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SELF-REGULATION AND COMPLIANCE WITH ENVIRONMENTAL LAW FROM A GLOBAL PERSPECTIVE

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THE EMERGENCE OF SELF-REGULATION

The amount of environmental regulations in industrial societies has increased tremendously during the last 20 years. Also there is a global tendency towards more stringent environmental regulation, in spite of a growing scepticism about its impact potentiality, which in the late1970s led to studies of the gap between legislation and its implementation.[1] In the last decade in complex industrial Western democracies the call for a strengthening of self-regulation of environmental management in industry has been heard time and again.[2] Governments seem to promote self-regulation because of the increasing difficulty in adequately managing policy issues via government regulations, particularly in such areas as the protection of the environment.

Self-regulation can take many forms. There is a distinction between individual self-regulation and self-regulation by groups. Also economic self-regulation and social self-regulation must be distinguished, the first being concerned with the control of the market and the second with the damaging consequences of industrialization.[3]

Self-regulation for the purposes of this chapter is described in terms of the degree of government involvement in regulation.[4] One can imagine in theory a continuum with pure forms of self-regulation at one end and government regulation at the opposite end.[5] It is the contention of many researchers of self-regulation by the industry, that success in this area is contingent on the co-existence of government regulation.[6] Therefore the concept of self-regulation is often used as mandated, enforced or even 'regulated' self-regulation.[7] In this

respect self-regulation is concerned with cooperative regulation or co-regulation.[8] Legislation and implementation are no longer being prepared and carried out without at least consulting the affected citizens. Regulation is rather the outcome of a horizontal negotiation process than a vertically imposed dictate; it is a 'bottom-up' movement rather than a hierarchically imposed, 'top-down' process. The essence of co-regulation within the framework of modern governance precludes the drafting and imposition of political goals in a unilateral fashion. Sustained efforts are made to ensure that the behaviour of domestic and international actors is guided by this new cooperative paradigm. Nowadays the concept of governance increasingly is being used – as distinct from government – in the sense of governance 'beyond the State' or even 'without Government'. On the basis of systems theory, 'governance' must increasingly rely on *reflexive governance* or *self-governance*.[9]

In developing or transition countries where environmental law is in its infancy, the option of self-regulation of environmental polluters to date hardly seems relevant. Nevertheless, in the long run self-regulation may become a matter for consideration in developing countries too. Through the introduction of foreign investments, these countries are confronted with commercial and industrial structures and cultures that are embedded in, or at least dependent on, legal systems devised by the 'home' countries of this foreign investment source.[10]

Investment of Western capital in developing countries resembles post-colonial influences of industry. In their home country, enterprises from industrialized nations may have to comply with more stringent environmental rules, while at the same time they may be subject to alternative forms of regulation, such as the promotion of self-regulation. It is common knowledge that international enterprises seek out locations where production costs are the lowest and where government requirements are most lenient, especially in the developing countries. Environmentalists, for instance, argue that weak national environmental standards draw industries to developing countries, thus creating 'pollution havens' and propelling a global 'race to the bottom' in environmental standards. But for this view no substantial evidence has been presented, nor has research clearly established that foreign companies create 'pollution haloes' in developing countries.[11]

If the bigger industrial companies hold on to (high) self-regulatory environmental standards, and at the same time comply with legal requirements of their own state, this might induce the governments of developing countries to adapt their legislation to these new forms of

regulation as well. However, it is also plausible that legal cultures in developing countries are strongly rooted in society, and resist adaptation of other legal systems.

In this chapter the dilemmas and the consequences of developments in government–industry relationships in developed countries as well as their impact on developing countries will be addressed. Theories about the globalization of law on the one hand, and theories of legal pluralism on the other, are used to illustrate the dilemma. What follows is a discussion on convergence or diversity of law and legal policy in the development of nation-states towards increased globalization. This discussion serves as a stepping-stone to some remarks on new perspectives on environmental governance, government control, and the environmental management of industry through self-regulation. If environmental legal styles are really converging at a global level, then it is necessary to recognize the differences in the culture of legal systems, for instance in Europe and the United States. As an example, several environmental enforcement strategies will be analysed. The concepts of *adversarial* versus *neo-corporatist* legal systems will be described as characteristic for the United States and the European Union respectively. The *implementation gap* (i.e. the gap between legislation and its implementation) 'discovered' in the 1970s may be bridged by fresh approaches based on new perspectives of *environmental governance* and the integration of government control and *enforced self-regulation*. The legal-institutional framework of environmental law enforcement in Western democracies, together with possible trends and similarities that may be observed when studying the enforcement process in practice, may be indicative of the ways in which legal systems in developing countries may adapt and develop. All these issues will be addressed.

CONVERGENCE OR DIVERGENCE OF ENVIRONMENTAL LEGAL SYSTEMS?

Theories of globalization of law imply a convergence of national or regional legal styles through the various contacts of commerce and industrial interests.[12] Legal styles are strongly connected with legal culture. Legal culture is a generic term for values and ideas about law, affected by events and situations in society. Legal culture may lead to actions that have an impact on the legal system itself.[13]

Theories of legal pluralism emphasize the divergence of legal styles and cultures, and indicate that legal styles are firmly rooted in nation-states, or in regional and local territories of a nation-state. Legal pluralism implies that national or supra-national legal rules do not have the power to disregard local legal culture completely.[14] That is why there will always be a divergence between traditional legal systems and newly emerging legal systems, as for instance in the legislation of the European Union. *This will be no different for the Indonesian environmental legal system in development, when confronted by legal systems of foreign industries investing capital in Indonesia.*[15]

In the debate between the adherents of *convergence* in national modes of regulation and the *divergence* theorists, which may be identified with *legal pluralists*, it is not easy to find a clear outline demarcating both perspectives. Nor has much convincing empirical evidence been presented to date to corroborate either perspective. According to Kagan *et al*.,

> *'in all economically advanced democracies, legal rules and liabilities now penetrate deeply into economic and social life … Moreover, in an increasingly integrated global economy, the dominant trend in national and regulatory systems seems to be toward convergence.'*[16]

The process of the globalization of law is irreversible.[17]

Yet, the adherents of the divergence theory suppose that legal styles are strongly rooted in the state institutions of nations. These institutions are considered to be rather resistant to change, even under the pressure of internationalization.[18] It may very well be that these observations also hold for legal styles and legal systems in developing countries.

Undoubtedly, the mobilization of international commerce brings about an intensification of business contacts throughout the world, which will have its impact on the administrations of all nations, both developed and developing. Yet one may seriously doubt whether these confrontations also lead to fundamental changes in national or domestic legal styles, as Teubner seems to indicate.[19]

Looking at the European supra-national legislation as it has been incorporated in the national legal systems of the Member States, there is no doubt that the impact of European legislation has resulted in the approximation of Member States' legislations. But this 'harmonization' by

no means solely implies a process of convergence of legal systems and regulatory styles, as may be observed from the few implementation studies of EC legislation conducted in the Member States.[20]

Convergence in the European Union

In an interesting study Haverland compared the implementation of the Packaging Waste Directive in Germany, The Netherlands and England. He concluded that due to the European Directive a convergence has taken place towards the more legalistic approach in Germany, in the sense that both the Netherlands and the UK followed the German example of implementing European law and introduced regulations based on public law. But no convergence was noticed regarding the targets of packaging waste policies. The diversity in the strictness of standards persists. Also European integration did not lead to convergence in the organization of packaging waste systems within the EU. For instance, the way economic and social interests are involved in the policy process varies, whilst government attitudes towards industry also show significant differences. In fact, national differences in implementing the Packaging Waste Directive are very manifest.[21]

It is clear moreover, that contrary to common belief EC legislation leaves the Member States a great deal of discretion and differentiation in the implementation of environmental policy.[22] EC directives often do not contain the same level of specificity as national legislation. Norms and standards may require concretization in national legislation.[23]

Institutions of the European Union

The apparent and relative degree of harmonization or approximation of legislation in the Member States may be explained by the key feature of the European Union, which distinguishes it from most international organizations, namely the existence of a sophisticated set of institutions enjoying autonomous powers to advance its interests: the Council of Ministers, which represents the interests of the individual Member States; the EU Commission, representing Community interests; the EU Parliament, the powers of which under the EC Treaty are limited; and the European Court in Luxembourg, which indeed has made a major contribution to the impact of Community law in the national legal orders of Member States.[24]

Instruments of European Community law

EC legislation consists of three legal instruments: regulation (which has general application, is binding in its entirety and is directly applicable to all Member States), directive (allowing Member States the choice of form and methods of implementing it in their national laws) and decision (binding in its entirety upon those Member States to whom it is addressed). As regards the environment, the preferred European legal instrument is the directive. EC legislation generally aims at a harmonization of national laws, taking it as a given that a high level of environmental protection is a fundamental prerequisite for harmonization. In the case of Member States having already adopted an environmental policy setting of higher standards, the EC Treaty permits these Member States to apply these higher standards if they can be justified on grounds of protection of the environment.[25]

The political initiative of the European Community to *harmonize* the legislative activities in Member States was primarily motivated by economic reasons. But this does not mean that a convergence of legal systems in the Community was expected. As Van Waarden[26] argues, economic internationalization does not necessarily lead to a reduction in institutional differences. It also seems unlikely that it will reduce the diversity of regulatory styles and institutions, characteristic of the various Member States.[27] The implementation of EC-fisheries policy in the Netherlands *prima facie* may seem to serve as an example of the contrary. The Netherlands has traditionally held on to a (neo)corporatist fashion of enforcement policy.

(Neo-)corporatism

By (neo-)corporatism is meant a model of society in which relationships between organizations, public as well as private, are characterized by a relatively closed system of vertically organized associations or corporations, oriented towards cooperation and a reduction in diverging societal interests.[28] In the Netherlands particularly elitist groups representing the various 'pillars' of society (Protestant, Roman Catholic and Non-religious) performed as sparring partners in the political and regulatory arena, which eventually resulted in the accommodation of the contradictions and the pacification of the antagonistic 'tribal wars'.[29] Although the secularization of society brought a reversal of confessional dominance in the daily routine of people, the notion of compromise and negotiation is still characteristic of Dutch political life. The difference, though, is that nowadays government deliberately uses negotiating methods in dealing with various levels and structures of society, and no longer the elitist representative corporate structures of the past alone. By these mechanisms government promotes the realization of

policy objectives, and stimulates and facilitates self-regulating by private organizations in the market environment.[30] Hoekema *et al.* use the concept of *integral governance*, and *horizontal governance*, thereby indicating that policy-making and policy implementation are dependent on the impact of negotiations in sustainable relationships between government and the relevant specific organizations and groups.[31] This consensual decision-making may be beneficial to attaining policy objectives, but there is also the danger of a lack of transparency in the empirical processes, because of the fact that regulatory processes are dominated by 'insiders'. Evolving Dutch experiences may be valuable to other countries seeking to gain stakeholder support for reform, while avoiding 'capture' by special interests and damaging policy rigidities.[32]

The Dutch Ministry of Agriculture and Fisheries, as a consequence of the corporatist approach, left implementation of the EC-fisheries directives to a large extent to the statutory fishermen's associations. By tacitly tolerating the fact that the associations were taking much more fish from the North Sea than their quota allowed, the Dutch government in fact legitimated the ineffective policy enforcement by the fisheries organizations. When the government subsequently was forced by the European Union to increase its control, it could no longer rely on self-regulation by the industry because the routine cooperative arrangements seemed to lack legitimacy.[33]

This, however, did not mean that European law with one stroke of the pen had eradicated local legal culture in the Netherlands. National and local governments have different approaches towards administering environmental protection policy, notwithstanding the fact that EC supra-national government promotes harmonization through the implementation of its rules in the national legislation. Furthermore the costs of adjusting national legislation to EC legislation may not be equally distributed among the Member States of the European Union, which would entail differences in competitive conditions for their national industries. Van Waarden is of the opinion that possible differences in styles of implementation under a shared regulatory regime could even produce new forms of social and economic inequality across nations. He goes on to imply that behind such differences may be more than just administrative overload, sloppiness, fraud, opposition, or even sabotage by interests affected. These differences may have structural roots in national regulatory styles and the institutions behind them.[34] Even if a supra-national controlling force were established, its operations in these circumstances could hardly be successful. As a concluding remark, we may state that convergence of environmental legal systems in developed and developing countries may be

possible, but that the differences in legal cultures and styles will prevent total convergence to the extent that a kind of integration will occur.

DETERRENCE AND COMPLIANCE IN ENFORCEMENT STRATEGIES. ADVERSARIAL VERSUS (NEO-)CORPORATIST LEGAL SYSTEMS

The discussion on convergence or divergence of national and local legal systems in view of globalization leads us to another theme: the legal-institutional framework of environmental law enforcement in Western democracies and possible trends and similarities that may be observed when studying the enforcement process in practice. This process is particularly intriguing, bearing in mind that the corporate system of the Netherlands implies a tendency of Dutch administrators to cooperate with enterprises, while it gives them the opportunity to put pressure on the enterprises to comply with environmental rules and regulations.[35]

Different approaches, different enforcement styles

Cooperative regulation is only part of the picture of environmental law enforcement in the Netherlands. Environmental law enforcement is also a function of the criminal law system, which differs strikingly with respect to legal culture and enforcement style compared with the administrative enforcement officials. This penal *deterrence*-oriented style is much more stringent than the *compliance*-oriented style of the administrative enforcement officials.

Compliance vs. deterrence

In the research literature on enforcement of law, two theoretical concepts are often distinguished in the approach of enforcement inspectorates: a compliance-oriented and a deterrence-oriented strategy. The objective of the former is to secure conformity with law by means of ensuring compliance or by taking action to prevent potential law violations without the necessity to detect, process and penalize violators. The purpose of the latter is to secure conformity with law by detecting violations of law, determining who is responsible for their violation, and penalizing those who infringe regulations in order to deter violations in the future.[36] Compliance strategies seem to be inspired by a cooperative, accommodative enforcement style, but this is not always the case. There is a continuum of accommodative and legalistic enforcement styles, corresponding with respectively excessively lenient and excessively stringent regulatory outcomes.[37]

To apply compliance strategies on the basis of a social control perspective, it is not necessary for governments to stimulate self-regulation. Self-regulation and compliance are different concepts. In the absence of self-regulation in industrial settings, it is nevertheless possible for government to employ compliance strategies. Also, it is theoretically possible for deterrence strategies to be used as a necessary back-up if environmental self-regulatory systems in industry are not in compliance with the overall government regulatory system.

During the last decade the criminal law enforcement body in the Netherlands (generally speaking, the Public Prosecutor's Office and the Police) has increasingly enhanced its activities in the sphere of environmental law enforcement. Particularly in the field of waste management violations, this has led to some highly publicized criminal cases in which the courts sentenced the defendants to several years of imprisonment.

Environmental criminal cases

In 1981 the Netherlands for the first time was confronted with a huge environmental scandal. Hazardous substances were being delivered by big chemical companies in the Rotterdam harbour to the UNISER company, which purported to be a service factory for the removal of hazardous waste. The actual removal was a process of mixing the dangerous chemical waste with water or sludge, and afterwards illegally dumping this 'product' into the surface water, or transporting it to Belgium, and selling it as crude oil. The managers of the waste discharging company, after an extended criminal procedure before the District Court in Breda , were found guilty and were sentenced to terms of imprisonment ranging from six months to two years.[38]

Another famous environmental criminal case was dealt with by the District Court of Rotterdam in 1995. A tanker cleaning company (TCR) operating out of Rotterdam harbour was prosecuted for violating environmental regulations, especially the Surface Water Pollution Act. For a period of almost six years, TCR illegally discharged hazardous waste substances into the water of Rotterdam harbour. The defendants were sentenced to terms of imprisonment ranging up to six years.[39] The fact that the company was financially supported by the Ministry of Transport and Waterworks with a grant of US$10 million was seen as a salient coincidence. Rumour had it that the Minister at one time had urged the Rotterdam Public Prosecutor not to continue with the prosecution, because of the financial damage that would be inflicted to the national economy, if tanker cleaning had to be stopped due to punitive measures being taken. But that rumour could not be ascertained in the analyses made after the process.[40]

In fact the stringent approach of the criminal law authorities proves that even in so-called corporatist states, different legal styles apparently exist side by side. *The picture of one determinant legal culture in a society is false. This perspective must be reconsidered.*[41]

The deterrence approach in the criminal prosecution of environmental offences apparently is no impediment to an environmental policy in most European countries in which governments are more and more inclined to stimulate industry to regulate its own environmental management. This is expressed by the development of environmental agreements (in Dutch policy-terms 'covenants') between government and industry, the search for market-oriented instruments, the introduction of flexible framework permits, and the promotion of intra-company environmental management systems.[42]

The arguments for this development are twofold. First, as was argued earlier, governments in Western democracies realize that they do not have the capacity to regulate society and order societal arrangements by command and control strategies only. Therefore they must look for other devices to force citizens to comply with the law.

Reiss supposes that there are three major changes in modern societies that bring about a general shift from deterrence systems to compliance systems of social control:

Major changes causing a shift from deterrence systems to compliance systems in social control

1 The extension of entitlements

Modern democratic welfare societies are characterized by the distribution of rights and benefits for all. This also means an extension of the right to privacy, which makes it more difficult directly to observe and survey wrongdoing and to gather evidence concerning lawbreaking.

2 *The growth of trust systems*

Historically there is a shift from direct observation and intervention to trust as the fundamental basis of relationships and transactions. '(T)he power of law as a means of social control lies in its capacity to secure compliance by agreement; to enforce the law by deterrence is to acknowledge the failure of law as a fundamental instrument of social control.'[43]

3 The growth of organizations and the complexity of organized life

The emergence of large-scale organizations is a cause and a consequence of the shift from deterrence to compliance strategies. It creates problems of detection and proof as organizations have greater capacity to avoid detection and the power to bargain.[44]

All three of these major changes have led modern societies to turn increasingly to compliance-based enforcement strategies.[45]

Moreover, the social problems governments are expected to solve are too difficult to be managed by the administration and through regulation alone. For any state bureaucracy, closer cooperation between the public administration and organized interests is a functional necessity. Thus, when it comes to law enforcement, the officials cannot manage without the cooperation and the help of industry. This may, as a side effect, even result in the entanglement of government interests with industry interests in such a way that government may be 'captured' by industry and even become criminally liable for illegal operations on markets as if they were private organizations. Democratic control by representative bodies in these circumstances has become quite difficult. The formulation and the execution of policies show less transparency; a subject that will be dealt with in more detail below.

Second, as we have already stressed, modern governments have come to realize that getting things done in modern society demands the support of their citizens. Government cannot rely on its own repressive state organizations for the ordering of activities and relationships in society, as was usual in former days. Increasingly, citizens and civil associations are called upon to regulate their own societal relationships. There is a financial reason for this, because of the fiscal crises which confront local government. But there is also a psychological reason. When an appeal is made to the self-regulatory capacities of people, they will more easily comply than if structures were merely imposed on them.

That leaves the question open, why in some countries the criminal approach towards environmental pollutors has been strengthened at the same time as governments have been attempting to stimulate self-regulation by industry. This paradox seems to be inherent in most Western democracies that suffer from fragmented problem-solving capacities. It is nevertheless possible to explain this paradox by arguing that both approaches are necessary. When an industrial organization breaks the law, government should hold it accountable. When enterprises deliberately evade the norms and standards to which they have committed themselves, there is even more reason to hold them liable for their actions. Criminal prosecution of environmental offences in many countries (the United States, Germany and the

Netherlands) has been enhanced, particularly in the case of flagrant fraud and organized crime, as was indicated in the examples of the UNISER- and TCR-cases in the Netherlands. Yet, although criminal prosecution and administrative fines may have an impact on the conduct of potential violators of social regulations, other devices remain necessary to change industrial attitudes in matters of safety and health and environmental management. Advocates of law enforcement via the command-and-control method do not take sufficient cognisance of the findings of socio-legal research, which indicate that deterrence strategies in general do not change attitudes that are strongly rooted in a market-oriented business world.[46] They should realize that such a strategy presupposes the existence of the following conditions:

1 comprehensive legal prescriptions for the majority of occupational safety and health problems and serious dangers to the environment;
2 government inspectors frequently visiting and thoroughly examining all enterprises;
3 the possibility of objective and prompt assessment of discrepancies between norms and reality;
4 inspectors' willingness to act as 'policemen' (i.e. the inspectors' term for a non-persuasive and non-accommodative conception of work);
5 an enduring and progressive change in environmental corporate mentality in view of potential for prosecution or litigation;
6 the efficient and effective processing of safety and health and environmental cases by the Public Prosecutor's Office and the courts.

These presuppositions are illusory in the light of the present common enforcement practices.[47] In fact, there is a growing consensus that, as an official of the US Environmental Protection Agency (EPA) put it, 'preference for a deterrence strategy has more to do with ensuring accountability to legislatures, the public and industry than with its ability to achieve compliance.'[48]

Adversarial versus corporatist legal systems

It might be concluded that regulatory policy is not completely shifting from direct and stringent regulation towards more flexible, lenient and accommodative control mechanisms, such as self-regulation and co-regulation. But even so, the increased promotion of self-regulating and co-regulating policies has important consequences for the enforcement of corporate regulation that must be faced. In order to study the socio-legal consequences of the

government emphasis on self-regulation, a greater understanding of what happens in government–business relationships at regional, national and international level is needed. This requires both an adequate, guiding theory and more empirical studies on the subject.[49]

The convergence–divergence debate may have its impact on the notion of similarities and differences in enforcement of law between nations. For example, some socio-legal research results indicate that the United States in general is characterized by a more adversarial legal system than is the case in most European states. A corporatist system of consultation and negotiation with respect to regulatory policy is much more prevalent in Japan and Europe than in the United States.[50]

In societies with an adversarial regulatory culture, industry is rarely consulted on the design of government regulatory intervention.[51] These societies are more likely to regulate environmental management in a way that frustrates goal attainment by business. In most European legal systems, where cooperative regulation is a normal procedure and government–industry relationships are aimed at reaching consensus, even unpopular measures taken by government prove to be accepted by the regulated community.[52]

It should be stressed that self-regulation cannot and should not exist without a government that strongly reacts against environmental delinquency or blatant abuses in environmental management. Self-regulation needs a framework of government regulation. Government should not neglect its responsibility to order and regulate the general societal interests that are not represented by self-regulatory systems, because the latter are primarily driven by self-interest and a self-referential orientation.[53] For this it is necessary to control and monitor potential polluters more frequently. Most important however is that government and industry cooperate and create relationships of trust. In other words, to further the cohesion of society, excessive juridical measures and regulations should be abandoned. Currently new ways of governance are replacing the more legalistic regulation practices from the past. In the next paragraphs the question of how governments in Western democracies approach these new forms of environmental regulation will be discussed. An assessment of their possible value in developing and transition countries will be made.

REGULATING INDUSTRY: HOW TO BRIDGE THE IMPLEMENTATION GAP

The development of concepts such as *regulatory styles* or *enforcement styles* may be seen as a direct consequence of *gap research*, which was started in the 1970s. One of the first to study 'modes of rule application' was Kagan.[54] This study did not have the implementation gap as its analytical focus, but rather the ways officials apply the law and the motivations by which they are led in defining decisions in concrete law application cases. Yet it also shed more light on the processes of policy implementation and rule application. One of the findings of the ensuing rule application studies, conducted in the United States and Europe, was that the social and political realities of the situation very much influenced the ways and modes of rule application. Therefore, often the objectives of legislation were not realized in accordance with the original formulation.

If we look at the objectives of environmental legislation, sustainable development nowadays may be considered as an overall recognized objective. Sustainable growth or *sustainable development* is often seen as a guiding principle in contemporary implementation and enforcement programmes of environmental protection policy.[55]

The 'carrying capacity' of the environment is being assessed on the basis of scientific research. But, to measure the carrying capacity of the public regarding environmental regulations is quite another matter. Little socio-psychological and economic research has been conducted regarding the necessary instruments to refocus the behaviour of the public in the direction of sustainable development.

In fact, the choice of threshold levels for sustainable resources use depends largely on the way the present generation judges its responsibilities towards future generations. In environmental policy and legislation, these threshold levels are laid down, but the implementation and the enforcement of these policies and legal programmes have to be implemented seriously.

Implementation and enforcement

Implementation is the process of applying policy programmes and legislation in the daily routine of individuals and groups of individuals (institutions) to regulate societal issues relevant to these individuals, facilities, businesses and institutions and make them subject to particular government requirements. *Enforcement* is the government activity to make individuals and institutions comply with the requirements in the legislation.

Apparently there is a conflict between policy goals and the achievement of these goals. Some factors interfere in the achievement of the set targets. People supposed to act according to the rules do not comply with them, and this leads to an *'implementation gap'*. The implementation of a certain policy programme or legislative framework is not simply a matter of *'applying'*. Often the original programme is changed in the process of implementation and the ensuing result does not correspond with the objectives desired by the legislators. The predicament centres on what exactly transpires in the process of implementation of environmental policy. Some scholars have indicated that the legislative programme is 'dropped' into a setting already full of normative orderings and activities. Interactions between government officials and business representatives already exist. Often action precedes policy. Not all actions relate to a specific or explicit policy.[56]

To know what is happening in the Black Box of the implementation process, we must study this process in the context of roles of different actors (government, industry and third parties such as environmental organizations and other non-governmental organizations) in the system. In particular, it is worth examining the role of *'street-level bureaucrats'*, that is, the government officials or inspectors with whom environmental managers are directly confronted in regulatory affairs.[57]

From a management point of view, the process of implementation is often characterized as lacking integration, coordination and cooperation. In one respect, individualized and ad hoc enforcement could be considered as a consequence of a high degree of effective discretion. If the administration did not have a certain amount of factual discretion, then rigorous and unreasonable behaviour on the part of regulators or inspectors would result. On the other hand, officials and inspectors may become too lenient, and may tolerate the illegal behaviour of the controlled industry. In these circumstances the administration is *'captured'* by business and industrial interests.[58]

Discretion

Implementation is often at variance with the law-makers' intention because of the discretionary powers of governmental or judicial institutions applying the rules. Discretion may be formally granted or it may be reasonably assumed. The former is a structural, administrative competency, bound by

law. The latter is a sociological concept, meaning that administration and bureaucrats may decide on the basis of (social) indicators other than the law. Discretion is a central and inevitable part of the legal order. It is the means by which law is translated in society.[59] Formerly, the majority of legal scholars considered discretionary power of officials without a legal basis to be a rather negative concept.[60] The negative aspects of discretion, were often summed up as follows:

- Discretion leads to inconsistent decision-making on the part of officials and appeal tribunals.
- It leads to arbitrary decision-making.
- It leads to undesirable control by officials.
- It diverts attention away from more fundamental issues.
- It encourages feelings of stigma in citizens.
- It prevents citizens from understanding how the system works.

The consensus on the discretion of government officials in the execution of social regulation has been changing during the last two decades. Nowadays commentators agree that discretion is endemic in the substance and the procedures of most social and economic regulation, such as social security, labour, health and safety, and environmental law.[61] There is a positive side to discretion in the mitigating role it plays in matters of over-rigorous law-making and in implementing legislation that is in need of interpretation.

INTEGRATION OF ENFORCEMENT OR ENFORCED SELF-REGULATION

Given the implementation gap and the use of discretionary power in implementation and enforcement, more and more administrations have gradually tried to improve governance by addressing the issue of *co-operative regulation* or *co-regulation*. This is the kind of regulation in which government officials and company managers together solve problems of compliance and enforcement of environmental rules. Can government control and law enforcement actually be integrated with in-company environmental management on a systemic basis? In answering this question it should be realized that often close interaction between the two already takes place.[62] Dutch environmental officials often develop enduring relationships with their counterparts in industry, during their consultations and negotiations about requirements in permits and how to comply with them. These relationships are built on a basis of trust, which, if broken, may lead to severe retaliation from the side of government officials, charged with monitoring and enforcing the environmental rules.[63]

The loss of legitimacy illustrated in our example of the fisheries' associations may only be temporary. As soon as the basis of trust is restored, cooperation may continue, presumably leading to a more compliance-oriented enforcement style. The private sector has become aware of the competitive advantage that lies in promoting environmental management systems, and this may be considered as a major development in the process of compliance with environmental rules.[64] These forms of self-regulation are often stimulated by Western governments, although we should be aware of the fact that even in countries with so-called neo-corporatist governance styles, a change to other more stringent enforcement styles in some particular legal domains is possible. Examples include the financial and the agricultural domains in the Netherlands.[65]

It is the contention of some policy-makers in Western democracies that environmental self-regulation is feasible, and even indispensable, if government wants to solve the problem of non-compliance. For reasons of efficiency and suitability, explained above, it is nowadays hardly possible to rely fully on deterrence and command-and-control strategies to secure the protection of the environment. Government depends to a great extent on the knowledge and the experience of the regulated companies. Frequent interaction is necessary to arrive at adequate solutions. In this respect it is erroneous to think only in terms of a dichotomous situation in which an accomodative and lenient enforcement style is set against a command-and-control strategy. Some melding of elements of the two approaches is possible and perhaps desirable. Although the possibility of 'collusion' or capture of government officials by industry should not be ignored, it is equally clear that through the frequent visiting and consulting of enforcement officials, a learning process develops in which compliance of environmental rules by the regulated enterprise becomes a matter of course. To switch to a more legalistic, stringent enforcement style is what happens in those circumstances, where enterprises deliberately evade complying with environmental rules. In other words, a compliance-oriented attitude is not necessarily congruent with an attitude of negligence and capture.[66]

In the descriptions of globalization of law, it is often contended that governments succumb to alternative solutions of regulation because of their incompetence to solve environmental problems with traditional legislative and enforcement instruments. It may be true that industry fosters the idea that alternative instruments of regulation are in fact a welcome substitute for

adversarial and counter-productive legislation. Still, from research documenting the relationships of enforcement officials and environmental managers, their interactions and respective regulatory behaviour, it may be concluded that there is not much ground for a perspective of continuous resistance by industry against regulatory requirements.[67] On the contrary, industry needs government rules to assess more accurately the socio-political boundaries of their production operations and their market behaviour. But it also needs '*administrative guidance*', as it is called in Japan. The Japanese mode of environmental regulation shows that administrative guidance reduces the Japanese regulatory system's reliance on formal legal rules, sanction-based enforcement and litigious relations.[68] As a consequence the Japanese environmental legal system emphasizes performance standards rather than specific, mandatory methods of control and informal regulatory initiatives formulated jointly by industry associations and government ministries. Aoki and Cioffi conclude that in comparison with the situation in the United States, antagonism towards regulators on the part of Japanese business is extremely low, and the system appears to facilitate corporate acceptance of regulatory norms.[69]

These differences have also been observed in comparative research of environmental legal styles in the United States, the European Union, and the European Member States. Moreover there are differences in legal styles between various European states or groups of states.[70] In the final section we shall try to assess the possible value of the approach of new forms of environmental regulation, such as self-regulation, in developing and transition countries.

PROSPECTS OF SELF-REGULATION IN THE MANAGEMENT OF ENVIRONMENTAL POLLUTION IN DEVELOPING COUNTRIES

The questions asked in this paper are, simply put:

1. Can self-regulation in the management of environmental pollution protection actually work?
2. Can it play a role in both developed and less developed countries?

By self-regulation is meant that polluters, in this case industrial companies, manage their own environmental systems according to rules developed by these very companies. It is

maintained here that self-regulation in this form may only be feasible within a set of precise and clear government rules and with frequent interaction between government enforcement officials and company environmental managers. In other words, 'self-regulation' depends on adequate governance and qualitative government regulation and control. If these conditions are fulfilled, and if 'legalistic' approaches in the case of deviance are guaranteed, even in the form of stringent criminal law actions, then self-regulation may indeed be successful. The contention is that government should give industry enough leeway to regulate and arrange its own activities, but act in a decisive and harsh way if it abuses its privileges. Of course, only the forerunners in industry are able to perform self-regulation in this way. But forerunners in environmental management strategy are often also the ones who perform well in the economic sense. These firms have come to realize that there is a competitive advantage if they comply with government rules because government is willing to reward this attitude with less stringent and more compliance-oriented regulation.[71]

Moreover, government must be prepared to meet certain conditions. The effort expected from government officials and regulatory enforcement personnel calls for a well-trained and experienced attitude. The officials become negotiators and facilitators, as much as policing officers. It is an attitude not yet very prevalent in most of the civil servants of Western democracies. But it is an attitude that certainly will gain popularity, as soon as it becomes clear that both parties are working for the common good, that is the compatibility of a sound environment and a sustainable economy.

As for the question of governments in developing countries stimulating environmental self-regulation in industry, the answer is not so clear. According to our conclusion, self-regulation could only work with strong government legislation and control facilities. Given the fact that the latter has still to be built up and to be structured in most developing countries, the odds are that self-regulation would come too early. But having said this, we should also emphasize that through investments of Western capital and the construction of enterprises and joint ventures, some globalization of legal systems is taking place, which would have its effects also in developing countries. Vogel contends that trade liberalization and agreements to promote free trade do not invariably undermine national health, safety and environmental standards. He argues that there is an increasingly important and contentious relationship between trade and environmental health, and safety standards.[72]

Another conclusion is that given the strongly rooted legal cultures in nation-states, actual influences on the system of national and regional law are only being felt at a superficial level. Yet some legal structures might easily adopt and foster the new global trend of compliance-oriented enforcement, because their own local legal traditions already provide for the consultation mechanisms that alternative forms of enforcement and compliance with environmental law demand.

In such a way, a matching of legal cultures could take place. As an example we might propose the Indonesian tradition of *musyawarah*, which may very well be useful in cooperative regulation and self-regulation and compliance with environmental regulation as it has been developed during the last decade in Western industrialized countries. Comparative studies of regulatory systems of industrialized and developing countries should be conducted to learn more about the ways and the degrees in which convergence or divergence of regulatory systems could develop in the confrontation of both legal systems.

In Indonesia initiatives have been taken to introduce mediation techniques in alternative dispute resolution, notably in the case of environmental conflicts. Indonesian participants in these programmes were perplexed to find that the American style of negotiating was much more aggressive and confrontational than the cautious, indirect method of mediation they are used to. This has led to the research question of determining and describing the content and the characteristics of Indonesian negotiation styles as compared to American styles of negotiation.[73]

Of considerable interest would also be a comparison of the Indonesian legal system and the Japanese legal system focused on the regulation of industry, where 'administrative guidance' assumes a prominent role.[74] If the premise of globalization of legal systems also holds for developing countries, it will only become apparent in empirical studies of the interaction between foreign enterprises and governments. As the American legislator and writer Oliver Wendell Holmes Jr. said: 'The life of the law has not been logic: it has been experience.'[75]

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NOTES

[1] One of the first 'gap research' studies was conducted by Pressman and Wildavsky 1973.
[2] For example, for the EC-Regulation No. 1836/96 (10 July) Allowing Voluntary Participation in the Industrial Sector in a Community Eco-Management and Audit Scheme (EMAS), 1993 OJ No (L168)1; for environmental agreements: Communication of the Commission to the Council and the European Parliament, COM (96) 561 (final).
[3] Hawkins and Hutter 1993: 199.
[4] Rees 1988: 10–11.
[5] See Gunningham and Rees 1997 (special issue on self-regulation): 363–414.
[6] In the same vein the distinction between social control and self-control is not very useful, because of the assumption that social control (compliance with social rules of behavior) includes 'self'-control (man always defines his own behavior), thus Griffiths 1996: 766.
[7] Ayres and Braithwaite 1992: 101–32; Aalders amd Wilthagen 1997 (special issue on self-regulation): 430 ff.
[8] Ayres and Braithwaite 1992: 102, consider co-regulation to be 'industry-association self-regulation with some oversight and/or ratification by government'. Dose describes cooperative government action (*Kooperatives Verwaltungshandeln*) as informal negotiation by government with the regulated citizens: Dose 1994: 103.
[9] See Jachtenfuchs 1995: 115–33.
[10] Some globalization theorists argue that international industries and multinationals have become 'footloose', and are no longer dependent on support or interventions of the nation-state. Cf. Teubner 1996: 3–28.

[11] See e.g. Zarsky 1999. See also Jaffe *et al.* 1995: 132–63.
[12] See Teubner 1996. International commercial arbitration has been indicated as an example of the globalization of law; a form of Lex Mercatoria has developed in an international legal field, where 'offshore litigation' takes place without notable influence of the state and national law, see Dezalay and Garth 1995: 27–64.
[13] Friedman 1997: 35.
[14] Moore 1973: 719–46. For a discussion on levels of legal culture and the relationship between the concept of legal culture and the working of legal systems, see Nelken 1997.
[15] For the impact of non-Western and indigenous normative systems in modern Indonesian company law see Kaehlig 1986, reviewed by Pompe and Winter 1988.
[16] Kagan *et al.* 1996: 2.
[17] Shapiro 1993: 37. See also Wiegand 1997.
[18] Van Waarden 1995: 333–72.
[19] Teubner 1996. It should be emphasized that Teubner by mentioning globalization does not seem to think of convergence at all: 'Today's globalisation is not a gradual emergence of a world society under the leadership of interstate politics, but a highly contradictory and highly fragmented process in which politics has lost its leading role' (p. 5). According to Teubner, neither a political theory of law nor an institutional theory of autonomous law will suffice to explain global law; instead a theory of legal pluralism is required (p. 7).
[20] Haverland 1999; also Aalders 1999: 200–28. See also Vogel 1991: 257–78; Vogel 1995.
[21] Haverland 1999: 275 ff.
[22] See Sevenster 1993: 344; also Somsen 1998: 169.
[23] Weatherill and Beaumont 1995: 137.
[24] Weatherill and Beaumont 1995: 35–7. A purely intergovernmental, state-centric perspective of EC governance was never intended, cf. Somsen 1998: 170.
[25] Articles 174, 175, and 176 EC Treaty.
[26] Van Waarden 1995: 362 ff.
[27] According to one author the 'split community' has even proved to be beneficial in the sense that the European Member States may profit from the jurisprudence of the European Court of Justice which rather supplies renovation of existing territorial social contracts, than imposes new constitutional community law, see Eijsbouts 1998: 133–50.
[28] See Williamson 1989.
[29] Lijphart 1975.
[30] See Sol 2000: 20–2; De Vroom 1994: 95–6.
[31] See Hoekema *et al.* 1998.
[32] See *Regulatory Reform in the Netherlands* 1999: 13–14.
[33] Vervaele *et al.* 1990. These authors seem to imply that legitimacy of the order of the European Commission 'replaces' the legitimacy of the cooperative arrangements with the fishery industry. Yet there actually was a form of cooperative legitimacy in the relationship between government and the industry, which cannot be neglected.
[34] Van Waarden 1995: 366.
[35] See for an exception the General Inspection Service of the Ministry of Agriculture, 'Nature Management and Fisheries in the Netherlands, regarding control of compliance with manure legislation', in Wiering 1999.
[36] See Reiss 1984: 23–36.
[37] See Kagan 1994: 388.
[38] First Instance Court of Breda 15 February 1982, NJ (Netherlands Case Law) 1983, 6.
39 Rb. Rotterdam, 13 October 1995, *M en R* (Journal for Environment and Law) 1996, no. 24.
40 About six studies were undertaken by various government agencies, consultancies and academic institutes, paid for by different ministries. Apparently government felt rather embarrassed, having after all pleaded that something like the UNISER-case would never happen again in the Netherlands.
[41] Cf. Cotterell 1997: 13–32. See alsoVogel 1996.
[42] Cf. Council Regulation 1836/96/EC Allowing Voluntary Participation in the Industrial Sector in a Community Eco-Management and Audit Scheme, EMAS-Regulation, OJ 1993 L 168/1; see also Aalders 1993.
[43] For a treatise on 'trust' as a basis of work organization in the sociology of work and management theory, see Heisig and Littek 1995: 17–56.
[44] Reiss 1984: 31–4.
[45] With the notable exception of the United States, cf. Vogel 1986; Kagan 1991: 369–406; Aoki and Cioffi 1999: 213–46.

[46] See Hawkins and Thomas 1984.
[47] Aalders and Wilthagen 1997: 415–44.

[48] Spitzer 1992: 19.
[49] Aalders and Wilthagen 1997.
[50] See Vogel 1986; Kagan *et al.* 1995; Aoki and Cioffi 1999.
[51] Braithwaite 1989: 33.
[52] See Braithwaite 1989; see also Aalders 1999.
[53] Teubner 1983: 239–85.
[54] Kagan 1978.
[55] See World Commission on Environment and Development 1987.
[56] Moore 1973; Griffiths 1983: 175–91.
[57] Lipsky 1980.
[58] Bernstein 1955. For an opposite perspective see Bardach and Kagan 1982.
[59] See Hawkins 1992.
[60] See for instance Davis 1969.
[61] See Sainsbury 1992: 296; cf. for a legal philosophical perspective Dworkin 1978, Ch. 4.
[62] See Hawkins 1984; Aalders 1987; Hutter 1988.
[63] Aalders 1987.
[64] Cf. the Responsible Care programme of the chemical industry, which has been adopted internationally by most chemical industries in Western democracies; see Rees 1997: 477–528
[65] Wiering 1999; Huisman and Niemeijer 1998: 212.
[66] See Hutter 1998: 228 ff.; Kagan 1994.
[67] Bardach and Kagan 1982; Hawkins 1984; Aalders 1987; Hutter 1998; Aalders 1999.
[68] Aoki and Cioffi 1999: 215.
[69] Aoki and Cioffi 1999: 215.
[70] Vogel 1986; Aalders 1999; see generally Van Waarden 1995.
[71] Porter 1990: 585. See also Aoki and Cioffi 1999: 230, for an example of Japanese officials and exporters seeing 'the global tendency towards more stringent environmental regulation as a potential opportunity: technical and managerial superiority in dealing with environmental problems may provide Japanese industry with an advantage in global markets.'
[72] Vogel 1995.
[73] Von Benda-Beckmann 1999: 21. The Law Faculty of the Erasmus University of Rotterdam started a research project in cooperation with Universitas Andalas in Padang: see Von Benda Beckmann 1999: 22, n.33.
[74] Kagan and Axelrad, 2000; Kitamura 2000.
[75] Oliver Wendell Holmes, Jr., The Common Law 1-2 (1881)