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A HARD LOOK AT SELF REGULATION IN U.K.

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SOMMARY: 1. Premises. – 2. The reasons of self regulation. – 3. The practice of self regulation in some more major areas. – 4. Which legal reconstruction is suited to self regulation? (4.1. The transfer hypothesis. – 4.2. Delegation hypothesis) – 5. A third route: the autopoietic model (5.1. the duties of State with regard to responsive law) - 6. In search of a lost legitimacy (6.1. General systematic premises. – 6.2. Solutions found by English legal literature). – 7. A possible parallel reading of English self regulation and community soft law (7.1. The question of the title legitimizing the author of the soft law and her rule making). 8. Conclusions.

1. PREMISES

This work examines the English experience in self regulation, one of the most advanced systems, though it is now going through a recessive phase. English scholarly literature has followed the evolution of self regulation, advancing different models at various developmental stages.

Anglo-Saxon legal thinking, which is essentially pragmatic, has not succeeded in defining or classifying self regulation mainly because the notion we are examining is of an intrinsically changeable character[1]. It has one common characteristic: the body that promulgates the regulation is, at the same time, subjected to it. There are other variables as well.

One variable is that at the origin of the self regulating process there may be both private and public bodies. In one case, self regulation will be linked to freedom of contract. In the other case, to discretionary powers. The distinctive characteristic of self regulation is not in the nature of those

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[1] The most scrupulous English researcher in this field is Ogus, who has not given preconceived definitions but has preferred to study the various degrees of self regulating autonomy, of legal power and, finally, the monopolistic power of the self regulating body as he has identified in them the key variables "to appreciate the range of possibilities(…) which can properly be described as 'self-regulation;' A. Ogus, *Rethinking Self-regulation,* in *Oxf. Journ. Leg.St.,* 1995, pp.376-377 . Others have followed his outlook, analysing self regulation on the basis of the variables Ogus mentioned, thus confirming his ideas: cfr. R. Baldwin - M. Cave, *Understanding regulation,* Oxford, 1999, pp.125-126.

decide[2], but in the identification of the body originating the process of self regulation with those who will have to observe it.

There is also variation in the nature and extent of the regulation. This may provide more meaningful distinctions than the first one (between public and private), because it will determine which legal category self regulation belongs to. Basically there are two hypotheses.

In the first case, the collective body which represents the interests of a social category, is entrusted with regulating the behaviour of the participants in the group in order to ensure that their actions will conform to abstract and general norms of behaviour.

In the second case, the body is still collective but has a social regulatory function so that its future norms cannot be exclusively "tailored to the circumstances of particular firms".[3] They will have to find their basis in requests and needs coming from many different sources connected to the widespread effectiveness of the future rules which will stand apart because they will regulate the behaviour of the members of the collective body and those of a third party as well.

English practice has observed these two hypotheses. They are connected to an inevitable presence of the State. The existence of public interests will influence the objectives also of a private regulator. The stronger the social task given to the regulator, the greater the presence of the State will be felt, and vice versa.

Basically, the phenomenon has two extremes.

There may be the case of a State that leaves private bodies all initiative, getting involved only when self regulation is missing. This form of self regulation will act within the limits of freedom of negotiation. In case

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[2] *The Code of Practice on Access to Government Information* (first edition 1994, changed in 97) written by the Government establishes that both local and central authorities have to be correct and transparent when they deal with political and administrative matters. These are norms that the governing body gives itself and has to respect – a moral commitment, not a legal one; this self regulation will give people access to the measures and proceedings of public powers. In case the code is not respected, a citizen may apply to the Ombudsman (art.11 of the Code) who will find a solution to the problem concerning the *freedom of information* by means of an exhortation which, because of its own nature, is not legally binding for the Government. However, such exhortations have proved more effective than binding decisions: "The fact that the Code is enforced by the Ombudsman (and not by the courts) should be seen as one of its main strengths and as a positive reminder and reinforcement of Parliament's constitutional role of holding the government to account": A. Tomkins, *The Constitution after Scott*, Oxford, 1998, p.119. So the *code* is not binding, because it has no legal power, but it can make behaviour uniform as it derives the strength of its effectiveness from the form of parliamentary government, that is, from that particular relationship which ties the cabinet to its own majority in Parliament; so the source of its effectiveness is in the political responsibility of the Government. On these themes more information will be found in R. Austin, *Freedom of Information: the Constitutional Impact,* in J. Jowell – D. Oliver (eds.), *The Changing Constitution*, 4th ed., Oxford, 2000, p. 319 following.

[3] J. Black, *Constitutionalising Self-regulation,* in *Mod. Law Rev*., 59, 1996, p.26

there is no social tension the State says nothing about the substance of the matter but the fact itself that it may act, turns the initial sensation of an absence into a sensation of potential presence. Thus, a State which is ready to play as a reserve, and only threatens "that if nothing is done state action will follow".[4]

We may also have a State which gives meaningful social tasks to a private body, but still conforms it to its way of being and acting, as, otherwise, it would have no guarantee that the task entrusted to the private body is successful.

English practice has not sacrificed any of the two hypotheses of self regulation we have just mentioned, though it has favoured the second one. There are issues still to be solved concerning the legitimacy and responsibility of a collective body and which still cause tension within the Anglo-Saxon legal organisation.

2. THE REASONS OF SELF REGULATION

English legal literature has examined the advantages of self regulation in ways which do not differ much from the practice in other countries.

First of all, we are dealing with rules which, owing to the great technicality of the matter at issue, need suitable and up-to-date knowledge and experience in the field. Even if, on principle, the State cannot be excluded from the rule making process, it should be ready to put money in training people and in what would make such training possible. The State easily avoids such costs by entrusting the participants themselves with the rule making process.

In this case public interest has some advantage from the point of view of efficiency, because the self regulating process of private bodies is quicker and, thanks to its being free from many constraints – this is not the case for public bodies – may soon get to a conclusion. The rules will also be amended in shorter time, which will help them be up-dated quickly and will prevent them from being out-of-date; this is not the case for public rules.

One other advantage of self regulation is in its being realistic, that is, its rules reflect the instances coming from the people involved; in this case, "l'impulso alla norma è dato dall'esperienza e dalle mutevoli e più sofisticate forme che prende nella sua rapida mutazione"[5].

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[4] These terms have been used by R. Baldwin – M. Cave, *Understanding Regulation,* cit., p.126.

[5] G. Berti, *Interpretazione costituzionale*, 2nd ed., Padova, 1990, p. 209, considers necessity as the first impulse to rule making "L'origine di queste fonti tende perciò ad essere sempre meno politica, sempre meno legittimata attraverso le dinamiche dei pubblici poteri tradizionali. Assistiamo ad una sorta di rovesciamento di prospettiva o di inversione

In order to produce rules in keeping with reality and not superimposed on it, the regulator and the person who feels the need of a rule should be the same. A public regulator is more likely to impose unreasonable behaviour, while a private one, knowing that he is the first one to have to obey what he has decided, will not prescribe unnecessarily sacrificing behaviour. A private regulator will take into consideration costs and benefits and, possibly, he will decide on a rule only if the costs of its "implementation" will not be inferior to the advantages coming from complying with it.

The tight bond with those who comply with the regulation gives the rule greater **effectiveness.** The English see the issue in a different way from us because they do not consider effectiveness as a consequence of one's willingness to respect the rule, but as a structural element of the self regulatory process, which, among the various regulatory hypotheses, must give prominence to, and then choose, the one that is characterised by easy effectiveness, that is the one which is more easily acceptable.

The English have[6] included effectiveness in the nature of the self regulatory process: the issues of "enforceability enter directly into process of policy formation"[7] and are evaluated by the regulators. The notion of a *reasonable* rule leads to the idea of easy effectiveness[8]. It is likely that rules formulated respecting the innermost logic of events and enforced flexibly in accordance with the specific case "tend to increase the acceptance of regulation by those affected by it"[9] more than rules formulated by others which have left the issue of implementation to the performing phase.

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di marcia: le fonti ora dette non discendono dall'alto del potere statale, ma derivano dall'esperienza, si legittimano sulla sorta di un tipo nuovo tipo di necessità di normazione".

[6] About this problem R.Baldwin – M.Cave, *Understanding Regulation,* cit. p.127 where deep knowledge of the matter and experience have been chosen as prerequisites to reasonable regulation, in its turn the first step towards effective regulation "An aspect of expertise also relates to regulatory effectiveness. It can be argued that self-regulators have a special knowledge of what regulated parties will see as reasonable in terms of regulatory obligations."

[7] See W. Streeck – P.C. Schmitter, *Community, Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order,* in W. Streeck – P.C. Schmitter (eds), *Private Interest Government,* London, 1985, p.22. On the importance of this issue also R.Mayntz, *The Conditions of Effective Public Policy: a New Challenge for Policy Analysis,* in *Policy and Politics,* 11, 1983, from p.123.

[8] E. Bardach – R.A. Kanyan, *Going by the book. The Problem of Regulatory Unreasonableness,* Philadelphia, 1982, p.219 "There are fewer reasons, however, to think that private regulation would be as effective as public regulation. To be sure, many of the conditions that facilitate reasonableness also facilitate effectiveness."

[9] Streeck W. – Schmitter P.C. *Community, Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order,* in W. Streeck – P. C. Schmitter (eds)*, Private Interest Government*, cit, p.22.

3. THE PRACTICE OF SELF REGULATION IN SOME MORE MAJOR AREAS

A diachronic interpretation of the most meaningful experiences in self regulation will highlight the shift from a phase when *tout court* deregulation prevailed, to a phase when the State has a more active role, ready to decide on issues which it had once delegated, combining rule making by a third party with self regulation. Such a changing behaviour among the English can be explained by the fact that the State is not willing to renounce intervention in the collaboration offered by private bodies in the regulatory process[10] and to conform it to the demands of politics.

In English literature on the topic, self regulation breaks down into three different models, each with its own characteristics and coherent legal discipline with reference to the specific field of action. They have basically come one after the other in time.

a) we have the first model when the effects of self regulation are limited to the participants in the membership agreement, which justifies the self regulatory power of a collective body, and is based on an exclusively private initiative. The State is neither involved in the origin of such self regulation nor in the enforcing strategies of the private authority whose effective range is confined to matters of limited social relevance. This confirms a one-to-one correspondence between the freedom of the collective body in the definition of its objectives and the absence of command in its regulatory decisions. This model has lost its importance since the 70s and 80s; even among professional associations, once the natural field of self regulation, there is a tendency to replace voluntary agreement with enforced regulation[11].

b) In the second model the implementation of rules involves a third party: this is the case of advertising where two types of relations are at stake[12]. The first concerns the association promoting the rules and its

[10] About this problem R. Mayntz, *The Conditions of Effective Public Policy: a New Challenge for Policy Analysis,* in *Policy and Politics*, cit. from p. 123.

[11] See R.Baggot, *Regulatory Reform in Britain: the Changing Face of Self Regulation, in Publ. Adm*., 67, 1989, pp.438-440

[12] This is the case of advertising, which is not broadcast or telecast, whose discipline can be found in the "British code of advertising" (the latest edition of the code, which has undergone several changes, can be read on the web: *http://www.asa.org.uk/guide/*) it was written by The "Committee of advertising practice" and implemented by the "Advertising standards authority", which has the status of "limited company", independent both from government and from its own professional association. So, even in a field where the State has not acted, we have a separation between those who decide the norm and follow it and those whose duty is to check on the observance of the code. This happens because the members of a category are more willing to screen the behaviour of an offender than to punish it.

But with OFCOM's Decision on the "Future Regulation of Broadcast Advertising" (OFCOM'S web side), published on May 17, 2004, the ASA is now responsible for setting, reviewing and, if necessary, revising the broadcast advertising codes. The latter are

members, who will have to respect those rules; the second, instead, concerns the author of the advertising message and its recipient, who being outside the association, is a third party as far as the self disciplining rules are concerned, though he will benefit from them. This because, if advertising is *legal, honest, decent* – as the code requires – it will be the claim for a commercial to be transparent that will be accepted. The State has considered such a type of self regulation with cautious appreciation: it has not accepted it as a source of law but it has not ignored it either. The rules concerning advertising have no enforcing character as they bind only the members of an association; they also have no legal character as they do not contribute to supplement, he legal system; therefore, their being infringed does not imply an automatic recourse to a judge; in brief, they do not share the legal discipline of the sources. Therefore, a person who has suffered from the violation of a norm of the code can both lodge a complaint with the self regulation Authority, which, however, has no power to punish a fault[13], and apply to a judge in order to claim damages or the re-enacting of the law. The judge will have to decide whether the deontological rule has contributed to define the basic elements of a misdemeanour from the point of view of the legal system in general, for example, completing the subjective element (on the terms of unskilful ness or incompetence from those who have infringed the ethical rule). Should it be the case, we have to make it clear that the ruling will be passed not because the code was infringed but because of the contravention of a law, even if made complete by the former. On the contrary, the judge may decide – within his discretionary powers – that such non-observance is not indicative of a fault and, as a consequence, he will deny compensation. In brief, the code cannot innovate *ex se* the pre-existing system, because it is in an area outside the legal system, an area the system may refer to.

In the case of low legal character - though greater than in the first case because the self regulatory rules are at the basis of the judicial

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submitted to the final approvation of OFCOM, who can deny his assent. In conclusion, broadcasting advertising codes are a new example of co-regulation, because the rules, on the contrary of the first model of advertising self regulation, are not decided by ASA alone, but shared between her and the public authority. In this case, there has not been a full delegation of power to ASA, but a new self regulatory system has designed, "to be run day – to – day by the ASA with OFCOM taking a hands-off role as a backstop regulator with the power to intervene where necessary". As see: A. Willis, *The future regulation of broadcast advertising*, in *Ent. L. R.*, 15, 2004, pp. 255-256.

[13] ASA has only *moral suasion* powers as it can bid either not to spread the message or to modify it, but it cannot do anything in case its invitation is not complied with. However, we should not underestimate "adverse publicity", that is the publication in the ASA monthly bulletin that the code has been infringed; at the same time the fact that the most important media organisations will accept the ASA invitation not to offer spaces to the offender, will have a great discouraging power. About this problem, see F. Darren, *Self regulation of Comparative Advertising in the United Kingdom*, in *E.L.R.,* 1997, vol.8., from p.250.

decision – State intervention has little influence. It will neither conform the structure of the self regulatory associations nor the outcome of the regulatory process, but it will, at least, monitor the implementation of the self regulatory system on the whole, taking into consideration its indirect effects on a third party[14].

c) In the third model individual aspects are inseparable from collective ones and, thus, the two forms of self regulation, discussed above, cannot be used effectively.

A meaningful example can be found in the financial market, which is worth examining in detail because of its importance. English practice had an initial great trust in the self regulation of financial markets; but, later, this behaviour has changed: the public body was given back the powers of regulation and *enforcement* which had previously been given to self regulatory organisations of markets; a disciplining framework was defined in which the public body makes use of few and controlled elements of self regulation.

It is worthwhile to summarise what has happened.[15] Since FSA in 1986[16] the Anglo-Saxon model has gradually reduced the regulatory competence S.R.O.s, imposing first of all that their *rulebooks* should be

[14] We have to read the heteronomous interventions, even if slight ones, from this point of view; for example, the invitation to create a new body, separate from the self regulatory professional body (CAP), that is ASA, which has to check how the code issued by CAP is being respected and how ASA decision-making organs are open to third parties. Such a participation is nowadays numerically prevailing over inside members. About this issue R. Baggot - L. Harrison, *The Politics of Self-Regulation: the Case of Advertising Control*, in *Policy and Politics*, 1986, 14, 2, p.143 onwards.

[15] We refer to a thorough research carried out by a Committee appointed by the government which came before this change and, in a way, directed the new course of financial discipline.: Joint Committee, *First and Second Report* in *http://www.FSA.gov.uk/development/legal/.*

[16] The annual report of Securities and Investment Board, *Annual Report 1995/96*, London, 1996, cit, from p.8, acknowledged self regulation provided it worked within a statutory framework". The Authority aimed at gaining back to its own regulatory competence what had been given to S.R.O. , which, if on one hand gives substance to the "framework" of public rules - by fixing *standards* about "resources, handling of complaints, monitoring and enforcement, and the need for investment exchanges to manage any conflicts between their regulatory and commercial responsibilities" – on the other cuts down the room for S.R.O.'s self regulation. About this issue see: A. H. Meltzer, *Regulatory Arrangements, Financial Stability and Regulatory Reform*, in K. Sawamoto- Z. Nakajima- H. Taguchi (eds.*), Financial Stability in a Changing Environment*, London, 1995, p.17: "The new proposals do not eliminate supervision and regulatory oversight; they supplement and, to a degree, substitute, market forces for more traditional methods of regulation"; P. Grindley, *Regulation and Standards Policy: Setting Standards by Committees and Markets,* in M. Bishop – J. Kay – C. Mayer (eds.), *The Regulatory Challenge*, Oxford, 1995, p. 210; P. Grindley – S. Toker, *Regulators, Markets and Standards Co-ordination: Policy Lessons from Telepoint, Working paper*, n. 112, 1992, Centre for Business strategy, London Business School.

officially approved by the public body (S.I.B.) before coming into operation.

In 1989 [17] the new F.S.A. rules contributed to give a detailed outline of the sources in the field, in which heteronomous regulation combined with self regulation and was distributed on three levels.

The first two levels included the *principles* and the *core rules* promoted by S.I.B., characterised by general effectiveness, that is, they could be applied also to those who were not S.I.B. members but belonged to a S.R.O.; the third level included the rules promoted by the various S.R.O.s, whose effectiveness was limited to their own members: this depended on their contractual nature and on their acting either to integrate or to supplement public norms.

In spite of the 1989 changes, the system could not protect investors. Those who should have controlled the implementation of rules, did not do it. S.R.O.s were entrusted with monitoring whether behaviour was in accordance with rules, but they preferred to cover misdemeanours rather than punish it.

This happened because S.R.O.s were, from the start, in a conflict of interests with those they should have controlled. They represented the professional category of brokers, in case of controversy they sided with them and not with the savers. Therefore, when they should have used their enforcing powers, they did not do it.

Experience had shown that, even in England, where professional deontology was more important than legal rules, defending a category's good reputation was no longer morally paramount. The various S.R.O.s., hoping that illegal agreements between the people who monitored and those who were monitored would not be discovered, had bartered honour and reputation for culpable silence and corporative behaviour, they had preferred not to punish those who should have been punished, even if they knew that in such a way they would lose reliability on the market.

What had happened proved that, when the people who controlled and the groups who were controlled coincided, enforcing powers could no longer be considered effective.

Thus the remedy, even if devised by the State, that a private body should have such *ex ante* conformation as to represent all the interests at stake, had practically failed, because R.S.O.s were in any case in the hands of financial business, against savers.

Moreover, *ex post* control had failed, too. The State had entrusted S.I.B. with controlling R.S.O. *rulebooks* but, in the case of homologation S.I.B. had just made formal assessments without really evaluating whether

[17] On *Companies act 1989* see: G. Morse [*et alii*], *The Companies act 1989. Text and Commentary*, London, 1990; C. Swinson, *A Guide to the Companies Act 1989*, London, 1990.

the self regulating rules had adequately protected investors, as law demanded.

To conclude, the conflicting relationship between the various S.R.O.s had slowed down S.I.B.'s *rule-making* and, as in all systems where participation is adversary, S.I.B. fell a victim to the "regulator's capture" syndrome, that is it was not able to formulate equitable rules because not all S.R.O.s were equally important.

Having stressed the limits[18] of self regulation in the field of financial markets, it is clear why the law giver has changed his mind in 2000 and has given all regulating and monitoring powers back to one public body (now F.S.A.), having first made its enforcement machine stronger, to be possibly activated in case of need, as F.S.A., quite differently from S.R.O.s, is not connected with financial business.

Two conclusions can be drawn from English practice. First of all, a law giver should pay the greatest attention to the birth of the body which wants to represent the interests of a social group because it may be representative only when all the interests of the people involved are fairly represented.

English experience has also proved that, even when the measure above mentioned has been adopted, self regulation is most effective when there is only one value at stake. In such a situation the best case is when the holder of that value and the regulator are the same person. We will draw different conclusions, instead, when several interests are involved – for example, to keep to financial markets – markets have an interest in relying on an investor's liquidity while the investor wants the greatest profit from the money put in a business – specifically, a private interest and another that goes beyond the individual dimension. When there are several interests involved, relying on one body which represents the needs of one side only, will lead to one-sided rule making. There will be no certainty that public interest will be met: this will happen when and if private and public interests coincide[19].

This is why in the introductory act of F.S.M.A. in 2000[20], which explains the reasons of financial reform, we read that the Authority had has back its powers of regulation and order, once given to S.R.O.s because of an unavoidable clash between investors and business. In such a situation the

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[18] J. Black, *Rules and Regulations,* Oxford, 1997, pp.71-80 deals with these limits very well.

[19] A.C. Page – R.B. Ferguson, *Investor Protection*, London, 2001, pp-83-84 where the authors stress that "as the Financial Services Act White Paper acknowledged, it is a risk of regulation by practitioner-based organisations that they may degenerate into "cosy club or cartels'".

[20] The *Financial Services and Markets Act 2000* can be found at the following address: Http://www.FSA. gov.uk/development/legal/fsma7data/fsma/act/. To have a comment on act 2000 there are: A. Alcock, *The Financial Services and Markets Act 2000,* Bristol, 2000 and M. Blair (*et alii*), *Blackstone's Guide to the Financial Services and Markets Act 2000,* London, 2001.

Authority has to act *adversarily*; this means that whenever the Authority does not know whose cause to embrace, it will have to side with the investor: *the place of the regulator is on the side of the investor*[21].

The example of financial markets has shown that when objective values are at stake, such as the good name of single markets, the trust in a free trade economy and the safety of one's savings, the State in the United Kingdom has no longer counted on one-sided regulation, but it has preferred to proceed along three different lines: it has given back to the State what was necessarily to be given back, that is, the overall regulation concerning the running of single markets and *enforcement* over R.S.O. members; it has left in the hands of R.S.O.s the management of markets taking over the monitoring of their action, but it has also organised R.S.O.s in such a way as to make them more widely representative.

To conclude, we can say that in the most complex area – financial markets – English legislators have deeply changed self regulatory models with the purpose of making public regulatory powers prevail.

4. WHICH LEGAL RECONSTRUCTION IS SUITED TO SELF REGULATION?

English legal literature has been inspired by the experience in self regulation we have just mentioned to outline several hypotheses of systematic reconstruction of the phenomenon.

4.1 *The transfer hypothesis.* Appeal to self regulation has been attributed[22] to the final transfer of a power, in this case the regulatory one, which the original holder, the State, has transferred to a private. As a consequence of this devolution the transferring party, having completed the transfer, is in a passive position: the State would step aside and would keep an eye on private behaviour, reserving for itself the right to step in only if the unity of the legal system was in danger.

To deprive the State of all roles, except the role of a reserve – as it was denied both the role of outlining the devolutionary plan and of vouching for correct functioning of the system - implied that self regulation had a precise characteristic. It ended up having unconditioned structural and

[21] S. Gleeson, *Financial Services Regulation: the New Regime,* Sweet and Maxwell, 1999, p.20; an overall view of the markets new trend came out of the proceedings of a forum held in London, at *The Institute of Advanced Legal Studies, University of London,* in the year 2001/2002, when the main characteristics of the act were discussed, from the remedies to stimulate the operators' greater *compliance,* July 18, 2001, to the new hypotheses of misdemeanour , such as *market abuse* and *conflicts of interest,* February 2002 (papers*).*

[22] See Baggot's work, *Regulatory Reform in Britain: the Changing Face of Self-Regulation,* cit., pp. 438 ss.

operational freedom, because there were no limitations concerning either form, that is pertaining to the behaviour of the future law giver, or substance, that is connected to the interests which would be regulated, or structure. Nothing had been decided about the criteria fixing setting-up and functioning of the deliberative units of a private body.

As a matter of fact, when self regulation has no effects outside the group concerned, the notion of transfer can be considered redundant. When the State renounces its power, private autonomy which had been curbed up to that moment, expands quite naturally: the private body starts doing again what it had been temporarily prevented from doing, that is regulating its own interests. Formal transfer does not seem essential. The private body resorts to a power it already had, and the State does not transfer anything as it has no negotiating autonomy, which had already been secured to the legal sphere of the individual.

Instead, the same legal solution is not enough when self regulation has widespread social effects. When values referring to undefined social groups are involved, transfer of regulatory powers, with no limits in object and purpose would give a private body the same authority as a public one. It could then take the place of the political regulator.

This exchange of roles, a private body turning public, and the State renouncing its political prerogatives, are not appreciated by English theorists, who prefer in such a case a more refined solution than transfer which may be partially compared to a delegation of functions which is referred to an autopoieic system[23].

4.2. *Delegation hypothesis.* Other scholars[24] think that the opening of a political actor to self regulation integrates the basic elements of *delegation* of functions from the State to a private body, which - quite differently from the transfer hypothesis previously taken into consideration – allows a private body to do what does not belong to its original legal sphere. Such an hypothesis is more effective when self regulation deals with socially relevant problems because the individual, or the group he belongs to, will not only regulate points concerning members. They will regulate sopraindividual situations which need more than negotiating autonomy to be managed. Such widespread nature of values entails that the State is still the holder of the entrusted power and does not renounce to assert its right

[23] See about this concept note 26.

[24] A competent opinion can be found in P.Birkinshaw – Harden – N. Lewis, *Government by Moonlight: the Hybrid Parts of the State,* London, 1990. The theory that considers private groups a useful tool in public hands for the formation and/or execution of public policy" has been reconsidered and developed by C. Graham, *Self-regulation*, in G. Richardson – H. Genn (eds.) *Administrative Law and Government Action,* Oxford, 1994, p.190, that quite explicitly defines "self-regulation as the delegation of public policy tasks to private actors in an institutionalized form."

even *pro tempore.* This prerogative is only frozen: the State will not speak first but it will leave the initiative to private actors if they are ready to take the lead and good at thinking rules *responsive* to the objectives of the State decisions. Only when private action is not carried to a successful conclusion will the State claim back its role.

The first and most important consequence of such an hypothesis is that entrusted action keeps its public characteristic. Such an action is public at the beginning and will go on being public even when it is in private hands. It will not lose its characteristic of representing objective interests which are typical of the entire community.

The second consequence is connected to the role given to a private actor who will not bring his own values to be changed into *ad hoc* norms of behaviour but he will only be the executor of precise objectives of *public policies* fixed in the hetero- imposed guidelines for self regulation.

Thanks to this hypothesis the State strengthens its regulatory role, not of single rules but of the system as a whole: the State organises a code, that, though outwardly compact, has different levels internally. The first ones linked to hetero-imposed rules, the others, at a lower level, connected to decisions from private bodies who are ready to work as parts of a whole they have neither set going nor regulated.

This hypothesis has two main points.

a) In case of formal delegation, as it is usually understood, the problem of the legal value of self regulation would be solved. It would be enough to implement the delegation managing principles: that is a delegated act is attracted to the discipline of delegation. After transferring regulatory powers, self regulation should have the *erga omnes* effects of heteronomous regulation. But it is impossible to solve the problem so easily. English literature in the field believes in the great difference between a public and a private actor; the former, having a political warrant, decides on behalf of everybody, also on behalf of those who did not elect him. The private body, who has only a limited warrant, has power only on those who gave such a warrant. A third party cannot bear settlement of its own legal sphere by those who have not been legitimised to do so on their behalf. Only a public body, because of its supremacy in the community, is legitimised to give rules valid for all members.

A negotiating warrant cannot give a self regulatory act the enforcing power typical of a law.

The same thing is true in the case of the above mentioned delegation of public function. It would give a private body regulatory power that, if it acts at a primary level as a manifestation of political will, does not tolerate delegation except the one initially given to the elected people who could not, in their turn, legally choose a representative of theirs. Otherwise, the system would be satisfied with a second degree representation and this would weaken, to the point of dissolving, the direct contact with the original holder of sovereignty. Thus, even when the collective body receives

heteronomous rules, it cannot regulate the behaviour of those who are not members though they practise the same profession or have the same interests as the body's members. The problem arises for the third party the group is in touch with, though indirectly, that is, for all the people that, owing to the particular structure of the relationship, will bear the effects of a rule they have not contributed to make.

What effects on this third party? The delegation model gives no answer to such a question, which is still to be defined.

b) The second critical point as far as delegation of self regulation is concerned is linked to loss of peculiar characteristics: the private body, only a *longa manus principis,* is no longer an autonomous source of ideas, as, at the most, it merely implements the ideas of others. There is no doubt that the State will have greater efficiency – thanks to a regulatory process faster than heteronomous proceedings when coming into operation or undergoing changes - and greater effectiveness as well because the apparent identity between the actor and those who have to follow the rules, will make them more willing to implement the rule. But where has the constructive contribution of a private body gone if its task is to serve the public cause?

The belief, widespread even among English experts, that self regulation is an *instrumentum principis,* shows its weakness in having made the private body only an expression of indirect administration.

5. A THIRD ROUTE: THE AUTOPOIETIC MODEL

The inadequacy noticed both in the transfer and in the delegation models explains why a different hypothesis is now prevailing among English experts. This hypothesis aims at greater effectiveness, though it borrows from *delegation* itself the basic idea of a private actor ready to fulfil the State political objectives.

Its best virtue is in the belief that self regulation cannot be studied as a fact in itself, separate from the rest of the legal system with remedies to be identified in order to take it back within the system itself. Self regulation, instead, becomes the opportunity to think over or, if necessary, formulate the legal system so that it may become the place where the acceptance opening of subsidiary contribution among members horizontal matches the State's never discarded claim to be present, though in a new role: no longer a direct regulator - the State no longer gives the rules, which are made by "the private interest governments"- but the one who formulates the principles of rule making and checks people's keeping within the law.

This policy leads to the notion of *reflexive law*[25] *or autopoietic system.* Any legal system contains in itself the rules of rule making; from this point of view it is a closed system, self-defining, self-sufficient and self-referential as well.

To be brief, it is a recurrent system.[26].

No one can ever think that a legal system may be totally isolated from the reality it wants to govern. So the main problem is to determine the "meeting point" between the self-referentiality of a legal system and its responsiveness to elements from outside which may influence its course and choices.

Autopoiesis - a notion developed in German legal literature - identifies a system which, though complete in its structural elements, can be defined in its regulatory contents on the basis of its continuous interaction with outward reality.

Some scholars say that autopoiesis is no better than a cognitively closed system; we can answer this criticism by saying that the circularity in the self production of rules – which is true for an autopoietic system as well - cannot be identified with an " assumed causal independence from the system"[27]. To tell the truth, circularity allows us to have a system which is closed from the point of view of organisation, but cognitively open to situations not related to law, ready to understand needs, apt to feel social influences, responsive to facts. The attention of the system to factors outside law becomes its way of being. It renounces the notion of State defined law making in favour of alternative regulatory systems or methods.

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[25] This happens when a legal system is ready to communicate with what is different from itself. So, to say it in the shortest possible way, being reflexive implies to overcome exclusively state defined law, which means that "il diritto non è più sottratto alla competizione" (this is said by M. R. Ferrarese in *Le istituzioni della globalizzazione,* Bologna, 2000, p.134), having to take into account the regulation of social origin, decentralised and widespread among the actors of the conflict.

[26] The first research about autopoietic systems were carried out in the field of natural sciences by two biologists from Chile: H.R.Maturana – F.J.Varela, *De Maquinas y seres vivos,* Santiago, 1973; Id., Autopoiesi e cognizione, Venezia, 1985; they elaborated this theory trying to find an answer to the question: "what is a living system?" and "what condition is necessary and sufficient for a system to exist?". German scholars, instead, have applied this theory, with the necessary changes, to the field of legal studies, in order to combine the system self-sufficiency with its cognitive responsiveness. We would like to recall at least some of the most important experts on the topic: G.Teubner, *Substantive and Reflexive Elements in Modern Law,* in *Law and Society Review,*17, 1983, p.239; G.Teubner- A.Febbraio (eds), *State, Law and Economy as Autopoietic Systems,* Milano, 1992; Id., *Il diritto come sistema autopoietico,* Milano, 1996 (translated by A. Febbrajo and C. Pennisi).

[27] G. Teubner, *Il diritto come sistema autopoietico,* cit; even those who are against the notion of autopoiesis have had to admit that "autopoiesis has got nothing to do with a determination exclusively from within, set against a "determination exclusively from without": W. Buhl, *Grenzen der Autopoiesis,* in *Kolner Zeitschrift fur Soziologie und Sozialpsychologie,* 1987, 39, p.228. Concorda D. Zolo, *Autopoiesi. Un Paradigma conservatore,* in *Micromega,*1986,1, pp.139-140

These cannot be linked to supreme authority, but are directly expressed by social groups, led by their own interests and values, who want to be legally acknowledged. Such a system can be called *reflexive.*

In case the legal system is responsive to social instances, there is the need to balance responsiveness and control: to pay attention to the autonomous thinking of groups does not mean that the State will not try to direct their instances towards the fundamental values of the system. Rule making by smaller bodies can exist only and if the superior system contemplates them.

Autopoiesis finds in the system itself the answer to the need of achieving some balance: the State will not prescribe the most elementary rules of everyday action; it will let private bodies to do so because they can be trusted. However, in order to trust them, the State will have to evaluate first their spontaneous way of being. Therefore not all groups will have the dignity of private interest governments[28] but only those who have the necessary qualifications to enable them to perform the given task: to foster what is good in each individual, to educate him to awareness of common responsibilities[29].

The autopoietic interpretation, though highlighting the willingness of the system to be completed by rules made by private interest governments counters this characteristic with the right of the State to prevail over the inferior systems coexisting in it. To sum it up, the legal system is responsive when it acknowledges private governments while it is not when it lays their structure, directs their regulatory function, checks its outcome and, if necessary, corrects it.

Otherwise, we will have an up-to-date version of corporatism, harmful to social values, acting in selfish ways, without the awareness of common responsibilities. Neo-corporatism, in the autopoietic view, does not want to take private interest governments out of the frame of rules they refer to, because it does not want them to act as monads. One ready to deny the

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[28] The definition is given by W.Streeck-P.C.. Schmitter, *Community, Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order,* in W. Streeck-P.C. Schmitter (eds.), *Private Interest Government,* London, 1985,p.16; according to the authors "the public use of private interest government takes the form of the 'establishment' under state licence and assistance, of 'private interest governments' (…) which are made subservient to general interests by appropriately designed institutions".

[29] The authors above mentioned stress the role of these associations as "promoters of public interest", relying on the "assumptions about the behaviour of *organizations* as transforming agents of individual interests", p.16 (the italics were in the texts). This belief is shared by Black, *Constitutionalising Self-Regulation,* in Mod. Law Rev., cit., p.28 where the writer deals with the position of German and English neo corporatist theory - going back to Streeck and Schimtter but also the works by Lehmbruch, Cawson, Crouch and Dore are worth remembering – it implies the use of *self regulatory associations* "to contribute to the achievement of public policy objectives (…). Their role is not simply to be consulted on issues but to implement public policy: essentially, it means sharing in the State's authority to make and enforce binding decisions."

values of the other, both inclined to exploit the advantages of their position, to defend competitors rather than competition, to use licence to deny *new entries* access to markets, to absolve members who have infringed deontological codes. This neo-corporatism[30] believes that professional ethics have an educational influence and are able to prompt collective bodies to *better regulation* - this is the rule making stage – and to a well timed, unbiased *enforcement* – this is the stage when the private regulator controls how associates respect rules[31].

5.1. *The duties of the State with regard to responsive law.* English legal literature has interpreted self regulation in an autopoietic perspective also starting from the analysis of the role that the State keeps for itself when it has recourse to private interest governments to implement its policy.

First of all the State formulates rules connected to the founding processes which are no longer spontaneous in this case; their being is no longer a private matter, and the task they have takes on social relevance[32].

Public choice does not merely contemplate the existence of private interest governments; it also shapes their own decision making. English law acknowledges binding rules which, notwithstanding the general principle of organising autonomy, require private governments to observe majority principles. This implies that statutory freedom is limited as it can only chose among the procedures allowed by the enforced principles, as , for instance, more democratic options; an example might be a *quorum* based on a qualified majority so that minorities, too, can give their consent.

On one hand the State wants to consider private governments able to be really representative of their associates' interests; on the other it gives rules connected with their organisation. The State, therefore, can ensure the private regulator's assumed representativeness, perhaps by requiring their boards to be elected. Owing to public choice, the collective body can no longer rely on such an unlimited organising autonomy as to consent the setting up of boards which restrict representation to *well founded and well structured* interests, by limiting their franchise to that effect.. For the sake of the social role of collective bodies, the State must advice or, if necessary, impose choices of *corporate governance*

[30] G.Teubner, *The "State" of Private Networks: the Emerging Legal Regime of Polycorporatism,* in *Brigham Young Univ. Law Rev.,* 1993, p.553 and following, is very clear about this issue.

[31] On this problem there are the following contributions: R.Baldwin, *Why Rules Don't Work,* in *Mod. Law Rev.,* 53, 1990, from p.321; K. Hawkins, *Enforcing Regulation,* in *Brit. Jou. Crim.,* 31,n.4,1991, from p.427; K. Hawkins – B. Hutter, *The Response of Business to Social Regulation in England and Wales: an Enforcement Perspective,* in *Law Pol.,* 15, 1993, p.199.

[32] The experience in the field of telecommunication is particularly important from this point of view; contribution on this particular issue are collected in the volume by R. Baldwin – C. Scott – C. Hood (eds), *Reader on regulation,* Oxford, 1998.

predisposed to the rule of a well balanced simultaneous presence of the [33]complex interests at stake.

Boards should make room for social actors outside collective bodies; their right to participate does not come from negotiations but directly from law, which makes use of "lay" people to combine private policy and elements beyond individual interests. In this perspective the third party is given the task of introducing public decisions into private ones.

Creating mixed organisational models, that is, models welcoming "lay" people, is an attempt to find a remedy for an otherwise irremediable flaw: a public regulator's lack of legitimacy.

The participation of a third party is complementary to the claim of the public body to direct in advance private regulatory powers both from a functional point of view – defining the lines of private self regulatory powers (an issue we are dealing with in the next paragraph) and as public control of the codes adopted in the implementation of regulatory powers.

Hence, private associations must promote policies adjusting self regulation from the beginning to social purposes. This confirms public interest in the entrusted matter; better, the State claims "the chance of political decision" though respecting "the organised power to act of social bodies"[34]

We have to add that the plurality of private interest governments and their acts have a precise place in the legal system. They are subordinate to heteronomous acts – laws, *statutes,* decisions of Independent Authorities – that select values and the level of balance among them and direct them to a private regulator usually in the form of general clauses. But this is not all: there is an order among private governments. We do not mean a hierarchical relationship – this would contradict the notion of a State open to social bodies all on the same level. We refer to a network of relations binding the associations. None of them will be able to act by itself, each will be part of a whole, but it will not be the whole *ex se.* The State will not disturb the autonomy of the subsystems but it will guide this autonomy so that "each of them will take into consideration the respective elementary functional prerequisites"[35].

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[33] We can refer to the characteristics of a non TV advertising regulator and the effect that public action has had on them. This issue has already been dealt with in paragraph 3, footnote 14. We can also study the structural evolution of financial markets regulators; J. Black's observations on the issue in *Rules and Regulations,* cit., from p.71 are interesting; as for a diachronic analysis of S.R.O. development we recall what was written in paragraph 3.

[34] R.Mayntz, *Steuerung, Steuerungsakteure und Steurungsinstrumente: zur Prazisierung des Problems,* in *HiMon,* Universitat Gesamthochschule Siegen, 198, 70, p. 24.

[35] Blanke, *Verrechtlichung von Virtschaft, Arbeit und sozialer Solidaritat,* in *Kritische Justiz,* 1988, 21, p.200.

The system responsiveness passes on to the subsystems in it. Each being closed from an autopoietic point of view, but responsive to the values expressed by the other. Otherwise, conflicts would start among micro-governments as none of them would be willing to give room to the claims of the others. The State can act in several ways to enforce the rule of mutual respect[36]. One solution can be joint action, that is not so many different decisions as there are authors, but only one decision taken by common accord among the subsystems involved: in a concertation based pattern balance among the interests at stake is compared and defined. Or one can act on the function, opening it to the participation of a third party and consenting that the goals of collective governments may have access to the proceedings.

However, the English system does not consider it enough for private actors to take into consideration, in their decision-making processes, the effect that their regulatory action may have on the other system. In fact the system requires that they compete one with the other in order to reach better regulations: thus competition among private governments[37] will avoid a "scaring race to the bottom", because competing will drive them towards the top. Micro-systems will challenge one another to formulate better rules; the market itself will cast out mediocre operators. The subsystem which has been able to combine cost and quality in the best possible way will be preferred.[38]

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[36] The hypothesis of "encompassing organization" to balance from within a great range of interests (inter-organizational concertation) is examined by M.Olson, *The Logic of Collective Action,* Cambridge, 1965, *passim.* W.Streeck – P.C.Schmitter, *Community, Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order,* in W.Streeck – P.C. Schmitter (eds.), *Private Interest Government,* cit , p.21 add to the study of the first solution also "inter-organizational concertation", a recurrent hypothesis when consent on interests is entrusted to the negotiation among the most representative associations. The Authors study the differences of respective patterns of action and also their supposed functional equivalence; they do not seem to believe in it as they think that their interests are too disparate to be taken "under the roof of one comprehensive organization". Neo-corporatism has just begun to deal with these issues.

[37] Private governments were called "private authorities" because, in their affecting the situation of others, they behaved as if they had enforcing power _ even if this wasn't true. In German legal literature the expression is often used by W.Streeck – P.C. Schmitter, *Community,Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order,* in W.Streeck-P.C.Schmitter (*eds), Private Interest Government,* cit, from p.21.

[38] A.Ogus, *Rethinking Self-Regulation,* in *Oxf. Journ..Leg.St.,* cit, p.382, has been one of the first supporters of "competitive self regulation", but he stresses its limits when consumers are not able to select on the cost-quality criterion because there may be cases when quality is not easy to be grasped. In order to avoid wrong choices, Ogus suggests that the competitive system may be corrected by heteronomous actions having the purpose of fixing "minimum quality standards which the SRA regimes must presumptively satisfy". If there was a superior level of rules from which to depart only *in melius* this fact would stop self regulation from ranging at low levels, as it could only act in order to improve standards.

This solution leads to the construction of a legal system founded on plurality. It is conceived not as the sum of separate entities coexisting in the same political space, but as a plurality of interacting legal spaces They are coexisting in our minds and actions, which will be directed by rules originating from the interaction of more than one regulator.

We understand from what has just been said that the State has fostered an exchange with the most active groups in society, has given them a political *status,* and in return it has received some decision-making autonomy. The final outcome of this negotiation is that private governments and the State share enforcing power; let's recall, for instance, the cases when codes are granted the status of legal rule. Private governments will see their self regulatory capacity diminish, that is there will be a curtailment exactly in that capacity thanks to which they offered to be an alternative regulatory pole.

As a consequence the nature itself of the rules of private governments should be thought over and the main reference parameter should be corrected. We should go on having rules characterized by great *responsiveness* but within a new frame: values should no longer be coming out of one's social area, rather the objectives of *public policies*. To conclude, the final outcome of the responsiveness of the system to inferior systems is their being institutionalised, that is, they are submitted to political decisions while at the beginning they wanted to be alternative.

We are faced by a dilemma, which is probably the truly weak point in an autopoietic interpretation. Either private governments are free to reach their objectives. In this case, the State will not be able to count on them as reliable partners as for the implementation of its *policies*, because the private authorities may happen to choose policies which may be only occasionally compatible with the public ones. Or they work side by side with the State, but then their rules will necessarily be influenced by politics, even if this will be harmful to the demands of social groups.

No way out of this has been found yet.

6. IN SEARCH OF A LOST LEGITIMACY

6.1. *General systematic premises.* An autopoietic interpretation is used by English legal literature also to answer the basic issue of the foundation of the power to self regulate matters of social importance.

The problem is to be examined with reference to two main hypotheses, which have previously been discussed for different purposes: a self regulation aiming to regulate matters of common interest to the associates; or a self regulation entrusted with social tasks because it has to regulate issues affecting third parties, too.

In the first case legitimacy comes from the negotiation, the contractual obligation because of which the member of a group accepts past rules and agrees to observe the ones that will be decided in the future.

Instead, in the case of the second hypothesis, the private interest government claims to enforce rules valid for all those working in the field even if they do no belong to the relevant social group. In this case the consensus within the social group will not give the regulator an adequate and proper basis to adopt acts which produce effects on third parties.

In the initial phase of the self regulatory experience the issue of legitimacy for collective bodies' rule making was a matter of debate. It was identified either in their technical competence, or in their being close to the issue to regulate or in the responsiveness of their rule making process to third parties. All this was not new at all because the Independent Authorities establishment had already referred to such elements.

But Independent Authorities did not have the problem of their legitimation to rule making because their public nature authorised them to enforce *erga omnes* decisions; their problem was what place their regulatory acts should have within the system of legal rules.

If these acts, as the basic rules contained in the law are vague, ended in regulating the problem as primary sources, with the characteristic of not being traceable attributable to an author _elected according to a politico-representative criterion.

The evidence that the problem concerning the regulatory acts of Authorities was connected to their position within the legal system is in the remedy which has been found: it consists in keeping the discretionary powers of an independent actor within more precise limits of subject and of principles indicated in regulatory acts of political actor. With this we can say that the problem concerning the Authorities is solved, mainly because it concerned the range of their regulatory power rather than who held it.

The situation is completely different when rule making depends on a private actor because the legal deed can only affect the associates; it cannot affect those who were outside the *consensus in idem placitum.* Self regulatory private bodies are not I.A, just as a contract is not law. A law is valid for everybody because of the supremacy of the enactor , who can enforce the rule without having to make sure of the consent of those who have to respect it; a contract, instead, is based on consent to define the legal position of the parties who have spontaneously decided to implement those rules.

However, practice gives us a partially different picture of the situation.

The legal deed has often been used as an instrument of social regulation[39] affecting groups not involved in the agreement; as a consequence of this fact private interest governments have been called

[39] See J.Black, *Constitutionalising Self-Regulation*, in *Mod. Law. Rev.,* cit, p.43.

private authorities; in this case the word "authority" refers to their asserting a power which is going to affect third parties.

6.2. *Solutions found by English legal literature.* One attempt at legitimacy has found a solution in involving third parties in the rule making process of private authorities. The legislator did not originally order the private regulator to consult third parties involved in the regulatory process just as he did not do it in the case of an independent public regulator[40]. Such an objective is to be wished, from the point of view of law making policy in order to compensate the inadequacy of the negotiation and consensus with the social group. Baldwin stresses that "The courts might act to demand proper access for affected parties on the lines noted above (….) but, as yet, self-regulators are free from general duties to consult non-members before taking decisions or devising policies. Nor are they subject to general duties to consult non-members before taking decisions or devising policies. Nor are they subject to general duties to give reasons for the actions or decisions that they have taken[41]."

Other scholars[42], instead, see in participation a chance for the State to reaffirm its role in regulation. Self regulatory bodies will define the rules of relationships between parties; on the other hand the State will

[40] In fact, though the most thoughtful scholars have called for it for a long time, law has not yet obliged Independent Authorities to consult those who will be called to implement the rules before starting the rule making process. This has not prevented regulators (this was the case of Oftel, to this regard there are useful data in R. Baldwin – M. Cave, *Understanding Regulation,* cit, chapter *Fair Procedure* in particular) to actually start this working method. Infact, U.K. "a long-estabilished tradition of well-respected consultation" (see now R. Baldwin, *Is better regulation smarter?*, in *Pub. L.*, 2005, espec. p. 494-495) that remains a consultation *de facto*, in lacking of legal duty.

There is an obvious gap between a legal obligation and a self imposed duty. In the first case the transgression may be brought to court; the situation is different in the second case when no legal obligation has been infringed. There is a third different case when the specific laws require consultation , though letting the regulator decide choice of time and, above all, the choice of what criterion to follow in selecting participants. As far as this problem is concerned, it is useful to recall the financial reform started by F.S.M.A. in 2000, which has accepted the necessity of consultation as a necessary and qualifying moment. It is certainly significant that the act opens with the provision concerning participation but it is also true that FSA keeps the power to shape participation in order to identify private interest admitted to consultation. Therefore there is no real social participation when there are *panels* originated by a public decision and consisting of private members chosen by F.S.A. It is advisable to study the practice in social participation developed in the United States, that have gone beyond the quasi judicial and heteronomous pattern to come to a notion of regulation where private interest and public regulators start negotiating from the very beginning. About this issue G. De Minico, *Regole. Comando e Consenso*, Giappichelli, 2005, chap. III in particular.

[41] R. Baldwin, *Understanding Regulation,* cit., p.129

[42] R.Mayntz, *The Conditions of Effective Public Policy: a New Challenge for Policy Analysis,* in *Policy and Politics,* cit, p.123, where she uses for the first time the expression "procedurally regulated self-interested self-regulation".

define which lines private authorities have to follow in order to reach final rules, that is, it will define the rules of the rules, the ones Hart [43] calls secondary. Law will not have the task of determining what remedy can solve the conflict between the interests at stake; instead, it will determine how to act in order to "ensure that the association takes into account other, wider interests in its decisions"[44].

This is the route chosen by the supporters of the autopoietic theory, who think that the "procedurally regulated self-regulation"[45] can be used to educate the collective micro-systems of government to the culture of responsiveness; they rely on the availability of "lay" people to introduce those social values that the private regulator would neglect.

Two different expectations would be fulfilled in this way. First, the expectations of third parties who would not passively accept the rules decided by others, as they would contribute to rule-making. Second, he worry of the State not to leave self regulation on its own. Self regulation would be accompanied towards objectives of *public policies.* This would happen either before the rule making process begins by directing participation towards them; or during the rule making process by giving third parties the difficult task of drawing the regulator's attention to the social objectives or, eventually, by adopting repressive or remedial measures such as *judicial review*, which, however, will be limited to the formal aspect of the decision and will not go in the merits of the matter.[46]

However, providing a formally defined procedure does not give an adequate solution to the above mentioned problems for two reasons.

First of all, once again we want from participation what it cannot give: the regulator's legitimacy. In fact, the contribution of a third party in the procedure does not affect the regulator's legitimacy; it cannot be a remedy to a rule making negotiation started by a representative without power. The contribution of a third party cannot go beyond setting forth his reasons or pointing out elements useful to start an impartial and complete preliminary stage of examination. A third party does not go in the merits of the decision, is not required to share responsibility which is invariably and exclusively attributed to those who decide. The gap between the third party and the regulator becomes less wide but it does not disappear because, after all, the third party takes no decisions.

It would be different if the third party was not simply consulted but he was asked to take part in the definition of the final rule. In this case

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[43] The expression is used in the same meaning as Hart; by it he meant provisions concerning the procedural rules by which substantial rules come into existence; Hart, *The Concept of Law,* London, 1961, from p.77 (Italian translation, *Il concetto di dirittto,* Torino, 1964)

[44] J.Black, *Constitutionalising Self-Regulation,* in *Mod.Law Rev.,* cit , p.30.

[45] The expression was coined by R.Mayntz, *The Conditions of Effective Public Policy: a New Challenge for Policy Analysis,* in *Policy and Politics,* cit, p.123.

[46] J. Black, *Constitutionalising Self-regulation,* in *Mod. Law Rev.*, cit ., p.53.

also the formal pattern of the regulatory decision would change, because responsibility would be shared by two regulators, as in all joint acts. The entry of a third party would compensate the lack of legitimation of the private authority because it would no longer be a third party but it would contribute to the decision making process and , as a consequence, it would be bound by the decisions taken. Such decisions, in their turn, would have *erga omnes* effects as the parties have included *omnes*, not because the decisions have taken formally binding legal force.

This interpretation appeals to third parties to go beyond the limits of *inter partes* validity. However, the result cannot be accomplished because the decision making moment is not affected and is left in the hands of the private authority. Hence, the participation of a third party is not enough to go beyond the limits of *inter partes* validity.

There is a second objection: the participation of third parties introduces further values compared with those expressed by the private regulator, but nothing tells us that they coincide with the social objectives pursued by the State [47]. In any case, should the third party be ready to introduce the demands of the community in the rule making process and self regulation conform to them, this would change the nature of regulation itself. In other words, if self regulation is *responsive* both to the relevant social group and to the objectives of *public policies* [48], it is conceptually and intrinsically contradictory.

Practice in U.K. has aimed at giving a pragmatic answer, mindful of reality. Thus, the State's careful use of the collaboration offered by private bodies has gone beyond unconditional and complete self regulation.

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[47] J. Black, *Proceduralizing regulation: Part I*, in *Oxford Journal of Legal Studies,* Vol. 20, n.4, 2000, pp. 597, in particular pp. 611-613, and Id., *Proceduralizing regulation: Part II*, in *Oxford Journal of Legal Studies,* Vol. 21, n.1, 2001, pp.33, says instead that "devise procedures for participation" in the two possible forms of "'thin' proceduralization, based on a liberal model of democracy, and 'think' proceduralization, based on deliberative models of democracy" could be a valid remedy to the question of the democratization of rule making.

I, instead, believe that social participation in decisional processes, insofar as they are the exhibition of the interests of categories, is useful only for the adequate preparation of the regulatory decision, but is not in a position to represent the complexity of the interests at stake – which is the irreplaceable task of the political representation, i.e. of the representative political decider. And this because the parade of the single individual positions does not lead to the sum of the 'common good'. For a more in-depth comparative examination of the two entities – representation of interests and political representation – directed towards maintaining their absolute non-fungibility in the decisional process, see G. De Minico, *Regole. Comando e Consenso,* Giappichelli, 2005, espec. pp.60-65. To conclude, we share the thought of American doctrine, which has for some time indicated that in the "scheme of interest representation […] such individuals may feel that their putative advocate is ignoring their real needs or actually working against them" and has therefore reached the conclusion of the unfitness of this model to work as "surrogate political process"", see: R.B.Stewart, *The reformation of American administrative law,* in *Harv. L. rev.,* vol 88, n.8, 1975, p.1767.

[48] I. Ayers – J.Braithwaite, *Responsive Regulation,* Oxford, 1992, p.21

What comes to the mind is the idea of complementary action between public and social bodies, guided by its last beneficiary, i.e. the State.

7. A POSSIBLE PARALLEL READING OF ENGLISH SELF REGULATION AND COMMUNITY SOFT LAW

The evolution of community soft law recalls that of English self regulation - apart from the diversities of the parties affected. The former in fact addresses the member States and not the citizens of the Union – in that, while aimed (art. 249 TUE) at orienting state conducts towards desirable ends - it has *ex facto* adapted them to the hoped objectives, obtaining, in pragmatic terms, the same result as a binding source.

Thus English self regulation coincides with community soft law in their common aptitude to go beyond the legal reference model, the former converting the civil law rule of relative efficacy into *ergas omnes* operativity. Under certain conditions in fact English self regulation orients conducts which can be referred to an entire social category, since it is more ample than the self-regulating associative basis.

While the community soft law goes beyond the paradigm referred to in art. 249, proposing itself as an act with juridical relevance, even if reflected.

And just as we raised the problem of determining a title legitimizing the private author of self regulation, the same question holds for the community sofl law, since it has become a decision with substantially normative effects.

Before studying the question, I think the concept under examination needs to be summed up.

An overall expression, it includes rules of conduct, of institutional[49] or social[50] provenance, which "in principle, have no legally binding force but which nevertheless may have practical effects"[51].

[49] Meaning by this, a vast catalogue of instruments referable to the authoritative subjects of community law, the Commission, with tendentially general competencies, and the Council, with special enumerated competencies – made formal by the Treaty (TEU) art. 249 in general terms, see also the sectorial provisions ex artt. 99 and 128 – or provided for in the secondary sources of legislation, such as: *resolutions, conclusions, declarations, codes of conduct and guidelines*. For a conventional cataloguing which follows the nature of the function performed by the instrument under examination (respectively preparatory to the legislation, interpretative of the existing legislation or, finally, the steering of conducts, cfr. L. Sendon, *Sofl law in European community law,* Hart publishing, Oxford-Portland Oregon, 2004, in particular pp. 118-120, see the annotated bibliography.

[50] This is a matter of the *codes of conduct* contemplated only by the *secondary sources of legislation* which, unlike the authoritative s.l., are an example of endogenous law, i.e. from below. Here the rule is dictated personally by the ruled, who fill a dual role: of active subjects, in their quality of authors of the rule, and passive subjects, as the

The common denominator of the concept lies therefore in the non binding value of the act, i.e. in its unfitness to create rights and obligations towards anyone. Therefore a European citizen cannot make cogent claims on the basis of a sofl law act, nor does a national State have to conform its internal norms to soft law – an obligation which derives from the binding sources of law alone.

This interpretation of sofl law is faithful to the literal tenor of the norm which provides for it (art. 249 TUE), which therefore does not pose the question of legitimization of the author, given the lack of a legally binding force for this source, so much so that, strictly speaking, it would not even deserve this denomination

But the abstract model of sofl law, i.e. that of the Treaty, has nothing to do with the soft law, which stems from the secondary sources of legislation.

Here clarification is necessary: a secondary source of legislation can create only non-binding sources, otherwise it would violate art.249 TEU.

In practice, however, things took a different course: the secondary sources often proposed acts that were soft in form but hard in substance, in that the recommendations, codes of conduct and guidelines were not limited to advising conducts which it would have been desirable for the receivers to follow, but created out-and-out legal duties to observe, sanctionable if they were not complied with[52]. In these cases the distance from hard law is

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receivers of the same. This particular figure of community s.l. is weak both in its juridical regimen and also in its procedure of formation: from below and not from above.

[51] See: F. Snyder, *Soft law and Institutional practice in the European Community,* in Martin S. (ed.), *The Construction of Europe: Essays in honour of Emile Noël*, Kluwer Academic Publishers, 1994, p.19. And also D. Thürer, *The role of sofl law in the actual process of European integration;* Jacot O. – Pescatore P. (eds.), *L'avenir du libre échange en Europe: vers un Espace économique européen?* Schultess Polygraphischer Verlag, Zürig, 1990, p.131, stress the fact that the heterogeneity of the case in question finds a moment of synthesis in the common trait of a "certain proximity to the law or a certain legal relevance".

[52] One should follow this line when reading the Commission Recommendation 97/489/EEC concerning the transactions by electronic payment instruments, or Recommendation 88/590/EC concerning the payment systems, in which the Commission imposed a guideline for its implementation, treating to adopt legislation in case of unsatisfactory implementation.

Or, more recently, see the acts of soft law – issued following the New Regulatory Package (Directives: 2002/21; 2002/20; 2002/19; 2002/22 EC) concerning the new regulatory framework for electronic communications networks and services – in particular the Commission's guidelines (of July 11, 2002, in *O.J.* 2002 C165/06), dealing with the criteria for the assessment of significant market power (SMP), or to Commission Recommendation (February 11, 2003, in *O.J.* 2003 L. 114/45) dealing with the criteria for identifying the relevant markets (RM). These acts, which are soft only in name, because art. 7 of Dir. 2002/21 leaves no doubt concerning the fact that in case of contrast between the implementing national acts and the suggestions contained in the soft acts, these latter will prevail even though not directly but thanks to the "escamotage" of the Commission's

only a matter of form, i.e. of authority which is competent in the adoption of the act and the relative procedure, given the equivalence of the two sources in terms of effects, to the point of being able to define the phenomenon as hard law dressed in the clothing of soft law[53].

Community jurisprudence has not accepted *tout court* this model because of its contrast with the above-mentioned principle of the closed system of secondary sources, without however denying it a certain, though indirect, legal relevance[54].

The model which emerges from jurisprudence[55] is a model of s.l. which is close to law, at least in some circumstances. In fact, for the judges too, the non-observance of sofl law acts implies, under certain circumstances, consequences for the non-complying State not unlike those of the violation of binding acts, even though the former are not sustained by the duty of the States to comply with them.

To sum up (though aware of how reductive this operation is) the indirect legal effects of soft law can be summarized in two different typologies, depending on those involved.

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reservation of veto power over decisions of the National regulatory Authorities (NRAs), which are different from the 'Advice' of the Commission. (On this see G. De Minico, *Decreto di recepimento del pacchetto Direttive CE in materia di comunicazioni elettroniche: conformità o difformità dal diritto comunitario?*, in *Pol. Dir.*, 3 2003). It must be stressed that with these last generation soft acts, unlike those mentioned before, the Commission has not limited itself to threatening recourse to hard law in the case of non-observance of the former, but has assured in first instance their enforceability, thus paralyzing the dissimilar national act. And for those who privilege an approach of a substantial type – by which the act must be evaluated according to its concrete functioning and not in virtue of how it should have operated – the act would be liable to annulment by the community judge (ex art. 230 TEU) for violation of the principle of legality, understood, in the case under examination, as a necessary correspondence between the form of the act and the relative juridical regimen, a relationship which our soft law overcomes with extreme casualness.

[53] M. Andenas anticipates this definition in *The interplay of the Commission and the Court of Justice in giving effect to the right to provide financial services*, in Craig P. – Harlow C. (eds.), *Lawmaking in the European Union*, Klumer law international, London, 1998, especially p. 341-342, which criticizes this casual use by the Commission for telecommunications "as an alternative route where its proposals for secondary legislation have failed in the Council".

[54] P. Craig – P. de Bárca, *EU law. Text, cases and materials,* 3rd ed., Oxford University Press, Oxford, 2003, p.116, define this profile in the terms of a non immunity of soft law. from the judicial process, "It is, for example, open to a national court to make a reference to the ECJ concerning the interpretation or validity of such a measure".

[55] The expression "under certain conditions" signifies that the act of soft law does not generate in any case and automatically the duty of *compliance* for the States, but only when a specific duty of loyal cooperation is expressly posed in the soft law act and provided that the matter under examination requires a common policy which justifies the imposition of the said duty. Otherwise the difference between acts of soft and hard law would be annulled. For this corrective reading of the duty of *compliance*, see for all the decisions: Case 229/86 *Brother Industries,* in *Eur. Comm. Rep.,* 1987, p.3757, especially p.3763; and again: Case 186/85 *Commission v. Belgium*, in *Eur. Comm. Rep.,* 1985, p.2029.

Towards States it proposes itself as the criterion " whom national courts are bound to take into consideration in order to decide disputes submitted to them, in particular when it is capable of casting light on the interpretation of other provisions of national or Community law"[56].

In other words, in the daily practice of Community Courts, sofl law has gained *de facto* a binding force not unlike that of hard law, because it acts as necessary intermediary between the community binding sources and the national measures adopted to implement them.

Towards citizens sofl law has acquired a certain regulatory aptitude, not in the capacity of creating rights and duties *ex novo* but in the more limited possibility of introducing supplementary duties to those already contemplated by the binding sources, i.e. strictly functional to the former.

7.1. *The question of the title legitimizing the author of the soft law and her rule making.* Considering the position of the act on a plane not far from the binding sources, its recovery to community legality will impose the revision of the title legitimizing the author and the *ex novo* design for adequate rule-making.

As for the author, if it – Commission or Council – is authoritative it would be fitting to provide to some extent for the intervention of Parliament, otherwise, bypassing the seat of maximum representative concurrence of the political interests of the Union, soft law would end by penalizing and not increasing, as expected, the degree of democracy of the European decisional process.

The right of participation of the Parliament is therefore proposed as a possible answer to the exigency of not leaving the community Executives alone at the moment of decision and in front of the risk of abusive recourse to soft law[57], i.e. to using it for questions of normative competence of the various institutional subjects of the Union. In this last case, the Parliament would intervene in defense of its own normative prerogatives, provided for in the rule of act/function correspondence according to which the exercise of a normative function must correspond to an act with binding legal force, and any other function, as long as it is different from the former, to a non-binding one. This rule would be disregarded if soft law were to intervene in place of a Directive – an interchangeability which in fact has occurred – because the so-called "light" instrument would propose itself in alternative to the heavy one, i.e. it would *ex facto* share its juridical efficacy, not observing the guarantees of external

[56] The reference is to Case 322/88, *Grimaldi v. Fonds De Maladies,* in *Comm. m. l. rep.,* 1991, n.2, especially p.278.

[57] L. Senden, *Soft law in european community law,* cit. p. 502, clearly expresses this preoccupation, indicating the possible way out in the involvement of Parliament, to whom to entrust "the opportunity to check that no abuse is being made of soft law and that the legislative process is not being unlawfully bypassed".

visibility of the decisional process and the balance of power – these latter guarantees being entrusted to a design of the decisional itinerary which involves not one but the different and concurrent seats of community policy.

As for the private subject - i.e. when one is in the presence of a self-regulatory community act - its *iter procedendi* must necessarily provide for the joint involvement of all the social parties affected by the future rules, otherwise self-regulation from "diritto a genesi sociale"[58] will turn into a unilateral regulatory process, i.e. egoistically oriented, since the agreement as compensatory moment of the opposing social demands will be lacking[59].

Instead, the secondary community sources which refer to social self-regulation[60] are still fascinated by the myth of self-regulation as a unilateral normative process, whose conception, development and completed definition is entrusted to one of the parties in the social conflict, generally the well structured and funded ones, while the opposing social party - if this is provided for - can only express its point of view on a normative hypothesis which it has not planned and which is passable of perfection even against its will. The distance which runs between this model of community code and the abstract one we have outlined is evident. In fact, to speak of participation of the weak social subject does not mean that the latter can claim to sit at the negotiation table with the same rights and powers as the other subject.. If this were the case, its consent would be as indispensable for the perfection the agreement as that of the strong party.

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[58] See about this expression G. De Minico, *Regole, Comando e Consenso*, cit., in part. chap. IV.

[59] Refer on this point to G. De Minico, *Regole, Comando e Consenso*, cit., in part. chap. IV, in which the request for a concerted method of formation of normative consensus on an equal basis is a condition for the constitutional compatibility of s.l. which is proposed as "spontaneous law with objective relevance" . Otherwise, i.e. in the case of the solitary exercise of the regulatory function, no-one will be able to save us from the inevitable result of an asymmetrical regulative product. See the above-mentioned text also for a parallel reading of the theme of "private interest governments" between the Italian and the English experience.

[60] On this see Directive1995/46/CE (well known as Data Protection Directive), which in art. 27, par. 3, provides the possibility for the most highly representative associations - in the sector of the treatment of personal data for professional purposes - to promote *ad hoc* community codes of conduct. The passage of these codes is open to the opposing consumer associations , i.e. the subjects to whom the personal data refers to, but their intervention is mortified into the narrow position of consultants, and not the more adequate one of their status of co-authors of the self-regulatory act, considering that they then will have to likewise observe it. The FEDMA (Federation of European direct marketing) followed up on this, developing the first sector code, bearing in mind to some extent the observations of the BEUC (a European consumer association), which was consulted on the matter.

The doctrine most sensitive to this theme has also limited itself to asking for an s.l. with a unilateral genesis though corrected by participation; see G.H.Howell, *'Soft law' in EC consumer law,* in Craig P., - Harlow C. (eds.) *Lawmaking in the European Union,* cit. p.311. But it is hard to understand why a model which is erroneous from the outset should be constructed only to be then corrected it in part.

This would grant the self- regulatory act entirely new structural co-ordinates: no longer those of unilateralism, revised by the participatory method, but those of equal plurilateralism, which alone is in a position to ensure a normative result of the fair balancing of opposed interests.

On the other hand, where placement is concerned, the tendency of soft law to have a normative efficacy will involve its subordination to the binding community sources, in the sense that it will not be able to precede them in opening the normative discussion, having to respect an inverse order of appearance: the binding sources have the task of introducing a political project, which is already defined in its co-ordinates, the soft ones will have the task of completing it , in the respect of its basic lines[61]. Consequently it must not be left alone to operate, having to interact because it is part of a political project conceived in democratic institutional seats. Otherwise, i.e. if soft law acts were to create new obligations or modify those placed in the binding sources, this inversion of the sequence projected onto the plane of political decision making would involve a multiplication of the decisional seats, because by the side of the institutional ones provided for in the treaties, there would be new places of social concurrence of an uncertain democratic origin.

Bearing in mind the concrete attitude of community s.l., of which only the form is "soft" because in its substance it is more prescriptive than a hard law, in order to bring it back to community legality it becomes essential that adequate guarantees be provided relating to procedures and hierarchical placement in the Treaty, which is the inevitable seat for ensuring that a safeguard is free from the risk of the changeable opinion of the current political majority.

But this has not occurred: the future Treaty which institutes a Constitution for Europe could have accomplished this, but didn't. The European constituent – provided that the Convention and the ICG were in fact the European Constituent - lost a chance to reflect on soft law in a perspective of rationalization, as advised by the ampler mandate to simplify Institutions and means. This latter passage would have needed few but clear prescriptions: the obligation of publicity of procedures, of negotiation between all the social parties – in the case of soft law synonymous with self-regulation – and of intervention within a framework outlined in advance by binding community law – all requisites which would have freed soft law from the legitimate suspicion of incompatibility with the system of community sources. On the contrary, the laconic expression, which merely reproduces art. 249 TUE, contained in the corresponding art. I-32: "Recommendations and opinions shall have no binding force" is certainly

[61] G. Howell, *'Soft Law' in EC consumer law*, in Craig P. – Harlow C. (eds.) *Lawmaking in the European Union*, cit. p.317, "the soft law rules should not stand alone, but rather be part of a legislative framework which suggests the broad direction of policy leaving it for soft law to give practical expression to democratically determined standards".

unsatisfactory [62]. Nor does it move in the above-mentioned direction in par. 2 of the same provision, which is limited to giving the form of a norm to the jurisprudential principle of preference of the legislative instrument, if it is already in course, with respect to that of soft law.

In conclusion, establishing the title legitimating the author and setting down a minimum procedural design, without imprisoning the phenomenon in a rigid framework[63], are still waiting for an answer.

9. CONCLUSIONS

From what English legal literature has recently said, we conclude that self regulation works better if it is included in an autopoietic perspective of the legal system combining with a reflexive view. That is, the State gives no blank delegation, but it leaves the private body free to formulate and enforce rules within limits inversely proportional to the weight of the public interest. The English system has reached this conclusion through a complex *trial and error* experience.

It is particularly important to lay down whether the private body is legitimised to take decisions binding third parties. By laying down rules involving everybody, private interest governments have behaved as if they were veritable authorities, political regulators, though having no popular legitimation; a *delegation* is not enough to this purpose as, all things considered, it does not relieve the State of the responsibilities deriving from its policy making role.

Starting from this point experts have studied the possibility that third parties and private governments collaborate in the regulatory process.

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[62] On the other hand A. Poggi, *Soft law nell ordinamento comunitario,* Report presented at the Convegno dell'Associazione Italiana dei Costituzionalisti, Catania, October 14-15, 2005 "The integration of European and national constitutional systems" in web: *associazionedeicostituzionalisti.it*, evaluates positively the systematizing the Treaty reserves for acts of *soft law* which, though atypical - i.e. recognizable by community institutions - can however be counterbalanced by the obligations of motivation and proportionality. Instead, M. Luciani, rightly notes in *Gli atti comunitari e i loro effetti sull'integrazione europea*, Report (provisional edition) presented at the Convegno dell'Associazione Italiana dei Costituzionalisti, Catania October 14-15, 2005 "The integration of European and national constitutional systems" in web: *associazionedeicostituzionalisti.it*, that, alone, the above principles will, at most, suffice to satisfy an exigency of formal legality, but will be inadequate for the demand for "democratic productivity" of the rule-making. We consider that the necessary and sufficient elements for reclaiming soft law to substantial legality are to be found in the three conditions mentioned in the text, while the motivation and proportionality can, at most, serve to verify the fulfilment of the former.

[63] This discussion was also tackled by the Working Group on simplification of the European Convention, but no trace of it remained in the final report to the Convention (CONV 424/02).

This, too, has proved inadequate because it requested from participation more than it could give.

Finally, if we consider the judicial answer, we understand it is not more conclusive because law thinks that a judge's intervention [64], even if accepted in case of private regulation, has to be very respectful of the heart of the matter, examining only its formal aspects, that is whether the rule making process was correct in its complying to procedure. No author has thought that the judge could decide on behalf of the private bodies, because, in this case, the rule would no longer be *reflexive.* Those who make the rule must preferably try to implement persuasive models. The judge can only draw a regulator's attention to irregular procedures, but he cannot order what is to be done. In a word, the reflexive character of a rule must be kept from the beginning of the rule making process to the final implementation.

One basic question was still in need of reply: who is responsible and to whom? It is not surprising that this problem has had great relevance in English practice, inserted as it is in a political system based on the rule of majority, in which the principle of political responsibility is a milestone. It was difficult for such a system to go on tolerating the proliferation of decision and rule making patterns in which responsibilities were not clearly defined and the existence of areas, not covered by political decisions, and, at the same time, not subject to prosecution, was endorsed.

Legal literature has rejected solutions potentially harmful effects on the system. They were to be absorbed within the observance of the rules of law, their discretionary powers limited in extent. For this part it was necessary to go back to political power and its inevitable responsibility. This new course has marked the end of a myth: U.K. no longer a heaven for self regulation, i.e. a legal space where several independent and autonomous rule making systems cohabit. It is rather a system able to include the several kinds of self regulation coming from a complex social organisation and to distribute them on several levels, on condition that these instances of self regulation are ready to enter a fundamentally unitary politico-institutional scheme.

English practice seems to suggest two things: to pay attention when the system wants to open to self regulation and to remember the role of the State. This role will be less relevant than in the past, because the

[64] The topic of *j.r.* is a far reaching question, certainly beyond the scope of this work. Here we want only to recall that some authors have wondered how to extend it from the category of public acts to self regulatory ones and within what limits to admit it. The works to be consulted on the topic are: J. Black, *Constitutionalising Self Regulation,* in *Mod.Law Rev.,* cit. pp.32-40 and 51-55; A. Page, *Self-regulation: the Constitutional Dimension,* in *Mod. Law Rev.*, 49, 1996, pp. 163-167; C. Scott, *The Juridification of Regulatory Relations in the UK Utilities Sector,* in J. Black - P. Muchlinski - P. Walzer (eds*), Commercial Regulation and Judicial Review,* London, 1998. For an extended analysis of literature and cases, starting from Datafin historical decision, see C. Harlow – R. Rawlings, *Law and Administration*, 2nd ed., London, 1997, pp.343-351.

State is no longer completely in charge of rule making, as private bodies, too, can, at least partially, hold this right; the State's role, however, will be still decisive as the State has the task of defining the characteristics of the self regulatory bodies, of indicating the proper course for the regulatory process and of correcting it if necessary.