to a number of protest demonstrations, facilitated by technologies such as the internet and text messaging. Some of these have been successful in forcing the cancellation or postponement of development projects (Wang 2010). The flurry of online criticism of rail transport safety following the crash of a 'bullet train' in July 2011 triggered state censorship of the media, which was also criticised in online forums. Across the Pacific, one sees online encouragement of consumer boycotts and websites that monitor particular industries or companies. Thus, technology facilitates the mobilisation and sustainability of mass action to an extent unimaginable before the coming of the digital age.

Citizens may also assist in labour-intensive investigation of noncompliance. The Chinese examples referred to above include one case involving the perpetrator of a wanton act of animal cruelty who was traced to a remote corner of the country and identified. In the United Kingdom, *The Guardian* newspaper posted hundreds of thousands of documents relating to expenses claimed by Members of Parliament, inviting members of the public to review them for questionable claims. Over 25,000 citizens did so.

Crowdsourcing also lends itself to policy development and to investigation under state auspices. The US Federal Communications Commission (FCC) has established an online forum for the public to voice ideas for the enhancement of the national broadband infrastructure. In an entirely different regulatory domain, roadkill observation systems invite members of the public to report species and location data to assist in wildlife management. Mobile phone apps have been developed to facilitate reporting of suspected illegal wildlife trafficking (Safi 2014). Sharesleuth.com, a website concerned with exposing securities fraud and corporate misconduct, encourages readers to send in tips and comments. The full potential of ‘wiki-regulation’ has yet to be determined, but the accountability problems posed by such extreme democratisation cannot be easily discounted. Self-appointed moral entrepreneurs may be driven by personal interest, misconceptions or malice rather than the public good. One recalls the persistent allegations that the logo of consumer products manufacturer Procter & Gamble was a satanic symbol. The sword of citizen participation is two-edged, and one would not wish to see the advent of wiki witch-hunts.

## 4. Conclusion

The lack of state capacity is not necessarily a good thing, especially when non-state regulatory institutions are themselves weak. Van der Heijden (forthcoming) studied over 50 market-driven approaches to urban sustainability and found their effects to have been negligible. From the Global Financial Crisis of 2008, to the collapse of once-plentiful fisheries, examples of regulatory failure abound. These failures have defied not only state regulatory actors but also private regulatory systems and markets. Vogel (2010) suggests that civil regulation is not a substitute for the exercise of state authority, and argues that it should be reinforced by and integrated with state regulatory systems (see also Buthe 2010).

The rich variety of institutional orderings that pluralistic regulatory systems entail might lend themselves to graphic depiction. One might envisage models of regulatory systems not unlike molecular models used in drug design and materials science (see Grabosky 1997). Such models might enable one to visualise a regulatory system’s constituent institutional as well as coercive properties. The next generation of

regulatory scholars may include those who wish to undertake more precise description or modelling of regulatory systems. This could permit a degree of hypothesis testing and theory building, which has thus far been largely absent from the literature on regulation.

## Further reading

Bucy, P 2006. 'Moral messengers: Delegating prosecutorial power', *SMU Law Review* 59: 321–44.

Engstrom, D 2013. 'Agencies as litigation gatekeepers', *Yale Law Journal* 123(3): 616–712.

Percival, R and Zhao, H 2014. 'The role of civil society in environmental governance in the United States and China', *Duke Environmental Law & Policy Forum* 24(1): 142–82.

## References

Auld, G, Cashore, B, Balboa, C, Bozzi, L and Renckens, S 2010. 'Can technological innovations improve private regulation in the global economy?', *Business and Politics* 12(3): art. 9. doi.org/10.2202/1469-3569.1323.

Ayres, I and Braithwaite, J 1992. *Responsive Regulation: Transcending the Deregulation Debate*. New York: Oxford University Press.

Bartel, R 2005. 'When the heavenly gaze criminalises: Satellite surveillance, land clearance regulation and the human–nature relationship', *Current Issues in Criminal Justice* 16(3): 322–39.

Bartley, T 2003. 'Certifying forests and factories: States, social movements, and the rise of private regulation in the apparel and forest products fields', *Politics & Society* 31 (3): 433–64. doi.org/10.1177/0032329203254863.

Bartley, T 2007. 'Institutional emergence in an era of globalization: The rise of transnational private regulation of labor and environmental conditions', *American Journal of Sociology* 113(2): 297–351. doi.org/10.1086/518871.

- Black, J 2001. 'Decentring regulation: Understanding the role of regulation and self-regulation in a "post-regulatory" world', *Current Legal Problems* 54: 103–46. doi.org/10.1093/clp/54.1.103.
- Black, J 2008. 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes', *Regulation and Governance* 2(2): 137–64. doi.org/10.1111/j.1748-5991.2008.00034.x.
- Braithwaite, J 1982. 'Enforced self-regulation: A new strategy for corporate crime control', *Michigan Law Review* 80(7): 1466–507. doi.org/10.2307/1288556.
- Buthe, T 2010. 'Global private politics: A research agenda', *Business and Politics* 12(3): 1469–3569. doi.org/10.2202/1469-3569.1345 .
- Coplan, K 2014. 'Citizen litigants, citizen regulators: Four cases where citizen suits drove development of clean water law', *Colorado Natural Resources, Energy & Environmental Law Review* 25(1): 61–124.
- Ellison, NB, Steinfeld, C and Lampe, C 2007. 'The benefits of Facebook "Friends": Social capital and college students' use of online social network sites', *Journal of Computer-Mediated Communication* 12(4): 1143–68. doi.org/10.1111/j.1083-6101.2007.00367.x.
- Galanter, M 1981. 'Justice in many rooms: Courts, private ordering and indigenous law', *Journal of Legal Pluralism and Unofficial Law* 13(19): 1–47. doi.org/10.1080/07329113.1981.10756257.
- Grabosky, P 1995a. 'Regulation by reward: On the use of incentives as regulatory instruments', *Law and Policy* 17(3): 257–82. doi.org/10.1111/j.1467-9930.1995.tb00150.x.
- Grabosky, P 1995b. 'Using non-governmental resources to foster regulatory compliance', *Governance* 8(4): 527–50. doi.org/10.1111/j.1468-0491.1995.tb00226.x.
- Grabosky, P 1997. 'Inside the pyramid: Towards a conceptual framework for the analysis of regulatory systems', *International Journal of the Sociology of Law* 25(3): 195–201. doi.org/10.1006/ijsl.1997.0040.
- Griffiths, J 1986. 'What is legal pluralism?', *Journal of Legal Pluralism and Unofficial Law* 18(24): 1–55. doi.org/10.1080/07329113.1986.10756387.

- Gupta, A and Lad, L 1983. 'Industry self-regulation: An economic, organizational, and political analysis', *The Academy of Management Review* 8(3): 416–25.
- Hayek, FA 1991. 'Spontaneous ("grown") order and organized ("made") order', in G Thompson, J Frances, R Levacic and J Mitchell (eds), *Markets, Hierarchies and Networks: The Coordination of Social Life*. London: Sage Publications, pp. 293–301.
- Kraakman, R 1986. 'Gatekeepers: The anatomy of a third-party enforcement strategy', *Journal of Law, Economics and Organization* 2(1): 53–104.
- Lao Tzu 1963. *The Tao Te Ching*. DC Lau, trans. Available at: [terebess.hu/english/tao/lau.html](http://terebess.hu/english/tao/lau.html).
- McGivering, J 2012. 'Drones to protect Nepal's endangered species from poachers', *BBC News*, 20 June. Available at: [bbc.com/news/science-environment-18527119](http://bbc.com/news/science-environment-18527119).
- Morgan, B 1999. 'Regulating the regulators: Meta-regulation as a strategy for reinventing government in Australia', *Public Management: An International Journal of Research and Theory* 1(1): 49–66. doi.org/10.1080/14719037800000004.
- Morgan, B 2003. 'The economization of politics: Meta-regulation as a form of nonjudicial legality', *Social & Legal Studies* 12(4): 489–523. doi.org/10.1177/0964663903012004004.
- Parker, C 2002. *The Open Corporation: Self-Regulation and Democracy*. Cambridge: Cambridge University Press. doi.org/10.1017/CBO9780511550034.
- Porter, M 1985. *Competitive Advantage: Creating and Sustaining Superior Performance*. New York: Free Press.
- Reagan, M 1983. 'The politics of regulatory reform', *Western Political Quarterly* 36(1): 149–67. doi.org/10.2307/447850.
- Safi, M 2014. 'Wildlife trafficking app launched at Sydney's Taronga Zoo', *The Guardian*, [online], 9 April. Available at: [theguardian.com/environment/2014/apr/09/wildlife-trafficking-app-launched-at-sydneys-taronga-zoo](http://theguardian.com/environment/2014/apr/09/wildlife-trafficking-app-launched-at-sydneys-taronga-zoo).

- Scott, C 2004. 'Regulation in the age of governance: The rise of the post-regulatory state', in J Jordana and D Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*. Cheltenham, UK: Edward Elgar, pp. 145–74. doi.org/10.4337/9781845420673.00016.
- Shapiro, S 1987. 'Policing trust', in C Shearing and P Stenning (eds), *Private Policing*. Beverly Hills, CA: Sage Publications, pp. 194–220.
- Streeck, W and Schmitter, P (eds) 1985. *Private Interest Government: Beyond Market and State*. London: Sage Publications.
- van der Heijden, J (forthcoming). *Voluntary Programs for Sustainable Cities: Potential and Limits in Decarbonising the Built Environment*. Cambridge: Cambridge University Press.
- Vandenbergh, MP 2007. 'The new Wal-Mart effect: The role of private contracting in global governance', *UCLA Law Review* 54: 913–70.
- Vogel, D 2010. 'The private regulation of global corporate conduct', *Business and Society Review* 49(1): 68–87. doi.org/10.1177/0007650309343407.
- Wang, Q 2010. 'China's environmental civilian activism', *Science* 328(5980): 824–6. doi.org/10.1126/science.328.5980.824-a.

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