REGULATORY THEORY

FOUNDATIONS AND APPLICATIONS

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For John and Valerie

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Abbreviations

ACL	Australian Consumer Law
ACMA	Australian Communications and Media Authority
AFCO	Australian Federation of Consumer Organisations
AFL–CIO	American Federation of Labor and Congress of Industrial Organizations
AIDB	Asian Infrastructure Development Bank
ANU	The Australian National University
APEC	Asia-Pacific Economic Cooperation
APRA	Australian Prudential Regulatory Authority
ARC	Australian Research Council
ASEAN	Association of Southeast Asian Nations
ATO	Australian Taxation Office
BIS	Bank for International Settlements
BIT	bilateral investment treaty
BVI	British Virgin Islands
BWI	Building and Woodworkers International
CAFTA	United States–Central America Free Trade Agreement
CALEA	*Communications Assistance for Law Enforcement Act*
CEO	chief executive officer
CERT	computer emergency response team
CETA	Comprehensive Economic and Trade Agreement
CFC	controlled foreign company

CI	Consumers International
CMA	Competition and Markets Authority
Codex	Codex Alimentarius Commission
CSDH	Commission on Social Determinants of Health
CSO	civil society organisation
CTSI	Centre for Tax System Integrity
DNS	Domain Name System
DPKO	Department of Peacekeeping Operations (United Nations)
DRC	Democratic Republic of the Congo
DS	datasets
ECN	European Competition Network
ECPA	*Electronic Communications Privacy Act*
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
EDR	external dispute-resolution
EPA	Environmental Protection Agency
EPAC	Economic Planning Advisory Council
EU	European Union
FBA	Folke Bernadotte Academy
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission (US)
FDI	foreign direct investment
FGC	Family Group Conference
FISMA	*Federal Information Security Management Act*
FRAND	fair, reasonable and non-discriminatory
FSC	Forest Stewardship Council
GCM	Global Coalition of Migration
GDP	gross domestic product
GFC	Global Financial Crisis

GFMD	Global Forum on Migration and Development
Global GAP	Good Agricultural Practice
GPS	global positioning system
HCR	Human Rights Council
HECS	Higher Education Contribution Scheme
HNWIs	high net worth individuals
HWIs	high wealth individuals
IBC	international business company/corporation
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	international criminal law
ICLEI	Local Governments for Sustainability
ICN	International Competition Network
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICT	information and communications technology
ICTs	international criminal tribunals
ICTU	Irish Congress of Trade Unions
IFAW	International Fund for Animal Welfare
IFC	international finance centre
IHL	international humanitarian law
IHRL	international human rights law
IIA	international investment agreement
ILC	International Law Commission

ILO	International Labour Organization
IMF	International Monetary Fund
IMT	international military tribunal
INPO	Institute of Nuclear Power Operations
INPROL	International Network to Promote the Rule of Law
INTERPOL	International Criminal Police Organization
IO	international organisation
IOCU	International Organisation of Consumers Unions
IOM	International Organization for Migration
IP	Internet Protocol
IP	intellectual property
IP logging	Internet Protocol logging
IPCC	Intergovernmental Panel on Climate Change
IPR	intellectual property rights
IPTF	International Police Task Force
ISDS	investor–state dispute settlement
ISP	internet service provider
ITU	International Telecommunications Union
LEED	Leadership in Energy and Environmental Design
LG	*The Limits to Growth*
MAI	multilateral agreement on investment
MPAA	Motion Picture Association of America
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NEG	new environmental governance
NGO	non-governmental organisation
NRC	Nuclear Regulatory Commission
NSW	New South Wales
ODA	official development assistance

OECD	Organisation for Economic Co-operation and Development
OECD-DAC	Organisation for Economic Co-operation and Development's Development Assistance Committee
OFC	offshore finance centre
OHCHR	Office of the United Nations High Commissioner for Human Rights
OHS	occupational health and safety
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Co-operation in Europe
PCBU	person conducting a business or undertaking
PGA	Peoples' Global Action on Migration, Development and Human Rights
PHLR	public health law research
PSI	Public Services International
RAA	regulatory arrangement approach
R&D	research and development
RAT	routine activities theory
RBT	random breath test
RCT	randomised controlled trial
REACH	registration, evaluation, authorisation and restriction of chemical substances
RegNet	Regulatory Institutions Network
RIAA	Recording Industry Association of America
RISE	Reintegrative Shaming Experiments
RJ	restorative justice
RLO	right-to-left override
ROKSO	Register of Known Spam Operations
RST	reintegrative shaming theory
SCP	situational crime prevention

SFOR	Stabilisation Force
SNA	social network analysis
SPCPP	South Pacific Consumer Protection Programme
SPE	special purpose entity
SPV	special purpose vehicle
SSR	security sector reform
T11	'Table of Eleven'
TCP	Transmission Control Protocol
TEC	transnational environmental crime
TIEA	tax information exchange agreement
TJN	Tax Justice Network
TLO	transnational legal order
TPA	*Trade Practices Act*
TPP	Trans-Pacific Partnership
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UKCN	United Kingdom Competition Network
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGCP	United Nations Guidelines for Consumer Protection
UNIDROIT	United Nations International Institute for the Unification of Private Law

UNODC	United Nations Office on Drugs and Crime
UNSC	United Nations Security Council
UPR	Universal Periodic Review
URLs	uniform resource locators
US	United States
USAID	United States Agency for International Development
VOM	victim–offender mediation
VSI	Violent Societies Index
VSL	value of a statistical life
W3C	World Wide Web Consortium
WHO	World Health Organization
WHS	work health and safety
WJP	World Justice Project
WTO	World Trade Organization

Boxes, figures and tables

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Preface

An edited book is usually the product of many conversational circles. The 43 chapters of this book draw together the work of an especially talkative group, the Regulatory Institutions Network (RegNet) program based at The Australian National University (ANU).

John and Valerie Braithwaite established RegNet in 2000. John Braithwaite had obtained financial backing from ANU in the form of a strategic development grant. Initially, RegNet was a part of The Australian National University's Research School of Social Sciences, but, as a result of wider processes of restructuring, it is now part of The Australian National University's College of Asia and the Pacific. The plan for RegNet included establishing an ANU-wide network for the study of regulation involving other centres in other parts of the university, such as the Centre for Health Stewardship at the Medical School and the Australian Centre for Environmental Law at the Faculty of Law. RegNet's network aspirations moved well beyond ANU, with membership open to non-governmental organisations (NGOs), government departments, regulators and other universities. It was all about building networks, networking networks and creating interdisciplinary conversations around the concept of regulation.

Why build an interdisciplinary research program devoted to the study of regulation? Lawyers, after all, had turned regulation into a dull topic. Regulation was about authoritative rules issued by the state. For some lawyers the meaning of regulation was confined to the rules of delegated legislation. The answer has both theoretical and empirical dimensions. Empirically, regulation had pluralised in important ways. States were drawing on third parties to deliver, for example, their welfare programs or foreign aid programs. Businesses such as banks were required to have compliance units that met particular standards—standards that, as in the case of banking regulation, were increasingly coming from international organisations such as the Basel Committee on Banking

Supervision. Would these bodies keep the world's financial system safe from crisis? States were signing on to free-trade agreements that were long and complex and seemed to go well beyond dealing just with the movement of goods. Why did these agreements contain standards that strengthened patent monopolies? This seemed inconsistent with the goal of free trade. The publics of states began to learn that their states could be sued directly by foreign investors. Consumers were taking a lot of interest in labels to do with standards relating to fair trade and forest stewardship. Who set those standards? Who checked for compliance? Regulation was changing in many different ways.

The changes taking place in regulation were only part of the reason to build a research program around it. The big problems facing states—such as crime control, environmental degradation, sustainable development, improving outcomes for the poor, women, indigenous peoples, children and the elderly and stopping the degradation of tax systems—would require creative regulatory solutions. John Braithwaite, normally the embodiment of respect for others, engaged in some mild-mannered trashing of disciplinary boundaries in the social sciences, arguing that traditions of excellence within the disciplines were narrowing their capacity to deliver creative solutions to these big problems. If these creative solutions were to have a chance of arriving, regulation could not continue to be thought of as an inelastic thing of law. Rather it had to be seen as a multilevel dynamic process in which many actors play a part and have varying capacities and means of intervention. Better ways of tackling big problems would only come when regulation achieved a resonance across the social sciences. Naturally, the important insights and findings of the disciplines would be retained, but synthesised into bigger and bolder regulatory theories for testing. The search for insights was not to be confined to the analytical worlds of social scientists, but included the insights of regulatory practitioners. Of course, this was not a prescription for a lack of excellence in the disciplines, but rather one that aimed to encourage the disciplines to come out from behind their walls in search of the partnerships that would generate the new knowledge needed to address the world's problems.

Perhaps drawing inspiration from the story of the Ark, Braithwaite assembled a group of scholars from different disciplines including anthropology, criminology, law, psychology, sociology, geography and political science. As the people who had been recruited to the RegNet enterprise began arriving, they were housed in various

parts of The Australian National University's campus. When, for example, Drahos arrived, he was given a room with a window directly opposite a kitchen vent—a special bonus, according to Braithwaite. The accommodation problems were solved when ANU provided the RegNet group with a new building that remains its home today: the Coombs Extension building (named after Herbert Cole Coombs, a senior Australian public servant, financial regulator and a Bretton Woods architect, who, among many achievements, helped found The Australian National University in 1946).

In its first three or so years, the RegNet program underwent an intense period of growth. By the beginning of 2004 there were more than 40 academic staff. Close to AU$32 million had been raised. Long-term research partnerships had been established with government departments and regulators, including the Australian Federal Police, the Australian Taxation Office, the Australian Competition and Consumer Commission and the National Occupational Health and Safety Commission, as well as with organisations outside Australia such as the British Home Office and Metropolitan Police and the Canadian International Development Agency.

The structure of the core RegNet program was always a little opaque to outsiders. Within RegNet there were various centre initiatives such as the Centre for Tax System Integrity (led by Valerie Braithwaite, it was RegNet's biggest centre and established in 1999 with funding from the Australian Tax Office); the Centre for Restorative Justice led by Heather Strang; the Centre for Competition and Consumer Policy led by Imelda Maher; Security 21: The International Centre for Crime and Justice under the charge of Peter Grabosky and Clifford Shearing; and the National Research Centre for OHS Regulation, its first director being Richard Johnstone. John Braithwaite described these centres as 'tents', the idea being that they would be collapsed (after people had exited, it should be added) and new tents erected to explore different dimensions of regulation.

And that is more or less what happened. Centres were closed and new ones erected. Examples include the Centre for International Governance and Justice (Hilary Charlesworth) and the Centre for the Governance of Knowledge and Development (Peter Drahos). RegNet was also part of a successful bid for funding from the Australian Research Council that saw the establishment of the Centre for Excellence in Policing and

Security. Peter Grabosky and then Roderic Broadhurst led the RegNet node of that centre. Roderic Broadhurst has gone on to be appointed to the foundation chair in criminology at ANU.

The variety of topics contained in the chapters of this book is a product of an openness to new initiatives that was nurtured by the Braithwaites. One did not join RegNet to be a criminologist, a tax lawyer or some other kind of specialist, but rather to collaborate in the study of regulation in its manifold forms, seeing if there were patterns and solutions to problems that could become the basis of a more general set of theories. Forming working groups around crosscutting thematic initiatives such as the role of hope in governance was one way in which thinking across regulatory areas was encouraged.

Today's RegNet is led by Sharon Friel. With its foci including health equity and governance, climate change, energy governance, peacebuilding, trade and investment, it is different to the RegNet that started a decade and a half ago. The one constant in this process of exploration and rebuilding has been advancing knowledge about regulatory processes to solve big problems.

The PhD students who joined the RegNet enterprise found that their topics seemed to have very little in common with each other. What were the links among, for example, tax havens, open-source biotechnology, the auditing of human rights in the HIV/AIDS field, public security in Northern Ireland, Somali piracy, corruption in Myanmar and Australia's Pharmaceutical Benefits Scheme? It wasn't immediately obvious. If unity was to be found in regulatory theory what was regulatory theory about? How were responsive regulation, smart regulation and meta-regulation related? This book is a response to these and many other questions asked by cohorts of RegNet PhD students over the years. It arrives late, but then could not have arrived much sooner since the questions and work by RegNet's PhD students have been central to the development and testing of regulatory theory. Many of these students have gone on to academic careers and some of them have contributed to this volume (see the chapters by Russell Brewer, Michelle Burgis-Kasthala, Lennon Chang, Christian Downie, Miranda Forsyth, Ibolya Losoncz, Gabrielle Simm and Natasha Tusikov). Other contributors to this volume, such as Cameron Holley, Nathan Harris, Kristina Murphy and Gregory Rawlings, spent the initial parts of their postdoctoral careers at RegNet in its early years, contributing to its growth.

The conversation that finally sparked this book into project form took place between Peter Drahos, Veronica Taylor (Regnet's director until the end of 2014) and Jeroen van der Heijden, who has taken regulatory theory into the field of urban sustainability. As RegNet had moved to improve its educational offerings to its PhD students under the stewardship of Kate Henne, the need for a text that provided PhD students with a more structured entry into the work of the RegNet program had become compelling.

The overall goal of this collection is to introduce a reader such as a PhD student, a regulatory practitioner or a policymaker to the central issues of regulatory theory through a selection of key concepts and topics that have been investigated by members of the RegNet group. The authors, all of whom either are at RegNet or have spent significant periods at RegNet, were asked to focus on the arguments around those key concepts, to reference texts they saw as important (while avoiding over-referencing), suggest some further reading and to stick to a word limit.

One aspiration for this book is that it will be a useful text for those wishing to learn more about the field of regulation, how it pervades social life in more ways than we realise, its dynamics of change and the possibilities of constructive intervention in its processes. RegNet, as is clear from the second half of the book, has studied regulatory problems in many different substantive contexts. One advantage of representing the diversity of RegNet's work in this volume is that a law enforcement official, a public health policymaker, a human rights lawyer, a competition regulator, a tax regulator or a practitioner from any of the other fields that are discussed in this volume will be able to read a chapter or chapters that engage with some contextual detail with which they are familiar, but should also see from other chapters that specific issues of interest to them also relate to broader patterns such as that regulatory outcomes within the borders of one state increasingly have their origins in decisions taken outside those borders (the globalisation of regulation).

With around 100 academics having trodden through RegNet's corridors of conversation it would have been difficult in one volume to give everyone an individual voice. Rather, the goal has been to group chapters around dominant themes and concepts that have emerged in the process of RegNet's rethinking of regulation over the past decade and a half. As the introduction by Drahos and Martin Krygier makes clear, three lines of investigation have been recurrently important in RegNet scholarship: the role of emotions in understanding the limits

and creative possibilities of regulatory institutions; the redistribution of the tasks of regulation within state and society; and regulation as a continuous process in which actors do or can intervene.

The first three sections (social-psychological foundations, concepts and theories and the role of the state in regulatory transformations) bring together the theory-building part of RegNet's work. The remaining sections set their discussion of theories and concepts in substantive areas such as human rights, health and commerce. This might be read as setting up a distinction between theory and its application, but within the RegNet program this distinction has not been seen as useful. Rather the goal has been innovation in regulatory knowledge, recognising that innovative ideas are part of a messy developmental loop that may have its source in the concrete particulars of regulatory systems or with practitioners who in moments of reflection offer insights that become the basis of new theory-building initiatives.

The book begins by introducing the reader to some of the psychological dimensions of regulation. Under Valerie Braithwaite's leadership, RegNet has a long history of exploring the psychological underpinnings of regulatory institutions such as tax or institutionalised virtues such as trust. This section also conveys some sense of the methods of the RegNet group, ranging from statistical analysis of large datasets to qualitative fieldwork and the use of case studies. RegNet can fairly claim to be the home of much of the work on responsive regulation; the first complete articulation of that theory is to be found in Ayres and Braithwaite's 1992 book, *Responsive Regulation*. As the next section of the book makes clear, the investigation of the ideal of responsiveness in regulation has led to the identification of different types of responsiveness, as well as theories such as smart regulation that place the emphasis on flexibility and the complementarity of regulatory instruments rather than on following a preset sequence of responses. The third section brings together the work done by RegNet scholars on the changing role of the state in regulation. To what extent have states been rendered rule-takers rather than rule-makers under conditions of globalisation? Can we plausibly argue that capitalism has entered a regulatory phase of its evolution? After these three sections there come four sections that represent substantive and persistent themes within RegNet's work. Rights-based regulation in its many forms, such as the human rights work of Hilary Charlesworth or the work by Nicola Piper on the rights of vulnerable temporary migrant workers, has been a hugely important part of RegNet's

research programs. Judith Healy was an early leader in RegNet on the integration of health regulation and regulatory theory and Scott Burris' visits to RegNet helped to foster this part of RegNet's work. As the essay by Sharon Friel makes clear, a sweeping research agenda around public health regulation has grown. The section on crime and regulation could easily have been the subject of a separate book. The essays in this section reflect the diversity of RegNet's contributions and methods in the study of crime, security and institutions of justice. As with many other disciplines, regulatory theory is slowing beginning to revitalise criminological theory. So, for example, Heather Strang's essay details the randomised trial carried out to test hypotheses in restorative justice while Roderic Broadhurst and Mamoun Alazab use datasets involving millions of emails to analyse the problems of regulating a global public bad: spam.

The final section on regulation and commerce covers what might be thought of as more traditional areas of regulation such as consumer safety, mining regulation and competition regulation—areas into which RegNet scholars have sought to inject innovative ideas. The essay by John Wood on consumer regulation speaks to a connection that has been deeply important to RegNet: the connection with the world of regulatory practitioners where practitioners include those from advocacy organisations and social movements. A number of practitioners were invited to contribute to the volume, but only John Wood found the time to write. His essay on consumer regulation is a gentle tour of regulatory achievements that date back decades and represent hard-fought victories won by a consumer movement in which he was a leader, working with others such as Ralph Nader. His contributions to promoting public goods are too long to list here, but they include helping to bring about freedom of information legislation in Australia, serving as Deputy Commonwealth Ombudsman and, in later years, bringing his skills and knowledge to help island countries in the Pacific region. He passed away in 2016. His daughter Charlie Wood, a key climate activist in 350.org Australia and in the RegNet family, continues to fight for those public goods that motivated John throughout his life.

Tracing the intellectual influences on the work of RegNet is not an aim of this volume. This would end in an impossibly long and likely incomplete list of names. In any case, the various chapters in the book convey a strong sense of where the influences have come from. By way of illustration, ideas and approaches from the law and society tradition such

as Nonet and Selznick's writings on responsive law have consistently informed much of RegNet's work, perhaps because law and society has been an open tradition in which different views of what it is to be critical and empirical have emerged. There have been long-term collaborations such as the one between Robert Kagan from the University of California, Berkeley, and Neil Gunningham from RegNet. There have been important writing projects such as *Regulating Law*, led by Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite. There have been joint initiatives such as the one by David Levi-Faur (Hebrew University), John Braithwaite and Cary Coglianese (Pennsylvania University) that produced the founding of the journal *Regulation and Governance*, a journal that has become a home for some of the best writing in the field. Individuals have impacted on particular strands of RegNet's work as in the case of Tom Tyler's and Kristina Murphy's work on procedural justice and obedience, Lawrence Lessig's writings on code and the way it expands regulation by architecture, Michael Power's pioneering analysis of the rise of the audit society and Philip Pettit's work on the republican idea of liberty.

Beyond the many individual collaborations, initiatives and influences, RegNet has also seen itself as part of a broader community of organisations and centres that were also advancing knowledge of regulation. The American Bar Foundation (where Terry Halliday, a long-time adjunct at RegNet, is based) and the Centre for Analysis of Risk and Regulation at the London School of Economics are examples of influential nodes in a bigger network of the study of regulation.

Having well and truly committed the sin of grievous omission in the preceding paragraph, it is time to end. The principal reason this volume has swollen into obesity is that it presents a stocktake of RegNet@15. While the primary aim of this stocktake is to provide a service to our students and the broader community of regulatory studies, it might also be helpful for ANU, which provided the start-up funds for RegNet, to see whether it has been money well spent.

Last but not least, it also serves as a tribute to John and Valerie Braithwaite for having the vision and bravery to build RegNet and to infuse it with an atmosphere of affection and loving support. The achievements of great athletes are underpinned by countless micromovements that escape the notice of admiring observers, but produce what seems impossible. In academic life, great leadership and achievement depend on many micro-acts quietly done, some of which

are not noticed by other than their recipients: the door that is always open, the conversational moments that help colleagues produce fresh insights, writing notes of praise that help build confidence, participating in events that matter to others, always engaging with the work of colleagues, delivering criticism gently, reading and rereading their drafts, suggesting ways to improve them and making individuals feel part of circles of public achievement. Somehow, John and Val found the time for these things and more. The essays in this book are just one example of their remarkable influence on regulatory scholarship.

On a personal note, my thanks go to the contributing authors whose timely responses to my deadlines have helped bring this volume to fruition. Martin Krygier read all the chapters of the book and helped me to think through the complexities of introducing the volume. John Braithwaite, Julie Ayling, Jeroen van der Heijden and Neil Gunningham provided helpful comments and suggestions at various stages. I am also grateful to the members of the Social Sciences Editorial Board of ANU Press for the speed with which they were able to find reviewers for the manuscript, and also for their constructive thoughts on the manuscript itself. As an aside, I regard the ANU Press model of publishing as a wonderful example of how academics can break free of the tyranny of global publishing cartels. My thanks also to the three reviewers who found the time to read the manuscript and make suggestions for its improvement.

Clare Kim provided wonderful editorial support helping to bring the chapters into line with various formatting requirements. Jan Borrie, the copyeditor, took on the manuscript and, with great calm and efficiency, applied the final coat of polish. Jillian Mowbray-Tsutsumi, the Senior Research Communications Officer at RegNet, read all the chapters and drafted a summary of the themes that appears as an interactive tool in the electronic version of the book. It is not the first time administrators at RegNet have crossed over into academic authorship. Boundaries have never meant all that much at RegNet.

Peter Drahos

1

Regulation, institutions and networks

Peter Drahos and Martin Krygier

1. Regulation and rules

When we set out for a shopping trip to our supermarket most of us do not think of it as an encounter with an increasingly global regulatory order. If asked to guess about the regulations applying to the supermarket, we would probably nominate things such as zoning rules, food safety standards and rules regulating opening hours and working conditions. We might sum up by saying that supermarkets are probably regulated by lots of rules passed by local and national governments. By implication, we would be thinking about the definition of regulation in terms of legal rules backed by penalties for noncompliance. We might even, in a moment of jurisprudential inspiration, label this the juridical version of regulation. This is not a false picture of our regulatory world, but, for reasons we will explain, it is a radically incomplete one.

We enter the supermarket, not having really noticed the private security guards in the mall or the surveillance cameras, and head over to the fresh fruit and vegetable section. We will not be thinking about the pesticide residue levels on the fruit or vegetables. If asked about this, we would guess that there is a government regulator setting and enforcing safe limits on health matters such as this. Not many of us would know about the links between national regulators and the

Codex Alimentarius Commission (Codex) in Rome or the hundreds of Codex technical committees working on harmonising food standards, including maximum limits on pesticide residue levels. The effect of being a member of the World Trade Organization (WTO) when it comes to implementing Codex standards is not a topic of conversation for most of us and we would perhaps be surprised by the number of industry representatives with interests in the outcome of these standards who sit on Codex committees. We might wonder whether the science triumphs over the commerce.

We pick up some berries for dessert. The name on the label is 'Driscoll's'. If we could be bothered researching it, we would find it was a US company that owned a lot of the genetics in berries. It seems odd to be able to own the genetics of something. That would seem to be a big regulatory stick with which to beat competitors over the head. Where did those standards of intellectual property regulation come from?

As we move down the aisles, we are surrounded by information, most of which we do not take in: labels, logos, special offers and so on. We may be registering only a fraction of all this information but we are still making purchasing decisions. On what basis? Perhaps we are being 'nudged' into making some of our choices. After all, supermarkets have had decades to study our behaviour in the aisles of their many stores. It would not surprise us to learn that large businesses are investing millions of dollars in understanding what happens in our brains when we see their brands (Yoon and Shiv 2012). We might know something about the standard-setting processes that sit behind the labels on some of the products we buy. Perhaps we have done some research on fair-trade labels and like the idea that producers will end up with more of the dollar we spend to buy their product. But there will be many labels communicating standards about which we know nothing. We could scan the information on some of the labels using smart apps, if we had the time. Supermarkets have their own labels, we notice. Have they become some sort of combination of regulators and 'nudgers'?

Of course, we might decide to do our shopping over the internet, but, if anything, that brings us into an even closer encounter with the global regulatory order. Internet ordering is an efficient way for supermarkets to gather data about their customers and to communicate with them. The compilation of customer data has been going on for decades through the issue of loyalty cards and linking purchases to credit card numbers, but digital technologies are allowing supermarkets to turn their fuzzy

sketches of consumers into intimate portraits. We might like the idea of the anonymity of cash, but for how long will payment by cash remain an option? The regulation of payment systems seems to be heading in the direction of total transparency of our purchasing behaviour. Will the anonymity and privacy of these transactions become things of the past or will new payment systems like Bitcoin preserve some aspects of these two things? Where all these data might end up depends on factors such as the cybersecurity competence of its holders, privacy laws and even trade negotiations. The Trans-Pacific Partnership Agreement, should it ever come into force, tilts the field against restrictions on data export limitations (Greenleaf 2016).

2. Regulation: The broader version

Supermarkets are one of the places where we can see or trace many of the fundamental changes in regulation that have occurred in states over the past few decades. The rise in private security services, private voluntary certification standards and the globalisation of regulation are some examples of such changes. Concepts such as the regulatory state and regulatory capitalism capture the scale and dynamics of these changes (see Scott, Chapter 16; and Levi-Faur, Chapter 17, this volume). However, if we approached a study of regulation and supermarkets that confined the meaning of regulation to rules commanded by a sovereign for the purposes of guiding or restraining behaviour, we would miss or only glimpse many of the processes of which supermarkets were a part. We might not pick up, for example, the way in which supermarkets were setting standards for those in their supply chains and how farmers, if asked, would say that supermarkets were the new regulators. Moreover, if we wanted to strategically intervene in systems such as the food system, a rules-based definition might mislead us as to how best to intervene.

Assume for a moment that we become convinced that one highly effective way to tackle the rise in obesity is to do something about the fat and sugar content of foods. If we were operating with a rules-based view of regulation, we might conclude that it is a matter of influencing national authorities to make laws limiting fats and sugars in food. But planning an intervention strategy based on targeting the legislature might not be the best strategy or not the only one we should be pursuing. A broader view of regulation that included non-legal forms of norm-making, along with the idea that private sovereignty over such

norm-making mattered to regulatory outcomes, might lead us to think about other strategies. Perhaps supermarkets with their command over the layout of choices to be found in their aisles could be persuaded to bring more healthy choices into focus for busy consumers. We might consider harnessing the regulatory power of code through smart apps that allow consumers to scan products for information about their fat and sugar content. We might also focus on the work of committees on the Codex—committees such as the one on fats and oils or the one on sugar. The work of Codex committees is geared towards having a worldwide impact on food standards of all kinds. It is foundational to a global trading system in food. A picture of regulation that ignored the Codex and its standards, or, for that matter, the global level of regulatory decision-making for any substantive area, would miss the empirical reality of the origins of many national regulatory standards.

So, one virtue of moving beyond the narrow or juridical view of regulation is that it leads to a theory of regulation with much more empirical content. All of the essays in this book in one way or another contribute to this broader theory of regulation. Importantly, and as we argue in Section 5, the state does not drop out of this broader picture of regulation (although some states may increasingly become rule-takers rather than rule-makers). Rather, the state becomes part of a network of regulation in which the tasks of regulation are redistributed in various ways among actors within the network. As the preface to this volume makes clear, all the authors have at various points been part of the Regulatory Institutions Network (RegNet) at The Australian National University (ANU). Aside from contributing to a broader understanding of regulation, the chapters also link to more specific concepts and themes that are distinctive of RegNet's work over the past decade and a half and that have led to shared approaches and related theories of regulation. We begin a discussion of these concepts and themes in the next section.

3. Regulation and RegNet

Through the analytical development of concepts such as meta-regulation (see our discussion below, as well as Grabosky, Chapter 9, this volume), RegNet scholarship has played a major role in opening the door to a world of regulation by networks in which the same actor in one context might be the regulator and, in another context, the regulatee. If, for example, supermarkets collude on price, they risk

the wrath of competition law regulators, but they can and have cooperated in the global development of certification systems on matters such as food safety, sustainable production and animal welfare—standards with which their suppliers have to comply (known as the Global GAP (Good Agricultural Practice) initiative).

A book that did much to explore the creative possibilities of a world of distributed regulatory capacities was Ayres and Braithwaite's *Responsive Regulation* (1992). The theory of responsive regulation developed in that book aimed to shift the debate about business regulation away from the frozen positions of those who favoured deterrence-based regulation through the consistent and present application of rules and penalties and those who favoured removing as many of those rules as possible, thereby maximising the role of freedom and rationality in the business world. Responsive regulation advanced the idea that regulators should understand the context and motivations of those whose conduct they were regulating and then choose a response based on that contextual understanding. A responsive regulator is not denied the option of penalties, but is denied their first and automatic application. The question of when 'to punish or persuade' (Braithwaite 1985) led to the development of the now famous regulatory pyramid in which a range of possible responses is arranged in sequential order, with dialogue and persuasion appearing at the base of the pyramid. As one travels up the pyramid, options carrying a greater degree of coerciveness become available to the regulator. There is a heavy presumption in favour of starting at the base of the pyramid because dialogue is a low-cost, respectful and time-efficient strategy for obtaining compliance. The responses of the regulatee to interventions drawn from the base of the pyramid are the ones that determine if, how far and when the regulator escalates up the pyramid.

Responsive Regulation was important not just for what it said about compliance and enforcement, but also for what it said about the role of public interest groups in increasing the regulatory capacity of a society. A relationship of close cooperation between a regulator and a firm can begin a slide into a partnership in which the independence of the regulator is replaced by corruption. A way to counter this danger is to think about models of regulation that draw third parties into the circle of regulation. Labelling this 'tripartism', Ayers and Braithwaite argued

that tripartite models of regulation required public interest groups to be given the information available to a regulator, the chance of a seat at any negotiations and the power to initiate enforcement actions.

Tripartism recognises that society cannot rely exclusively on law and its agencies of implementation. The law and society movement that had begun in the first half of the twentieth century had brought the methods of the social sciences to bear on the actual operation of legal rules and found too many gaps between what they promised and what actually happened. Legal rules were not enough to alter the pattern of the 'haves' always coming out ahead (Galanter 1974). The combination of law and reason on which social-contract theorists such as Thomas Hobbes and John Locke had placed so much emphasis as a means to a largely peaceful and safe state for citizens was looking less and less sufficient.

Behind the model of regulatory tripartism found in *Responsive Regulation*, there is a more basic message to citizens of a polity. If you want to safeguard your interests within the state then you will need to contribute in some way, big or small, to building a world of distributed regulatory capacities and enforcement. It is not enough to assume that legal rules and rights alone will protect you. It is not enough to think of civil society as an arrangement devoted exclusively to the pursuit of self-interest. And, in the end, and to a large extent by implication, it is not enough to count on civic virtue or even associations of the civically minded. The norms of civic virtue have to be accompanied by the organisation of regulatory networks—networks that have meaningful powers of intervention. Law has to become part of a much larger regulatory world in which there are many defenders, guardians and protectors of public interests, all operating under conditions of full information, mutual transparency and accountability.

Tripartism is not itself a novel idea, but a systemisation of the hard-won insights of social movements such as the consumer movement. If one wanted better regulation of car safety then, as Ralph Nader showed in the 1960s, one had to establish a consumer movement that would fight for better safety standards and help to enforce them. The alternative of leaving it to the regulator and the US car industry was a death and injury toll from cars that were 'unsafe at any speed' (Nader 1965).

The theory of responsive regulation is an important part of a conceptual evolution in which the narrow view of regulation as a subordinate species of law is replaced by a broader view in which law becomes part of

a regulatory world in which regulation has multiple levels and sources. This broader view of regulation is nicely captured in the definition of regulation as 'influencing the flow of events' (Parker and Braithwaite 2003: 119). This, as we discuss in the final section of this introduction, pushes regulatory theory in the direction of much greater engagement with processes of change and responses to change. A lot of RegNet's ideas about regulation turn out to be ideas about processes: processes of escalation up and down enforcement pyramids and processes for bringing together victims and offenders into restorative justice circles. This wider definition of regulation underpins much of the writing by RegNet scholars and has, among other things, led to theories of networked, nodal or polycentric regulation or governance (see Holley and Shearing, Chapter 10; Brewer, Chapter 26; Maher, Chapter 39; and Holley, Chapter 42, this volume). In these types of theories, regulation emerges as increasingly networked interventions in processes of institutional change.

Much of the work done by RegNet scholars on institutions has been aimed not at a general theory of institutional change so much as at an understanding of how individuals engage (or do not engage) with institutions. Valerie Braithwaite's (1995, 2009) concept of motivational postures has been foundational to understanding this engagement and, in particular, how those in positions of regulatory authority might better learn to look for and interpret the signals coming from individuals reacting to regulatory interventions. Motivational postures are a composite of values and beliefs about authority that are held by individuals and used by them to enter into a positioning game with regulatory authorities. The positioning game is a dynamic process in which individuals may choose a posture such as commitment but at some later point, because of an adverse experience, adopt a posture of resistance or disengagement from authority. Whether regulatory authorities realise it or not they operate in regulatory domains that are saturated with signals from individuals about how close to or distant from the goals of the authority each individual views herself. Motivational postures of resistance and disengagement are linked to actions of defiance, with defiance itself taking on two distinct forms: resistant or dismissive. Without elaborating the distinction in detail, resistant defiance targets particular rules of an authority for change while dismissive defiance targets the very legitimacy of the authority itself. The dismissively defiant are much more likely to enter behavioural worlds in which the reach of authority no longer matters.

Motivational postures are empirical constructs arrived at by means of statistical testing of large-scale survey data obtained from specific domains such as tax regulation. Although the theory of motivational postures has been tested in domain-specific contexts and is closely linked to theorising about regulatory compliance, it is also relevant to a more generalised theory of institutional change. For example, the apparently sudden collapse of institutions or states, as in the case of former Soviet Bloc states, might have its micro-foundations in a long lead-up period in which individual citizens increasingly adopt motivational postures that enable defiance. Regulators that do not actively scan their respective domains for signalling behaviour and put effort into interpreting its processual implications may end up learning about its meaning when they are confronted by a 'sudden' mass movement—a movement that is coordinated by leaders in whom the defiant have vested their hopes. The mass movement may seem sudden but it will generally have a long history in the form of trails of psychological engagement/disengagement by individuals with the institution to which the mass movement is the latest and now, worryingly for authorities, potentially highly coordinated response. Pretty well everyone was surprised by the collapse of European communism, but in retrospect they should not have been. More recently, the results of the Brexit referendum and the 2016 US Presidential elections came out of the blue to most of us. In both cases, we seem to explain with retrospective ease what we never saw coming. Perhaps with a better analysis we would suffer fewer surprises.

So far we have seen that two themes weave their way through much of RegNet scholarship. The first is a focus on the possibilities of regulatory change and improvement in the state when the tasks of regulation have become radically re-redistributed (a theme we explore in Section 5). The second is an emphasis on the use of processes to respond to the changing dynamics of regulatory domains (Section 6 discusses the implications of this shift). A third and final theme is the importance of including the emotions in a theory of regulation and, in particular, understanding the potential of institutions to catalyse processes of repair and healing of relationships among individuals. In analysing the connections between emotions and regulatory institutions, RegNet scholars have been early movers in a more general movement within the social sciences that has exposed the limits of rationality in explaining and predicting human behaviour and has begun to look to the emotions for a fuller understanding of our chosen actions. The next section expands on this theme.

4. The emotions as regulators

David Hume, perhaps more than any other philosopher, formulated the relationship between reason and the passions in provocative terms. Reason is, he argued, the 'slave of the passions', its role being 'to serve and obey them' (Hume 1739: 217). Responses to this particular provocation by Hume were slow to gather, as philosophy and the social sciences for much of the twentieth century focused on reason, assuming that its study would unlock most of what was important about the mental and behavioural life of human beings. Over the past several decades, more of social sciences, as well as the sciences, have developed theories and models of the emotions, perhaps even 'over-intellectualizing' the emotions (Goldie 2000: 3). The greater focus on emotions is to be welcomed because, among other things, it has helped to widen the discussion of what the ultimate objects of an economic system might be, prompting data-driven investigations of the links among the emotions, progress and economic systems (see, for example, Helliwell et al. 2015).

Emotions may help to account for the long-running ideological debates over regulation, but it remains true that theories of emotion do not generally feature strongly in theorising about regulation. Implicitly or explicitly, the use of regulatory tools and strategies by a regulator to alter the behaviour of regulatees is dominated by the assumption of rationality. The relevant binary is thought to be rational/irrational rather than rational/emotional. Our intention here is not to question the robustness of the rationality assumption. If anything, regulators around the world do not make enough contextual use of the links between, for example, rationality and deterrence. For example, multinationals generally have superior information and resources compared with national regulators. The use of financial penalties will often not change the cost–benefit calculations of these multinationals when it comes to compliance with regulatory standards. However, threatening to strip these multinationals of their intellectual property rights might be a much more effective means of deterrence because in today's global knowledge economy multinationals all depend on intellectual property rights such as trademarks for their income and valuation.

The assumption of rationality has to remain a part of our regulatory world view, but this does prevent an exploration of theories of the emotions and their implications for regulation and institutions. The challenge in opening up the emotions for investigation is the

difficulty of generating universals about them. As Jon Elster (2007: 146) points out, for every supposed attribute of an emotion, counterexamples can be found. They may or may not generate action, they may be fleeting or long lasting—sometimes, seemingly, as in the case of anger, pride or shame, being transmitted across generations. For the physicist, it would be similar to trying to write equations about a universe in which the electrons carried a negative charge at some times, a positive one on other occasions and no charge at other times, with variations in intensity, time and place, and with all other particles also behaving as if they were carrying fluctuating rather than stable charges. Whatever laws we might write to describe this universe they would not be of the kind 'all As are Bs'.

One issue of major significance for regulatory theory lies in the causal attributes of the emotions and, in particular, whether emotions are dependent on beliefs or in some way account for the origins of our beliefs (Frijda et al. 2000). The former account suggests the comforting possibility that mounting evidence will eventually overcome those emotional commitments fuelled by false world views. The emotional genesis of beliefs is a less comforting hypothesis because emotion may so suffuse an actor's world view that no amount of contrary evidence will change an actor's beliefs. So, for example, irrespective of the evidence around the inadequacy of gun control in the United States, its National Rifle Association will defiantly hold on to its beliefs and maintain its adopted identity of civil rights defender. The existence of emotionally resilient but false beliefs can create regulatory problems on a national or transnational scale, as does, for example, the belief in the curative powers of rhino horn (see Ayling, Chapter 29, this volume). In a world where truth is not a self-executing regulatory tool of persuasion do we return to the pre-Socratic traditions of rhetoric to influence emotion and therefore outcomes? In reality, these techniques have never left practical life and politics, only that nowadays they are practised on digital media at a speed and scale unimaginable to the rhetoricians of Ancient Greece. Social media, as Peter Grabosky (2016) has argued, has made the use of ridicule an even more potent form of regulation.

Hopefully, to use an emotional term, it should be clear that theories of emotion as well as specific emotions such as shame and pride deserve more attention in regulatory scholarship. The psychology of rationality, along with its heuristics and biases, continues to occupy much of the social sciences' stage (see Gilovich et al. 2002). Well-developed theories

of framing help to explain why a food manufacturer will advertise its chocolate bars as 'fat-reduced' rather than 'fat-included'. If we were totally rational utility calculators, the presentational language around products would not make a difference and manufacturers would not invest in developing and using it. Understanding the contextual fallibility of rationality is only one small part of understanding human behaviour. As Aristotle suggested long ago in his *On Rhetoric*, there are different paths to persuasion, of altering the course of affairs, including through the awakening of emotions. There are famous chapters in *On Rhetoric* discussing paired emotions such as anger and calmness, friendliness and hate, fear and confidence and shame and shamelessness. The emotions, if the Greek myths are any guide, are likely to explain at least as much of the judgements of men and women as theories of cognitive heuristics and biases.

As the chapters by Valerie Braithwaite (Chapter 2), Kristina Murphy (Chapter 3), Nathan Harris (Chapter 4) and Heather Strang (Chapter 28) show, the connections between emotion and regulation have formed an important part of the RegNet corpus, with much of the foundational work being done in the years when RegNet's formation was conceived. Examples of this early pioneering conceptual work that have carried over into RegNet projects include John Braithwaite's *Crime, Shame and Reintegration* (1989), Eliza Ahmed et al.'s *Shame Management through Reintegration* (2001) and Valerie Braithwaite's (1995) work on motivational postures to explain the variety of individual responses to regulatory authority. From these beginnings, RegNet's engagement with emotion theory has widened to include a focus on institutions of hope (Braithwaite 2004).

5. Redistributing regulation

In their contribution to this volume, Holley and Shearing recall the frontispiece to Hobbes's *Leviathan*, which encapsulates a whole political philosophy, topography and armoury in one deftly drawn page. At its centre, and towering over the well-ordered society ('Commonwealth') in the foreground, is the sovereign, literal embodiment of his people and indispensable guarantor of their lives and any chance of 'commodious living'. His huge sword, which also towers over the landscape, protects and enforces obedience among the populace living in the tidy settlement below.

Obedience to what and to whom? Hobbes makes clear in the text of *Leviathan* that the sword is the necessary handmaiden of the *law*, which 'is not counsel, but command; nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him' (Hobbes 1946: 172). And who can issue such commands? 'The legislator in all Commonwealths is only the sovereign' and 'none can abrogate a law made, but the sovereign' (Hobbes 1946: 173).

Hobbes's philosophy has been endorsed, amended and rejected by scores of later hands, but the political frame and architecture that he half-observed, half-designed and the elements—sovereign state, law and rule—that he regarded as foundational to it, have over centuries remained at the heart of Western political imaginaries. Some wanted *Leviathan pur sang*; others wanted to moderate it, tame it and make it benevolent. Anarchists loathed it, but, as exceptions that prove the rule, their aim was defined by it: their focus was on *Leviathan*, even as their aim was to destroy it. In the meantime, sovereign, rule and law were what we supposedly had to deal with in the normal course.

Certainly, that is what generations of legal theorists have assumed. Anglophone lawyers learnt from John Austin that 'law is the command of a sovereign to habitually obedient subjects'; Continentals examined variations of the *Rechtsstaat* or *état de droit* or *stato di diritto*. The terms (and meanings; see Krygier 2015) differ, but the locations and occupants of them, and their instruments of rule, less so.

Within this frame, regulation appears as a subcategory, a species, of law. Thus, Orbach explains:

> People intuitively understand the word 'regulation' to mean government intervention in liberty and choices—through legal rules that define the legally available options and through legal rules that manipulate incentives. (Orbach 2012: 3)

Narrowly construed, regulation is commonly reduced to a technical meaning of subordinate rules passed to amplify the operation of a statute. Even in its broader sense, the meaning of regulation remained narrow; regulation was carried out by states using law. Governance was also part of an analytical jurisprudential circle in which the state was the primary governor and good governance was about the rule of rules (rules being the essence of law).

Indeed, while the literature on governance is a little akin to a big-bang phenomenon, many definitions of governance retain this jurisprudential influence. The World Bank, for example, as part of its worldwide governance indicators work, presents governance as consisting of 'the traditions and institutions by which authority in a country is exercised', including the selection of governments (see World Bank 2015).

So: sovereign/state/government > laws > regulations > society. Those of a sociological inclination often switch the first and last place-holders, so that society comes first. Either way, these are the familiar parts of a picture easily visualised. You might be friendly or hostile to any element in the picture, think it works well or ill, but its place in the landscape can be assumed. A major finding of regulation theory is, however, that it cannot.

One way in which that finding is expressed is in discussion of 'meta-regulation'. The Greek term '*meta*' implies that in talking about meta-regulation we are referring to something beyond regulation. What lies beyond regulation, as commonly understood? RegNet theorists use the term to draw attention to two phenomena. The first is that regulation is not just something that applies directly to objects but may itself be an object of regulation. The answer to the question of what lies beyond regulation is more regulation. The point of the second use of the term is to redraw the map more radically: it is that the activity of regulation has many sources other than the state (multisource regulation).

In the first sense, the regulation of the regulatory process still often has the state at the centre, but the distance between it and its targets increases, intervening actors between it and them are introduced and sometimes targets themselves are enlisted in the processes of supervised self-regulation. Thus, Braithwaite's model (1982) of enforced self-regulation, which gave origin to this use of the term, begins from the premise that the state will, in the context of corporate crime, generally fail when making corporations the direct object of regulation because of resource issues (for example, not enough inspectors, not enough technical expertise). The model has two prescriptive elements, the first of which is to switch to making the self-regulation of corporations the object of regulation, with the second being to strengthen the process of self-regulation so that it is more likely to generate the social benefits of compliance rather than the private rewards of noncompliance. In short form, this means the state requiring corporations to develop credible rules around, for example, accounting standards and then enhancing

the capacity of corporate compliance units to act independently in the enforcement of those rules. Enforced self-regulation is all about finding ways to tilt the exercise of the discretionary core of self-regulation into the zone of socially responsible decision-making.

In the second usage of the term, the redistribution of tasks—often called the 'decentring' of the state—is more wideranging; indeed, it is multiple. The state is decentred, so is law, so too regulation. We speak of redistribution rather than the more common 'decentring', since moving from the centre is only part of the story. A lot more has been found to be happening than that. Thus, the early work on multisource regulation by Peter Grabosky (for the history, see Grabosky, Chapter 9, this volume) and John Braithwaite has blossomed into a field of research by RegNet scholars on the role of third parties in regulation that looks at, for example, how professionals can infiltrate corporations to render them more 'open' (Parker 2002); how banks, non-governmental organisations (NGOs) and online auction houses might be drawn into a regulatory strategy to help make progress on seemingly intractable problems such as the illegal taking and trafficking of wildlife and timber and the international dumping of toxic waste (see Ayling, Chapter 29, this volume); or how intellectual property owners, the US state and payment providers such as Visa, Mastercard and PayPal have formed a global enforcement network that reaches across borders to close websites believed to be infringing intellectual property rights (see Tusikov, Chapter 20, this volume).

Conceiving of regulation as being multisourced leads, as many chapters of this book discuss, into theories of polycentric, networked, nodal, decentred, new, plural or collaborative governance or regulation (see, in particular, Brewer, Chapter 26; Holley and Shearing, Chapter 10; Holley, Chapter 42; and van der Heijden, Chapter 41, this volume). At the risk of offending proponents of these labels, the differences among these approaches are more of nuance than of kind, with all recognising that regulation no longer has one exclusive command centre and that rising interconnectedness characterises the relationship among the many centres and sources of regulation in the modern world. So, for example, if one focuses more on the qualities and capabilities of organisational sites of governance then one can usefully think of this dimension of governance as nodal governance. If, on the other hand, one is more interested in the interaction among nodes (where nodes now

refers to any set of objects making up a network) then one can think of this as networked governance. Placing the emphasis on the influence of non-state actors leads to decentred or polycentric governance.

The network concept is highly relevant for regulatory studies because it offers a better description of how regulation is changing, as well as allowing researchers to focus on both the structure of regulation and the strategic behaviour of actors within regulatory domains (Easley and Kleinberg 2010: 4–6). It is also useful since it allows us to track connections that exist both within and without the boundaries of states, without needing to make some conceptual leap or contortion, in the face of empirical links that are often seamless and borderless.

For the most part, RegNet's researchers have not followed the precise metrics of social network analysis (SNA) (for example, measures of density, centrality, fragmentation; see Everton 2012: 11–12), although, as Russell Brewer's chapter makes clear, some use has been made of SNA techniques in studying crime (see, in particular, the references to the work of Benoit Du Pont). RegNet researchers have been more interested in networks that form 'webs of influence' (Braithwaite and Drahos 2000: 550) than in the algorithmic mapping of the actors and their ties in a network. One can have a network, such as the names in a telephone directory, without that network constituting a web of influence. Webs of influence are constructed, in the jargon of philosophers, by intentional agents acting on their beliefs and desires to intervene in processes. Through disaggregation into webs of dialogue, coercion and reward, webs of influence provide a more fine-grained explanation of how power is used within such networks to secure regulatory outcomes and bring about institutional change. The focus of RegNet researchers has predominantly been on behavioural dynamics within these distinctive types of networks, as well as on the possibilities for weaker actors such as groups of indigenous people (Drahos 2014), small farmers in developing countries (Hutchens 2009) or scientists fighting for open-source principles (Hope 2007) to create strands that may be tied to webs of empowerment across space and, as Terry Halliday's Chapter 18 in this volume suggests, across time. Network thinking, it is fair to say, has become part of the attitude of responsiveness (Drahos 2004).

Apart from shifting topographies, matters of style also change with location—not now 'meta' but what might be 'better' or 'smarter' (see Gunningham and Sinclair, Chapter 8, this volume). When regulation moves from the state to various differently configured 'nodes',

it shifts not merely in space but often also in kind. RegNet researchers have found, and have recommended, hosts of kinds of regulation, in hosts of kinds of places, generated by hosts of different actors, which 'challenge rulish presumptions', as John Braithwaite puts it. Rules might still matter inside and outside states and law, but, even where they do, there are many contexts in which they 'derive strength from being woven with other strands into a fabric of flexible regulation' (Charlesworth, Chapter 21, this volume).

Where the state is and what it does in relation to particular forms and styles of regulation are matters to be discovered and analysed. They can no longer—if they ever could—be assumed. States have a range of powers for good and ill that few other institutions, even today, can match, and there are many contexts where it might indeed turn out that 'the state remains at the centre of regulatory space' (Grabosky, Chapter 9, this volume). The point is that the extent to which this is so must be a matter of theorisation and investigation, not presumption, and what theory and investigation we have suggest that it varies hugely between societies and across domains.

So none of this is to suggest—and no one at RegNet does suggest—that states are irrelevant or laws of no use to regulation. Rather, the state and its law are not always to be found at the centre of the action, nor are they always the best things to be found there. That does not mean they are unimportant. Nor even that we know as a general truth what else can/should replace them or what it should do. What we do know, or are coming to see, is that assuming there is one entity, in one metaphorical space, behaving in one commanding way, to which regulation is or must be attributed, is both empirically misleading and normatively misguided. Indeed, even to think of regulation as a *thing*, and the process of regulation as imposing things of one sort on things of another, already misleads.

6. Things and processes

Consider the disarmingly simple definition of regulation as 'influencing the flow of events' (Parker and Braithwaite 2003: 119). The greater attention being paid to regulation and governance within the social sciences is a long story, but in abstract terms it has to do with ideas and concepts that shift the focus from an ontology of things to an ontology of process. So, to illustrate, Michel Foucault's (1980: 98) insight that power

circulates rather than being a thing possessed by a sovereign represents one of many starting points to seeing power and governance in network terms. Friedrich von Hayek (1945), to take a rather different thinker, also contributes to an ontology of process though his insights concerning the dispersal of knowledge among individuals and how markets can bring about economic processes of spontaneous ordering based on the use of this knowledge. A third and final example is the emergence in the twentieth century of philosophical ideas about language that spread to produce, among other things, analyses of rights not as entities, but as behavioural outcomes of speech act processes (Jackson 2010) and legal concepts as the outcomes of processes engaged in by interpretative communities (Robertson 2014).

Conceiving of regulation as influencing the flow of events connects regulation to the study of processes—processes that spread in terms of their ordering effects far beyond anything that is captured by thinking of regulation as rules commanded by a sovereign holding the authority to do so, or indeed any jurisprudential theory that ascribes to regulation the essentialising characteristic it has selected for law. The enforcement pyramid in responsive regulation is an example of how, in much of the work done by RegNet scholars, there is a mild ontic commitment to the category of process. The pyramid comprises sequenced interventions that begin with processes of dialogue and persuasion and escalate to processes of punishment. Whether or not processes of intervention will produce compliance is contingent on a variety of other processes. Compliance with gun regulation will depend on, for example, institutional processes of procedural fairness, as well as the role emotion plays in the genesis of beliefs held by an individual about the need to possess guns. Emotion theory suggests that some psychological processes may not be responsive to processes of intervention based on rational persuasion or procedural fairness because, as Valerie Braithwaite's chapter makes clear, the emotions have set individuals on a path of disengagement that pushes them towards the precipice of coercion and counter-coercion.

Whether process is the most important ontological category for understanding the world (as opposed to categories such as objects or events) is an issue for professional metaphysicians using their analytical tools of investigation. Process is certainly a useful category for regulatory studies in that it helps us to make sense of observable data. We can identify many chemical and biological processes of transformation in the physical world. Even if we begin with a study of events, we may

end up with a much wider investigation of the processes that enable us to understand those events as part of a pattern. So, for example, we can think of forest fires as events, but explaining their frequency will very likely be connected to deeper processes of climate change. In the social world, the study of processes allows us to follow trails of evidence across contexts and scale, jumping the fences of the social science disciplines as we go. For example, studying the shame of a people within a nation and the shame of an individual within a group may reveal processes of formation common to both, perhaps suggesting processes for the peaceful resolution of shame capable of applying across contexts (Ahmed et al. 2001: 3). More abstractly, process has some claim to be the naturalistic starting point for the development of concepts that unite micro and macro contexts of regulation. By linking regulation to the study of processes of intervention or influence in other processes, we can draw on the insights of thinkers as different as Hayek and Foucault and work our way towards a more coherent and general theory of regulation. Once we tread this processual path, the distinction between regulation and governance becomes blurred and perhaps collapses altogether. If a distinction is needed, one can see them as part of a continuum in which the focus of regulation is on actors and their modes of intervention or influence, while in governance we focus more on the normative attributes (for example, accountability, authority, legitimacy) of institutions.

Summing up, linking regulation to the category of process creates a link between regulatory theory and what appears to be true—namely, that we live in a world where processes from the most microscopic to the most macroscopic are everywhere. If we adopt the responsive attitude to regulation, our approach should be to study this multiplicity of processes to better intervene in them. What has been learned from this study of processes occupies the remaining chapters of this volume.

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Section 1: Social-psychological foundations and methodological issues

Under Valerie Braithwaite's leadership, RegNet has a long history of exploring the psychological underpinnings of regulatory institutions such as tax or institutionalised virtues such as trust. The goal has been more to produce an understanding of how individuals engage (or do not engage) with institutions than to produce a general theory of institutional change.

Valerie Braithwaite's chapter draws together much of the work done by RegNet scholars on the psychological processes that underpin individual responses to regulatory institutions. Key explanatory concepts here are motivational postures of accommodation and defiance towards authority and the way these are, in turn, shaped by interaction among the different parts of the individual psychological self, such as the moral, grievance and status-seeking selves. Kristina Murphy focuses on how the use of procedural justice by authorities may draw out the moral self in citizens, highlighting, however, that procedural justice does not operate mechanically to produce greater compliance. Compliance and other regulatory concepts have been dominated by the assumption of rationality in processes of human decision-making. Nathan Harris,

noting the greater attention being paid to the emotions by regulatory scholarship, analyses the various effects of shame and the ways in which it should or should not be used in regulatory settings.

The final two chapters of this section introduce the reader to the various methods employed by RegNet scholars (the reader will also find more on these methods in Brewer, Chapter 26; Burris, Chapter 32; and Broadhurst and Alazab, Chapter 30, this volume). Ibolya Losoncz describes the psychological methods, introduces the reader to the philosophical issues that sit behind choices of methodology and locates much of the work of the RegNet group within the critical realist tradition—a tradition that stays sensitive to the empirics of causality, as well as the need to look for theoretical reconceptualisations of regulation that open up causal fields in new ways for investigation and testing. One way into the complexity of these fields, their linked levels and subjective meanings is through multi-sited fieldwork, with such fieldwork central to many RegNet projects, including on globalisation (see Drahos, Chapter 15, this volume). Kathryn Henne's chapter analyses the strengths and appropriate uses of this method.

2

Closing the gap between regulation and the community

Valerie Braithwaite

1. Introduction: Regulation—from social dread to social 'cred'

For most people, 'to regulate' means to control or direct others by rules or standards. The term can carry negative baggage, particularly when attached to government. Rightly or wrongly, government regulation has connotations of a powerful authority 'making' people do things they would not otherwise do and generally interfering in people's lives in intrusive and wasteful ways.

Regulation need not be this way. First, it need not be dominating. We can agree to regulation and participate in it. Second, it need not involve government. In an era where governance is global and nodal, we find ourselves being regulated by international bodies, professional associations, trade agreements, markets, private industries, local entities and even event organisers unknown to us. And third, regulation may of course serve a useful and important function for the community. It may enhance wellbeing—as through quality standards in health care, education, food, water and housing—provide consumer protection and safeguard our security and rights.

So why do we hear the word regulation and think bureaucratic overload instead of valuable community oversight? If regulation has been gift-wrapped as Pandora's box to which government alone holds the key, it is time for us to undo the wrapping and be part of the conversation about the contents of the box and how to best manage its harms. As a social activity that includes persuasion, learning, praise, emulation, self-regulation, influence, voluntary compliance, along with its usual companions, deterrence and coercion, the term 'regulation' might lose its mystery and remoteness. We can recognise regulation as something we all engage in when we intervene purposefully in any social world.

As social beings, our acts of regulation are endless. On a daily basis, we shepherd each other at home, school, work and play: holding a child's hand when crossing a road, giving others feedback on their written work, complimenting a person on a job well done, showing appreciation of another's thoughtfulness, reciprocating a favour or offering advice to a person in distress. New forms of formal regulation should never be about undermining the social fabric that regulates effectively. The purpose should be to strengthen the useful aspects of informal regulation that are already in play, complementing, not undermining, them. So, for instance, we teach a child to watch the traffic lights as we cross a road, we assess and review papers to improve their quality, we have awards for excellence in performance and extraordinary acts of kindness, and we have help lines and emergency numbers to phone for assistance. None of these regulatory measures weakens the natural systems of social regulation already in place. Rather, formal regulatory measures build on the informal. They become a welcome part of the flow of everyday life because they are judged to add value.

Looking at regulation through a social lens may seem to some to miss the mark, given the many regulatory activities we witness occurring at a distance from human beings. Simple regulatory measures in this category include building pathways, gates and walls. More sophisticated examples are the technological surveillance of money transfers, tracking devices on aircraft, withholding pension payments from wages, income management within social security systems, satellite imaging of vegetation and forest degradation, desk analyses of big data, paper trails and record keeping and the highly technical, complex and voluminous tax code. Such high-tech approaches combined with intricate design rules that allow only an elite to understand the game makes 'the social' in regulation seem quaint, if not entirely the wrong genre for analysis.

It is important, however, to differentiate mechanism from purpose. Mechanisms at times may be devoid of the social, being impenetrable and invisible to us. Yet their purpose may be deeply social and have far-reaching consequences for a society. The use of drones to drop bombs in war zones is distant from us. They are the weapons of politicians, though they may also deny responsibility with a moral defence of distance. Drones are highly sophisticated, 'thinking' machines that do their jobs devoid of human intervention. The consequences, however, may involve the destruction of towns and villages, and the loss of civilian lives. The consequences are not only highly social, but also political. 'Human hands-off' technology may destroy not only societies and culture, but also international cooperation and trust. So-called asocial interventions change the social fabric and relationships beyond the zones in which they operate. Regulatory purpose, as Christine Parker and John Braithwaite (2003) express it, is to steer the flow of events. Steering at some point takes place through, or impacts on, people; people at some point become aware of changes in the flow of events, they give meaning to events and meaning plays an important role in determining regulatory outcomes, not only on that occasion but also in future.

2. An example: Higher education in Australia

Australia's higher education contingent loan scheme provides a fitting example of why shared meanings of regulation in the community are important. The Australian Government replaced free tertiary education in 1989 with a scheme whereby government paid universities for a student's tuition through a loan, which was to be repaid by the student when her income exceeded a certain level. Policymakers hailed it a brilliant regulatory strategy. The idea was exported to other countries, including the United Kingdom. The public, however, did not agree, as Eliza Ahmed demonstrated in a series of analyses of tax and loan repayment (Ahmed and Braithwaite 2004, 2005, 2007; Braithwaite and Ahmed 2005). Students who considered the scheme unjust and who were less than satisfied with the education they received acted out their grievance through shifting the focus of their retribution from the government to the tax system. The tax system, used to collect the Higher Education Contribution Scheme (HECS) debt, became the target of abuse for work-related expenses and undeclared income. This was a paradoxical regulatory result given that a rationale for abolishing free higher education was that the public was said to be unwilling to pay higher taxes for free education for their children.

This tax blowback was symptomatic of trouble to come. The government's attempt to reform the tertiary sector in 2015 collapsed, with the feared cost of tertiary education fees being no small part of the community backlash. A lost Arcadia of free tertiary education lay dormant as a benchmark and high point of Australia's tertiary education system—not according to the technocrats of Treasury and higher education policymaking, but in the meaning ascribed to it by ordinary Australians. Free tertiary education meant a fair go and equal opportunity for one's children and grandchildren.

The interpretation and meaning given to regulation by those being regulated may not match that of regulators. If the gap in sense-making is associated with low trust, cooperation may be jeopardised. Cooperation does not guarantee regulatory success, but it helps. Cooperation and willingness to comply are most likely to occur if those being regulated see benefits, believe the regulation is fair and feel a sense of obligation to defer to a regulating authority's wishes. It also helps if alternative authorities (for example, peak bodies or international organisations) endorse the regulator's efforts and do not lead a campaign to steer the flow of events in different directions. These dynamics are all part of the compliance process in a democratic society.

3. Foundation concept: Compliance as process

Compliance has two usages: outcome and process. First, it may represent an outcome of a regulatory intervention. Did the regulated party do what was required according to law or the demand of the regulator? Was a tax return filed on time at the behest of a tax authority? Was a restraining order adhered to at the behest of the court? Was a security alarm activated in a building at the behest of an insurance company? Was a car securely locked? Were dietary restrictions adhered to at the behest of a doctor? Compliance as outcome tends to be specific, behavioural and measurable.

Compliance as process is a broader, relational concept. Compliance as process bridges the world of the regulated and the world of the regulator. From the perspective of the regulated, it incorporates our understanding of what an authority wants us to do, the purpose behind the regulation,

whether or not we agree with it, how we evaluate implementation of the regulations and what our attitudes and behavioural intentions are with regard to the regulatory request and the authority.

From the perspective of regulators, compliance as process asks what effort has a regulatory authority made to elicit compliance and what have alternative authorities been doing: contesting the actions of the lead regulator or endorsing them? How regulators and regulatees view each other and negotiate the compliance space is relevant not only to compliance as outcome, but also to the future legitimacy and trustworthiness of the regulatory system more generally.

Compliance as process involves mapping the regulatory actors in what Meidinger (1987) calls the 'regulatory community'. A regulatory community comprises different subcultural groups with their own values, norms, beliefs and processes. Through their leaders, they may undermine regulatory authority or extend its reach. They use their networks and alliances to push back and shape the actions of the regulator, just as the lead regulator uses its power and authority to steer the flow of events in the direction it wants.

4. Freedom, respect and procedural fairness: Regulatory principles to live by

The RegNet community philosophy has always been to respect pushback wherever it comes from. This is why compliance as process has such appeal in our work. We do not assume that those with power always have it right. And we do not assume that regulation is the answer to all social ills. Indeed, Peter Grabosky's (1995) work on unintended consequences demonstrates how the best of intentions in regulation can go horribly wrong. Debate and contestation over what regulation might achieve and how best to regulate in the context of democratic governance are at the core of our conception of good regulatory practice.

Two meta-principles have guided our work in RegNet. The first is to use regulation sparingly, introducing formal regulation only when it is necessary as a means of structural reform to further the Republican principle of 'freedom as non-domination' (Pettit 1997). The right kind of regulation is that which reduces the amount of domination (increases the quantum of freedom) in the world (J Braithwaite et al. 2007).

The second meta-principle is consistent with the first, but focuses specifically on how a regulatory system should operate and how regulators should engage with the community—that is, with respect and procedural fairness (see Murphy, Chapter 3, this volume).

Freedom as non-domination, respect and procedural fairness are held as desirable principles in their own right. They also serve another function. When regulations are designed following these principles, cooperation and voluntary compliance are likely to be higher and fewer parties are likely to need coercive measures to comply.

This approach should be tantalising for a regulator: a regulatory system that runs essentially on goodwill with regulatory effort dedicated to the recalcitrant few. Why should this not be the normal experience with government regulation? Globally, workplaces mostly manage to run this way. Locally, families do, too. How, then, can we replicate this across our society?

5. Regulating well: The wheel of social alignments

One way of thinking about how to turn this aspiration into a practical implementation plan is through the wheel of social alignments represented in Figure 2.1.

The wheel of social alignments was developed by the author to guide regulatory conversation and responsiveness in the regulatory community. The model grew out of work in the Centre for Tax System Integrity (CTSI, 1999–2005) undertaken by Eliza Ahmed, John Braithwaite, Nathan Harris, Kersty Hobson, Jenny Job, Kristina Murphy, Greg Rawlings, Declan Roche, Yuka Sakurai, Natalie Taylor and Michael Wenzel. The work of the centre challenged traditional deterrence theory as the approach best suited to understanding tax compliance. The odds of detection and penalties were so low that it was rational to cheat on tax, yet most people did not. The CTSI research focused in particular on the importance of the social-psychological determinants of compliance: norms, values, identity, shame, guilt and trust (Braithwaite and Wenzel 2008).

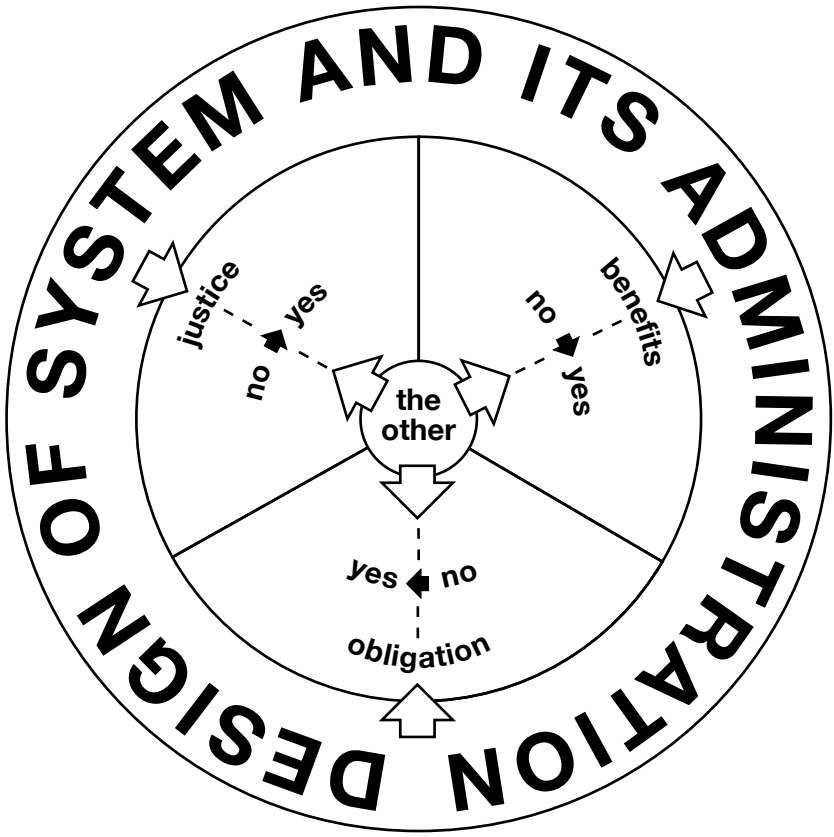

Figure 2.1 Tracking the process: Wheel of social alignments
Source: Author's research.

The wheel integrates the results of this work into bands and segments that a regulatory authority needs to monitor systematically if they are to regulate in accord with the democratic and republican meta-principles above.

The outer band of the wheel represents the design of the regulatory system. This part sets out the legislation, guidance for interpretation and policy intent, investigative rules and enforcement practices, principles of governance and administrative practices. The outer band incorporates the activities of the regulator and the base from which the regulator works.

The middle band represents how those who are being regulated evaluate what is being asked of them and the primary factors shaping compliance. Conflict with authority is most likely to arise around the failure of regulations to: 1) provide benefits; 2) ensure justice; and 3) elicit moral obligation. Michael Wenzel provided an extra dimension to these considerations through demonstrating that each of us identifies with our own interests, as well as with the interests of the many groups to which we belong. Depending on our level of identification at the time—from personal to national—our evaluation and discussion of benefits, justice and obligation change. Regulatory leadership is necessary to convince us which collective identity we should put forward to facilitate collective action.

If leadership is not forthcoming and we remain unconvinced of the value of the regulations for the community, even if not for us personally, we may turn to other sources for advice. The inner core of the wheel represents 'the other'—the significant voices or nodes of influence that shape our views and to which we turn to formulate a regulatory response. 'The other' in the regulatory community thereby can take on the role of an alternative authority. The role is strengthened when there is confusion, uncertainty, dissension and loss of trust in the system as represented by the outer circle in Figure 2.1. For taxpayers, the alternative authority may be aggressive tax planners; for young disenfranchised Muslims, it might be Islamic State; for unskilled, marginalised workers engaging in unsafe work practices, it may be their hire company or recruitment agency.

The width of the three bands in Figure 2.1 indicates the degree of dialogue and contestation, and varies with culture and context. The inner core and middle band are likely to be relatively wide when regulators must rely on public cooperation, as is the case with anti-littering laws or safe work practices. When a regulatory system is imposed 'invisibly' without opportunity for noncompliance, the outer band will be wide, leaving the middle band and inner core empty, bereft of dialogue and contestation. This was the case with the collection of metadata and surveillance of private phone calls and emails by the US Government, until the revelations of Edward Snowden in 2013.

The central idea of the wheel of social alignments is that when the parts in Figure 2.1 work harmoniously together, the wheel moves forward. When one part separates from the others, the wheel comes to a stop or is difficult to move until repaired through dialogue, responsiveness

and regulatory leadership. The greatest risk to forward momentum is defiance by individuals or groups who form alliances to confront the regulatory authority with its failings. Examples of alliances of defiance that demonstrate 'the strength of weak ties' (Granovetter 1973) in the regulatory context include the Boston tea party, with its chants of 'no taxation without representation' (1773), Australia's Eureka Stockade (1854), Gandhi's Salt March in India (1930), the 1960s US civil rights movement, Nelson Mandela and the African National Congress's fight against apartheid in South Africa through the second half of the twentieth century, Czechoslovakia's Velvet Revolution (1989) and, more recently, public protests against police brutality in the United States.

6. Responding to authority: Defiance and motivational postures

Defiance can be understood not only as an act of combustible contrariness, but also as a premeditated response when a regulatory authority threatens identity. Authority threatens by virtue of being an authority—an entity that can take away one's freedom to act as one pleases. From the moment of birth, we learn to cope with authority: parents, teachers, work bosses, an array of professionals whose role is to advise and care and officials from the government and private spheres. We are well practised in dealing with authority that exercises control over what we do.

Motivational postures refer to the signals or messages that we send to authority about the control it purportedly has over us. Motivational postures are sets of beliefs and attitudes that sum up how individuals feel about and wish to position themselves in relation to authority: they communicate social distance. Social distance has two aspects: liking and deference. Liking and deference often go together, but not always. Theoretically, they are distinct. I may like and admire my supervisor in the sense that I have positive emotions towards her, but I may not always defer to her judgement of how I should progress my career. I may judge her not to be an authority on what is best for me. On the other hand, I may defer to her judgement on every occasion because of her capacity to help me further my career, but I may not particularly like or admire the way she operates. In other words, we may be satisfied with and approve of an authority, but not defer to the requests it makes of us. Or we may defer, but not think well of the authority to which we are deferring.

The five motivational postures are empirically derived. We have found that people adopt these postures in many different areas of regulation, from aged care regulation and taxation to the regulation of civil wars (J Braithwaite et al. 2007, 2010; V Braithwaite 2009). First, we may display the posture of *commitment*—that is, we may communicate to the authority that we believe it has a worthy mission and we feel duty bound to support its work. Or we may recognise the authority, but be somewhat less enthusiastic or agnostic about what it does. That is, we may signal *capitulation*: 'Tell me what you want of me and I will do it; you're probably legitimate and I don't want trouble.'

Both commitment and capitulation are postures of accommodation to authority. In a democracy, both tend to be strong. Regulatory bodies that do not command support from a critical mass do not last long, as Bernstein (1955) observed in his study of US railway commissions. Railway commissions were legal entities with specialised knowledge that sought to emulate the impartiality and political aloofness of the judicial system. Their complexity and remoteness, however, meant that outsiders lost sight of their purpose and value, and they were dissolved.

In addition to accommodating postures, we may signal defiant postures. We often mix them, hedging our bets in a bid to be self-protective in case the threat from authority escalates. The most common defiant posture is *resistance*. Resistance is healthy in a democracy and signals dissatisfaction with how the authority is doing its job. Resistance, more than any other, is a plea to authority to be fair and respectful. Authorities manage resistance successfully when they introduce greater procedural fairness into the way they operate (see Murphy, Chapter 3, this volume).

Two other defiant postures are less common, but far more threatening to regulators. They are postures that are adopted by those who refuse to defer to the authority's rule. They are postures of dismissiveness. The first is *disengagement*, in which social distance from the authority is greatest. Disengagement involves neither attending nor responding to the authority, but rather continuing business as usual. Disengagement mirrors Merton's (1968) construct of 'retreatism': 'in the society but not of it'. The final dismissive posture of *game playing* takes place in an adversarial space where the regulator is being watched carefully and the objective is winning against the rules. Game playing involves searching for loopholes and ways around the regulatory authority, undermining the authority's effectiveness and its legitimacy.

Postures of accommodation and defiance ebb and flow in all of us and provide regulators with a complex, ever changing set of signals to decipher. It is in response to this challenge that the wheel of social alignments is useful. It reminds regulators to reflect on their own mission and practice and ask if they have all the pieces in place to have earned postures of commitment and capitulation from the public, if they have the institutional mechanisms in place for hearing resistance and responding respectfully and constructively to it and if they have accurately assessed the root causes of disengagement and game playing.

Dealing with disengagement and game-playing, both of which have been empirically related to law violation, seriously challenges an authority's enforcement capacity and legitimacy. The battle here is not about procedural fairness since postures of disengagement and game playing are adopted by those individuals or groups who have no respect for the regulatory institution and expect none in return. The battle is about moral authority: what is the right thing to do (and who has the power to decide)? This requires the force of the law, credible enforcement and society's backing to add normative moral gravitas to the debate.

7. What shapes motivational postures? World views and three selves

Motivational postures sum up our feeling about and responsiveness to authorities. They are shaped in part by stable world views. It is unlikely that wildlife traffickers hold accommodating postures to the World Wide Fund for Nature when it supports local governments in the fight against illegal trafficking. Similarly, supporters of civil liberties are unlikely to adopt accommodating postures to government keeping records of private phone calls and internet usage. In the field of tax compliance, we find that those disillusioned with the democracy feel less obliged to pay tax, as do those who believe in small government and free markets. Those who look to government to care for the vulnerable, on the other hand, willingly pay tax.

While values and world views are important, so, too, are contextual variables. Credible enforcement matters in so far as it signals an authority's (and society's) belief that compliance matters: it is not just obeying rules; it is the right thing to do. When costs and benefits are being weighed up

in a rational or pseudo-rational manner, credible enforcement sways the ledger in the direction of compliance rather than noncompliance, and in the direction of the more accommodating motivational postures.

Just as important as deterrence is how a regulatory authority manages the wilfulness of potential noncompliers. Shame and guilt are powerful emotions for driving compliance (see Harris, Chapter 4, this volume). But when regulators set out to publicly shame regulatees in a stigmatising way, they risk a regulatory stalemate. Stigmatising shaming by authority is likely to induce humiliation and set in train social ostracism. Those affected are likely to express their anger and grievance through fighting back, inflicting reputational damage on the regulator in the process (V Braithwaite et al. 2007). This is why procedural fairness, whatever the regulatory breach happens to be, is so important as part of a regulator's standard operational procedure. The regulatory purpose is to change the harmful behaviour and not be diverted into reputational battles, as Kristina Murphy (2004, 2005) describes in her research on Australian taxpayers. In 1998–99, many were caught in mass-marketed schemes that the Australian Taxation Office judged to be tax-avoidance products, peddled by promoters in the financial planning industry.

Nathan Harris (Chapter 4, this volume) discusses the role of guilt and shame in regulation, but equally important is the role of pride. Eliza Ahmed's work apprises us of how important pride is in a regulatory context, particularly 'humble pride' (Ahmed and Braithwaite 2011). Ahmed draws a distinction between humble and narcissistic pride. Narcissistic pride occurs when individuals garner success to put themselves above others, to be superior and dominate others. Humble pride is about self-respect for our achievements and inner satisfaction, while acknowledging our social infrastructure and its support. Humble pride allows us to be socially in tune with others and is responsive to quiet acts of appreciation and acknowledgement of effort by others that help us achieve success. Recent work on regulating through supports as well as sanctions (Healy 2011) targets our humble pride, recognising and thereby reinforcing our inner belief in our goodness, competence and self-efficacy (Bandura 1986; Jenkins 1994).

Whenever we are faced with a regulatory imperative—as individuals or groups—threat lies in the background. Emotions therefore are triggered as well as reason. One way of thinking about our inner psychic battles when a regulatory agency makes its presence felt is in terms of three selves that step forward to analyse or make sense of the potential threat

for us. There is the moral self that assures us we are good, competent and law abiding, and that the best course of action is not to be afraid, but rather to tend and befriend the regulator. Safety lies in working with the regulators. Then there is the grievance self, the self that feels oppressed and unappreciated, and threatened by impending unreasonable demands and acts of injustice. The grievance self is a threatened self that needs reassurance and support. The third self is the status-seeking self. This self overcomes and solves problems, determinedly pursuing a path of personal achievement and ensuring no real regulatory threat materialises.

These three psychological selves explain how postures ebb and flow. Motivational posturing theory posits that the defiance of resistance comes about when our grievance self is strong, possibly triggered by disrespect from the regulator, and our moral self is weak, possibly left to wither on the vine by the regulator. In contrast, the defiance of dismissiveness of authority (involving disengagement or game playing) pits a strong status-seeking self against a weak moral self.

These three psychological selves reinforce the regulatee's segments in the wheel of social alignments: provide benefits, to be mindful of a status-seeking self; ensure justice, to be mindful of the grievance self; and elicit moral obligation, to be mindful of the moral self. Offending any or all of these selves is likely to make the task of regulating without constant surveillance and coercion extremely difficult.

8. Conclusions: 10 things to know and 10 questions to ask

Ten principles follow from looking at micro–macro regulation through a social-psychological lens and they trigger important regulatory questions for conversation in the regulatory community:

1. Understand that people view a regulatory authority as a potential threat to freedom and wellbeing. This threat exists for those who break the law and those who do not. How is the threat being interpreted by different segments of the community?
2. Know the regulatory objective. Is the purpose to punish or alienate or is it to elicit a substantive improvement and cooperation in the future?

3. Be open and responsive to cases of hardship. Is this individual or organisation being burdened or limited in unexpected and unfair ways by regulation?
4. Deliver procedural justice by treating those being regulated with respect, have clear and transparent procedures and provide reasonable and fair hearings for dissidents. Are various segments in the regulatory community experiencing regulation as an unfair and unreasonable imposition because they see no mechanism for change and are denied a voice in stating and resolving problems?
5. Engage constructively with dissenting voices. Have the regulator and other relevant authorities got it wrong, and is there a better way of dealing with a harm that everyone acknowledges is there?
6. Engage with dissent in terms of social justice. Do the outcomes of the regulation benefit everyone or are the costs and benefits of regulation born disproportionately across the regulatory community?
7. Engage with dissent on moral grounds. Is it right morally to steer the flow of events in the way proposed?
8. Provide hope for the future through recognising and praising strengths openly. Are there acknowledgements and rewards in the system that are set up in such a way as to strengthen internal resolve to achieve the goals of the regulatory system and encourage humble pride among others to do likewise?
9. Return to the scene of noncompliance and reengage with regulatory interventions. Is there a restorative justice and responsive regulatory framework that can be used to simultaneously build commitment to the regulatory system and achieve compliant outcomes?
10. Build networks within the regulatory community to ensure clear communication and exchange of views and information. Will alternative authorities be willing to support the regulator with enforcement challenges or will alternative authorities act as countervailing forces?

These 10 principles and questions emerge from seeing regulation through a social-psychological lens. We have engaged with regulation in this chapter as a set of social institutions that coordinate communities—individuals and organisations alike—with respect and with the minimum amount of intrusion required to redress harms of domination by some that undermine the freedom of others to pursue their hopes and dreams. Seeing regulation in this way may demand

a quality of social nuance in government that is unusual on the world stage these days. But as people turn to a philosophy of individualism to give their life meaning and purpose, as trust in democratically elected governments continues on a downward slide and as alternative authorities see a power vacuum and extend their influence, there seems little option for us collectively but to place our hopes in a transformation where governance and regulation are openly contested and regulatory measures are agreed to with eyes wide open. In other words, the time may have come for a genuine effort to regulate responsively and transparently with inclusion of the nation's residents and citizens. It is time for us together to open this Pandora's box and let hope out.

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3

Procedural justice and its role in promoting voluntary compliance

Kristina Murphy[1]

1. Introduction

Why do people obey the law, and what can authorities do to encourage people to comply voluntarily with the law? These questions have received interest from regulators and scholars interested in understanding the motivators of law-abiding behaviour. This chapter addresses these two questions. It first discusses different perspectives on why people obey the law and it then proceeds to discuss in detail the growing interest in *procedural justice*–based approaches to regulation. The chapter puts forward that people can be rational actors motivated solely by personal gain or they can be moral actors motivated to obey authorities and laws because of an intrinsic obligation to do the right thing. Research across a variety of regulatory contexts has revealed that the latter form of compliance can be fostered when authorities use procedural justice. The key ideas and controversies in the procedural justice literature will also be presented, followed by a discussion of future directions in the field.

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2. Why do people comply with the law?

Laws are established to control human behaviour, and regulatory authorities are put in place to enforce those laws. For a well-functioning society, we need people to comply with the law and to follow the directions of those who enforce the law. A longstanding debate has existed in the literature between those who believe people obey the law only when confronted with harsh sanctions and penalties and those who believe people obey the law because it is right and just to do so (Tyler 1990). The former perspective on compliance is instrumental in its focus while the latter perspective is normative in its focus. This dichotomy resonates with Valerie Braithwaite's discussion in the previous chapter of compliance being driven by both outcome and process.

The basic premise of the instrumental model of compliance is that people are motivated to maximise their own personal gains; they are rational actors who behave in a manner that personally benefits them. Individuals are thought to assess opportunities and risks and will disobey the law when the anticipated fines and probability of being caught for noncompliance are small in relation to the profits to be made through noncompliance. The view is that if compliance is a rational choice, authorities should respond by deterring individuals from acts of noncompliance by ensuring the benefits to be obtained through noncompliance are much lower than those obtained through compliance (Becker 1968). Advocates of this perspective suggest that compliance can be best achieved in two ways: 1) by increasing the probability of detecting noncompliers; and 2) by increasing sanctions to the point where noncompliance becomes irrational. According to this deterrence-based approach to regulation, authorities need to find an appropriate balance between these two measures to make compliant behaviour the rational choice. This instrumental perspective of human behaviour underpins many of the enforcement policies adopted by regulators.

The problem with such an instrumental perspective of behaviour, however, is that it can only ever give a partial explanation for why people obey the law. Deterrents may prevent noncompliance, but they cannot explain why people obey the law in the absence of deterrence. We know from the work undertaken at the Centre for Tax System Integrity (CTSI) at RegNet (1999–2005), for example, that taxpayers

often complied with their tax obligations despite the fact that the odds of detection and penalties for noncompliance were low. In other words, deterrence is less helpful for explaining why people obey laws voluntarily.

The normative perspective of compliance, in contrast, suggests that people comply with the law not because of a fear of the consequences they may face for noncompliance, but because they see the law as right and just and feel a moral obligation to obey the law (see Tyler 1990). Here, compliance is therefore voluntary in nature because it occurs in the absence of deterrents. Research has supported the idea that law compliance is motivated more often by normative concerns borne out of the perceived legitimacy of the system than by instrumental concerns. In his influential study, Tyler (1990) found that people reported being compliant with laws because the laws aligned with their morals about what was right and just. Tyler also found that these internal morals influenced people's compliance behaviour more so than the perceived risk of detection or sanctions for wrongdoing.

It is appealing to think of most people as committed moral actors motivated to comply with the law out of a sense of obligation to do right (Braithwaite, Chapter 2, this volume), but what happens if the law contravenes an individual's morals? What if the law is seen to be inconsistent with what an individual sees as right and just? This might lead to a situation where a person becomes resistant to authority and its laws or feels justified breaking the law. This situation points to the crucial role that authorities can also play in securing voluntary compliance. Importantly, research has revealed that compliance can also be influenced by how a person views an authority charged with enforcing the law. Tyler (1990) again has shown that the perceived *legitimacy* of an authority is key to securing compliance with laws that might be incompatible with an individual's morals. Legitimacy reflects the degree to which people recognise the right of an authority to govern their behaviour. If people view an authority as legitimate, they agree that the authority has the right to govern them. Providing an authority with legitimacy transfers to them the authority and right to define what constitutes acceptable forms of behaviour. As such, citizens will be more willing to defer to a legitimate authority's laws even if they may not like the law they are obeying.

The fact that the perceived legitimacy of an authority can also promote voluntary compliance behaviour, even when people view a law itself as unjust, is important because authorities are able to directly shape the way

in which people view them. Some of the taxation and policing research undertaken at RegNet suggests that an authority's legitimacy can be built through the way in which authorities yield their power (Hinds and Murphy 2007; Murphy 2005). Tyler (1990) argues that authorities that govern with *procedural justice* will be better able to foster voluntary compliance and will have to rely less heavily on deterrence. Regulators are often unable to change unpopular laws but they are able to change the way they treat those they are charged with regulating. This makes procedural justice an appealing and valuable tool for promoting voluntary compliance.

3. What is procedural justice?

In the social-psychological literature, procedural justice is conceptualised as involving the quality of treatment and quality of decision-making received by an authority. It involves more than a regulator just being nice to people. Criteria typically used to define procedurally just treatment include respect, neutrality, trustworthiness and voice. *Respect* refers to whether the authority is respectful and polite in their dealings with a person, and also whether they respect people's rights under the law. If they treat people with dignity and are respectful in how they issue orders or enforce laws then people will view them as more procedurally fair. Research has found that people are particularly sensitive to the way in which authorities issue directives, with disrespectful treatment being shown to produce reactance and negative evaluations of the authority (Murphy 2004). *Neutrality* involves making decisions based on consistently applied legal rules and principles and the facts of a case, not on personal opinions and biases. People want to feel assured that authorities are treating them in the same way as any other individual in society. Transparency or openness about how decisions are being made also facilitates the belief that decision-making procedures are neutral. An authority's *trustworthiness* is an indicator of whether the authority will be motivated to treat a person in a fair manner. People react favourably to the judgement that an authority they are interacting with is benevolent and caring and is sincerely trying to do what is best for the people with whom they deal. Authorities communicate their trustworthiness and fairness when they listen to people's accounts and explain or justify their actions in ways that show an awareness of and sensitivity to people's needs and concerns. Finally, *voice* is important to individuals. People value having the opportunity to voice concerns

and issues to an authority before a decision is made in their case. If an authority then takes these concerns into account in the decision-making process, people will be left feeling that they have received procedural justice. Resistance can be allayed through providing regulatees a voice (see also Braithwaite, Chapter 2, this volume). Giving an individual a real voice, however, requires that an authority genuinely commits to acting on any valid concerns that may be raised. Ignoring an individual's grievances or concerns is unlikely to foster a sense that the authority has used procedural justice. In summary, then, if individuals are treated respectfully by an authority, are dealt with in an unbiased fashion, believe the authority has demonstrated trustworthy motives and has taken the individual's concerns into account before reaching a decision then individuals will evaluate the interaction as more procedurally just.

There has been a plethora of studies published that demonstrate how procedural justice can build legitimacy and promote voluntary compliance with both authority directives and laws. The majority of these studies use self-report survey methodologies to show that people who view their experience with an authority to be more procedurally just are much more likely to view the authority as having legitimacy (for example, Hinds and Murphy 2007; Murphy et al. 2008; Sunshine and Tyler 2003; Tyler 1990). Many of these studies also find a direct link between procedural justice evaluations and subsequent self-reported compliance behaviours, or they find that procedural justice shapes compliance indirectly through the mediating influence of legitimacy (Sunshine and Tyler 2003; Murphy et al. 2008; Murphy 2005). While much of this research has been undertaken within a policing context, similar findings have been obtained across a number of different regulatory contexts, including in prisons, in taxation regulation and in nursing home regulation, to name a few (for example, Braithwaite and Makkai 1994; Reisig and Mesko 2009; Murphy 2004, 2005; Wenzel 2006). Studies that use observational or interview methodologies reveal similar findings to survey studies. For example, McCluskey's (2003) observational research showed how interactions between police and the public were less likely to result in defiance towards officers and were less likely to escalate to violence if police officers used procedural justice when initially dealing with individuals. Authorities often have to deliver unfavourable decisions or outcomes, yet even if an outcome is unfavourable, research has demonstrated that people will still be more likely to accept those decisions and will be more likely to comply if the authority has delivered that outcome in a procedurally just way (Tyler 1990).

4. Theories of procedural justice

With empirical evidence consistently showing that procedural justice has beneficial effects on promoting an authority's legitimacy and people's willingness to comply with the law, understanding the theoretical mechanisms that explain why this occurs is important. Early theorising in the field suggested that procedural justice mattered to people because it was able to maximise their instrumental gains. This instrumental perspective on procedural justice can be traced back to the seminal work of Thibaut and Walker (1975). Their 'process control' theory was developed after observing the way in which disputants who were party to a formal grievance evaluated the authorities that made decisions in their case, and it focused on the degree to which people were able to exert influence over the authority's decisions. Thibaut and Walker posited that if people felt they had *control* over decisions pertaining to their dispute, they would believe the procedures arriving at those decisions had been just. In contrast, if people felt they lacked control over the final outcome of their case, they were more likely to believe the process had been unjust. In this particular theory, voice and control were of particular concern to people. If they felt they were able to voice concerns and that voice was able to shape the outcome of their case then they evaluated the experience as more just.

Later theories in the field steered away from this instrumental view of procedural justice. Instead, the next wave of theories suggested that procedural justice mattered to people because it conveyed important symbolic messages about a person's identity, value and status in society. *Social identity* thus comprised the core theoretical mechanism explaining why procedural justice had the effects on people that it did. And, indeed, work undertaken by Wenzel (2002) from the CTSI revealed the importance of identity processes in shaping how individuals respond to justice concerns. The 'group engagement' and 'group value' models specifically incorporate these notions of identity to explain the relationship between procedural justice, legitimacy and compliance (see Blader and Tyler 2009; Lind and Tyler 1988). These identity-based explanations have dominated theorising in the field and they provide a way of understanding the dynamics of power relationships within social groups. Specifically, they attempt to explain why people comply with group laws and internalise group values. These theories suggest that the experience of receiving procedural justice from authority figures has positive effects on perceptions of legitimacy and on compliance

behaviour because such experiences strengthen people's connections to the social groups that the authorities represent. This in turn promotes allegiance to group norms and values and encourages compliance with the law (Blader and Tyler 2009). In other words, receiving procedurally just treatment from an authority communicates to people that authorities respect them and see them as worthwhile members of the community. This promotes greater identification with the community by generating a positive sense of the individual's place in society and leads the person to feel more committed to doing right by the authority who represents that community. Hence, people are motivated to legitimate the authority of groups within which they feel status and standing. They feel they should support the authority of the groups to which they belong and they internalise the value that they should obey the authority of a group with which they identify (Bradford et al. 2014).

More recent theorising in the field highlights the added importance of *emotion* for understanding the effect of procedural injustice on legitimacy and noncompliance. Murphy and her colleagues have acknowledged the value and importance of identity, but they have posited that both identity and emotion should be included within one explanatory framework to fully understand how, when and why procedural justice works as it does. In other words, perceptions of an authority's legitimacy, in addition to emotional experiences and identity processes, need to be considered together to fully understand the different effects that procedural justice can have on different people across different contexts. Using empirical data, Murphy and her colleagues demonstrated how unjust treatment by authorities could elicit negative emotions in individuals (for example, Murphy and Tyler 2008; Barkworth and Murphy 2015). These negative emotional reactions subsequently produced a variety of retaliatory behaviours in response to unfair treatment, including reactance, defiance towards authorities and subsequent noncompliance with the law. The idea that authorities can have an impact on people's emotions is not new. There is a long tradition in the criminology literature showing how injustices can elicit negative emotions (for example, Sherman 1993; Braithwaite 1989; see also Harris, Chapter 4, this volume). What is new in Murphy's work is the attempt to merge theories of emotion with theories of identity to produce a more sophisticated theory of procedural justice.

Murphy argues that events (for example, being regulated or punished) can be appraised as either harmful or favourable to an individual's personal goals or desires. Here, emotions can be experienced in response to such appraisals. Anger, it is argued, results from an appraisal that another person or group is harming or threatening the self. This can result in retaliatory action as a person attempts to protect their identity and self from the harm. Unfair treatment from an authority could be one such threat to a person's sense of self (Braithwaite, Chapter 2, this volume). Such treatment can lead individuals to perceive their identity and standing in a group are being threatened. This identity threat can produce a negative emotional response that in turn results in destructive thoughts and behaviours. Hence, Murphy proposes that when unfair treatment threatens one's identity, negative emotion may result. If negative emotion is then not managed appropriately it has the potential to lead people to question the legitimacy of an authority or can lead to retaliatory behaviour and noncompliance with authorities and laws. Studies testing the validity of an emotion-based theory of procedural justice are only in their infancy, but findings thus far appear to support the value of considering legitimacy, emotion and identity in one explanatory model.

5. Controversies in the field

The discussion presented earlier suggests that procedural justice is a useful tool for authorities wishing to promote their own legitimacy and to encourage people to voluntarily comply with the law. Despite the apparent success of procedural justice, however, research in the field is not without its limitations. Several continuing controversies with this body of research remain. Three of these controversies will be highlighted followed by a brief discussion of new research agendas that have attracted attention in the field.

Measurement issues represent one recurring controversy in the field. A number of scholars have argued that procedural justice research inconsistently operationalises key constructs and has done little to evaluate the construct validity of existing scales (for example, Gau 2011; Reisig et al. 2007; Johnson et al. 2014). These authors have noted that measures of procedural justice and police legitimacy have differed from one study to the next. Concern has also been raised about whether measured variables actually reflect different concepts. For example,

it has been argued that commonly used procedural justice measures often overlap with measures used to construct legitimacy. If measures are inconsistent or do not measure what is intended, it can lead to misleading and inaccurate conclusions across different studies.

Second, Tankebe (2009a) has noted that the procedural justice literature has tended to overemphasise the relationship between procedural justice and compliance, and has tended to underemphasise the role of instrumental factors such as outcome favourability or authority effectiveness in shaping people's compliance behaviour. Tankebe used research from the field of restorative justice to demonstrate his point. He noted that many restorative justice studies fail to find long-term effects in reducing reoffending. Offenders participating in restorative justice conferences tend to rate their experience as more procedurally just than those who attend traditional courts. Hence, one would expect long-term changes in compliance to occur among participants involved in restorative justice conferences if claims made in the procedural justice literature are valid. In fact, many procedural justice studies that purport to examine compliance behaviour do so using self-report measures of compliance. In those studies, procedural justice is typically found to be linked to compliance, yet the conclusions are more mixed when objective measures of compliance are used, as is the case in restorative justice studies.

With respect to Tankebe's (2009a) second issue, it has been noted that procedural justice scholars tend to underemphasise the importance of instrumental factors in shaping people's views and behaviours. For example, when compared with American and UK-based research, Australian procedural justice policing research finds that citizens often place much greater weight on the effectiveness of authorities when judging their legitimacy or when predicting their cooperation (Hinds and Murphy 2007; Sargeant et al. 2014). While procedural justice still dominates most Australians' assessments of the legitimacy of authorities, such findings do suggest that researchers should not discount the importance of instrumental concerns. In fact, in research from Ghana—a country characterised by the widespread corruption of regulatory authorities—it has been found that citizens are more likely to view authorities as legitimate or are more likely to cooperate with them if the authorities are viewed to be effective in their job, with procedural justice playing little role in predicting their compliance behaviour or assessments of an authority's legitimacy (Tankebe 2009b; for similar

findings across different regulatory contexts, see Murphy 2009; Murphy and Barkworth 2014; Sargeant et al. 2014). Hence, context appears to matter and researchers should not underestimate the potential effect that instrumental factors, in addition to procedural justice, have in shaping people's compliance behaviour and views of authorities.

The third major criticism raised in relation to the procedural justice literature is the tendency for some regulators and researchers to overemphasise the value of procedural justice for securing cooperation and compliance, rather than promoting it as a good in itself (Tankebe 2009a). Regulators have an obligation to exercise their authority in a procedurally fair way, irrespective of any instrumental benefit such an approach may have in facilitating their role in maintaining compliance. This needs to be kept in mind when advocating a procedural justice–based approach to regulation.

Future research directions

It is important to highlight at this stage in the chapter that the majority of new studies published in the procedural justice literature simply aim to replicate existing studies in the field. The concern with this type of research is that the procedural justice literature risks becoming stale, failing to push the boundaries or challenge the key assertions put forth in the existing literature. This is what made the procedural justice work coming out of RegNet so appealing; it sought to push the boundaries in theory development. What is needed for the future of procedural justice scholarship is research that adopts *new methodologies* or that seeks to better understand the contexts where procedural justice works *more* or *less* effectively or *why* it works as it does. In terms of future directions for the field, therefore, there are a few developments that have occurred in the past five years that offer important avenues for extending research in the field. These developments include: 1) more sophisticated theorising around the concept of legitimacy; 2) extending existing theoretical frameworks to better understand when, how and why procedural justice works; and 3) utilisation of innovative methodologies to understand the effect of procedural justice in practice.

Reconceptualising legitimacy

Legitimacy has typically been conceptualised in the procedural justice literature as people's 'obligation to obey' an authority and by the perceived 'institutional trust' of an authority. Tyler's (1990) measures

of 'obligation to obey' and 'institutional trust' feature prominently in most of the empirical research on perceived legitimacy. Recently, however, Tankebe (2013) offered an alternative conceptualisation of legitimacy, arguing against equating legitimacy with a felt obligation to obey authorities. Tankebe (2013) posits that legitimacy comprises four components: distributive justice (that is, the equal distribution of services across groups), procedural justice, authority lawfulness and authority effectiveness. While Tyler treats procedural justice as an antecedent of legitimacy, Tankebe considers it a component of legitimacy. Moreover, Tankebe (2013) treats obligation to obey as a consequence of legitimacy, rather than it being a component of legitimacy, as originally conceptualised by Tyler.

Jackson et al. (2012) also suggest that legitimacy entails more than just trust and obligation to obey. They have recently defined and measured police legitimacy as a multidimensional concept with three interlinked elements: 1) obligation to obey; 2) moral alignment; and 3) legality. Obligation to obey is consistent with Tyler's definition of legitimacy, with a legitimate authority able to garner obedience from the public. Moral alignment reflects the belief that authorities and the public share broadly similar moral positions about appropriate law-abiding behaviour. Legality reflects whether authorities themselves follow their own rules (similar to Tankebe's authority lawfulness concept). If authorities are seen by the public to be acting in an ethical manner or exercising their authority according to established principles, they will be seen as legitimate.

The reconceptualisation of legitimacy shows much promise as a future research direction. By exploring empirically the link between these different proposed notions of legitimacy, future research can begin to tease apart the separate roles that each might play in explaining compliance behaviour.

Extending theory

As noted earlier, the group value and group engagement models have dominated theorising in the procedural justice field. Very few scholars have attempted to offer alternative models or to extend theories in the field, opting instead to utilise existing theories. Murphy has perhaps been one of the few recent procedural justice scholars to offer an alternative perspective to the dominant identity-based theories, suggesting that researchers should consider the role of emotion in

addition to identity and legitimacy to understand how, when and why procedural justice works as it does (see the discussion earlier explaining this new perspective). Future researchers should consider whether the inclusion of this emotion perspective represents a more valid and reliable explanation for procedural justice effects or whether other alternative theoretical explanations may offer more reliable explanations for the procedural justice effect across different contexts and groups. One such example is Valerie Braithwaite's motivational posturing theory of defiance (Braithwaite, Chapter 2, this volume; see also Murphy 2016).

Innovative methodologies

Finally, a burgeoning area of study in the procedural justice field, and one that offers another fruitful avenue for future research, has involved researchers working closely with regulators to evaluate procedural justice effects in applied settings using randomised controlled field trials. The limitation with many of the other methodologies commonly used in the procedural justice field—that is, survey research, observation and interview methods—is that the causal relationships between the key variables of interest are difficult to establish. Randomised controlled field trials allow researchers to directly manipulate one variable (in this case, procedural justice) to explore its effect on a range of other variables (for example, can introducing procedural justice change how people evaluate police?). By randomly allocating people into different groups to experience a manipulation differently—that is, a control versus an experimental group—this allows direct causal testing of the effect of procedural justice on the public's views and behaviour.

A few notable scholars have made use of randomised controlled field trials to evaluate whether authorities can be trained to use procedural justice and whether this has beneficial effects on the public's behaviour and their perceptions of those authorities (for example, Mazerolle et al. 2012, 2013, 2014; Murphy et al. 2014; Wenzel 2006; Wheller et al. 2013). Of the limited number of studies that exist, researchers have typically found that members of the public who have interactions with procedurally just authorities—that is, those exposed to the experimental condition—are significantly more likely to evaluate those authorities positively and are more willing to display cooperative and compliant behaviours compared with people exposed to the control condition. While there are likely to be more fruitful developments that arise, these three directions are currently receiving attention in the field.

6. Conclusion

To conclude, procedural justice appears to have an important role to play in regulatory practice. Procedural justice can improve people's willingness to cooperate with authorities and it can encourage them to voluntarily comply with the law. This is because procedural justice can promote identification with authorities and reduce negative emotion and resistance. It can also build public perceptions of the legitimacy of authorities, leaving people to feel more obligated to obey their instructions and laws.

Further reading

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4

Shame in regulatory settings

Nathan Harris

1. Introduction

How do people feel when they have broken the law? Does it make a difference whether their behaviour was also against their own values? And how does this feeling affect their response to regulatory action? As a consequence of questions like these, the moral emotions and their implications for regulatory systems have received increased attention within disciplines such as criminology, sociology and psychology. One reason for the revival of interest in shame, in particular, is John Braithwaite's (1989; Ahmed et al. 2001) theory of reintegrative shaming. While the theory has its roots in sociological and criminological theory, it suggests that an important psychological effect of social disapproval is the emotion of shame, and that the emotional responses to disapproval are critical to explaining the effect that regulatory action has on subsequent compliance. In response to growing recognition that moral emotions are important, two sets of questions have been explored. The first is whether social disapproval, or 'shaming', should be used in regulatory contexts and, if so, how? Restorative justice is one domain that draws on the concept of reintegrative shaming, but it is also a domain in which concerns about the dangers of shaming have been raised. The second set of questions concerns the nature of shame itself. Is the emotion a response to the fear of rejection, is it a response to a perception of being a failure or is it a consequence of violating one's values? What does the emotion tell us about the moral engagement of individuals with regulatory practices?

2. Shaming in regulatory contexts

A focal point for the revival of interest in shame was publication of John Braithwaite's (1989) book *Crime, Shame and Reintegration*. In this book, he argues that the criminal justice system has underestimated the significance of social disapproval in preventing offending. To understand crime rates, we need to look beyond official mechanisms, such as penalties that are imposed by criminal justice systems, to the degree to which societies express disapproval of crimes. The concept that is central to Braithwaite's analysis is shaming, which he defines as:

> all societal processes of expressing social disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming. (Braithwaite 1989: 100)

An important characteristic of this definition is that it does not limit itself to demeaning or humiliating forms of disapproval but seeks to encompass the full spectrum of ways in which disapproval might be expressed.

The fundamental distinction the theory makes is between stigmatisation and reintegration. Stigmatisation occurs when disapproval is directed at the person as well as at the offensive behaviour, when the person is not treated with respect, when there is no ceremony to decertify the individual's deviant status and when deviance is allowed to become a master status trait (Makkai and Braithwaite 1994). As with labelling theories, stigmatisation of offenders is expected to lead to greater reoffending. Being charged with a crime, found guilty in a court and then sanctioned imposes a deviant identity on an individual because it ceremonially changes the position of the person within society and has important social implications, such as reduced employment opportunities. This critique of criminal justice asserts that, once imposed, a deviant identity becomes a self-fulfilling prophecy: marginalisation reduces the individual's access to legitimate opportunities while increasing perceptions of injustice and the attractiveness of supportive subcultures.

Reintegrative shaming theory diverges from the labelling tradition by rejecting the idea that stigmatisation is an inevitable product of social disapproval. Reintegration can occur, instead of stigmatisation, when shaming is respectful, distinguishes between the person and their actions, concludes with forgiveness or decertification of deviance and does not

allow the person to take on a negative master status trait. One context in which this often occurs is in family life and the disciplining of children, where research shows that authoritative approaches are more effective than either permissiveness or authoritarianism.

While an important element of reintegrative shaming theory concerns the failure of stigmatisation, the distinctive contribution the theory makes is to explain why it is that reintegrative shaming works to reduce offending. Here the theory places greatest emphasis on the role shaming plays in the development or engagement of conscience. As Braithwaite (1989: 9) puts it, reintegrative shaming, is:

> conceived as a tool to allure and inveigle the citizen to attend to the moral claims of the criminal law, to coax and caress compliance, to reason and remonstrate with him over the harmfulness of his conduct.

Shaming is important because of its educative value in developing or reinforcing beliefs about what is wrong. Shaming can have a deterrent effect, as an informal sanction that threatens the loss of respect by valued others. This is, however, secondary in reintegrative shaming theory to its moralising qualities. Shaming that is reintegrative is seen as having distinct advantages over shaming that is stigmatising because it allows concerns about behaviour to be communicated effectively to offenders. Affirmation and inclusion of the individual allow for moralising and denunciation of the act to occur in a way that invites the offender to acknowledge guilt and express remorse, knowing that he or she will not be outcast and that forgiveness, or decertification of their deviant status, will occur. Stigmatisation focuses attention on the individual's status rather than the harm he or she has caused and is more likely to damage the offender's bonds with law-abiding others.

Reintegrative shaming theory places considerable store in the ability of moral persuasion to reform individual offenders. However, this faith in moral persuasion at the individual level stems from a broader social premise, one derived from control theory, that the reason individuals do not commit crime is because they have commitments to shared moral norms and social institutions. It is argued that punishment is irrelevant to most people because committing serious crime is unthinkable to them. Socialisation of children in families and schools about moral norms leads to a broad consensus about what acts should be crimes. While subcultures that support alternative cultural values exist,

support for the criminal law is much greater. Indeed, Braithwaite states that reintegrative shaming theory is only valid to the degree that there is a consensus that certain actions should be prohibited.

The application of shaming theory to restorative justice

The significance of shaming to regulatory intervention has been explored in a variety of domains, including school bullying (Ahmed and Braithwaite 2006; Morrison 2006), workplace bullying (Ahmed and Braithwaite 2011; Braithwaite et al. 2008; Shin 2005), sexual offenders (McAlinden 2005), tax evasion (Braithwaite 2009; Murphy and Harris 2007), nursing home regulation (Braithwaite et al. 2007) and business regulation (Braithwaite and Drahos 2002). However, the most extensive application has been in the development of restorative justice programs, which expanded rapidly in the 1990s and are now found in criminal justice, child protection, schools and prison systems in many parts of the world. Restorative justice is an alternative to the criminal justice system that redefines the goals of justice as well as the way in which it is carried out. A defining principle of restorative justice is that an offence creates an obligation for offenders to repair the harm that has been caused (Zehr 1990). Unlike the principles of traditional justice that emphasise the importance of consistent and proportional punishment, the aims of restoration are the empowerment of participants as well as reparation and reconciliation. These broad goals include reintegration of offenders because the focus is on repairing harm that has been caused to the offender and their social networks as well as any victims.

The dynamics of restorative justice interventions—such as family group conferences, victim–offender mediation or healing circles—are also rich contexts for the reintegrative kinds of shaming that are advocated (Harris et al. 2004). Family group conferences, for example, involve semiformal meetings between the offender(s), people who are close to them, the victim(s) and their supporters. The focus of a conference is on finding out what happened and how the incident has affected all of the parties, as well as coming to an agreement about what needs to be done to repair the harms that are identified. As a consequence, they involve communities in the kinds of conversations about the negative consequences of crime that Braithwaite argues are critical to developing individual conscience and commitment to the law. Empirical observations suggest that family group conferences are perceived as significantly more

reintegrative than court cases (Harris 2006) and that well-run programs have the potential to assist in resolving shame-related emotions that occur during them (Retzinger and Scheff 1996).

Concerns about shaming

While awareness of shaming has increased, so, too, have concerns about the explicit use of shaming to control or respond to crime. The explicit use of shaming by courts has also seen the rise of 'shaming' practices that are completely contrary to the restorative approaches discussed above. Recent examples have occurred, particularly in American criminal justice, where shaming has been used in the court system as a deterrent or punishment for convicted offenders. Offenders have been ordered to complete 'shame sentences' relevant to the crime they commit instead of spending time in jail. Shoplifters have been ordered to stand out the front of shops holding signs declaring that they stole, drink-drivers are ordered to attach 'DUI' (driving under the influence) stickers to their cars, while those convicted of soliciting sex are ordered to sweep the streets.

Massaro (1997) argues that this 'modern' kind of shaming outcasts certain segments of society in a way that does not protect the individual and undermines the dignity of the whole community (see also Condry 2007). In addition to arguing against the decency of this approach, she argues that the complexity of the emotion of shame is such that courts are ill equipped to employ shaming and that the effect on offenders would be difficult to predict. Martha Nussbaum (2004) identifies five arguments in the literature against the use of shaming punishments: that they are an offence against human dignity, that they are a form of mob justice, that they are unreliable, that they do not hold the deterrent potential that they are supposed to and that they are potentially net-widening.

While it is not surprising that concerns are raised about overt forms of humiliation, the appropriateness of shaming within more reintegrative forums such as restorative justice has also been questioned. Maxwell and Morris (2002) and others have argued overt disapproval should not be an aim of restorative practices, suggesting instead that they are oriented towards exploring the consequences that an offence has on its victims, with the aim of provoking empathy. They argue that 'shaming' is a dangerous proposition in restorative justice because even with the

best of intentions offenders might interpret shaming as stigmatising. Shaming young offenders may exacerbate problems rather than prevent reoffending, particularly if offences have been committed as a consequence of low self-esteem, which has occurred as a consequence of an absence of emotional support or a difficult past.

This critique of shaming is based in part on doubt as to whether shame is a positive emotion for offenders to feel. A number of scholars have argued that the more important mechanism in restorative justice is the eliciting of remorse, which occurs as a consequence of the offender coming to understand the impact that their actions had on the victims. Shame, on the other hand, is said to be a dangerous emotion to invoke in offenders because it is a threat to their sense of self worth and is potentially destructive. These questions reflect a broader debate about the virtues of shame as an emotion, in which there is a clear division between those who are pessimistic about the role shame plays and those who are more optimistic.

3. What is the role of shame in regulatory contexts?

As just illustrated, various ideas about shaming—both positive and negative—are based on assumptions, often implicit, about the nature of the emotion that shaming invokes. This raises the question of what is shame, when does it occur and what are its characteristics? Answering these questions is critical to understanding the role that shame plays in regulatory settings and has been the focus of recent research, discussed below. Two broad conceptions have dominated thinking about shame.

Shame as a social threat

The first of these conceptions describes shame as a response to social threat, which is precipitated by the individual's perception that they have been rejected or disapproved of in some way. This conception of shame is apparent in early anthropological perspectives that describe shame cultures as those relying for social control on the sensitivity of individuals to negative perceptions of others, rather than through the development of conscience (Benedict 1946). This idea has been elaborated in contemporary research. While these approaches have varied in their explanations of why people are sensitive to social evaluation, they

all emphasise the need to be accepted by others—because the need to have strong personal ties is a basic human motive, because there is an evolutionary need to maintain status or because shame is related to the person's perception of his or her own self-worth (Gilbert 1997; Leary 2000; Scheff and Retzinger 1991). An important characteristic of this conception is that it describes shame as a response to social pressures that are exterior to individuals and constraining. The individual feels shame as a result of others' decision to reject. If others do not reject in the face of the same actions, no shame is felt.

Shame, or the fear of shame, is described as powerful motivation for the individual to continually monitor and work on personal relationships and to comply with social expectations at a broader level. Scholars have drawn on this understanding of shame to argue that informal social sanctions represent a significant deterrent (for example, Grasmick and Bursik 1990). A number of empirical studies, which place shame within a rational choice perspective, show that concern at feeling shame is associated with lower self-reported projections of offending and, in some cases, that the effect is comparable with, or greater than, official sanctions (Grasmick and Bursik 1990; Paternoster and Iovanni 1986; Svensson et al. 2013). While research suggests that expectation of feeling shame deters offending, it provides less support for conceptualising shame as a direct response to social threat. Studies suggest that shame can occur in the absence of external disapproval, that individual sensitivity to criticism is a moderating factor and that the individual's own moral judgement is important (Gausel et al. 2012; Liss et al. 2013; Smith et al. 2002).

Shame as personal failure

A second way in which shame is described in the literature is as a response to perceptions of personal failure. This is based on the proposition that shame occurs when an individual perceives that they have failed to live up to an ideal or standard that they uphold, and that the consequence of this is the perception that the 'whole' self is a failure (HB Lewis 1971; M Lewis 1992). This proposition has been explained using a number of theoretical frameworks, including psychoanalytic theory, attribution theory and affect theory. Shame is compared with guilt, which is described as a response to the perception that an act or more transient characteristic of the self was deficient, as opposed to the whole self.

Unlike the social threat conception described above, here, perceptions of failure are not necessarily prompted by disapproval, but can occur in isolation and in relation to personal ideals.

June Tangney and her colleagues, in particular, have argued that a disposition to feel shame is far less adaptive than a disposition to feel guilt, because shame involves an overwhelming negative evaluation of the self that prevents individuals from responding positively (see Tangney and Dearing 2002). An extensive program of research shows that individuals who are shame-prone are more likely to feel anger and hostility, are less likely to feel empathy for others and are more likely to suffer from psychopathology. The implication of this research is that regulatory systems would engender more adaptive responses in offenders if they provoked guilt rather than shame in offenders. However, recent research in offending populations did not show a direct relationship between shame-proneness and reoffending, although shame-proneness did predict externalisation of blame, which, in turn, predicted reoffending (Tangney et al. 2014).

A critique of both the social threat and the personal failure accounts of shame is that they fail to adequately explain the complex relationship between the individual and the social contexts in which shame occurs, either conceptualising shame as a response to values that are extrinsic to the person (social threat conception) or having little to say about the social context at all (personal failure conception). Neither of these conceptions adequately accounts for repeated observations that shame is both intimately tied to identity and sensitive to the disapproval of others. Understanding the effect of social context on what the individual feels and how they respond is critical for understanding the relevance of shame to regulatory contexts.

4. Shame as threat to ethical identity

To better explain the social context in which shame occurs, an ethical-identity conception of shame has been proposed (Harris 2001, 2011).[1] It is argued that shame occurs when people perceive that their behaviour was or is inconsistent with their ethical identity. In contrast with the social threat conception, here, it is argued that shame occurs in reference to the individual's own values. A central question for individuals is whether they have done the wrong thing or are in some way defective. For at least some shame experiences, this question is not easily resolved.

This does not mean that the experience of shame is immune from external disapproval. Social-psychology research shows that the influence of others is not necessarily due to fear of social disapproval. People are sensitive to the opinions of others—at least those whose views we respect—because they contribute to our interpretation of our behaviour. A long history of research in psychology demonstrates that the values, attitudes and beliefs held by individuals are influenced by others (Turner et al. 1987). We expect to agree with those people whom we see as similar to ourselves and as having the same social identity, and it is disconcerting when we do not. Social disapproval results in shame because it either validates the person's belief that a particular behaviour was shameful or it challenges an interpretation that it was not.

The central experience of shame is a threat to the person's identity. If we come to the realisation that we have violated values that we believe are important, this undermines our sense of who we are. Holding certain values is at the heart of personal or social identities because identities are defined in large part by one's beliefs and their related behaviour. For example, being nurturing and protective might be perceived as important characteristics of a mother or a father. It follows that when we become aware that we have acted contrary to our values, our identity is called into question. The painful feelings of self-awareness, anger at

1 This understanding of shame has a much longer history in moral philosophy. Bernard Williams (1993), in particular, argues that the precondition for feeling shame is the perception that a respected 'other', defined in ethical terms, would think badly of us. In this view, people are seen as neither morally autonomous nor responsive to the disapproval of anyone. Instead, Williams presents an argument for understanding shame as an emotion that is intimately connected with individuals' sense of their own ethical identity.

ourselves and confusion that are associated with shame occur because the contradiction between our values and our behaviour cannot be easily reconciled.

Along with threat to identity, shame motivates the individual to resolve the contradiction between their identity and their behaviour. We experience a sense of dissonance that is uncomfortable and that motivates us to make sense of what has occurred. An individuals, we can resolve the inconsistency in a variety of ways, depending on a range of factors including social context. This means that the experience of shame can be heterogeneous. For example, an individual might seek to diminish the significance of their behaviour by seeing it as an aberration, apologising and seeking to repair harm that was caused. A very different response would be to decide that there was a compelling excuse for their behaviour, which justified it. As will be discussed below, scholars from a number of theoretical perspectives have also observed that, in some cases, individuals struggle to resolve shame, often with negative consequences.

5. Shame management: The different forms of shame

Evidence that the experience of shame is heterogeneous and that it can have both positive and negative consequences has turned attention to understanding why shame is a constructive emotion in some situations but counterproductive in others. Why do we hope that some individuals feel shame for what they have done, but experience unease at the idea of imposing shame within criminal justice? A long tradition of research on shame emotions has explored variation in how individuals experience the emotion, and this, like more contemporary research on dispositions, has generated the notion of shame management (Ahmed et al. 2001). This theoretical perspective suggests that when confronted with feeling ashamed for their actions, individuals can manage or respond to the emotion in different ways. This has important implications for criminal justice institutions.

Evidence of differences in shame experiences was first captured in the seminal work of psychiatrist Helen Block Lewis (1971). In her research with patients, Lewis identified three different forms of shame. The first, 'acknowledged shame', involves the recognition that one feels shame and has awareness of associated feelings. 'Overt-unidentified shame'

describes the experience of feeling the negative emotion associated with shame but not recognising it as shame and thus mislabelling it. 'Bypassed shame' involves an awareness that an event may be shameful and doubt about how others see the self, but the emotion is bypassed, leaving the person with 'an insoluble, plaguing dilemma of guilty thoughts which will not' be solved (Lewis 1971: 134).

One of the important findings from this work for understanding the implications of shame is that unacknowledged forms of shame are associated with feelings of anger and hostility towards others. Scheff and Retzinger (1991) extended Lewis's analysis by arguing that shame is a signal that the bond between the individual and others is threatened. When an individual does not acknowledge feelings of hurt associated with rejection, as is the case in unacknowledged forms of shame (bypassed and overt-unidentified), this emotion becomes redirected as anger towards the self and others. According to Scheff and Retzinger (1991), this is the cause of humiliated fury and helps to explain not just individual anger but also the behaviour of groups who experience a sense of shared shame. The implication is that shame that is not acknowledged, or resolved, by the individual can manifest itself in an unhealthy reaction.

Eliza Ahmed and her colleagues (2001) have described the various manifestations of shame through the concept of shame management. This captures the notion that, when confronted with a shame-inducing situation, individuals can manage the negative feelings in a variety of ways, influenced by both individual characteristics and the social context. Acknowledged shame occurs when the individual accepts that they are responsible. When this occurs, the person is more likely to make amends, to feel less anger towards others and is more likely to discharge the negative feelings. In contrast, unacknowledged shame, which Ahmed describes as displaced shame, occurs when the person does not accept that they are responsible. Failure to resolve the emotion, because of the tension between the disapproval of others and this denial of responsibility, results in shame being displaced into anger towards others.

There is growing empirical evidence that shame management predicts both bullying and criminal behaviours. Ahmed's own research in Australia and Bangladesh shows that children who are bullies are more likely to displace shame compared with children who have not bullied, who are more likely to acknowledge shame feelings (Ahmed and Braithwaite 2006; Ahmed et al. 2001). These results have been supported and extended in a study by Ttofi and Farrington (2008), which showed

that stigmatisation predicted poorer shame management in children, characterised by shame displacement, and that this predicted a greater prevalence of bullying. Positive shame management, characterised by shame acknowledgement, predicted a lower prevalence of bullying. Murphy and Harris (2007) found a similar result in the context of white-collar crime. In this study, unacknowledged shame (or shame displacement) predicted recidivism, and the relationship between shame acknowledgement and recidivism was mediated through feelings of remorse.

Research on shame management has significant implications for reintegrative shaming theory and has prompted a revision of the theory (Ahmed et al. 2001). While the revision does not alter the theory's prediction that reintegrative shaming increases compliance (while stigmatic shaming increases offending), it does clarify why this is the case as well as the role that shame plays. The original formulation of the theory implies that the benefit of reintegrative shaming is that it leads to greater feelings of shame. However, the implication of shame management is that reintegrative shaming allows greater moral engagement with disapproval and the threat that it poses to ethical identity, because it provides individuals with greater opportunity to engage with others' interpretations of their behaviour and to respond positively. As a consequence, individuals are more likely to acknowledge and resolve feelings of shame. Stigmatisation, on the other hand, is more likely to result in offenders displacing shame and feeling anger towards others. Thus, it would seem, somewhat ironically, the benefit of reintegrative shaming is that it allows offenders to resolve and diminish any shame they feel.

6. Conclusion

Interest in the role of emotion has grown in a number of regulatory fields (Karstedt 2002). Shame is of particular significance because most regulatory interventions implicitly or explicitly communicate disapproval. In some cases, such as restorative justice with juveniles, great care is necessary to avoid this disapproval becoming stigmatising. In other cases, such as regulating powerful corporations, disapproval has to be expressed loudly if it is to be heard (Braithwaite and Drahos 2002). In all these cases, the expression of disapproval raises the possibility of invoking shame. While discussion of shaming punishments and

'naming and shaming' strategies has tended to focus on the social impact of these strategies, such as loss of face or humiliation, this chapter has highlighted research that indicates that shame has a much more complex role. Shame is invoked when individuals question whether they have violated their values and, when experienced, represents a threat to the person's sense of who they are. This suggests that shame is invoked when individuals are morally engaged. A question for those who seek to change or regulate behaviour is how to engage the individual in this kind of discussion. Restorative justice does so by exploring the consequences for victims with the offender and those who are important to them in a reintegrative process. Similar approaches have been proposed in the regulation of aged care (Braithwaite et al. 2007). The concept of shame management shows that the way in which individuals manage the experience of shame is just as important as whether or not they experience the emotion. Indeed, unresolved or unacknowledged shame can appear very much like an absence of shame, and there is evidence that this form of shame has the potential to be a destructive emotion that is associated with anger and defiance. On the other hand, shame that is acknowledged would appear to promote empathy, remorse and reparation. These dynamics have important implications for the efficacy of regulatory interventions that are only just beginning to be understood.

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5

Methodological approaches and considerations in regulatory research

Ibolya Losoncz

1. Introduction

The chapters in this book cover a broad range of regulatory topics through a kaleidoscope of lenses, such as law, sociology, economics, social psychology and theories of regulatory regimes and networks. A notable and shared element of the chapters is the seamless overlaying of two or more lenses to best illuminate the complex connections and interplays between actors, events and mechanisms contributing to regulation. Yet, to date, little work has been published explicitly describing the methodological approaches that might be used to integrate the range of paradigms present in most regulatory research. As a result, those new to the regulatory research field can find themselves in a quagmire of theoretical perspectives brought on by the considerable divergences between, and within, disciplines and their methodological approaches.

The aim of this and the next chapter is to fill this gap by considering two of the many methodological aspects of studying regulation: integrating the objective and subjective concerns informing regulation and accounting for the transnational dimensions of regulation.

This chapter analyses some of the theoretical considerations we, the researchers, should consider before embarking on our regulatory research project. Included in such an analytical reflection are fundamental questions. What is your underlying logic of seeing the social world and, thus, what *theoretical rationale* should you adopt for your research project? What *methodology*, design or chart will you use to navigate your inquiry? What *methods*, techniques and procedures should you employ to execute your plan? And, importantly, how do the choices that you make influence your findings? What are the things you will not know because your inquiry is limited due to a biased selection of your theoretical rationale, methodology or methods?

The next chapter, by Kathryn Henne, discusses the use of multi-sited fieldwork to address the complex, transnational dimensions of regulation. Regulation is often embedded in world systems and researchers should be attuned to how global, national and transnational systems and discourses inform and affect their studies. Henne proposes field-intensive qualitative methods to analyse the many factors that emerge across structural, systemic and local-level systems. She explains how field-intensive methods facilitate the gathering of in-depth data to uncover how relationships between the events, social conditions and actors shape regulation, and how participants' perceptions and social context inform the meanings attributed to regulation.

The rest of this chapter is divided into three sections. The first section looks at what regulatory research involves and the implications it has for choices concerning theoretical approach and research design. The second section discusses the principal building blocks of research projects in general, as well as in the context of regulatory research. The chapter concludes with some examples of critical-realist theoretical approaches in regulatory research.

2. What does regulatory research involve?

Regulatory research involves the description and explanation of *complex*[1] interplays between structural and systemic conditions and actors and their agency over time and at different levels. Regulating and influencing the behaviour of people and organisations never occur on the basis of a single mechanism (Braithwaite and Drahos 2000). They usually involve a number of leverage points, such as changes in law and norms, changes in networks and protocols or changes in relationships and behaviour. Regulatory controls are enmeshed in webs of legal and social structures, and institutional power, action and ambition. Yet, if institutions want to be successful in influencing people and gaining their cooperation, they need to understand and connect with people's constructions of institutions and institutional actions and ambitions (Braithwaite 2009a, 2009b). At the same time, people's behaviour, or the meanings they attach to events, is worked out within the framework of cultures[2] and social structures (specific to times, places and groups of people), and regulatory interventions need to consider and reflect the context, values and cultures of the regulatory community (Meidinger 1987).

Some of these elements, such as the power of law and how actors (people and organisations) respond to it (that is, comply, ignore or violate), exist *objectively*. Yet, actors experience the mechanisms underlying these responses *subjectively*. The experience is subjective in the sense that it is influenced by the individual, cultural and historical experiences of actors. These subjective experiences have a strong influence on how interactions and relationships with regulatory regimes are constructed. Thus, regulatory research needs to account for both the objective and the subjective.

The relation between the objective and the subjective, and the complex interplays between structural, cultural and agential properties, has important implications for one's methodological approach. Understanding these implications requires a brief, yet systematic, mapping and discussion of the main elements of the social research process—a task taken up in the next section.

1 For distinguishing between simple, complicated and complex problems, see Zimmerman and Glouberman (2002).

2 A set of shared understandings that makes it possible for a group of people to act in concert with each other (Becker 1982).

3. The building blocks of the social research process

There are numerous constructions of the social research process. What I offer here is just one perspective, based largely on Crotty's (1998) framework. Under the perspective I propose, researchers should ask the following three questions:

1. What is my theoretical perspective? That is, in my view, what *theoretical rationale* would capture effectively the interplay between actors, events and mechanisms?
2. What is my overarching research strategy or *methodology*?
3. What *methods* or tools will I use for my data collection?

Answering these questions, in this order, guides researchers in developing a coherent research design and overall consistency. Figure 5.1 is a schematic representation of this process of moving from theoretical rationale to methodology to method, with examples of some[3] of the options under each. Next, we turn to a focus on the theoretical rationale with a particular look at critical realism.

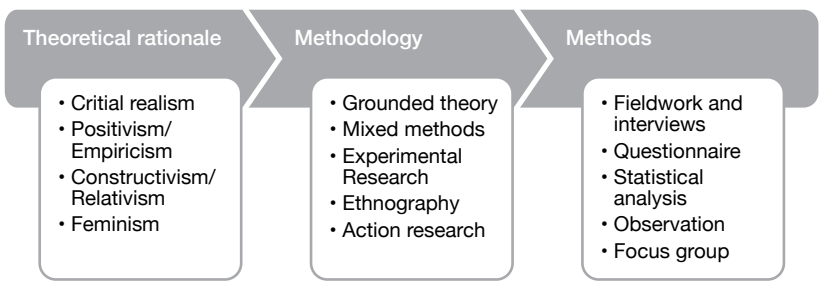

Figure 5.1 The main building blocks of a social research process
Source: Adapted from Crotty (1998).

Theoretical rationale

To adopt a theoretical rationale is to adopt a way of looking at the world and making sense of it. It embodies a certain way of understanding *what is* (ontology) and a certain way of understanding *what it means to know* (epistemology) (Crotty 1998). In other words, ontology asks

3 These are just a few examples and not an extensive list of options.

what is the nature of existence, what constitutes reality and how can we understand existence. Epistemology, on the other hand, asks what constitutes valid knowledge and how can we obtain it. The theoretical rationales most often discussed in the social sciences are those of positivists, also referred to as empiricists, and constructivists, also referred to as relativists.

Positivists hold that there is a single, objective truth or reality and this reality can be captured by finding regularities in observable empirical events. It is the analysis of these patterns that can lead to constructs underlying individual and social lives (Miles et al. 2014). Constructivists, on the other hand, argue that the world and reality are socially constructed and, before we can look for plausible causal relationships between events, we need to understand the experience of these events in terms of people's subjective meanings (Hammersley 2008). Positivist approaches, then, lend themselves to structural-level analysis, while cultural and agential concepts are more adequately analysed from constructivist perspectives. Yet, by simply applying each of those approaches to the appropriate concepts, or level of analysis, we will not be able to adequately capture and account for the relation between the objective and the subjective and the linkages and interactions between social and institutional structures, the agency of actors and regulatory cultures.

Understanding the relationship between structure and agency is a deep-seated and persistent problem in social sciences in general (Archer 1995; Bakewell 2010; Carter and New 2004; King 2007). The crux of the challenge is how to acknowledge the importance of both social structures and agency in understanding social action and social change. But why is this such a challenge? To a large extent, the challenge is a consequence of the division, and often dispute, between positivism and constructivism and the inherent inability of either of these approaches to adequately capture and explain the social world on their own.

The main criticism of positivism is ontological flatness (Abbott 2001)—that is, equating reality with what is knowable about it through observable events. Many researchers (for example, Danermark et al. 2002; Sawyer 2005; Sayer 2000) also argue that empirical regularities are not sufficient for claims of causal explanation; rather they are pointers to further inquiry to find the generative mechanisms that underlie the regularities. Critiques of constructivism, on the other hand, argue that reality cannot be reduced to *experiences* and *interpretations* of reality. Furthermore, by relativising truth, constructivists deny the possibility

of objective knowledge about the world, and undermine the notion of causal explanation or the ability to adjudicate between different theories of reality (Iosifides 2012). Constructivists also have a tendency to overemphasise the 'discursive processes by which they are constituted and identified by culture members' (Hammersley 2008: 173), whereas the focus should be on what causes phenomena and what effect they produce. Finally, the social actions of actors cannot be restricted to an understanding of meaning-making or agential intentionality as these things are also the subject of structural and cultural context, social relationality and other external conditions (Somers 1998).

Yet mixing positivism and constructivism, or mixing methods resting on competing definitions of knowledge and how it is obtained, without a coherent theoretical rationale for the mix can make things even more complicated. Data collected using different methods cannot simply be added together to produce a unified reality. The analysis of data needs to be integrated and made sense of in relation to each other. Objectivity and subjectivity need to be viewed and treated in 'dialectical unity' (Iosifides 2012: 39), despite the fact that they are at different ontological levels. One way out of this ontological quagmire is critical realism. Unlike positivism or structuralism, critical realism has a stratified ontology. Through its stratified levels, it can connect interpretations of reality with objective aspects and patterns to be found in the social world.

Critical realism

The key feature of critical realism, founded by the British philosopher Roy Bhaskar in the 1970s, is the rejection of 'epistemic fallacy' (Bhaskar 1978: 36), which conflates reality with our knowledge of reality. That is, while critical realism recognises that there exists a reality independent of our representation of it, it acknowledges that our knowledge of reality is subject to a range of social constructions (Danermark et al. 2002; Sayer 2000). It accepts the relativity of all knowledge claims (interpretations of experiences), while critically assessing the validity of related conceptual schemes, theories and interpretations. It does that by distinguishing between three reality domains of *empirical*, *actual* and *real* (Bhaskar 1978; Danermark et al. 2002), as presented in Figure 5.2. The domain of the empirical consists of *experiences*, *concepts* and *signs*, which are known and conceptualised by social agents and researchers. This domain is always theory-impregnated and is always mediated by our theoretical conceptions. The domain of the actual consists of experiences, concepts, signs and *events*. Unlike experiences that are known through

conceptualisation (by the social agent or the researcher), events are what happen in the world irrespective of its conceptualisation and knowledge. Finally, the domain of the real includes experiences, concepts, signs, events and *generative causal mechanisms*—interactions between structures and causal powers exerted by social objects. These causal mechanisms are unobservable at the empirical level, yet they produce observable events, processes and phenomena (Danermark et al. 2002; Sayer 2000).

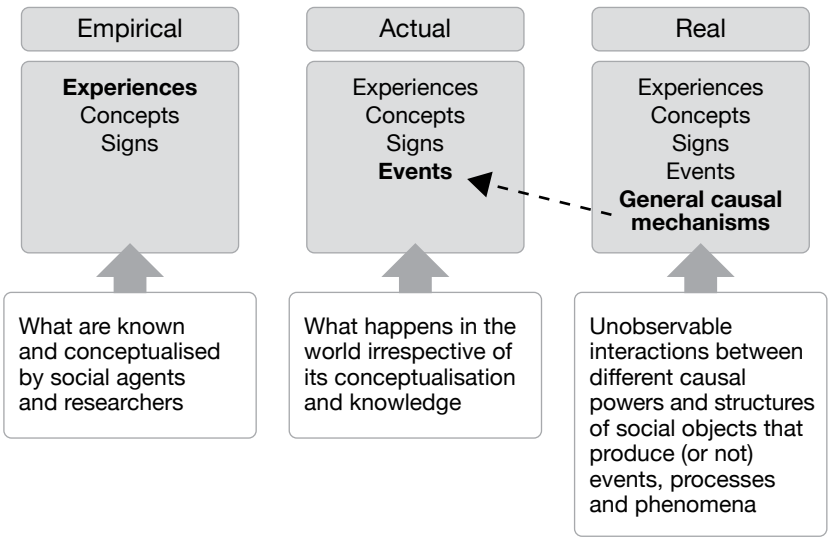

Figure 5.2 The reality domains of critical realism

Sources: Bhaskar (1978); Danermark et al. (2002); Hartwig (2007); Sayer (2000).

The focus of causality in critical realism is not the regularity of observable empirical events (as per positivism), but the generative mechanisms that produce events, processes and phenomena. Causality derives from causal powers exerted by social objects due to their structure. These causal powers are *relational* and, depending on the interaction between them and other mechanisms, they may be exercised, modified or remain unexercised. It is through this relational phenomenon, labelled *social emergence*, that critical realism can link structure with agency and bring together individual and social structures, even though they exist on different ontological levels. Instead of conflating them, or reducing each to the other, they are kept analytically distinct with different emergent properties and causal powers, focusing on how their *interplay* results in social transformation. This 'openness' of the realist paradigm can also account for agency. That is, while people's actions are conditioned,

they are never determined by structures alone. People can see, choose or be forced to choose alternative actions. In other words, the relationship between causal powers is not only relational, but also *contingent* (Archer 1995; Danermark et al. 2002; Sayer 2000).

Critical-realist research is theory driven as well as theory generating. Existing theories are used to link concrete phenomena and processes to theoretical and conceptual abstractions to generate new theories. Thus, conceptualisation and conceptual abstractions of phenomena and their emergent properties are critical steps in a critical-realist approach. Although the literature on concept analysis tends to be dominated by the semantic analysis of words (for example, Sartori 1984), researchers who regularly traverse the quantitative and qualitative—for example, Goertz (2006)—would argue that a semantic approach is never adequate by itself, as 'a concept involves a theoretical and empirical analysis' of the phenomenon referred to by the word. A good definition of the phenomenon to be studied is 'relevant for hypotheses, explanations, and causal mechanisms' (Goertz 2006: 4). In short, concepts should focus on what constitutes a phenomenon and which attributes play a key role in causal mechanisms and explanations. This step typically takes researchers to the next building block of inquiry: methodology.

Methodology

Although the terms methodology and methods are often used as though they mean the same thing, they are different, have a different purpose and should be addressed separately. Methodology is about the underlying logic of research—'our chart to navigate the social world'—while methods are 'the tools of our trade' (Castles 2012: 7). The main purpose of methodology is to outline the design and focus of one's research. There are no hard rules on the range of methodologies that can be used by realist researchers, as long as the selected methodology reflects the rationale that critical realism brings to research. Below, I briefly discuss[4] one example: grounded theory. Multi-sited fieldwork, discussed by Henne in the next chapter, is also compatible with a realist framework.

4 For a detailed and critical assessment of a critical-realist rationale/grounded theory methodology package, refer to Clarke (2003) or Oliver (2012).

Grounded theory

Grounded theory is widely used in the social sciences. It is ultimately about uncovering meaning and developing theory grounded in the data. While in the past 50 years, grounded theory has seen numerous modifications from its original form (developed by Glaser and Strauss in 1967), all approaches share its core characteristics: to generate theoretical explanations through a process of concurrent data collection and analysis. This process is performed iteratively through a constant comparative analysis involving moving back and forth through increasingly focused data. The researcher gradually links initial codes into progressively abstracted higher-level categories and conceptual themes (Charmaz 2006; Glaser 1992; Glaser and Strauss 1967).

The power of grounded theory and its important contribution to the critical-realist rationale is its analytical process that leads to a theorising of how actions, meanings and social structures are constructed. It requires researchers to move beyond describing data to think analytically about the data by applying pre-existing theoretical knowledge of concepts. Yet, extant theories have to 'earn' their way into the analysis based on extensive inductive analytical work, instead of stamping their preconceived ideas on the data (Charmaz 2006). We can see, then, how critical-realist research can draw considerably on grounded theory to support its iterative process of abstraction. The one point of difference is the position held by the critical realist that data produced from participant narratives are not a sufficient basis alone for theory. Analysis (that is, coding) needs to connect categories and abstraction of data to their emergent properties (Bakewell 2010; Pratt 1995).

Methods

The final step in developing a research plan is selecting methods, or research tools, to execute the research plan. Critical realism does not claim to develop new methods; it simply reorients and links existing theoretical paradigms (Danermark et al. 2002). Thus, existing quantitative and qualitative research tools used in those paradigms can also be used and combined in critical-realist research, provided the researcher is aware of the functions of these methods in the critical-realist framework. To explore these functions, this section will describe the four main forms of inferences typically used in critical-realist

research: deduction, induction, abduction and retroduction. We can view these complementary techniques as different thought operations of moving from one thing to something else.

Deduction and induction are well known and frequently used in the social sciences. In a deductive approach, knowledge of individual phenomena is derived from universal laws by the use of formal logic and set inference rules. Inductive reasoning works in the opposite way: inferences about larger populations are drawn from individual observations. The main limitation of these two techniques is that they give no guidance as to how, from something observable, we can reach knowledge of underlying structures and mechanisms. Thus, to identify causal generative mechanisms, unobservable at the empirical level, critical realists often need to go beyond induction and deduction and use abductive and retroductive reasoning.

Abduction and retroduction are seldom discussed in the literature on method despite their important contribution. Abduction involves taking a known phenomenon and recontextualising it by using existing general theories. It is reinterpreting something as something else, understanding it within a different frame of context. This reinterpretation then provides new meaning, new insight and possibly a more developed or deeper conception. Social scientists rarely discover new events; instead, they discover 'connections and relations, not directly observable, by which we can understand and explain already known occurrences in a novel way' (Danermark et al. 2002: 91). A well-known example of recontextualisation[5] is Giddens's interpretation of anorexia as a manifestation of reflexive identity—a characteristic of postmodern society. In his theorisation, a 'tightly controlled body is an emblem of a safe existence' in a plural, ambiguous social environment (Giddens 1991: 107).

If abduction is a theoretical redescription then the focus of retroduction is identifying what is fundamentally constitutive for the structures and relations highlighted in this theoretical redescription. That is, what are the basic characteristics of the general structures from which we interpret and recontextualise particular actions and events? Retroduction requires the researcher to go beyond empirically observable events

5 Other well-known examples of abduction include Marx's recontextualisation of the history of man, Durkheim's recontextualisation of suicide, Darwin's redescription of the evolution of species and Freud's interpretation of people's dreams.

and characteristics by asking questions about the more fundamental, transfactual conditions for such events. Such questions are constantly asked by philosophers, but can also be asked in relation to norms, rules or for structuring particular actions. Specific strategies to produce retroductive questions and inferences include: counterfactual thinking, social experiments, studies of pathological cases, studies of extreme cases and comparative case studies (Danermark et al. 2002).

All four types of inference are fundamental tools in regulatory research. Typically, we have to use more than one of these complementary inferences in a single regulatory research inquiry, and there is often a need to mix methods. As signalled earlier, quantitative approaches are well suited for describing the macrosocial changes of a given regulatory context, while qualitative approaches are ideal to uncover regulatory cultures and individual and community-level responses and social actions (see Henne, Chapter 6, this volume). Recent developments in vocabulary, taxonomy, process description and systematic integrative procedures[6] have provided mixed-methods research with more sophistication and refinement. Despite these developments, most mixed-methods research tends to show limited integration of the range of data and methods used, partly because of the limited ability of existing theoretical rationales to support both qualitative and quantitative methods. But, as we saw in the section on theoretical rationale, critical realism has the capacity to treat qualitative and quantitative methods as part of a dialectical unity.

4. Examples of a critical-realist approach in regulatory research

There are plentiful examples in the social sciences of adopting the theoretical and methodological premises of critical realism, from migration research (George 2000; Walby 2009) to research exploring the dynamic relationship between globalisation and inequalities (Carter 2000). An example of a critical-realist approach within the regulatory field is research by Losoncz (2015) demonstrating the effect of government policies and programs on the resettlement styles and strategies of migrants, and their impact on integration outcomes.

6 For more information on the different types of mixed-methods design and their applications, refer to one of the many textbooks on mixed-methods research (for example, Bergman 2008; Creswell and Plano Clark 2010; Teddlie and Tashakkori 2008; Thomas 2003).

Despite robust claims that integration outcomes are influenced by not only individual characteristics, resources and strategies adopted by migrants, but also acculturation attitudes and public policies and programs of the receiving society, our understanding of these processes and facilitators is insufficient. An important step towards a better understanding of integration is to focus on the conceptualisation of these processes, their causal properties and the generative causal mechanisms through which they influence integration outcomes.

The research adopted a general theory of goals and means put forward by Merton (1968) to demonstrate that current Australian resettlement policies are dominated by a strong emphasis on migrants adopting their new country's cultural goals (such as economic participation and tests of citizenship), without a corresponding emphasis on ensuring that there are effective means for migrant groups to achieve these goals. Resettled migrants are expected, after a brief transition period, to use the standard modes of means—ones that have been designed for the mainstream population and delivered by mainstream institutions. The assumption is that existing mechanisms and protocols (such as impersonality, equity, uniformity and universalism, codes of conduct, the merit-based recruitment system) developed to ensure that institutions provide equal access to all members of Australian society will also ensure equal rights for resettled humanitarian and other migrant groups. Losoncz (2015) argued that these processes do not account for the disadvantage of migrant groups and fail to provide equitable paths to shared goals and ambitions. Instead, these mechanisms favour those already socialised to the functioning and operation of these institutions. Thus, mechanisms of fairness become a charade, blocking pathways to social and economic security among migrants. Some migrant groups responded by retreating from government and social institutions and from the broader Australian community. Such social distancing from institutions and communities can have long-term detrimental impacts on both the migrant and the broader society. It can lead to entrenched resentment and systemic problems, including anomie and deviance in structurally excluded and stigmatised communities (Merton 1968).

For this research, critical realism provided an ideal approach for acknowledging the multilayered social reality of resettlement and for adequately framing an interdisciplinary understanding of resettlement concepts and processes. The use of grounded theory methodology within a critical-realist approach provided a robust research design to integrate

participants' narratives with attributes of government bureaucracies and social structures of Australian society. That is, grounded theory directed the researcher to uncover evidence and meanings among participants, while critical-realist inquiry drove the researcher to go beyond describing meanings to examining and analysing the structures that generate them. Finally, mixed methods accommodated the integration of multiple data sources and analysis techniques. While interviews were the primary source of data, this information was augmented through ethnographic fieldwork. The subjective experience of social and economic integration outcomes reported by participants was compared with objective measures available from Australian population census data. This use of multiple data sources and methods brought layered, yet convergent meanings (Lincoln and Guba 1985) to the research and has contributed significantly to the trustworthiness (Maxwell 1992) of the findings claimed by the researcher.

Although to date there are few examples of regulatory research explicitly inspired by realist principles, there are plentiful examples of regulatory research that adopts the theoretical and methodological premises of critical realism. Valerie Braithwaite's theory of tax defiance has connected psychological processes of people's fears, hopes and expectations with public policy and the operation of authorities administering the policy. She has used sophisticated structural equation modelling techniques to test her theoretical models predicting resistance and dismissiveness (Braithwaite 2009a). Another example is John Braithwaite's (1989) reintegrative shaming theory (RST). The theory has been highly influential in providing a rationale for restorative justice conferencing in Australia and internationally. The basic idea of the RST is that societies, communities and families among whom shame is communicated effectively and reintegratively are less likely to experience crime than places where shame is communicated in a stigmatising way or not communicated at all. A key concept in the theory is the distinction made between stigmatic shaming and reintegrative shaming. The theory argues that reintegrative shaming reduces crime, while stigmatic shaming increases it (Braithwaite 1989).

In his theory, Braithwaite drew on aspects of Hirschi's control and social bond theories, Sutherland's differential association theory and Becker's labelling theory (Makkai and Braithwaite 1994). According to the labelling perspective on delinquency, disapproving actions or reactions by other people affect the negative beliefs and feelings individuals develop

about themselves (Taylor et al. 1973). But, critics of labelling theory maintained that any such statement needs to be refined by identifying alternative outcomes of labelling and specifying the conditions under which each is likely to occur (Grimes and Turk 1978). Braithwaite's theory refined and clarified labelling theory. It also provided a deeper conception of shaming by partitioning stigmatising shaming from reintegrative shaming. By exploring and identifying the variety of qualities and structures involved in shaming, the RST demonstrates how shaming can be contingently damaging or beneficial. That is, while labelling offenders may make them view themselves as outcasts and adopt a deviant identity, there is an alternative outcome, as long as it is the act that is being labelled and not the person. Following the labelling of the wrongful act and holding offenders responsible for their behaviour, offenders are forgiven and accepted back into their family and community. Other important conditions facilitating reintegration include a communitarian society and a strong family system characterised by a sense of interdependency.

The development of the theory started out with observational data of encounters between regulatory inspectors and firms in a nursing home context, followed by various quantitative methods to empirically test initial propositions. Methods included principal component analysis to measure the concept of reintegration and multiple regression analysis to estimate the impact of reintegrative shaming on compliance (Makkai and Braithwaite 1994). The development of the theory has seen a number of empirical tests and validations. To explore the dimensionality of reintegration and stigmatisation, Harris (2001) used explanatory factor analyses followed by confirmatory analysis in a restorative justice context, while the relationship between shaming and shame was tested using hierarchical regression analysis.

The RST is one of the compelling examples of how the integration of existing theories to analyse social reality can generate a new and highly influential theory of social transformation. The RST is also an example of theoretical redescription of existing constructs (abduction) and identifying the prerequisites or conditions under which those new constructs occur (retroduction).

5. Conclusion

Regulatory research is an interdisciplinary field. Yet, without a theoretical approach that can connect the theoretical foundations and assumptions of disciplines, one's research could become flat, fragmented, unconnected or confused. This chapter has considered critical realism as a methodological approach to provide a framework for interdisciplinarity. It has explained how critical realism can deal with the analytically distinct structural, cultural and agential elements of the regulatory realm to capture their interplay and the causal mechanisms involved in producing social change or reproduction. Critical realism can be especially useful for those less experienced in regulatory research, because of its propensity to lead researchers from simply uncovering and describing phenomena to examining and analysing the powers generating them and developing theories of their production. This is important as, without the theoretical explanations of these generative causal mechanisms, one's research is in danger of establishing little more than banal descriptions.

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6

Multi-sited fieldwork in regulatory studies

Kathryn Henne

1. Introduction

Studying regulation, as the other chapters in this book attest, can be a complicated process. The previous chapter provides guidelines regarding the theoretical and methodological concerns that we as researchers should consider critically before conducting research on regulation. It emphasises the importance of studying objective concerns, such as regulatory enforcement and whether or not actors comply, alongside subjective ones, such as the meanings attributed to regulation as influenced by participants' world views. This chapter acknowledges those important considerations, but focuses on the particular concern of accounting for the transnational dimensions of regulation. While both objective and subjective concerns inform regulation, so, too, do the globalised undercurrents shaping broader social change.

This chapter discusses the use of multi-sited fieldwork methodology to document and analyse the many factors that emerge across structural, systemic and local levels. This approach requires field-intensive qualitative methods, which include, but are not limited to, participant observation, interviewing, fieldnote taking, archival and document analysis, audio and/or visual recording and sustained interactions with participants. Regulatory regimes are made up of processes that exceed

written laws and rules; they entail a 'range of policies, institutions and actors' (Scott 2010: 1). As a result, regulation makes for an unwieldy and unpredictable object of inquiry. It can be difficult to document and account for the number of actors, practices, spaces and norms that contribute to regulation, yet alone understand *how* they contribute. In addition, it is not always possible to identify the key actors, mechanisms and principles within a regime at the start of a research project. How, then, do we go about studying regimes, which may—or may not—have clear boundaries and regulatory webs? How do we discern which actors, mechanisms, principles and processes matter? How do they interact in practice? The foundational assumptions and methods of multi-sited fieldwork offer guidance in answering these questions.

Multi-sited analyses have traced how regulatory regimes influence various fields of social activity. Recent studies have examined a wide range of domains of regulation and governance, including global environmental politics (Downie 2014), internet governance (Tusikov 2016), global mining standards (Dashwood 2012) and international sport (Henne 2015). These studies, although examining distinct arenas of activity, point to the many ways that the development and expansion of regulation both respond to and reflect globalised changes. Others, such as Paul Verbruggen (2014) in his research on advertising and food safety, do not limit their focus to a single regime or social arena. Verbruggen looks at two distinct regimes to study the broader institutional design of transnational private regulation. Studying both spaces helps in discerning the weaknesses of private enforcement mechanisms and the role of courts in enforcement. Despite their different foci, this body of regulatory research shares a common concern: to describe and explain how regulation is embedded in world systems.

Globalised systems have major impacts on the study of regulation and its concepts. Regulatory capitalism, for instance, is a broad trend (see Levi-Faur, Chapter 17, this volume) that demonstrates how the pursuit of capitalistic growth often gives rise to more—not less—regulation and bureaucracy. That said, regulatory capitalism has not emerged uniformly across the globe; it takes on specific contexts and contours in different spaces. Researchers therefore should be attuned to localised concerns as well as to globalised shifts that inform their studies. Accordingly, carrying out field research on regulation requires careful consideration of how global, national and transnational systems and discourses inform what we observe as researchers. Other disciplines share this preoccupation.

For example, anthropologists have employed what is often referred to as 'multi-sited ethnography' to describe and analyse how people, objects, ideas, symbols and commodities circulate and become interconnected within transnational processes of globalisation (Marcus 1995). The drive for multi-sited ethnography is as much theoretical as methodological: it advances a notion of connectivity—one that assumes a 'local' site is linked to a broader set of globalised relations. In doing so, this approach requires the ethnographer to follow those relationships empirically.

While some anthropologists are dismissive of multi-sited ethnography (for example, Candea 2007), we would be remiss not to acknowledge some of its parallels with regulatory studies. Regulatory scholarship retains a critical focus on how different actors, ideas, objects and events inform governance structures, institutions and practices. The regulatory theories and concepts discussed in other parts of this book reflect the importance of understanding systems, webs and networks in making sense of regulatory and governance practices. As regulatory scholarship is not confined to anthropological conventions, the study of regulation has given way to a distinctly interdisciplinary tradition of multi-sited fieldwork. This chapter outlines core concerns underpinning multi-sited studies of regulation. It addresses complementary schools of thought, such as multi-sited ethnography, and how regulatory studies brings together seemingly varied approaches to fieldwork under an interdisciplinary umbrella. This chapter is organised by a series of questions that target substantive and methodological issues in regulatory studies. Together, the sections of this chapter provide an overview of the practices and challenges of multi-sited fieldwork.

2. What kinds of regulatory research problems and questions does qualitative fieldwork address?

Field-intensive methods facilitate the gathering of in-depth data on the relationships between events, behaviours and context, because they require three research practices that other methods do not: the direct observation of social actions as they take place, the accounting of events that come before or after such actions and the consideration of how the resulting behaviours are understood by 'participants and spectators, before, during and after its occurrence' (Becker and Geer 1957: 28). The emphasis of field-

intensive methods on observing relationships yields robust information on the connections between events and behaviours, which interview or survey methods alone cannot capture (Jerolmack and Khan 2014). In relation to law and regulation, qualitative fieldwork enables researchers to document relationships between the events, social conditions and actors that shape regulation and to analyse how participants' perceptions and social context inform the meanings attributed to regulation.

Fieldwork enables a better grasp of how regulation operates in practice, particularly how it can reflect or diverge from written rules. Kitty Calavita (2010: 9) summarises this distinction and its importance:

> Noting that the law as it is written and advertised to the public is often quite different from the way it looks in practice, law and society scholars have long had an interest in studying that gap.

The gap to which Calavita refers can manifest in a variety of ways, taking on different forms as conditioned by their context. Consider Losoncz's (2015) analysis of how Australian government policies and programs inform the resettlement strategies of migrants. She draws on sustained fieldwork to unearth how mechanisms developed to ensure equal access among citizens fail to secure such rights to humanitarian and other migrant groups. These processes, by failing to account for the marginalisation and cultural values of many migrant groups, actually block pathways to social and economic security, prompting some groups, such as South Sudanese refugees, to disengage from government, community and social institutions. As Losoncz's work demonstrates, in-depth fieldwork can provide significant insight into the social actors and milieu of regulation. This focus echoes legal-realist principles that embrace 'a ground-level up perspective' that illuminates how law and regulation impact people in everyday life, be they elites or ordinary residents (Suchman and Mertz 2010: 561). Unlike legal-formalist values, their scope is not limited to formal law.

It is important to note that law is just one form of regulation. As such, regulation encompasses myriad forms of social control and a wide array of social activities. The interests of regulatory specialists, in turn, often diverge from the traditional foci of law and society scholarship. For example, rather than engage the longstanding socio-legal debates about what counts as law in society (see Calavita 2010), scholars of regulation are more interested in questions about how regulatory orders emerge, take on meaning and come to influence behaviour. Law, according to David Levi-Faur (2011: 5):

> cannot save us from the recognition that there are many ways in which regulation enters the public and academic discourse. Instead of forcing unity, we need to recognise the many meanings of regulation.

Qualitative studies of regulation are thus keenly attuned to how multiple instruments and techniques of regulation interact when mobilised.

A mainstay of regulatory research is its engagement with regulatory pluralism. Regulatory pluralism, as explained by Neil Gunningham and Darren Sinclair (1999: 49), encompasses a 'much wider range of policy mechanisms' than traditionally assumed of law and policy, including 'economic instruments, self-regulation, information-based strategies, and voluntarism'. Take, for example, the differences between regulatory pluralism and legal pluralism and their study (see Forsyth, Chapter 14, this volume). Legal pluralism, as a concept, captures the diversity of legal systems and normative orders, which often have formal and informal dimensions operating simultaneously (Forsyth 2009). Legal pluralism was first observed in colonial societies in the exercise of colonial and customary law, but the concept has since been extended to understand other domains, including postcolonial settings where customary and state law coexist and hybrid regimes that combine multiple regulatory strategies. For example, Miranda Forsyth's (2009) research in Vanuatu illuminates the challenges of two systems coexisting, which are exacerbated because the state system does not officially recognise the *kastom* system (the non-state, customary system administered by chiefs). Regulatory pluralism certainly overlaps with these concerns, but accounts for various regulatory instruments, which may have customary, colonial or hybrid origins.

The differing focal points of legal pluralism and regulatory pluralism have yielded distinct, though arguably compatible, empirical insights. Qualitative studies of legal pluralism—notably, the contributions of legal anthropology—provide important methodological and analytical approaches to studying law in action, even in situations when some forms of social control are not recognised as law. Such contributions include the *trouble case* approach, which looks at disputes to identify 'the trouble' and how it was resolved; *processual analysis*, which examines the means of settling disputes; and the acknowledgement of *semi-autonomous social fields*, which appreciates that different legal orders are not autonomous and affect how other orders operate (Forsyth 2009).

Although these represent important analytical breakthroughs in the study of law, the recognition of *global* legal pluralism—that is, forms of pluralism that extend beyond the boundaries of the nation-state—has challenged the applicability of some earlier approaches. Multi-sited regulatory scholarship offers an important intervention, because it considers pluralistic spaces in which law may or may not be present. For example, wireless communication standards that shape the direction of information technology are not set by global legal organisations such as the United Nations (UN) agency the International Telecommunications Union (ITU), but by standards-setting bodies such as the Institute for Electrical and Electronics Engineering. These organisations operate through voluntary participation, not through legalised enforcement mechanisms. The study of regulatory pluralism can thus better capture the array of regulatory tactics and their interplay across different social orders.

Through the empirical scrutiny of regulatory pluralism, scholars have levied analytical challenges to foundational socio-legal ideas, among them reconsiderations of the core characteristics of the state (Braithwaite 2000) and citizenship (Henne 2015). John Braithwaite's analysis of the 'new regulatory state' contends that contemporary forms of governance and social relations no longer reflect a welfare state model. As a result, Braithwaite (2000: 222) argues, social science disciplines must reorient their approach if they are to engage new problems as states embrace market competition, privatised institutions and decentred forms of regulation. Moreover, the critical study of regulatory regimes and their influence across jurisdictions emerges as an equally important task. Multi-sited field research offers two interrelated contributions: it enables a robust empirical explanation of multi-scalar and cross-jurisdictional phenomena and can, in turn, aid in generating new concepts to better respond to governance challenges. The next section elaborates on the features and methods of multi-sited fieldwork.

3. What is multi-sited fieldwork?

Multi-sited fieldwork is most often discussed in relation to ethnography. Ethnography, as a methodology, is traditionally described as the systematic study of a population in a particular location through long-term field research. Although considered a robust methodology for understanding localised cultural dynamics and describing what actors do in these spaces,

ethnography has clear limitations. Colin Jerolmack and Shamus Khan (2014: 181) characterise them as a lack of 'generalisability beyond those actually studied' and 'difficulty accounting for social structure'. Different methods are thus better suited for certain kinds of research questions. For example, 'the study of macro changes in birth, death, and fertility rates is best left to demographers' (Jerolmack and Khan 2014: 181). While this is an important point about the appropriateness of methods, it is a misnomer to assume that field-intensive research can only be conducted in one location with immersion achieved only through a long period in that location.

Multi-sited ethnography—a term coined by anthropologist George Marcus (1995)—is the practice of producing in-depth research attuned to the influence of world systems. World systems theory posits two central tenets: first, that capitalism supersedes geographic boundaries in significant ways that shape relationships between nations and across the globe, and second, that macro-level examinations are necessary to understand how capitalism informs global inequality (Wallerstein 2004). Multi-sited ethnography gleans insights into these macro-level developments through the close study of commodities, objects, persons and ideas as they travel across time and space. In essence, it uses methods traditionally associated with the study of micro-level phenomena (for example, participant observation, interviewing, sustained interactions with participants) to make sense of larger-scale processes. For Marcus (1995), research methods may focus on small-scale interactions, but they need to attend to how they take shape in world systems. Rather than making sense of cultural changes through the sustained analysis of one community, a multi-sited ethnographic approach entails 'following' objects of inquiry, which can include things (such as gifts, money and other objects), people, signs and metaphors, stories and narratives, life histories and biographies, as well as conflicts (Marcus 1995: 106–13). This definition may at first seem abstract, but, in keeping with the conventions of ethnography, it focuses on observable relationships.

Consider how Kim Fortun (2001) studied advocacy on the behalf of the thousands of victims affected by the 1984 Union Carbide gas tragedy in Bhopal, India.[1] The incident remains a globally recognised industrial disaster—a seemingly clear case of regulatory failure. A traditional

1 Official estimates vary, but the gas leak and explosion exposed over 500,000 people to methyl isocyanate gas and other chemicals.

anthropologist may have an interest in the transnational flows that shaped the disaster and how they informed responses to it, but she would not necessarily leave India to do so. Instead, a classical anthropological approach is more likely to produce an in-depth analysis of the changing dynamics within Bhopal over the years following the disaster. Fortun spent substantial time in India; however, in pursuing the multiple forms of advocacy that emerged in response to the Bhopal disaster, she also studied transnational advocacy networks and responses from international corporations. Her research questions and methodology required her to go to spaces where she could examine different court reactions in the United States and India, how Union Carbide designed plant sites and even how trade agreements being signed by India influenced domestic discourses while the Indian Supreme Court decided the Bhopal case. As Fortun's work demonstrates, multi-sited ethnography prompts the researcher to be attentive to changing circumstances during fieldwork, including their globalised dimensions. Accordingly, there is a methodological imperative to trace the various relationships informing them, which often requires following the flows to other field sites. It involves adding sites until you arrive at a better explanation of the problem. Whereas the traditional anthropologist obtains immersion by remaining in one space, the multi-sited ethnographer traverses spaces to understand the contours of phenomena.

Multi-sited ethnography aids in examining transnational processes that do not map neatly on to global, national or local levels. Marcus (1995) underscores three important areas of focus on actors, objects, ideas, symbols and stories: how they circulate; how they coalesce and diverge; and how their relationships reflect and contribute to existing systems of knowledge as well as the production of new forms of knowledge. The principles underpinning multi-sited ethnography reflect its theoretical subscription to global connectivity. It can be difficult, however, to see how this description lends itself to a distinct methodology—and this is perhaps part of Marcus's point. That is, because this approach recognises that many research problems are conditioned by transnational circulation, an overly prescriptive methodology might undermine the dynamism required for multi-sited inquiry.

Ethnographies of globalisation provide guidance in terms of how to go about designing and carrying out a multi-sited project. Anna Tsing's (2005) study of how corporate growth changed the rainforests of Indonesia serves as a case in point. She illustrates how an array of capitalist

interventions (many backed by regulatory instruments) transformed Kalimantan's forests and the lives of many residents in Borneo during the 1980s and 1990s. To do so, she traces a series of developments that shaped the area's transformation: the discursive framing of the area as a 'frontier' ripe for resource extraction, the contingent alliances between corporations and local residents, the treatment and responses of the Meratus Dayak community—who live deep in the rainforests and are considered 'the disorderly cousins of the civilized people in surrounding plains and towns' (Tsing 2005: 174)—and the rise of a domestic environmental movement that vehemently opposed the devastation of the forests and their inhabitants. In detailing the relationships between these actors and the landscape, Tsing illuminates broader structural changes that led to rapid commercial changes and the Dayaks' disenfranchisement. Reminding her readers that globalisation is not delivered 'whole and round like a pizza' (Tsing 2005: 271), she describes how globalisation reconfigured the region through a series of fragmented encounters that included dealings with entrepreneurs and conflicts between local residents, activists, scientists, private investors and funding agencies. Rather than a clash of cultures, Tsing argues, globalisation results in sometimes awkward frictions. These frictions expose unequal forms of exchange that can yield 'new cultural and power dynamics through the fragmentary intersection of ideas and concepts at global/local scales' (Levitt and Merry 2009: 445). In doing so, her analysis demonstrates how multi-sited ethnography enables deeper scrutiny of the power relations underlying these structural changes.

By attending to localised conditions in individual sites as well as the relationships between them, multi-sited ethnography accounts for context in critical ways that thin interpretations based on geographic case studies can fail to do (Bartlett and Vavrus 2014). This approach enables the identification and analysis of activities that exist beyond state-sanctioned boundaries by tracing circulations, 'shifts, technoscience, circuits of licit and illicit exchange, systems of administration or governance and regimes of ethics or values' (Collier and Ong 2005: 4). According to Sally Engle Merry (2015), ethnography's emphasis on localised and contextual dynamics offers important insights into how we think about the global. In fact, as Philip McMichael (1996: 50) explains:

> Global relations are inconceivable without local 'faces,' just as the 'local' has no meaning without context. The very definition of 'global' and 'local' are not only mutually conditioning, they continually change.

For Merry (2015), examining smaller sites of sociality is critical to understanding the everyday actions that take place in international spaces, which are sometimes thought of (incorrectly) as abstract and far removed from the local. Instead, she argues, the global is a particularly important set of localised interactions between influential actors, which have ripple effects across other locales.

Merry (2015) outlines specific kinds of ethnography that can illuminate transnational dimensions: *deterritorialised ethnography*, which studies spaces that are not based in a particular geographic locale but exist internationally, such as UN conferences; *contextualised ethnography*, which examines how a local site is embedded in larger social systems, networks and practices; and the *analysis of commensuration*, which is the process of translating diverse social conditions and phenomena into comparable units. Processes of commensuration are important, because they actually decontextualise people, events, actions and objects to create points of comparison and similarity. Merry (2011) has analysed their power. Specifically, she has studied the expansion of quantitative measures used to evaluate the efficacy of international legal intervention, which often disavow the importance of context. In contrast, Merry brings attention to the particular conditions informing the development of indicators, how these measures have come to have global currency and the consequences of their privileging over other forms of knowledge. Within this in mind, formulaic approaches to research design and practice cannot capture the variety of ways to account for the transnational dimensions of social phenomena and processes. Fieldwork can take place in different sites across the globe or in strategically situated sites where a researcher or research team can observe and connect relationships beyond a particular locale. Thus, and importantly for studies attentive to world systems, the researcher needs to pay careful attention to transnational connections as well as to site-specific distinctions. This can require the reconsideration of both spatial and temporal influences and their bearing on one's research design, objects of inquiry and data. Doing so can actually lead to the revision of one's initial research questions, which is a benefit as well as a challenge of adopting this approach.

There are other words of caution for the aspiring multi-sited fieldworker. It can be difficult to ascertain the level of immersion, as ethnographic research that traditionally relies on long-term fieldwork within a particular space or community. Regulatory researchers, however, are not necessarily bound to the conventions of anthropological inquiry.

Instead, the interdisciplinarity of regulatory studies yields different obligations: the difficult duty of explaining and justifying a multi-sited approach to scholars from a range of backgrounds. The next section offers a discussion of a few—certainly not all—examples of multi-sited regulatory research, each adopting a distinct approach that attends to different demands of their research questions and sites.

4. How have scholars of regulation used multi-sited fieldwork methods?

Multi-sited studies of regulation reflect varying approaches to obtaining in-depth understandings of the transnational dimensions of governance arrangements. In terms of foundational studies of regulation, *Global Business Regulation* by John Braithwaite and Peter Drahos (2000) stands out as a classic text (see also Drahos, Chapter 15, this volume). It is also a pioneering multi-sited research project, drawing on interviews with over 500 participants in multiple sites across 13 cases. Braithwaite and Drahos (2000: 13) refer to their research approach as a 'micro–macro method for the anthropology of global cultures', which, they argue, requires 'a combination of the qualitative methods of anthropologists and historians'. *Global Business Regulation* is methodologically distinct in the sense that it is, for the most part, not comparative, but rather global in its orientation. Its transnational character emerges through a sustained endeavour to identify and describe themes that cut across domains of business regulation.

In her work on human rights and gender violence, Merry (2006) opts for a deterritorialised approach to fieldwork. It shares the micro–macro methodological concerns expressed by Braithwaite and Drahos (2000). Her examination of the global movement to promote human rights and to end gender violence brings attention to how global and local activism converge in ways that reveal different framings of human rights issues across sites that include the United Nations, Fiji, Hong Kong, India, China and Hawai'i. In particular, she looks at how activists and other intermediaries help global human rights gain local currency, because they 'translate up and down'—that is, across the global–local interface. Translation is not the transfer of knowledge from the United Nations, but, instead, the appropriation of human rights principles to better fit localised contexts. These principles, in turn, become rooted in social practices, in ways that reflect ongoing negotiations and translations.

Merry's work demonstrates clearly how ethnographic research can engage different parts of world systems and be used to identify synergies (as well as distinctions) between and across them. Its important contribution is not simply the depth of its investigation across sites, but also its ability to demonstrate how a deterritorialised approach can bring together disparate sites to illuminate global processes.

Multi-sited fieldwork can also be used to study a particular regulatory concern that requires consideration of different perspectives, spaces and actors. Annelise Riles (2010: 7) traces the rise of 'global private law solutions'—as outwardly distinct from direct governmental regulation of financial markets—through a focus on the role of collateral in derivatives transactions. Riles documents localised practices of and global influences on Toyko's international swap market (for example, the International Swaps and Derivatives Association, with headquarters in New York and offices in other parts of the globe) and the financial exchanges they enable. Her characterisation of regulation in this field is one marked by hybridity: it is 'neither inherently private nor public, neither global nor local'; rather, the governance of global financial markets emerges as 'a set of routinized but highly compartmentalized knowledge practices, many of which have a technical legal character' (Riles 2010: 10). While this is not an unexpected finding for regulatory scholars, her illustration reveals various manoeuvres that gloss over, and even mask, the inherent uncertainty of derivatives trades. In short, they give collateral a veneer of certainty. In light of this finding, Riles casts doubt on reforms that lack a grounded sense of routinised knowledge practices and their influence, arguing that a ground-level–up approach offers more regulatory potential. In doing so, she demonstrates how micro-level analysis can support broader recommendations.

Multi-sited research can facilitate the documentation of an emergent form of regulation, while also being attentive to broader globalised trends shaping its development and proliferation. Kate Henne's (2015) research on the relationships between antidoping regulation and gender verification[2] in global sport offers one such example. It is an explicit attempt to combine multi-sited approaches used in anthropology with the micro–macro methods used by Braithwaite and Drahos (2000) to study a hybrid regulatory regime. Henne traces the history of these

2 Gender verification is a form of regulation in women's athletic events. It polices a presumed binary boundary between women and men by subjecting women to additional levels of surveillance and bodily scrutiny.

intertwined regulations while also conducting ethnographic fieldwork on global policymaking, national and sport-specific stakeholders' strategies of compliance, forms of resistance to the regime, individual participants' understandings of the rules and athletes' experiences of navigating the mass surveillance endorsed by the regime. Looking from these different angles, she analyses how antidoping regulation shifted from a simple set of medical rules and testing implemented by private sporting organisations to a more expansive regime backed by corporate–state partnerships and reliant on various surveillance and legalistic tools. According to Henne, the regime—although attempting to preserve traditional values of fair play, bodily integrity and moral fortitude in sport—actually comes to embody many of the neoliberal values that regulators claim to stand against.

Well-designed multi-sited research can deliver robust findings without the long-term fieldwork conventionally required in anthropology to justify the depth of fieldwork. Christian Downie's (2014; see also Downie, Chapter 19, this volume) study of prolonged international negotiations on the subject of climate change provides an in-depth account without following prescribed ethnographic methods. He tracks climate change negotiations that took place between 1992 and 2013, which forecloses the possibility of participant observation and interviews across this period. To better grasp how a state changes its position in relation to the type of agreement achieved, Downie (2014: 11) examines the United States (US) and European Union (EU) during the Kyoto phase of negotiations, as both have changed their stance during negotiations and have 'traditionally been critical to the success or failure of international negotiations'. With little data on these closed-door negotiations, he relied heavily on interviews with both state and non-state elite representatives deeply engaged in the negotiations. This required multiple, iterative rounds of interviewing, enabling Downie to refine his focus. This resulted in 105 formal interviews in which participants served as important interlocutors to ensure a deeper understanding of the research problem at hand. As this example evidences, regulatory spaces are not favourable to traditional modes of ethnographic inquiry and often require strategic reconsideration and recalibration in terms of research design and planning.

5. What are the future directions of multi-sited regulatory research?

Many regulatory concerns have complex, transnational dimensions, which lend themselves to multi-sited fieldwork. However, emergent problems often have features that are not easy to observe, yet alone access, for field-intensive research. Growing concerns over big data and its retention, internet governance and the expansion of mass surveillance across a variety of domains are just a few timely examples. Natasha Tusikov (2016) documents how private–public relationships facilitate non–legally binding enforcement agreements that are altering how governments and corporations regulate content and information on the internet. Drawing on research conducted in the United States, United Kingdom, Canada and Australia, she convincingly argues that large internet companies, such as Google, PayPal, eBay and Yahoo, enable prominent multinational rights-holders and states to police vast populations across the globe—practices that were technologically impossible or prohibitively expensive in the past. As these arrangements between powerful actors are secretive in nature and protected from public scrutiny, Tusikov's findings point to both the promises and the perils of multi-sited research (see also Tusikov, Chapter 20, this volume). On the one hand, multi-sited fieldwork has the capacity to shed light on otherwise invisible regulatory relationships. On the other, it entails a number of challenges in terms of obtaining access and eliciting robust information.

Given the number of transnational governance arrangements that would benefit from in-depth scrutiny, refining multi-sited research design is an ongoing process. There is a risk that a multi-sited study may not yield enough information about a research site or may obfuscate the direction of a research project by focusing too heavily on presumed connections between sites. In response to these potential limitations and challenges, Lesley Bartlett and Frances Vavrus (2014) propose the vertical case study approach as a useful model, particularly for researchers new to multi-sited research design. It essentially offers a guide for tracing relationships by outlining a set of axes for researchers to address in relation to each field site and then in relation to other sites. Vertical case studies help researchers identify connections and divergences across sites in ways that are attentive to how globalisation affects fields of governance without replicating the tendency of comparative approaches to overemphasise the position of the nation-state (Bartlett and Vavrus 2014).

The vertical case study approach has three principal areas: the *transversal*, the *vertical* and the *horizontal*. Applied to regulatory contexts, the *transversal* facilitates analysis of pluralist dynamics that emerge across and through different scales. It accounts for how particular understandings of and approaches to regulatory problems circulate and become popularised within and across cases. This requires the examination of how historical, social and temporal considerations influence the development and uptake of regulatory strategies. The *vertical* focuses on how higher-level (for example, institutional, national, global) governance practices interact with contextual factors in ways that enable or restrain a particular technique or instrument to take hold or receive funding. The *horizontal* captures other grounded developments that interface with regulatory interventions (which can, in turn, have other transversal and vertical relationships not otherwise captured). The horizontal axis can include existing communal, site-specific and/or pluralistic concerns that invariably influence regulation in practice. In essence, the vertical case study can assist with mapping the distinctions of particular cases in relation to transnational regulatory relationships.

Against the backdrop of globalisation, it is difficult to study regulation without considering how it is grounded in nested systems, be they legal or otherwise. Globalisation is not an even or uniform process, nor is the emergence of regulation. Regardless of the specific design used to guide multi-sited fieldwork, an overarching concern for the field researcher is to make sense of how pluralistic orders come together and diverge. This is especially important, as regulatory pluralism does not always yield convergence. For example, labour certification and fair trade schemes are spaces in which many different standards are emerging. Such challenges make multi-sited fieldwork a particularly useful methodology for regulatory researchers. Importantly, multi-sited fieldwork provides an organising framework for micro–macro methods while prompting the researcher to be empirically attentive to the nuances of regulatory pluralism in each site. It can also be compatible with the realist underpinnings of regulatory studies by enabling the researcher to add sites as she seeks a deeper understanding of how regulation-in-action invariably deviates from rules on the books.

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Section 2: Theories and concepts of regulation

The Regulatory Institutions Network (RegNet) can fairly claim to be the home of much of the work on responsive regulation, with the first complete articulation of that theory to be found in Ayres and Braithwaite's 1992 book, *Responsive Regulation*. This section encapsulates many of the important developments since 1992. The ideal of responsiveness has proved remarkably fertile, allowing RegNet's research to grow in different directions and providing new contexts for empirical testing. The chapter by John Braithwaite identifies different types of responsiveness such as micro-responsiveness, networked/nodal responsiveness and meta-regulatory responsiveness. The chapter by Neil Gunningham and Darren Sinclair on smart regulation and the chapter on nodal governance by Cameron Holley and Clifford Shearing provide key examples of how RegNet has rethought regulatory theory.

The other chapters in this section deal with concepts that are central to both responsive regulation and regulatory theory more widely, and without which a volume on regulation would be incomplete. Peter Grabosky analyses the concept of meta-regulation, which lies at the very heart of reconceptualising the change in the distribution of regulatory tasks in the modern state. Risk is central to regulatory theory. Haines distinguishes three forms of risk—actuarial, sociocultural and political—and discusses how perceptions and calculations of each, either individually or in combination, influence the path of regulation. Michael W Dowdle traces the rise and crisis of accountability—a crisis that is being widened by globalisation as it creates different views of

duties of accountability and of who should bear those duties. Christine Parker and Vibeke Lehmann Nielsen's chapter, through a set of questions, provides the reader with a structured way of thinking about the information base required for an understanding of the compliance issues within a given sector of regulation. The final chapter in this section, by Miranda Forsyth, outlines the concept of legal pluralism, showing how its application to the case of traditional knowledge regulation in the Cook Islands is more likely to connect to the lived reality of social systems that produce such knowledge. The theme of traditional knowledge has also been the basis of collaboration between RegNet scholars and scholars from New Zealand (see the book by Peter Drahos and Susy Frankel, from Victoria University of Wellington, *Indigenous Peoples' Innovation*).

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7

Types of responsiveness

John Braithwaite

1. Introduction

Responsive regulation suggests that governance should be responsive to the regulatory environment and to the conduct of the regulated in deciding whether a more or less interventionist response is needed (Ayres and Braithwaite 1992). From those bare bones, a number of types of responsiveness are considered: pyramidal responsiveness, micro-responsiveness, networked responsiveness and meta-regulatory and socialist responsiveness. The Regulatory Institutions Network (RegNet) has been one among many nodes in networks of regulatory practitioners and scholars where these ideas have been through decades of research and development (R&D). They need decades more.

2. Responsive regulation

Law enforcers can be responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention. Responsive regulation is not something only governments do; civil society actors can also regulate responsively—indeed, they can even regulate governments responsively (Gunningham et al. 1998).

Responsive regulation requires us to challenge rulish presumptions that harmful conduct X mandates regulatory intervention Y. If an armed robber is responding to the detection of her wrongdoing by turning around her life, kicking a heroin habit, helping victims and voluntarily working for a community group 'to make up for the harm she has done to the community' then the responsive regulator says no to imprisonment as an option mandated by a sentencing rule.

Therefore, many worry that responsive regulation is not designed to maximise consistency in law enforcement. The idea of responsive regulation grew from dissatisfaction with the business regulation debate. Some argue that businesspeople are rational actors who only understand the bottom line and who therefore must be consistently punished for law breaking. Others contend that businesspeople are responsible citizens who can be persuaded into compliance. In different contexts, there is truth in both positions. This means that both consistent punishment and consistent persuasion are foolish strategies. The hard question is how do we decide when to punish and when to persuade? What makes the question such a difficult one is that attempts to regulate conduct do not simply succeed or fail. Often they backfire, making compliance worse. So the tragedy of consistent punishment of wrongdoers of a certain type is that consistency causes regulators to make things worse for future victims of the wrongdoing.

3. Pyramidal responsiveness

The crucial point is that responsive regulation is a dynamic model in which persuasion and/or capacity building are tried before escalation up a pyramid of increasing levels of punishment. It is not about specifying in advance which are the types of matters that should be dealt with at the base of the pyramid, which are so serious that they should be in the middle and which are the most egregious for the peak of the pyramid. Even with the most serious matters, such as genocide in the Great Lakes region of Africa, responsive regulatory scholars have tended to stick with the presumption that it is better to start with dialogue at the base of the pyramid. A presumption means that, however serious the crime, our normal response is to try dialogue first for dealing with it and to override that presumption only if there are compelling reasons. Of course, there

will be such reasons at times: the man who has killed one hostage and threatens to kill another may have to be shot without a trial, the assailant who vows to pursue the victim again and kill her should be locked up.

As we move up the pyramid in response to a failure to elicit reform and repair, we often reach the point where reform and repair are finally forthcoming. At that point, responsive regulation means that escalation up the pyramid is put into reverse and the regulator de-escalates down the pyramid. The pyramid is firm yet forgiving in its demands for compliance. Reform must be rewarded just as recalcitrant refusal to reform will ultimately be punished. Responsive regulation comes up with a way of reconciling the clear empirical evidence that punishment works sometimes and sometimes backfires, and likewise with persuasion (Braithwaite 1985; Ayres and Braithwaite 1992). The most systematic empirical exploration of the feasibility of these ideas can be found in 100 working papers of RegNet's Centre for Tax System Integrity (regnet.anu.edu.au/research/publications).

The pyramidal presumption of persuasion gives the more respectful option a chance to work first. Costly punitive attempts at control are thus held in reserve for the minority of cases where persuasion fails. Yet it is also common for persuasion to fail. When it does, a recurrent reason is that a business actor is being a rational calculator about the likely costs of law enforcement compared with the gains from breaking the law. Escalation through progressively more deterrent penalties will often take the rational calculator up to the point where it becomes rational to comply. Quite often, however, the business regulator finds that they try restorative justice and it fails; they try escalating up through more and more punitive options and they all fail to deter. Perhaps the most common reason in business regulation for successive failure of restorative justice and deterrence is that noncompliance is neither about a lack of goodwill to comply nor about rational calculation to cheat. It is about management not having the competence to comply. The manager of the nuclear power plant simply does not have the engineering knowhow to take on the level of responsibility asked of him. He must be moved from the job. Indeed, if the entire management system of a company is not up to the task, the company must lose its licence to operate a nuclear power plant. So when deterrence fails, the idea of the pyramid is that incapacitation is the next port of call (see Figure 7.1).

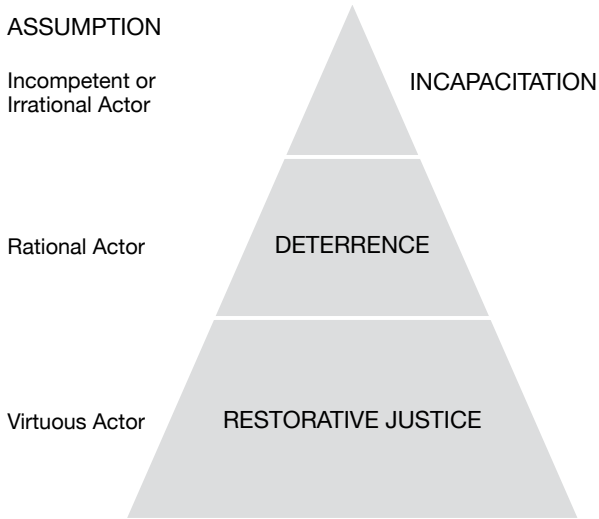

Figure 7.1 Integrating restorative, deterrent and incapacitative justice
Source: Author's work.

This design responds to the fact that restorative justice, deterrence and incapacitation are all limited and flawed theories of compliance. What the pyramid does cover are the weaknesses of one theory and the strengths of another. The ordering of strategies in the pyramid is not just about putting the less costly, less coercive, more respectful options lower down to preserve freedom as nondomination (Pettit 1997). It is also that by resorting to more dominating, less respectful forms of social control only when dialogue has been tried first, coercive control comes to be seen as fair. When regulation is seen as more legitimate and more procedurally fair, compliance with the law is more likely (Murphy 2014). Astute business regulators often set up this legitimacy explicitly. During a restorative justice dialogue over an offence, the inspector says there is no penalty this time, but she hopes the manager understands that if she returns and finds the company has slipped back out of compliance again, under the rules, she will have no choice but to refer it to the prosecutions unit. When the manager responds, yes, this is understood, a future prosecution will likely be viewed as fair. Under this theory, therefore, privileging restorative justice at the base of the pyramid builds legitimacy and therefore compliance.

There is also a rational choice account of why the pyramid works. System overload results in a pretence of consistent law enforcement where, in practice, enforcement is spread around thinly and weakly.

Unfortunately, this problem is worst where crime is worst. Hardened offenders learn that the odds of serious punishment are low. Tools such as tax audits that are supposed to be about deterrence frequently backfire by teaching hardened tax cheats how much they can get away with. Reluctance to escalate under the pyramid model means that enforcement has the virtue of being selective in a principled way. Moreover, the display of the pyramid itself channels the rational actor down to the base. Noncompliance comes to be seen (accurately) as a slippery slope that will inexorably lead to a sticky end. In effect, the pyramid solves the system capacity problem by making punishment cheap. The pyramid says unless you punish yourself for law breaking through an agreed action plan near the base of the pyramid, we will punish you much more severely higher up the pyramid (and we stand ready to go as high as needed). So it is cheaper for rational firms to punish themselves (as by agreeing to payouts to victims, community service or new corporate compliance systems). Once the pyramid accomplishes a world where most punishment is self-punishment, there is no longer a crisis of the state's capacity to deliver punishment where needed. One of the messages of the pyramid is: if you keep breaking the law it is going to be cheap for us to hurt you because you are going to help us hurt you (Ayres and Braithwaite 1992: 44).

According to responsive regulatory theory, a good legal system is one in which citizens learn that responsiveness is the way institutions work. Once they perceive the system to be responsive, they know that there will be a chance to argue about unjust laws. They also see that gaming legal obligations and failure to listen to persuasive arguments about the harm their actions are doing and what must be done to repair it will inexorably lead to escalation. The forces of law are listening, fair and therefore legitimate, but also seen as somewhat invincible.

4. Micro-responsiveness

Development of responsive regulation was inductive. The ideas of responsive regulation and restorative justice—that because injustice hurts, justice should heal—as researched by RegNet's Centre for Restorative Justice (led by Heather Strang), were greatly influenced by conversations with coalmine and nursing home regulators. There was little originality, as what RegNet scholars did was distil the thinking of people considered master practitioners of regulation.

The nursing home regulation data collection by Toni Makkai, Anne Jenkins, Diane Gibson, Valerie Braithwaite, John Braithwaite and others set out to test pre-existing theories rather than develop a new one. Valerie Braithwaite tested Kagan and Scholz's (1984) classic typology of regulated actors as political citizens, amoral calculators and incompetent. This was not the structure of reaction to regulatory authorities revealed in Braithwaite's (2009) factor analyses of the nursing home data or the subsequent tax data. The results that did emerge grounded her theory of motivational postures that became the micro-foundation for further R&D of responsive regulation with the Australian Taxation Office (ATO). The motivational postures towards an authority were commitment to the authority and its rules, capitulation, resistance, game playing and disengagement. Responsiveness today is understood in terms of the variable requirements of responsiveness to individual and collective actors with these different motivational postures. These motivational postures are also being coded for 60 armed conflicts in 'Peacebuilding Compared', in which Valerie Braithwaite, John Braithwaite, Hilary Charlesworth, Adérito Soares, Bina D'Costa, Camille McMahon and other RegNet colleagues have been involved in seeking to understand what fails and succeeds in building sustainable peace.

The other important micro-foundation, developed in work on healthcare regulation by RegNet's Judith Healy (2011), has been on the need to complement a pyramid of sanctions with a pyramid of supports. Neil Gunningham and Darren Sinclair's (2002) work on the importance of leaders pulling laggards and environmental outcomes up through new ceilings also shaped the pyramid of supports idea.

5. Networked, nodal responsiveness

Peter Drahos (2004) more than tweaked the responsive regulatory pyramid to attune it to possibilities for networked regulation. In developing countries in particular, state regulators do not have the enforcement resources to escalate to one state regulatory strategy after another as each layer of the pyramid sequentially fails. The idea of the pyramid of networked escalation in Figure 7.2 is that a state regulator escalates by networking regulatory pressure from other actors—which can include other states (for example, the United States pressuring a foreign airline that puts US travellers at risk), international regulators, industry associations, hybrid industry–non-governmental organisation

(NGO) certification organisations such as the Forest Stewardship Council, competitors, upstream and downstream corporate players in the supply chain of the problem actor and, most importantly, different media and civil society actors such as trade unions. Of course, civil society actors such as human rights groups can reflect responsively on how to deploy their own pyramid of networked escalation to enrol (Latour 1987) actors with more muscle than themselves in their regulatory projects (Braithwaite and Drahos 2000).

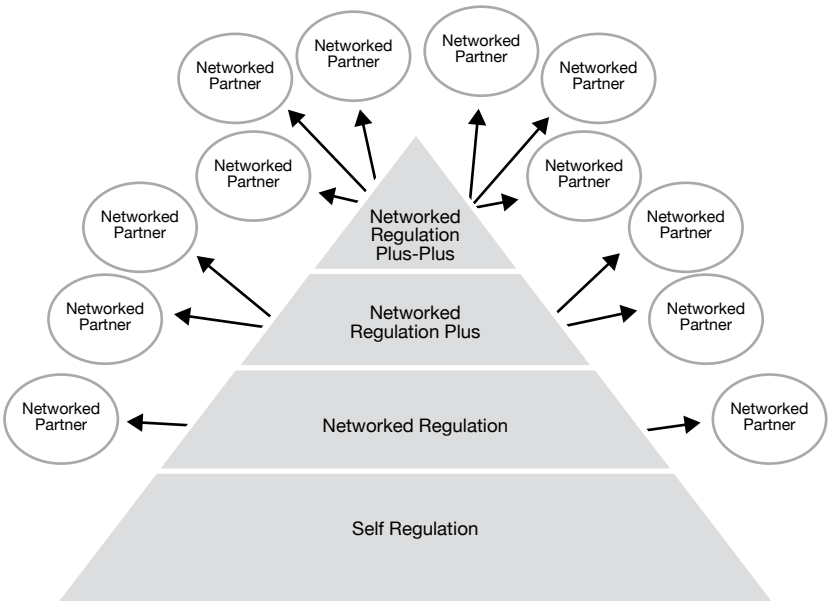

Figure 7.2 Drahos-esque networked escalation

Source: Author's work.

As combined use is made of pulling different kinds of levers wielded by different kinds of actors, the smart regulator attends to the many and various insights of Gunningham et al. (1998) into how some levers complement one another, while others are mutually incompatible, each defeating the purposes of the other. Smart regulation implies a diagnostically reflective regulator attending to the possible synergies and contradictions a pyramid of networked escalation can throw up.

A fair criticism of responsive regulation in theory and practice is that its emphasis on escalation up the pyramid when less interventionist strategies fail neglects refinement of tactics for de-escalation and lateral movement to more creative forms of networked regulation at the same

level of the pyramid. Responsive regulation prescribes consideration of these options before escalation. Jennifer Wood and Clifford Shearing's (2007: 106–7) critique is that the pyramid can encourage the thought that if regulatory intervention fails, it is natural to escalate rather than scan laterally with fluidity and agility looking for horizontal problem-solving partners. When a restorative justice conference at one level of the pyramid fails, another conference that widens the circle to participants who bring new problem-solving resources into the circle is always an option, then another that widens it again. The Wood and Shearing critique commends special training in how to think more laterally and in less automatically escalatory ways. Hence, Braithwaite (2008: 99) proposed a set of corrective principles of responsive regulation that include never escalating to hard options without considering all available softer and horizontal interventions; using restorative dialogue to bubble up norm improvement, including law reform and radical deregulation; having a preference for 'governing by providing' over 'governing by regulating' and for capacity building over control; and scanning creatively and optimistically for potential network partners with fresh resources.

6. Meta-regulatory responsiveness

Enforced self-regulation was a founding idea of responsive regulation in the early 1980s. This was the notion that while self-regulation had the potential to harness the managerial creativity of a regulated industry to come up with cheaper and more effective means for achieving regulatory outcomes, self-regulation has a formidable history of industry abuse of this privilege. Peter Grabosky (1995; Gunningham et al. 1998) and Christine Parker (2002), among others, developed this theme in the more theoretically fruitful direction of meta-regulation. For regulation to become more resilient, attention was needed to how to make the regulation of regulation meaningful.

Some of the better-known meta-regulatory initiatives in enforcement practice have been disappointments. For example, US prosecutors negotiating Corporate Integrity Agreements in lieu of heavier corporate crime sentences deferred prosecutions while corporations put in place new internal compliance systems to prevent recurrence. These have been disappointing in the pharmaceutical industry, for instance, where firms like Pfizer have had one failed Corporate Integrity Agreement after another (Dukes et al. 2014: 339). A problem here is that

prosecutors' offices are not regulatory bureaucracies. Specialist regulatory bureaucracies are better equipped to negotiate meaningful Corporate Integrity Agreements. They have superior knowledge of their domain of regulation than generalist prosecutors, because of their networking with compliance professionals and civil society (a special emphasis in Parker 2002) and with advocacy groups interested in monitoring that kind of miscreant corporation. Indeed, from a responsive regulatory perspective, best practice in the design of negotiated settlements has those third parties in the room. They participate when deals are proposed on the design of any Corporate Integrity Agreement or Enforceable Undertaking. With follow-through, the responsive ideal has always been that mandated independent reports on compliance with Enforceable Undertakings should be on a public register. These days, that means posted on the internet, where meta-regulators, who are competitors of the compliance professional who audited corporate compliance with the Enforceable Undertaking, can give the regulator a call to suggest that their competitor has done a methodologically shoddy or captured job of certifying compliance. Their interest in doing this is commercial—to convince corporations in trouble with the law and regulators that they, rather than their competitors, are more trustworthy meta-regulators for ensuring that Enforceable Undertakings are exceeded rather than underdone. Without this, meta-regulatory laggards are the ones who will be rewarded rather than the leaders who take regulatory innovation up through new ceilings of excellence.

As with US Corporate Integrity Agreements, the Australian history with Enforceable Undertakings is littered with disappointments from the time of Brent Fisse's (1991) earliest attempts to reform them, yet also many successes that have occasionally transformed whole industries (such as the life insurance industry two decades ago: Fisse and Braithwaite 1993; Parker 2004). Some of the successes have been achieved with formidable follow-through by the relevant regulator. In the case of the transformation of insurance industry practices with disadvantaged consumers, prime minister Paul Keating asked for a briefing on what we were doing at the Trade Practices Commission to ensure that industry transformation occurred. Leading chief executive officers (CEOs) called press conferences to announce what they would do to achieve change for Aboriginal consumers and other disadvantaged consumers, and leading television current affairs programs followed through on those promises (Parker 2004). In short, successful meta-regulation is a bureaucratic accomplishment; prosecutors' offices are not regulatory bureaucracies.

Prosecutors also have a different ethos from regulatory bureaucracies about what key performance indicators count. At worst, prosecutors are interested in counting notches on their gun.

The same regulator in Australia had some appalling experiences in negotiated settlements with big business, the most notorious being Robert McComas, chairman of the Trade Practices Commission, who came from being a director of Australia's largest tobacco company (and returned to chair its board). McComas negotiated a remedial advertisement with the Tobacco Institute that was as clearly a breach of his own statute as the initial advertisement complained about by Action Against Smoking and Health. It was an advertisement that claimed passive smoking was not proven to be a danger to health. The Australian Federation of Consumer Organisations (AFCO) appealed the commission's remedial advertisement. This was a brave decision by AFCO's young CEO, Robin Brown, who risked bankrupting AFCO had there been an order to pay the tobacco industry's costs. The Federal Court found the advertisement approved by the regulator to be in breach of its own statute because the evidence was clear that passive smoking was a danger to health. It was the first time anywhere in the world that a court made this finding. As soon as it did, risk managers across the globe started to advise restaurants, workplaces, discos and even sports grounds to prohibit smoking for fear of passive smoking suits. Such suits also started in Australia, citing that Federal Court decision. Surprisingly, even in the open air of baseball grounds in the land of the free, consumer self-enforcement through raised eyebrows quickly achieved 100 per cent compliance with these bans (Kagan and Skolnick 1993). It is hard to think of any case of responsive tripartism in Australian regulatory enforcement that might have saved more lives around the world. It was a case where the grunt of regulated self-regulation came from the consumer movement.

In the next decade, Brent Fisse started a debate on how to replace the kind of deals 'in smoke-filled rooms' of the passive smoking case with statutory provisions for Enforceable Undertakings that were susceptible to public checks and balances ratified/modified by a court. One crucial discussion among leading regulators in the early 1990s was led by Fisse and convened by The Australian National University (ANU) to shape this reform. Two decades later, most of Australia's important regulatory

agencies have incorporated into their statutes Enforceable Undertaking provisions that were discussed at The Australian National University's University House that day.

The journey towards more meaningful meta-regulation in Australia continues to take steps backwards and forwards. Yet its strength is encapsulated by those meetings in Canberra on passive smoking and Enforceable Undertakings that delivered greater engagement of regulatory bureaucracies, greater public awareness and greater public scrutiny and greater third-party engagement with meta-regulation than seen with US prosecutors negotiating deferred prosecutions or Corporate Integrity Agreements.

7. Socialist responsiveness

Responsive regulation found markets to be institutions that could be harnessed and regulated to achieve outcomes that reduce domination (Pettit 1997). It conceived the past four decades as an era in which markets became stronger but so did regulation. It was an era of regulatory capitalism (Levi-Faur 2005; Braithwaite 2008).

I will never forget the first of a sequence of dozens of day-long meetings between 1983 and 1987 when treasurer Paul Keating and prime minister Bob Hawke argued in the Economic Planning Advisory Council (EPAC) that Australia should not only deregulate certain markets (including floating the dollar, which was quickly executed) but also privatise the national telecom provider, parts of the post office, the Commonwealth Bank, Qantas and many other state-owned enterprises. I was the most junior member of EPAC, representing consumer and community groups. The shock was that a Labor government was proposing such privatising reforms. I became convinced by the arguments for all of the initial privatising reforms (other more disastrous steps towards the commodification of higher education, for example, started later in 1988). The privatisation of Qantas was the one that most worried some of us initially. Arguments of some persuasiveness were advanced that Qantas had a better safety record than private US airlines, indeed, than any airline in the world, partly because it was a public enterprise. The government responded with assurances to strengthen air safety regulation.

In the event, Qantas, at least for its first decade or two as a private enterprise, continued to have a very good safety record; indeed, after privatisation, it was the first airline in the world to introduce certain safety technologies such as new-generation radar. Still, the worry remains that in the history of capitalism, public enterprise has taken safety practice up through ceilings of excellence that corner-cutting private enterprises would never have secured. In the middle decades of the twentieth century, British coalmines became much safer than Australian or US coalmines (Braithwaite 1985: 76–7). Some analysts (Turton 1981; Braithwaite 2013) and even the US General Accounting Office (1981) diagnosed great leaps forward in coalmine safety as being caused by the nationalisation of the coal industry in Britain from 1946. A good number of rapacious mining magnates were replaced with professional managers who invested in safety self-regulation, empowered the National Union of Mine Workers and invested in R&D into how to make mines safer. Interviews at Charbonnages de France in France in 1981 also led me to suspect that they and other European nationalised coal industries also made strategic global contributions to making mines safer.

In the West, the era of nationalised coal is long gone, as, hopefully, an era of leaving coal in the ground approaches. Yet under global privatisation of coal, the safety gains of nationalised coal were not lost. Continuing progress in improving the safety of mines was internalised as part of the social licence that privatised coal had to satisfy. Jody Freeman (2003) might say that privatised coal had been publicised by public law values, particularly about stakeholder voice in their own safety, during the socialist interregnum of coal production systems. Progress has continued apace in the safety of Western coal production, though it has been set back by authoritarian capitalist coal production from China to the Democratic Republic of Congo. In the West, strategic socialism was a kind of circuit-breaker on the road to a more civilised capitalism. This case study of regulatory capitalism might be a clue for more focus on the possibilities for temporary socialism as a path to a less destructive capitalism.

Elsewhere, Braithwaite (2013) argued that Europe should have established a socialist ratings agency after the 2008 Global Financial Crisis to compete with Moody's and Standard & Poor's, and argued for states owning shares in banks they bail out, which they then sell when banks return to profitability. Today the imperative for strategic socialist shifts away from markets is as strong as it was during the strategic

privatisations of the 1980s. Universities as a key site for doing regulatory analysis represent a crucial node for that struggle for public value, for a gift economy that trumps a market economy where it is important to do so. That is why RegNet prioritised pro bono work in its values statement. RegNet has been in the business of seeking to persuade ANU that giving universities attract even bigger gifts, while universities that are on the take reap a bitter harvest.

8. Conclusion

Types of responsiveness considered here complement many others that might have been detailed in a longer essay. Normative dimensions of responsiveness are a particularly important omission—such as domination responsiveness in the work of scholars like Philip Pettit and his collaborators and rights and feminist responsiveness in the work of Hilary Charlesworth and her collaborators, among others.

The responsiveness frames listed have been enough to illustrate the way that responsive regulation is not a tightly prescriptive theory. Rather it pushes us to see regulation as central to the kind of regulatory capitalism of this century. The suggestion of this chapter is that we might only see the dangers and opportunities in regulatory capitalism by picking up multiple responsiveness lenses, including consideration of pyramidal responsiveness, then micro-responsiveness to motivational postures, then networked responsiveness, then socialist and meta-regulatory responsiveness to regulatory capitalism.

Networks of scholars have worked on all these lenses, most from beyond ANU. RegNet has perhaps been a noteworthy node in that R&D. It has not made this contribution with a few stars, but by 60 RegNet networkers across 17 years. PhD scholars made some of RegNet's best contributions, as did research officers and regulatory practitioners who became PhD graduates, of which there have been many. Jenny Job's leadership on responsive regulation in the ATO and Safe Work Australia, her work as a RegNet research officer and then a brilliant PhD on a micro–macro theory of social capital and responsive tax system integrity are fine examples. Another is Liz Bluff, who, as a RegNet research officer, built, with Richard Johnstone, Neil Gunningham and Andrew Hopkins, the National Research Centre for Occupational Health and Safety Regulation with a large network of scholars and practitioners beyond ANU. Liz

completed her PhD and is now a Research Fellow at RegNet. Michelle Burgiss-Kasthala worked at that centre even before Liz, completed an exciting PhD on architectural regulation (walls) in international affairs, moved to a lectureship at St Andrews University for some years and is now back at RegNet as an Australian Research Council (ARC) Fellow. There are many others whose contributions have been their equal.

Responsive regulation is about listening to the wisdom of practitioners in regulatory agencies, business and advocacy groups to discover deep structures of theoretical meaning in their struggles. At the various ANU and Canberra meetings on passive smoking enforcement and on Enforceable Undertakings statutes, and at the 1983–87 meetings of the National Economic Summit and EPAC in the Cabinet room that helped refine Hawke–Keating regulatory capitalism, scholars did not count among the most important voices or sources of ideas. The idea of responsive regulation and the idea of RegNet is that wisdom grounded in practice leads theory; then that theory provides better lenses through which to see and transform practice. The gifts we scholars give, at their best, add a little yeast to that noble process.

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8

Smart regulation

Neil Gunningham and Darren Sinclair

1. Introduction

Gunningham et al. (1998) first advocated the concept of 'smart regulation' in a book of that title in 1998. Subsequently, the concept has been refined in various publications by Gunningham and Sinclair (1999a, 1999b, 2002). The term refers to a form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control. In doing so, it harnesses governments as well as business and third parties. For example, it encompasses self-regulation and co-regulation, using commercial interests and non-governmental organisations (NGOs) (such as peak bodies) as regulatory surrogates, together with improving the effectiveness and efficiency of more conventional forms of direct government regulation. The underlying rationale is that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation. As such, it envisages the implementation of complementary combinations of instruments and participants tailored to meet the imperatives of specific environmental issues.

To put smart regulation in context, it is important to note that, traditionally, regulation was thought of as a bipartite process involving government (as the regulator) and business (as the regulated entity). However, a substantial body of empirical research reveals that there is a plurality of regulatory forms, with numerous actors influencing

the behaviour of regulated groups in a variety of complex and subtle ways (Rees 1988: 7). Crucially, informal mechanisms of social control often prove more important than formal ones. Accordingly, the smart regulation perspective suggests that we should focus our attention on understanding such broader regulatory influences and interactions, including: international standards organisations; trading partners and the supply chain; commercial institutions and financial markets; peer pressure and self-regulation through industry associations; internal environmental management systems and culture; and civil society in myriad different forms.

In terms of its intellectual history, smart regulation evolved in a period in which it had become apparent that neither traditional command-and-control regulation nor the free market provides satisfactory answers to the increasingly complex and serious environmental problems that confront the world. This led to a search for alternatives more capable of addressing the environmental challenge and, in particular, to the exploration of a broader range of policy tools such as economic instruments, self-regulation and information-based strategies. Smart regulation also emerged in a period of comparative state weakness, in which the dominance of neoliberalism had resulted in the relative emasculation of formerly powerful environmental regulators and in which third parties such as NGOs and business were increasingly filling the 'regulatory space' formerly occupied by the state.

At the heart of smart regulation is a series of *regulatory design principles*, adherence to which would enable policymakers to take advantage of a number of largely unrecognised opportunities, strategies and techniques for achieving efficient and effective environmental policy. These design principles include:

- The desirability of preferring complementary instrument mixes over single instrument approaches, while avoiding the dangers of 'smorgasbordism' (that is, wrongly assuming that all complementary instruments should be used rather than the minimum number necessary to achieve the desired result).
- The virtues of parsimony: why less interventionist measures should be preferred in the first instance and how to achieve such outcomes.

- The benefits of an escalating response up an instrument pyramid (utilising not only government, but also business and third parties) to build in regulatory responsiveness, to increase dependability of outcomes through instrument sequencing and to provide early warning of instrument failure through the use of triggers.
- Empowering third parties (both commercial and non-commercial) to act as surrogate regulators, thereby achieving not only better environmental outcomes at less cost but also freeing up scarce regulatory resources, which can be redeployed in circumstances where no alternatives to direct government intervention are available.
- Maximising opportunities for win–win outcomes by expanding the boundaries within which such opportunities are available and encouraging business to go 'beyond compliance' within existing legal requirements.

While space precludes a fuller discussion of all of these principles, two of the most important are elaborated on below: compliance and enforcement and the importance of designing for complementary instrument combinations.

2. Compliance and enforcement

Beyond the traditional enforcement roles of the state, smart regulation argues that enforcement is possible not just by the state (as traditional theories of regulation assume) but also by second and third parties who act as surrogate regulators. Building on the original (1992) version of *responsive regulation* (under which the regulator escalates or de-escalates their intervention depending on the regulatee's response), smart regulation argues the virtues of escalating up a three-sided enforcement pyramid, *with escalation of enforcement possible up each 'face' of the pyramid*, including the second face (through self-regulation) or the third face (through a variety of actions by commercial or non-commercial third parties or both), in addition to the first face (government action).

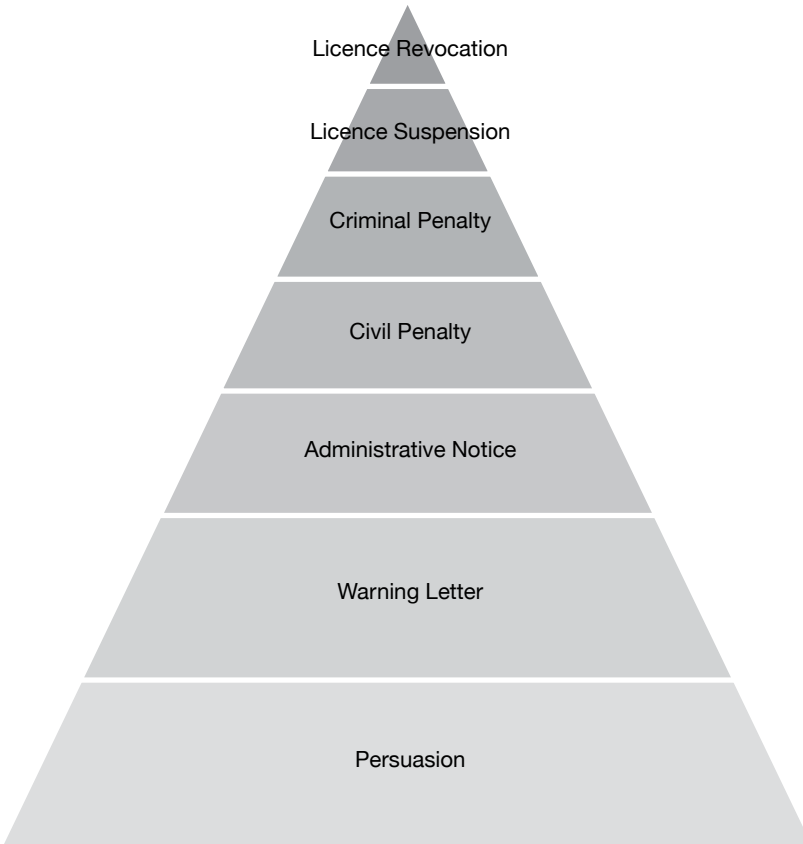

Figure 8.1 Enforcement pyramid
Source: Author's work.

In the case of the third face, an example is the Forest Stewardship Council (FSC), which is a global environmental standards-setting system for forestry products. The FSC both establishes standards that can be used to certify forestry products as sustainably managed and 'certifies the certifiers'. As such, its enforcement 'clout' rests on changing consumer demand in favour of FSC-certified timbers and timber-based products. While government involvement, such as formal endorsement or preferential procurement, may be valuable, the scheme is essentially a freestanding one: from base to peak (consumer sanctions and boycotts), the scheme is entirely third-party run. Under such an institutional system, the imposition of environmental standards is independent of government regulators (McDermott et al. 2010).

The smart regulation pyramid also conceives of the possibility of regulation using a number of different instruments implemented by the range of parties mentioned in the previous paragraph, with escalation to higher levels of coerciveness not only within a single instrument category, *but also across several different instruments and across different faces of the pyramid*. A graphic illustration of how this can indeed occur is provided by Joe Rees's analysis of the highly sophisticated self-regulatory program of the Institute of Nuclear Power Operations (INPO). INPO, established in the wake of a near meltdown of a US nuclear power plant, is arguably among the most impressive and effective of such schemes worldwide (Rees 1994). However, INPO is incapable of working effectively in isolation. There are, inevitably, industry laggards—nuclear power plants that do not respond to education, persuasion, peer group pressure, gradual nagging from INPO, shaming or other measures at its disposal. INPO's ultimate response, after five years of frustration, was to turn to the government regulator, the Nuclear Regulatory Commission (NRC). That is, the effective functioning of the lower levels of the pyramid may depend on invoking the peak, which, in this case, only government could do: closing a nuclear power plant.

The INPO case also shows the importance of coordination of the different levels and faces of the pyramid. The NRC did not just stumble across the issue or threaten action against the recalcitrant alone. Rather, there was considerable communication between INPO and the NRC. This facilitated a tiered response of education and information, escalating through peer group pressure and a series of increasingly threatening letters, ultimately leading to the threat of criminal penalties and incapacitation. Crucially, the peak enforcement response is one the government alone possesses, while INPO is in the best position to pursue lower-level enforcement responses. Thus, even in the case of one of the most successful schemes of self-regulation ever documented, it was the presence of a regulatory 'gorilla in the closet' that secured its ultimate success (as such, it may be more accurately termed co-regulation).

This example is not intended to give the impression, however, that a coordinated escalation up one or more sides of an instrument pyramid is practicable in all cases. On the contrary, controlled escalation is only possible where the instruments in question lend themselves to a graduated, responsive and interactive enforcement strategy. The two measures that are most amenable to such a strategy (because they are readily reshaped) are 'command and control' and 'self-regulation'. Thus, it is

no coincidence that the above example of how to shift from one face (regulator) of the pyramid to another as one escalates up graduated enforcement options to invoke a dynamic peak was taken from precisely this instrument combination. However, there are other instruments that are at least partially amenable to such a response. A combination of government-mandated information (a modestly interventionist strategy) with third-party pressure (at the higher levels of the pyramid) might also be a viable option. For example, government might require business to disclose various information about its levels of emissions under a Toxic Release Inventory, leaving it to financial markets and insurers (commercial third parties) and environmental groups (non-commercial third parties) to use that information in a variety of ways to bring pressure and financial sanction to bear on poor environmental performers (see, generally, US EPA 2014; see also Hamilton 1995).

In contrast, in the case of certain other instruments, the capacity for responsive regulation is lacking. This is either because an individual instrument is not designed to facilitate responsive regulation (that is, its implementation is 'static' rather than 'dynamic' and cannot be tailored to escalate or de-escalate depending on the behaviour of specific firms) or because there is no potential for coordinated interaction between instruments. Another limitation is the possibility that, in some circumstances, enforcement escalation may only be possible to the middle levels of the pyramid, with no alternative instrument or party having the capacity to deliver higher levels of coerciveness. Or a particular instrument or instrument combination may facilitate action at the bottom of the pyramid and at the top, but not in the middle levels, with the result that there is no capacity for gradual escalation. In the substantial range of circumstances when coordinated escalation is not readily achievable, a critical role of government remains to fill the gaps between the different levels of the pyramid. In doing so, they should seek to compensate for the absence of suitable second or third-party instruments or for their static or limited nature. They should do so: a) through direct intervention; or b) by facilitating action by other parties; or c) by acting as a catalyst for effective second or third-party action.

Finally, smart regulation cautions that there are two general circumstances where it is inappropriate to adopt an escalating response up an enforcement pyramid, irrespective of whether it is possible to achieve such a response. First, in situations where there is a serious risk of imminent irreversible loss or catastrophic damage, a graduated response

is inappropriate because the risks are too high. Second, a graduated response is only appropriate where the parties have a relationship involving continuing interactions—allowing for credible initiation of a low interventionist response and then escalation (in a 'tit for tat' fashion) if this proves insufficient. In contrast, where there is only one chance to influence the behaviour in question (for example, because small employers can only very rarely be inspected), a more interventionist first response may be justified, particularly if the risk involved is high.

In summary, the preferred role for government under smart regulation is to create the necessary preconditions for second or third parties to assume a greater share of the regulatory burden rather than engaging in direct intervention. This will reduce the drain on scarce regulatory resources and provide greater ownership of regulatory issues by those directly concerned in industry and the wider community. In this way, government acts principally as a catalyst or facilitator. In particular, it can play a crucial role in enabling a coordinated and gradual escalation up an instrument pyramid, filling any gaps that may exist in that pyramid and facilitating links between its different layers.

3. Instrument combinations

Smart regulation highlights the importance of utilising combinations of instruments and parties to compensate for the weakness of standalone environmental policies. It cannot be assumed, however, that all instrument combinations are complementary. Some instrument mixes may indeed be counterproductive. The outcome of others may be largely determined by the specific contexts in which they are applied. Unfortunately, the task of answering the question of which particular combinations are complementary, which are counterproductive and which are context-specific is complex. To explore the full implications of all instrument combinations would be both impractical and tedious. Instead, we provide a brief overview of some potential instrument interactions with selective examples to sensitise policymakers and others to the importance of selecting judicious policy combinations.[1] Box 8.1 summarises the principal policy instruments from which

1 A detailed exposition of instrument combinations is provided in Gunningham and Sinclair (1999b).

policymakers may choose. While these examples are taken from the area of environmental regulation, the same approach can be taken to many other areas of social regulation.

Box 8.1 Policy instrument categories

Command-and-control regulation

The various types of command-and-control standards have fundamentally different modi operandi. For example, *technology standards* prescribe an approved technology for a particular industrial process or environmental problem. Such a standard 'is defined in terms of the specific types of safeguarding methods one must use in specific situations and … places great emphasis on the design and construction of these safeguards' (McAvoy 1977: 9). In contrast, *performance standards* define a firm's duty in terms of the problems it must solve or the goals it must achieve. That is, performance standards are outcome-focused. They avoid overt prescriptions on how to achieve these outcomes. Finally, *process standards* address procedures and parameters for achieving a desired result—in particular, the processes to be followed in managing nominated hazards. They are most often used in respect of hazards that do not lend themselves to easy risk measurement and quantification.

Economic instruments

Three types of economic instruments may be distinguished. The first are *broad-based economic instruments*, such as tradable emission/resource permits and pollution/resource taxes that apply to the whole industry, which do not discriminate between sectors and/or preferred technological solutions or impose performance limits on individual firms. That is, apart from government setting the overall level of the tax or the number and value of permits, the market is left to operate freely. The second are *supply-side incentives*, which are financial subsidies provided by government for particular types of technology and/or specific types of industrial activity. These are distinguished from broad-based instruments in that there is a much higher level of government prescription. The third is that of *legal liability* whereby firms can be held financially responsible for cases of environmental harm.

Self-regulation

This is not a precise concept, but, for present purposes, self-regulation may be defined as a process whereby an organised group regulates the behaviour of its members. Most commonly, it involves an industry-level organisation (as opposed to the government or individual firms) setting rules and standards (codes of practice) relating to the conduct of firms in the industry. One can further categorise industry self-regulation in terms of the degree of government involvement ('pure' self-regulation, without any form of external intervention, is relatively uncommon).

Voluntarism

In contrast with self-regulation, which entails social control by an industry association, voluntarism is based on individual firms undertaking to do the right thing unilaterally, without any basis in coercion. Commonly, voluntarism is initiated by government and may involve government playing the role of facilitator and coordinator. At a general level, this category embraces voluntary agreements between governments and individual businesses taking the form of 'non-mandatory contracts between equal partners, one of which is government, in which incentives for action arise from mutual interests rather than from sanctions' (OECD 1994: 7). However, the variety of such agreements makes precise classification difficult.

Information strategies

The range of educational and information-based instruments is broad and, in many cases, these instruments may overlap. For present purposes, information strategies may be taken to include: education and training; environmental reporting; community right-to-know; freedom of information; proactive public disclosure; pollution inventories; and product certification.

Certain combinations of the above instruments are inherently complementary. That is, their effectiveness and efficiency are enhanced by using them in combination, irrespective of the circumstances of the environmental issue being addressed. As such, policymakers can be confident in choosing these combinations over others. An illustrative example can be drawn from the combination of voluntarism (in which individual firms without industry-wide coordination voluntarily seek to improve environmental performance) and command-and-control regulation.

Voluntarism (when genuine rather than tokenistic) will complement most forms of command-and-control regulation, particularly where levels of environmental performance 'beyond compliance' are desired. In the case of performance standards, a minimum performance benchmark is established, with voluntary-based measures encouraging firms to achieve additional improvements. The 33/50 program of the US Environmental Protection Agency (EPA) is an example of this approach (Aora and Cason 1995). Under the 33/50 program, firms were encouraged to reduce the levels of their toxic chemical releases, often at substantial cost, on a purely voluntary basis. Existing command-and-control regulations that applied to toxic chemical releases remained in force, with the 33/50 program delivering additional benefits in terms of reducing unregulated emissions.

The combination of the two instruments means that participating firms are encouraged to go beyond a minimum standard, while non-participating firms must still comply with this performance baseline. If voluntarism were introduced alone, there would be no guarantee that non-participating firms would contain their levels of toxic chemical releases, thus freeriding on those committed to higher levels of reduction. The combination of voluntarism and performance-based command and control in this instance has produced environmental improvements additional to those that could have been achieved in isolation. In contrast with *beyond compliance* activities, if voluntarism and performance-based standards were targeting the *same* level of behaviour then, at best, they would be a duplicative combination and, at worst, counterproductive.

Voluntarism can also work well with process standards—for example, where the adoption of environmental management systems (such as ISO 14001) has been mandated (Thomas 1997). As process-based prescriptions tend to be qualitative in nature, and therefore more difficult to measure quantitatively than performance or technology standards, their full potential is difficult to enforce externally unless the regulated firm is committed to the concept. Voluntary measures that seek to change the attitude of managers and the prevailing corporate culture may serve to underpin a commitment to process standards.

In contrast, technology standards are unlikely to produce complementary outcomes when used in combination with voluntary measures. This is because they are highly prescriptive: firms can either comply or not comply, resulting in little room for *beyond compliance* achievements. In effect, technology standards restrict the way in which firms respond to an environmental imperative in terms of the method of environmental improvement, whereas voluntary measures are, in principle, designed to provide additional regulatory flexibility.

Certain other combinations of regulatory instruments are either inherently counterproductive or, at least, suboptimal. Their efficiency and effectiveness are significantly diminished when they are employed in combination. The example of command-and-control regulation and economic instruments is illustrative. Most command-and-control instruments—namely, performance standards and technology standards—seek to impose predetermined environmental outcomes on industry. That is, even if the standards are not uniform (in that different requirements apply to different sectors or firms), individual firms are not free to make independent judgements as to their preferred method of environmental improvement (in the case of technology standards) or their overall level of environmental performance (in the case of performance standards). Economic instruments, in contrast, seek to maximise the flexibility of firms in making such decisions: government influences the overall level of environmental performance by providing a price signal relative to the level of pollution or resource consumption desired, or by creating a purchasable right to pollute or consume resources within an overall cap.

If a command-and-control instrument were to be superimposed on an economic instrument targeting the same environmental issue, or vice versa, to the extent that the command-and-control instrument limits the choice of firms in making individual decisions, the economic instrument would be superfluous (unless acting as a revenue stream for government). That is,

there will be a suboptimal regulatory outcome. Economic instruments are designed to exploit differences in the marginal cost of abatement between firms. It makes economic sense for those firms that can reduce their levels of pollution most cheaply to carry a greater share of the collective abatement burden, and for those for whom it is most expensive to carry a lesser share of the same burden. The result is that the net cost of reducing the overall level of pollution (or resource consumption) will be lessened. Alternatively, for a given level of expenditure, a greater level of pollution reduction will be achieved. By simultaneously applying a prescriptive command-and-control instrument (be it a performance or a technology standard), free market choices would be artificially restricted, thus undermining the basic rationale of the economic instrument. An example of this might be mandating specific energy efficiency technologies for firms in tandem with a carbon tax.

One way of avoiding potentially incompatible instrument combinations is to sequence their introduction. That is, certain instruments may be held in reserve, to be applied only if and when other instruments demonstrably fail to meet predetermined performance benchmarks. One type of sequencing is when an entirely new instrument category is introduced where previous categories have failed. Another version is when only the enforcement component of a pre-existing instrument is invoked to supplement the shortcomings of another. Logically, such sequencing would follow a progression of increasing levels of intervention. As such, considerable utility can be derived from otherwise dysfunctional instrument combinations and, in the process, the dependability of an overall policy mix can be improved.

So far, we have confined our discussion to bipartite mixes. There is, of course, no reason why mixes should not be multipartite, and they commonly are. The benefit of our examination of bipartite mixes has been to identify complementary and counterproductive mixes, with the result that we know, in the case of multipartite mixes, which combinations to avoid and the complementary combinations on which we might build. The possible permutations of multipartite mixes are very large indeed, and it is not practicable to consider them here.

4. Smart regulation in practice

A substantial number of policy approaches are consistent with the precepts of smart regulation. In Canada, smart regulation became the principle focus of federal government–driven regulatory reform in

the mid-2000s and continued under a different name for some time thereafter.[2] There it has been characterised by 'a restructuring of the process of assessing, reforming and improving the regime in which regulations are developed, managed, enforced and measured' (Wood and Johannson 2008: 361). A few years later, the European Union (EU) promoted smart regulation as a vehicle to achieve a 'cleaner, fairer and more competitive Europe' (Danish Ministry of Economic and Business Affairs et al. 2010). Indeed, according to Toffelson et al. (2008: 257), 'the smart-regulation critique has also resonated in potentially sweeping law and policy reforms in many other Western liberal democracies'.

At a more specific level, EU and Dutch regulators have invoked smart regulation to combat the global problem of e-waste, and as a vehicle for effective governance of the globalised shipping industry (Bloor et al. 2006). It has also been contemplated for other emerging globalising industries. The European Community regulation on chemicals and their safe use, which deals with the 'registration, evaluation, authorisation and restriction of chemical substances' (REACH), is also built on similar principles (Farber 2008).

Having said this, it must be cautioned that while 'many governments have adopted the term [smart regulation] to provide intellectual justification for a wide range of public-sector regulatory reform initiatives' (Toffelson et al. 2008: 357), the way the term is used by politicians and policymakers bears only a loose resemblance to the original academic concept. For example, while the authors of smart regulation emphasised the importance of designing complementary policy mixes, of harnessing third parties as surrogate regulators and of sequential combinations of public and private enforcement, policymakers have often paid little heed to this advice. They have, for example, been: a) reluctant to ascend an enforcement pyramid for fear of offending business; b) unwilling to cooperate with NGOs for fear of losing control; and c) more inclined to embrace a 'grab bag' of tools than a judicious combination of complementary ones. Overall, what passes for smart regulation in policy circles is more akin to a regulatory stew from which policymakers have selected particularly juicy morsels that appeal to the political rhetoric of their masters, largely irrespective of their likely effectiveness or efficiency.

2 See, in particular, the Canadian Government's regulatory reform program under this banner (Government of Canada 2005) and Leiss (2005).

If political acceptability was closely tied to evidence-based policymaking then the gap between such acceptability and effectiveness should be a relatively narrow one. Unfortunately, this is usually not the case. Governments, of whatever variety, seem far more concerned with political and economic rhetoric than with rational and evidence-based decision-making. For example, in Australia, the former Rudd Labor Government went beyond the Blair Government's various 'reducing regulatory burdens' initiatives by establishing a Department of Finance and Deregulation. It was no longer necessary to debate the complexity of public policy, the options involving varying degrees of government intervention or how to achieve an efficient and effective policy mix. Rather, the answer in each case was apparently clear: regulation bad; deregulation good. Indeed, so resistant was the department to any hint of new regulation that a smart regulation initiative was nipped in the bud, emerging finally in a much-diluted form as 'smart policy'.

Finally, smart regulation has not been immune from academic criticism. Some authors have claimed that it does not address institutional issues, compliance-type specific responses, performance sensitivity and adaptability of regulatory regimes (Baldwin and Black 2008; Böcher and Toller 2003). Van Gossum et al. (2010: 245) suggest that these shortcomings can be resolved by 'by merging the smart regulation theory with the policy arrangement approach and the policy learning concept' under what they call a 'regulatory arrangement approach' (RAA). The aim of the RAA is:

> to constrain the almost infinite smart regulatory options by: the national policy style; adverse effects of policy arrangements of adjoining policies; the structure of the policy arrangement of the investigated policy and competence dependencies of other institutions. (van Gossum et al. 2010: 245)

We take this as a constructive and nuanced means of preserving the essence of smart regulation, while extending its practical reach to a broader range of circumstances.

In conclusion, while there has been considerable progress in the development of smart regulation as a theoretical construct, its attempted translation into regulatory policy and practice has been mixed. This is because policymakers appear eager to embrace pluralism without the necessary constraints of choosing *complementary* combinations, and display an unwillingness to move from the base of the pyramid and/or to engage a range of third parties as surrogate regulators. In this regard,

it may be that the complexity and sheer number of possible instrument/party permutations dissuade policymakers from doing the necessary empirical research to effectively implement a smart regulation approach suitable for a given circumstance. If this is the case then, as van Gossum et al. (2010) suggest, a streamlining and tailoring of key complementary approaches to particular institutional circumstances will be of assistance.

In any case, the lack of appetite among many governments to confront an armada of significant environmental problems confronting society today—such as greenhouse gas emissions, unsustainable water use, diffuse pollution, species loss and habitat destruction—suggests that the principles of smart regulation are still pertinent. Certainly, a redesign of patently inadequate policy responses, such as the Australian Government's so-called direct action initiative—which is all voluntary 'base' and no enforcement 'peak', lacks third-party engagement and contemplates uncomfortable policy combinations—would be a good starting point from which to re-engage with smart regulation.

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9

Meta-regulation

Peter Grabosky

1. Introduction

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

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

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

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

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

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

2. Regulatory pluralism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The rise of meta-regulation

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

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

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

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

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

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

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

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

4. Conclusion

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

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

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

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10

A nodal perspective of governance: Advances in nodal governance thinking

Cameron Holley and Clifford Shearing[1]

For centuries, regulatory thinking has been inspired by the powerful story of a benign giant, made up of the bodies of people, beautifully depicted in the frontispiece by Abraham Bosse, with input by Thomas Hobbes for his *Leviathan*, published in 1651 (Hobbes 1951). This giant stands over a landscape that he rules on behalf of these people. In his left hand, he carries a crosier that symbolises his legitimacy as a ruler. In his right is a sword that symbolises his ability to overcome resistance to his rule. This great leviathan—whose contemporary incarnation is the nation-state—was conceived as being so powerful that he would be able to shape the wills of 'his' people in ways that would ensure peace at home as well as aid against enemies abroad. This story, told with much acumen by Hobbes, has provided an influential and compelling way of thinking about and creating arrangements for governance in the West (Burris et al. 2005)—in particular, the governance of security through the institutions of criminal justice.

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The contours of this story have, at different times and places, taken different shapes (Braithwaite 1999), from Weber's (1946) 'human community', which claims a monopoly of the legitimate use of physical force within a given territory, to the minimalist nightwatchmen state (Nozick 1974) and the more active welfare state associated with Keynesian thinking (Keynes 1933). Despite their differences, these stories all embrace a unified vision of governance that was nicely captured within the terms of the Peace of Westphalia of 1648, in which the parties to this treaty conceived of sovereign states as enjoying exclusive authority within their geographic regions (Krasna 2001; Shearing and Johnston 2010).

Although modern versions of this vision have long dominated governance thinking, this persuasive image has never constituted a satisfactory empirical account of the realities of governance. Scott (2009) draws attention to this in his historical study of the 2,000-year history of the hill-people of Zomia in South-East Asia, who have deliberately and consistently strategically organised themselves to keep the state at arm's length. This more polycentric view of governance has been confirmed by a host of other studies within political science and criminology (see, for example, Rhodes 2007; Brodeur 2010; Dupont 2004). Criminology and related discussions of 'crime control' have long noted the presence of both public and private 'auspices' and 'providers' (Bayley and Shearing 2001) as well as the role of non-human 'actants' (Latour 2013)—for example, Shearing and Stenning's (1984) analysis of the governance of security within Disneyworld and Lessig's (1999) analysis of the regulation of cyberspace.

A variety of decentred theories of governance has been developed to capture this reality of governance beyond the state (see, for example, Castells 2000; Black 2002; Rhodes 2007; Ostrom 2010; Bisschop and Verhage 2012). These theories do recognise explorations of state-focused forms of 'command and control' governance that often involve coercion exercised through hierarchy. However, they have also told an alternative story of governance as having multiple sources and many forms that appreciate, to use Foucaultian language, that: 'Power is everywhere; not because it embraces everything, but because it comes from everywhere' (Foucault 1984: 93).

While some of these stories of decentred or polycentric governance (Ostrom 2010) have focused on 'flows' and 'networks' (Castells 2000), others have focused attention on nodes as sites of governance and have recognised the possibility of Robinson Crusoe nodes that can and do

operate in relative isolation from other sites (Burris et al. 2005). In this understanding, nodes—as 'auspices' and 'providers' of governance (Bayley and Shearing 2001)—are understood not simply as points established by the intersection of flows within networks (Castells 2000: 15–16, 22), but rather as sites of capacity, knowledge and resources relevant to 'shaping the flow of events', to use Parker and Braithwaite's (2003: 119) simple and succinct definition of governance.

In developing this perspective, Wood and Shearing (2007: 149) define nodes as follows:

> Governing nodes are organisational sites (institutional settings that bring together and harness ways of thinking and acting) where attempts are made to intentionally shape the flow of events. Nodes govern under a variety of circumstances, operate in a variety of ways, are subject to a variety of objectives and concerns, and engage in a variety of different actions to shape the flow of events. Nodes relate to one another, and attempt to mobilise and resist one another, in a variety of ways so as to shape matters in ways that promote their objectives and concerns. Nodal governance is diverse and complex.

Within this decentred conception of governance, there are multiple 'tops' and many 'downs' and they 'overlap' (Wood and Shearing 2007: 149). In Brodeur's (2006: ix) terms, the pluralisation of security 'does away with the single stuff mythology' (for discussion of boundaries within complex systems, see Cilliers 2005).

Within political science this emerging 'governance perspective' (Rhodes 2007) conceives of governance as extending beyond government in much the same way as policing, within criminology, has come to be understood as extending beyond police (Brodeur 2010). Explorations of nodal governance and networked governance have become increasingly commonplace. Within this polycentric perspective, while states are recognised as significant governors, they are conceived of as existing in a broader context of other auspices and providers of governance.

This conception considers the questions of who governs and how they govern as issues that cannot be determined a priori, but that require careful exploration through empirical and context-specific research. Johnston and Shearing (2003: 22–30) have developed an eight-point framework to be used in guiding such explorations (for an example of its use, see Kerr 2015). Crucial to the empirical inquiries that this polycentric conception of governance has generated have been the issues of how

different auspices and providers of governance relate to one another and how, and when, they enrol the capacities and resources of others as they seek to realise their governance objectives (Nakueira 2014).

These empirical 'post-Foucauldian' (McKee 2009) inquiries into 'multilateral' (Bayley and Shearing 2001) or 'multidimensional' (Rhodes 2007) forms of governance (for a recent example, see Kerr 2015) are to be distinguished from the normative arguments of political philosophy that consider who *should* govern, how they *should* govern and to whom they *should* be accountable (for a discussion, see McLaughlin 2007: Chapter 4). Within the context of nodal systems of governance, these normative explorations often argue that, for governance to be legitimate, it should, in Loader and Walker's (2007) terms, be 'state-anchored'. That is, governance, it is argued, should, if it is to be legitimate, be both overseen and authorised by states who are themselves authorised, via legitimate political processes, to govern.[2]

Many differing policy advocates have employed and developed the normative position that governance should be overseen and authorised by states. For instance, Osborne and Gaebler (1993) have drawn specifically on the normative thinking of economists such as Frederick Hayek (1945, 2007) and Milton Friedman (1962) to support 'neoliberal' governance arrangements organised around the outsourcing of the provision of governance by the state to private and civil-sector nodes. This issue of how 'plurality needs to be managed and whether, in fact, it needs to be' (Kerr 2015: 26) is a significant topic of discussion and debate within nodal governance (see, for example, Bayley and Shearing 1996; Ayling et al. 2009).

Much exploration of nodal forms of governance took place at the Regulatory Institutions Network (RegNet), including work at The Australian National University (ANU) before RegNet came into existence (Grabosky et al. 1993). Several scholars based at RegNet have made important strides in developing polycentric understandings of governance—for example, Julie Ayling, John Braithwaite, Val Braithwaite, Peter Drahos, Peter Grabosky, Neil Gunningham, Monique Marks and Jennifer Wood (see also Holley, Chapter 42, this volume). One of the most recent of these has been Russell Brewer's

2 For a discussion of the practical implications of 'anchored pluralism' (Loader and Walker 2006: 194), see Ayling et al. (2009); and for a comparison of nodal governance and anchored pluralism, see White (2011: 90–5).

(2014) work on the governance of security within waterfronts and his chapter in this volume (see Chapter 26) that analyses patterns of connections within security networks.

While much of the research exploring nodal ordering has taken place within criminology—work that uses a polycentric nodal framing both explicitly and implicitly[3]—increasingly, the nodal governance idea is being developed and explored by scholars within other areas.[4]

Nodal governance thinking has to date been centred primarily on the twin concepts of nodes and networks. Both concepts are grounded in a constitutive understanding (Shearing 1993) that sees governance as layered. In this understanding, worlds that present themselves as given are understood as being constituted through subterranean governing processes that have shaped events to produce these worlds.

Coordination between nodes is made possible via networks. When this happens, governance becomes 'the property of networks rather than … the product of any single centre of action' (Johnston and Shearing 2003: 148); under these conditions, governance is said to be 'coproduced' and collaborative (Holley et al. 2012). Crawford (2006: 466) writes of networks linking nodes into 'horizontal partnerships' with a presupposed 'element of coordination'. In reflecting on such arrangements, Johnston and Shearing (2003) insist that, within networks, there is no necessity for a single locus of control. Nor, they argue, do nodes within networks necessarily work together to promote shared outcomes. Furthermore, who does what within these networks can, and does, change across space and over time. Certainly, some nodes can be fixed and wield power by regulating other nodes (Burris et al. 2005). In such cases, networks will often need to enrol these nodes to 'capture' their power or their access to other nodal networks (Drahos 2004). Even so, networks are very often fluid and rarely fixed. In the words of Wood and Dupont (2006: 4), networks and the nodal assemblages constitute 'temporary hubs of practices' involving iterative processes carried out by a range of actors who occupy different positions of influence. Networks may exist within and across sectors such as environment, policing, health or other regulatory issues (Wright and Head 2009).

3 See, for example, Ericson and Doyle's (2004) groundbreaking work on insurance and Pat O'Malley's (2010) work on risk.

4 See, for example, Burris (2004) and his research on public health and Peter Drahos and John Braithwaite's (2002) work on developments within intellectual property issues.

Nodes are regarded as 'any formal or informal institution that is able to secure at least a toe-hold in a governance network' (Burris et al. 2008: 25). For Braithwaite (2008), nodes are what make governance 'buzz'. While nodes, like networks, are typically not fixed, they are nonetheless conceived of as 'point[s] in time and space' (Braithwaite 2004: 312), where actors mobilise pooled resources to tie together strands in networks of power. They may comprise individuals, groups (or parts of groups), organisations (or parts of organisations) or states (or parts thereof); they may be large or small, tightly or loosely connected and inclusive or exclusive; they may engage in similar activities or they may be specialised (Shearing and Johnston 2010). Nodes can function separately or jointly as sponsors of governmental actions and/or as providers who supply governmental services such as security (Shearing and Wood 2003).

Consistent with a constitutive conception of governance, the boundaries of networks, and the nodes within them, are not a given. They may be defined with clear boundaries or their boundaries may be blurred; organisationally, they may be decentralised or hierarchical. While nodes and networks are constantly reconstituting themselves to form new structures, nodes typically do too much planning for their governing activities to be considered purely spontaneous in a Hayekian sense (Baumgartner and Pahl-Wostl 2013). Indeed, with such flux—and with neither the state nor any other set of nodes given conceptual priority—understanding how certain nodes plan and interact with other nodes, and then form assemblages and networks, requires considerable research (Shearing and Wood 2003).

Such an empirical analysis, it is argued, requires the investigation of four principal elements: mentalities (relating to how nodes think about a governance outcome—for example, security, or a safe environment); technologies (relating to the methods they might use to facilitate it); resources (relating to the social, cultural, economic or other means they might deploy in its furtherance); and institutions (relating to the structures that enable the mobilisation of resources, mentalities and technologies in pursuit of governance outcome) (Johnston and Shearing 2003; Burris et al. 2005). Mapping these elements typically requires the compilation of data by a variety of means, including documentary analysis, observation, qualitative interviews and focus groups, as well as the quantitative techniques that currently dominate network analysis. In particular, ethnographic methods are used to deepen more quantitative analyses (Shearing and Johnston 2010). In accord with the constitutive

conception noted earlier, nodal governance recognises that every 'world' is 'a human invention and reinvention' (Johnston and Shearing 2003: 148) that is accomplished through governing processes.

The nodal governance framework has been used by a variety of scholars to shape and guide their analyses of governance processes. A good example of this is John Braithwaite's (2008) insightful discussion of Timor-Leste, where he uses nodal governance thinking in conjunction with a responsive regulation framework to map and understand post-conflict security governance. He considers how the governance of security within this context involves a variety of nodes, each with access to different sets of resources, authority and mentalities, each of which engages the other in realising security agendas.

Particularly valuable in this exploration is the way Braithwaite enhances nodal governance thinking by including 'things' as 'actants' (Latour 2004) as he explores the resources that nodal agents deploy as they seek to shape the flow of events. In this analysis, he contrasts the way in which two public sector nodes (the Australian Federal Police and the Guarda Nacional Republicana from Portugal) brought to the governance of security in Timor-Leste very different governing sensibilities.

While Braithwaite's focus is principally on formal nodes, James Martin (2012), in contrast, focuses his attention on nodes within the informal sector. He draws on Dupont's (2004) integration of Bourdieu's (1986) notion of a variety of 'capitals' to explore the mentalities and resources of nodal action. In particular, he explores the way in which 'force capital' is used in exercising control over physical spaces.

A third example of the systematic use of a nodal conception to explore security governance is provided by John Kerr (2015), who uses the analytical framework for nodal mapping developed by Johnston and Shearing (2003) to explore the complex set of public, private and civil arrangements involved in the coproduction of 'art security'. As is common across nodal analyses, Kerr focuses on the ways in which nodes attempt to enrol others to achieve their governing objectives.

Peter Drahos, in his work on the governance of intellectual property, has also utilised a nodal analysis to explore 'nodal concentrations of power and knowledge' (Drahos 2005: 21). Drahos utilises a nodal framing and enhances it with his analysis of what he terms superstructural nodes: 'Super-structural nodes are the command

centers of networked governance' (2004: 405). Yet another example, at the boundary of established security governance, is the use of a nodal governance framework to explore normative 'good governance' agendas within public health (see, for example, Burris et al. 2007). For Burris (2004), a nodal analysis is useful in finding innovative institutional arrangements for the delivery of key social goods.

One strength of the nodal approach, as applied by these and many other authors, is that it reveals the complexity of governing processes while at the same time opening up new avenues for explanatory and normative thinking. As Wright and Head (2009: 207) note: 'The potential strength of such models could be their ability to map interactions and capacities of nodes, both as sites of continuity and of contestation.'

Nodal analysis opens up opportunities for first describing, and then transforming, networked relations that produce governance outcomes. As Johnston and Shearing (2003: 160) write, in drawing attention to the normative implications of nodal thinking:

> Our point is merely that with demonstrable evidence of nodal governance becoming more and more apparent, opportunities may arise to transform networked relations in ways that could, under the right conditions, advance just and democratic outcomes.

Braithwaite (2004), in discussing 'methods of power', suggests how global governance processes might be reshaped through reshaping nodal relations (see also Ayling et al. 2009). As Braithwaite (2004: 330) explains, 'weak actors, wielding only puny sanctions, can escalate to enrolling more and more actors of increasingly greater clout to a project of network confrontation with the strong'.

Given the history of nodal governance thinking, many of the scholars who have used it have done so within the fields of policing and security, and it is here that much of the debate over its value as an analytical framework has taken place. Within this context, nodal governance thinking has been deployed to explore the 'pluralisation' (Loader 2000) of security provision through private, community, public and hybrid forms of providers; the role of voluntary service agencies (Martin 2012; Huey 2008); and the development of 'mass private property' (Shearing and Stenning 1981) in the form of shopping malls, gated communities and the like (Wakefield 2003).

A number of scholars have questioned what they regard as the tendency of a nodal framework—given its history as an alternative to state-centred analytical frameworks—to neglect vertical relations in favour of horizontal ones. Kerr (2015: 159) draws attention to this when he writes that:

> Although it is necessary to avoid state fetishism (Shearing 2006) when analysing art security in London, it is also important to eschew private fetishism because of the huge amount of art in London for which the public sector takes responsibility and the manner in which public and private nodes work together (even if only temporarily).

In a similar vein, Cook (2010: 456) has argued that:

> [S]tudies of nodal governance suffer from excessive localism inasmuch as they almost always focus on 'horizontal' networks, ignoring the more 'vertical' connections to actors and institutions that operate at other spatial scales.

These critiques echo concerns expressed by Loader and Walker (2007; see also Boutellier and van Steden 2011) that nodal governance thinkers are inclined to treat states as 'idiots' and, in so doing, have lost sight of the important role states play in 'civilising' governance processes.

This critique is also taken up by Crawford and Lister (2004), who argue that the state should be conceived of as more than merely one node among many, as the role of states remains pivotal in respect of both symbolic power and its regulatory capacity. According to this line of critique, nodal governance thinking runs the risk of unintentionally weakening state institutions and ceding legitimacy to nodes of uncertain virtue (Wright and Head 2009). Similarly, Zedner (2009: 161) notes that, instead of being part of the solution, the emphasis that some nodal thinkers place on empowering communities may encourage vigilantism, the pursuit of private vengeance and the vilification of particular groups of individuals. In the view of these scholars, nodal governance's decentring of states, and what is interpreted to be a denial of the need for strong state institutions, is regarded as unwise for both explanatory and normative reasons. By emphasising the plural locations of power and legitimacy, so the argument goes, nodal governance thinking risks denying the need for strong state institutions and ceding influence to nodes of uncertain legitimacy (Wright and Head 2009). Even so, there is still much work to be done to resolve such debates. For instance, as Drahos's (2010) work on patent office governance has

shown, thinking in a nodal manner can in fact *strengthen* weak developing states' patent offices, which can compete with multinationals only when they enrol outside actors to help with the examination of patents, and thus increase their legitimacy.

Other scholars have used their critiques to shift terminologies—for example, Brodeur (2010), with his notion of 'the policing web', Abrahamsen and William's (2011) use of the idea of 'security assemblages' and Baker's (2007) notion of 'multi-choice policing'. Others have sought to expand on the range of nodes that nodal governance recognises (for example, Brewer 2014, in his study of waterfronts). Yet other scholars have sought to recognise other theoretical possibilities—for example, Drahos (2004), with his notion of 'superstructural nodes'. Still others have sought to extend the normative repertoire of nodal governance thinking. Marks and Wood (2010), for example, use the 'minimalist and minimal police perspective' in seeking to extend previous explanatory and normative accounts of nodal governance.

While policing and the policing arena have been the principal empirical terrain of nodal governance thinking, this terrain is now broadening. In the environmental area, for instance, there has been growing use of the nodal governance framework (Holley et al. 2012). Similarly, Baumgartner and Pahl-Wostl (2013) have used a nodal governance theoretical framework to study global water governance, while Burris and his collaborators have used a nodal governance framework within public health (see, for example, Burris 2004; Burris et al. 2007). Within a security umbrella, nodal governance thinking has been applied to harbours and port security (van Sluis et al. 2012; Brewer 2014), the security of taxi drivers (Paes-Machado and Nascimento 2014) and child protection (Harris and Wood 2008). Another area of expansion of nodal thinking has been in relation to the governance of cyberspace (Wall 2007; Huey et al. 2013; Nhan 2010).

In conclusion, the nodal governance perspective has done much to encourage an emerging body of empirical research, across a range of different social contexts, which has explored the shifting shape of policing and security governance, as well as an increasingly wide variety of public problems, including the environment, health and intellectual property. While nodal governance may 'lack' a normative model, it provides a valuable means for describing the dynamics and structures of regulatory networks including non-state actors. Its fundamental benefit,

then, is its capacity to open space for new normative responses otherwise closed to traditional state-centric governance perceptions (Wright and Head 2009).

Further reading

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11

Regulation and risk

Fiona Haines

1. Introduction

Risk often appears ubiquitous in modern life. We are inundated with news of terrorist attacks, environmental catastrophe and the emergence of diseases such as swine flu and Ebola, brought to us through a never-ending media stream. Conceptualising these threats through the language of risk enjoys widespread popularity and currency—a language that embodies ideas of rationality, probabilistic reasoning and modernity (Zinn 2009; Bernstein 1996). In this way, we are made conscious of our individual and collective vulnerability. Yet it is also within these overlapping paradigms that we understand our capacity to reduce the risks we face and to enhance our wellbeing. In this context, effective regulation appears as the antidote to many, if not all, contemporary risks. Risk and regulation are brought together through scientific and technical assessments combined with economic analyses to determine when, what kind of and how much regulatory control should be forthcoming to reduce a particular risk to an acceptable level. Arguably, it is by virtue of regulation that those in the industrialised world have come to expect safe food, safe consumer goods and safe buildings. Certainly, regulatory reforms that follow the realisation of a particular risk—whether an industrial disaster, financial collapse or some other event—suggest that our vulnerability to a wide variety of risks can be ameliorated through regulation. Regulation, realised in the form of a wide variety of policy instruments, including legal and quasi-legal strategies (Freiberg 2010),

is developed and enforced to shape everyday behaviours, technologies and organisational processes in a manner aimed at reducing the possibility of disaster.

This narrative of effective regulation as a response to an unwanted risk represents a dominant way of understanding the connection between risk and regulation. It is one, though, that requires complication to make sense of when regulation is forthcoming and why, and why some risks bring a significant regulatory response and others languish for want of attention. This chapter teases out this complex relationship by drawing on the literature on risk in the context of regulation—a broad remit that encompasses psychology, sociology, politics and law, among others. Many of these literatures are well represented in this edited collection and so the analyses of different aspects of regulation by a number of contributors are relevant to the analysis presented here.

A major puzzle for what might be termed the modernist narrative of the significant capacity of regulation to reduce risk, highlighted above, is the casting of regulation as a burden. Surely, the reduction of risk through regulation should be a cause for celebration? Yet this is only part of the story since, despite its promise of protection, regulation is often castigated as burdensome. 'Too much regulation' raises concern. Disparate actors voice their opposition to 'red tape', 'green tape' and the overweening influence of 'the nanny state'. Business voices are prominent here. Governments respond by undertaking various campaigns aimed at sweeping away this 'regulatory burden' and freeing the creativity of private enterprise (see, for example, Government of the Netherlands n.d.). This debate that oscillates between too much and too little regulation provides a critical insight into the way that regulatory reform and the challenges of compliance are part of an ongoing political discourse. It is a discourse infused alternately with a language of protection from risk on the one hand and of stifling creativity, agency and responsibility on the other.

When risk and regulation are understood as embedded within a political discourse, differences between jurisdictions, with their disparate conceptions and sensitivities to risk, become apparent. For example, the European Union is well recognised as a jurisdiction within which the precautionary principle can hold considerable sway. Under the guidance of the precautionary principle, a risk-averse stance is recommended where uncertainty about the potentially damaging long-term consequences of a particular chemical or side effects from

a pharmaceutical drug, for example, leads to a presumption that such a substance or process should not be allowed on to the market unless and until its safety is assured (Tosun 2013). In contrast, the pharmaceutical drugs regulatory approach in the United States tends towards a regime based on an iterative feedback model where products can be released on to the market without a full understanding of the consequences of that action. A preliminary approval process is undertaken and warnings are provided for the individual to make their own decision regarding its suitability for them. The aim is that the product will be redesigned as any negative consequences come to light (Davis and Abraham 2011). Similar risks and uncertainties arising within different contexts can generate disparate regulatory outcomes.

2. Three risks, not one?

The relationship between risk and regulation appears to be somewhat of a paradox. It makes regular media appearances with regulation being obvious and necessary for our protection against risk and, at the same time, onerous, unnecessary and burdensome. One way to make sense of this paradoxical relationship is to interrogate and break apart the concept of risk. This can be done by asking key questions about what kind of risk is at issue and how different risks may shape the imperative to regulate and deregulate. The first question to ask is who or what is at risk and from what source? In light of this, the second question is what is the relationship between this particular form of risk and regulation itself? The answers to these questions allow us to understand that risk in the context of regulation can be usefully understood as comprising three separate ideal types (Haines 2011: especially Chapter 2), which have a different subject at, or vector of, risk, which helps explain the way regulation is patterned. The interaction between these ideal types also helps explain the contested territory regulation often inhabits.

The first of these conforms to the idea of risk as presented at the beginning of the introduction. Here, what is at risk is the possibility of harm to an individual, collective or the environment arising out of an unwanted event. The vector precipitating this event can be apprehended as external to those individuals or groups affected or the natural environment that is threatened. This ideal type I term 'actuarial risk'. A disease, a fall from a height at a worksite and an unintentional release of toxic effluent from a factory would all fall within this conception of risk.

Natural, medical, engineering and their allied sciences are often used to determine the probability and impact of this kind of harmful occurrence being realised. Superficially, it would appear that actuarial risk is the one most commonly associated with regulation, exemplified by regimes concerned with infection control, public health, occupational health and safety and environmental protection. Yet, we know that scientific concern can often fail to produce the necessary social and political motivation for regulation to emerge. A prominent example here is that of climate change. Despite the scientific consensus on the catastrophic consequences of our impact on the climate for both humans and the environment, effective regulation remains elusive, as social, political and economic concerns shape what regulation is forthcoming and why. Two other ideal types capture these social, political and economic concerns and reframe them within the language of risk. These two allow us to better interrogate the political discourse around risk and regulation.

The second ideal type, 'sociocultural risk', comprises threats to the human collective. Sociocultural risks are those that threaten to harm collective wellbeing, comprising the social interactions that are part of everyday life—interactions that generate tangible needs, such as food, and the less tangible, such as a sense of security and belonging. This risk captures the reality that humans are social beings, and our concern with the health of the collective is a logical consequence of this (Douglas 1966). Social order, and hence events that heighten sociocultural risk, is also likely to be context specific. The introduction of a new technology (such as digital technology) may raise sociocultural risks, particularly when this technology mediates relationships (such as dating sites). New technologies, processes and relationships may be perceived as threats more in one context than in another and are certainly subject to changing perceptions over time. The point, however, is not that a particular social order is moral and desirable, or immoral and undesirable; rather, it is that, as social beings, we need some form of social order for our survival. For this reason, human beings are uniquely attuned to group wellbeing and their place within the group. Hence, those who voice their concerns and draw attention to what they perceive as being harmful to the social group not only raise issues of social concern but are also making a statement of belonging to that group. It is important to recognise that this reality of our interdependence does not preclude either significant conflicts in values within a society (expressed in different views about

what is a concern) or the presence of significant inequalities (Haines 2011: 44). The inescapable reality, though, is the need for a requisite level of sociality for a society to sustain itself (cf. Carson 2007).

The third ideal type—'political risk'—brings together within a single risk frame threats to political legitimacy and risks to the economy or, more accurately, to capitalist accumulation. The subject at risk can be understood not only as risks to the government of the day, but also to the legitimacy of a political system within a particular setting. This understanding of political risk is framed by the central task of government to sustain capital accumulation while also maintaining its own legitimacy, with an understanding that those imperatives may be in conflict with one another (Offe 1984; Habermas 1979). Threats to political risk, then, are, on the one hand, economic and, on the other, sociocultural and actuarial. Managing political risk involves ensuring the requisite conditions for capitalist economic activity to flourish and, through taxes and other charges, providing the necessary income for government itself to function. This economic requirement is met by the need for governments to reassure the citizenry of their security. The maintenance of legitimacy often involves governments protecting, or promising to protect, citizens from a wide variety of risks, most often in the form of threats to collective wellbeing. While some of these threats may be actuarial in origin, dealing with actuarial risks is not sufficient, or even necessary, to retain political legitimacy. Reassurance is a political dynamic framed towards sociocultural risk roots. What becomes obvious here is the way that sociocultural risks are inevitably drawn into political debates and governments positioning themselves to maintain their own legitimacy (cf. Clarke and Short 1993). Indeed, these political debates may actually deflect attention away from particular actuarial concerns. The debates around climate change provide an excellent example of the way political risk can be managed (at least in the short term) without addressing the actuarial risk problem.

As ideal types, none of the three—actuarial, sociocultural or political—will ever be found independently from one another. They exist in combination and in complex interaction. Nonetheless, their relative independence allows us to understand how and why regulation may concentrate on one area where, arguably, a problem of limited actuarial risk may lie, and yet concentrate on another where the actuarial risks may be real, but limited.

3. Risk, uncertainty and risk assessment

When each of these three ideal types of risk is examined, what becomes clear is that each has integrity. That is, a sociocultural risk to collective wellbeing (a serious undermining of the social fabric) or a risk to political legitimacy (the presence of serious political unrest or a military coup) can give rise to an equally problematic and harmful outcome as an actuarially based risk. Put simply, each risk is real and fears of their realisation may be entirely rational. But what is also clear is that the basic *assessment* of a particular risk can be partial, distorted or virtually non-existent. Levels of uncertainty and the contours of that uncertainty differ (Renn 2008). Actuarial, sociocultural and political risks are all subject to risk assessment—an assessment that must grapple with varying levels of uncertainty.

The relationship between risk, risk assessment and uncertainty is itself the subject of a considerable literature. On the one hand, some psychologists point to the frailty of human beings in their capacity to assess risk as well as differing appetites for taking particular risks (Slovic 1987). Here, regulation may well depend on the particular biases of the policymakers themselves. It may also depend on how a particular risk challenge is framed. As human beings, we are better able to apprehend the potential impact of a given risk than a finegrained appreciation of wide differences in the probability of its occurrence (Sunstein 2003). Further, certain risk events seem to garner greater attention because of their visceral nature (Sunstein 2005). Regulations, then, can be expected to cluster around events where the potential impact is severe even where the probability is remote.

Many writers also draw out the inevitability and even desirability of uncertainty. From the perspective of the natural sciences, science understands itself as an uncertain enterprise (Bedsworth and Kastenberg 2002). In the classic Popperian view of science, a scientific fact remains a hypothesis, waiting to be replaced with a more accurate analysis. Problems can arise, though, when science is brought into political debate and legal processes. Political debates look for certainties even as they exploit uncertainties for political gain. Politicians draw on evidence to support their own predetermined political positions in what has been termed 'policy-based evidence' as opposed to its more respectable cousin, evidence-based policy (Strassheim and Kettunen 2014). From a different perspective, Pat O'Malley (2004) argues that the very language of risk and risk assessment is an exercise in taming the uncertainty of governing

through risk while acknowledging that some level of uncertainty is desirable. It allows governments and authorities to act in the face of what may be essentially (and properly) unknowable. Risk technologies such as risk assessment, risk management and the like resonate with our understanding of ourselves as rational and risks in the world as calculable. Here, the connection with regulation is that it provides visible evidence that a risk has been tamed even as uncertainty remains.

This discussion of the relationship between risk assessment and uncertainty highlights the way a risk assessment ostensibly based on one form of risk—most often actuarial risk—may be driven by sociocultural or political risk concerns. Discounting an assessment as 'irrational' does not help us understand the complex nature of this dynamic. To be sure, there are some bureaucratic techniques that try to tease apart the actuarial from the social and the political to make good regulatory decisions. Their success or otherwise is often subject to intense debate. Cost–benefit analysis is one such example. Proponents argue that political priorities are essential and legitimate, but should be informed by a cost–benefit analysis or equivalent approach to encourage reflection (Sunstein 2005). However, attempts to capture social priorities are brought into the process. In the first instance, a cost–benefit analysis rests on a scientific or technical assessment of a particular actuarial risk in terms of its potential impact and the likelihood of its occurrence. The risk assessment here is based on an actuarial frame. The next step involves estimating monetary costs associated with reducing this risk followed by a formal or less formal process of understanding whether the societal benefits of the regulatory regime outweigh its costs. This involves a social calculus. In some cases, a monetary value is included that comprises a given society's willingness to pay for its reduction, and to what level. This may be calculated according to some value placed on a statistical human life. Value of a statistical life (VSL) calculations are subject to intense debate regarding their validity and their appropriateness (Fourcade 2009; Robinson 2009; Viscusi 2009a, 2009b). The substance of this debate often rests precisely on the degree to which sociocultural and political risk concerns are, or are not, made transparent through this process.

Even outside a formal cost–benefit analysis process, the way political or sociocultural risk concerns shape assessments of a given actuarial risk is often in evidence. A common example used here are those risk assessments made of the likelihood and impact of a terrorist attack within the context of Australia, the United States and the United

Kingdom. Considerable legislative and regulatory changes have taken place in these three jurisdictions following the terrorist attacks in the United States on 11 September 2001. These reforms, including those designed to reduce the impact and likelihood of an attack in a public place, such as an airport, rest on an uncertain and highly politicised risk-assessment process (Sunstein 2003, 2005). Indeed, it is possible to argue that regulatory reforms in this area have been designed as much to reduce political risk or enhance political legitimacy as to reduce the actuarial risk of a terrorist attack (Haines 2011: 115–23).

4. Risk management and regulation

This final section explores the connection between risk management and regulation; keeping in mind the three ideal types of risk is also illuminating. To illustrate this, this section begins with an approach that aims to enhance the self-regulatory capacities of organisations together with regulatory oversight—what Ian Ayres and John Braithwaite (1992) term 'enforced self-regulation', and others have labelled co-regulation (Wardrop 2014) or meta-regulation (see Grabosky, Chapter 9, this volume). As with other regulatory styles, co-regulation is most explicitly connected through the lens of the need to manage an actuarial risk, but its design seeks to engender a particularly conscious form of compliance. It requires a given regulatee, such as a chemical plant or oil refinery, to put in place its own regulatory strategy. This is designed explicitly for that site and is able to reduce or eliminate the potential for a catastrophic explosion. The site is then required to comply with the regulatory strategy it has developed. Within the major hazards area, this is labelled the 'safety case approach' (Haines 2011: 101–8). This form of regulation combines the risk management strategy of the regulator with the self-regulatory capacity engendered by an internal risk management process. Enforced self-regulation draws on the knowledge of actors inside an organisation to ensure risks are properly controlled while retaining external regulatory oversight to ensure this process has ongoing integrity. To be effective, it must be sensitive to sociocultural, and not just actuarial, risk concerns (Haines 2011: 149–54). While the relationship between the internal organisational actors and external oversight can vary (Wardrop 2014), the ultimate aim is the effective management of risk through engaging the conscious efforts of actors within the organisation to ensure risks are properly controlled.

This process of eliciting conscious effort in the pursuit of risk reduction, such as the safety case regime, has consequences in terms of the efforts needed for an organisation to comply. A conscious, thoughtful and systematic approach to the management of a potentially catastrophic risk engendered by a particular regulatory regime may be appropriate. But, in other cases, attempts by a regulator to elicit significant conscious effort may have significant impacts on other functions of an organisation—that are, arguably, more important. A good example of this problem is provided by Carol Heimer's (2008) analysis of AIDS clinics and the regulatory regime of government funders designed to ensure the proper use of government funds. What her research shows is that the onerous nature of this regime could have a significant impact on the capacity of AIDS clinics to provide effective treatment. Further, it appeared that political risk considerations about potential scandal to government from the inappropriate use of government funds, or at least use in an area not allowed for, drove the regulatory regime and increased the effort required to comply.

To be sure, various regulatory regimes have been conscious of the need to target resources and moderate the level of effort required by regulated sites to the level of risk posed. Risk-based regulation is the name given to this particular strategy. Here, regulators assess the impact and likelihood of noncompliance across their regulatees to decide where their resources are best employed. The greatest attention—arguably, demanded by a meta-regulatory approach—is directed to where problems are likely to be the most significant (see Grabosky, Chapter 9, this volume). The Australian Prudential Regulatory Authority (APRA)—the regulatory authority responsible for banks, insurers and superannuation funds—has designed its regulatory approach in this way. In doing so, it hoped to reduce the risk of financial collapse of one of these institutions or a serious inability to meet its ongoing liabilities. Its regulatory effort was framed to target those institutions with potentially the greatest impact should they fail (Black 2006; Haines 2011).

A major challenge, though, is that regulatory regimes are multiple not singular. Regulation and compliance are each aimed at removing different forms of risk from an overall beneficial and socially desirable activity. Regulation is an instrumental, problem-focused and narrowly targeted form of policymaking. It is supported by a risk-based approach to regulation—a modernist paradigm characterised by separating out,

analysing, assessing and managing discrete risks. As such, it highlights the significant challenge of a regulatory approach in managing a potentially broad array of disparate threats.

With a focus on compliance from the perspective of the regulated entity, as opposed to the regulator, particular challenges with a risk management approach associated with regulation come into view. Organisations are likely to be subject to multiple regulatory regimes, each with a particular risk and risk management process in mind. For example, compliance with various forms of regulation relevant to a for-profit business may entail the reduction of a diverse range of risks, from financial fraud, occupational health and safety risks, product safety and environmental concerns to risks of anticompetitive conduct, among others. In general terms, for-profit business is desirable not only in terms of the products and services it may provide, but also in terms of the employment it creates. An even more complex array of regulations may be associated with hospitals and schools. Both serve significant areas of human need, their activities are desired and sanctioned by governments and they often enjoy considerable public support. But their activities encompass a broad array of potential risks each of which is likely to be subject to regulation. Even where each of these risks has been carefully assessed and regulations have been designed to be as effective as possible, the capacity to achieve these outcomes without negatively affecting the public benefits inherent within a given activity may be difficult. To be sure, there are also examples where regulatory compliance enhances organisational outcomes—for example, good accounting practice may both reduce the potential for fraud as well as enhance the pursuit of good business opportunities, but this is not necessarily the case. Indeed, there may be examples where the aims of compliance in one area are in considerable tension with those in another (Haines and Gurney 2003). Further, the policy emphasis on internal risk management processes by regulated sites may simply be understood as part of political strategy to ensure governments protect their political risk liabilities at the expense of overall public benefit (Haines and Sutton 2003). Regulation remains critical to enhancing public benefit, but we should be alert to its inherent problems.

The problem of too much regulation—or what is sometimes called 'juridification' (Teubner 1998)—needs careful attention. A focus on political risk highlights why. The call for a reduction in the regulatory burden is common, particularly in the context of private enterprise, as highlighted above. The paragraph above explains why this may be

a problem. However, part of the task of political risk management is responding to this call from business to reduce 'red tape' in the hope and expectation that business activity will flourish. The reality is more complex. First, the impact of regulation on capital accumulation itself is not straightforward. Indeed, certain forms of regulation can engender business in their own right in terms of not only consultancies and risk management specialists but also technological innovation and industrial processes designed to reduce both human and environmental risk (Grabosky 1994; Jaffe et al. 1995). It is likely, however, that regulation will benefit some industries, and businesses within industries, more than others. The risk assessment process undertaken by governments in relation to the impact of regulation on conditions for capital accumulation may well be influenced by some businesses more than others. For example, the impact of the fossil fuel industry in weakening regulation aimed at mitigating carbon pollution and transforming energy production is recognised (Gunningham 2012). In other industries, too, such as regulatory reform in the context of the Global Financial Crisis, public concerns may be lost (Krawiec 2012). Further, the impetus towards reducing the regulatory burden in some areas such as corporate law may engender a positive feedback loop when any regulation, irrespective of its public benefit, is seen as suspect (Chen and Hanson 2004).

Finally, we turn to risk management in the context of sociocultural risk. The management of sociocultural risk can be seen to draw on interpersonal and, arguably, leadership skills rather than on technical acumen. The psychological literature on procedural justice and that on responsive regulation provide some insight here. Tom Tyler's work (2003), for example, shows how interpersonal skills are essential to ensuring acceptance of a given judicial or other form of authoritative outcome (see also Murphy, Chapter 3, this volume). Where people are treated fairly, listened to and their opinions respected, they are more likely to accept a given outcome even if that outcome is, on the face of it at least, not in their material interests (Tyler 2003; Braithwaite 2009). This suggests that procedural justice and responsive regulation tap into sociocultural risk management themes (Haines 2011: 44–5). At an organisational level, one can also look to the social licence literature. Research here points to the need for social acceptance of a given industry for it to function effectively. However, social oversight and acceptance may have different implications for particular actuarial risks depending on political context and the levels and contours of political risk. So, social oversight has, alternately, been argued to raise industry standards in some cases (for example, reducing pollution levels) (Gunningham et al. 2005), while other studies point to a social licence

being somewhat independent of actuarial concerns (Haines 2009) or even that social acceptance or a social licence (that is, successful sociocultural risk management) can be accompanied by ongoing and serious actuarial concerns (Bachrach and Baratz 1970; Culley and Hughey 2008).

5. Conclusion

This chapter has teased apart the complex relationship between risk and regulation through an analysis of the three different ideal types of risk at play. Risk is captured not only by actuarial risks—those threats able to be calculated through a scientific or technical frame. Critically, sociocultural risks, risks to collective wellbeing and political risks framed by the dual challenges for governments of maintaining the conditions for capital accumulation and for legitimation are also important to understand. Each of these risks has real consequences should they be realised, but they differ in who or what is at risk. Each ideal type is also subject to a risk assessment—judgements that grapple with varying levels of uncertainty and the influence of concern about other risk types. Risk assessment of actuarial risk, for example, is often influenced by political risk such as that discussed above in the debates about science. Sociocultural risk assessments are often political in nature.

The analysis above on uncertainty also points to risk as a modernist framework for understanding the world. A modernist paradigm sees threats analysed, teased apart and dealt with through multiple assessment processes that result in discrete risk management imperatives. Risk management is made visible in disparate regulatory regimes that cover a broad array of different threats. With this in mind, it is not surprising that there are common complaints of overregulation. Yet, uncertainty always remains and regulation may be as much about governments' need to demonstrate their mastery over uncertainty as it is about the capacity of a particular regulatory regime to reduce a particular actuarial risk.

A sustained interrogation of the connection between risk and regulation demonstrates the essential nature of regulation, yet also its limitations in enhancing our wellbeing. Ultimately, the dynamic of regulation may be best illuminated by the particular challenge of the management of political risk. Government assessment of the need to enhance capital accumulation may see it respond to business demands for deregulation, particularly by those businesses seen as central to a given economy. Arguably, capital accumulation and business acumen need some level of

uncertainty to flourish. But this imperative is met by a competing demand for governments to tend to their legitimacy—a demand more easily met by putting in place new or reformed regulation to manage disparate threats. Regulation as a solution to a political problem explains in part why regulation varies from place to place despite the similarity of the actuarial risk. The significant problem, however, is that meeting various demands for reassurance and juggling this with economic demands may not, in fact, mean that significant actuarial risks are responded to.

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12

Public accountability: Conceptual, historical and epistemic mappings

Michael W Dowdle[1]

1. Introduction: On the crisis in public accountability

Many in the Anglo-American world perceive a growing crisis in public accountability. They fear that privatisation and globalisation are breaking down the traditional accountability arrangements that give us confidence in our government—for example, by devolving important political authority and power to private actors who are able to operate outside the public accountability mechanisms designed for civil servants, or by shifting governmental powers and responsibilities on to transnational actors, both public and private, who operate outside the jurisdictional reach of domestically formulated accountability systems (see Drahos, Chapter 15; Tusikov, Chapter 20, this volume). All this leads to suspicion about whether the political forces affecting our lives are really acting in the interest of the public.

1 Adapted from Dowdle, M 2006. 'Public accountability: Conceptual, historical, and epistemic mappings', in MW Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences*. Cambridge: Cambridge University Press, pp. 1–32.

This crisis is further exacerbated by the fact that different people seem to have different and often conflicting ideas as to what constitutes or satisfies a meaningfully 'public' accountability. Economic development agencies, for example, tend to see public accountability primarily in terms of rationalised and transparent systems of bureaucratic control. Human rights activists see it primarily in terms of popular participation in and supervision of political decision-making. Legal development agencies often see it in terms of judicial enforcement of legal norms. Many regulatory reformers in the United States and the United Kingdom see it in terms of market-like competition and discipline. Thus, while there is common perception of an accountability problem, there is also deep division about its exact causes and nature and about what our appropriate response to that problem should be.

As will be explored in this chapter, this is because different visions of public accountability reflect different histories, different experiences and different concerns. Historically, these differences have been harmonised somewhat by the conceptual predominance of what we will call the bureaucratic mode of public accountability. Recent events, however, have weakened this predominance and, in so doing, have catalysed inconsistencies between and among these various ways of experiencing public accountability.

Part 2 of this chapter looks at the historical roots of present-day Anglo-American understandings of public accountability. As we will see, that understanding is very much the product of historical accretion, embedding within it different ways that generations past perceived and responded to accountability crises. As we will see in Part 3, what stabilised this accretional collection of historical experiences and responses until recently was the relative conceptual dominance of one particular kind of public accountability: bureaucratic accountability. Part 4 will explore how recent evolutions in global and domestic governance have reduced the appeal of bureaucratic accountability and, in the process, catalysed conceptual inconsistencies with and among these other conceptualisations, resulting in a growing fragmentation of our present-day notions of public accountability—the 'crisis' referred to in the opening of this chapter.

In Part 5, we will see that underlying this fragmentation is the fact that we as individuals actually experience accountability in a number of different ways: as subjects of state power; as evaluators of state institutions; as citizen participants in the state itself (as popular

sovereigns, in other words); and simply as human beings interacting with other human beings. Each of these ways of experiencing public accountability has its own distinct logic and its own distinct epistemology. This suggests that the key for a more robust understanding of the nature of public accountability lies in a consilience involving these different kinds of experience, as will be explored in Part 6. Finally, Part 7 concludes by exploring what all this might have to tell us about where the 'responsiveness' in 'responsive regulation' really lies.

2. An intellectual history of public accountability

In beginning our exploration of the diverse structural and experiential facets of the notion of public accountability, we might first ask ourselves what is public accountability? At its heart, the idea of public accountability seems to express a belief that people with public responsibilities should be answerable to 'the people' for the performance of their duties (see also Mashaw 2006). But there are problems with this conceptualisation.

This standard conceptualisation of public accountability is really simply a metaphor that borrows very imperfectly from a number of other discourses about 'accountability' per se. From the private law, it borrows from the notion that accountability is a product of a particular kind of relationship existing between two individuals—namely, the principal and her agent, in which the agent is required to demonstrate that her actions conform to the demands, intentions and interests of the principal. It then borrows from political theory the idea that the 'public' itself can be analogised to an individual (in this case, the individual of principal in private law). The problem is, of course, that the 'public' is not an individual. As an inherently collective phenomenon, the 'public' is only vaguely identifiable in space. Its corpus is diffuse and contestable, and its internal dynamics are often so complex as to be opaque. As a collective, it rarely can be said to have mental-state intentions, as what 'intentions' it might be meaningfully said to have are often internally inconsistent (see Loughlin 2010).

Perhaps because of this conceptual conundrum, Anglo-American political and legal society has tended to define public accountability primarily in terms of discrete institutional architectures. Most prominent among these have been elections, rationalised bureaucracies, judicial review,

transparency and 'markets'. These different architectural modalities originally emerged as contingent responses to various legitimacy crises that have periodically beset Anglo-American governance. In other words, as implemented in the Anglo-American legal system, public accountability is more a spontaneous aggregation of experiences than a structural extrapolation of foundational principles.

Elections have been a key component of Anglo-American conceptions of public accountability ever since the founding of the American constitution. In the United States, electoral recall originally represented the principal sanction by which the citizenry was to hold politicians accountable for errant political frolics (Keyssar 2000; see also Madison 1961).

But even in the Anglo-American world, intellectual and political support for electoral democracy has always been decidedly mixed. In the United States at the end of the nineteenth century, the ability of machine-style, patronage-based politics to thrive in democratic competition, at the seeming expense of the public good, caused many to become sceptical of the electorate's capacity to hold politics to true public account. Reformers sought, instead, to hold political behaviour to such account via the construction of rationalised, professionalised bureaucratic frameworks. To these reformers, devices such as meritocratic recruitment, tenure and promotion; professionalisation; and scientific administration offered a more satisfying vision of public accountability. It was a vision of public accountability that worked by subjecting political behaviour to the oversight of an organisational environment specifically designed to recognise and pursue the public good as opposed to that relying primarily on corruptible electoral impulses (Lee 2011).

But, about the same time as Americans were turning to bureaucracy as a cure for perceived accountability problems of electoral democracy, constitutional scholars in England began turning to the judiciary as a cure for the perceived accountability problems of both democracy and bureaucracy. In the 1880s, the influential English constitutional law scholar Albert Venn Dicey became concerned—some might even say obsessed (see, for example, Schneiderman 1977)—with both the expanded administrative capacities of the British state and the expansion of the franchise. Dicey (1982) advanced an idea—what he famously called 'rule of law'—that the only way to secure constitutional constraints in the face of these twin expansions was to preserve and strengthen the political-legal oversight of bureaucratically and democratically insulated courts.

In the 1930s, American jurists also became increasingly concerned about perceived constitutional threats brought about by the emergence of the American administrative state, and they were strongly influenced by Dicey's description of the need for a strong judicial check on the growing administrative bureaucracy (Horowitz 1992: 225–8). But Dicey's vision saw judicial review primarily as a substantive constraint of bureaucratic decision-making. The American vision, in contrast, adopted a more process-focused approach (White 1978: 136–63).

In the 1960s and 1970s, rising disillusionment in government generated first by American participation in the Vietnam War and later by the Watergate scandal caused many to become sceptical about the degree to which either professionalised rationalisation or judicial review could encourage public officials to work in the public interest. This occasioned the appearance of a yet another architectural modality for political accountability—that of 'transparency' and 'open government' (Anechiarico and Jacobs 1996: 8, 23–6). Open government sought to make governmental decision-making as visible as possible—not simply to those who directly involve themselves with government, but also to the larger, uninvolved portion of the polity. This new vision of open government promised to allow our increasingly remote civil society to nevertheless hold public officials to account even without directly participating in political decision-making.

But soon thereafter, in the 1970s, economic stagnation in the United States and the United Kingdom caused growing concern about governmental waste, inefficiency and unresponsiveness. This caused some reformers to look to market-like mechanisms—which they believed to be more efficient in the allocation and usage of resources—as a means of promoting responsible use of public resources. In some cases, these reformers advocated devolving public responsibilities directly to private, market-based actors (Savas and Schubert 1987). Beyond this, reformers in the United Kingdom also invented new governance architectures that replicated market-like forces of competition by having different public departments 'compete' in the development of effective regulation (Hood 1995), while American reformers developed architectures and procedures, such as cost–benefit analyses, that sought to replicate market-like pricing and demand mechanisms (Layard and Glaister 1994).

3. Stability and contiguity

In sum, the Anglo-American idea of public accountability is not so much the product of extrapolation from core conceptual principles as an accretional layering of responses to periodic legitimacy exigencies experienced by Anglo-American societies. But why and how did these successive modalities aggregate into a *singular* conception of public accountability, rather than simply producing a sequence of competing conceptual paradigms?

For most of the twentieth century, the stability of this accretional layering has been due largely to the fact that one particular modality of public accountability—bureaucracy—has enjoyed a privileged, *primus inter pares* status when it came into conflict with other modalities (Rubin 2006). Of course, this predominance was not always the case. We noted above that elections were the principal recognised source of public accountability for the first 100 years of American constitutional government. When American reformers began promoting bureaucratisation as an accountability alternative to democracy, however, they triggered a corresponding reconceptualisation of the nature of democracy itself. 'Democracy' came to be thought of in the more limited terms of elections and suffrage, as opposed to the more robust notion of 'participation' famously described by Tocqueville (1969) in 1835. Reorienting the idea of democracy in this way avoided conflict with growing norms of bureaucratisation and professionalisation, both of which sought to remove the more day-to-day, technocratic matters of public administration from the partisan politics that a more participatory vision of democracy seemed to unleash (Keyssar 2000: 117–71).

A similar clearing of space occurred when the expanded capacities of bureaucratised administrative government also brought it into conflict with judicial review. As described above, constitutional scholars in both the United Kingdom and the United States had originally hoped that pre-existing processes of judicial review could be used to put a brake on the inherent dangers of bureaucratic administrative governance; however, this was not to be the case. Both UK and US courts have adopted a vision of judicial review that was largely deferential to the substance of bureaucratic decision-making. During the first two-thirds of the twentieth century, the UK courts' deference to the administrative state has been so complete that there was a real question whether judicial review in the United Kingdom had any real meaningful impact on the

actual operations of administrative governance (JUSTICE-All Souls Review Committee 1988). On the other side of the Atlantic, the US courts have also decided—wisely, in the eyes of many—to generally defer to bureaucratic judgement, at least when it follows proper processes (Kagan 2001: 2383).

Nor have the more recent modalities of public accountability—for example, open government, deregulation, privatisation and contracting out—seriously challenged bureaucratisation's dominance as our main paradigm for public control. The 'open government' movement of the late 1960s and early 1970s quickly subordinated itself to the perceived needs of bureaucratic government. For example, the *Freedom of Information Act* is qualified by its famous Exemption 5, which allows an agency to lawfully withhold 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency' (5 U.S.C. § 552(b)(5)). The exemption was thought necessary, in the words of the US Supreme Court, to protect the innately bureaucratic 'decision making processes of government agencies' (*NLRB v. Sears, Roebuck & Co*. 421 U.S. 132 (1975) 150).

More recent, market-inspired governmental reforms such as contracting out, devolution and 'streamlined government'—despite often being motivated by expressly antibureaucratic impulses—have, for the most part, simply substituted one (often less visible) bureaucracy for another. In the United States, for example, an overall decrease in the size of the federal bureaucracy during the 1990s has been offset by corresponding increases in the size of state government bureaucracies (Diiulio, jr, and Kettl 1995). Decreases in public bureaucratic responsibilities due to 'contracting out' have been counterbalanced by increased private bureaucratic responsibilities within contracting firms (Light 1999: 4). Thus, despite their often expressly antibureaucratic intentions, this most recent round of regulatory reforms has not so much challenged bureaucratic accountability as it has shifted it around.

4. Fragmentation

More recent events, however, have disrupted the stability of this 'accretional' vision of public accountability. We noted above that this vision has been sustained in part by the pride of place it gives to bureaucratic structuring. One of the reasons bureaucratisation has

been able to enjoy this position is because it was most consistent with the evolving organisational trends of what we might call 'modernised' Anglo-American society as it emerged in the early twentieth century (Piore and Sabel 1984: 49–104). Industrialisation occasioned a massive rationalisation, regularisation and centralisation of social life. The rationalisation, regularisation and centralisation that characterise bureaucratic administration worked in significant part by paralleling this development (see also Dowdle 2006). However, recent developments have caused both domestic and international regulatory environments to become increasingly volatile and fragmented. As a result, regulatory systems are being reoriented to emphasise flexibility and adaptability, at the expense of bureaucratic predictability and control (Sabel 1994).

Another reason for the disruption of the Anglo-American vision of public accountability has to do with recent developments in the global environment. During the last half of the twentieth century, what we are calling the Anglo-American 'model' of public accountability also became increasingly transnationalised, due in significant part to the United States's dominant position within the global geopolitical arena (see, for example, Mazower 1999: 294–6; cf. Erkkilä 2007). This transnational tolerance of America's intellectual dominance with regards to issues of public accountability had been sustained in part by the First World's perceived need to present a united front against communism in general and the Soviet Union in particular. With the collapse of the Soviet Union, however, this united, US-led vision of what constituted good, or even democratic, governance has come under increased scrutiny. At the same time, new technologies have enabled formerly isolated, localised activists to join international networks of like-minded resistors and activists. A growing number of self-consciously 'local' interests are now increasingly able to contest, both normatively and practically, their assimilation into centralising, bureaucratic regulatory frameworks (see, for example, Morgan 2006). For both these reasons, the Anglo-American vision of public accountability, which used to be seen as a bulwark for liberal political stability, is now seen by many as an instrument of political hegemony (Jayasuriya 2001).

The result has been a 'fragmentation' in public accountability discourse. As the harmonising dominance of bureaucratic modernisation is delegitimised by newer and more localised organisational logics that stress flexibility and local knowledge, formerly latent tensions among the diverse architectural modalities that make up the Anglo-American

vision of public accountability become more manifest. Different kinds of political interests tend to be attracted to different modalities of accountability. Trade unions, for example, whose impact on political decision-making historically has come in large part from their ability to mobilise voters, tend to prefer electoral modalities of accountability. International human rights organisations, whose staffs generally include a high number of people with legal training, tend to prefer juridical modalities of public accountability. Economically oriented interests seem to be more comfortable with what Weber (1947: 328–39) called the 'legal-rational model' of public authority, which meshes with their own institutional practices and makes it easier for them to navigate the diversity of transnational and domestic regulatory environments in which they must operate.

At the same time, globalisation has generated growing demands for more public accountability. The more willing participants in globalisation processes—for example, international business, trading interests, labour activists and environmental activists—are demanding an evermore expansive scope of public accountability from domestic government actors, whom they suspect to be illegitimately impeding the implementation of emerging public international norms (see, for example, Rodrik 1999: 151; Human Rights Watch 1999; AFL–CIO 2001: 47, 60). At the same time, more reluctant, involuntary and localised participants in the globalisation process demand increasing public accountability from transnational regulatory actors, whom they see as illegitimately interfering with what should be ultimately domestic political matters (see Tusikov, Chapter 20; and Tienhaara, Chapter 38, this volume).

5. Experiences and epistemologies

Compounding this fragmentation of the ideal of public accountability is the fact that we *as individuals* encounter public accountability in a variety of ways, due to the fact that our individual experience with public accountability is inherently fragmented (Pinker 2002: 220–1). For example, one way in which we encounter public accountability is as 'subjects' of the state's dominium and authority. Here, our experience with public accountability is passive and positivist. We are concerned

primarily with what the existing demands of public accountability mean to us, as beneficiaries of others' conformity to these demands and/or as subjects who must conform to its demands.

Alternatively, we encounter public accountability as critical conceptualisers of political institutions—what we might refer to as an 'architectural' perspective. Of course, few of us ever have the opportunity to actually set up a public accountability system, but that does not stop us from thinking about how such a system should be designed or how it should work. Thus, when we think about the viability of electoral term limits or the problems of judicial activism, political lobbying or campaign finance, we generally think about these issues from a largely architectural perspective. We are not so much concerned about the subjective implications of these mechanisms—that is, how they affect us personally. Rather, we wonder more abstractly and objectively about what sort of implications these devices might have on mechanisms and dynamics of government.

We also encounter public accountability as citizens or as participants in the state. Here, 'accountability' itself is an inherently participatory experience. To give an account is to communicate, it is not to completely surrender control. Accountability is therefore a discursive condition, something that sets up a dialogue between the public and public servants. As members of the public, we actuate public accountability by deciding for ourselves whether the accounts offered by public officials are proper and in our interest, and how exactly we should respond in our actions to the officials offering these accounts.

Finally, we also encounter public accountability through direct experience (see, generally, Braithwaite 2006b). Consider, for example, our experience of being treated with respect and kindness. Such experience implicates a particular form of public accountability: it indicates to us that some other person is taking our own concerns into account. Another example would be when we experience ourselves behaving responsibly and accountably. Even as wholly private citizens, we still recognise that in certain aspects we, too, are and should be held accountable to a larger public (Gardner 2006). Our experiences with regards to both these examples rarely depend on our contemplated appreciations of the dynamics of political coercion or how our actions implicate institutional design. They are feelings that operate prior to our rational understandings of larger political contexts, and hence represent an encounter with public accountability that is distinct from the other kinds of encounters described above.

Moreover, each of these different ways of encountering public accountability has its own, distinct logic. As 'subjects' of state dominium, we see public accountability primarily in terms of formal and positivist powers, authority and duties on the one hand; and rights, privileges and capacities on the other. These are the constructs that 'the state' uses to portray and define the scope of its coercive might (see, for example, Hohfeld 2001), and we therefore find these constructs useful in helping us negotiate our way along the state's institutional pathways.

When we look at the institutional architecture of public accountability, we use another kind of epistemic logic. Here, our concern is primarily with understanding institutional possibilities for promoting accountability, rather than simply with the demands of its positivist legalism (Foley 1990). Here, our epistemology is one that resembles scientific positivism, rather than the legal positivism of the above described state-subject perspective.

When we encounter public accountability as citizens—that is, as participants in, rather than simple subjects of, the state—we perceive our environment in more discursive terms. The epistemology of this perspective is dialogic (Habermas 1989; cf. Bakhtin 1986). This perspective sees accountability in terms of cooperation and agreement. The knowledge that governs this realm is more intimate, more nuanced and less conducive to positivist or scientific structuring. It is, in significant part, conventionalist and political—embedded in the stories and symbologies that we are forever sharing with other participants (Dunn 2000; Berger and Luckman 1966: 92–103).

Finally, the epistemic logic of what we are calling the experience of public accountability is primarily perceptual and phenomenological. It is largely pre-theoretical, founded in the irreducible complexities of tacit or practical knowledge. Like the dialogic logic of participation, the logic of experience has an emotive quality, often appearing in the form of intuition and gut feeling. But, unlike that dialogic logic, the logic of this realm can be personal and private. It need not depend on conventionalist confirmation (see Polanyi 1958).

The importance of recognising the fragmented nature of our experience with public accountability lies not in the possibility that it will help us resolve our disagreements about what accountability demands. Indeed, just the opposite. The fragmented nature of our own experience with public accountability would seem to mean that, at the end of the day,

the hunt for a single, grand unified theory of public accountability is likely to be futile. The simple fact that we all individually have experience of a diversity of kinds of encounters with public accountability—each encounter governed by a distinct logic—suggests that at some fundamental level, these differences are not completely reducible to a single common experiential referent.

But, paradoxically, the inherently fragmented, accretional nature of our vision of public accountability could actually be a source of strength, rather than a weakness. While a unified theory of public accountability might provide some degree of Kantian psychic comfort, it would not and could not reflect the full diversity of our actual experience. No matter how it was structured, a unified theory would invariably delegitimise some experiences that contribute to our thriving. We need to embrace our multiplicity of epistemically conflicting approaches to public accountability if we are to make sense of that phenomenon.

6. Consilience

Although distinct, our differing realms of experience and knowledge are not insular. In fact, they are highly interdependent. New experiences and understandings in one realm can often be translated into new and useful understandings in another—a process Edward O. Wilson (1998) famously termed 'consilience'. Consilience refers to the generation of new, robust understandings of the human condition that occurs when different experiences and epistemologies come in contact with and learn from one another (on regulatory pluralism and local epistemologies, see Forsyth, Chapter 14, this volume). The fragmented and accretional nature of our vision of public accountability can work to help catalyse this kind of dynamic: by simultaneously legitimating a wide diversity of not entirely harmonious experiences, such fragmentation ultimately facilitates an especially inclusive discourse about the experience of public accountability. Our task, in this regard, should not be one of finding ways to dissolve this epistemic diversity, but one of finding ways to harness it—to use it to catalyse these new, more robust understandings of the human condition (cf. Looney 2004).

Take bureaucratic accountability as an example. We saw, initially, that underlying the accountability crisis is a widespread dissatisfaction with a possible overreliance by modern governments on bureaucratic accountability. This dissatisfaction would seem to stem primarily from our experiences as subjects of state power, since it is as subjects of state power that we feel the coercive oppression of bureaucracy most directly and keenly (Rubin 2006). A more architectural perspective, however, suggests that the dichotomy between bureaucracy and other forms of accountability need not be as hard and fast as is commonly portrayed—that the state-subject's perception of bureaucracy can be dissolved somewhat by a more microanalytical approach to organisational design (see, for example, Braithwaite 2006a).

A citizen-participant's perspective, on the other hand, suggested that there were critical aspects of bureaucratic accountability that are likely to escape detection by design-based perspectives—aspects that lie in the irreducible complexities of social interaction (see Scott 2006). Some effective responses to the state-subject's dissatisfaction can therefore be found in collective learning from these experiences (see, for example, Courville 2006). But, to be useful, this new learning often has to be folded back into existing understandings and expectations. Therefore, our collective capacity to learn—or to learn effectively—is itself vitally informed by existing broad conceptual mappings that are captured primarily in what we have called the subject-oriented perspective (see, for example, Dorf 2006; cf. Dowdle 2006).

In other words, no single perspective captures the full dimension of public accountability. Effective understanding of, and responses to, the 'crisis' in public accountability must be epistemically collaborative. As noted above, our crisis in accountability is in some sense perpetual. Our disagreements about accountability are therefore also in some sense perpetual. Perhaps paradoxically, our best hope for the future may lie precisely in the fact that this perpetual disagreement provides an endless supply of raw material with which we can continually triangulate new and more robust understandings of the nature of public accountability.

7. Conclusion: From 'consilience' to 'responsive regulation'

The dynamic described above—what I have been calling 'consilience'—has special resonance with John Braithwaite's notion of 'responsive regulation'. Consider, along these lines, Braithwaite's 'responsive-regulatory' critique of Gunther Teubner's and Niklas Luhmann's notions of law as a normatively autonomous epistemic system:

> In this regard my conception of responsiveness differs from Teubner's (1986) reflexiveness and Niklas Luhmann's autopoiesis. I do not see law and business systems as normatively closed and cognitively open. In a society with a complex division of labor the most fundamental reason as to why social systems are not normatively closed is that people occupy multiple roles in multiple systems. A company director is also a mother, a local alderman, and a God-fearing woman. When she leaves the board meeting before a crucial vote to pick up her infant, her business behavior enacts normative commitments from the social system of the family; when she votes on the board in a way calculated to prevent defeat at the next Council election, she enacts in the business normative commitments to the political system; when she votes against a takeover of a casino because of her religious convictions, she enacts the normative commitments of her church … So much of the small and large stuff of organizational life makes a sociological nonsense of the notion that systems are normatively closed. Nor is it normatively desirable that they be normatively closed … there is virtue in the justice of the people and of their business organizations bubbling up into the justice of the law, and the justice of the law percolating down into the justice of the people and their commerce. (Braithwaite 2006b: 885)

In this light, responsive regulation can be seen as the regulatory face of consilience. But recognising the distinctive cognitive processes of consilience also helps give us a deeper understanding of the dynamics that must underlie responsive regulation. As described above, consilience requires us to see the other side in its own light—not as an existential competitor but as a repository of some distinct, highly impacted 'local' knowledge. This suggests that to be truly responsive, responsive regulation must be able to see the world from the perspective of its subjects and, in particular, from the perspective of those subjects who resist its imperium. For it is there that the seeds of true responsiveness are to be found.

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13

Compliance: 14 questions

Christine Parker and Vibeke Lehmann Nielsen[1]

1. Introduction

Political rhetoric often implies that regulation can be quickly implemented to achieve policy goals, but its effectiveness depends on the responses of individual citizens and businesses. Research in 'compliance', by contrast, directs attention to the complexities of implementation. The impact of regulation, compliance researchers show, depends on the responses of individual businesses and citizens.

The explanation and understanding of compliance in regulatory studies draw on a bewildering array of concepts from different disciplines. These include the psychology of individual motivation, organisational and institutional theories of the firm in its environment, criminological understandings of the causes of law-breaking and sociological and anthropological studies of the interaction of law with plural social orderings (see Braithwaite, Chapter 2; Murphy, Chapter 3; Harris, Chapter 4; and Forsyth, Chapter 14, this volume).

We begin this chapter by briefly setting out the range of meanings of compliance. We go on to synthesise the lessons of these different literatures into a holistic set of 14 compliance questions. We propose

1 We acknowledge the assistance of Dr Kym Sheehan, who helped the first author work up this material into an earlier version of this chapter for the purposes of a consultancy for Consumer Affairs Victoria in 2011.

these 14 questions as a set of prompts that policymakers, practitioners and applied researchers can use to identify and understand the many facets of behaviour and meaning that influence 'compliance' in each specific situation.

2. What is compliance?

In regulatory studies, 'compliance' refers to the panoply of behavioural and attitudinal responses that individuals and firms make to regulation. Parker and Nielsen (2011: 3–8) distinguish between 'objectivist' and 'interpretivist' approaches to compliance studies.

Objectivist approaches to compliance (Parker and Nielsen 2011: 3–6) identify and explain how, why and in what circumstances individuals and firms comply with regulation, and when and why they do not (for example, Simpson 2002). The core meaning of compliance in this context is behaviour that is obedient to a regulatory obligation. Objectivist compliance studies also seek to explain compliance and noncompliant individual intentions and attitudes, firm-level systems and management processes and the consequences of rule adherence for the accomplishment of policy goals (such as whether a policy goal, like pollution reduction, was actually achieved, as distinct from whether a firm complied with mandatory technology requirements). Many objectivist studies of compliance point out that rule adherence is often supported by commitment to the principles and values behind the rule (for example, Braithwaite 2009; Gunningham et al. 2003) and a democratic and fair process of regulatory rule-making and enforcement (for example, Tyler 2006).

Interpretivist approaches to compliance (Parker and Nielsen 2011: 3, 6–8) understand compliance to be a complex, ambiguous process in which the meaning of regulation is transformed as it is interpreted, implemented and negotiated in everyday life by those to whom it is addressed (for example, Edelman et al. 1999; Silbey 2011). Here compliance can refer to meanings and interpretations, social habits and practices and interactions and communications between different actors in the implementation process.

A broad and multifaceted understanding of compliance can help illuminate the complexities of regulatory implementation to achieve policy goals.

3. Background and origins of the 14 questions

Our 14 questions are based on the 'Table of Eleven' (T11) developed by Dr Dick Ruimschotel for and in collaboration with the Dutch Ministry of Justice to assist the government in determining whether new legislation could be enforced in a way that would lead to compliance (Law Enforcement Expertise Centre 2004). The table lists 11 factors that behavioural science research showed influenced compliance. The designers of the T11 recommend that it works best where single target groups and one or more very specific core obligations are assessed one at a time.

We have adjusted the original T11 by reference to Nielsen and Parker's later review and synthesis of the interdisciplinary empirical literature explaining compliance (Nielsen and Parker 2012; Parker and Nielsen 2011).[2] The original T11 was particularly strong on delineating the different aspects of government enforcement that are relevant to compliance defined in the objectivist sense. In contrast, Nielsen and Parker's 'holistic compliance model', shown in Figure 13.1, is particularly strong at seeking to understand how individuals' and businesses' everyday motivations, characteristics and business models interact to influence their perceptions of their regulatory obligations, enforcement and, ultimately, their compliance.

The Nielsen–Parker holistic compliance model emphasises the interaction between the different factors and the different actors that can enforce or encourage compliance. Some factors might have a short-run effect, while others might slowly build up (or eat away at) compliance, depending on their interaction with other factors.

2 A table comparing the original T11 with our model is available from the first author on request. We have added one dimension (number 8) to the original six 'enforced' compliance dimensions. We have reorganised the original five dimensions of 'spontaneous' compliance into seven dimensions in three subcategories informed by a more expansive understanding of compliance. Finally, we have reworked the questions and descriptions to emphasise the need to identify interactions between the various factors influencing compliance.

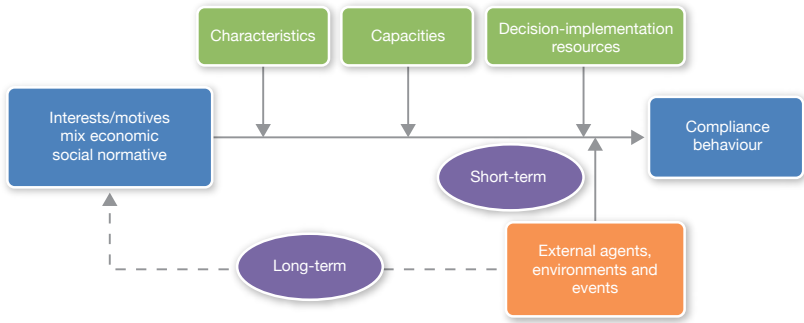

Figure 13.1 The Nielsen–Parker holistic compliance model
Source: Nielsen and Parker (2012).

4. Purpose and use of the 14 questions in practice

The purpose of the framework is to guide the collection of information about potential reasons why people do or do not comply with particular obligations. It can be used prospectively to help *design effective legislation*, to predict where there might be compliance issues in the future if new obligations are introduced and how policy purposes can most effectively be put into regulatory design to promote compliance. It can also be used during the *implementation* phase to help design and target effective regulatory education, compliance monitoring and enforcement strategies. At this stage, it can be a useful way of developing a *risk assessment of target populations* to help determine which regulatory strategies (education, monitoring, enforcement) should be used with which subgroups. Finally, it can be used in the post-implementation *monitoring and evaluation phases* to examine the impact of existing regulatory strategies. This might prompt ideas for changes in compliance and enforcement strategies, reforms to the regulation itself and strategic alliances with other parties to assist in improving compliance.

It is important to use all 14 factors to guide information gathering. The reasons people behave the way they do in society, including in relation to their regulatory obligations, are often complex and it is important to avoid overly simplistic explanations. The 14 questions are intended to be comprehensive and holistic enough to pick up all salient and significant issues.

Table 13.1 The 14 compliance questions

Spontaneous compliance factors	Enforced compliance factors
Economic, social and normative motives	8. Respect for the regulator *Does the target group respect the regulator and how it goes about its tasks? Do they have a relationship with the regulator? Do they respect the judgement of those responsible for law enforcement?*
1. Social and economic costs and benefits *Does the target group believe that it costs too much time, money and effort to comply? Does the target group believe that there are tangible advantages to be gained from breaking the rules? Does the target group see any advantage to them in complying with the rules?* 2. Degree of acceptance of this regulation *Does the target group agree with the policy objectives and the principles that underpin the rules surrounding their licensed activity? Do they agree with how the policy and principles have been put into practice—for example, do they think particular obligations are unacceptable?* 3. Respect for the law in general *Does the target group generally believe in abiding by the law; do they believe that complying with the law is a good thing to do regardless of whether they agree with a specific obligation?* 4. Existence of non-official influence over the targeted group's compliance *Do industry groups and other regulatees, customers, investors, trading partners, local communities, industry groups, non-governmental organisations or other stakeholders facilitate compliance?*	**Deterrence factors** 9. Risk that any violations of the rules will be reported to the authorities *Is there a high risk of violations being reported to the authorities, either by members of the target group's community or by the public? Is the target group deterred from noncompliance because they fear they will be complained about or reported if they do not comply?* 10. Risk of inspection *Is there a low risk of particular businesses being inspected by the regulator, either by a physical inspection or by a records inspection? Do members of the target group perceive themselves as likely to be subject to inspection?* 11. Risk of detection *Is there a high risk of any violations of the rules being detected if there is an inspection or some other monitoring (such as an audit)? What is the impact of factors such as an inspection only selectively examining records, particular violations being difficult for inspectors to detect or the ease of falsification of records? How does the target group perceive the risk of detection?* 12. Selectivity of inspection and detection by the regulator *Is the regulator selective in identifying and prioritising targets for inspection? Do some members of the target group perceive themselves as falling outside the priority targets for inspection? Are they aware of how the regulator 'screens' for breaches when inspecting or investigating?* 13. Risk of sanction *Is there a major risk of a violation, once detected, being sanctioned? Does the regulator have a practice or policy of dismissing charges or not enforcing charges? Does the target group believe that the risk of being sanctioned is low even if they are caught and the breach can be proved?* 14. Severity of sanction *Does the target group believe that the sanction they will face for a particular violation is severe, that it will be imposed quickly and will have other tangible disadvantages for the person concerned? For example: does the person suffer a loss of reputation from being sanctioned that has a negative impact on their business activities?*
Characteristics and capacities of members of the target population	
5. Business model *Is compliance relevant to the target group's business model or is it an 'afterthought', or even irrelevant?* 6. Knowledge of the rules *Is the target group aware of their obligations? Do they know the rules that govern the particular activity? Are the rules comprehensible or are they too complex to understand?* 7. Capacity to comply *Does the target group have the capacity to comply with the rules? Or do they lack the money, time, education or expertise to become aware of their obligations, decide to comply and implement compliance? Do they have good enough management systems to implement compliance?*	

Source: Authors' work.

Not all 14 factors will be equally important in any particular situation. When these 14 dimensions are used to gather information, it will usually become obvious that a subset of factors (either individually or in interaction with each other) is of particular salience in explaining and understanding compliance and noncompliance. The 14 questions act as a checklist that expands thinking to ensure all potentially important issues are considered, and to determine which ones are of particular salience in relation to a particular target group and regulatory obligation. They are summarised in Table 13.1.

5. The 14 questions

Spontaneous compliance dimensions

The spontaneous compliance dimensions are the factors that would influence people to comply even if no government education and assistance activities, complaints handling, monitoring, inspection and enforcement were in place.

Dimensions 1–3: Economic (material), social and normative motives

1. Social and economic costs and benefits

Does the target group believe that it costs too much time, money and effort to comply? Does the target group believe that there are tangible advantages to be gained from breaking the rules? Does the target group see any advantage to them in complying with the rules?

The costs and benefits of compliance relate to people's social and economic motives for compliance (see Braithwaite, Chapter 2, this volume).

How does compliance fit with a person's economic (material) motives—that is, their commitment to maximising their own economic or material utility? For example, to what extent is a regulated business or individual motivated by expanding the business, making (and selling) more products and services, earning more money and returning a greater profit to its owners? Does compliance fit well with those goals or derogate from them?

How does compliance fit with a person's social motives—that is, their commitment to earning the approval and respect of others? For example, to what extent is a regulated individual or business committed to earning the approval and respect of significant people with whom an actor interacts including other businesses, trading partners, employees, customers, local communities, the wider public, family and friends? To what extent do these other people value compliance or noncompliance?

This dimension will interact with the existence of social control over the target group (Dimension 7) since other parties are generally the ones who will control economic and social resources that motivate the target group. So, the extent to which the regulated individual or business perceives there to be costs and benefits to compliance and noncompliance depends on whether or not various other parties see compliance as relevant. For example, will some businesses or customers refuse to deal with another business that does not comply? Will peers stigmatise an individual who does not comply?

2. Degree of acceptance of this regulation

Does the target group agree with the policy objectives and the principles that underpin the rules surrounding their licensed activity? Do they agree with how the policy and principles have been put into practice—for example, do they think particular obligations are unacceptable?

This relates to people's normative motives—that is, their commitment to obeying the law because doing so helps them realise their normative understanding of what it is to 'do the right thing'. This dimension is concerned with the extent to which the individual or business accepts the specific policy goal of the specific regulatory regime and obligation under consideration. That is, they can see that it is aimed at effectively addressing an issue that they agree would be a problem if it were not regulated.

There may be some interaction with knowledge of the rules (Dimension 5) since people who understand the rules might also have a better understanding of why the rules exist and therefore why they should support them. There might also be an interaction with social motives (Dimension 2) and social control to comply (Dimension 7) since, over time, people often come to accept and internalise the values of their peers and trading partners.

3. Respect for the law in general

Does the target group generally believe in abiding by the law; do they believe that complying with the law is a good thing to do regardless of whether they agree with a specific obligation?

This is another dimension of normative motives. Here the concern is whether the individual or firm is committed to obeying the law and respecting authority in general, regardless of whether they agree with the specific regulatory regime and obligation under consideration. Some people will want to obey the law and comply with official authorities regardless of whether they agree with the specific law because they have a high degree of trust in the legitimacy of the government and the law (see Tyler 2006; Murphy, Chapter 3, this volume).

4. Existence of non-official influence over the target group's compliance

Do industry groups and other regulatees, customers, investors, trading partners, local communities, industry groups, non-governmental organisations (NGOs) or other stakeholders facilitate compliance?

The Nielsen–Parker holistic compliance model shows that economic, social and normative motives to comply or not comply are 'activated' through the behaviour and attitudes of the many individuals, firms and organisations that surround each business or individual. Official regulators also activate these motives, as indicated by the 'enforced' compliance dimensions below.

Identifying and understanding the various parties that can exercise non-official influence over compliance require a detailed and sensitive inquiry into that individual's or firm's everyday social and business world (see Harris, Chapter 4, this volume). It involves asking about key parties who might influence them and key events where that influence could be or is regularly exercised. It might also involve asking about perceptions of the general social, economic and political environment and what the relevant individuals and firms perceive this to require of them in terms of compliance and noncompliance.

Dimensions 5–7: Characteristics and capacities of members of the target population

5. Business model

Is compliance relevant to the target group's business model or is it an 'afterthought', or even irrelevant?

The 'business model' sums up the whole way an individual or business thinks about their everyday business life. It sums up what they are trying to achieve—that is, which motives or interests are most important to them and how they will try to achieve them; which stakeholders are important to them in terms of business dealings and reputation (for example, which customer segment do they target, how will they get investment into their business, who are the peers whom they want to respect them). How do they relate to their social, economic and regulatory environment?

The constraints of production and service provision are particularly relevant—that is, what does the trader have to do to actually make a living in their business and according to their business model? Does this leave enough time and resources for compliance with obligations? Does it put pressure on them to cut corners? Or does it make compliance with certain obligations a key to business success?

Thus, the 'business model' interacts with all the other spontaneous compliance dimensions. If a business's regulatory obligations are irrelevant to its business model, it is less likely to always comply.

6. Knowledge of the rules

Is the target group aware of their obligations? Do they know the rules that govern the particular activity? Are the rules comprehensible or are they too complex to understand?

People who are unaware of the rules may unintentionally violate them. This might be because they are unaware that there is a rule that applies to the situation or the rules may be too complex or inaccessible for them to understand how they apply to their own situation. Some members of target groups will not have the capacity to know and understand their regulatory obligations (Dimension 6), especially if there are complex and changing obligations.

People do not always need to know what the rules are to comply with them. Sometimes other parties might make sure that compliance is integrated into standard industry or organisation practice so that most people do not need to think about compliance explicitly—that is, knowledge of the rules can interact with social control over the target group (Dimension 7) through other parties and environments that make compliance natural and easy.

Often people become aware of rules and the need to know about their regulatory obligations only when they find out about enforcement action against peers or are the subject of enforcement action themselves (Dimensions 9–14). People are often capable of denying or rationalising away ignorance or incorrect knowledge until they are forced to confront enforcement against themselves or their peers (see Parker 2012).

7. Capacity to comply

Does the target group have the capacity to comply with the rules? Or do they lack the money, time, education or expertise to become aware of their obligations, decide to comply and implement compliance? Do they have good enough management systems to implement compliance?

It is well established that regulated firms vary in relation to fundamental characteristics such as economic resources, technical knowhow, managerial capacity and oversight and the personal and professional backgrounds of the people who make up the firm, and that these differences to a large degree explain differences in their compliance behaviour (Parker and Nielsen 2009). Similarly, an individual's capacity to comply with the law can be greatly influenced by their general cognitive capabilities, social capital and interpersonal relational skills. It is important to note that all these characteristics of a firm or individual can give them a greater potential capacity to know the law (Dimension 5), to decide whether it is in their interest to comply (Dimensions 1 and 4) or whether they value compliance for its own sake (Dimensions 2 and 3) and then be capable of putting the commitment to comply into practice through procedures and advice.

This can also give individuals and firms greater capacities to evade or game the law (see Braithwaite 2009; McBarnet 2003), and greater capacities to use their resources to fight or negotiate with regulators and law enforcement agencies to prevent enforcement of the law if they do not want to comply or disagree with the regulator's interpretation of the law (Edelman et al. 1999). Therefore, greater capacity and resources may or may not lead to greater compliance.

Enforced compliance dimensions

The enforced compliance dimensions are the various government activities that influence compliance and noncompliance and how they are perceived by the obligation-holders. This includes compliance education and assistance activities and activities to deter noncompliance.

It is important to compare and contrast the objective and subjective (or perceptual) aspects of these dimensions—that is, a regulator might have sophisticated compliance education, monitoring and enforcement strategies, and an array of sanctions designed to educate and deter. However, these sophisticated tools and strategies will only make a difference to the behaviour of members of the target population if they are perceived in the right way. For example, the existence of heavy penalties will not make a difference if regulatees are not aware of them or if they perceive the chances of being caught in noncompliance as slight. Similarly, a comprehensive program of educational visits might not have the desired effect if the target population perceives them as heavy-handed and unnecessary 'inspections' (Waller 2007).

8. Respect for the regulator

Does the target group respect the regulator and how it goes about its tasks? Do they have a relationship with the regulator? Do they respect the judgement of those responsible for law enforcement?

Whether the regulatee is aware of and respects the regulator will influence the way they perceive all the other dimensions of enforced compliance. Regulatees' assessment of the legitimacy and procedural fairness with which the regulator goes about its task will influence their trust in the law and the regulatory process, their belief in whether the regulatory regime will meet appropriate objectives and, hence, their normative commitment to comply (Dimensions 2 and 3).

Moreover, regulatees will likely only pay attention to advice and guidance (Dimension 6) if they respect the expertise and bona fides of the person seeking to educate them.

Respect for the regulator will also influence the way regulatees' perceive the seriousness and effectiveness of monitoring and enforcement efforts (Dimensions 9–14).

Dimensions 9–14: The deterrence dimensions

The remaining dimensions of 'enforced' compliance all relate to the various ways in which regulators seek to deter noncompliance through enforcement.

Deterrence theory proposes that people will be deterred from breaking the law when the legal penalty they would receive for a breach multiplied by the likelihood of swift detection and conviction outweighs the gain—

that is, they fear financial penalties, the loss of livelihood (for example, by losing a licence to trade or being put out of business because of a compliance scandal) and possibly imprisonment (if the offence is a criminal one for which jail sanctions are available). It is often the perception more than the objective risk of deterrence that influences regulatees.

Enforcement can activate social and normative motivations for compliance because it stigmatises and shames those who are caught in noncompliance and acts as a reminder to others that the general community values compliance. On the other hand, enforcement that is not effective, that is ignored by the community or that seems pointless can encourage noncompliance. Moreover, the targets' perceptions of the likelihood and severity of enforcement and of economic and social penalties are what are more likely to influence behaviour than the mere existence of penalties and enforcement that are disregarded.

9. Risk that any violations of the rules will be reported to the authorities

Is there a high risk of violations being reported to the authorities, either by members of the target group's community or by the public? Is the target group deterred from noncompliance because they fear they will be complained about or reported if they do not comply?

10. Risk of inspection

Is there a low risk of particular businesses being inspected by the regulator, either by a physical inspection or by a records inspection? Do members of the target group perceive themselves as likely to be subject to inspection?

11. Risk of detection

Is there a high risk of any violations of the rules being detected if there is an inspection or some other monitoring (such as an audit)? What is the impact of factors such as an inspection only selectively examining records, particular violations being difficult for inspectors to detect or the ease of falsification of records? How does the target group perceive the risk of detection?

12. Selectivity of inspection and detection by the regulator

Is the regulator selective in identifying and prioritising targets for inspection? Do some members of the target group perceive themselves as falling outside the priority targets for inspection? Are they aware of how the regulator 'screens' for breaches when inspecting or investigating?

13. Risk of sanction

Is there a major risk of a violation, once detected, being sanctioned? Does the regulator have a practice or policy of dismissing charges or not enforcing charges? Does the target group believe that the risk of being sanctioned is low even if they are caught and the breach can be proved?

14. Severity of sanction

Does the target group believe that the sanction they will face for a particular violation is severe, that it will be imposed quickly and that it will have other tangible disadvantages for the person concerned? For example: does the person suffer a loss of reputation from being sanctioned that has a negative impact on their business activities?

6. Collecting information about compliance using the 14 questions

The information used to make these assessments can be gathered in several different ways.

First, the 14 factors can be used to develop a set of questions for *qualitative in-depth interviews with the targets of regulation* to determine how they understand and work with the compliance in relation to a particular obligation. If an appropriate and sufficiently varied sample is chosen, this method provides deep insight into the nature of obstacles and opportunities for compliance. However, this method will not necessarily give a good indication of the absolute quantitative levels of these obstacles and opportunities for compliance.

Second, the 14 factors can be used to develop a *quantitative survey of a group targeted for regulation to gain information about the levels* of obstacles and opportunities for compliance among that group. Since it can be difficult to design a good and engaging survey that is also long enough to cover every factor that might be relevant to compliance, it will usually be more appropriate to do a pilot study first using in-depth interviews and then design a survey that gathers information from a large representative sample about the main issues identified in the qualitative interviews.

Third, this framework can be used as *a prompt for expert review of compliance obstacles and opportunities*. Here, rather than going directly to the target group to collect information about compliance, the researcher or policymaker can gather a group of experts in the area (such as inspectors, complaints handling staff, industry association representatives or consultants to the relevant industry) and use the framework as a basis for gathering together all the relevant information and insight about compliance that is available. This will be most valuable where representatives from as many different angles on the particular compliance issue are included in the conversation (for example, those from the relevant industry, regulators and professional advisers to the relevant industry). This may be done in person via interviews or a focus group/roundtable, or it might be done 'on the papers' simply by eliciting opinions and information from a range of experts.

7. Conclusion

The 14 questions do not set out a single unified model that explains compliance in every context and for every obligation. Rather, they form a checklist of potentially relevant factors that can enlarge one's view of compliance to comprehend the complexity of regulatory policy implementation. The 14 questions are the raw materials that can be used by regulators, policymakers and anyone interested in how regulation is implemented in everyday life to collect information and build models and understandings of how compliance works in their own field.

The 14 questions do not necessarily prescribe solutions to regulatory implementation problems. Rather, they prompt understanding and insight into the multifarious actors and mechanisms that interact with one another to influence and create compliance. It is foolhardy to assume that just because one or two factors have been addressed (for example, a comprehensive education campaign has been launched or penalties have been increased), compliance will automatically increase. There may be other factors (for example, a business model that does not allow time for keeping oneself updated on newsletters from the regulator; a perception that noncompliance will never be discovered by the regulator; or a social milieu in which messages from authority are disregarded in favour of messages from peers) that will influence compliance intentions, behaviours and outcomes. Our 14 questions prompt consideration of these different factors and the ways they interact. As other regulatory

studies scholars have pointed out, it is up to regulators to have the skill and ultimately the courage (Perez 2014) to craft solutions and alliances that are responsive to the complex social, economic and political contexts in which they work (Baldwin and Black 2008; Braithwaite 2013).

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14

Legal pluralism: The regulation of traditional medicine in the Cook Islands

Miranda Forsyth

1. Introduction

This chapter examines the role and power of law in development in countries with plural regulatory orders through a case study of the regulation of traditional medicine in Cook Islands. This case study gives rise to a series of observations relevant to regulatory theory in general—in particular, concerning the utility of legal pluralism as a theoretical framework in developing states, the need for detailed empirical research to understand the operation of non-state regulatory orders and the way in which different regulatory orders permit and foreclose different levels of agency, empower different stakeholders, reflect different institutional realities and draw on varying underlying values and principles. This chapter is based principally on fieldwork conducted in Cook Islands in November 2014[1] and, more broadly, on fieldwork conducted since 2011 in Samoa, Fiji and Vanuatu investigating the impact of intellectual property laws on development in Pacific Island countries.

1 Thirty-two in-depth interviews were conducted with a range of key stakeholders including heads of government agencies, local artists, traditional healers and customary authorities.

2. Legal or regulatory pluralism

Before delving into the fascinating details of the regulation of traditional medicine, it is helpful to set out some of the basics about the theory of legal pluralism. This is a theory that has proven extremely useful in studying regulation in Pacific Island countries (Forsyth 2009). It emerged in the 1970s as a response to what its proponents saw as an ideology of state centralism—namely, the assumption that all discussions about the law necessarily concerned only the state (Griffiths 1986). This state focus, while the basis of a positivistic account of law, was increasingly recognised as too limited, particularly in the postcolonial era. Like regulatory theory, of which it can be seen as a relative, the theory of legal pluralism is founded on the observations that, in many social fields, state law is just one system of ordering that exists, and other systems of ordering, such as customary norms or entrenched business practices, may have just as much or more impact on how people's conduct is actually regulated (Moore 1973; Merry 1988). The early users of the theory were largely legal anthropologists, and the emphasis of their scholarship was on producing thick descriptions of the particular ordering systems at play in certain geographic contexts—often postcolonial countries. Much of the research on regulation of the Regulatory Institutions Network (RegNet) has involved using anthropological methods to study corporate regulatory culture (see Henne, Chapter 6, this volume; Braithwaite and Drahos 2000).

In the past decade, however, the theory of legal pluralism has been expanded on and has been taken in a number of different directions.[2] There has been a move away from the purely descriptive use of the theory to an exploration of how it can be used in a normative or instrumentalist way. This new direction has been most extensively explored in the law and development context, especially in countries just emerging from civil wars, where state institutions are weak and, often, lacking in legitimacy (Albrecht et al. 2011). This approach involves a change of mindset from seeing non-state orders as disorderly, corrupt, unimportant or potentially subversive, to viewing them as indispensable components of

2 For example, Berman (2012: 10) argues that at an international level there is a whole range of legal orders that are regulating people's lives in an increasingly complex and networked way, and that, rather than attempting to subsume them all within higher and higher systems of global order, 'we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems'. Legal pluralism is also being used in the analysis of the regulation of minority communities, such as Muslims, in First World countries (see Kutty 2014).

reform processes (Faundez 2011: 18–19). In this use of legal pluralism, non-state justice systems are viewed as another regulatory tool to be galvanised and coopted into particular regulatory agendas. There are two advantages to such an approach. First, it provides a number of different options when considering what type of regulation may work best in a particular context, meaning that responses can be more creative—and possibly more widely implemented, responsive and legitimate for the relevant community. Second, it raises awareness of the fact that focusing a regulatory strategy through just one legal system involves a high risk that it may be undermined by the other ordering systems. For example, creating mandatory jail sentences for rape in state courts may mean that chiefs or local leaders ensure that such cases stay outside the state criminal justice system.

There has been a degree of criticism of the new instrumentalist use of legal pluralism. One commentator criticises what he calls 'executive shortcuts' to liberal developmentalism, arguing that working with non-state actors allows donors to circumvent the state in countries where governments are reluctant to change, and thus undermines state-building (Porter 2012). Another common criticism is that it has led to donors working with non-state justice systems to try to reshape and transform them to fit in with global norms and standards, which negates the ostensible purpose of engaging with them in the first place—namely, that they respond to local and community understandings of and demands for justice. It has also been observed that any intervention by a donor will have an impact on the power balance existing between the state and the non-state justice system, and thus can prove deeply destabilising. Finally, there are frequent claims that non-state justice systems are reified and essentialised by both external and internal agents, that their patriarchal nature is overlooked and that empowering them undermines state guarantees of human rights.[3]

As in most theories and trends, there are lessons to be learnt from both the proponents and the critics of the instrumentalist use of legal pluralism. The challenge for users of the theory is to be mindful of the pitfalls that too narrow a conception of legal pluralism can lead to, such as romanticisation of non-state systems and unawareness of the different levels of politics at play in all levels of regulatory ordering.

3 Many of these criticisms and more are set out in the edited collection by Tamanaha et al. (2012).

Overall, however, the fundamental insights of legal pluralism remain relevant today, as is demonstrated in the case study below. As with meta-regulation, legal pluralism involves building awareness that there are numerous non-state sources of regulation in any given field that interact with and impact on each other and state regulation in ways that can be both emancipatory and oppressive.

3. The regulation of Māori medicine in Cook Islands: A regulatory challenge

Cook Islands is in the heart of Polynesia in the South Pacific. Several hundred years ago it was the centre of a busy trading route between Samoa and what is currently known as French Polynesia, but today it is more often conceived of as isolated and remote. Cook Islands comprises 12 inhabited islands spread over 2 million sq km of ocean, with a population of approximately 15,000 people. It has been self-governing since 1965 and is in free association with New Zealand. All Cook Islanders have New Zealand citizenship, making depopulation a serious issue; and there are roughly 70,000 Cook Islanders living in Australia and New Zealand.

Cook Islands is a modern state with a Westminster parliamentary system and a justice system based on a New Zealand model. However, it is also a pluralistic society whereby power and authority also reside in customary authorities and customary laws, particularly in regard to issues of land and intangible valuables such as traditional knowledge. Each tribal area in Cook Islands has its own Aronga Mana, which comprises the head chiefs, the Ariki, and their subchiefs, the Mataipo and Rangatira. There are also state-created institutions that represent the customary authorities: the House of Ariki[4] and the Koutu Nui, a house for the subchiefs.[5] In practical terms, the role of customary authorities is very reduced, particularly in the urban centre, although there is still great respect for their *mana* (power and prestige) and ceremonial functions.

Pluralism is also a significant feature of health and medicine in the Cook Islands. Traditional medicine (known as Māori medicine) has always been a vital component of Cook Islanders' wellbeing and it continues

4 Created by the *House of Ariki Act 1966*.
5 Created by an amendment to the *House of Ariki Act 1966* in 1972.

to play an important role today, even in the capital island of Rarotonga, where modern medical care is relatively accessible. In every community throughout the country there are expert healers (*ta'unga*) with specialised knowledge in regard to certain 'recipes' for traditional medicines based on plants and particular methods of preparation. In general, the knowledge and rights to be a *ta'unga* are passed down through families, with new apprentices chosen after careful observation of their character and interest. Knowledge is transmitted in a series of stages, with the different layers of specialisation and secrecy kept until the apprentice has proved him/herself worthy. The *ta'unga*'s powers do not come just from the knowledge of the medicinal 'recipes'; they are also related to their spiritual power. This, in turn, is associated with the notion that they have been 'chosen' as a worthwhile recipient of the knowledge or have inherited certain skills through their bloodline.

Far from being static, Māori medicinal knowledge is continually evolving and responding to new influences. New recipes are regularly being developed, often as a result of detailed dreams, and new ingredients incorporated; I was told of one recipe that included carrot and potato juice and also aloe vera—all introduced ingredients.[6] The diverse influences of different types of Christianity also have an important effect on the spiritual dimension of the healing practices, and even on knowledge transmission—in some instances, church ministers are required to give a blessing to the end of the knowledge transfer when an apprentice becomes a *ta'unga*.

The practice of Māori medicine is currently regulated by a combination of customary norms, beliefs and established practices, such as secrecy. The fundamental guiding principle is that *ta'unga* cannot be paid for their services; rather, they are motivated 'from their hearts' with a desire to cure the sick. As such, any request for payment is said to undermine the potency of the medicine and make it fail, although healers can be gifted with food or other goods. In return for their services, *ta'unga* also gain prestige and respect—both extremely highly valued commodities in Polynesian societies. Similar beliefs regulate the transfer of knowledge over the medicinal recipes: those without the rights to make the recipes are thought to be unable to make the medicine actually work, even though they may know as a matter of practice how to make the

6 Vougioukalou (2009: 109) describes how on the island of Atiu it is common for people to experiment with the properties of newly introduced plants.

medicine. It is also believed that those who do not have the rights to make medicines will simply not be able to 'see' the medicinal plants that are growing when they go to forage for them ('their eyes and their mind are blocked'). As elsewhere in the Pacific Islands, here, the power to heal is closely linked to the power to harm. In the Cook Islands, this takes the form of the ability to 'curse'—another important regulatory tool that healers can utilise to keep control over their knowledge (until relatively recently, *ta'unga* were often referred to as 'witchdoctors'). One *ta'unga* told me that she had taken on someone as her apprentice and had then found out that he was selling his services; in response, she cursed him by removing his powers. This same story was recounted to me from various perspectives; in one version, the man's hands were afflicted with blisters such that he could not work.

There are very strong narratives around the importance of secrecy and a common belief is that all recipes are 'owned' by certain individuals and families. However, the exchange of medicinal knowledge is in fact characterised by considerable fluidity. One of the most well-known *ta'unga* in Rarotonga told me that all of her knowledge originally came from her grandmother, who was from Tahiti. She also explained that she in turn had passed on the knowledge to at least six different people on various islands, none of whom she was related to, through a series of workshops. Her motivation for doing so was that 'if you are a true *ta'unga* you have to pass to the people who can do it'. Of great concern to her, and indeed the general population, is the lack of interest from the younger generation in receiving the knowledge, together with the rather onerous burden it places on people to make medicine for those who come for help. Another *ta'unga* commented: 'I am all for it to be shared, then if I am not available someone is there to help a person in need.' The sharing of knowledge and recipes has also occurred due to the considerable mixing of communities since missionisation, with many Cook Islanders today referring to themselves as 'a fruit salad' of different islands and also European ancestry. Difficulties in determining the origin of knowledge and who has rights over it are compounded as well by the long history of voyaging and trading between Cook Islands, Samoa and French Polynesia, resulting again in considerable diffusion of concepts of plant preparation, usage and delivery across Polynesia (see Vougioukalou 2009: 49).

This degree of disjuncture between the common narrative about the importance of secrecy and close control over medicinal recipes and the actual rather porous processes of transmission is also observed in a detailed ethnographic study of traditional medicine on the island of Atiu, Cook Islands, in 2009. Vougioukalou (2009: 133) observed that the 'importance of family ownership of individual recipes was intensely stressed by all the informants that I spoke with'. However, she also recorded eight different types of ethnomedical knowledge transmission, including through training sessions, transmission of knowledge to the diaspora (and back again) and as required by emergency medical situations, which did not always follow strict family lines, concluding that there are 'adapting mechanisms in place that allow for knowledge to be transmitted among highly fragmented populations' (Vougioukalou 2009: 147). These findings accord with other fieldwork I have done in regard to traditional knowledge in Pacific Island countries over the past four years: simplistic narratives about knowledge transmission and geographical boundedness of knowledge are belied by the reality of its dynamism, diffusion and recirculation. I have also observed a trend among the actual practitioners of traditional knowledge to take a far more open approach to the need to share and pass on knowledge than the policymakers in the capitals and regional organisations, who instead stress the need to document and assign rights over it (Forsyth 2012b).

There have been several new developments in regard to Māori medicine in recent years that demonstrate both its adaptation and new challenges for its regulation. The most significant of these has been an initiative to develop a range of medicinal and skincare products based on Māori medicine, led by an Australian-based company, CIMTech.[7] In a nutshell, the story of this development is that the director of the company, who grew up in Cook Islands and whose paternal grandmother is a Cook Islander, became interested in the bone regeneration properties of Cook Islands herbal remedies. His tertiary training in medicine made him reflect on his childhood experiences of injuries sustained on the rugby field mending astonishingly quickly. In 2003, he therefore returned to Cook Islands and conducted extensive research into the properties of plants commonly used by healers in Cook Islands to treat broken bones. While no one shared their particular recipes with him, he drew on their collective knowledge of particular plants and preparation and conducted a great deal of his own experimentation.

7 See: cimtech.com.au/index.html.

Early in his research he entered into a benefit-sharing agreement with the Koutu Nui, whereby they would be major shareholders in CIMTech. His motivation for entering into the agreement was a combination of factors, including his knowledge of the customary understandings that knowledge about Māori medicine is considered to be 'owned' by Cook Islanders in general, a desire to establish a business to benefit the people of the Cook Islands and recognition that Cook Islands is his family's home and positive relationships are crucial for everyday life and for the success of the business.[8] To date, the venture has filed a number of patents but it is still seeking funding to make it an operating commercial enterprise. As such, no actual benefits have been paid to the Koutu Nui. While there is a degree of concern raised about the lack of payment, and also questions about why the Koutu Nui was chosen to be the benefit-sharing partner rather than individual *ta'unga* or the House of Ariki, there are no widespread concerns about the initiative or narratives about biopiracy.

The point of this discussion has been to demonstrate that adopting a legal pluralist perspective to regulation enables us to 'see' and appreciate the existence of the non-state regulatory order around Māori medicine in Cook Islands today. This forms a relevant background to the questions of how traditional knowledge can and should be regulated, which, as we will see below, is an area with which the region is currently grappling.

4. The push to regulate traditional knowledge

There has been a strong push in the Pacific Islands for almost two decades to regulate traditional knowledge through legislation (Forsyth 2012a, 2013). However, Cook Islands is one of a few countries in the region to have actually passed legislation to date. The *Traditional Knowledge Act 2013* establishes a system whereby those claiming to be rights-holders can register their traditional knowledge and, as a result, are granted certain exclusive rights, including 'to use, transmit, document or develop the knowledge in any way (whether commercial or not)'.[9] The rights-holders of the knowledge are those who either created the knowledge or are the customary successor to the knowledge.

8 See: cimtech.com.au/news-and-events.html.
9 Section 7(1)(a).

The register, which records a general description of the knowledge, is to be maintained by the Secretary of Cultural Development and be available for inspection at the offices of the Ministry of Cultural Development.[10]

There are certain features of the Act that reflect a pluralistic approach to the regulation of traditional knowledge. For example, it delegates decisions over questions of who are the true rights-holders to a local institution called the Are Korero ('House of Knowledge'). Are Korero used to exist in all communities to facilitate the sharing of specialised knowledge of healing, fishing, navigation, chanting, weaving and so forth. The Act envisages that the Are Korero will be re-invigorated and that the relevant paramount chiefs will decide who constitutes the Are Korero for their particular island or area. This provision for making determinations about rights over traditional knowledge at local levels is a major improvement on previous frameworks that give such decision-making power to state or regional authorities (see Forsyth 2011, 2012a).

However, it is unlikely that the *Traditional Knowledge Act* in its current form will satisfy many of the expectations set for it. The general nature of the description of the knowledge to be recorded in the register and the register's relative inaccessibility make it very doubtful there will be any clarity over what traditional knowledge is actually being claimed and by whom, especially for those living in Australia or New Zealand or on the outer islands. The slight variations in knowledge from one island to another make it likely that many different variations could be registered, also making it hard to determine who the rights-holders actually are. A further problem with the Act is that it is limited in its jurisdictional reach to Cook Islands, and so will have no ability to impact on any misappropriations taking place outside the country, which was the main reason Members of Parliament and the general public wanted the legislation.[11] In and of itself, the Act also does not create any mechanisms to preserve or record traditional knowledge or to perpetuate its use, which was another feature desired of it. Indeed, there is a danger that these types of initiatives will be undermined by the lack of clarity around the Act, creating apprehension in all future dealings with traditional knowledge by Cook Islanders themselves that what is being done may contravene the law and attract a substantial award of damages.

10 Section 60(1).

11 Although there have been negotiations for an international treaty to protect traditional knowledge since 2000 (see: wipo.int/tk/en/igc/), it seems unlikely that it will be finalised any time soon.

5. What regulatory insights does the case study offer us?

The case study demonstrates the crucial need to take non-state orders into account when developing new regulatory frameworks over areas currently regulated by non-state orders, such as traditional knowledge. For instance, as we saw above, the non-state regulatory system that governs Māori medicine in Cook Islands is a complex system of beliefs, norms and practices that is largely self-regulating. Neither customary institutions nor the state have traditionally been called on to make determinations of ownership of medicinal recipes or to regulate the proscription about receiving payment, making it ideally suited to a small population with limited human and financial resources. This regulatory framework has in fact operated astonishingly well in promoting the valuing and *mana* of *ta'unga*, protecting people's claims over their traditional recipes and facilitating the continual transmission of Māori medicinal knowledge, especially given the changes and challenges occasioned by depopulation. It has even been used to deal with the emergence of new commercial enterprises, such as those by CIMTech, by creating a strong normative expectation of benefit-sharing and yet being flexible enough to allow the details of how that occurs to evolve organically.

Second, when non-state regulatory orders are supplanted by state regulatory orders—as is potentially the case with regard to Māori medicine as a result of the *Traditional Knowledge Act*—it is important to be aware of the different values and assumptions that are also introduced. In this regard, the distinction between accounts of how systems are imagined/supposed to operate and how they actually work in practice is critical. From an idealised and relatively generalised position, the introduction of a register, the requirement to receive written authorisation for the use of traditional knowledge and the support of state courts and the force of law can be seen as merely a useful complement to the existing system of ordering. This is because in such an account there are clear owners of certain discrete parcels of knowledge and the transmission processes are straightforward. However, once we burrow into the rich ethnographic detail of transmission of Māori medicinal knowledge, it becomes clear that making determinations of rights-holders is likely to be extremely fraught. Moreover, transforming a dynamic, oral, community-based regulatory system into a fixed written system is likely to make it less responsive and adaptable. This is particularly problematic because this system is concerned with the regulation of

knowledge, which requires a balance between protecting the rights of current holders of knowledge and those of future users of the knowledge. The global intellectual property system is constantly evolving in response to these competing objectives and has important balancing features, such as time-limited monopoly rights and fair use, to ensure public access to knowledge. A similar balance is achieved in the current non-state regulatory system through its inherent flexibility, leading to what has been referred to as the porosity of the system. However, the *Traditional Knowledge Act* contains neither type of balancing mechanism, raising the real danger that it will fundamentally alter the ability of the general public to access and use traditional knowledge.

Third, it is important to be aware of the fact that different regulatory orders permit and foreclose different levels of agency, reflect different institutional realities and are based on a variety of underlying values. These differences are, however, often covered up by the ostensible neutrality of state law. For instance, the *Traditional Knowledge Act* is likely to benefit those who have the closest access to the state to register their claims. Those most likely to be disenfranchised by this process are the Cook Islanders living outside Cook Islands, who are unlikely to be aware of claims made over traditional knowledge and the need to contest them. As the registration of traditional knowledge is in perpetuity, this potentially has ramifications for generations to come. The mere involvement of the state judicial system in the regulation of traditional knowledge also empowers those who are financially advantaged. The *Traditional Knowledge Act* is also based on a state regulatory framework that implies a degree of human and funding resources that is often not available for small island nations. The values introduced in the Act through Western mechanisms, such as the need for written documentation and clear assignment of rights, are in many ways at odds with the values espoused by the *ta'unga* about the need to heal with all your heart and the importance of passing on the knowledge to those who are willing to learn. It also ignores the deeply ingrained importance of secrecy; a number of informants expressed certainty that many *ta'unga* and other experts in traditional knowledge would refuse to have their knowledge recorded in writing in a publicly accessible register. Identifying individual rights-holders who are given absolute rights over the knowledge also facilitates the commercialisation of that knowledge by a select few, thus disenabling the more diffuse community-based use of the knowledge. Similar neoliberal presumptions about the importance of registering customary land have had devastating consequences across much of Melanesia (see Anderson and Lee 2010).

Finally, the Māori medicine case study is an example of the problematic emphasis that many in the development industry place on drafting legislation, which stems from a positivistic approach to regulation that ignores the importance of non-state regulatory orders. Legislation is widely seen as being a solution to almost every developmental problem, regardless of whether or not there are the resources to implement it and regardless of its effect on existing non-state regulatory orders. Although the *Traditional Knowledge Act* was passed in 2013, by the end of 2014, there were still no processes in place for its implementation and, indeed, knowledge of the Act itself was limited. As commonly occurs, the funding for the drafting of the legislation came from a regional source, but did not extend to implementation. The danger with focusing attention on legislation is that it diverts resources from actual knowledge-revival projects, sidelines existing regulatory mechanisms and gives a (sometimes) misleading impression that something is actually being done.

6. Conclusion

This chapter has identified and discussed a number of regulatory challenges surrounding the protection of traditional knowledge, and how an approach informed by legal pluralism can assist. It argues that there is a need to engage respectfully with non-state orders in developing regulatory frameworks in plural legal orders. Such respect can only come from an appreciation of the complexity of non-state orders, and a willingness to understand the contexts in which they have evolved, the principles and values underlying them and the various mechanisms by which they operate. The discussion above should not be taken as dismissing the need for a legislative response to the protection of traditional knowledge. The desire for some 'real' or hard protection from the dangers of misappropriation of traditional knowledge springs from a long history of exploitation of Cook Islanders, and, indeed, other Pacific Islanders, by foreigners who unfairly extracted, and continue to extract, both natural and human-made resources. Such a feeling of vulnerability can and should be addressed in a nuanced and well-designed regulatory framework, in which legislation can play a supporting role. However, regulatory responses in this area need to be very carefully tailored and adopt a light hand with regard to their impact on existing non-state regulatory orders.

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Section 3: The state and regulatory transformations

A significant part of RegNet's scholarship has focused on understanding the dynamics of change at different levels of regulation (global, regional, national, local) and how these levels are connected. The globalisation of regulation (see Braithwaite and Drahos 2000) has been a major project employing a distinctive micro–macro methodology aimed at understanding how individuals as actors use domain-based webs of influence to obtain change, including of a structural kind (on the micro–macro method, see Henne, Chapter 6, this volume).

The chapters in this section analyse different dimensions of the state and regulatory change. Peter Drahos synthesises the findings of *Global Business Regulation*, showing how even weak actors, if they understand the possibilities of global webs of coercion and dialogue, may entrench principles that pattern regulatory outcomes in ways that serve their interests. Scott focuses on the role of the state in regulation, tracing the changes in the state's oversight of rules and delivery of services and goods, as well as analysing the implications of responsive regulation for harnessing the regulatory capacity of non-state actors. David Levi-Faur's chapter shifts the perspective from the regulatory state to the rise of regulatory capitalism. Using the idea of constitutive rules, he presents an argument for why the long-term adaptability of capitalism may lie in regulation (on this theme, see also Drahos, Chapter 43, this volume). Terry Halliday takes on the neglected variable of time in regulatory

transformations, arguing that time may be a resource that favours the weak in regulatory contests. Christian Downie assesses the transformative possibilities of international negotiation for regulatory capitalism (webs of dialogue), focusing in particular on how prolonged negotiations may affect state preferences, melting frozen positions and thereby revealing possible paths to change. In the final chapter, Natasha Tusikov explains how non-state actors and states cooperate to forge transnational non-state regulatory regimes (new webs of influence and nodes of decision-making)—regimes that, unlike many treaties, are not a dead letter but operate to change behaviour.

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15

Regulatory globalisation

Peter Drahos

1. Globalisation, but of what?

Globalisation was one of the buzzwords of the 1990s. But almost as soon as it buzzed into the social sciences, it provoked a sceptical reaction (Hirst and Thompson 2003). In one view, globalisation referred to processes of economic integration in which national markets were becoming a part of regional or global markets, in which multinational firms were dominant players. The capacity of states to influence these markets was seen as radically diminished. However, it soon became clear that the economic data could be made to tell different stories. Technical debates arose around whether the indicators used to measure globalisation, such as the rising ratio of merchandise exports to gross domestic product (GDP) using constant prices as a measure, exaggerated the effects of globalisation (Sutcliffe and Glyn 2003). Similarly, depending on how one defined a multinational corporation, there were either tens of thousands (based on a firm with one or more foreign subsidiaries) or very few (based on a firm with an integrated chain of global production). The clearest area of globalisation was the financial sector, where cross-border financial flows between banks and investment in bonds and equities had increased dramatically in scale. Even here, however, in the very heartland of globalisation, there were, and are, stark country differences. For example, expressing foreign assets and liabilities as a ratio to GDP, Lane (2012) points out that advanced economies went from 68.4 per cent in 1980 to 438.2 per cent in 2007,

while emerging markets in the same period went from 34.9 per cent to 73.3 per cent. In other words, the cross-border financial integration of the latter group was considerably less.

These debates about globalisation, at least to some extent, were referring to different processes rather than just one process of integration and interconnection. Globalisation cannot really be understood without distinguishing among the globalisation of markets, the globalisation of firms and the globalisation of regulation (Braithwaite and Drahos 2000: 8–9). These are distinct processes with contingent rather than necessary connections among them.

a) Market globalisation without regulatory globalisation

Markets can globalise even though national regulation remains in place. Amazon, eBay and Taobao are examples of substantially globalised marketplaces that are still regulated nationally.

b) Regulatory globalisation without market globalisation

The globalisation of regulatory standards may end up impeding the integration of national markets. For example, the World Trade Organization (WTO) agreements on phytosanitary standards and technical barriers to trade were intended to create some convergence of standard-setting in these areas, with the goal of this convergence being to facilitate trade.[1] But the evidence suggests that developing countries face problems in achieving the level of scientific capability required by these standards (Athukorala and Jayasuriya 2005). The upshot is that developing countries may lose rather than gain markets as a result of the standards. The increasing globalisation of prescription drug regulation and intellectual property rights has had a varied effect on prices for pharmaceuticals because some states act as monopsony buyers and pharmaceutical companies use intellectual property rights as an aid to price discrimination.

1 The Agreement on Technical Barriers to Trade and the Agreement on Application of Sanitary and Phytosanitary Measures.

c) The globalisation of firms without the globalisation of markets or regulatory standards

Pharmaceutical multinationals such as Pfizer and GlaxoSmithKline operate in prescription drug markets that have not globalised. Media companies such as Rupert Murdoch's News Corporation have globalised even though the regulation of the media remains substantially a national affair.

2. Explaining regulatory globalisation: Is parsimony possible?

The explanatory approach to regulatory globalisation that is sketched in this chapter draws on the argument by Jon Elster (1989) that connections between events are best explained in terms of mechanisms rather than general laws. Elster is concerned with higher-order mechanisms such as evolution, rationality and reinforcement, whereas here we will be discussing lower-order mechanisms such as coercion and reward. The reason is simple. These kinds of lower-order mechanisms are often observable, so verifying evidence for their operation can be sought. For those who attach weight to parsimony in theory building, a potentially long list of lower-order mechanisms might be seen as unwieldy. Those who work in the political economy tradition, for example, might seek an explanatory framework that reduces rather than multiplies causal variables (see, for example, Mattli and Woods 2009). Can Occam's razor be applied to reduce the number of mechanisms? Can we develop a more general theory that, for example, unites lower-order mechanisms under a master mechanism of some kind?

A possible candidate for a master mechanism might be a dialectical one based on materialism (Marx) or non-materialism (Hegel). The difficulty is moving beyond some vague general formulation of the mechanism (in the case of the dialectic, thesis, antithesis, synthesis) to something that strongly relates to all the evidence and allows conditions for its testability to be formulated. The push for parsimony in theory building runs the risk of turning the chosen explanatory variable into a defensive and narrow-lensed paradigm. For example, it might be argued by a realist that states and power are the only variables that one needs to explain regulatory globalisation. It turns out to be surprisingly difficult to define realism. Realism describes a 'general orientation' rather than a specific

theory—an orientation that emphasises the developmental egoism of the state and the centrality of power in advancing its developmental goals in a world of competing egoists (Donnelly 2000: 6). If, under the guise of a single variable, one includes other forms of power such as soft power then parsimony is more or less out the window, as it is when realism and constructivism are combined (see, for example, Barkin 2010). The fact that we may choose to weaken the principle of parsimony in our search for explanations is itself not a problem. The explanation may still continue to connect in important ways with the phenomenon we are studying. The multiplication of explanatory entities may create the conditions for a grander conceptual transformation of our understanding of the world than a parsimonious theory ever could (see Losoncz, Chapter 5, this volume for a discussion of these broader issues).

3. Regulatory globalisation: Key concepts

Three concepts are central to the account of regulatory globalisation that is presented in this chapter: actors, principles and mechanisms. The basic claim is that this form of globalisation is a nonlinear dynamic in which actors contest various domains of regulation by using mechanisms to support principles that best fit their goals in the relevant domain.

Actors

States have been and remain important to explaining the spread of regulation across borders. Since World War II, the US state has been the single most important actor in the spread of regulatory models, including in nuclear power regulation (through its role in the formation of the International Atomic Energy Agency), financial regulation (a manifold influence through, for example, Wall Street innovation and the International Monetary Fund), intellectual property (its influence in bringing intellectual property into the trade regime), competition law (the export of antitrust principles after World War II to countries such as Germany and Japan) and the regulation of illicit drugs (its support for prohibition and its capacity to influence in various ways other countries to take the same approach). Other states have been important as well, such as the United Kingdom in financial and insurance regulation or Germany in environmental regulation; but, for breadth and depth of influence, no state has rivalled the United States. Critical to an understanding of US regulatory power is the role of US multinationals, which can, for example,

through the juridical prowess of their many lawyers, provide the US state with detailed information on the shortcomings of a developing state's intellectual property law—information that US Government officials can leverage in various ways in international negotiations. It is this capacity to deploy combinations of hard and soft power that has made the United States such a central player in the globalisation of regulation.

Regulation does not begin with the modern state, if by the modern state we mean a union of people in which ultimate power resides not in the formal head of the union but in the people—a conception of the state that gathers critical momentum in the seventeenth century (Skinner 1997). The regulation of commerce and trade in medieval Europe cannot be explained without reference to the customary and contractual practices of merchants (the use of bills of exchange and promissory notes). There are debates over the extent to which merchant custom (as opposed to contractual practice) produced a genuinely transnational body of rules (Law Merchant) (see Kadens 2012), but it is clear that it provided states with principles (such as looking to merchant custom to solve disputes) that exercised a lasting influence on state commercial orders. The influence of canon law on medieval law, the role of the Church in the regulation of slavery and the rise of the antislavery movement in late eighteenth-century Britain all provide examples of why a typology of non-state actors is required in any explanatory account of regulatory globalisation. Confining the actions of corporations to the realm of domestic politics and assuming that only states can act in the international sphere ignores the many ways in which corporations act directly as causal agents in creating and globalising regulatory norms (see Tusikov, Chapter 20, this volume). Such a typology should include organisations of states (for example, the Organisation for Economic Co-operation and Development (OECD), the WTO), business organisations (for example, national chambers of commerce, the International Chamber of Commerce), corporations, non-governmental organisations (for example, Consumers International, Greenpeace, International Accounting Standards Committee), mass publics (especially as constituted by reactions to disasters such as nuclear accidents) and epistemic communities (a group of actors united by common regulatory discourse and technical expertise).

Principles

If we think of the word 'norm' as referring to a general category, we can distinguish different kinds of norms, all with regulatory effect, such as legal, social, moral and customary norms. There are other ways in which to draw distinctions between regulatory norms, including between rules and principles or performance standards and prescriptive standards. Different types of norms have different effects in processes of regulatory globalisation. Customary norms may not be transferable in the way that statutory-based systems of regulation are, but different customary norms may sometimes give rise to a unifying principle such as the recognition of indigenous peoples' laws and customs. Principles are recurrently important in the globalisation of regulation (Braithwaite and Drahos 2000: Chapter 21). One way in which to draw the distinction between rules and principles is to argue that principles are open-ended as to the range of actions they prescribe, while rules prescribe specific actions. In the process of regulatory globalisation, actors will often promote some principles and other actors wishing to contest the practices grounded by those principles will counterpoise different principles. By way of example, transnational corporations may defend principles of deregulation and lowest-cost location to be able to arrange the management of their labour force, their tax affairs and their environmental obligations, while green groups, for example, may argue for corporate regulation based on principles of regulation and sustainable development. Framework treaties such as the Convention on Biological Diversity or the United Nations Framework Convention on Climate Change articulate core principles that then drive the evolution of detailed rule-based national regulatory schemes. Principles do not need the vehicle of law to have regulatory impact, as demonstrated by the practices in corporate culture based on principles of lowest-cost location, total quality management and continuous improvement. Aside from the principles already mentioned, a list of key principles that has been important across many domains of regulation includes harmonisation, rule compliance (doing no more than the rules require), transparency, reciprocity, national treatment, most favoured nation, national sovereignty, strategic trade and world's best practice.

Mechanisms

The spread of regulation across borders involves different types of actors and different types of norms and is linked to the operation of different kinds of mechanisms. For present purposes, mechanisms can be thought of as devices or tools that are consciously used by actors to bring about their desired ends. For example, in a bilateral trade negotiation between the United States and a developing country, intellectual property will always be on the table. In reality, the principle of strategic trade is at issue since the United States will be pushing for intellectual property forms of regulation that advantage its exporters and avoiding those that do not (for example, the greater protection of traditional knowledge). The US negotiator will never refer to strategic trade, but will, rather, make rhetorical use of a principle such as world's best practice (meaning US practice), arguing that the developing country should adopt higher standards of intellectual property protection. A standard move by a developing country negotiator is to say that the developing country is not obliged to follow these higher standards (the principle of national sovereignty) and, in any case, it does not have the capacity to implement the administrative and judicial infrastructure to run a high-standard intellectual property system. A US negotiator may offer some financial assistance (the mechanism of reward) as well as indicating that various experts will be found to instruct the developing country in the mysterious arts of intellectual property (the mechanism of capacity building), or, if the US negotiator is losing patience, he may dangle the threat of trade sanctions, suggesting that the country is in fact in breach of its international obligations on intellectual property (the mechanism of economic coercion).

Historically, the transfer of entire systems of rules from one country to another has generally travelled along paths of military conquest and colonisation. British laws were applied to Australia after Britain invaded Australia and crushed the resistance of Indigenous people. Aspects of Japanese domestic law ended up applying to Korea as Japan progressively integrated it into its empire, annexing it in a treaty in 1910. Japan was on the receiving end of this process of regulatory imposition—its antimonopoly law of 1947 being the product of US occupation. The globalisation of regulation through the conduit of military coercion is not just a matter of antiquarian interest. After the US invasion of Iraq, the Administrator of the Coalition Provisional Authority, Paul Bremer, promulgated an order that brought aspects of Iraq's patent law up to

international standards.[2] There are many other examples of a conqueror's regulatory systems following the conqueror into a territory and, more often than not, remaining there well after the conqueror has departed or been thrown out. The continuing influence of Roman law is perhaps the most spectacular example of how regulatory conquest outlives military conquest.

Another mechanism of central importance to regulatory globalisation has been modelling. In the abstract, this is a process of observational learning in which an actor sees, interprets and reproduces the actions of a model (Bandura 1986). Learning and interpretation distinguish modelling from simple imitation. Within the regulatory context, a number of variables affect the direction in which the modelling mechanism causes the diffusion of regulatory models. Having the status of a hegemonic superpower increases the probability of having one's regulatory models adopted. Other countries study the regulatory models that underpin US innovation even if the scale of the US economy means that those models are likely to be inappropriate for most countries. A shared ideology increases the likelihood of a modelling interaction between countries. China, in the early years of its planned economy, looked to the former Soviet Union for regulatory guidance in the implementation of its five-year plans. The influence of US telecommunications deregulation captured the attention of UK policymakers because of a shared interest in deregulatory models.

Models begin life as prescribed actions in symbolic form, meaning that, among other things, they are relatively cheap to devise. The barriers to entry to using modelling as a mechanism are not as high as they are for military or economic coercion or for systems of reward. Modelling is a mechanism within the reach of many weak actors. The weak, through the invention of models, can contest the models of the powerful. Consumer groups, women's groups, indigenous groups and poor farmer groups can, through modelling, offer countervailing regulatory prescriptions (consumer protection laws, antidiscrimination laws, land rights, rights to save seeds, and so on) to the models of the powerful—prescriptions that evoke different identities and values. On a structural account of power, the consumer reforms proposed by the activist Ralph Nader in the 1960s that led to safer cars, safer airline travel and rising safety standards for

2 Coalition Provisional Authority Order Number 81: Patent, Industrial Design, Undisclosed Information, Integrated Circuits and Plant Variety Law, 26 April 2004. Available at: www.wipo.int/wipolex/en/text.jsp?file_id=229977.

many other products should not have succeeded in the United States, let alone globalised to other countries. A raft of social science theory ranging from class power to the logic of collective action would have predicted Nader's failure rather than what transpired: his astonishing success and the modelling of his crusader approach by activists in other countries.

Modelling is at its most influential in moments of disaster and crisis. It is when, for example, there has been an accident at a nuclear power plant that models for the regulation of nuclear power are likely to have an attentive political audience or when, after a global financial crisis, states are facing fiscal hard times that they are likely to pay much more attention to models for combatting the global tax evasion strategies of multinationals. Crises on this scale trigger media frenzies and mass demand for a response. Those individuals and organisations that have a regulatory solution to the problem are presented with a global modelling opportunity. The successful diffusion of modelling depends on the involvement of a range of actors: model missionaries who preach its virtues, model mercenaries who see how they might profit from its adoption, model mongers who float models as part of political agendas, model misers who adopt rather than invest in models of their own and model modernisers who support the model because they seek to come under its halo of progressiveness (Braithwaite and Drahos 2000: Chapter 24).

4. Regulatory webs, network enrolment and forum shifting

Actors, principles and mechanisms are categories that lay the foundation for an explanatory framework for globalisation. Which actors, mechanisms and principles have been important in a given domain is a matter of empirical investigation. This explanatory framework can be deepened by the addition of three more concepts: regulatory webs, network enrolment and forum shifting. The addition of these concepts provides a better explanation of how individual agents may and do intervene in globalisation processes to affect their outcomes. Instead of confining globalisation to macro–macro processes (systems or states acting on other systems or states), it becomes possible to detect and explain micro–macro processes (individual agents acting to bring about changes in systems). Regulatory webs can be thought of as connected

strands of weak or strong influence or control, with actors in a regulatory domain having one or more such strands at their disposal. Regulatory webs can be divided into webs of coercion and reward and webs of dialogue. In webs of dialogue, actors meet informally or formally to talk or deliberate about their interests and the interests of others. Dialogue is a general mechanism—one of persuasion rather than control. In regulatory contexts its efficacy is often dismissed on the grounds that where sanctions are not involved talk is cheap. However, even in contexts where a dialogic web is not intertwined with a web of coercion and reward, dialogue may help actors to better understand their interests, enabling them to understand that they may be in a situation where reciprocal coordination makes sense (for example, to settle a common technical standard). Those who operate within global regulatory circles generally prefer to work through dialogue—one obvious reason being that coercion and reward are both costly. Following through on, for example, the threat of trade sanctions, which must be done from time to time if the threat is to remain credible, generates diplomatic, economic and domestic political costs for the coercer country. The United States has a lot of countries on its various trade watch lists, but the instances of where it moves to sanctions are comparatively rare. Those in US government would think hard about responding to every demand from US business groups to impose trade sanctions on, for example, India because India is an important partner on security issues.

Dialogue is also important to understanding how power in global regulatory contests is harnessed and exercised. Social science theorising has moved away from seeing power exclusively as a static property of X to theorising it as something that flows through networks (Foucault 1980) or is translated into action by networks (Latour 1986). Influencing the course of global regulation requires multiple capacities and resources at technical, legal and political levels—capacities that no one actor possesses. Power in global regulatory contests is harnessed by enrolling the capacities of others into a network that works towards a common purpose. These networked flows of power explain the emergence of different regulatory standards such as a food standard at a committee of the Codex Alimentarius Commission or technical wi-fi standards by a private standard-setting body, as well as the imposition of trade sanctions that coerce a developing country into a compliance strategy. Network enrolment is fundamental to understanding the processes and outcomes of regulatory globalisation.

An equally fundamental strategy is forum shifting. Forum shifting is made up of three basic strategies: moving an agenda from one organisation to another, leaving an organisation and pursuing agendas simultaneously in more than one organisation (for the general theory of forum shifting, see Braithwaite and Drahos 2000: Chapter 24). A classic example of forum shifting is the way in which the United States was able to shift the issue of intellectual property into the Uruguay Round of trade negotiations, despite developing country opposition to such a move (Drahos and Braithwaite 2002). Forum shifting can occur across regimes or within a regime. An example of the latter is the WTO in the trade regime. It has become subject to forum shifting as states have become highly active in preferential trade negotiations while the pace of multilateral trade has slowed. The basic reason for forum shifting is that it increases the forum shifter's chances of victory. The rules and modes of operation of each international organisation constitute the payoffs that a state might expect to receive if it plays in that particular forum. Forum shifting is a way of constituting a new game. Facing defeat or a suboptimal result in one forum, a state may gain a better result by shifting its agenda to a new forum. Sometimes forum shifts are transparent, but, on other occasions, they can be far less visible, as in the case of the transnational non-state regulatory regime that is evolving for the global enforcement of intellectual property rights in movies, music and brands based on trademarks (see Tusikov, Chapter 20, this volume).

To initiate and develop a global forum-shifting sequence is a hugely resource-intensive exercise that requires the coordinated deployment of webs of coercion and reward. For the most part, forum shifting has been used by powerful actors. That said, in today's world, which is dense with non-governmental organisation (NGO) networks, forum shifting rarely goes unnoticed or uncontested. During the 1990s, the use of bilateral trade agreements by the United States to achieve its intellectual property agenda was largely ignored by NGOs, as they were primarily focused on the effects of the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This has changed, with preferential trade negotiations such as the Trans-Pacific Partnership being closely tracked and analysed. Big business coalitions deploying forum-shifting strategies have to confront a lot more horizontal and vertical complexities, with the payoffs from forum shifting being much less certain. NGOs reframe earlier losing contests of principles (such as private property versus piracy, which helped produce TRIPS) using other principles (monopoly privileges versus access to medicines or monopoly

privileges versus farmers' right to save seeds). One response of big business is to retreat to less transparent forums (the case of transnational non-state regimes).

For weak actors, there are payoffs from forum shifting, but they can be a long time coming. Indigenous groups were among the first practitioners of forum shifting after colonisation. Unable to find land rights justice at the hands of settler societies, some indigenous groups from countries such as Australia, Canada and New Zealand in the nineteenth and early twentieth centuries took their cause to seats of power in Europe, generally with very little success (Drahos 2014: 74–5). But in the second half of the twentieth century, indigenous movements and their leaders became much more successful, using the United Nations (UN) system to articulate principles for indigenous people, entrenching them in treaties and employing them in domestic litigation and negotiating strategies.

5. Intervening in regulatory webs

As argued above, the globalisation of a given regulatory domain can never be understood in terms of a one-actor, one-mechanism model. Instead, actors find themselves in moments of historical legacy, enmeshed in regulatory webs about which they have imperfect information, using principles that have been fashioned in previous contexts and with varying access and capacities to enrol other actors into the networks needed to alter the standards of regulation. There is a measure of indeterminacy in historical legacy such that individuals with an understanding of webs of influence can become agents of profound regulatory change. Behind some cases of regulatory globalisation lie inspirational stories of individual moral agency such as that of Raphael Lemkin, the Polish lawyer who invented the term 'genocide' and then became the 'one-man, one-globe, multilingual, single-issue lobbying machine' that drove states into drafting, signing and then ratifying the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (Power 2003: 61).

More often than not, though, coalitions of business elites are the ones to exploit the indeterminacies of historical legacy, creating monopolies where citizens would like competition and finding ways to restrict or evade regulation where citizens would like it. The globalisation of intellectual property rights was the work of a small group of Washington-based policy entrepreneurs who, in the 1980s, were able to convince the chief executive officers (CEOs) of some major US

companies such as Pfizer, IBM and DuPont to back the idea of creating an agreement on intellectual property in the trade regime. Once these CEOs were on board, they were able to begin the processes of network enrolment and inner circle consensus building that culminated in one of the most powerful business coalitions ever assembled, backed in the end by the United States, the European Union (EU) and Japan.

Yet this case also reveals how in a world where the exercise of power is deeply contingent on network enrolment and dialogic webs of influence, power can ebb away and be made to flow through different network architectures. By 2001, a network of health activists and developing countries had managed to create a consensus around the importance of public health that led to adoption at the 2001 Doha WTO Ministerial Conference of the Declaration on the TRIPS Agreement and Public Health (Odell and Sell 2006).

The scale and scope of these kinds of successful interventions in global regulatory webs by civil society groups will, of course, vary. The important point is that they are possible. Taking as their goal the defence or recapture of people's sovereignty against business sovereignty, Braithwaite and Drahos (2000) outline five basic strategies of intervention that weak actors might use to ratchet up regulatory standards where business might oppose higher standards and four strategies to counter the entrenchment of monopolies by business.

Strategies for ratcheting up standards:

1. exploiting strategic trade thinking to divide and conquer business
2. harnessing the management philosophy of continuous improvement
3. linking Porter's (1990) competitive advantage of nations analysis to best available technology and best available practice standards
4. targeting enforcement on 'gatekeepers' within a web of controls (actors with limited self-interest in rule-breaking, but on whom rule-breakers depend)
5. taking framework agreements seriously.

Strategies to counter monopoly:

1. using competition policy to divide and conquer business
2. harnessing continuous improvement in competition law compliance
3. building epistemic community in competition enforcement
4. transforming the consumer movement into a watchdog of monopoly.

Since the publication of *Global Business Regulation* in 2000, the relevance of these strategies has increased rather than decreased. Aided by increasingly powerful information communication technologies, networks, as Castells (2000) has argued, have become the organisational form of choice to manage complexity. The world has become saturated by NGOs that are involved in continuous processes of network formation and alliance creation. The networks of state power that Braithwaite and Drahos found to be most relevant to explaining global regulation were, at their core, based on a US–EU duopoly. In the past decade, this duopoly has had to confront new circuits of power, as the importance of its traditional partners has faded and new state players and alliances have emerged. In the 1980s, the 'Quad' (the United States, European Union, Japan and Canada) dominated the negotiations around the General Agreement on Tariffs and Trade. In 2008, Pascal Lamy, then Director-General of the WTO, pointed out that:

> the QUAD is dead and we talk about the G-4 (US, EC [European Commission], India, Brazil). Moreover, it is not possible to propose any new rule without testing the waters with countries like China, South Africa and Indonesia just to name a few of them.[3]

Since Lamy's words, new and potentially powerful nodes of financial governance have appeared in the global web of financial regulation. Brazil, Russia, India, China and South Africa established in 2015 the New Development Bank, and China in the same year established the Asian Infrastructure Development Bank (AIDB). The New Development Bank is headquartered in Shanghai and the AIDB in Beijing. The air may not be as clean in these cities as in Washington, DC, where the International Monetary Fund (IMF) and World Bank are headquartered, but perhaps potential borrowers may get better terms than in Washington, DC.

Summing up, the categories of actors, mechanisms and principles provide the basis for a more finegrained causal account of global regulatory processes. A conceptualisation of regulatory webs, network enrolment and forum shifting provides an understanding of how actors intervene in these processes.

3 See: wto.org/english/news_e/sppl_e/sppl94_e.htm.

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16

The regulatory state and beyond

Colin Scott

In John Braithwaite's remarkable set of contributions to ideas about and the practice of regulation over four decades, the state is one of the central organising concepts. This is true for much thinking about regulation more generally, but for a variety of reasons. In Braithwaite's case, the focus on the state may lie with his original interests as a criminologist, where there is a strong consensus that the responsibility for regulating criminal behaviour not only lies with the state, but also provides a core rationale for the existence of the state as monopolist over legitimate use of coercive power. Just as that consensus has broken down with the privatisation of some aspects of prisons and policing systems in various countries, so the agreement around the centrality of the state in regulation has been challenged. In this chapter, I argue that while some, including myself, have seen in Braithwaite's early and highly significant research on the role of the state in regulation a tendency to neglect the wider community and market context, in fact, the seeds of a more broadly based analysis of regulatory capitalism may be found throughout Braithwaite's oeuvre. Policy and scholarly communities were less receptive to understanding the key role of community and market actors set out from an early stage in Braithwaite's work and more fully developed in his later work. In this chapter, I attempt to locate Braithwaite's major contributions to the theory and practice of the regulatory state and the broader concept of regulatory capitalism within the wider context of contemporary thinking about regulatory governance.

1. Introduction

I first encountered the scholarship of John Braithwaite when I read his article on enforced self-regulation (see Braithwaite 1982). The significance of this article was that it recognised the significant role of businesses in contributing to regulatory success while at the same time according to the state a central role in setting norms, monitoring and enforcement. That article set the stage for the later collaboration with Ian Ayres, *Responsive Regulation* (1992), which set out to 'transcend the deregulation debate' by showing the scope for finding common objectives and shared instruments between state, business and civil society in the development and implementation of regulation. John Braithwaite's scholarship, in common with professional life more generally, has constantly sought to take advantage of ways of working that prioritise the potential for collaboration and dialogue over other modes, which emphasise rivalry or coercion. This is reflected in his commitment to republican thinking about the state and civil society actors (Braithwaite 1997: 309) and his claim that 'most regulation can be about collaborative capacity-building' (Braithwaite 2011: 475).

In my own earlier readings of Braithwaite's scholarship, and of *Responsive Regulation* in particular, I have been critical of the central emphasis he places on the state (Scott 2004). However, in this chapter, I substantially revise this critique, as I think my earlier analysis was a misreading. While there is no doubt that *Responsive Regulation* has been most influential for what it has to say about the role and modes of operation of the state in regulatory governance, I suggest this has been because of a neglect of other important aspects of the work that have taken rather longer to take root in both scholarly and practice communities.

In particular, we find in Braithwaite's work, from the earliest days, a concern to identify capacity across state, business and civil society sectors, and to work out how shared capacity can be utilised in developing effective ordering. This more nuanced view of the role of the state in collaborative or network modes of governance is seen strongly in Braithwaite's more recent work on regulatory capitalism (Braithwaite 2008) and elsewhere. In this chapter, I aim to offer an evaluation of how Braithwaite's scholarship emphasises both the centrality of and the limits to the role of the state in regulatory governance.

2. Responsive enforcement and design in the regulatory state

The regulatory state

The core idea of the regulatory state is that there is a distinctive mode of governance oriented towards the promulgation of rules that engages more or less systematic oversight of compliance with those rules by public agencies operating at arm's length from those they are overseeing (Levi-Faur 2013; Loughlin and Scott 1997; Majone 1994b). We might think of independent regulatory agencies' oversight of businesses as offering the core case of regulatory state governance (Selznick 1985). However, it is clear that the shift towards arm's-length oversight of compliance with rules as a governance mode extends well beyond independent regulators of business, and takes in also the separation and oversight of delivery functions within the public sector (Majone 1994a). To take the example of the utilities and network industries, such as communications, the regulatory mode of governance has been reflected in the corporatisation of telecommunications and postal services, which at one time were operated by government ministries and are now subject to regulatory oversight, whether the services are now offered by private companies, as is overwhelmingly the case with telecommunications, or by public bodies, as occurs in many countries in respect of postal services (Thatcher 2007). The communications sector actors have in common a trend towards oversight by reference to rules, displacing discretion, whether the rules and oversight are coming from ministries or agencies. Furthermore, the deployment of regulatory state mechanisms is not restricted to economic sectors, but also includes the redistributive functions of the state (Levi-Faur 2013, 2014; Mabbett 2011).

Arguably, the United States was a well-developed regulatory state by the 1930s, when the 'New Deal' agencies, such as the Federal Communications Commission, were introduced to subject a wide range of business activities to independent arm's-length oversight by reference to rules (Schultz and Doern 1998; Moran 2003). The terminology of the regulatory state was used extensively in comparisons of the administrative arrangements of the United States with those of countries which chose different models (Levi-Faur 2013). European attempts to address similar problems—of making utility services available and affordable as widely as possible—adopted public provision models, with a high degree

of discretion, which came to be characterised as aspects of welfare state governance (Esping-Andersen 1990). Giandomenico Majone identified a trend towards convergence between Europe and the United States over regulatory state governance in the 1980s. This trend emerged both from a tendency towards prioritising regulatory governance modes in European Union (EU) policymaking (the EU institutions lacking the cash and the organisational capacity for substantial direct provision) and from the take-up of neoliberal policymaking (which tends to favour regulatory over welfare state modes of governance as representing a less intrusive and smaller state) in the United Kingdom and, progressively, in other European states from the 1980s (Majone 1994b). Significantly, the regulatory governance mode—often thought to focus on the exercise of public law power—places a significant emphasis on contractual instruments such as licences and bilateral contracts to set, monitor and enforce regulatory norms, both by governments and by others, on organisations that encompass state, market and community actors (Collins 1999; Scott 2002).

Braithwaite's own take on the development of the regulatory state starts with the nineteenth century and the idea of the state as a nightwatchman, providing the rules and enforcement through the courts to guarantee property rights and the enforcement of contracts sufficient to underpin the growth of enterprise (Braithwaite 2000). For Braithwaite, the Great Depression of the 1930s led to disenchantment with markets as the chief mode for organising and delivering services, and growth in the ambitions and capacity of the state both in direct provision of services and in its use of command capacity—the former perhaps more in European states and the latter perhaps more in North America (Braithwaite 2008: 15–16). The Keynesian welfare state, on both sides of the Atlantic, evidenced a belief that the state could deliver sufficient ordering generally and, for Braithwaite the criminologist, policing for society in particular. Braithwaite saw his home discipline of criminology as being closely linked to the rise of the welfare state and as coming under significant challenge from ideological and governance changes since the 1980s (Braithwaite 2000). A key change associated with the neoliberal reforms of the new regulatory state has been the privatisation of key elements of public service delivery and the establishment of new regulatory mechanisms to oversee them. This pattern ranges between network service providers—for example, in energy and communications (Prosser 1997)—and core elements of the criminal justice system including prisons (Harding 1997), security and policing (Crawford 2006; Loader 2000; White 2014).

The separation of policymaking from operations across a wide range of public service activities, with privatisation of some and hiving off to separate public agencies of others, is a key element in establishing more formal and rule-based oversight relationships than were typical in welfare state arrangements. The nature of the fragmentation that accompanies the creation of arm's-length agencies for both delivery and regulation in rule-based governance regimes is demonstrated in the simplified model of the UK experience in the 1990s in Figure 16.1. What we see is not simply a shift from legislative discretion to the setting down of goals and expectations in rules, licences and contracts, but also the diffusion of responsibility for activities that had previously been managed directly by government ministries to executive agencies, linked to departments, to companies (some of them privatised) and to non-governmental organisations (NGOs). We see also, frequently, the recasting of the citizen as consumer (Barron and Scott 1992).

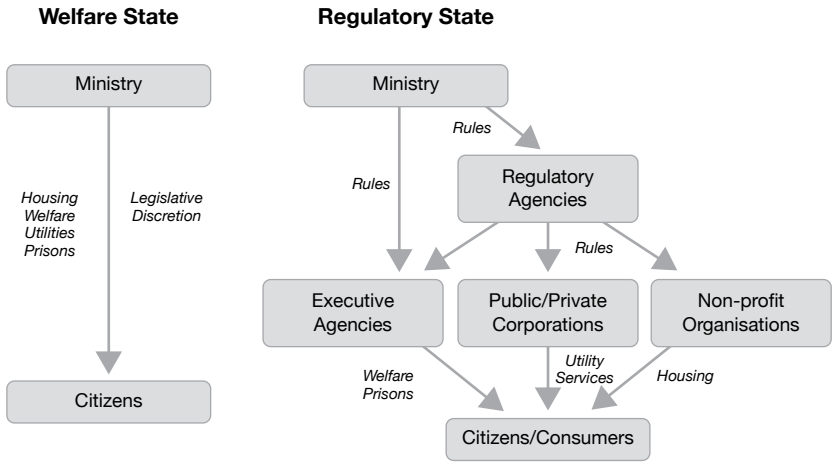

Figure 16.1 Simplified model of the United Kingdom's shift from welfare state to regulatory state

Source: Author's research.

Braithwaite's 'new regulatory state' is marked by its deployment of responsive techniques, which place greater emphasis on the steering of private and self-regulatory capacity over the aspiration to direct command and control (Braithwaite 2000: 224–5). Thus, the new regulatory state combines state oversight with marketisation of service provision and, in the responsive model, considerable responsibility for businesses to cooperate with state oversight. Thus, when considering the role of the state in regulation, there is a focus on the variety of modes

of engagement with businesses and others, and how they may deliver on public interest objectives. This aspect is considered in the next two subsections of the chapter. However, it is clear that Braithwaite's focus has always been broader, and, reflecting on this, the following section takes us beyond the core focus on the state to consider more fully the roles of the widest range of actors within contemporary regulatory capitalism.

Enforcement practices

Braithwaite's research has been central to enhancing the range and quality of techniques available within the regulatory state. His 1986 study, with Peter Grabosky, of the enforcement practices of a wide range of Australian regulators was seminal in offering a systematic and empirically informed analysis of how regulators enforce the rules. A core theme of the study was captured in the book title, *Of Manners Gentle* (Grabosky and Braithwaite 1986). Grabosky and Braithwaite provided systematic evidence for observations made by others in more limited contexts (Cranston 1979) that enforcement agencies tend to rely to a large degree on education, advice and persuasion to secure compliance with regulatory rules, reserving formal and more stringent sanctions to egregious and persistent breaches. They gave empirical weight also to Donald Black's observation that the stringency of enforcement is shaped not only by instrumental considerations, but also by cultural factors, such as the degree of shared social history and engagement between enforcer and enforcee (expressed and measured in terms of 'relational distance') (Black 1976; Grabosky and Braithwaite 1986; Hood et al. 1999). There have been numerous attempts to reduce relational distance through such measures as rotating inspectors so that they do not get to know regulatees too well through regular visits and the appointment of outsiders, with no previous history with regulated firms or relevant social networks, to key regulatory roles.

Braithwaite further theorised these empirical observations in his collaboration with Ian Ayres, combining his research data with Ayres's game theoretical analysis to construct an enforcement pyramid that demonstrated the dependence of low-level persuasion on the capacity to escalate up the pyramid towards more stringent sanctions (Ayres and Braithwaite 1992). In game theoretic terms, the theory of responsive regulation suggested that regulators should start at the base of the pyramid with education and advice and escalate where there was noncompliance,

but should be contingently forgiving and move back down the pyramid where regulatees fell into line (Ayres and Braithwaite 1992: 62–3). Such practices were advocated on the basis that the perception of fairness and responsiveness would build commitment among regulatees, while at the same time ensuring that regulators escalated sanctions where necessary. Such high-level sanctions might go as far as removing regulatees from the market through licence revocation, where they lacked either the will or the capacity to comply.

The concept of the enforcement pyramid takes as a starting point the presumption that regulators have a range of sanctions available to them. However, a key observation is that the 'sanctions' at the base of the pyramid are frequently not referred to in legislation or even conceived of as formal sanctions at all. It is only as we escalate up the pyramid that we invoke the formal sanctions. From this observation we may glean that regulators have a good deal of discretion in the deployment of their powers, which they use to construct their enforcement practices. This is true to the extent that regulators that lack formal enforcement powers may, nonetheless, be able to construct a form of enforcement pyramid. UK research that reads across the core literature on the regulation of businesses to examine the regulation of public sector bodies has demonstrated this potential, observing that organisations as diverse as the prisons inspectorate, the ombudsman and the National Audit Office lacked formal powers to apply sanctions to public bodies they found to be in breach of the rules. Nevertheless, they engaged in education and advice, sometimes offered warnings and then created a further level of sanction by drawing in the capacity of the media to name and shame those they found in breach (Hood et al. 1999). Others have noted that naming and shaming are, for some, more punitive than a fine (Baldwin and Black 2008: 86). In this instance, publicity was the top-level sanction, which is not the same as being able to fine or revoke a licence, but nevertheless is an action with considerable capacity to change behaviour in those agencies for whom the risk of adverse publicity was a significant deterrent. We may additionally note that the publicity sanction is dependent on the capacity of others (in this case, privately owned media organisations).

The example of the regulator that can build an enforcement pyramid from few materials, in terms of formal sanctions, should not be taken as a model. Rather, it is an example of necessity being the parent of imperfect invention. There can be no doubt that, other things being

equal, a regulator with the capacity to escalate to more stringent sanctions will be better able to 'speak softly', because, in the quotation attributed to Theodore Roosevelt, they 'carry a big stick'. However, the nature of the big stick and its relationship to the gentle talking are important. A regulatory regime in which the formal enforcement powers contain only the most draconian measures, such as licence revocation and nothing else, will struggle to establish a credible enforcement pyramid. This is because draconian measures can only be used for the most persistent, wilful or egregious breaches. Most breaches do not fall into this category and, accordingly, the threat of formal sanctions will not be credible if the sanctions larder is bare of all but the most stringent sanctions. The pyramid with a large gap between the warnings level and the next level is a 'broken pyramid' and possibly not much better than the pyramid built by the regulator with no formal sanctions, and is, arguably, even worse (Scott 2010).

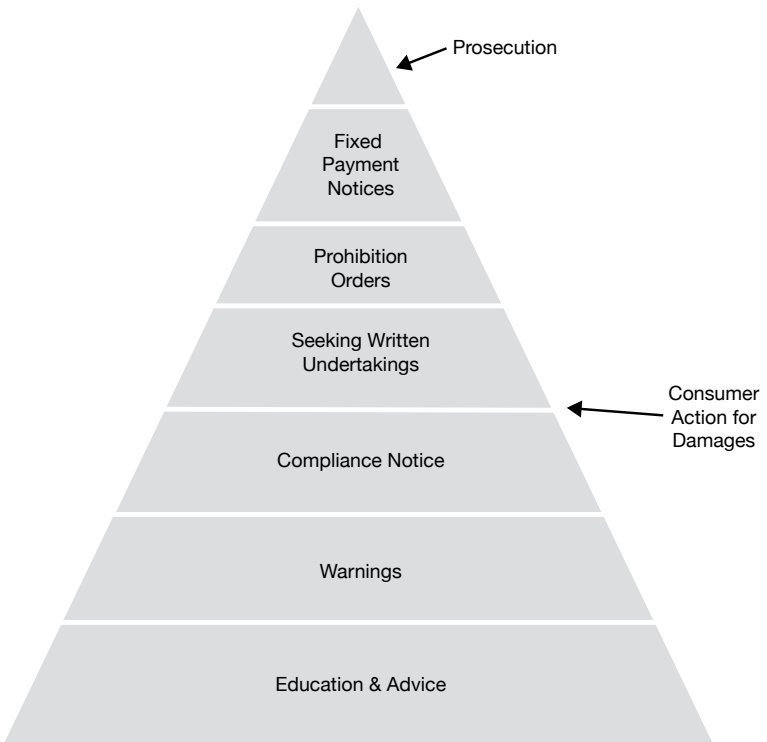

Figure 16.2 Enforcement pyramid under the Irish *Consumer Protection Act 2007*

Source: Adapted from Ayres and Braithwaite (1992).

Governments have, increasingly, learnt this lesson and pay considerable attention to the array of levels of sanctions that may be invoked, building ever more responsive character into them—for example, by including voluntary commitments around compliance and consent to enforcement actions within the sanctions that may be deployed. An example is provided by the *Consumer Protection Act 2007* in Ireland, which constitutes a well-structured enforcement pyramid in which formal sanctions include the issue of compliance notices by the regulator, the securing of written undertakings to comply from the regulatees, prohibition orders and fixed payment notices before the top-level sanction of criminal prosecution is reached. There is, additionally, the possibility of consumers pursuing an action for damages (see Figure 16.2).

A key component of the pyramidal approach to enforcement is that it is responsive to its environment (Ayres and Braithwaite 1992: 4). While it is traditional to view regulatory enforcement as a bilateral process in which enforcement is imposed on regulatees by regulators, the responsive approach recognises that the characteristics and posture of the regulatee are also relevant to how enforcement actions will be received and acted on. Kagan and Scholz (1984), for example, have distinguished the political citizens (who are fundamentally committed to being compliant with their legal obligations), the amoral calculators (who comply only where this aligns with their financial interests) and the organisationally incompetent (who lack the capacity to comply even if they wish to). The pyramidal approach responds with the insight that the first group will generally comply with education and advice, the second will require credible threats of escalation to comply and the third group should be removed from the market with licence revocation or equivalent. More recent work has built on this sensitivity to the enforcement environment to argue for 'really responsive regulation' (Baldwin and Black 2008), which seeks to understand better the cognitive frameworks within which enforcement takes place (legitimate and illegitimate enforcement, for example), and the broader institutional environment (for example, which other actors may shape tendencies towards compliance—such as NGOs and consumers boycotting firms perceived as immoral) and, more generally, the limits of traditional regulatory tools.

Among lawyers, a central legitimacy concern with the model of responsive enforcement is that it argues for treating similar or identical transactions in different ways, apparently breaching a fundamental tenet of the rule of law concerned with generality of applications of laws (McDonald 2004;

Westerman 2013). A further challenge to rule-of-law ideals arises from the opacity that may result from the exercise of broad discretion around enforcement decisions (Job et al. 2007: 94). Both these challenges can be addressed simultaneously by requiring regulators to publish details of their enforcement policies, practices and activities. It is in the interests of all involved that regulatory enforcement is predictable, as this promotes compliance for the regulator and creates a stable environment for regulatees.

The use of the insights around responsive regulation to make a more transparent and responsive enforcement structure is demonstrated by measures taken in the United Kingdom. In 1998, the UK Government adopted a soft law instrument called the Enforcement Concordat, in which signatory agencies in central and local governments agreed to follow a set of principles for regulatory enforcement that included consultation over standards, openness over enforcement policies and practices, helpfulness (for example, in assisting with compliance), the development of user-friendly complaints systems, proportionality and consistency (Department of Trade and Industry 1998). The concordat set down a partnership approach between regulators and businesses for securing regulatory compliance and was linked to the wider objectives of the government's 'Better Regulation' program, which was concerned with reducing the cost of regulation to businesses. The UK Government built on this approach with reviews of regulation generally (Hampton 2005) and enforcement in particular (Macrory 2006), which led to a more general and statutory application of responsive enforcement principles in the *Regulatory Enforcement and Sanctions Act 2008* and the statutory Regulators' Compliance Code. In one view, these measures have made a responsive and cooperative approach to regulatory enforcement transparent and linked it to core principles of proportionality and consistency. For some, however, this approach represents the application of a neoliberal agenda and the degradation of regulatory enforcement because of the priority given to softer measures, even where more stringent enforcement would be merited (Tombs and Whyte 2013; cf. Braithwaite 2008: Chapter 1).

Regulatory design

It is clear from the discussion of the well-structured and broken pyramids that there is a significant element of design involved in creating an effective enforcement pyramid. A more obvious aspect of design is put

forward in another section of *Responsive Regulation*. Alongside the enforcement pyramid, Ayres and Braithwaite also developed a pyramid of technique, which offers a theoretical prescription for regulatory design. It is this aspect of their book, *Responsive Regulation*, which perhaps most justifies the subtitle, *Transcending the Deregulation Debate*. The insights of this analysis underpin the now standard statements in regulatory design and better regulation discourse to the effect that with any policy problem for which regulation offers itself as a solution we should, first, consider the option of doing nothing, on the basis that any intervention may make matters worse and, second, consider the option of depending on or seeking some form of self-regulation. Only when these options have been considered and rejected should more intrusive regulatory techniques be proposed, involving, for example, civil penalties, criminal sanctions or licensing.

A central argument of the pyramid of technique is that governments should recognise the scope for delegating regulatory tasks to businesses and business associations but frequently with the oversight role of enforced self-regulation (Ayres and Braithwaite 1992: Chapter 4). From this important idea, originally put forward in 1982 (Braithwaite 1982), has come a stream of literature from Braithwaite, his colleagues—notably, Peter Grabosky and Christine Parker—and others, developing the idea of meta-regulation. In this perspective, a key role for the state lies in observing and steering self-regulatory capacity (Gilad 2010; Parker 2002; Parker and Braithwaite 2003). Rather than simply delegating, this involves the state in trusting more, but also verifying more, requiring considerable expertise and capacity (Gilad 2010).

Taken together, the pair of responsive regulation pyramids—the first on enforcement and the second on technique—has significantly enhanced the capacity for understanding and implementing some of the key tools of the regulatory state and, in particular, the promulgation and enforcement of rules. With enforcement, my own experience asking regulators about how they enforce their rules is that most describe something like the enforcement pyramid, many have been schooled in it and those who have not mostly recognise an outline pyramid and can discuss in articulate fashion the particular components of their own pyramid and how they relate to each other (see also Braithwaite 2011: 480; Mascini 2013; Parker 2013: 3–4). Many regulators have engaged directly with the enforcement

pyramid and, increasingly, governments drawing up legislation have become cognisant of the importance of making available a range of gradated sanctions to avoid the risk of the broken pyramid.

The Australian Taxation Office (ATO), for example, worked directly with Val Braithwaite, John Braithwaite and colleagues in the Australian Centre for Tax System Integrity to redesign their enforcement practices in line with the responsive recipe of a two-way process of learning from which Val Braithwaite was able to learn more about the significance of motivational posture for designing enforcement techniques, while at the same time opening the ATO to learning about how to enhance compliance. Key aspects of the project were to engender cultural change in the ATO through training and reflection, enabling it to build and implement a responsive enforcement pyramid (Job et al. 2007: 90).

The Organisation for Economic Co-operation and Development (OECD) has embraced policies of regulatory reform and better regulation since the 1980s, drawing both implicitly and explicitly on the pyramid of regulatory design to suggest how states should address the challenge of regulatory responses to policy problems (OECD 2012). While the high-level recommendations of the OECD reflect Ayres and Braithwaite's policy prescription, the practice among states has been quite mixed and, arguably, whatever commitments have been made in theory have overwhelmingly rejected the proper implementation of the pyramid of technique approach. The European Commission (EC) appointed in 2014 recommitted itself to the development of better regulation strategies and made an explicit commitment to including well-designed self-regulation and co-regulation among the instruments to be deployed (EC 2015: 6).

There are, of course, exceptions. Perhaps the most developed is the pattern of private regulation of the advertising industry, which has swept Europe since the early 1960s. The advertising industry was concerned about its credibility following the sensational lifting of the lid on its techniques in a widely read book (Packard 1957). The UK industry responded with private regulation, which has been progressively enhanced, often with both encouragement and threats from government to legislate. The peak European organisation for private advertising regulation today represents effective private regulatory bodies across the EU and beyond, and has significant trust not only from national governments, but also from the European Commission (Verbruggen 2013). Similar stories might be told about press regulation in the United Kingdom and Ireland, where

self-regulation has been a significant element of control in respect of press content, and governments have responded with threats and reform where the self-regulatory measures were found wanting (O'Dowd 2009).

More typically, however, European governments, and the EU legislature itself, have tended to make regulatory rules without proper evaluation of alternative techniques in terms of their capacity both for more effective outcomes or for reducing costs to regulatees (Brown and Scott 2011). The weakness in implementing the pyramidal approach to technique may be partly because the research base for the prescription has been less well developed. Relatedly, we do not know enough about what motivates governments to reach for rules to address policy problems rather than try other techniques that can harness the capacities and commitments of other actors. There is, of course, a significant concern that only the state is well equipped to deliver the public interest in public policy. Such concerns require a careful inquiry into the extent to which public and private interests are or can be aligned within a regulatory or meta-regulatory context (Gunningham and Sinclair 2009).

So, the scorecard thus far suggests that the enforcement pyramid has been a highly successful policy idea; the pyramid of technique, less so. Why should this be? It may be that expert regulatory agencies are better able to respond to ideas and innovations whereas governments as a whole, in their legislative function, are, first, less expert and, second, overcome by political imperatives to adopt measures that indicate at least symbolic commitment to an aspiration to control matters. This may provide an explanation for other core ideas in responsive regulation, beyond the enforcement pyramid and technique pyramid, receiving an even poorer reception, with the consequence that much in responsive regulation theory that was most insightful about the relationship of the state to other key actors has been neglected (Mascini 2013).

3. Regulatory capitalism beyond the state

I have previously suggested in my own work that Braithwaite's work overemphasises the role of the state in contemporary regulatory governance (Scott 2004; see also Grabosky 2013). Having considered Braithwaite's response and his later work, I now believe I was wrong. While many and perhaps most of Braithwaite's readers took from his work chiefly to understand and to develop state regulation, it has

been shown they, like me, have given the work only a partial reading. Rereading *Responsive Regulation* in light of the work that follows it suggests that the scholarly and policy readerships of the 1990s were more ready for what Braithwaite had to offer in terms of the development of the state's capacity for regulation and willing to neglect the other aspects of Braithwaite's work that show how he conceives of the role and relationships of all social actors, state, market and community in creating effective regulatory regimes. The introduction to the concept of responsive regulation in the 1992 volume focuses centrally on delegation of regulatory tasks to regulated businesses, to competitors and to interest groups (Ayres and Braithwaite 1992: 4), yet the primary influence of the book has been concerned with its prescriptions for state regulatory agencies. I have noted already that the pyramid of technique has been less influential particularly in its advocacy of greater use of self-regulation and enforced self-regulation. Other aspects of the book, which call for greater dependence on market and civil society actors within regulatory regimes, have been even less noted.

The central, neglected theme of *Responsive Regulation* concerns the potential for delegating regulation to others and embracing such delegated regulators within wider networks within which state authorities are liable to be key actors. We have noted already the importance of enforced self-regulation (and subsequently meta-regulation), in which the state oversees businesses and business associations in regulating themselves. A further technique offered by Ayres and Braithwaite, regulatory tripartism, involves drawing the commitments and resources of interest groups into regulatory roles. This analysis explicitly recognises that regulation of business is frequently not a bilateral game and that state, business and civil society actors within any policy setting are likely to be fragmented and diverse (Ayres and Braithwaite 1992: Chapter 3). The empowering of civil society actors such as interest groups draws in alternative capacity both for contributing to policymaking and for monitoring the actions and motivations of business actors pursuing self-interest and state actors at risk of capture. While acknowledging such risks, the analysis does not preclude the possibility of misbehaviour by interest groups. Thus, while some interest groups will be well aligned to the public policy objectives of measures with which they may be involved in enforcing, others may be captured by firms or may be overzealous in their tasks, irrationally pursuing symbolic rewards from enforcement activities that do not promote compliance (or cooperation) (Ayres and Braithwaite 1992: 74–7). The theoretical case for tripartism put forward

by Ayres and Braithwaite is very strong, but, admittedly, not so well developed empirically. A second aspect of *Responsive Regulation* that has been neglected is the model of asymmetric regulation developed under the rubric of 'partial industry intervention', under which both firms and government learn from comparing the effects of regulation on market actors with the conduct of firms that are substantially unregulated (Ayres and Braithwaite 1992: Chapter 5). This model effectively delegates to the firms—regulated and unregulated—aspects of the application of regulation to the unregulated firms.

So, *Responsive Regulation* sets down core roles in building regulatory regimes for both community and market actors, but these aspects of the work have been little observed and acted on. Others have sought to extend the theory of responsive enforcement to directly address the fragmented character of contemporary regulatory governance. The elaboration of the three-sided enforcement pyramid attributes a role in enforcement not only to state agencies but also to civil society and market actors (Grabosky 1997). The idea of parallel enforcement capacity for other actors, using market power or private or public enforcement rights, offers the advantage of harnessing more wide-ranging monitoring and enforcement capacity, similar to Ayres and Braithwaite's concern to recognise the enforcement potential of public interest groups to reduce dependence on the diligence of public regulators. Indeed, Braithwaite himself, in a central passage of *Regulatory Capitalism*, has demonstrated the potential for 'networked escalation' to address weaknesses in enforcement capacity (Braithwaite 2008: 94–108). However, the recognition of this capacity also has the potential to be disruptive of responsive enforcement, since measured approaches by public regulators might be disrupted, as Ayres and Braithwaite acknowledge, by overzealous interest groups or others.

For the majority of readers in scholarly and policy communities, especially me, who failed to get the core themes of *Responsive Regulation* concerned with recognising and taking advantage of fragmentation in regulatory policy settings, Braithwaite's subsequent work offers increasingly insistent pointers. These works include a major statement on how a new theory of a separation of powers might envisage state, market and community actors holding each other in check through their overlapping capacities and interests (Braithwaite 1997). Braithwaite's work with Peter Drahos on global business regulation explores how standards with international reach are set through regulatory webs or networks of participants, each bringing different aspects of highly

fragmented capacity (Braithwaite and Drahos 2000). Braithwaite's 2008 book, *Regulatory Capitalism*—titled following a term developed by Jacint Jordana (2005) and David Levi-Faur (2005)—is important not simply for the novelty of its ideas, but also, and perhaps more significantly, for its restatement of a position that could be found in the earlier work through a response to critics (Braithwaite 2008). We see clear indications of his interest in addressing the decentring of regulation (Black 2001) and of nodal governance (Burris et al. 2005), and the identification of the more limited role for the state in securing effective regulatory outcomes.

The fundamental problem within this decentred world is how to address key problems of ordering, not only for the state, but also for communities and markets. Within the EU, a novel approach to the regulatory challenges of the digital society has been to establish a community of practice concerned with self-regulation and co-regulation, drawing in governmental, market and community actors to deliberative processes that examine the relationship between governmental authority and self-regulatory capacity. A key objective for this group might be to rewrite the protocols on lawmaking in the EU to give recognition and legitimacy to appropriate self-regulatory and co-regulatory instruments (EC 2015).

4. Conclusions

The rise of the regulatory state has been a central trend in public policymaking within the OECD member states since the 1980s. While regulatory science has offered much to enhance the capacity of states to design and implement effective regulatory strategies, the advice to policymakers is as often ignored as it is implemented. Nevertheless, a core area of influence of John Braithwaite's work has been on enhancing public regulation, especially in the dimension of enforcement, where his fingerprints may be found on the numerous enforcement agencies around the world that use some version of the enforcement pyramid as a guide to action. The centrality of the state to discussions of how to address key public policy challenges has tended to obscure the importance of market and community actors in developing and implementing solutions to key ordering problems. As we consider how to enhance the capacity of the regulatory state, we should simultaneously give greater priority to techniques that draw in the capacity of others, and which locate the state as one of a number of key actors in making regulatory governance effective. John Braithwaite offers a vision of how we may enhance a

more nuanced version of state regulatory capacity, oriented not only to recognising the limits of the state, but also to devising mechanisms for learning within implementation processes (Braithwaite 2011: 512–18) and a wider deliberative democratic experimentalism (Braithwaite 2008: 206–7). Such an approach takes us beyond state actors and draws in both market and community actors, and the range of mechanisms through which they may act, to achieve public interest objectives and more generalised wellbeing. These concerns are not limited to the industrialised countries (the traditional territory of the regulatory state), but apply equally and increasingly to the challenges arising from globalisation (Abbott and Snidal 2013) and the governance of developing countries (Braithwaite 2013; Braithwaite and Drahos 2000; Ford 2013), in each case demonstrating significant and often interrelated challenges for state capacity.

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17

Regulatory capitalism

David Levi-Faur[1]

1. Introduction

Governance in capitalist polities is increasingly evolving as a patchwork of regulatory institutions, strategies and functions. This patchwork varies widely across regions, nations, regimes, sectors, issues and arenas, but the increase in the role of regulation in shaping policy and politics is evident almost everywhere. Regulatory processes condition the operation, manipulation and deployment of political, social and economic power. The penetration of regulation as an institutional design, as a practice and as a discourse to all spheres is captured by the concept of regulatory capitalism (Levi-Faur 2005; Braithwaite 2008). Regulatory capitalism tells us simply that capitalism is a regulatory institution—one that is being constituted, shaped, constrained and expanded as a historically woven patchwork of regulatory institutions, strategies and functions. It asserts that regulation made, nurtured and constrained the capitalist system and capitalism creates the demand for regulation. In doing so, the concept reasserts the inseparable, intimate and interdependent relations between politics, society and the economy. This, in turn, allows us to think about basic institutions of capitalism such as the corporation (Parker 2002) and explore risk management as a public function that both constitutes and mediates capitalism (Moss 2004; Shearing 1993).

1 Sections of this chapter draw on Levi-Faur (2005, 2011b). I acknowledge with thanks comments from Peter Drahos, Christine Parker and Colin Scott.

Capitalism is understood in this perspective not simply as a system of commodity accumulation via markets, in which things with use values are converted into things that have exchange value. Instead, it is understood as a patchwork of institutions that constitute and govern the triplet of markets, society and state and the imaginary borders between them.

Shifts in commodity accumulation depend on redefinitions of property rights, the latest and most important of these being the evolution of intellectual property rights (property rights are constitutive regulation). Constraining and empowering regulation are ways in which capitalism stabilises and adapts to the consequences of its main mission of commodity accumulation—for example, limiting patent duration means that monopolies over medicines come to an end. However, this is not a restraint on commodification, but rather eliminates one type of commodification (the patent on the invention) while allowing other property rights (for example, a trademark over the medicine, the property in the tangible product) to continue.

The concept of regulatory capitalism builds on and extends the observations on the rise of a particular form of state—the *regulatory state* (Majone 1997; Levi-Faur 2014)—and social governance via rule making, rule monitoring and rule enforcement (Braithwaite 2000; Scott 2004). At the same time, it strives to do more—namely, to embed the notion of the regulatory state in the literature on the capitalist state (Offe 1984; Jessop 2002; Hay 1999) and the literature on the autonomy of the democratic state (Dryzek and Dunleavy 2009; Nordlinger 1987). While the regulatory state literature captures the extent, scope and direction in which regulation shapes national-level institutions, the concept of regulatory capitalism allows us to explore the relations between the state, on the one hand, and the capitalist order, on the other. When we say or write 'regulatory capitalism', we look beyond the state as a domestic political institution, and, at the same time, make a theoretical judgement about the relations between states and markets. This, in turn, helps advance a 'constitutive interpretation' of the role of regulation—a perspective that focuses on the role of regulation in the continuing expansion, adaptation and transformation of capitalism. In this interpretation, states constitute markets and markets constitute the state. The chicken starts with the egg and the markets with the state. Not only are the state and its regulation necessary conditions, they are also the causal factors behind the creation and institutionalisation of markets. Commodification via new regulatory designs that shape incentives and choice—rather than deregulation—is the major characteristic of our changing politics, economic and society.

Redistribution is increasingly determined in the regulatory arena and, thus, we should think about the welfare state and about redistribution as a system of regulatory rather than fiscal transfers (Levi-Faur 2014; Mabbett 2011; Leisering 2011; Haber 2011). The expansion of capitalist governance is primarily regulatory rather than simply and solely via fiscal means. This means that the expansion of the welfare state (and the state more generally) is best captured via measures of regulatory impact rather than via accounts of state budget.[2]

Why regulatory capitalism? Why not work our way through the maze of social, political and economic changes with the help of perhaps more modest and more widespread concepts such as the state, capitalism or even the regulatory state? The concept of regulatory capitalism offers a broader and more rewarding understanding of what is going on around us—certainly, more than the idea that the current order is about the 'free market' or that liberalisation, privatisation and deregulation are about the retreat of the state or depoliticisation. In addition, it has the advantage over the concepts of both the regulatory state and regulatory governance in the sense that it requires us to think not only about institutions in general but also about capitalist institutions in particular. In other words, it brings capitalism back in (Streeck 2011). One should remember in this context that capitalism is rarely analysed from a regulatory governance point of view. It is the elephant in the room of scholarly literature on regulatory governance as much as regulation is the elephant in the room in the literature of the political economy of capitalism. The concept of regulatory capitalism aims to move beyond the walls that separate the two bodies of literature and the two scholarly communities. This move should make both capitalism and regulation more central and more legible than they are now.

2. Regulation, the state and beyond

The regulatory state is one morph of the capitalist state (Dryzek and Dunleavy 2009; Levi-Faur 2014). This means that one of its primary roles—perhaps secondary only to internal and external security—is to nurture a process of capitalist accumulation and commodification

2 Of course, longitudinal annual national accounts of regulatory impact—national accounts that will redefine and extend what a national budget really is and provide international statistics similar to those of gross national product—have not been developed so far.

via various regulatory means, but most critically via regulation for competition (Offe 1984; Levi-Faur 1998). Note that both internal security (policing) and external security (military might) depend on plenty. Therefore, the economic logic of capitalism and the security logic of the state go hand-in-hand—that is, power and plenty are interdependent (see Katzenstein 1977). The state depends on a process of accumulation, which, in turn, depends on its power and capacity to nurture the process of commodification, nowadays mainly by active promotion of competition and 'competitiveness'. To fulfil its role as guardian of the capitalist economy, the regulatory state has to be relatively autonomous. The resilience of the capitalist system itself, especially in times of rapid change, depends on this systemic autonomy, where the process of capitalist accumulation sets the limits on autonomy. The state has to protect the functioning of the capitalist system and even nurture it. In this sense, it is not fully autonomous but only partially so.

These limits on the autonomy of the state are sometimes taken for granted by analysts who focus on the interpersonal and intersocial interdependencies between the state's elected and nominated officials and business. The literature on the relative autonomy of the state contrasts these two dimensions of relative autonomy in conflicting terms as if one is more important than the other. In my account, these are two important dimensions of the relative autonomy of the regulatory capitalist state. Still, the interdependent relations between the state's elected and nominated officials, on the one hand, and the capitalists, on the other, are a secondary feature of a more systemic dependency of the state on the process of capitalist accumulation. When conflicts occur between the demands of capitalists (for example, subsidies or favourable regulations) and the demands of capitalism (for example, competition or creative destruction and economic transformation), autonomous state officials are expected to favour capitalism over the interests of the capitalist class. The autonomy of the state and its officials is nonetheless *relative*, since the requirements of capitalism will prevail over other demands and needs.

The autonomy of the regulatory state is expressed in its claim for a legitimate monopoly over the deployment and distribution of power through rule making, rule monitoring and rule enforcement. It is this *claim* of monopoly—which may be delegated or shared, practised or not, at will or under constraint—that matters. In this way, the regulatory state is distinguished from the police and warfare states that are defined

by their claim of a legitimate monopoly on the means of violence; and from the welfare state, which is defined by its aim of welfare for all citizens. Of course, the claim of a monopoly does not suggest *actual* monopoly either now or in the past. A claim is just a claim, no more and no less, and there are gaps with regard to the *actual* monopoly over the regulatory distributional authority just as there are gaps with regard to the actual monopoly of the means of violence.

While it is tempting to focus the discussion on the regulatory state, it should be recognised that regulatory globalisation, on the one hand, and domestic centres of regulatory powers, on the other, augment and compete with the regulatory state (Braithwaite and Drahos 2000). Here, the concept of regulatory capitalism is useful as well. It suggests that regulation and rule making are major instruments in the expansion of global governance, and takes regulation theory and regulatory analysis beyond national boundaries (hence, also beyond the nation-state). The locus of the analysis is simply shifted from the state to capitalism and the perspective is expanded—up, down and to the side(s)—to envelop not only the capitalist state but also the capitalist society (or market society) and the capitalist economy (or simply the economy). The agents of objects of regulation are not merely state actors anymore, and the regulatory space is extended beyond national borders and traditional administrative law. The concept also moves regulatory analysis beyond formal state-centred rule making and therefore towards civil and business regulation and decentred analysis of regulatory systems (see Levi-Faur 2011a). It also denotes a world where regulation is increasingly a hybrid of different systems of control, where statist regulation coevolves with civil regulation, national regulation expands with international and global regulation, private regulation coevolves and expands with public regulation, business regulation coevolves with social regulation, voluntary regulations expand with coercive ones and the market itself is used or mobilised as a regulatory mechanism.

3. Regulation of/for/and/with commodification

As noted at the beginning of this chapter, governance in capitalist polities is increasingly designed as a regulatory system—that is, as a patchwork of regulatory institutions, strategies and functions. One of the most useful ways to understand the relations of regulation and

capitalism is via the concept of commodification. Commodification is increasingly taking over key concepts such as accumulation, exploitation and alienation in the lexicon of critical theory.

Commodification was first systematically introduced into the social sciences by Claus Offe in the 1970s (Offe 1984). Inspired by both Marx and Polanyi (1944), Offe's work uses commodification to refer to processes of the transformation of non-wage labourers into wage labourers. In a more general manner, it refers to the transformation of social relations to commodity relations. The term suggests its meaning is being extended from the properties or characteristics of labour to a set of human relations, which encompasses all human relations without regard to their class or status. Thus, commodification specifies the conditions under which *every* citizen becomes a participant in commodity relationships (Offe 1984). Offe goes on to discuss—indeed, develop—two more concepts: decommodification and recommodification. Decommodification is 'the withdrawal and uncoupling of an increasing number of social areas and social groups (surplus labor power) from market relations' (Offe 1984: 61). Recommodification is the administrative and political reform of human commodification processes where they become obsolete (Offe 1984: 124).

True to critical tradition in the social sciences, the current literature on commodification emphasises the commodification of labour and, more recently, that of nature itself. Implicit in this critical approach is the idea that capital and investment are natural commodities or at least that some institutions, subjects and objects are less 'fictitious commodities' than others. At the same time, this tradition has a tendency to assume away or limit the analysis to the commodification of everything but capital. I contend, however, that 'capital' and 'accumulation' processes are not inherently 'commodities'. There is no reason to assume that capital keeps a dynamic form and investment and innovation logically follow from the profit motive. The role of regulatory organisations in promoting the commodification of capital itself is critical. Forms of capital failure and stagnation of investment are abundantly captured by concepts such as rentier capitalism, crony capitalism and monopoly capitalism. Rentier capitalism is a term that denotes profits and investment that are generated by the privileged position of having capital without contestation of position, rights and gains (as is also the case with the terms monopoly capitalism and crony capitalism). De/re/commodification should be conceived as institutional strategies that are directed at capital as much

as they are at labour, meaning they ought to be adopted in the context of domestic developmental aims as well as in the context of international economic competition. The design of regulatory regimes in general and the regulatory state in particular should allow public actors, inside and outside the state, to opt for commodification, decommodification and recommodification strategies according to autonomous preferences.

A key element in the theory of regulatory capitalism depends on the relations between regulation and commodification. To fully grasp these relations, we need to make some conceptual distinctions between strategies and types of regulation. Regulation is a form of bureaucratic legalisation (Levi-Faur 2011a). As such, and not unlike commodification, it has two conceptualisation siblings: deregulation and *re*regulation. Deregulation became the favoured strategy for economic and political renewal by neoliberals in the United States. It often conveys the idea that regulation is a major problem and that deregulation—that is, the removal and elimination of regulation—is the solution. Reregulation, on the other hand, suggests that the content, instruments and outcomes of many of the reforms that were put in place in the name of deregulation reflect a new mixture and balance between the political, the economic and the social—that is, new types of regulation rather than simply deregulation.

It is useful to distinguish between three types of regulation: constraining, empowering and constitutive. Regulation as a constraint is probably the most intuitive and frequent way in which we think of it. Regulation as a set of prescriptive rules specifies prohibitions and mandates behaviour. It is expected that failure to comply will be followed by punishment as a deterrent or will incur a social and political extraction of payment by the rule maker. Yet, regulation is sometimes, and in important ways, also about empowerment or the allocation of rights. Regulation may empower and thus acquire positive associations with values such as liberty and freedom, rather than the negative association with constraints. Yet, constraining someone is often empowering others and vice versa. Boundaries are blurred and can be distinguished with reference to primary and secondary effects. This is also true for constitutive regulation that constitutes categories of action, entitlements, identity and normative behaviour. Some regulations do not merely regulate but also create or define new forms of behaviour, rights and identity. This is, indeed, the basis of Kant's distinction between regulative and constitutive rules. The regulative rules overlap in constraining and empowering regulation.

What is interesting is the notion of the constitutive rules as developed by Searle. Let me start with a borrowed example before defining the constitutive type of rules. The rules of chess, Searle tells us:

> do not merely regulate an antecedently existing activity called playing chess; they, as it were, create the possibility of or define that activity. The activity of playing chess is constituted by action in accordance with these rules. Chess has no existence apart from these rules. (Searle 1964: 55)

While regulative rules regulate activities whose existence is independent of the rule, constitutive regulation constitutes forms of activity whose existence is logically dependent on the rules. Rules of polite table behaviour regulate eating, Searle further suggests, but eating exists independently of these rules and therefore the regulation of eating should be considered regulative rather than constitutive.

The distinctions between different types of regulation allow us in turn to distinguish between regulation *of* capitalism and regulation *for* capitalism. The first reflects the common understanding of regulation as inherently different and exogenous to capitalism. Regulation here is either an external constraint or an external empowerment—in other words, the first two types of regulation described above. The term 'regulation for capitalism' refers to a more endogenous understanding where regulation is a constitutive element of capitalism. As in chess, here, capitalism and its rules are inseparable. So far, I have distinguished between three of the manifestations of regulation and decommodification: de/re/regulation and de/re/commodification. I have also distinguished between regulation *of* and *for* capitalism and between three types of regulation: constraining, empowering and constitutive. It is now time to link them together. Table 17.1 brings capitalism and regulation together but distinguishes between them via the notions of de/re/commodification. Note that the distinctions made in Table 17.1 are much harder to draw clearly in reality and require detailed case analysis. For example, limiting patent duration means that monopolies over medicines come to an end. One can treat this action as decommodification. However, this is not a restraint on commodification but rather eliminates one type of commodification (the patent on the invention) while allowing other property rights (the trademark, the property in the tangible product) to continue. Thus, it is better to understand this action as recommodification. Still, the action itself should also be understood with reference to the larger context

of the economic value of the trademark. If the trademark is protected strongly and widely, the balance tends towards recommodification, but, if it is not, the balance tends towards decommodification.

Table 17.1 Regulatory capitalism as a variegated approach

		Commodification	Decommodification	Recommodification
Constraining regulations	Regulation *of* capitalism	Regulation that limits the scope and depth of commodification—for example, gender equality rules are enforced on employers	Regulation that limits the scope and depth of decommodification—for example, compulsory leave rights are enforced on employers	Regulation that revises limits on the scope and depth of de/commodification processes—for example, revision of rights for annual leave
Empowering regulations		Regulation that extends the scope and depth of commodification via empowerment of labour—for example, eligibility for pension rights via corporate pension plans	Regulation that extends the scope and depth of decommodification—for example, eligibility for maternity or paternity leave determines the rights of employees	Regulation that extends the scope and depth of de/commodification processes—for example, redrawing eligibility rules for retraining programs for mothers of grown-up children who withdraw from the labour market
Constitutive regulation	Regulation *for* capitalism	Regulation that defines categories of eligibility and accountability—for example, categories for working mothers entitled to tax breaks or corporate pension plans	Regulation that defines categories of eligibility and accountability outside the labour or capital markets—for example, defining paternity leave for students	Regulation that redefines categories of eligibility and accountability and therefore redraws the boundaries between commodification and recommodification processes—for example, revision of paternity leave rules

Source: Author's research.

The notion of regulation *of* capitalism captures regulation as a reactive response that sets ex-ante rules and institutions that either constrain or empower actors. These rules basically accommodate and moderate the negative and positive externalities and internalities of capitalism. Both constraining and empowering regulation fall within the category of regulation *of* capitalism. Constitutive regulations, by contrast, are part of a second category, regulation *for* capitalism, where regulation serves not just as a moderating affect, but also as the set of constitutional rules

of capitalist institutions and as a facilitative force—framing, nurturing and steering capitalism. When this happens, the disciplinary and allocative functions of regulation are secondary to its constitutive functions. The constitutive approach to the regulation of capitalism requires rules whose constitutive effects are the building blocks of capitalist institutions. The intersection between these different dimensions allows us to point to nine different ways in which regulation and capitalism are linked and, in effect, to demonstrate how variegated order is made possible. These links provide much more room for regulation than the analytical 'market failure' approach because there is room for 'empowering regulation' and for applying it in a constitutive manner.

The emphasis here on the many faces of regulation helps us to understand not only the variegated nature of the current order but also that regulation is both a progressive policy instrument (for example, empowering minorities) and a regressive policy instrument (for example, various forms of conditionalities and caps that aim to discipline the poor). Change in capitalism is strongly linked to the progressive and regressive uses of both regulation and commodification. The term itself should be seen—much like the notion of the regulatory state—as a constitutive element of other morphs of capitalism rather than as a competing morph. It is possible to use regulatory institutions—state, civil and economic—to extend the other institutional morphs of capitalism such as the developmental, the welfare, the financial and the risk; such extension and expansion do not necessarily represent trade-offs but may represent trade-ins. This applies not only at the level of the so-called tensions between equality and efficiency, growth and welfare and development and regulation. It also holds with regard to the relations between global and regional regulation and can expand where there is a good infrastructure of regulation via the state. This also is the case with private and public regulation—which can expand in tandem to enhance the effectiveness of regulation or simply to enhance the legitimacy and powers of the regulators and regulatory institutions. Because regulation entails the delegation of power and has distributive implications, the expansion of regulation to global and private realms can also simply represent a system of checks and balances by which the reproduction of regulatory controls allows a wider number of actors and institutions to keep some control over processes of rule making, monitoring, enforcement and interpretation.

4. Conclusions

Regulation changes the way politics is carried out, how society is organised and the governance of economic production and exchange. Thus, the term 'regulatory capitalism' denotes the importance of regulation in defining and shaping the capitalist systems of governance in a way that the regulatory state or the concepts of 'free markets' or 'capitalism' do not. It points to: a) the intertwining of society, the economy and politics via regulatory instruments and institutions; b) the growth in scope, importance and impact of regulation at the national and global levels; c) the growing investments of political, economic and social actors in regulation in general and regulatory strategies in particular; d) the emergence, extension and consolidation of hybrid forms of regulation that shape diverse and more complex forms of regulatory regimes; and e) the critical role of regulation in the constitution of other forms of states and capitalism—for example, the welfare state and welfare capitalism. So, regulatory capitalism is about regulation as a defining feature of the capitalist mode of production and about the mutual embeddedness of the social, economic and political (Polanyi 1957). The concept interlinks economics and politics, the market and the state and allows us to understand them all as spheres of power. Power, both in its structural and in its relational dimensions, is embedded in and operated via regulatory designs—that is, systems of rule making, rule monitoring and rule enforcement. So important is regulation that even alternatives to power such as rational, traditional and charismatic forms of authority are mediated and conditioned by a regulatory discourse and regulatory institutions.

To demonstrate and extend the theoretical arguments about the role of regulation in capitalism—an interpretation that might best be called 'constitutive'—we need to build up an analytical space for the study of the relations between regulation and capitalism, suggesting the distinctions between de/re/regulation *of/for* de/re/commodification, de/re/regulation *of/for* capitalism and de/re/regulation *of/for* capitalists. These distinctions extend our analytical terminology and therefore may help liberate our imagination as to what are capitalism and the relations between capitalism and regulation. Regulation is not necessarily 'socialist' (decommodifying), 'mercantilist' (recommodifying) or 'neo/liberal' (commodifying), but it is an instrument that can be used by various actors for diverse purposes: neoliberal as well as social-democratic, risk-taking

and risk-averse, sustainable growth and unsustainable growth. It can be used for private interest purposes and for public interest purposes. Whatever your purpose, you need regulation.

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18

Time and temporality in global governance

Terence C Halliday[1]

1. Introduction

The politics of global governance and regulation occur in time. To say so is a truism, even ingenuous. To disentangle the manifestations of temporality, however, is another matter. The intricacies of political-legal action too often are taken for granted. They lie beneath the surface where undercurrents influence processes and products of globalisation and resistance, where their invisible dimensions hide sweeps of history, imprints of events and manifestations of power. To understand how global norms and standards are produced, to anticipate when transnational legal

1 I express my indebtedness to my co-authors in five research collaborations that inform this essay: Lucien Karpik and Malcolm Feeley on struggles through grand time and events by the legal complex for political liberalism in South Asia, South-East Asia and Africa (Halliday et al. 2012); Bruce Carruthers on international lawmaking and national reforms in East and South Asia following the East Asian Financial Crisis (Halliday and Carruthers 2009); Michael Levi and Peter Reuter on global regulation of money laundering and the financing of terrorism (Halliday et al. 2014); Susan Block-Lieb on the making of trade and commercial law for corporate insolvency, secured transactions and carriage of goods by sea by the UN Commission on International Trade Law (UNCITRAL) (Block-Lieb and Halliday, forthcoming); and Gregory Shaffer on the rise and fall of transnational legal orders in financial regulation, business law and human rights (Halliday and Shaffer 2015a).

orders will rise or fall, to anticipate if the power of global hegemons will succeed, it is imperative to develop systematic approaches to time and temporality in all studies of globalisation, governance and regulation.

The sociological significance of time has a rich heritage, from the sweep of historical sociology over the very long term (Braudel 1996; Karpik 1998; Putnam et al. 1993) to the microdynamics of power in queuing (Schwartz 1975) and the manipulation of sequences through time (Abbott 2001). To bring time more integrally into the understanding of governance and regulation in the late twentieth and early twenty-first centuries, I make two principal arguments. First, it is necessary to distinguish between grand time (*longue durée*) and events (*événements*) because each entails a different scale of explanation and each offers complementary methods of inquiry (Halliday and Karpik 2012). Second, despite the apparent constancy and fixity of time, its seeming metrical precision and rigidity, the manipulability of time and temporality is integral to the micropolitics and macropolitics of global norm making and resistance. To support both propositions, I draw on reanalysis of my empirical research at the centres and peripheries of the global North and global South.

2. Grand time

In their magisterial work, Braithwaite and Drahos (2000) show repeatedly that global business regulation in the late twentieth century has roots in ancient or medieval common law or continental civil law. Their imprints may not be seen, yet they continue to be felt on bankers in Frankfurt or Tokyo, on shippers in China and West Africa and on traders in the southern cone of Latin America.

The scale of grand time varies enormously. In its most expansive form, the *longue durée* can be attached to epochs of history, whether the contours of great empires (Roman, Mughal, Ottoman, British, Spanish), the reigns of religions (medieval European Christianity, South-East Asian Buddhism), pervasive ideologies (for example, liberalism in politics and economics) or the shape of regions over many centuries (Braudel's Mediterranean).

Grand time may be punctuated or bracketed by great historical moments, such as the fall of the Roman Empire, the Protestant Reformation, the collapse of the Qing Dynasty, the Spanish Conquest of Latin America, the Great War or the long postlude to World War II that ushered in decolonisation and eras of human rights.

When students of global governance or national regulation and local legal consciousness seek understanding of the contemporaneous in Burma or Brazil, New York City, Geneva or Washington, DC, the theory and methodology of grand time compel them to situate the present in the deep currents of ideological and material continuities, long-enduring fundamentals of political and economic institutions and persistent configurations of superordination and subordination, whether of politics, markets, social relations or mentalities. The methodology of grand time attends to the long arcs of history, which leave enduring residues. Understandings of property or trade, of protection and freedom, of rights and duties, of probity and corruption, not to mention institutions, which entrench such understandings, can enable or constrain global governance and the permutations of international regulation.

Within these epochs of grand time lie episodes of lawmaking and regulation that stretch over many years or decades. Recent theory on legal change in global contexts (Halliday and Carruthers 2007b) and transnational legal orders (Halliday and Shaffer 2015a) proposes that any given issue of governance or regulation on human rights, the environment or financing of terrorism cannot be properly understood without comprehending earlier episodes of efforts to solve longstanding issues of environmental degradation, violence against women, dehumanisation of races and religion, genocide, taxation across borders, bankrupt companies or financing of trade—to name but a few. To make sense of what is happening now, it is necessary to map temporally and dynamically those earlier episodes of norm making and implementation that produced or failed to produce lasting transnational legal orders. For instance, the powerful impetus from the World Bank to reframe the rule of law as an institution to construct vibrant markets will be grossly misunderstood unless it is seen to be in tension with earlier episodes of global norm making and implementation that are grounded in universal human rights and protections against predatory rulers. Without knowing about prior episodes of maritime legal orders that stretched from the nineteenth century to the 1980s, it is impossible to

recognise either the significance or the contingencies of the Rotterdam Rules—a set of current global reforms applying to carrying goods to market across oceans.

Halliday and Shaffer (2015c) posit that episodes of lawmaking that lead to the rise or fall of transnational legal orders will be situated in unfolding temporalities where impulses for change emerge, frequently over long periods. To look back and explain the onset of a new episode of global norm making and regulation, or to look forward and predict why a longstanding regulatory order might disintegrate, scholars in politics, law and sociology point to *facilitating* factors that may include:

> (1) a growing mismatch between national regulation and global markets in light of changes in economic *interdependence*; (2) changes in the interests and *power* configurations of nation-states and other actors regarding the demand for and content of transnational legal ordering; (3) shifts in *ideas* and the conceptualisation of problems shaping the regulation of economies and political institutions; (4) *technological change*, industry inventions, and developments in the organisation of business; and (5) the *unintended consequences* of existing transnational legal orders. (Halliday and Shaffer 2015b: 32)

Within the nation-state, developmental political scientists have construed the embeddedness of current national political options in terms of a long sequence of earlier events as path dependency. The longer the sequence, roughly speaking, the more entrenched is the configuration of institutions and behaviour. This treatment of states corresponds in broad contours with studies on organisations. The form of an (international) organisation at the time of its founding, and the reinforcement of its natal form over time, can render organisations inertial and inflexible, thereby inhibiting their capacity to adapt to changing circumstances, to new competition or to a drying up of resources. The liability of newness for a neophyte organisation, such as the United Nations Commission on International Trade Law (UNCITRAL) in the 1960s, has its analogue in the liability of age for an entrenched organisation, such as the UN International Institute for the Unification of Private Law (UNIDROIT), which was founded in 1926 (Block-Lieb and Halliday 2016).

While grand time exerts a long effect, those impacts can be mixed. It is true that national path dependency and organisational inertia, reinforced by accretions of time, can strictly limit parameters for contemporaneous decision-making. Imaginations may be stunted, organisational processes can be ossified, bases of legitimation can be outdated and the dead

hand of history stunts adaptation and threatens even survival. At the same time, history can provide its own legitimation. A competitor to the International Maritime Committee, for instance, is unimaginable. Entrenched infrastructures elaborated over decades present potential competitors with start-up costs that can be impossible to bear.

3. Events

Any given episode of global lawmaking occurs also in compact time or discernible events (*événements*) (Halliday and Karpik 2012). These interludes, even if they unfold over several years, represent a short span in which particular actors and their strategies and tactics can be carefully observed and parsed. Studies of key events make it possible to:

> delve deeply into issues of language and power, of dramaturgy and discourse, of narratives and counter-narratives, of nuance and interpretation, of scripts and actors, of doctrine and cases, of national currents and local variations. (Halliday and Karpik 2012: 17)

Here the long sweep of grand events can be traced through intricacies of particular moments. The seeming inexorability of the *longue durée* yields to the actuality and appearance of human agency.

Intensive studies of moments in time may be artificially segregated into interactions of exterior and interior components. Exterior components are readily identified in episodes of legal change as *precipitating* events, frequently in the form of crises. Although financial reforms were increasingly needed in South-East Asian countries during the explosive economic growth of the Asian Tigers during the 1980s and 1990s, it was *financial crisis*—the East Asian Financial Crisis—that spurred the International Monetary Fund (IMF) and the World Bank, together with the Asian Development Bank, international lenders and global financial powers, to trigger entire new episodes of global financial regulation. The fall of the Berlin Wall demonstrates the shock value of a *geopolitical crisis* for reconstruction of Central and Eastern European economies, just as the Nuremburg Trials and the genocides in the Balkans, Sudan and Rwanda spurred erection of international institutions of humanitarian law. The severe acute respiratory syndrome (SARS) and AIDS epidemics of the 1990s and 2000s stimulated responsive regulatory orders to *health crises* just as the slower moving but much more fundamental *environmental*

crisis, signalled by growing evidence of the disappearance of the ozone layer over Antarctica, energised international norm entrepreneurs who crafted the Montreal Protocol.

But less momentous events can also trigger the rise or fall of new regulatory and legal orders. Sometimes it occurs when a powerful state experiences *a shock*, such as the 11 September 2001 attacks, or the far less remarkable but nonetheless far-reaching influence of an unexpected judicial decision, such as the US Supreme Court decision in *Sky Reefer*,[2] which precipitated a powerful worldwide movement to redesign the rules governing international trade by sea. Even less perceptible are *outbreaks of competition* among international organisations, as when, for instance, the World Bank and the UNCITRAL almost came to diplomatic blows over whose international principles or rules would constitute the 'gold standard' for governance of business failures within states or across national jurisdictions.

When empirically grounded theory of globalisation combines analyses of grand time and events, powerful, layered explanations of legal orders emerge. The worldwide struggles of the legal complex over the ideals of political liberalism, which can be observed explicitly in early modern Europe—whether in seventeenth-century Britain or eighteenth-century France—became internalised in contradictory ways within Britain's colonial Raj, and ramified across decades of postcolonial India, punctuated by critical events, such as Mrs Gandhi's 'Emergency' in 1973. Indeed, the historically contextualised struggles of British post colonies to institutionalise legal orders that can be characterised as politically liberal or despotic all turn on interplays of movements and events arrayed on temporal scales of varying length and speed (Halliday et al. 2012).

4. The micropolitics of time and power: Making global norms[3]

Grand time and momentous events (as history and event) can appear inexorable and substantially unalterable, subject to minor direction by individual and collective actors, but nonetheless flowing in such broad and strong currents that their own momentum carries most prospects of

2 *Vimar Seguros y Reaseguros, S. A.v. M/V Sky Reefer*, 515 U.S. 528 (1995).
3 This section draws heavily on Block-Lieb and Halliday (forthcoming: Chapter 5).

human agency before them. But actors in global governance do exercise agency and they can do so in part through creative adaptations to the finitude of time.

In the United Nations, for instance, norm making confronts two sets of scarcities of time. On the one hand, much UN production depends on volunteers—activists, professionals, industry leaders—who are prepared to devote long unpaid hours to drafting and meeting, quite apart from their costs of travel and accommodation. On the other hand, the United Nations itself has a scarcity of space and translation capacities. There are only so many meeting rooms in New York and Vienna, and all official proceedings must be translated into the six official UN languages: English, French, Spanish, Russian, Chinese and Arabic. The constraints of space and translation affect how much time the United Nations can afford to devote to the governance efforts of any its agencies and groups.

Much of the micropolitics inside global lawmaking, therefore, is directed towards the transformation of time as a rigid metric or temporal constraint into a resource that is malleable and manipulable. Individual and collective actors in global lawmaking exercise power by converting clock or calendar time into new constructions of temporal action. They seek to circumvent the constraints of space and language by finding time in other places and mitigating costs for volunteers by proceeding at other paces.

Research on lawmaking in a global quasi-legislature (UNCITRAL) reveals at least five temporal tactics.

Staging time

Staging time refers to the influence on the moment of onset of a lawmaking episode. Here, actors may be able to speed up or slow the temporal moment of beginnings to negotiations and lawmaking—to hurry when competitors threaten to preempt jurisdiction or to delay when prudence requires that some other event occurs or set of norms be released before an actor proceeds with its own.

For instance, in the late 1990s, UNCITRAL sped up the onset of its lawmaking on secured transaction law when it became aware that a rival lawmaking body, UNIDROIT, based in Rome, might claim that it was the legitimate international organisation (IO) to write new global law of very wide legal scope across a huge spectrum of secured financial

transactions. UNIDROIT had already had great success in developing new global norms on a narrow front: the Cape Town Convention on Security Rights in Mobile Equipment. Energised by its success, UNIDROIT might preempt UNCITRAL, its friendly rival global legislature. Anticipating this move, UNCITRAL sprang into action, 'commissioned' a private US industry body to draft global norms of wide legal scope and placed this draft before its standing working group essentially to stake out territory before UNIDROIT had time to act.

By contrast, UNCITRAL's working group on corporate insolvency felt compelled to slow its official take-off of deliberations on a legislative guide for nation-states across the world. Energised by their rapid drafting consensus on the Model Law on Cross-border Insolvency, norm entrepreneurs set their sights on a quick pivot towards a much more ambitious effort of expansive legal scope. A colloquium to reconnoitre the prospects for a comprehensive legislative guide exceeded all expectations of reaching international consensus. At that very moment, however, the World Bank signalled that it was drafting its own norms. Afraid that the World Bank might preempt or marginalise the much weaker UN body, UNCITRAL essentially put its take-off on hold until it could take the measure of how the 'territory' of lawmaking might be divided between the bank and UNCITRAL.

The power to alter staging in this and similar cases rests principally with the strong: high-impact delegations, the availability of resource-rich non-governmental organisations (NGOs) ready to offer extensive expertise and an agile IO secretariat with a broad repertoire of legal technologies from which to choose.

Compressing time

Compressing time is a tactic for shortening the period of decision-making. Here, actors who control a calendar or who exert substantial power can reduce the amount of time available to inject urgency, to reduce the probability of alternative agendas or solutions and to exclude actors who are not at the centre of communication networks or whose problems of collective action preclude rapid mobilisation.

One form of compressing time, the fast start, can be observed in UN deliberations. At UNCITRAL, it was conventional to begin a new episode of global lawmaking with a colloquium at which issues were put on the table and an agenda was mapped out. Then a working group

would begin to divide up a lawmaking area into separate categories, discussions would begin that would lead to drafting, then refinement of drafts and ultimately consensual acceptance of drafts. But the transport working group decided that any new convention—which in the past had taken an average of six years to develop—might be marginalised or overtaken by regional fragmentation or by the emergence of a radically new concept of governing the carriage of goods from manufacture to market that was preferred by the UN Conference on Trade and Development (UNCTAD). UNCITRAL's secretariat, with the support of some leading delegations, including that of the United States, charged a private organisation, Comité Maritime International (CMI), the acknowledged leader in international lawmaking for carriage of goods by sea since the late nineteenth century, with supercharging the start of proceedings by developing a draft treaty or convention that was placed on the UNCITRAL working group's agenda at its very first meeting. Some delegates believed this potentially controversial move shaved years off negotiations.

Another fast start was enabled when UNCITRAL's working group on insolvency divined through a colloquium that a surprising degree of consensus already existed across legal families on the core principles of bankruptcy norms for the world.

The power to compress time in UNCITRAL likewise relied on a coalition of strong delegations and a well-established non-state organisation. To the extent that such compression required a reallocation of resources within the United Nations—access to scarce meeting rooms, increased secretariat infrastructure—it also required effective bureaucratic politics. The stimulus to compress time, however, may lie within the power of the weak, because if coalitions of states or initiatives of regions to fragment global norms made credible threats to 'exit' from the primacy of a given global lawmaking proceedings, a prime adaptive response by the global body would be to speed up proceedings.

Expanding time

Expanding time involves lengthening the period of decision-making in calendar time from a three-year project, for instance, to five or six years. This may occur to ensure a result when issues are particularly divisive, to attenuate proceedings in the hope they will stalemate or to provide a more elaborate product with layers of norms or wider reach. It may be

that the projected deliberations that have extended the Doha Round on intellectual property illustrate the threat that without appropriate concessions a large bloc of states can extend indefinitely the prospect of global consensus.

However, the absolute quantum of actual hours spent in deliberation can also be achieved by expanding the number of hours available in formal proceedings while holding calendar time constant. Leading delegations in UNCITRAL's Transport Working Group realised quite quickly that their formal meeting sessions, which occurred each year for one week in New York and one week in Vienna, were simply too infrequent to handle the volume of work and intensity of negotiations required to get out a new multilateral treaty before it was preempted by competing efforts. Hard-driving delegations and the UNCITRAL Secretariat persuaded the working group and commission that it must meet for two weeks, twice a year, to achieve in three years what might otherwise have taken six years.

Another way of expanding time is a variant on segmenting time (see below). If negotiations prove particularly difficult on a topic then it can be excerpted from negotiations and held over for some future regulatory or lawmaking project. Deferral essentially transforms one block of lawmaking time into two sequential blocks.

Segmenting time

Segmenting time involves the temporal partition of global governance and regulation making so that norm-making responses are segmented and sequenced. Segmentation sometimes serves a strategy of incrementalism in global lawmaking (Hathaway 2005). While both the empirical consequences and the normative debates over the merits of incrementalism continue in lively fashion across all domains of global norm making, it is useful to distinguish among three types of incrementalism: pyramidal, vertical and horizontal (Block-Lieb and Halliday 2007). Vertical incrementalism follows a strategy of small but successful steps that build on earlier successes at lawmaking to thereby develop confidence in the lawmakers, to forge collegiality in lawmaking communities and to obtain legitimation.

The area of corporate bankruptcy law had for decades been considered too challenging for global legislatures because bankruptcy law was thought to be too deeply entrenched in the particularisms of national

legal cultures and economic histories. Globalisation of trade and markets, however, proceeded in tandem with the expansion of multinational corporations that owned assets in many countries. Further growth in world trade, it was said, required orderly ways to handle corporations in financial distress, especially when they were involved in cross-border trade. Rather than take on the full spectrum of issues that comprehensive national bankruptcy laws conventionally embrace, UNCITRAL's secretariat, international professional societies and some hard-driving delegations from Australia, the United States and France decided UNCITRAL must begin with a very small first step: a procedural model law that would not be binding on countries and would simply provide some rules about how a cross-border corporate bankruptcy might be handled by companies, professionals and courts. The relatively quick success of the Model Law on Cross-border Insolvency emboldened its norm entrepreneurs and UNCITRAL to consider a more ambitious second step. UNCITRAL's insolvency working group decided to write a legislative guide for domestic corporate bankruptcy law. In so doing, however, it deferred until step three a risky project where law was quite underdeveloped—that is, on how to handle corporate groups in financial distress. And it delayed further to step four and beyond areas where controversy was likely to be intense—for example, whether company directors should be liable for the debts of their companies in some circumstances. The partition and sequencing of global norms thereby have led to five products, each building on the other and each punctuating time with periodic successes to maintain momentum and fuel norm-making ambitions.

Segmentation sometimes serves forces of reaction, because breaking a larger task in a finite period into many smaller products or decisions invariably amplifies the time for each and thereby extends the decision-making process. This can be a useful strategy of resistance by the weak, as we see below.

Multiplying time

Multiplying time involves slicing decision-making episodes into finer tracks. This approach offers a creative adaptation for IOs with few or no options to extend time or which have severe constraints on the costs of deliberation. Time can be multiplied by creating parallel or

simultaneous tracks so that different topics are allocated to different groups, unofficial meetings parallel official meetings or deliberations in formal chambers are supplemented by deliberations in offshore meetings.

After a few sessions of deliberation, the leaders of UNCITRAL's Transport Working Group realised that even with their fast start the pace of deliberation was so slow that any multilateral agreement would take many years to complete. The head of the US delegation pressed delegates to come up with a way to fast-track proceedings. The solution? Divide the issue area into separate topics, each of which prefigured a separate section in a prospective treaty. Ask a country delegation to lead an issue area. Invite delegates to join a network of people to work on that topic. And give every topical group/network a deadline to produce a draft set of issues and lawmaking responses. Sweden, Finland, the Netherlands, the United States and other countries each led a group that operated 'offline' and informally, far from UNCITRAL's formal proceedings, but which ultimately fed into formal deliberations and prefigured working group consensus on topics.

The move to multiply time might ordinarily be yet another opportunity for power to be exercised by large states or expert NGOs with the capacity to mobilise. Yet the means of multiplying time also provides an opportunity for weaker players on the global stage, not least when smaller informal groups and networks can offer a vocal delegate persuasive powers less readily exercised before the entire panoply of delegates and delegations.

5. Time as resistance

The ultimate arbiters of global convergence on norms are national states and local actors. Worlds of governance and regulation are replete with examples of elegant and ambitious global standard-setting efforts that remain global in name only. Norms and laws, regulations and standards remain on the books of IOs and fail to be adopted or implemented locally. The theories of recursivity of law and transnational legal orders are premised on the contingencies that inhibit settling of globally transmitted norms in local situations and that institutionalise not conformity but discordance between transnational and global norms, on the one hand, and national and local laws, regulations and ultimately behaviour, on the other (Block-Lieb and Halliday 2015).

Comparative research demonstrates that so-called weak states have greater powers to foil the hegemons than is often supposed (Halliday and Carruthers 2007a). In fact, the efficacy of weapons of the weak frequently turns on the temporal qualities of lawmaking and implementation. Research reveals at least six ways that a politics of temporal manipulation gives supposedly weak states considerable power to determine their own fates in worlds of putative global governance.

Delay

The classic response of weak states to unwanted global norms and regulation is to adopt externally mandated or authorised norms in slow motion. States with limited infrastructure capacities, weak public administration, scarce supplies of expert civil servants and tiny private clusters of expertise can protest effectively to international monitors and IOs that state officials are very willing to comply, but, due to state incapacities, they simply cannot proceed very rapidly. Inspection of IMF quarterly reports on Indonesia's adoption of agreed-on reforms after the 1997–98 East Asian Financial Crisis reveals repeated postponements of progress on adopting and implementing reforms.

Comply symbolically

Symbolic compliance has long been identified as a means by which the objects of regulation or lawmaking gesture compliantly towards the regulators and lawmakers but, in practice, act deviantly. In effect, these methods are another way of playing for time.

- Implement partially: Here states implement something but not everything and that can lead to externally or internally (for example, interest groups, NGOs, social movement pressure) induced iterative rounds of further lawmaking, monitoring, feedback or regulatory tightening, all of which elongate time to implementation.
- Implement perversely: For example, hidden or detailed recommendations that come to light slowly and begin to take hold before international monitors, regulators or governors perceive their subversive capacities.
- Enact statutes, subvert through regulations: Statute books are more visible to global lawmakers and international monitors. Regulations, written in local languages, spread sometimes among multiple agencies and recorded in a shadowland far less accessible to IOs, which

track up to 200 states across the world. As China's 1996 Criminal Procedure Law demonstrated, a new law with vague and potentially inconsistent terms, interpreted in disparate ways by multiple agencies (police, courts, prosecutors, and so on), draws out any likely settling of national norms and practice in accordance with global norms, and thereby offers local interests diverse ways to confound local or international norm-setters intent on legal change.

- Enact law, fail to enforce: Some global regulatory systems, such as the vast transnational legal order erected to combat money laundering and the financing of terrorism, place a premium on national compliance through law on the books or the creation of new administrative agencies, such as financial intelligence units. Every five years or so every country must undergo a country assessment. Knowing that five-year cycles provide windows of time in which law might become practice, countries can comply with law on the books, but the number of arrests, convictions, sentences or confiscations of funds can lag dramatically. By the time a country responds partially to its lagged law-in-practice, another five years may go by with marginal increments, which a country can then promise to improve in the next five years. All the while, countries buy time to implement selectively.
- Enact statutes, subvert courts: A similar logic can occur via the courts. Prosecutors may bring charges for money laundering but judges can fail to convict, sentence lightly or not at all or release convicted persons.

Fragment international regulators and norm makers

This tactic, when possible, provides another temporal challenge to national convergence on transnational norms. An effective foiling tactic for a state intent on noncompliance is to appeal to alternative or conflicting sets of transnational norms or standards. The most sophisticated of those international actors understand that conflicting norms and confusing signals from global centres will slow the impetus for change—certainly national and local change—towards convergence on standards or rules. This incipient power of weak states thereby contributes impetus for veteran IOs of all sorts to take more time in global lawmaking and regulation to achieve global consensus. An overt struggle between the World Bank and UNCITRAL, for instance, over whose global norms would constitute the gold standard for bankruptcy systems took years to resolve (Halliday and Block-Lieb 2013). In the final analysis, their

agreement was induced because of strong pressure from the IMF and the US State Department and Treasury, who feared precisely the lack of certainty that would accompany competing global standards. In other words, to enable a faster pace of national and local implementation, global lawmakers had to tolerate a slower pace of negotiations among contesting IOs along the path to consensus.

Segment reforms

Just as IOs may break a potential stream of norms into a sequence of incremental products, so, too, states can segment reforms not only for progressive and deliberate implementation but also for delaying implementation. In the latter case, state lawmakers may break a single comprehensive reform into many small parts, each of which must then go through recursive cycles of lawmaking, partial implementation, further adaptive reforms and new efforts at implementation, until either new practices emerge or the legal change is abandoned as ineffective. International financial institutions suspected that this was South Korea's tactic following the 1997–98 East Asian Financial Crisis. The Government of South Korea enacted small statutory and administrative reforms at the pace of about one a year for several years, all the while postponing drafting and enactment of a comprehensive bankruptcy law that the international financial institutions believed they had been promised at the height of the crisis. Of course, the government might construe these small steps as prudent and incremental. To impatient global standard-setters, however, the promise of comprehensive reform seemed to be subtly receding into a dimly uncertain future.

Invoke cultural incompatibilities

From China to Indonesia and across the world, national and local lawmakers and law implementers make the argument—frequently true—that externally induced norms are so foreign to local customs and practices that formal adoption or practical implementation presents a formidable barrier to concordance with transnational and global norms. This argument can take an absolutist form—namely, that an overseas practice simply will not work, which was an argument made by Indonesian reformers who declared that adversarial tactics between debtors and creditors in corporate bankruptcy proceedings simply would not work in a conflict-averse Javanese or Indonesian culture. Such an argument can also take a temporal form—namely, that a country might

be willing to try to bring its law and institutions into concordance with global norms, but it will take a very long time for it to seep into local legal and other consciousness, and therefore IOs should lower their expectations about the timing and scope of global regulatory impacts.

Substitute a solution

Any state may plausibly make the case that it concurs with the general principle of a reform concordant with global norms, but the specifics of implementing it might be better reconceived by national and local alternatives. Germany made this argument, for instance, to assessors from the Financial Action Task Force, which demanded that Germany adhere to the letter of the anti–money laundering international standard and not substitute an alternative it had asserted would be much better in local circumstances. Whatever the merits of Germany's case in this circumstance, the logic of alternative solutions remains plausible, even desirable. But, here again, time intrudes because global regulators, with their toolkits and templates in place, are inclined to retort: yes, your alternative might make sense, but how long can we wait until we find out? If you are wrong, and facts prove you are mistaken, years of regulatory impact are effectively lost. And, of course, in the realpolitik of regulatory conformity, the claim made by states for substitutionary alternatives may itself be a cynical attempt to play for time.

6. Conclusion: The politics of time

Time offers one of the most powerful weapons to be wielded by the weak in struggles over global governance, lawmaking and regulation. If the manipulation of time enables the strong to jockey for power at the global lawmaking centre, the politics of time endows the weak with a resource that is very difficult to overpower in global peripheries.

International lawmakers, the IMF and World Bank, regional development banks and international rights organisations are all impatient. For them, virtue inheres in the immediacy of action, in rapid conformity, in fast concordance of norms and short-term convergences of practice. In part, such impatience is a virtue borne of necessity—IOs lose interest, shift priorities, lose resources or are dragged away to new paradigms or fresh crises. Their prospects for global impact are

frequently momentary. And, even when they can be sustained for decades, IOs are never fully a match for the tactical powers of the so-called weak, whose patience by intent or incapacity invariably will outlast the strong.

Here, then, we are compelled to return to the varieties of grand time and events. Given epochal influences over the *longue durée*, ideologies or systems of coercive power or pervasive beliefs reinforced century after century will leach directly and indirectly into the localities of their spheres of influence. Even epochal events—a great war, horrific genocides, a worldwide depression—cast long temporal shadows, certainly of decades, occasionally of centuries. Global governance and regulation play themselves out in varieties of time. Historical time, organisational time and decision-making time—all are both backdrops to action and variously manipulable by differently situated actors. Research must consciously situate its subjects inside time of varying scale as it concomitantly searches for temporal agency by all the players in the great game of global governance and regulation.

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19

International negotiations

Christian Downie

1. International negotiations in a globalised world

Since the 1980s, globalisation has been on the march. The process has been broader than just economic integration where national markets become part of global markets and multinational firms are the dominant players. There are separate, distinct processes, including the globalisation of markets, the globalisation of firms and the globalisation of regulation (see Drahos, Chapter 15, this volume). The new global order is well characterised as 'regulatory capitalism' (see Levi-Faur, Chapter 17, this volume)—that is, an era in which states have become more preoccupied with the regulation part of governance and steering the flow of events than with providing and distributing. It is also an era that has witnessed the rise of not only state-based regulation, but also non-state regulation, which has grown even more rapidly.

One of the defining features of the globalised world that is less commented on is international negotiation. International negotiations are by no means a new phenomenon. After all, it was almost 100 years ago that the victors of World War I sat down in Paris to negotiate a new map of the world, as countries were simultaneously erased and created at will. However, since the 1980s, international multilateral negotiations have proliferated across regulatory domains to harmonise legislation and/

or to create rules that can be applied by and to states. Witness the law of the sea negotiations, the world trade negotiations and the international climate change negotiations, to name a few.

One of the striking characteristics of these examples is that each has been prolonged, stretching for years and sometimes decades. Yet, despite seeking to address some of the most critical problems facing the globe, prolonged international negotiations are not well understood. Although international negotiations have been an important area of study in the social sciences and much research has focused on explaining how and why states cooperate, remarkably, almost none of this work has considered prolonged international negotiations (Downie 2012). For example, extensive work has been done on the role of state and non-state actors in international negotiations, on the influence of domestic interests and institutions and on the role of transnational activities of state and non-state actors. Yet very little work has been undertaken on how these factors vary over time in protracted negotiations and what the implications of these variables are for regulatory capitalism.

Accordingly, the aim of this chapter is twofold: first, to consider why international negotiations matter to regulatory capitalism. In particular, to assess the means by which international negotiations act to globally diffuse regulatory capitalism. Second, and most importantly, the aim is to draw attention to the temporal dimension of long international negotiations. In so doing, this chapter argues that the preferences of actors, including states, are fluid, not fixed, and fluctuate over the course of a long negotiation. It also argues that once the variables that affect the preferences of actors and hence outcomes in long negotiations are identified, there are specific strategies that state and non-state actors, including traditionally weak actors, can employ to steer prolonged international negotiations towards their preferred outcome.

The chapter proceeds as follows. The next section provides a brief introduction to negotiation studies before considering international negotiations as a means of global diffusion of regulatory capitalism. The principal sections then focus on the temporal dimensions of prolonged international negotiations, both the variables that explain their outcomes and the strategies that can be used to alter those outcomes. The chapter concludes by considering the implications of this phenomenon for regulatory capitalism.

2. Negotiation studies

Traditionally, international relations have been viewed as a world dominated by unitary states with stable and coherent preferences, especially in the realist and liberal traditions. Yet, in an era of regulatory capitalism, such a view is clearly too narrow to capture the myriad states and non-state actors that operate, often in networks, at the domestic, international and transnational levels. Multinational corporations, civil society, individual state agencies, international organisations and trade associations, among others, have become important regulators. For example, chemical producers put in place a global self-regulatory regime called 'Responsible Care' to avert another disaster like the Bhopal tragedy in India (see Holley, Chapter 42, this volume).

Based on the pioneering work of William Zartman and others, a body of scholarship has emerged to capture the role of these various state and non-state actors in negotiations. In particular, it has sought to examine the negotiation process and the effect it has on the behaviour of actors and global outcomes. In analysing the negotiation process, scholars assume bounded rationality, where there are limits to an actor's capacity to process information and make complex calculations (March 1978). The process is also viewed as a positive-sum game, where the parties' underlying interests are distinguished from the issues under negotiation, on which their negotiating position is based. Scholarship in this tradition has also explored how the negotiation process evolves. Zartman and Berman (1982) identified three principal phases in the negotiation process in which parties move from a *diagnostic* phase, through to a *formula* phase and, ultimately, to a *details* phase, where parties send signals to each other, exchange points, arrange details and attempt to bring the negotiations to an end using deadlines. Others have argued that many negotiations continue after the detail phase into what has been termed the 'post-agreement' or 'compliance bargaining' phase, which refers to the negotiations post agreement over the terms and obligations of international treaties (Smith and Tallberg 2005; Zartman 2003).

Ultimately, in international negotiations, an agreement can include an informal settlement or a more explicit agreement, and the focus is invariably on the outcomes for the parties, be they tangible or intangible. In multilateral international negotiations, such as those noted above, the outcome rarely results directly in the distribution of tangible goods, as is more common in bilateral negotiations. Instead, the principal goal is to

harmonise national legislation or to create rules that can be applied by and to states. The effects of rule-making agreements such as conventions and protocols are often uncertain, long range and universal, and the adoption of a rule depends more on a convincing justification than on a material exchange of concessions, though these are often required as well, especially from developed to developing countries (Susskind 1994; Zartman 1994).

3. International negotiations as a means of diffusion of regulatory capitalism

In contrast with older forms of capitalist governance, such as laissez-faire capitalism, the development of regulatory capitalism has come to rely on rules, principles, standards and other norms and their enforcement. In a globalised world, these regulatory norms, often in the form of concrete models, are diffused across different countries and sectors, rather than being reproduced independently as discrete events. The focus on diffusion in regulatory capitalism has centred on 'horizontal' and 'vertical' approaches. Vertical approaches consider top-down explanations, such as national policymakers responding to international pressures, or bottom-up explanations, such as rules reflecting the balance of domestic politics. Horizontal approaches, on the other hand, emphasise diffusion of rules across borders via social interactions and networks (Levi-Faur 2005: 24–7).

These discussions have built on and paralleled efforts in negotiation studies to understand international negotiation outcomes, which, to the extent that they produce rule-making agreements, play an important function as a means of diffusion. First, in the negotiation literature there has long been a distinction between domestic interest-based explanations of negotiation outcomes (bottom-up approaches) and an international bargaining explanation of negotiation outcomes (top-down). However, these explanations are not very good at explaining negotiation outcomes when domestic politics and international relations are in play, as they invariably are in international negotiations. One of the most fruitful attempts to integrate these explanations is Robert Putnam's (1988) 'two-level game', which stresses the interaction of actors at both the domestic level, such as interest groups, and the international level, such as heads of state. In short, it incorporates elements of a bottom-up and top-down understanding of diffusion.

However, much like the emphasis of horizontal approaches to diffusion, scholars of the transnational turn in international relations take a different view on negotiation outcomes. They argue that state behaviour in international negotiation outcomes cannot be understood without taking account of the cross-boundary activities of subunits of government and non-state actors (Risse-Kappen 1995a). Accordingly, scholars in this tradition focus on the role of 'trans-governmental relations' to describe 'sets of direct interactions among sub-units of different governments', and on the role of transnational networks of non-state actors, such as 'epistemic communities' and 'transnational advocacy networks' (Keck and Sikkink 1998; Slaughter 2004). For example, Peter Haas (1989) has argued that epistemic communities, which have recognised expertise and competencies in a particular domain or issue area, can affect how states' interests are defined and hence how rule-making agreements at the international level are produced.

4. Variables in prolonged international negotiations

While these explanations capture the main factors that explain the process of diffusion via international negotiations, it is not clear how these dynamics affect outcomes over time. In other words, they ignore the temporal dimension in long negotiations. For example, the two-level perspective is valuable for understanding how domestic politics and international relations interact in a one-off negotiation. But, if one is to inquire into how domestic political dynamics change to affect international outcomes—such as in the Uruguay Round of trade negotiations, which lasted eight years, or the Kyoto round of the international climate change negotiations, which lasted 10 years—the two-level approach is limited.

Further, empirical studies of long negotiations that stretch for years and sometimes decades highlight how, over time, state preferences become fluid, not fixed. In long negotiations, the preferences of actors are not like neutrons; rather, they are positively charged one year and negatively charged the next. Take the cases of the United States and the European Union (EU), two of the most important parties during the Kyoto round of the climate negotiations. In both cases, their negotiating positions changed, as did the type of agreement they were prepared to sign. This, in turn, affected the type of regulations that were diffused via the

international climate change negotiations. In 1995, the United States and the European Union agreed to the Berlin Mandate, which stipulated that countries could not use emissions trading—a market-based trading system for greenhouse gas emissions—to meet their international climate objectives. Then, in 1997, the United States and the European Union agreed to the Kyoto Protocol, which supported emissions trading and the diffusion of the concept of market-based flexibility mechanisms. Yet, by 2000, the United States and the European Union refused to sign an agreement that would have fleshed out the detail of the Kyoto Protocol already agreed to in 1997 (Downie 2014). Almost two decades later, the experiments that the United States and European Union took with emissions trading have been diffused around the globe, in large part due to these negotiations.

However, the important point here is that once the temporal dimension of prolonged international negotiations is taken into account it becomes clear that the preferences of states fluctuate over the course of an extended negotiation—in contrast with what realist and liberal scholars would contend. The questions, then, are how and why? Drawing on an analysis of existing theories of international negotiations and a large empirical study that was undertaken of the United States and the European Union during the Kyoto phase of the climate negotiations (see Downie 2014), two sets of factors appear important to explaining variations in state behaviour: internal factors and external factors.

Internal factors refer to variables that precipitate a direct shift in state behaviour via the national, international or transnational level. Internal factors include the level of engagement or mobilisation of actors, changes in the strategies of actors or changes in networks of actors, among others. The increased engagement of a treasury department in domestic discussions is an example of such an internal factor. External factors, on the other hand, refer to variables that shift multiple internal factors and operate independently of the stage of the negotiation—that is, they operate without regard to whether the negotiation is over an informal settlement or an explicit agreement with tangible outcomes. External factors include exogenous shocks, changes in the state of expert knowledge and challenges from other international regimes. For example, a global financial crisis, a nuclear meltdown and a catastrophic hurricane are all possible external shocks that may change state behaviour.

In general, internal factors are more proximate than external factors and, as a result, it is easier to draw inferences from internal factors than from external ones.

Internal factors

One of the most important internal factors is the level of engagement of actors. In prolonged negotiations when actors mobilise there is the potential for new networks to develop between actors and changes in the distribution of the power and preferences of coalitions. As Schattschneider (1960) first pointed out, which stakeholders are mobilised and which are not matter because it affects the balance of forces between actors. As a result, as actors engage and disengage, it will create the conditions for new winning and veto coalitions to emerge at the domestic, international and transnational levels. This might mean the intervention of a treasury department into bureaucratic debates, a new environmental non-governmental organisation (NGO) into international discussions or a business group engaging at the transnational level. Each new actor could directly precipitate a shift in state behaviour.

Or, take another example of an internal factor, such as the strategic choices actors make about where and how to negotiate. If they choose a new strategy, this could shift state behaviour and the outcome. For example, some authors use the terms 'forum shopping' (Braithwaite and Drahos 2000) or 'different pathways' (Risse-Kappen 1995b) to describe how actors take actions in different forums or at different levels to influence state behaviour and the outcome of a negotiation. For example, traditionally less powerful actors, such as environmental NGOs, may decide to shift their activities to the international level because of limited access to government at the domestic level, whereas strong actors may not need to do so because of their powerful position at home. Or, business groups may supplement their domestic lobbying by engaging in transnational actions as well.

While these internal factors are critical, a key question in the case of prolonged international negotiations is: why do these factors change? In other words, why do new actors mobilise? Why do actors change their strategies? Why do networks among actors change? And, what is it that shifts the distribution of coalitions over time? The short answer

is that these changes are the function of the following internal factors: domestic political incentives, the stage of the negotiations and the preferences of government leaders.

Domestic political incentives and the stage of the negotiations are interrelated. As negotiations progress, the domestic political incentives for government agencies, non-state actors or government leaders will change and, with it, their level of engagement. The political incentives for these actors will, in turn, be a function of how they perceive the tangible costs and benefits of the agreement under negotiation, which, as others have pointed out, is directly related to the stage of the negotiations. For example, in elaborating on the two-level game, Moravscik (1993) and Evans (1993) note that, as negotiations move from the bargaining to the ratification stage, the costs and benefits of an agreement become clearer, and, as a result, domestic groups will mobilise in defence of their interests. This, in turn, will bring new actors into the game. In other words, as some actors push *for* an agreement, it engages other actors to push *against* it (Spector 2003).

Further, in protracted negotiations government leaders are crucial to explaining the type of agreement that states are willing to sign. In protracted negotiations, there is the potential for changes in the preferences of leaders if there is a change in government or a change in the beliefs or political incentives of existing leaders. While a change in government is possible in shorter negotiations, it is almost inevitable in protracted negotiations and can lead to a fundamental change in the preferences of the leader. Yet even when there is no change in government, there is the potential for the preferences of a government leader to change with a change in their beliefs or political incentives. As voter interest changes, so will the domestic political incentives of the government leader. In the same fashion, the capacity of leaders to manipulate these domestic constraints will also vary over time. Evans (1993) concludes that as international negotiations move from the bargaining to the ratification stage, the relative autonomy of the government leader to manipulate these pressures decreases. This is because, as discussions focus on ratification and tangible costs and benefits, more actors mobilise to advance or defend their interests, and, hence, the constraints on the government leader increase.

External factors

Whereas internal factors precipitate a direct shift in state behaviour, external factors, as noted, indirectly shift state behaviour by reshaping the context in which the negotiations take place. To be clear, external factors are independent of the stage of the negotiations—that is, they operate without regard to the negotiation process itself. Take just one external factor, an exogenous shock—that is, an event that has the potential to transform the context in which international negotiations take place (Zartman 2003). The most common pathway is where a dramatic event or series of events captures the imagination of mass publics, after media organisations dramatise the event and state actors are forced to act to placate the public and the media (Braithwaite and Drahos 2000). The Bhopal accident in 1984 and Chernobyl accident in 1986 are classic cases of exogenous events that catalysed mass publics and forced states to act both domestically and internationally. Such events, which are more likely in a long negotiation, can shift multiple internal factors as new actors mobilise in response to new political incentives, which, in turn, affect the distribution of coalitions and so on. In short, an exogenous shock will indirectly shift state behaviour.

5. Strategies in prolonged international negotiations

The complex processes that shape prolonged international negotiation outcomes provide opportunities for highly networked actors to influence state behaviour by making strategic choices at the domestic, international or transnational level to mobilise other actors, establish coalitions, manipulate government leaders' preferences and, in turn, shape international negotiation outcomes. In other words, it provides them with an opportunity to engage in what might be referred to as 'constructive management'. This recognises that, because preferences are fluid in a long negotiation, actors have considerable agency to influence state behaviour and hence the nature of the rule-making agreements that diffuse regulatory capitalism. The fact that preferences are fluid in a long negotiation means that actors will always have a degree of agency no matter how weak they are. There is a series of strategies that actors can employ to constructively manage international negotiations, which are likely to be uniquely effective when they are used to exploit the strategic opportunities that arise in long negotiations.

Exploiting the minimal mobilisation of interested actors

When other actors are disengaged, there is a unique strategic opportunity for traditionally weak actors to dominate discussions because more powerful actors are not mobilised. As discussed above, which actors are mobilised and which are not matter because it affects the balance of forces between actors. This is particularly pertinent in international environmental negotiations where key actors—environment agencies and environmental NGOs—are often the weakest actors. Accordingly, when interested actors are not mobilised, weak actors should actively engage in the discussions as early as possible to exploit the circumstances. In other words, weak actors should go in hard and early to influence state behaviour. Weak actors who exploit these circumstances will therefore have a first-mover opportunity to frame the discussions. One of the most effective ways that actors can affect state behaviour is by strategically framing debates to draw attention to their concerns. The actor or coalition of actors that succeeds in establishing a frame that is consistent with its goals is likely to reap the greatest gains from negotiations.

Infiltrating and manipulating networks and coalitions

In a networked world, as discussed, where the state acts as an agent for the interests of non-state actors and other actors act as agents for states, highly networked actors have the capacity to shape state behaviour (Rhodes 2006: 426). For traditionally weak actors, this is often difficult given that policy networks, for example, are often inaccessible. However, when a tentative agreement is being negotiated, the costs and benefits of which are not yet tangible and, as a result, interested actors are minimally mobilised, domestic networks and coalitions are likely to be fluid. This will provide a strategic opportunity for weak actors to move in and out of this space with greater ease. As a result, a second and related strategy for weak actors is to infiltrate and manipulate domestic networks and coalitions when they are most fluid.

Targeting a government leader's capacity to manipulate domestic constraints

While the preferences of government leaders are crucial to explaining state behaviour, their capacity to manipulate domestic constraints is greatest when the international negotiations are in the bargaining phase. The lesson for actors, especially weak actors who have fewer alternative pathways to influence state behaviour, is to target leaders in the bargaining phase. If an actor is successful in influencing a leader's preference at this point in the negotiations, it is more likely that these preferences will be reflected in a state's negotiating position given the greater relative autonomy of the government leader. A leader's preferences will be informed both by personal beliefs and by the desire to enhance their domestic political position. Accordingly, actors should target both these avenues to persuade them to adopt a position consistent with their interests.

Facilitating the flow of expert knowledge to policy elites

The basic premise of constructive management is that state preferences matter to international outcomes, they are fluid and they can be socially constructed. When government leaders and policy elites have not developed firm preferences on the issue under negotiation, weak actors can facilitate the flow of expert knowledge to these actors to inform their beliefs and, in turn, their preferences and negotiating position. Again, this will work best in the early phase of negotiations because networks are more fluid and leaders have a greater capacity to manipulate domestic constraints based on their beliefs.

Exploiting exogenous shocks

Exogenous shocks have a very real potential to shift state behaviour by catalysing mass publics and forcing states to act both domestically and internationally. In such an atmosphere, actors who have a prepared model to address the crisis will have an enormous appeal to state actors looking for a solution. For example, if a nuclear meltdown forces a state to act, such as the German Government's decision to close its nuclear power plants following the Fukushima disaster in Japan in 2011, the actors with a prepared model to reregulate energy production and phase out nuclear

power will be in a powerful position. Indeed, the key for weak actors is that their influence depends on the power of the model, not on the power of the advocate (Braithwaite and Drahos 2000: 589). Accordingly, where weak actors have been outmanoeuvred by more powerful actors and are closed off from policy networks, an exogenous shock can provide a strategic opportunity, if they have a model in hand, to influence state behaviour and steer the negotiations towards their preferred outcome.

Leveraging other international regimes

Further, where powerful interests dominate, weak actors, where possible, should engage with other international regimes to influence state behaviour. As we have seen, one international regime, such as the ozone regime, can provide an exogenous challenge to a second regime, such as the climate regime, if they are involved in competing efforts to deal with aspects of the same problem (Zartman 2003). Where this occurs, strategic opportunities may exist for weak actors whose influence has been muted in one international regime to shift their attention to a second regime and use it as leverage. If possible, actors should engage a stronger regime as this is likely to have a greater capacity to provide an exogenous challenge. For instance, environmental NGOs participating in the climate negotiations may seek to affect the rules and boundaries of the international trade regime with the hope of spurring changes in the climate regime.

Building transnational coalitions

Finally, as the transnational perspective points out, 'transnational relations matter in world politics', and state behaviour in international relations cannot be understood without taking account of the cross-boundary activities of subunits of government and non-state actors (Risse-Kappen 1995b: 280). When powerful interests begin to dominate domestic networks and coalitions, a good option for weak actors is to develop transnational networks. The evidence from the climate negotiations indicates that transnational networks are most effective at influencing domestic and international policy outcomes when they include state and non-state actors. Further, weak actors in one country can enrol more powerful actors in another to help push for or veto agreements that they do not have the influence to do alone.

6. Conclusion

Regulatory capitalism has come to rely on rule and rule enforcement. In a globalised world, these rules are diffused, they are not reproduced and international negotiations have proven to be a principal means of diffusion. International multilateral negotiations have proliferated across regulatory domains to harmonise legislation and/or to create rules that can be applied by and to states. Regulatory solutions that are often shaped in the United States or the European Union are broadcast globally via international negotiations. For example, as this chapter has discussed, the international climate change negotiations diffused the concept of emissions trading around the globe as a regulatory solution to rising greenhouse gas emissions. A solution that originated in the United States has now spread via international negotiations to be one of the most common regulatory responses to climate change.

Accordingly, to understand diffusion in an era of regulatory capitalism it is necessary to understand the international negotiation process. Fortunately, negotiation studies is well developed and it has expanded our understanding of the negotiation process beyond top-down and bottom-up approaches by drawing attention to the myriad state and non-state actors that operate, often in networks, at the domestic, international and transnational levels. Yet many of the most significant rule-making agreements are the product of negotiations that stretch for years and sometimes decades. The international climate change negotiations, already mentioned, are a good example. But one does not have to look far to discover the significant impact the almost decade-long rounds of trade negotiations have had on globalising international trade rules or the international law of the sea negotiations, which govern our oceans.

Recent empirical studies have started to uncover the dynamics of such negotiations and how the negotiation processes that diffuse and enforce rules vary over time. As this chapter has shown, first, it is clear that the preferences of actors, including states, are fluid, not fixed. And, as a result, there are internal and external factors distinctive to prolonged international negotiations that explain how and why the rule-making agreements that negotiations generate change, such as the different levels of engagement of actors and the preferences of government leaders. Second, because preferences are fluid, actors, including traditionally weak actors, have considerable agency to influence state behaviour. Indeed, there are strategic opportunities in the course of a protracted negotiation

for actors to steer negotiations towards their preferred outcomes if the right strategies are employed. Of course, the means by which long international negotiations diffuse and enforce rules need to be tested across a wide range of cases, and across multiple sites of regulation, but negotiation studies have much to offer our understanding of the spread of regulatory capitalism.

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20

Transnational non-state regulatory regimes

Natasha Tusikov

1. Introduction

What do Apple's Supplier Responsibility program, the UK-based Internet Watch Foundation and the campaign against unauthorised downloads of movies by the Motion Picture Association of America (MPAA) have in common? They are examples of transnational non-state regulatory regimes. This type of regulation encompasses a broad array of regulatory arrangements carried out by corporate actors, non-governmental organisations (NGOs) and civil society groups working alone or in collaboration. It is a form of meta-regulation that operates at a global level (see Grabosky, Chapter 9, this volume). Regulation in this context refers broadly to the means that guide any activity, individual or institution to behave according to formal or informal rules (Picciotto 2002: 1). Given the diversity of actors and activities making up this type of regulation, there is no standard definition for transnational non-state regulation. It can be broadly understood as non-state actors making, implementing and/or enforcing rules and standards across national borders. Transnational non-state regulation connects with theories of globalisation—most obviously regulatory globalisation (see Drahos, Chapter 15, this volume).

Some arrangements may comprise a single company or industry, while others cut across industry sectors or involve multiple business and civil society stakeholders who represent a range of interests. Actors may employ formal legal mechanisms, such as national or international laws, as well as informal processes such as non–legally binding certification programs or codes of conducts. They may have different motivations and interests for becoming involved in regulatory endeavours and diverse goals. Participants may have profit-oriented goals, such as reducing regulatory duplication to strengthen corporate performance, or efforts may be publicly oriented to target problems such as pollution or child labour. Apple's Supplier Responsibility program, for instance, in which the company may terminate its contracts with suppliers that do not comply with its labour and environmental standards, is designed to burnish Apple's credentials as a good corporate citizen. The MPAA pressures internet firms, particularly Google, to make it more difficult for people to find and download unauthorised versions of copyrighted movies. In contrast, the Internet Watch Foundation is a non-profit organisation that works with internet firms like Google and PayPal to remove child pornography from websites around the world.

The rest of the chapter explores how transnational non-state regulation operates, particularly the ways in which non-state actors can make and enforce rules, and then outlines the challenges raised by this type of regulation. First, the chapter introduces the concept of regimes to provide a way to understand this type of regulation and then describes how non-state actors interact with states. Then the chapter outlines why transnational non-state regulation emerges before turning to discuss how non-state actors draw on varying forms of authority to regulate. Third, the chapter explores the varying degrees of involvement states may have with transnational non-state regulatory regimes. The chapter then discusses the benefits and challenges of this type of regulation before providing a brief conclusion.

2. Regimes and states

Given the diversity of actors, rules and interests making up the many instances of transnational non-state regulation, the concept of regimes provides a useful analytical framework. Regimes can be understood as 'the full set of actors, institutions, norms and rules' making up a particular regulatory arrangement (Eberlein and Grande 2005: 91). Scholars from

the fields of international relations, socio-legal studies and regulatory theory employ the concept of regimes to explain the ways in which non-state actors can set and enforce rules and standards transnationally, and explore their varying interests in participating in such regimes (see, for example, Cutler et al. 1999). The concept is useful because it explicitly acknowledges the role of non-state actors and recognises that regulation may involve 'soft law' or informal governance practices, such as certification practices or industry-derived codes of conduct, along with other rule-making mechanisms such as contracts or statutory laws. As regime analysis considers the full ensemble of actors, interests and rules making up regulatory efforts, it is also valuable for tracking similarities and differences among actors' material and ideational interests in relation to the governance of a particular issue. Actors may have conflicting, sometimes irreconcilable, differences that shape the composition and function of governance arrangements. Regulation that materially benefits one party can impose costs on the other.

In terms of their scope, regimes may be considered transnational according to the reach of their rule-setting actors, the level of the rule-setting institutions, the span of the rules themselves or a combination of these factors (Mügge 2006: 179). Even though a regime may operate transnationally through the scope of its actors or rules, the regime may have distinct territorial roots or localised characteristics (Graz and Nölke 2008). These local roots may infuse a regime with characteristics that shape its character or operation. Prominent rule-making actors, for example, may all be based within the global North, creating rules that govern how transnational mining companies operate in the global South (see Dashwood 2012). Using regimes can help trace the particular historical and sociocultural contexts from which actors emerged to form particular regulatory arrangements.

From the term, it would appear that the state has very little or even no role in transnational non-state regulation. However, this is not the case. To understand the role of states in this type of regulation, it is important to outline briefly how states can strategically deploy their power through regulation. One way to consider how this occurs is through the framework of regulatory capitalism, which is prominently associated with John Braithwaite and David Levi-Faur, among other regulatory theorists (see Levi-Faur, Chapter 17, this volume). In regulatory capitalism, the state takes on a meta-regulatory role: it directs, oversees and spurs on regulation and, in so doing, governs through regulation

(see Levi-Faur 2013). The oft-quoted metaphors of 'steering' and 'rowing' aptly describe the state's meta-regulation. In these nautical images, the state strategically 'steers' or directs regulatory efforts while non-state actors take on the state's traditional task of 'rowing' by creating and operating various regulatory arrangements (Osborne and Gaebler 1992).

States may play a strong, direct role by facilitating regulatory efforts, prescribing specific goals or mandating the use of certain monitoring and enforcement mechanisms. They may also govern indirectly by empowering non-state actors to enact rules, shaping discourse and distributing resources (Levi-Faur 2013: 39). States may also provide incentives to corporate and civil society actors to create or enforce certain rules and standards (see Gunningham and Sinclair, Chapters 8 and 40; and Grabosky, Chapter 9, this volume). When there are conflicts among actors or appeals to governments for assistance, states can arbitrate among competing non-state interests. Corporate actors, for example, may lobby a state for a particular regulatory approach that is opposed by civil society groups that advocate different measures. Not all actors have equal resources with which to persuade states to support their regulatory preferences or command the same degree of influence in shaping state policymaking processes. Some large corporate actors have the capacity to lobby for policies that benefit their interests and create their own rules and standards, both domestically and transnationally, to regulate their individual corporations, their global supply chains or even industry sectors. Similarly, not all states have equal capacity to influence, stimulate or control regulatory efforts by non-state actors, particularly mega-corporate actors.

To understand why states privilege certain interests, it is helpful to consider the state as embedded in the economic and social orders: the state and society mutually constitute one another (Underhill 2003). Simply put, there is a flow of ideas between the state and society in which each shapes the other. States grant a role in policymaking to interest groups that put forward competing and complementary ideas to articulate problems, propose remedies and shape policies. States determine which actors are more authoritative, lend legitimacy to some interests over others and privilege certain policies (Hall 1993: 288). It is important to underline that states retain interests and goals that are distinct from their lobbyists even as those actors endeavour to shape governments' priorities and policymaking. States retain a capacity to act autonomously even as they accord interest groups opportunities to shape policymaking (Hall 1993).

3. Origins and authority

One of the principal reasons that non-state actors may form transnational regulatory arrangements is because states are perceived to be incapable of or unwilling to provide transnational governance on certain issues. Corporate actors or civil society groups may also turn to non-state regulation if states are not addressing problems in ways that the non-state actors consider appropriate. By creating standards and rules privately, non-state actors can work to address gaps in regulation or harmonise competing or uneven rules internationally to make governance efforts more effective (Cafaggi 2012). Multinational corporations working alongside civil society groups, for example, have created international standards in relation to the commercial use and preservation of forests (see Meidinger 2002). Similarly, child protection advocates, together with law enforcement and industry groups, created the Internet Watch Foundation to target child pornography hosted anywhere on the internet. Corporate actors may strategically embrace non-state regulation to preempt government regulation or water down existing rules (Cutler et al. 1999). There may be normative reasons for corporate actors' adoption of private rules, such as to repair or safeguard their reputations. For example, following criticism of Apple's supply-chain practices, the company began using third-party auditors to ensure the tantalum, which is a valuable metal, used in its products was obtained from conflict-free countries in Africa (see Apple 2014).

Transnational non-state regulatory regimes vary widely in the sources of their authority to set or enforce rules and standards. Actors within such regimes generally exercise 'autonomous regulatory power or implemen[t] delegated power, conferred by international law or by national legislation' (Cafaggi 2010: 1). In terms of delegated authority, states may designate responsibility for monitoring or enforcing criminal or civil laws to non-state actors, or direct those actors to perform specific duties such as inspections or audits (see Scott 2002). In many countries, private security companies, such as the UK-based multinational Serco Group, have state-delegated authority to transport, guard and house prisoners. A common form of autonomous regulatory authority comes from contracts. Corporations can set rules or standards within their supply chains through contracts with their manufacturers and suppliers—for instance, in relation to labour or environmental standards (see, for example, Apple 2014). Companies that wish to become suppliers to Apple, for example, must abide by its environmental and labour

conditions and demonstrate compliance in third-party audits or risk losing contracts. States, however, can intervene in commercial contracts if they violate laws, such as those prohibiting anticompetitive behaviour.

Non-state actors may lack a formal legal authority to govern and instead must persuade—or pressure—others to accept their rules or comply with their regulatory programs. To do so, they can draw on their resources and put forward their policies as the best approach. These are examples of structural authority and discursive authority and one may be employed to strengthen the other. Structural authority, which is based on Susan Strange's (1997) notion of structural power, refers to transnational corporate actors' capacity to influence government policymaking by threatening to relocate investment or employment. It also encompasses those actors' ability to control access to or the use of certain markets and to govern their supply chains, particularly when they dominate markets (see Fuchs and Kalfagianni 2010). Visa, MasterCard and PayPal, for example, dominate the online payment market, while Google commands the search market, which means that these companies have considerable capacity to act as online regulators. Discursive authority, in contrast, refers to actors' ability to frame and shape the meaning of ideas to affect how people understand issues and influence policymaking (Fuchs 2007). Using this capacity to shape ideas, non-state actors may also invoke moral and technical authority to argue for their preferred regulatory approach. Moral authority involves drawing broadly accepted values, while technical authority involves claims to specialised or expert knowledge or skills, or objective advice (Avant et al. 2010). The Internet Watch Foundation, for instance, claims moral authority when it demands that internet firms such as Yahoo and Google join its ranks to target the online distribution of child pornography (see Laidlaw 2012). The MPAA, meanwhile, invokes both moral and technical authority. It claims to protect the copyright of its members' movies from 'theft'[1] and, invoking its status as the trade body for the movie industry, it designs policies to deter the unauthorised download of movies (see Brandom 2014).

Non-state actors without formal legal authority may create regulatory regimes based on informal measures, such as non–legally binding certification programs and corporate social responsibility codes.

1 Proponents of stronger protection for copyright have long successfully framed copyright infringement as 'theft'—an effective strategy that casts infringement as a serious crime that necessitates a correspondingly serious enforcement response (see Drahos and Braithwaite 2002).

For example, the Forest Stewardship Council (FSC), which comprises business, social and environmental interests, certifies forestry companies, including manufacturers and retailers, as compliant with the FSC's standards on sustainability and environmental protection (see Meidinger 2002). Corporate social responsibility codes are often joint agreements between civil society organisations and corporations to address certain problems resulting from poor industry practices, such as pollution, or to improve industry practices in particular areas, such as human rights or labour standards (see Dashwood 2012). Certification and corporate social responsibility programs are generally intended to marry private business interests with public interest goals. They are designed (whether or not they are effective) to benefit the interests of the regulated, which are primarily business entities, and serve the collective interest through efforts to protect human rights, among other programs.

In addition to the arrangements described above among non-state actors, there is another that is gaining prominence: non–legally binding 'voluntary' agreements (see Gunningham and Sinclair, Chapters 8 and 40, this volume). These agreements are voluntary in the sense that they are not based on legislation or legal contracts but on nonbinding guidelines or sets of industry-derived 'best practices'. The term 'voluntary', however, can be misleading, as states can exert considerable coercive pressure to force non-state actors to join the arrangements or abide by their decisions. Other non-state actors may also pressure stakeholders to join the agreements by threatening legal action or withholding business deals. Non–legally binding agreements are increasingly used to regulate digital copyright infringement (for example, unauthorised downloads of music and movies) and the online sale of counterfeit goods, which is a form of trademark infringement. In these nonbinding agreements, rights-holders of intellectual property—typically large multinational companies such as Nike or Sony—work with internet firms such as PayPal to stop the online distribution of copyright-infringing and counterfeit goods (Tusikov 2016).

4. Degrees of state involvement

Government involvement in transnational non-state regulation varies according to the issue under regulation, the nature of the regulatory arrangement and the degree of reliance, if any, on the state. As discussed earlier in the chapter, states retain the authority in the regulatory

capitalist framework to mandate, shape, endorse or reject non-state regulatory efforts, as well as to delegate authority to non-state actors (see Levi-Faur 2013; Levi-Faur, Chapter 17, this volume). States may not necessarily be aware of or equally attentive to all cases of non-state regulation, particularly where its interests are not affected or private actors do not seek state involvement. For example, corporate social responsibility programs organised among corporations and NGOs to strengthen standards relating to environmental protection may not elicit attention from governments. As well, states vary widely in their capacity to influence and their degree of involvement in transnational non-state regulation.

Transnational non-state regulatory regimes may have little, if any, state involvement. Where there is relative agreement among stakeholders in relation to the regime, or if there are suitable incentives offered (or penalties credibly threatened), there may be few interactions with state actors. This is the case when powerful multinational companies, such as Walmart or Apple, contractually require their suppliers to adhere to specific environmental, labour or quality-control standards. Suppliers are under considerable pressure to accept these contracts as they have few alternatives given the significant market share commanded by Walmart and Apple. Further, the penalties for violation are serious. Suppliers found to be in violation of the contracts can be terminated as preferred suppliers and, given the market dominance of such firms, this means the suppliers essentially lose their licence 'to participate in the global market' (Fuchs and Kalfagianni 2010: 3). Contract-based regimes require little direct interaction with the state, as the corporations set and enforce rules through their supply chains. However, corporations' use of legal contracts to enforce rules and standards means they rely indirectly on state legal systems. Similarly, in the case of a disagreement among regime participants, actors have recourse to pursue the matter in the relevant national legal jurisdiction.

When non-state actors lack a contractual or statutory basis to their regime, they can attempt to persuade or pressure others to conform to their rules. They can draw on their structural and discursive authority by employing litigation or promising to grant or withhold business deals. If these methods fail, actors may turn to the state or its structures, although actors may have different preferences as to the degree and nature of state involvement (Cafaggi 2010). Faced with noncompliant actors, a regime's actors can, in some situations, turn to national laws or public institutions to seek compliance or use the threat of civil or criminal

remedies to motivate compliance with the regime's rules, standards or codes. They may also seek direct assistance from state actors. Members of a transnational regime may lobby states to support or facilitate a particular regulatory agenda, or to prod reluctant actors into cooperating with the regime. The success of these requests depends on the state's interests in the regime, as well as the state's capacity and willingness to intervene. The distribution of power among non-state actors, however, is temporal as interests may shift over time or different sets of actors may assume greater power (see Downie, Chapter 19; and Halliday, Chapter 18, this volume). Further, the state may weaken or revoke its recognition of the regulatory arrangement, non-state actors can lose credibility from their stakeholders or those they govern and rivals may contest the regime's legitimacy (Avant et al. 2010).

Some requests for state assistance resonate with the state or align more closely than others with its interests. Both the Internet Watch Foundation and the MPAA enjoy a close relationship with the UK and US governments, respectively. The UK Government is strongly supportive of the Internet Watch Foundation's enforcement strategy in which internet firms, including Google, Yahoo, Twitter and PayPal, block access to websites suspected of hosting child pornography content to deter individuals from accessing those websites (see Internet Watch Foundation 2013). Similarly, the MPAA has a long, successful history of shaping US—and international—policymaking in relation to the ever-increasing protection of copyright (see Brandom 2014; Drahos and Braithwaite 2002). For Apple, in contrast, pressure to improve the company's labour and environmental standards came primarily from NGOs and its customers (Apple Press Info 2012). In cases where states have interests in the subject of regulation, they may exert direct, even coercive, pressure on non-state actors to convince them to participate in transnational non-state regulatory regimes. For example, in the United States and the United Kingdom, government officials warned internet firms that they could expect legislation or legal action to force their compliance if they did not adopt non–legally binding agreements with rights-holders to address the online distribution of copyright-infringing and counterfeit goods (Tusikov 2016). Given this coercion, the non–legally binding agreements are not voluntary but a form of enforced regulation. When state actors intervene in non-state regulation by supporting, facilitating or even directly creating a particular regulatory arrangement, they legitimise the authority of the non-state actors to govern and the regime.

5. Benefits and challenges of transnational non-state regulation

Transnational non-state regulation can offer certain benefits (see Chang and Grabosky, Chapter 31, this volume). Governments may perceive non-state actors, particularly corporations, as more responsive, cost-effective and efficient regulators than government agencies in certain areas, or as having specialised technical knowledge, industry or sector familiarity and greater access to markets (see Cutler et al. 1999). Such regulation can be more responsive and adaptive to changes in technology or circumstances than legislation, international law or trade agreements (Cafaggi 2012). As contracts and non–legally binding agreements can be more flexible than law, non-state actors may be more willing to join regulatory arrangements using these mechanisms as they may have more of an ability to provide input or amend them to suit their needs. The regime can be expanded or contracted as needed and its rules amended to reflect changing circumstances or stakeholders' needs. NGOs and civil society organisations can have greater power to push corporate—or even state—actors to address public-oriented goals, such as protection of the environment or consumers' rights, through non-state regulatory regimes. This is particularly the case when civil society actors can capitalise on corporations' fear of scandal and damage to their reputations, as was the case with Apple and criticism of its labour practices (see Apple Press Info 2012).

Working outside more traditional legal processes can enable non-state actors to address problems that states are unwilling to or incapable of addressing alone, at least in ways that non-state actors may prefer. For example, partnerships with internet firms based on nonbinding agreements enable the MPAA and Internet Watch Foundation to extend their enforcement reach globally through the internet firms' global operations. Working with government officials from various jurisdictions using their national laws would be much more time-consuming and difficult. Transnational non-state regulation can also provide ways to harmonise rules and address gaps or inconsistencies in national laws (see Cafaggi 2010). Non-state efforts in the forestry and food industries attempt to address these problems through the use of industry certification programs and supply-chain contracts (see Fuchs and Kalfagianni 2010; Meidinger 2002). Although non-state regulation

is often associated with soft law, such as certification programs, it can deliver formidable sanctions. Suppliers who violate their supply-chain agreements, for example, can lose lucrative contracts.

For states, transnational non-state regulation can be useful as it enables them to reach beyond their traditional jurisdictional boundaries or to regulate in ways, or at a scale, that are typically unfeasible for government agencies. By supporting or facilitating non-state regulation, states can capitalise on or influence the production, implementation and enforcement of rules in particular sectors or issues that align with their interests. Non-state regulation can also provide avenues for states to sidestep failed, stalled, unworkable or controversial legislation or trade agreements and achieve similar, or even enhanced, regulatory outcomes. States can publicly, but selectively, endorse specific efforts or strategically distance themselves by emphasising the central role of non-state actors in the creation and operation of the regulatory regime.

Transnational non-state regulatory regimes raise significant challenges, particularly in terms of accountability and due process. In terms of accountability, it is often difficult for those outside the regime to determine how rules and standards are drafted, the ways they are enforced or by whom. It may also be difficult to evaluate the regime's effectiveness in the context of its goals. Regimes may seek to address these problems by publishing annual reports on their activities and achievements (see, for example, Apple 2014; Internet Watch Foundation 2013). These reports, however, are often little more than public relations documents that promote the regimes but do not provide the level of detail necessary to evaluate their operation or performance.

Transnational non-state regimes also raise broader challenges in terms of accountability (see Dowdle, Chapter 12, this volume). These regimes often reveal global North–South patterns in which influence over governance is concentrated in the global North. Regulatory capitalism tends to describe regimes that are 'shaped in North America and Europe [and] are increasingly internationalised and projected globally' (Levi-Faur 2005: 13). This means rules and standards that are generally set in the global North extend internationally to govern people who may have little awareness of the regime's existence. Further, governments in the countries in which the regimes operate may have little knowledge of or influence over these regimes, even though their governance could affect them. This pattern is echoed in the cases of Apple, the MPAA and the Internet Watch Foundation. Apple's rules—set in its California

headquarters—govern its global supply chain, particularly its production activities in China. By tapping into internet firms with global operations, the MPAA and Internet Watch Foundation are able to carry out worldwide enforcement campaigns against the unauthorised downloads of movies and the distribution of child pornography.

The same characteristics that enable non-state regimes to be flexible and responsive to changes in circumstance can impede due-process mechanisms. Appeals processes may be inadequate or difficult to navigate and actors may impose sanctions based on suspicion, not proof, of wrongdoing. Regimes' participants may use technology to identify and target potentially suspicious behaviour, which raises challenges of wrongful identification and mass policing of legitimate activities and innocent people. The Internet Watch Foundation, for example, compiles a blacklist of websites suspected of being involved in distributing child pornography and instructs the internet firms participating in its program to block all sites on the list. However, blacklists can—and do—incorrectly block legitimate content and thereby thwart legal activities. The criteria used to blacklist websites and the process for doing so are often closely guarded secrets, as is the case with the Internet Watch Foundation, which also blocks examination by outsiders of websites it blacklists (see Laidlaw 2012). Regulatory efforts based on secretly drafted criteria and unobservable processes raise significant problems in relation to accountability and legitimacy.

6. Conclusion

As transnational non-state regulatory regimes comprise a broad array of actors, rules, arrangements, strategies and interests, it is important to examine each regime's constituent components. An important element of this analysis is to explore the nature of the regime's authority, whether actors invoke moral, technical or discursive authority, or how they draw on their resources to wield structural authority. Further, it is necessary to determine how actors set rules: do they primarily use statutory laws or contracts, non–legally binding mechanisms or some combination of these? Related to this, one must examine the degree to which the regime relies on the state or its structures. State actors may play significant roles in supporting, facilitating or even directly constructing the regime, depending on the degree to which the state's interests align with those of the regime. As states recognise non-state regimes, they legitimise the

regime and its activities. Not all states, however, have equal influence over transnational non-state regimes, nor can all non-state actors equally shape public policymaking. Such regimes often follow a global North–South pattern in which rules are set by actors in the global North and then exported worldwide. The three regimes explored throughout the chapter—Apple's supply-chain program, the Internet Watch Foundation and the MPAA's antipiracy campaign—echo this global North–South configuration. These examples demonstrate the importance of state actors in facilitating and, in certain cases, directly shaping non-state regulation, even coercively pressuring non-state actors' participation. Given the diversity of transnational non-state regimes and the important issues they regulate, this is a fertile area for future research.

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Section 4: Rights-based regulation

Rights, irrespective of whether they are natural or invented, legal or non-legal, have to be made concrete in the world through networks that turn rights from script into action. However, there is a danger in leaving the responsibility of network coordination exclusively to one entity, whether state or non-state. For example, when men coordinate the networks, women lose; when states coordinate the networks, migrants and refugees lose.

Each of the chapters in this section takes on a major topic of rights-based regulation and picks up on one or both of the themes mentioned above. Hilary Charlesworth, whose RegNet centre, the Centre for International Governance and Justice, has provided much of the focal point for RegNet's work on rights-based regulation, introduces the reader to the advantages of reconceptualising the enforcement of human rights from a regulatory perspective. Nicola Piper shows how state-led managerialism of rights robs subjects of the promise of rights and turns powerless groups such as migrants into objects of economic and political management. Social movements and transnational advocacy networks have to form new organisational strands in the web of influence if rights are to truly work for such disempowered groups. The rule of law and rights are, or at least should be, intimately linked, but they part company when, as Veronica Taylor shows, the rule of law becomes a set of institutional products peddled by development aid merchants. The limits of networked and smart regulation—forms of regulation described in a number of other chapters in this book—are analysed by Gabrielle

Simm in the netherworld of sexual crime, private security firms and peacekeeping operations. In the last chapter, Michelle Burgis-Kasthala probes the capacity of a rights and agency-based international criminal law to deliver satisfactory outcomes for crimes of individuals that have their roots in the dynamics of state systems.

21

A regulatory perspective on the international human rights system

Hilary Charlesworth[1]

1. Introduction

Regulatory theory has paid little attention to international law, and international legal theory, in turn, has largely overlooked the field of regulation. Given that compliance and implementation are two constant anxieties in international law, this lack of engagement with regulatory theory is surprising.

In this chapter, I outline some insights that regulatory theory offers to one arena of international law: the protection of human rights. Despite its elaborate system of norms and institutions, human rights law often appears ineffective. International human rights scholars have tended to focus on law as the sole form of regulation in the field and they have paid little attention to other forms of human rights influence. This chapter first outlines the international human rights system and the disappointment it has generated. It sketches some explanations for the perceived failures of the system to affect behaviour and then introduces two aspects of regulatory scholarship that can enrich approaches to protecting human rights. I conclude by considering the value of the concept of responsive regulation to the field.

1 Many thanks to Fleur Adcock, Ben Authers, John Braithwaite, Michelle Burgis-Kasthala, Peter Drahos and Emma Larking for helpful comments on this chapter.

2. The international human rights system

The United Nations (UN) is home to the global human rights system. It comprises the Universal Declaration of Human Rights (1948) and nine 'core' human rights treaties, including two general treaties—the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) and the International Covenant on Civil and Political Rights (ICCPR) (1966)—and treaties devoted to particular human rights and groups: for example, the Convention against Torture (1984) and the Convention on the Rights of Persons with Disabilities (2006). The human rights norms set out in these instruments include rights applicable to individuals and to groups. In short, there has been a 'cascade of norms' (Keck and Sikkink 1998) setting human rights standards over the past 60 years.

The UN human rights treaties have attracted widespread participation. All of the United Nations' 193 members are party to at least one of the nine core treaties, and 80 per cent of states have ratified four or more. The most widely accepted treaty is the Convention on the Rights of the Child, with 194 parties; the two covenants have 164 parties (ICESCR) and 168 parties (ICCPR). Compared with other treaty systems—such as environmental, arms control or resource treaties—these are impressive figures.

The UN human rights architecture is complex. All the human rights treaties require parties to implement the treaty provisions in their national legal systems. These obligations are overseen by a system of specialist committees, one for each treaty. The role of the human rights treaty bodies is to monitor the implementation of the treaties by states that have become parties to them, primarily through scrutiny and comment on periodic implementation reports submitted by state parties to the treaties. Political bodies are a second major feature of the UN human rights architecture—most notably, the Human Rights Council (HCR). The council, to which 47 states are elected as members for three-year terms, was established in 2006. Its role is to ensure the primacy of human rights within all aspects of UN work. A third element in the international human rights system is the Office of the UN High Commissioner for Human Rights (OHCHR), which is responsible for the promotion and coordination of human rights throughout the UN system, assisting the development of new norms, as well as taking preventive human rights action.

Three regional human rights systems exist, built around the European Convention on Human Rights (1950), the Inter-American Convention on Human Rights (1969) and the African Charter of Human and Peoples' Rights (1982). The Arab Charter on Human Rights (2004) and the Intergovernmental Commission on Human Rights (2009) of the Association of Southeast Asian Nations (ASEAN) are less-developed regional structures. These systems vary considerably in terms of the types of rights covered, the range of implementation mechanisms and the extent of regional participation that they have attracted.

On one level, then, the human rights system appears a success story of international law: the development of human rights norms and institutions at the international level is significant, as is the level of participation in the system. But the implementation of UN human rights obligations presents a less positive picture: it is partial, inconsistent and based on a haphazard system of shaming (Hafner-Burton 2008). States may legally commit themselves to human rights standards, but often this does not translate into human rights protection at the national level. Unlike the European, Inter-American and African systems, the UN system offers no judicial scrutiny of breaches of human rights treaties. The political organs of the United Nations are generally reluctant to take stronger measures, such as sanctions, in response to human rights abuses. There is widespread disregard for human rights norms; indeed, treaty participation at the global level does not appear to have a clear effect on the protection of human rights in a particular country. Human rights also have a precarious status *within* international institutions. For example, Darrow and Arbour (2009) have examined the way that UN operational activities in development take human rights into account, concluding that human rights have only an insecure and fragile influence on UN practice. A common complaint is that there are great gaps between human rights standards set out in treaties and human rights protection within states.

Scholars have charted the relationship between treaty acceptance and state behaviour, finding little correlation between the two (Hathaway 2007). Indeed, some studies show that ratification of human rights treaties is sometimes followed by increased violations of human rights (Hafner-Burton and Tsutui 2007). Hathaway argues that states gain legitimacy from treaty ratification, but lose little by failure to implement. Variations on this conclusion are that treaty participation improves human rights practices in democracies, but not necessarily otherwise

(Neumayer 2005; cf. Cole 2012). Overall, the political-science literature shows that international human rights law is like a smoke detector that stops working whenever a fire is large.

A typical prescription for improving the implementation of human rights principles relies on coerced rule compliance. An example is the sporadic campaign for a global human rights court to implement the human rights treaties when national systems fail to do so. In 2011, a Swiss Government–sponsored panel of eminent jurists called for a world court of human rights that would adjudicate complaints of human rights violations by both states and non-state actors and provide reparations to victims (Panel on Human Dignity 2011: 41). Another proposed remedy to strengthen the international human rights system is the erection of greater barriers to participation in the system for countries that fail to demonstrate genuine commitment to rights, making ratification of human rights treaties probationary for states, to discourage 'insincere ratifiers' (Hathaway 2002). The design or reform of monitoring institutions to improve compliance with human rights obligations is also a staple of the human rights literature. The work of the UN human rights treaty monitoring bodies is a popular focus as it is cumbersome and inefficient in many ways.

One problem with this concentration on institutional reform as the route to transforming the dismal empirical reality of human rights protection is the political context of the human rights system. Attempts to streamline institutions and processes are often thwarted by regional coalitions, determined to ensure that state sovereignty trumps human rights scrutiny. In the case of the Swiss-sponsored proposal for a world court, for example, the capacity of the five permanent members of the UN Security Council to veto enforcement of court rulings would undermine the court's work (Alston 2014: 204). More generally, giving priority to judicial mechanisms as a response to human rights violations overlooks the limited capacity of international courts to create local cultures of respect for human rights (Alston 2014: 210).

3. Regulatory theory

Regulatory theory offers different approaches to the problem of the weak implementation of human rights standards. It draws attention to how international human rights law shapes behaviour both inside and outside international institutions. The concept of regulation has been

described as 'the intentional activity of attempting to control, order or influence the behaviour of others' (Black 2002: 1). A more expansive account of regulation includes all forms of pressure to change the course of events, even the unintentional effects of agency (Parker et al. 2004: 2). Regulation thus goes beyond legal rules and mechanisms and also comprises political, social, economic and psychological pressures. Understood in this way, the notion of regulation is much broader than that used in the international law literature to mean governmental imposition of public obligations on private parties, such as the direct duties on individuals created by international criminal law (Cogan 2011).

The lack of dialogue between the fields of human rights and regulation relates perhaps to their differing traditions. The focus of human rights has been largely on individual claims to universally applicable rights against the state and their capacity to mobilise and promote social change. Regulatory scholarship, on the other hand, is often associated with a quest for efficiency and rational design of institutions (Morgan 2007). Bronwen Morgan summarises the popular perception that rights and regulation are antithetical as 'rights claims act as constraints on state discretion while regulation allows the state to flex its muscles' (Morgan 2007: 18). This dichotomy is rather simplistic, as Eve Darian-Smith and Colin Scott (2009) have pointed out in one of the rare studies of human rights and regulation. Human rights standards can be invoked by states in an instrumental way to increase their powers, as well as by individuals and groups to promote governmental reform. Equally, international regulatory institutions can both restrict state power and promote human rights.

My interest here, however, is not so much the relationship between the fields of human rights and regulation but how regulatory theory can inform human rights. Here, I identify two regulatory concepts that can enrich our understanding of how international human rights law works: networked governance and ritualism.

Governance through human rights networks

International relations realists often dismiss human rights law as idealistic waffle. This is understandable, given the assumptions of realist theory, which posit the centrality of one type of actor, states, and a single type of motivation, pursuit of interest. Realism is based on assessments of national interest from the vantage point of those with political and

military power; it discards the more diffuse evidence of what the weak are up to. On this analysis, human rights law, which gives priority to the interests of individuals and minorities, is unlikely to play a significant role in international relations. Regulatory theory, in contrast, draws attention to the multiplicity and complexity of both actors and motives in the international sphere, deploying the notion of regulatory webs of influence (Braithwaite and Drahos 2000: 550–63). It observes that, at the global level, each separate regulatory control tends to be weak, and strength comes through the weaving together of frail strands to form a web and its animation by networks. Savvy actors discern which strands they should tighten at what time to make the web effective (Braithwaite and Drahos 2000). The idea of governance through networks explains why it is sometimes possible for those in a weak position to prevail over the strong. Networked governance is organised from nodes of activity or interest; of course, not all the nodes in a network will have identical concerns or strategies and there may be deep tensions between them. The strength and success of a network, indeed, depend on the management of dissonance among nodes.

An example of the regulatory power of human rights networks is the achievement of independence of Timor-Leste in 2002 (Braithwaite et al. 2012). Timor-Leste was a Portuguese colony until 1975, when it was invaded by Indonesia and was incorporated as the 27th Indonesian province in 1976. Although there was some international disapproval of Indonesia's actions—expressed, for example, in resolutions of the UN Security Council and the General Assembly adopted between 1975 and 1982—as the years passed, the legitimacy of Timor's incorporation was widely accepted. The standard, realist analysis, promoted with some vigour by successive Australian governments, was that Indonesia's control of Timor should be accommodated as a 'fact on the ground' and that Indonesia's vast military and economic resources would make Timorese independence impossible.

The situation in Timor, however, was strongly resisted by a wide range of groups without much apparent influence or power, forming networks built on human rights claims, particularly the right to self-determination. There were highly organised resistance networks inside Timor, including guerrilla fighters and the *clandestinos* (civilian groups organised in cells), who formed links with the Catholic Church. The right of the Timorese to self-determination is also supported by networks across Indonesia, in the former colonial power, Portugal, and other Lusophone countries;

by networks of veterans in Australia who had fought in Timor during World War II; as well as by the webs created through the tenacious diplomacy of José Ramos-Horta at the United Nations. None of these groups stood in a hierarchical relationship to another, but, rather, they were nodes in a network.

In a surprising move in 1999, Indonesian president BJ Habibie agreed to allow a referendum on whether or not Timor should remain a part of Indonesia. Most Indonesians expected the referendum would confirm Timor's incorporation into Indonesia. However, the networks of Timorese resistance galvanised to make the most of this opportunity. Almost 80 per cent of the population voted for independence, sparking a violent backlash from the Indonesian army and its local supporters. Eventually, under pressure from various international networks, Indonesia agreed to the creation of a UN peacebuilding mission to help bring the country to independence, which was achieved in 2002.

Some accounts of the creation of Timor-Leste take a realist tack, emphasising the shifting positions of powerful states as the explanation for the successful move to independence. They give short shrift to the role of human rights networks in advocating for the recognition of Indonesian human rights abuses at the international level and the complex connections between local, regional and international people and groups working for Timor-Leste's independence.

The idea of networked governance, in contrast, emphasises the need for attention to the way that those with little political or military power can create networks, often slowly and tentatively, enrolling disparate, and sometimes much more significant, groups to work towards an inspiring ideal of freedom. Timor-Leste illustrates the complex array of connections that came together to allow a tiny country to reach independence and the skilful tugging at various strands in the regulatory web at different times to achieve self-determination.

The case of Timor-Leste illustrates not only the power of human rights networks, but also their capacity, if successful, to morph into authoritarian networks: 'the networked power that is a force for liberation quickly becomes one of oppression when the key node of the oppositional network absorbs the commanding heights of the state' (Braithwaite et al. 2012: 4). If there is no network formed to balance and contain newly achieved state power, such power will quickly corrupt. Indeed, the skills of networked resistance fighters are particularly suited to authoritarian

rule (Braithwaite et al. 2012: 5). One way of countering these tyrannical tendencies is through creating mechanisms that allow the separation of powers within a polity that can be mobilised by networks.

Human rights ritualism

Regulatory theorists have used the term 'ritualism' to describe a way of adapting to a normative order, building on sociologist Robert Merton's typology of five modes of individual adaptation to cultural values: conformity, innovation, ritualism, retreatism and rebellion (Merton 1968: 194). These modes also appear at the level of organisations and among collectives. All five modes are evident in responses to international human rights regulation, but ritualism is particularly pervasive. It can be defined as 'acceptance of institutionalised means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves' (Braithwaite et al. 2007: 7).

Detailed studies of regulatory ritualism have been conducted in various contexts, including taxation and aged care. For example, in a three-country study, Braithwaite et al. (2007) found that nursing home operators rarely actively resisted regulation. It is much more common for operators to avoid confrontation with regulators and to agree to the language and techniques of regulation—for example, by changing a policy. This strategy usually favours the preservation of the status quo both because regulators do not have sophisticated follow-up mechanisms and because the new plans or policies are observed in a perfunctory way.

A typology of responses to regulation that builds on Merton (1968) and that has resonance in the human rights field is that of 'motivational postures'. Valerie Braithwaite (2009: 77–9) identifies postures towards normative systems such as commitment, capitulation, disengagement, resistance and game-playing, noting that more than one posture could be held simultaneously by those being regulated. Commitment is the most likely to lead to the realisation of regulatory goals. Capitulation means a certain willingness to abide by obligations and a resigned acceptance of the legitimacy of a regulatory regime, in the absence of genuine commitment to the regime's goals. Disengagement entails rejection of the underlying legitimacy of a regulatory regime and a refusal to participate. Resistance involves the refusal to abide by particular obligations but acceptance (even if half-hearted) of the underlying legitimacy of a regulatory regime. Both capitulation and resistance can represent forms of ritualism.

The concept of regulatory ritualism captures an important feature of the international human rights system. The high ratification rates of human rights treaties illustrate the preparedness of UN member states to accept the institutionalised normative order. This may be a response to pressures from the international community—for example, ratification of human rights treaties may be a conduit for development assistance or newly independent countries may accept human rights treaties to signal their membership of the international community. Ratification is a relatively straightforward step, involving a formal bureaucratic process, but implementation is much more costly and complex.

Rights ritualism is a more common response than outright rejection of human rights standards and institutions (rebellion, to use Merton's term, or disengagement, in Valerie Braithwaite's typology). Ritualism is a technique of embracing the language of human rights precisely to deflect human rights scrutiny and to avoid accountability for human rights abuses, while at the same time gaining the positive reputational benefits or legitimacy associated with human rights commitments. This is well illustrated in Fleur Adcock's (2012) case study of the ritualism of state responses to the work of UN special rapporteurs on human rights. Practices of ritualism can include ratifying human rights treaties without implementing their provisions domestically, perfunctory reporting to international human rights bodies, failing to provide remedies for human rights breaches or to develop policy to prevent violations and, in some circumstances, invoking claims of culture to undermine international standards.

Take, for example, the Universal Periodic Review (UPR), a mechanism devised by the UN HRC. This involves all 193 UN members being subjected to human rights scrutiny every four and a half years. This is a significant step in international human rights scrutiny, undermining the sense that there are some countries with incorrigibly bad human rights records and some countries of impeccable human rights virtue.

The UPR was established in the founding resolution of the HRC (5/1), which declares the basis of the review to be the UN Charter and the Universal Declaration, along with any human rights treaties to which the state is a party and any voluntary commitments undertaken by the state in international forums. The UPR's purpose is an assessment of the human rights situation in each state in an 'objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner' (HRC Res. 5/1). Three documents are central to the UPR: a national

report by the state (states are encouraged to consult with members of civil society before finalising their state report); a compilation of existing treaty body reports and any relevant reports from special rapporteurs prepared by the OHCHR; and a summary of 'credible and reliable' information received by the OHCHR from 'other stakeholders', such as NGOs.

The most dramatic aspect of the UPR is the 'interactive dialogue' with the state under review, conducted in public in Salle XX in the Palais des Nations in Geneva, in which the state presents its report and other states can question it and make recommendations. After the dialogue, a draft report is prepared. This is essentially a transcription of the recommendations made along with any immediate responses by the state. The state then has a short period to consider the recommendations and respond to them. The final act in this drama is when a compilation of these documents is forwarded to the whole HRC as its report, and this is formally accepted. At this session, the state under review can again make a presentation and states, national human rights institutions and NGOs can make observations. The UPR has completed its first full cycle and the second cycle will conclude in 2016.

The UPR process has generated a remarkable level of coordination and communication on human rights not only between states but also among states, other human rights mechanisms and civil society. But the UPR can also deflect or postpone human rights observance, providing fertile ground for ritualism. In the context of the UPR, ritualism can mean participation in the process of reports and meetings, and formal acceptance of recommendations, but an indifference to or reluctance about increasing the protection of human rights.

A question is whether ritualism can be transformed into conformity or commitment and what role the UPR can play in this. Taking a regulatory approach to the UPR allows us to identify some ways of countering human rights ritualism that go beyond the standard prescriptions of institutional reform or tougher enforcement mechanisms. For example, Cowan (2014) has suggested that the repetitive character of the UPR provides a less confrontational space in which difficult human rights issues can be raised. Using the notion of motivational postures, the UPR practice for African states has been analysed as a posture of capitulation that can give human rights norms some legitimacy (Bulto 2014). And civil society networks have used the UPR to publicise a state's progress in human rights protection (UPR Info 2014).

Some scholars have dismissed cooperative peer review in the context of human rights as a weak regulatory measure (for example, Neumeyer 2005: 926). However, although states may initially participate in cooperative regulatory regimes in a perfunctory manner, or even for reasons at odds with the stated purposes of the regime, they are sometimes drawn into more effective commitments simply through their representatives' direct experience of participation and a desire to claim virtue in implementation (Braithwaite and Drahos 2000: 555–6). There is some evidence of such a process at the UPR. For example, states often announce human rights initiatives prior to their review, and mission staff in Geneva display a marked willingness to engage with civil society throughout the review process (Schokman and Lynch 2014). Scrutiny mechanisms such as the UPR can discourage states from undermining the legitimacy gained initially by signing on to international human rights instruments (Cole 2012). It is also possible that involvement over time in a cooperative regime leads to an internalisation, or socialisation, by participants of the regime's goals (Goodman and Jinks 2004).

Along with recognition of the potential offered by self-regulation and peer review in certain contexts, the regulatory literature also offers the idea of continuous improvement. This focuses on incremental, constantly monitored steps, rather than great leaps forward. It can be achieved by moving from a culture of blame to a culture of learning—a move that is clearly envisaged by the UPR process, with its emphasis on peer review and the 'sharing of best human rights practices' (HRC Res 5/1, annex., 27 (b)). Even so, the regulatory literature highlights the need to guard against the process of continuous improvement itself becoming ritualised (Braithwaite et al. 2007: 207–8). This problem is evident in some aspects of the UPR's second cycle, where states have sometimes interpreted recommendations from the first cycle in very restrictive ways (UPR Info 2014).

4. Conclusion: Responsive human rights regulation

A sense of disappointment besets the field of human rights. Despite the inspirational norms and sophisticated architecture of the international human rights system, its weaknesses and failures to regulate human rights abuses are manifest. Indeed, there is an academic industry in announcements of the breakdowns or even the death of human rights (for example, Douzinas 2000; Hopgood 2013).

Regulatory theory offers a different and more optimistic perspective. Its focus is not so much the strength of the treaty texts, their formal methods of implementation or their impact on states who are parties to them, but rather on the way that human rights norms as expressed in the treaties can be mobilised by non-state actors to regulate states' and others' behaviour. In other words, regulatory theory is interested in a much broader range of influences than traditional legal tools and mechanisms. The potential of complex networks of third parties in galvanising international standards in the context of transnational environmental crime is explored in Julie Ayling's chapter in this collection (Chapter 29). Similarly, Susan Sell has chronicled the success of coalitions of activists and developing countries in changing the terms of the World Trade Organization's approaches to intellectual property in pharmaceuticals, shifting it from an issue of corporate property rights to one of public health (Sell 2003: 142–62).

Regulatory theory suggests the promise of networked governance of human rights, which enables the weak to mobilise human rights principles against oppression, challenging the realist disdain for human rights. Regulatory theory also draws attention to the role of networks in designing the architecture of human rights regulation. A good example of this is the influence of national and international disability coalitions in the drafting of the 2006 Convention of the Rights of Persons with Disabilities (Sabatello and Schulze 2013). A second feature of regulatory theory is its identification of types of behaviour, such as ritualism, which can undermine the protection of human rights. It suggests the value of self-regulation and peer regulation as effective means of countering ritualism in the human rights field, even in the absence of commitment among participants to the goals of a regulatory regime.

The concept of responsive regulation is valuable in achieving normative goals, such as human rights. The idea of responsive regulation—first developed in the context of business regulation—is built on pyramids of supports and pyramids of sanctions. The idea is to start by identifying the strengths of a particular system or actor, and then to expand them through building capacity (Braithwaite 2011: 480). Superlative forms of recognition sit at the tip of the support pyramid. Moving up the pyramid of supports encourages the growth of an actor's capacity to respond to problems. If particular problems are impervious to regulation through the provision of support, a pyramid of sanctions can be deployed. At its base are dialogue-based sanctions such as education and persuasion.

Increasingly tough measures apply moving up the sanctions pyramid, such as shaming, sanctions and, finally, even ejection from the system (Braithwaite 2011: 482). Escalating the severity of penalties takes place only when the previous step has manifestly failed.

A pyramid shape has a broad base reaching to a narrow tip, indicating progression from general ideas and concepts to highly specific ones. It embodies the regulatory insight that it is most efficient to start at the base of the pyramid and that, even in the most serious cases, escalation is necessary only when collaborative solutions or self-regulation fail. In Braithwaite's words:

> The pyramidal presumption of persuasion gives the cheaper, more respectful option a chance to work first. More costly punitive attempts at control are thus held in reserve for the minority of cases where persuasion fails. (Braithwaite 2011: 484)

This process also has the benefit of imbuing the pointy end of the sanctions pyramid with more legitimacy. As Kristina Murphy's chapter in this book (Chapter 3) shows, perceived procedural fairness increases the likelihood of compliance with a normative system.

Responsive regulation translates productively in the field of human rights, highlighting the value of persuasion, education and capacity building as the first steps to achieving compliance with human rights norms. The main principles of responsive regulation include flexibility, giving voice to stakeholders, engaging resisters with fairness, nurturing motivation, signalling but not threatening the possibility of escalation and enrolling powerful regulatory partners in networks (Braithwaite 2011). Thus, laggards may be willing to acknowledge problems complying with international human rights standards if they can see that this will protect them from more punitive forms of sanctions (Braithwaite 2011: 496). Other lessons from responsive regulation that are applicable to the international human rights system are the value of collaborative regulation, of an assumption that the regulatee has the capacity to change and of eliciting active responsibility (with passive responsibility as a fallback position) for human rights protection.

Theories of responsive regulation also point to the weak spots in the international human rights system. Braithwaite has pointed out that regulation works best when there is a firm commitment to escalation when dialogic-based sanctions do not work (Braithwaite 2011: 489). He notes the paradox that 'by having a capability to escalate to tough

enforcement, most regulation can be about collaborative capacity building' (Braithwaite 2011: 475). Such a capability is difficult to maintain in the international legal system, which is highly attuned to the distribution of political power and where imposition of formal sanctions is rare. However, as the Timor-Leste case shows, it is possible for networks of states, aid donors, business, the media and NGOs to create webs of informal sanctions in a regulatory pyramid of human rights. These can go from publicising human rights abuses to withdrawal of donor support to expulsion of a state from an international organisation (Braithwaite et al. 2012: Chapter 3).

Through the lens of responsive regulation, the UN HRC's UPR process can be seen as a partial success. It operates at the broad base of a regulatory pyramid of supports for human rights compliance but has the capacity, through peer review, to increase this support. As a pyramid of sanctions, it is, so far, less efficacious, with rather porous systems of scrutiny of implementation of recommendations and little risk of penalties for non-implementation (UPR Info 2014).

Perhaps the most important implication of regulatory theory for the international human rights system is the limitation of purely legal approaches to the protection of human rights. The concept of responsiveness suggests that the popular idea of a world human rights court as the answer to weak implementation of human rights standards is misguided. The goal of the international human rights system should, rather, be providing forms of access to justice for human rights violations that respond to particular contexts (Braithwaite and Parker 2004: 285). Legal norms and institutions may be of value in this project, but simply as strands in a regulatory web. They derive strength from being woven with other strands into a fabric of flexible regulation.

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22

Global governance of labour migration: From 'management' of migration to an integrated rights-based approach

Nicola Piper

1. Introduction

In recent years, international migration has reached a firm place on the global policy agenda as evidenced by a flurry of activities and actors involved, amounting to what some commentators have come to call the 'global governance of migration' (Grugel and Piper 2007; Betts 2011; Koser 2010).

The idea of global governance in its various conceptualisations has emerged to capture the cooperation or coordination of different actors (governmental, non-governmental and international organisations) within a network made up of formal and informal rules to reform institutions of 'the global' (Rittberger 2001; Kennedy et al. 2002). As a concept that took off gradually after the end of the Cold War, global governance has been used not solely for the description and analysis of complex structures within a globalising world that is no longer subject to classification into 'first, second and third worlds'. This concept is also part of a wider attempt to change this 'new' world into something different or better in a normative sense (Habermann 2011).

Falk (1995) distinguishes between 'inhumane' and 'humane' governance, with the former characterised by unequal distribution of wealth and extensive violation of human rights; the latter, in contrast, emphasises people-centred criteria of progress—measures such as declines in poverty and adherence to human rights. 'Humane' governance has been reconceptualised as rights-based governance, based on an approach to rights beyond the sphere of international law, thus reflecting the increasing purchase of rights discourses and rights activism emanating from civil society (Grugel and Piper 2007).

Rights-based governance is essentially and necessarily driven 'from below'—that is, a project that involves or derives from collective activism by social movements and transnational advocacy networks. This is even more so the case for migrant workers who find themselves marginalised as noncitizens or 'absentee citizens', and thus in a particularly precarious situation in social, economic, legal and political terms. In this sense, rights-based governance mirrors other decentred conceptualisations of governance, such as networked or nodal governance (see Charlesworth, Chapter 21; and Holley and Shearing, Chapter 10, this volume). What distinguishes rights-based governance, however, is the struggle to advance and promote social justice for noncitizens who not only have had their rights seriously restricted but are also facing enormous hurdles in politically agitating for their rights. In other words, migrant workers—as both noncitizens and workers in primarily low-wage sectors or types of work rejected by locals—are increasingly excluded from the process of forging organisations with which to network and through which to channel their concerns and demands. This is why insights from political sociology—a component missing from existing work on global migration governance (but see Grugel and Piper 2007)—are vital.

Recognition that, as a policy field, international migration for employment requires not only bilateral but also effective global regulation has come very late when compared with other issue areas that have been subject to global governance for some time, such as trade, health and finance (Jönsson and Tallberg 2010; Betts 2011; Koser 2010). Yet, international migration is among the key features of economic globalisation today

(Standing 2008), and, as a truly global phenomenon, migration implicates most, if not all, countries in the world in one form or another, as major migrant senders and/or receivers.[1]

The discourse and concomitant policy prescriptions that have resulted so far from this new international cooperation on migration have largely centred on what some have referred to as 'the paradigm of managed temporary labor migration' (Chi 2008: 500). The 'management of migration' discourse is linked to the renewed interest in migration's contribution to development (the 'migration–development nexus'), placing great emphasis on the design of formal policies by which origin and destination states try to assert control over migratory flows and access to employment—that is, over income and profit generation as well as the securing of livelihoods through migration. In essence, what have emerged are attempts at 'managing migration' in the sense of peoples' cross-border movements alongside 'managing poverty' through access to overseas employment. Temporary contract migration schemes are attractive as they allow destination countries to adjust their workforce to the cyclical nature of economies without further commitments (turning migrants into what political economists would refer to as 'disposable labour'), while ensuring a steady flow of remittances on which many countries of origin heavily depend. As a result of this scenario, however, migrants' labour and human rights are more and more curtailed.

Being in practice embedded in an increasingly restrictive policy environment based on selective if not discriminatory criteria, current policy practices heavily circumscribe the human rights of migrants. Despite the existing set of comprehensive international human rights instruments for the protection of migrant workers, as low-skilled/low-wage temporary contract workers, many migrants in fact find themselves in highly vulnerable and exploitative situations. As it is argued here, migration governance, therefore, continues to fail in several key areas, as reflected in decent work deficits with regard to employment opportunities, labour rights and social protection. This is so because 'management of migration' is not accompanied by the management of working conditions and labour relations. In addition—and related to this decent work deficit—many migrants are unable to function as 'agents of development' through the acquisition of skills and savings

1 Some countries are classified as 'transit countries', but often migrants whose original intention was to move on remain. In other words, transit countries often become destination countries.

that would turn them into 'entrepreneurs' on return to their home communities (Spitzer and Piper 2014). It is the nascent global migrant rights movement, supported by a number of global trade unions, that is advocating for an integrated rights-based approach to migration to address this disconnect between migration and labour governance.

This chapter analyses the emerging institutional architecture of migration governance from the vantage point of advocacy networks that have taken up the concerns on behalf of, or are run by, the many marginalised migrants (that is, low-wage/low-skill migrant workers employed on temporary contracts), probing into the obstacles to, and opportunities for, shaping the direction of policymaking towards a rights-based approach to migration within this evolving architecture. By introducing a social movement perspective, the elitist project of global migration governance is being re-envisioned and resisted.

2. Global migration governance: Institutions and rights activism

In an institutional sense, migration for work is not governed by a formal international regime of the kind that exists for refugees, with the United Nations (UN) High Commissioner for Refugees as the central node. Instead, various UN agencies and international organisations, including international financial institutions, are involved in producing data about the international migration of workers and the translation of such knowledge into policy. It is mainly for this reason that the global architecture of migration governance has been described as fragmented.

Moreover, the International Labour Organization (ILO) as the central standard-setting international organisation (IO) in the realm of labour (migrant and non-migrant)—and, arguably, the only global institution with the potential to combine migration with labour governance—has occupied a marginal position within the emerging migration governance in terms of its ability to assert influence on the direction of the current policy debate (Standing 2008). This may appear somewhat surprising given the fact that migration is linked, directly or indirectly, to the world of work: more than 50 per cent of the 214 million international migrants today are economically active and, together with their families, migrant workers make up over 90 per cent of this total (ILO 2013: 3). However, the inability of the ILO to push itself to the centre of the

migration governance debate and take a leading role has to do with the general onslaught on workers' rights that has come with the spreading of neoliberalism alongside enhanced global interconnections of economies and production systems.

Global migration governance has, in fact, come about at a specific, historic moment in time when labour in general (that is, migrant and non-migrant) has been subjected to the downgrading of standards through the loss of traditional union rights, which is attributed to the spread of neoliberalism (Standing 2011; Schierup and Castles 2011) and economic globalisation characterised by the 'race to the bottom' in the search for cheaper labour. This trend is reflected in the weakened position of the ILO, the key player in the upholding of migrants' rights in their role as *workers* (Standing 2008). The organisation's historical success in promoting labour standards can be attributed in part to its tripartite structure,[2] which has allowed for significant input into the standard-setting process from two specific non-state actors: employers and trade unions.

However, these successes are under pressure from within and from without. Pressure from within includes the lack of inclusion of organisations beyond the traditional employer–employee nexus that has historically emerged from the specific experience of European labourism, which has led to the exclusion of other non-union labour organisations (migrant and non-migrant) (Standing 2008). There are also new state-owned processes of deliberation[3] that occur outside the UN framework and which pose direct competition to standard-setting organisations like the ILO. In the migration field, the main competitor for the ILO is the International Organization for Migration (IOM), whose mandate is not based on the United Nations' human rights framework. It is an intergovernmental organisation whose work is project-based and, thus, also funding-based (Geiger 2010). In terms of process and participation, global dialogue on migration has become subject to extra-UN processes, such as the annual Global Forum on Migration and Development (GFMD), which is state-led and occurs behind closed doors (apart from

2 This structure refers to three parties that make up its constituency: worker organisations (trade unions), employer associations and governments.

3 In this context, the notion of 'forum shopping' has been used to describe states' choices of suitable sites to advance their interests. We would instead refer to this phenomenon as 'forum shifting' to reflect the perspective of political activist organisations such as trade unions and migrant rights groups for whom this choice given to states means fewer opportunities for participation and less access.

short 'interspace' sessions with selected members from civil society), thus escaping scrutiny by and input from civil society organisations (such as trade unions and other labour rights organisations). These developments have led critics to argue that without paying greater attention to migrant workers' rights, the benefits of migration are skewed in favour of employers and the ever expanding private recruitment industry[4] that operates across borders, to the expense of migrants' own benefits (Wickramasekara 2009; Piper 2008). Only a rights-based approach can ameliorate this situation.

The institutional fragmentation of migration governance and the marginal role of the ILO as the most democratic global organisation in procedural terms therein, however, pose serious challenges for the ability of migrant rights advocacy organisations to represent the concerns of their constituencies. To overcome the challenges of institutional barriers, on the one hand, and institutional fragmentation, on the other, migrant rights activists have stepped up their mobilising efforts at the global level, building on pockets of existing national and regional activism. This is well expressed in the following quotation:

> Our biggest asset is the existence of global social movements. Our task is to think and work together so that we move beyond advocacy for policy changes, and towards a strong process of inter-movement building so that we can occupy the relevant spaces and challenge the global paradigm. (WSFM 2012: 42)

By embarking on broader social movement building, migrant rights activists have come to address not only the consequences but also the major causes of international migration. The key concept in the development of a comprehensive approach to migrants' rights thereby is 'decent work' applied in a transnational context—that is, to the 'here and there'. This was taken up in the Final Declaration of the World Social Forum on Migration that was held in Manila in 2012; the right not to emigrate should be in place in the countries of origin. This implies creating the necessary conditions that transform migration into a choice rather than a necessity (Clause 31).

4 The key issue with the private recruitment industry is the charging of excessive fees to migrants (rather than employers), often in the country of origin and destination countries, which is deemed illegal according to ILO Convention 181.

The concept of decent work has gained prominence because most forms of international migration have employment-related aspects attached, as cross-border movement of people is largely a response to a lack of economic opportunities 'at home', often accompanied by conditions of insufficient or non-existent social safety nets provided by states (Hujo and Piper 2010). Migrants tend to find themselves in a state of precariousness on the basis of labouring in low-wage sectors, often in an undocumented or contract-tied manner (ILO 2013), and, then, again, post-migration when returning home to often still hopeless situations that often drive migrants into remigration (Spitzer and Piper 2014).

Bringing labour back in

The management of migration literature and concomitant policy prescriptions are not the only things that have left out concerns for labour relations and working conditions. The call for 'bringing labour back' into academic discourse and conceptualisations of global governance as well as into policy has reappeared from various corners and epistemic circles, voiced most strongly by labour relationists, sociologists and labour geographers (Herod 1995; Munck 2000; Bronfenbrenner 2007 Evans 2010). Calls to study labour have also appeared in the context of global production network analysis—an area of scholarly inquiry marked by an 'inadequate incorporation of labour' (Stringer et al. 2013: 3).

By studying 'networks of labour' beyond macro-structuralist perspectives, such scholars have shifted attention to political agency. Increasing calls to 'bring labour back in' (Cumbers et al. 2008) are mainly driven by the imbalance among overtly structural analyses that have shifted worker agency to the back stage (Herod 1995). International relations literature on global governance, in contrast, has neglected labour and, as a result, has not concerned itself with the role of the ILO and trade unions in the study of international organisations and politics. This stands at odds with the fact that, historically, the labour movement has constituted one of the most significant drivers of social reform (Gallin 2000) and an important ally in the struggle for social justice in general (Leather 2004) and migrant labour's rights in particular (Ally 2005; Piper 2010).

Injecting the role of collective agency by social and labour movements into the broader literature on globalisation—especially the combined appreciation of the organisational dimension of globalisation (regulation, governance), the direction global policy is taking in certain issue areas

and the way in which the outcome is reshaping the lives of real people in the global web of places (cf. Coe and Yeung 2001)—paves the way for a 'bottom-up' perspective on global governance (Grugel and Piper 2007).

3. Resisting global migration governance from the 'bottom up'

Within the global governance literature, two issues have attracted considerable scholarly attention: 1) the issue of democratic deficit and transparency, given the lack of opportunities for direct participation by civil society organisations (Scholte 2011); and 2) the role of IOs and the degree to which they are independent from states, raising the issue of IOs' levels of autonomy (Finnemore 1993).

The latter strand of the literature questions whether IOs are constrained by the sovereign (and financial) power of states or whether they are autonomous organisations capable of setting up independent programs, and even influencing public policy (Loescher 2001; Finnemore 1993; Charnock 2006; on migration, see Geiger 2010). Overall, much of the existing scholarship on IOs has focused on the relationship between IOs and states, with most analyses of global governance tending to centre on the operation of power and changes within the configuration of that power in the context of global institutions. Far less is known about 'bottom-up governance' and the relationships of conflict and resistance that emerge at the interface between vulnerable groups of people (here, migrant workers), global governance institutions and states, especially from the perspective of civil society activists.

In the realm of human rights theorising, of which labour and migrant rights are a subgroup, it is the contradictory role of the state—as oppressor or violator of rights, on the one hand, and the primary agent of justice or deliverer of rights, on the other—that constitutes a paradox (Pogge 2001; Kuper 2005b). This is the main reason social movement scholars argue that the state remains the principal target for political action (Grugel 2004; Tarrow 2006). Yet, there is also increasing recognition of the role and responsibility of transnational actors in global politics (Jönsson and Tallberg 2010), as both violators of human rights (as evident in the increasing prominence of the 'human rights and business' debate) and those responsible for realising rights (Kuper 2005a). In this context, the debate on global governance has concentrated

on the question of whether cooperation within the international system, together with the integration of new private actors, makes it more democratic, legitimate and accountable (Zürn 2005; Erman and Uhlin 2010). This last concern has triggered increased interest in the contribution of civil society organisations (CSOs) to democratising public sector institutions at any level (Scholte 2011).

In the human rights field, it has been shown that global norms are increasingly shaped through interaction between states, international institutions and activist networks, many of which (such as peasants, farmers, female informal sector workers and so on) today emanate from the global South (Rajagopal 2012). The fact that global norms and legal enforcement are increasingly influenced by the everyday resistance of ordinary people, channelled through collective organisations, points to the relevance of social movements and, thus, to a theory of resistance derived from the mobilising of hitherto marginal or non-existent political constituencies (Stammers 2009; see also Charlesworth, Chapter 21, this volume). In this sense, as argued by Rajagopal (2012), it is inadequate to analyse human rights from the exclusive perspective of states (as realists/positivists would do) or from the exclusive perspective of the individual (as liberals would do).

Hence, a conceptualisation of resistance is put forward here that takes transformative mobilisation as its core feature, whereby 'transformative' is used to refer to changing institutional practices pushed from below via activist networks. In this sense, the case of the global migrant rights movement falls into the category of 'overt' resistance (as per the typology developed by Hollander and Einwohner 2004)—that is, a category of resistance that involves visible behaviour easily recognisable by targets and observers and, thus, includes collective acts such as mobilisation by, or into, social movements. However, as social movement literature has predominantly concerned itself with grassroots mobilisation, constructivist international relations scholarship has to be brought in as it highlights the socially constructed nature of international relations (in contrast with pure materialism) and, thus, opens up an avenue for the role of ideas in international advocacy. Unlike classic social movement scholarship, international relations has the benefit of addressing political contention in a cross-border context. This allows for analysis and conceptualisation of transnational social movements. Transnational

advocacy networks are the primary actors in the pursuit of social justice and human rights vis-a-vis global governance processes and institutions (Keck and Sikkink 1998).

Importantly, international relations and development studies scholarship on global governance have also raised the issue of the democratic deficit inherent in supranational policymaking processes. It is, however, not sufficient to simply highlight the democratic deficit of international organisations in operational and processual terms, but to delve into the actual *achievement* of transformative justice via institutional change. In an abstract sense, resistance concerns struggles for human freedom and liberation from structural oppression and exploitation (Gills and Gray 2012). In relation to migration governance, this relates to greater freedom of mobility that would render migration a choice, not a necessity (GCIM 2005; UNDP 2009). In concrete terms, transformation of institutions has to come from the bottom up—and, in the context of global governing institutions, from 'global justice networks' (Routledge and Cumbers 2009). Given the fragmented nature of global migration governance, for resistance to have an effective impact it has to address this institutional complexity by engaging in equally complex 'networks of networks'.

Nascent global migrant rights movement

The recent developments around the tabling and subsequent adoption of ILO Convention No. 189 on Decent Work for Domestic Workers in 2011 constitute an example of the successful strategy of forming 'networks of networks' between migrant rights organisations and trade unions. The adoption of ILO Convention No. 189, which constitutes a political victory, is an instrument that regulates a hitherto unregulated sector in the informal economy whose workforce is primarily female and primarily located in or drawn from the global South, migrant and non-migrant. Although it was formally adopted by two-thirds of the ILO's 185 member states at its annual congress in 2012 and formally entered into force as of September 2013, the remaining challenge is to boost its ratification record (as of December 2014, there were 16 ratifications).

Importantly, the success of the ILO convention is related to the networks of networks. It was the involvement of unconventional unionists and migrant worker organisations that, in fact, revived the entire ILO process and its usually very routinised and highly technical procedures. Senior

ILO staff found this new approach very refreshing and stimulating (Personal interviews, conducted in 2011 and 2012). Whether or not opening up channels to domestic and migrant worker organisations constitutes a breakup of the sacrosanct tripartite structure of the ILO by turning this into a consistent feature of the organisation is yet to be seen. But it is a step in the right direction, as pointed out by critics who have argued for the ILO's institutional renewal and inclusion of non-traditional types of workers (Standing 2008), who make up the majority of workers. In this way, the ILO would also become relevant to the situation of workers in the global South (Sen 2000).

At the global level, migrant rights organisations and their regional networks formed the Peoples' Global Action on Migration, Development and Human Rights (PGA) in response to the state-led process and closed-door deliberations of the GFMD and the broad-based composition of its Civil Society Days. The PGA was established at the first global meeting on international migration and development held at UN level, the UN High Level Dialogue on Migration and Development, in 2006. It comprises regional and national migrant rights networks, supported by global and a few national trade unions.[5] At the PGA in Mexico City in 2010, for instance, there were nearly 800 delegates representing migrant associations, trade unions, human rights and women's groups, faith-based and anti-poverty organisations as well as academics.

The PGA brings together groups from around the world and provides essential space for lobbying and pressuring governments and international bodies to look at migration—and development—from a human rights perspective and to make governments accountable to their international human rights and development commitments. Furthermore, PGA paves the way for capacity building and establishment or widening of networks.

Born of the PGA process is the Global Coalition of Migration (GCM), the first truly global initiative aimed at the promotion of migrants' rights. It constitutes a formal alliance of global unions, regional and national networks of membership-based migrant rights organisations from Europe, Asia, Africa, Latin America and North America as well as two academic research networks. It uses the network form of operation to share information and resources and to develop common

5 Those are: Building and Woodworkers International (BWI), Irish Congress of Trade Unions (ICTU), Public Services International (PSI), the Canadian Trade Union Council and American Federation of Labor and Congress of Industrial Organizations (AFL–CIO).

strategies. One such strategy is to broaden and reach out to other social movements—such as Via Campensina, the peasant movement that is now part of the GCM—based on the personal experience of displacement of many peasants and the subsequent migration of their wives or other female family members to work overseas as domestic workers.

4. Concluding remarks

To overcome the challenges posed by multiple institutional deficiencies and barriers to participation in decision-making processes at the global level, migrant rights activists have begun to step up their mobilising efforts around the globe. Building on grassroots migrant activism, transnational advocacy networks have been formed and broader social movement building, including transnational campaigns for labour standards and labour rights, embarked on. In so doing, migrant rights advocates have developed a comprehensive approach to migrant rights that addresses not only the consequences but also the major causes of international migration. Such initiatives are challenging elitist ('top-down') projects of global governance by articulating alternative visions based on international human and labour rights principles ('bottom-up governance').

It is through the CSO-led processes that a radical rethinking of migration and the socioeconomic development models that surround its governance is being pursued. These CSO gatherings are used to deepen the analysis of the migration–development nexus and to sharpen their counterdiscourse of what they view as a systematised labour export–import program practised on a global scale. In their interpretation, such practice amounts to forced migration and, thus, is replete with human and labour rights' violations.

The key messages that have emanated from these 'networks of networks' and cross-sectoral alliances are: guarantee the right to free movement, on the one hand, and, on the other, the creation of employment/livelihood opportunities for people 'at home'—that is, the right not to have to migrate in the first place. The activists are politically savvy enough to realise that the 'right not to have to migrate' can be misinterpreted and abused by anti-migrant constituencies in mostly migrant-receiving countries. Instead, they resort to the demand for decent work 'here' and

'there', thus making use of the ILO's inclusive framework—inclusive of migrants and non-migrants as well as of the situation of sending and receiving communities.

In sum, the unified message that has come out of the CSO-led initiatives in response to the migration–development nexus and 'management of migration' discourse promoted by global governing bodies is that development goes beyond economics and involves comprehensive human, or people-centred, development. Instead of the current migration–development paradigm that views migrants as agents of development in the neoliberal sense of 'self-help' in an era of increasing privatisation of public goods, the demand is for a refocusing on the migration–employment nexus, which combines migration and labour governance—and, therefore, puts the ILO at centre-stage in the global governance of migration. In this way, an integrated rights-based approach to migration is conceptually developed and politically fought for that combines migration and labour governance from a holistic (that is, transnational) perspective.

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23

Regulatory rule of law

Veronica L Taylor

1. Introduction

For much of the twentieth century, we thought of rule of law as being part of the form and operation of a nation-state, expressed through attributes such as uniform application of law, the state's own submission to law and judicial independence from the executive branch of government. Domestic rule of law has been theorised in different ways within Western democracies (for example, Krygier 2015), but the fall of the Berlin Wall in 1989 triggered a recasting of both the conceptualisation and the practice of rule of law. As the United States and its allies sought to democratise Eastern and Central Europe and the former Soviet Union, and open those markets to capitalism, the so-called 'revival' of rule of law unfolded (Carothers 1998). Rule of law now emerged in a more obviously ideological and instrumental guise—as a policy tool intended to advance political goals worldwide, through multilateral and bilateral interventions in transitional and developing states, official development assistance (ODA), state-building and peacekeeping (for example, Sannerholm et al. 2012).

Twenty-five years later, the conceptual range, regulatory effect and geographic reach of rule of law have grown dramatically (Carothers 1998, 2009). We now acknowledge that its form and function in Asia and in authoritarian regimes are very different to our original Anglo-European definitions (for example, Peerenboom 2004; Mason 2011;

Cheeseman 2015). Following the September 2001 terrorist attacks on the United States, rule of law has been further mobilised to combat security risks and terrorism. Today, we label these policy interventions in various ways, including 'rule of law promotion', 'rule of law assistance, 'law and justice reform', 'law and development', 'governance', 'legal and institutional reform', 'access to justice', 'legal empowerment', 'security sector reform', 'international peacekeeping' and 'international policing', but, in this chapter, we will collapse these categories and focus on the regulatory character of what I will call 'rule of law promotion'.

Regulatory scholars have written extensively on the intersection of regulation and law within domestic legal systems (for example, Parker et al. 2004; Freigang 2002). This chapter starts from the premise that rule of law projected transnationally is regulatory: it forms part of multilateral or bilateral policies designed to change the course of events in target states. In this chapter, we look at just two aspects of this phenomenon: 1) how rule of law norms are produced, exchanged and distributed by transnational actors in a global marketplace; and 2) the extent to which transnational rule of law actors are themselves subject to regulation.

2. Regulatory rule of law defined

Rule of law promotion can be viewed as one of many ways in which a transnational legal order (Halliday and Shaffer 2015) is constructed. It involves multiple actors at the international, transnational, national and local levels who interact through processes such as diplomacy, ODA, military interventions and provision of humanitarian aid. Rule of law promotion is transnational because it sits 'somewhere beyond the reach of the nation-state and below the legal regime of international law and the authority of international organizations' (Folke Schuppert 2012: 90).

The projects that become the 'carriers' of rule of law concepts and practices (for example, Behrends et al. 2014) between these levels of governance range from electoral monitoring and support, through post-conflict legal reconstruction, to setting up institutions for transitional justice. So, when the Australian Federal Police use their International Deployment Group to keep the peace and provide police training in the Solomon Islands,

this is rule of law promotion; so, too, are projects where faith-based non-governmental organisations (NGOs) are subcontracted by multilateral donors to provide legal advocacy for women affected by violence.

Rule of law interventions often follow a crisis—such as the US declaration of the 'war on terror' in 2001—or a political watershed, such as the Burmese military junta's 'roadmap to democracy' announced in 2008. These moments create fissures in the borders of otherwise sovereign states that admit external actors, using international financing or mandates under international law to advance rule of law reform prescriptions. They do this through multilateral organisations—for example, the Organisation for Economic Co-operation and Development (OECD) or the United Nations (UN) and its agencies—or through bilateral or regional negotiations, or unilaterally, and often with the help of political allies and globalised epistemic communities such as international NGOs and rule of law practitioners (Simion and Taylor 2015).

The legitimating discourse for rule of law interventions is that the target state 'lacks' rule of law (Mattei and Nader 2008), but the driver is undeniably the policy aims of the intervening actors (for example, Lancaster 2006), which may include accession to a multilateral trade agreement (for example, Humphreys 2010), securing a weak neighbour's porous borders, improving human rights as a means of creating peace and security or creating a more supportive climate for foreign investment.

3. Normative conflict within rule of law promotion

Contemporary rule of law projects are now ambitious in scope; they aim to do much more than improve the legislative framework or strengthen the judiciary in developing economies (for example, Hammegren 2015; van Rooij and Nicholson 2013). The World Bank has been a dominant actor in pursuing multiple, and often conflicting, rule of law objectives (for example, World Bank 2011). Santos (2006) profiles the bank's own use of competing—and conflicting—ideas of the rule of law in its reform interventions: Dicey's separation of powers and submission of the state to law; Hayek's realisation of market transactions with minimal state interference; Weber's substantive focus on norms and personnel shaping institutions; and Sen's (1999) emphasis on institutions and their representatives doing distributional equity to citizens.

The malleability of rule of law as a concept lends itself to use by dictators and progressive reformers alike (for example, Tamanaha 2004, 2006). Many thoughtful scholars argue that 'rule of law' should deliver a fuller set of substantive and procedural justice norms, such as human rights, access to justice and distributive justice (for example, Armytage 2012; Cane 2010; Mason 2011). Krygier (2010) observes that freighting the idea of rule of law with the obligation to deliver security, human rights, social equity and market efficiency—as well as the institutions to deliver these—has diminished our understanding of the conditions under which the rule of law flourishes and its fundamental purpose, which, he argues, is to curb the exercise of arbitrary power by both state and non-state actors.

The choice of conceptual foundation matters: how you design security sector reform (SSR), for example, depends on what you think its normative goals should be. If you see SSR as a technical program designed to strengthen the criminal justice sector and provide solutions to specialised threats such as narcotics control and counterterrorism, establishing US-style high-security prisons in somewhere like Afghanistan will be a priority. If human security is your concern, you would ask how SSR interventions in that country could reduce the incidence of women and children jailed for crimes of poverty, or how to manage opportunistic 'forum shopping' between state justice institutions and those of religious and customary law (for example, Jayasuriya 2012).

4. Rule of law as a transnational marketplace

This apparent goal confusion in rule of law interventions is not accidental. Carothers and Samet-Marram (2015) have reimagined the post-1989 period of global democracy promotion as a 'global marketplace of political change'. Rule of law promotion is both a symbolic and a material marketplace: rule of law programs and norms are created, commodified and distributed globally through financial transfers totalling billions of dollars. Pinpointing the precise value of rule of law–related expenditure is difficult; it is only a subset of the world's ODA, defence expenditure on state-building and private philanthropy for development (Development Initiatives 2013; IDLO 2010). Australia, for example, as a medium-sized donor, was, until recently, spending AU$371 million per annum (or 14.7 per cent of its then bilateral aid

budget) on law and justice assistance (DFAT 2012: 5). How to effectively code and aggregate the many different forms of rule of law financing, even by members of the OECD's Development Assistance Committee (OECD-DAC), are challenging, precisely because the substantive focus of the work is fluid.

Notwithstanding the ideological claims that rule of law promotion will advance 'legal empowerment' and 'justice for the poor' (for example, Golub 2009, 2010; van Rooij and Nicholson 2013), structurally, the money follows the political aims of the funder; it is largely a supply-driven phenomenon. International development aid agreements contemplate 'partnership' and 'local ownership', but the dominant values in those agreements are transparency, efficiency and accountability (OECD 2015). The actual disbursement of funds is mediated by chains of international and local 'designers', 'implementers' and 'evaluators'—a crowd of principals and agents who make up what I have called the 'rule of law bazaar' (Taylor 2010b). Rule of law market actors range from state-owned enterprises through to self-employed individuals. Across the spectrum are international NGOs, state agencies, local NGOs, militaries, churches and corporations. There is considerable blurring of profit and non-profit profiles; NGOs, for example, are often funded by both public agencies and corporations. The process of 'assisting' target states is thus also a process of siphoning some of the development assistance finance back to the global North (for example, Ghani and Lockhart 2008). At the same time, Carothers and Samet-Marram (2015) argue that both the financiers and the implementers of democracy promotion are increasingly non-Western and non-liberal; we can observe a similar trend in rule of law promotion (for example, Taylor 2010a).

Lawyers feature prominently in rule of law's international, transnational and local spaces, even though the work itself is varied and distributed across many different occupational groups. Indeed, rule of law promotion as a practice has something in common with the professional organisation of law in the global North: it declares allegiance to altruistic aims (poverty reduction, human rights, access to justice) (for example, Halliday and Karpick 1997; Halliday et al. 2007) and pursues these in tandem with strategies to secure market share and profitability (Dezalay and Garth 2011).

5. Rule of law as a transnational legal order

Rule of law promotion can be viewed as the formation of a transnational legal order (TLO) of the kind theorised by Halliday and Shaffer (2015). It functions as one of many 'global scripts' promoted within and through transnational organisations in the making of 'soft law' and regulation internationally (Darian-Smith 2013). Rule of law norms are inscribed in legal technologies such as conventions and treaties, best practices and standards, legislative guides and model laws, international court rulings and the rules of global regulatory bodies.

The paradigm example of a rule of law 'script' is the UN promulgation of a definition of rule of law in 2004. This can be understood as an attempt to assert control over rule of law's 'regulatory spaces' (for example, Scott 2001), within and outside the UN system. It also shapes the discursive production and distribution of rule of law, by injecting 'laws that are publicly promulgated, equally enforced and independently adjudicated' with 'international human rights norms and standards' (UN Secretary-General 2004). This definition, then, becomes a compliance standard for the UN system as a whole, embedded within UN agency programming and within its rule of law assessment tool. The European Union (EU), too, has a new rule of law compliance standard: a 'pre–Article 7' warning procedure for assessing where there has been 'a systematic breakdown in rule of law' within a member state of the kind that would trigger the suspension of EU voting rights under Article 7 of the Lisbon Treaty (EC 2014).

Both the UN and the EU examples show how rule of law operates as a multinodal form of transnational regulation. There is no single international forum or agency that oversees the production, distribution and enforcement of the rule of law by state and non-state entities. Thus, the UN system, the EU, the World Bank and other international and transnational actors compete for the symbolic and practical ownership of rule of law promotion as a means of creating and entrenching their desired global norms.

6. Rule of law as surveillance and monitoring

Mobilising rule of law promotion as regulation requires some form of enforcement, so rule of law comes packaged with diagnostic, surveillance and evaluative tools with which to measure a state's 'progress' in rule of law adoption. Many of these are modes of regulation that are routine within new public management: outsourcing and public procurement, highly detailed contracts, standardised costing formulas, standardised forms (including spreadsheets, 'log-frame' plans, internal reports and 'communication plans'), audit and monitoring, policy 'toolkits' and public reports (Natsios 2010). Rule of law is also 'performed' through the practices of rule of law agents and their epistemic communities and professional networks, so personnel roles and titles, styles of physically organising the workplace, public announcements of 'results', narratives about 'lessons learned' and formal monitoring and evaluation (for example, Cohen et al. 2011; Cohen and Simion 2013) are also important processes in the production and distribution of rule of law, as they are in ODA in other domains as well.

Can we measure or quantify 'rule of law'? The value and impact of rule of law promotion programs are typically 'measured' by counting their outputs (for example, number of lawyers trained, number of cases filed) or through proxy 'indicators' (for example, Parsons et al. 2010). The short time horizons of most policy interventions mean that longitudinal studies of how rule of law projects affect local actors and institutions over time are uncommon.

The 'indicator culture' that has taken hold within organisations that fund rule of law policy interventions (Davis et al. 2010; Engle Merry et al. 2015) is a strategy of global governance in which social phenomena are presented in a quasi-scientific form, and where different sets of indicators reference and mimic one another to present stylised accounts of the target states. Indicators are also combined with other forms of monitoring. So, embedding indicators in procurement contracts, for example, means that moving the target country up or down an anticorruption or democracy index can become a contractual performance requirement (for example, Taylor 2010b).

Most indicators focus on formal legal systems and the agencies of the state (Taylor 2007), rather than on non-state and religious forms of law (for example, Forsyth 2009). The gap between this metric representation

of rule of law and how citizens experience 'everyday' law and legal institutions in that country is generally not explained (cf. Deinla and Taylor 2015). The World Justice Project (WJP) Rule of Law Index®, for example, uses 47 indicators to evaluate constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice (WJP 2015). The *Regulatory Guillotine*™ tool identifies and disestablishes duplicative or redundant laws (Jacobs et al. 2014).

Some indicator sets are more nuanced. The self-assessment tool for rule of law in public administration developed by the UN Development Programme (UNDP) and the Folke Bernadotte Academy (FBA) in Sweden (UNDP 2015), for example, is explicit about the political nature of public administration and how local political power determines the type and quality of public sector services. These kinds of approaches are consistent with Braithwaite's (2011) recommendations about responsive regulation and Kavanagh and Jones's (2011: 25) proposal for strengthening the United Nations' own rule of law capacity, both of which emphasise attention to local context.

7. Branding rule of law

As indicators proliferate, they become rule of law 'products' in their own right: the purchase and distribution of the regulatory tool itself become a rule of law intervention. Many of these tools are originally developed with public funding; some are fully open access, such as the UN Rule of Law Toolkit (UN 2011) and the UNDP–FBA assessment tool (UNDP 2015); others are presented as the intellectual property of the designing organisation, such as the WJP Rule of Law Index® (WJP 2015). What all of these tools have in common, however, is some form of 'brand architecture'—branding that seeks to build an affiliative bond between the rule of law commodity and its end-users.

Australia's 'law and justice' interventions feature a bouncing red kangaroo. The Australian Government is clear that this logo 'represents the product we deliver—Australian aid' (DFAT 2015a). In the United States, the US Agency for International Development (USAID) rolled out its new branding in 2004–05 to strengthen its foreign policy

objectives, and the 'favourability of the US nearly doubled in Indonesia … thanks to the massive delivery of—for the first time "well branded"—US foreign assistance' (USAID 2015).

Other rule of law brands include the World Bank's 'Justice for the Poor' (J4P) and USAID's 'Educating and Equipping Tomorrow's Justice Reformers' (E2J) and 'People to People Peacebuilding' (P2P). The shorthand brands are intended to distinguish projects that might otherwise be confusingly similar. They also seek to direct attention to the funder (rather than their agents, which often have their own brands). In each case, they seek to suggest to end-users that the project/product is more desirable than its unbranded forerunner or competitor.

8. Regulatory rule of law actors

In sociological terms, when rule of law travels abroad as a set of both concepts and practices, it becomes a transnational 'project' (Behrends et al. 2014). Its rationalities—embedded in epistemic communities, knowledge and surrounding institutions—are left behind and the model's concepts and practices must be adapted and reinvented at new sites. That reinvention takes place through the people and organisations that design and deliver rule of law interventions in developing or fragile-country settings, within the constraints of a military operation or a development aid–funded project.

We see this when a state seeks to join a multilateral organisation such as the EU or the World Trade Organization (WTO). International rule of law advisors often substitute for state actors to prepare the state for accession (for example, Morlino and Magen 2009). They mobilise professional capital, occupational prestige and the power of ideas and technical knowledge from abroad (for example, Halliday and Carruthers 2009; Bosch 2016; Simion n.d.). In so doing, they act as the 'brokers', 'translators', 'mediators' and 'agents' for the organisations advancing the desired policy intervention (for example, Mosse 2011; Lewis and Mosse 2006; Levitt and Merry 2009). Bill Easterly (2014) terms this process, when performed by economists, 'the tyranny of experts'. So, this prompts us to ask who are the rule of law practitioners in these new locations, how do they act as regulatory agents of a TLO and how are they themselves regulated?

9. Agents of the rule of law

Development economics is replete with descriptions of the complexities of principal–agent relationships in the design and delivery of aid (for example, Gibson et al. 2005). We lack a full benchmark study of how many organisations and individuals are involved in rule of law promotion work worldwide. Thus, it is risky to profile rule of law practice by sampling public documentation, as Desai (2014) does. What we know from pilot empirical studies is that, despite highly technocratic regimes of oversight and control, rule of law remains a highly relational field (Simion and Taylor 2015).

Many of the rule of law market's biggest actors—the EU, the UNDP and the Organization for Security and Co-operation in Europe (OSCE)—limit their recruitment to lawyers and members of other branches of the legal profession. Chiefs of parties recruiting for a rule of law mission, particularly in a high-risk location, will prefer colleagues who are known to them or who come with endorsements from trusted third parties. Established missions in places that lack glamour or prestige also relax their standards when it comes to recruitment. This is consistent with what Baylis (2009) describes as the 'cycling' effect of cohorts moving from one 'hot' development destination to the next, and with international policing studies that show a reluctance to be 'the last man out' (Durch 2012).

Professional networks

Rule of law is intensely mobile work, so it is not surprising that digital communities of practice have emerged: key examples are the Rule of Law Community of Practice Network in the UN Department of Peacekeeping Operations (DPKO) and the International Network to Promote the Rule of Law (INPROL), sponsored by the US Institute for Peace (Simion and Taylor 2015: 66). More interactive discussion takes place using social media such as 'LinkedIn' and through groups such as the Justice Support Group and the Rule of Law Veterans group (Simion and Taylor 2015: 66). The growth of online forums can be seen as 'wiki-regulation' (Grabosky 2012) and the creation of a self-regulatory 'space' for debating rule of law ideas, norms and practices, but these are not designed to have strong regulatory traction.

Ethics and accountability

A signature capacity of a profession is its ability to control its membership and to sanction members who violate its behavioural standards (for example, American Bar Association 2015). Rule of law actors in transnational spaces may perceive themselves to be beyond the reach of regulation, either because they see themselves as the 'source' of legal norms or because they are physically removed from familiar professional environments. Where this occurs it may have legitimacy costs for the discursive or actual power of rule of law norms; people promoting rule of law should also be subject to the laws of the system they are supporting (Rausch 2006; Roesler 2010). The most egregious examples of violation have been by UN peacekeeping forces and private military contractors (for example, Simm 2013; Durch and Berkman 2006). But anecdotal evidence suggests that we should also examine legal and ethical awareness among practitioners of rule of law.

Where more than one agency or state is involved in a rule of law promotion project, a threshold issue is whose rules apply? Secondees from government agencies are generally bound by domestic legislation and a 'sending' organisation's code of conduct and legal mandate (for example, DFAT 2015b), as well as by those of their 'receiving' organisation and sometimes immunity provisions deriving from international conventions (for example, UN 1946) and restrictions stemming from insurance coverage.

In this 'choice of law' contest, the first casualty is usually local law (for example, Derks and Price 2010: vi). The paradigm example is consumption of recreational drugs or alcohol in places where this is illegal. This may be ignored or downplayed, in the tacit or overt belief that the local legal system is underdeveloped or unworthy of respect. Or it may be excused on the basis that remote locations allow more latitude for behavioural lapses, and an expectation that monitoring by peers is looser where their professional relationships may be short-lived (Taylor 2009).

Beyond strict legality, rule of law practice is replete with ethical dilemmas. Do you honour 'local ownership' and accommodate gender segregation or a degree of ethnic patronage in distributing opportunities, or do you insist that the 'international' norms must prevail (for example, Hansen and Wiharta 2007)? There is currently no mechanism in place for resolving those tensions beyond particular projects or for defining

quality standards for rule of law practice. So, regulatory contestation at the project level is normal, as local actors and international actors compete for control over the norms and direction of a rule of law intervention (Bosch 2016).

Rule of law practitioners move fluidly among networked organisations, taking with them their knowledge, contacts, professional practices and their sense of 'how we do' rule of law promotion (Alkon 2013; Bosch 2016). This makes it difficult to sustain 'feedback loops' for the kind of learning that is necessary for effective interventions. This was termed a 'problem of knowledge' (Carothers 2006) and was considered to be a lack of political and commercial incentives for rule of law actors to coordinate their efforts (Channell 2006; Taylor 2009). More accurately, it is a problem of how to effectively share, absorb, reflect on and institutionalise knowledge gained from practice across a multilevel, globally diffuse field.

10. Conclusion

This chapter has argued that rule of law promotion is a transnational regulatory endeavour that can also be seen as an attempt to create a transnational legal order. Rule of law promotion operates discursively as a form of regulation by purporting to identify states that 'lack' rule of law. The malleability of the concept of rule of law allows a very wide range of norms to be produced and inscribed in global policy tools and technologies. By so doing, transnational actors are able to pursue a range of policy aims in relation to the target state.

The production and distribution of rule of law are sustained in part through standardisation of norms—one example being rule of law indicators, which focus on formal, abstracted aspects of legal systems rather than the pluralist, context-specific details at the local level. Tools for monitoring and measuring compliance with these standards, then, in turn, become rule of law 'products' for the rule of law marketplace.

The translation of rule of law norms from the transnational to the local level is the work of individual and organisational 'brokers' and 'translators' (Lewis and Mosse 2006; Mosse 2011). They shape regulatory outcomes locally by leveraging their technical knowledge, prestige and professional capital. That process, however, is complicated by the fact that rule of law practitioners and their employer organisations largely float beyond

national regulatory reach. Visible slippage between practitioners' invocation of rule of law norms, and their failure to embody these in practice, is one of the ways in which rule of law's claim to legitimacy may be diminished.

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24

Regulating sex in peace operations

Gabrielle Simm[1]

1. DynCorp in Bosnia

DynCorp is a large private military and security company that was contracted by the US Government to provide police trainers and advisers to the United Nations (UN) mission in Bosnia in the late 1990s (Simm 2013). Despite the company's role in policing and training police, some employees were implicated in trafficking women and girls to Bosnia from Russia, Moldova, Romania, Ukraine and other Eastern European countries. At the time it was estimated that international personnel accounted for 30–40 per cent of clientele and approximately 70 per cent of the revenue from trafficking in Bosnia (Mendelson 2005). Media reports indicated that some DynCorp employees purchased trafficked women and children as well as benefiting from free sex in brothels. Evidence of the involvement of some DynCorp employees came from two whistleblowers, Kathryn Bolkovac and Ben Johnston.

Kathryn Bolkovac was employed in April 1999 by DynCorp to work as a police monitor in Bosnia. An experienced police officer from Nebraska, USA, she had particular expertise in child abuse and sexual assault

1 This chapter is based on Simm (2013).

cases.[2] Bolkovac became aware of widespread trafficking of women and girls into Bosnia by organised crime groups and that international personnel were involved. According to local police, trafficking had not existed prior to the arrival of international peacekeepers (Lloyd-Roberts 2002). Bolkovac sent emails to around 50 recipients in the United Nations and DynCorp describing in graphic detail the abuses perpetrated against trafficked women and girls. She alleged that women and girls were smuggled into Bosnia 'to work as dancers, waitresses, and prostitutes', forced to perform sex acts on customers to pay debts and, if they refused, they were 'locked in rooms without food for days, beaten and gang raped by the bar owners and their associates' (Wilson 2002). She alleged that the clientele of these women included '"some" local people, SFOR [Stabilisation Force] and IPTF [International Police Task Force] personnel, local Police and international/humanitarian employees in Bosnia-Herzegovina'.[3] Following the email, Bolkovac was redeployed to another area and, in April 2001, she was dismissed. Bolkovac won her unfair dismissal case against the company, with the UK Employment Tribunal holding that DynCorp's explanation was 'completely unbelievable' and that it had 'no doubt whatever that the reason for her dismissal was that she made a protected disclosure' under the UK legislation protecting whistleblowers.[4] The tribunal awarded Bolkovac £110,000 (about AU$305,000 at the time) compensation for unfair dismissal. Bolkovac's story has been made into a feature film titled *The Whistleblower* (Kondracki 2010), based on the book by Bolkovac (with Lynn 2011).

Ben Johnston, a former US Army aircraft mechanic employed by DynCorp in Bosnia, made internal complaints about company employees who boasted about 'buying and selling women for their own personal enjoyment' and about the 'various ages and talents of the individual slaves they had purchased' (O'Meara 2002: 12). Johnston reported that at DynCorp 'a lot of people said you can buy a woman and how good it is to have a sex slave at home' (Human Rights Watch 2002: 66). DynCorp's site supervisor at the US military's Comanche Base, Bosnia, John Hirtz, videotaped himself having sex with two women, one of whom was clearly saying 'no'. Hirtz later admitted to having raped one of the women. Kevin Werner, another DynCorp employee, admitted

2 *Bolkavac v DynCorp Aerospace Operations (UK) Ltd* (2002) Employment Tribunals Case No. 3101729/01.

3 ibid.

4 ibid.

purchasing a weapon and a woman from a brothel owner and left Bosnia as a result of the weapons charge (US Inspector-General 2003). Another DynCorp employee, Richard Ward, told Johnston he could purchase a woman for him.

> He says he'll get me one for you—you can have one for 100 marks a night or buy them for two or three thousand marks. They can be yours, and they can be your 'hoes'. (Deposition of Benjamin Dean Johnston, *Ben Johnston v DynCorp Inc.*, District Court, Tarrant County, Texas, 20 March 2001, pp. 50–2, cited in Human Rights Watch 2002)

When DynCorp took no action on his complaints, Johnston approached the US Criminal Investigation Command, which substantiated some of his allegations (Capps 2002). Johnston also alleged that the company 'turned a blind eye' to the involvement of DynCorp personnel in purchasing women and that their involvement in trafficking continued despite the army investigation. In June 2000, DynCorp fired Johnston 'for "misconduct, violation of standards and conditions of employment and employment agreement" by bringing "discredit to the Company and the U.S. Army while working in Tuzla, Bosnia and Herzegovina"' (Human Rights Watch 2002: 66). DynCorp was reluctant to fire the employees about whom Johnston had complained. The US State Department intervened to ensure that some employees were dismissed and repatriated (US Department of State 2002). In August 2000, Johnston sued DynCorp in a federal district court in Texas. The case settled in August 2002, two days before it was due to go to trial and hours after Bolkovac won her case against the company in the United Kingdom.

Despite evidence from whistleblowers, corroborated by US Army investigations, no members of the international police taskforce were prosecuted for trafficking in Bosnia; they were instead repatriated (Evidence of Martina Vandenberg, in US Congress 2002; Andreas 2009). US Army investigators found they did not have jurisdiction over civilian contractors so they referred the case to Bosnian police. Bosnian police were apparently unsure whether the contractors benefited from immunity under the Dayton Peace Accords so did not prosecute them. At least 13 DynCorp employees were repatriated from Bosnia, at least seven of whom were fired for 'purchasing women, many of them underage, or participating in other sex trafficking activities' (Feminist Majority Foundation 2002). DynCorp nevertheless kept its contract

with the US Government to provide police to Bosnia. An inquiry by a subcommittee of the US Congress heard evidence from David Lamb, a former UN human rights investigator in Bosnia:

> an astonishing cover-up attempt … seemed to extend to the highest levels of the UN headquarters … The Department of State purposefully distances itself from US IPTF members by hiring DynCorp as the middle man and makes no attempt to know anything about the activities of its IPTF officers who are serving as representatives and Ambassadors of the United States. (Evidence of David Lamb, US Congress 2002: 35)

The case of DynCorp illustrates the range of actors involved in peace operations. Individual personnel include private military contractors working as UN police, diplomats, international humanitarian workers and local police. Entities whose personnel were implicated were international organisations (such as the United Nations and the North Atlantic Treaty Organization (NATO)), private corporations (DynCorp and others), sending states (whose diplomats and military were representing their governments, and aid workers whom the government might not have known were there) and the host state (Bosnian police and government officials). While there are layers of law regulating some of these actors, such as military peacekeepers, who are bound by the laws of their sending state and military discipline, they benefit from immunity from the host state's law for crimes they commit in that country. Other actors, such as foreign aid workers, are unlikely to benefit from any legal immunity but are rarely prosecuted for any crimes they commit, suggesting they benefit from impunity in practice. The variation in regulation of different categories of personnel, depending partly on which organisation employs them, raises questions about the regulation of sex in peace operations.

2. Regulatory studies and sex in peace operations

How are regulatory studies relevant to situations such as the sex trafficking perpetrated by some DynCorp employees in Bosnia? Sexual crimes committed in peace operations might be seen as a human rights abuse, a problem of criminal impunity, an issue of violence against women or an example of sexual abuse of children. All of these could, and perhaps should, be dealt with by a combination of international and domestic human rights law and criminal law. Sex, not amounting to sexual

crimes, is already highly regulated, by social mores, religious doctrine, organisational codes of conduct and personal morality. Sex in peace operations is arguably subject to greater strictures, occurring as it does during conflict or in post-conflict societies and usually between people of different ages, cultures, religions and socioeconomic status. When sex occurs between people of the same gender, it is often subject to social stigma, taboos and, sometimes, criminal penalties. So why should sex in peace operations be further regulated? Why should the United Nations, a non-governmental organisation (NGO) or a private military security company, such as DynCorp, act as 'the sex police' (Jennings 2008)?

Using a broad definition of regulation as 'the intentional activity of attempting to control, order or influence the behaviour of others' (Black 2002: 1), sex in peace operations is already highly regulated. Drawing on regulatory studies, which see law as a subset of the broader field of regulation, enables us to 'decentre' law and consider other regulatory options. Decentring law is both productive and unsettling for an international lawyer such as myself. Regulatory studies are particularly relevant when the attempts to regulate sex, particularly sexual crimes, in peace operations have primarily taken the form of 'zero tolerance' codes of conduct, which lack the force of law. A prime example in this context is the *Secretary-General's bulletin on special measures for protection from sexual exploitation and abuse* (UN Secretariat 2003). It might be expected that criminal law would be the most appropriate response to crimes. The problems with applying and enforcing criminal law in the internationalised space of peace operations are precisely what have led the United Nations, NGOs and private military security companies to resort to non-legal forms of regulation.

Building on the work of Charlesworth and Chinkin (2004), I have attempted to view international law through a regulatory lens. Lacking a central authority or sovereign and relying more on horizontal or peer enforcement than on vertical or hierarchical authority, international law is an ideal candidate for regulatory approaches. Surprisingly, there has been little engagement by international lawyers with the field of regulatory studies. However, certain aspects of regulatory theory are helpful in conceptualising the problem of sex in peace operations. In my work, I draw on the foundational theory of responsive regulation put forward by Ian Ayres and John Braithwaite, particularly John Braithwaite's elaboration of networked regulation in developing economies. My work is further informed by the idea of smart regulation advocated by Gunningham, Grabosky and Sinclair (see Gunningham

and Sinclair, Chapter 8, as well as Grabosky, Chapter 9, this volume). Their willingness to consider non-state actors as potential regulators is useful in a context, such as peace operations, where a functioning host country legal system is often absent. Finally, I raise some feminist questions of regulatory studies—in particular, while regulation offers useful insights into problems, such as sex in peace operations, regulatory studies remain largely oblivious to questions of sex and gender. The issue of sex in peace operations highlights this weakness in regulatory theory to date.

3. Responsive regulation

Responsive regulation holds that regulation 'be responsive both in what triggers a regulatory response and what the regulatory response will be' (Ayres and Braithwaite 1992: 4). In this model, regulation starts with non-legal mechanisms and reserves state-enforced criminal law for the most serious transgressions where other measures have failed. Responsive regulation draws the regulator's attention to the particular actor and specific situation. So Ian Ayres and John Braithwaite envisage different regulatory responses according to the type of actor involved. Virtuous actors will elicit restorative justice responses; rational actors will respond to deterrence; and incompetent or irrational actors should be incapacitated by the regulator. Command and control or punitive legal responses will be reserved for incompetent or irrational actors. This model also works with a single actor across time, such that a regulator should begin on the assumption that the actor is virtuous, but, if this assumption is demonstrated to be false, based on repeated disregard for the rules, the regulator's response will harden and escalate accordingly (Braithwaite 2005). Designed to be tested through empirical research, responsive regulation is a dynamic model and the type of matters to be dealt with through self-regulation or increasing degrees of punitive intervention need to be adjusted based on experience. As responsive regulation incorporates both punitive and persuasive models of regulation, it is able to invoke the more appropriate strategy based on the situation. Another benefit is that responsive regulation makes punishment cheap, relying as it does on self-regulation in the majority of cases and reserving punitive measures for serious cases, making it attractive to developing countries. Responsive regulation offers promise in dealing with sex in peace operations where state-based law is inadequate.

Regulatory studies have been developed in industrialised countries characterised by strong legal systems. In this sense, regulatory studies could be seen as a reaction against state-centred law. The international arena is usually seen as lacking a strong central power such as that represented by the state in industrialised economies. Even there, 'few countries exhibit a sufficiently unified or strong state capacity for regulatory power to be capable of sustained manipulation to secure desired regulatory outcomes' (Scott 2003: 158). Peace operations might be seen as an extreme example of the lack of central state power and hence ripe for the application of regulatory mechanisms. A potential critique of regulatory theory is that it assumes that the punitive power of law can be called on when necessary—an assumption less likely to apply in states hosting peace operations. Braithwaite responds to this critique by arguing that responsive regulation relies on a large degree of self-regulation and invokes the punitive power of regulators progressively as the effectiveness of self-regulation diminishes. Nevertheless, responsive regulation appears less likely to work in weaker states, due to lower levels of capacity and the potential for regulatory officials to be corrupted due to poverty, the greater risk of capture and corruption of bureaucrats by business and NGOs' comparative lack of resources (Braithwaite 2005).

Braithwaite's solution to these potential problems with responsive regulation in developing states is 'networking around capacity deficits' (see also Braithwaite, Chapter 7, this volume). Unlike in industrialised countries, where there is reference to the regulatory or even post-regulatory state, in developing countries 'under the influence of international organisations, many states are looking to construct the institutions which will make state governance more effective, rather than to dismantle them' (Scott 2003: 167). This is particularly the case in peace operations, where the United Nations usually has a specific mandate to develop institutions as part of a process of state-building. Another approach is for developing states to enrol non-state regulators to cover their weaknesses. These non-state regulators might be foreign states, domestic or international businesses or NGOs. Braithwaite adapts this model to the example of a domestic NGO regulating human rights abuse by either business or the state. The domestic NGO enrols or networks with a range of domestic and international actors, such as international NGOs, foreign embassies, media and the United Nations, when its initial naming and shaming of human rights abuses are not successful. Escalation of naming and shaming through a network of regulators is advocated 'as a path around the developing economy's capacity problem

for enforcing standards' (Braithwaite 2005: 891). Networked regulation also avoids the problem of legal loopholes or the opportunities for abuse that I argue international law creates.

However, there are two potential weaknesses in networked regulation. The first is the absence of the voices of victims to draw attention to abuses, as empirical research has demonstrated that most victims are reluctant to report (Lattu 2008). This is not necessarily a problem if whistleblowers come forward to report where victims do not. For example, the evidence of two whistleblowers was crucial to the revelation of DynCorp employees' involvement in trafficking in Bosnia. While the whistleblowers were effective in exposing the problem of DynCorp employees' involvement, the biggest sanction faced by those allegedly involved was dismissal—a fate shared by the whistleblowers themselves. The second potential weakness is the fact that, in many cases of sex in peace operations, it is not just one organisational actor, such as an NGO, that is involved, but others as well. This leads to the conclusion that it is insufficient to rely on a limited number of actors—such as states, NGOs, private military and security companies or the United Nations—to regulate each other. Braithwaite anticipates this problem, giving the example of where only two actors are sufficiently networked to escalate regulation and there is a risk they will collude to protect their own interests, rather than contesting each other. Other actors, such as the media, NGO donors, UN member states (who fund peacekeeping operations), insurance companies, corporate clients and perhaps shareholders, are required as regulators.

4. Smart regulation

In *Smart Regulation*, Gunningham et al. (1998) undertake a comprehensive inquiry into the potential for regulatory instruments to support, neutralise or negate each other (see also Gunningham and Sinclair, Chapter 8, this volume). They call this 'smart regulation'. The main contribution of smart regulation is a detailed consideration of the optimal combination of particular regulatory instruments to achieve desired policy goals:

> In the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation. By implication, this means a far more imaginative,

> flexible, and pluralistic approach to environmental regulation than has so far been adopted in most jurisdictions: the essence of 'smart' regulation. (Gunningham et al. 1998: 4)

The proponents of smart regulation are not purist about their instruments, declaring that 'the goal is to accomplish substantive compliance with regulatory goals by any viable means using whatever regulatory or quasi-regulatory tools that might be available' (Gunningham et al. 1998: 14). They argue against 'single instrument' approaches as misguided and not flexible enough to address all problems in all contexts. Like the proponents of responsive regulation, on which smart regulation builds, they aim to 'harness the strengths of individual mechanisms while compensating for their weaknesses by the use of additional and complementary instruments' (Gunningham et al. 1998: 15).

Regulatory theory takes the role of non-state actors as regulators seriously (see Grabosky, Chapter 9, this volume). The economic heritage of regulatory studies is possibly responsible for this, because of the field of economics' interest in markets and its suspicion of the role of the state. Some proponents of free-market ideology call for the 'invisible hand' of the market to take care of business and regard state 'intervention' as ineffective and inefficient. However, while they ascribe a larger and more significant role to non-state actors as regulators than as adherents of a state-based conception of law, most regulatory scholars continue to see a role for the state as 'backstop' or meta-regulator. Braithwaite and Ayres advocate the enrolment of non-state actors such as business and civil society where they are better placed for or more suited to the job of regulation. In environmental regulation, where Gunningham et al. (1998: 250) describe a shift to 'new environmental governance', commercial and non-commercial third parties scrutinise and pressure 'regulatees' (see also Holley, Chapter 42, this volume). Some businesses realised that the reputational benefits of going 'beyond compliance' recouped the initial costs. NGOs frustrated with the slow pace of government intervention believed that they could achieve more by direct negotiation with business. Hence, private, public and non-government stakeholders collaborate towards 'commonly agreed (or mutually negotiated) goals' (Gunningham 2009: 203). Another model is that of enforced self-regulation, in which the state's role should be to act where other regulators have tried but failed. Also referred to

as 'regulating at a distance', 'light-handed regulation' and 'steering not rowing', mechanisms such as self-regulation and enlisting surrogate regulators continue to depend on their enforcement by the state.

However, there are a number of potential problems with enlisting non-state actors as regulators. Gunningham identifies the risk of virtually delegating regulatory powers to private actors who may be coopted by the process. Further, there may be a disparity between the financial resources of the parties involved in regulating—for example, the state and private sector being much better funded than NGOs, leading to burnout of NGO volunteers and the inability to voice their concerns effectively due to the power differentials in the forum. Another possibility is that the state merely uses non-state actors as a 'delivery vehicle' for government initiatives, retaining political control but outsourcing responsibility for failures (Gunningham 2009). A further concern is the risk of vigilantism where non-state actors act as delegated or surrogate regulators. Another risk is collusion, where there are only a few actors powerful enough to act as regulators and they collude to protect their own interests.

5. Sexing regulation

Regulatory theories assist in understanding sex in peace operations. The scenarios in which sexual crimes are most likely to be committed are those where law is marginalised or its enforcement is dependent on a constellation of political factors. However, regulatory approaches also have limits and weaknesses when applied to sex in peace operations. Having originated in industrialised countries, regulatory studies to this point assume a functioning state and legal system, a rule of law and a basic level of order that may not be applicable to post-conflict societies. While regulatory scholars often argue that it is more efficient for the state to 'steer' rather than 'row', a question that remains unanswered is whether the enrolment of non-state actors as regulators would work if the state were not able to guarantee the non-state actors. Put another way, would 'speaking softly' be effective in the absence of the 'big stick' that the threat of law represents (Braithwaite 1997)? The enrolment of surrogate regulators is not necessarily effective where the reason non-state actors are being called on to act as regulators is precisely the state's inability to intervene effectively. States hosting UN peace operations are, by definition, unlikely to be effective regulators. Regulatory studies pay detailed attention to the available selection and mix of policy instruments

but less attention to what the policy aims of regulation should be. There is some discussion of whether policy instruments are pure and unadulterated, or whether their selection affects the design of policy (Black 2003). Clearly, policy aims will be very important, no less so in the case of sex in peace operations. Another striking feature of regulatory studies is the absence of attention to sex. There are a number of studies of regulation of areas that raise sex squarely—for example: sexuality, reproduction and sexual assault (Harding 2011; Sangster 2001; Jackson 2001; Daly 2002). However, these studies might be better understood as feminist scholars engaging with regulation, rather than regulatory scholars engaging with sex (cf. Braithwaite 2006). The questions posed by Charlesworth and Chinkin (2004: 268) remain relevant: 'Who are the regulators; who regulates the regulators? Does regulation affect women and men differently? What gendered patterns of life, work and politics does regulation support?' They highlight the potential for further engagement between regulatory studies and studies of gender and sex.

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Holding individuals to account beyond the state? Rights, regulation and the resort to international criminal responsibility

Michelle Burgis-Kasthala

1. Introduction: Understanding international criminal law as governance

International law as a discipline and practice comprises a number of overlapping and sometimes conflicting regimes for the regulation of relations between states as well as, increasingly, various relations *within* and *across* states (Koskenniemi 2007). This chapter considers the rise of international criminal law (ICL) as a particular technique of governance that both builds on other international legal regimes and marks a departure in its practices and effects. ICL is concerned with holding individuals criminally responsible for various crimes that have become internationalised including the well-known singular crimes of piracy, slavery, genocide and apartheid as well as a whole range of offences under the broad headings of war crimes and crimes against humanity. Procedurally, ICL offences can be heard in international, hybrid and domestic jurisdictions, but it is important to note that the reach of ICL is imperfect and often relies on states to codify specific crimes. Many ICL offences grow out of public international

law concerns over state responsibility regarding a state's citizens, international human rights law (IHRL), as well as a state's conduct of hostilities, international humanitarian law (IHL). Under these regimes, states may be held responsible for breaches of both customary and treaty norms. States will also often be required to criminalise and prosecute or extradite individuals suspected of breaching these various norms. Thus, ICL takes norms initially applicable to states and transforms them into individual criminal offences. The irony in this system—particularly for IHRL—is that, although it depicts the state as predatory and in need of restraint (Cogan 2011: 331–7, 342–3), its normative impetus is state action/consent, whether through treaty or customary law. Thus, rights and responsibilities as well as individual and state liabilities intersect at domestic, international, transnational and global levels in increasingly complex and sometimes antagonistic ways.

The greater emphasis on individual *rights* within IHRL (see Charlesworth, Chapter 21, this volume) is also now reflected in an increasing focus on individual *responsibility* for crimes committed during peace and particularly during conflict in international criminal law. We can therefore understand IHRL and ICL as opposing and complementary trends within the international legal field's focus on the individual as situated within a global (rather than a national) community.

> [Yet the] paradox at the heart of this twin project (international criminal law and international human rights law) is that while its core animating idea is the abolition of all distinctions within humanity, some of its most energetic practices are dedicated to punishing 'inhumane' acts … and acting on behalf of humanity against those who are deemed to have stepped outside or defied humanity. (Simpson 2012: 115–16)

A shift towards individual criminal responsibility is a manifestation of neoliberal governance, which tends to obscure structural dimensions of conflict and only works towards 'negative peace' (or the absence of violence) (Nouwen 2012: 332). In addition, Kendall (2011: 587) identifies the 'neo-liberal premise that justice can be subjected to market rationalities', including the increasing prominence of private, donor-led initiatives. It is not surprising, then, that despite ICL's post–World War I genesis, it has come to flourish in the post–Cold War international system.

Focusing on individual perpetrators simplifies the complexities of responsibility in modern life (Drumbl 2007: 35). Within the realms of an international criminal trial, highly complex conflicts can be 'lifted outside of worldly politics and into a morally unambiguous realm of good and evil' (Orford 2011: 186).

> [Focusing] on the idea of international criminal justice helps us to forget that an overwhelming majority of … crucial problems … are not adequately addressed by criminal law … The seemingly unambiguous notions of innocence and guilt create patterns of causality in the chaos of intertwined problems of social, political and economic deprivation surrounding the violence. (Tallgren 2002: 593–4)

Critiques of ICL focus particularly on the way it obscures profoundly political situations through techniques of criminalisation, legalisation and juridification (Simpson 2008; S Dezalay 2012). A study of ICL as governance, then, must be attuned to the politics shaping and being produced within the matrix of a range of ICL practices. Although intimately reliant on states and societies for its impetus and normativity, ICL as a governance tool overexposes the role and responsibility of an alleged individual criminal for the most heinous and often the most *systemic* of acts, such as genocide, apartheid and crimes against humanity (Cryer 2005: 985).

This chapter first examines the evolution of ICL as a field of practice and scholarship. It then considers the central actors and institutions within ICL before considering its normative substance and boundaries. The chapter ends by evaluating the contribution that ICL makes to the governance of intersecting domestic, international, transnational and global spaces.

2. Mapping the rise of the ICL field and associated projects

The rise of ICL can be recounted in many ways, but, for the purposes of this chapter, it is important to understand how ICL emerged as a key component of managing conflict-torn and post-conflict societies across the developing world since the end of the Cold War. In this way, we can see ICL as an example of regulatory globalisation that has favoured the interests of the global North, such as in the case of global business regulation (Braithwaite and Drahos 2000). We must also appreciate the

ways in which ICL was built on, and has even colonised, other fields, particularly human rights and transitional justice. Finally, although it is beyond the scope of this chapter, we need to be aware of how progressivist histories of ICL justify its place today as a key global governance tool.

Compared with its domestic counterpart of criminal law, ICL springs from immature roots. It is for this reason that Dubber (2011: 930) describes ICL as 'ahistorical' and 'a pioneer project to boldly go where no one has gone before'. When origins are needed, however, dominant historical accounts within ICL tend to overlook efforts during the interwar years and begin with the Nuremberg and Tokyo international military tribunals (IMTs) after World War II. The Cold War figures as a pause in a narrative of progress that then resumes with the ever-growing importance of ICL through the proliferation of international criminal tribunals (ICTs) from the 1990s onwards, which I consider in Section 3 (Skouteris 2010: Chapter 4).

Although the IMTs remain a watershed moment for ICL, what has been more significant is the rise of human rights as a discourse and set of mechanisms during democratic transitions from the 1970s onwards. Like ICL, the practical promise of IHRL remained largely unfulfilled for the first few decades after the Universal Declaration on Human Rights of 1948 as Cold War politics shifted attention to other projects. According to Dezalay and Garth (2006: 239), Chile served as a laboratory for human rights, where activists learned to frame their claims less in domestic, constitutional law idioms, and more in universal, IHRL-centred language (see also Moyn 2010). Human rights framing and various transitional justice techniques became dominant tools for societies in transition throughout the 1970s and 1980s, especially in Latin America and Eastern Europe. Invoking international or universal norms became even more acceptable once the Cold War ended and the best way to do this was through recourse to human rights in increasingly technical and legal registers. Humanitarian actors discovered that professionalised legal discourse attracted donor funding and this, in turn, contributed to the juridification of public discourse (S Dezalay 2012: 72–3) alongside massive institutional investments in international trials (Levi and Hagan 2012: 15).

Thus, the meteoric rise of the ICL industry (Tallgren 2015: 137) is very much a product of the post–Cold War world that allowed for greater multilateralism within the context of numerous ongoing and emergent civil conflicts and the triumph of neoliberalism. No longer paralysed by

superpower rivalry, the United Nations (UN), in particular, could devote greater attention and resources to peacekeeping operations. According to Orford:

> [the] expansive apparatus of techniques developed at the UN for conflict-prevention, peacekeeping and civil administration would no longer be limited to filling a political, economic, social or military vacuum. Instead, they would be used for detecting possible causes of conflict and acting early to prevent disputes arising. (Orford 2011: 91)

The de jure obstacles of non-intervention and state sovereignty (as per Article 2(4) of the UN Charter) were eroded by an emphasis on de facto questions about state capacity and willingness to protect populations, particularly within the idiom of human rights (Mazower 2012: 379–80, 388). Legal requirements of state consent or UN Security Council (UNSC) Chapter 7 authorisation became less important in the face of overwhelming humanitarian concerns that gave rise to the emergence of the 'Responsibility to Protect' doctrine. This new humanitarianism (of militarised care) or 'humanity law' (Teitel 2011) was not simply a product of state-level multilateralism, however, as such activities were supported and extended by proliferating civil society actors, particularly within the interrelated aid, development and human rights sectors. Thus, in instances where certain states were deemed by the 'international community' to be incapable of protecting their populations, both public and private actors operating within this global arena were ready to intervene and directly assist such populations with far more than emergency relief. According to Sara Dezalay (2012), we can understand the post–Cold War era as producing a conflation of development and security that, in turn, has enabled the transformation of (underdeveloped) societies through various forms of intervention, whether military or legal.

It was within such a context of UN operations, human rights consciousness and debates about humanitarian intervention that ICL emerged as a central tool for shaping conflict-affected and post-conflict states (Mazower 2012: 396). Despite much of ICL's institutional and normative architecture being the product of classic state-based-consent international law, it is also very much a product of UN design. This is illustrated by the UNSC's responses to two of the most significant conflict-based humanitarian crises of the 1990s: the dissolution of the Yugoslav Republic and the Rwandan genocide. In both cases, the UNSC acted under Chapter VII to create ad hoc ICTs tasked with 'prosecuting

persons responsible for serious violations of international humanitarian law' (UNSC Resolution 827 (1993)). This marked a radical departure vis-a-vis interpretations of the council's powers to determine and act on threats to international peace and security (UN Charter, Article 39).[1] This concern with international criminal justice significantly expanded the remit of the UNSC beyond a model of simple conflict prevention and, occasionally, collective security. Such UNSC institution building precipitated the establishment of a number of other ICTs, including ICL's permanent forum, the International Criminal Court (ICC), explored below.

What is important to note here in our discussion about the expanding powers of the UNSC as refracted through ICL is the way in which a series of crises has led to the institutionalisation of international criminal interventions backed by the police powers of the UNSC. Although the UN General Assembly had originally been the main UN body to support the ICC's creation (Mazower 2012: 399), the UNSC's key role in determining threats to the peace or acts of aggression under Chapter VII of the UN Charter as well as its power under the Rome Statute to refer cases to the ICC have placed this highly political body at the centre of ICL practice. Through this interplay between law and politics, along with crisis and institutionalised norm, we see how the UNSC's turn to ICL is emblematic of international law as a discipline of and a discipline in crisis (Charlesworth 2002). As a practice, ICL straddles crisis and norm through its focus on exceptional events that are then juridified and institutionalised most powerfully in ICT prosecutions.

3. Delimiting the field: ICL actors, institutions and effects

Although ICL is increasingly seen as a default governance tool, we need to understand how the 'apparent normative consensus' on the increasing resort to ICL 'comes to be presented as such' (Levi and Hagan 2012: 14). This is particularly apparent during armed conflict where calls for 'global justice' are often linked with support for international criminal trials (Nouwen and Werner 2015: 163). In this section, I touch on how ICL

1 See also *Prosecutor v Dusko Tadic (Judgment)* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-94-1-A, 15 July 1999).

has become naturalised through the pioneering role of 'lawyer-brokers', how they operate within the transnational conflict or criminal justice field and how ICTs were established within this milieu.

As a result of the processes outlined above in the post–Cold War world, including the juridification of public discourse, lawyers have become central figures in the interrelated fields of human rights and ICL. Within a climate of 'humanitarianism' and greater consciousness of others' suffering, international lawyers felt the urge to 'do something' with the law (Orford 1998: 11). The elaboration of rights was not enough and, instead, it is ICL, with its enforcement 'teeth', that has allowed international lawyers to be part of a 'global responsibility to protect' (Nouwen 2012: 329). Critical international law scholarship on ICL has noted how international criminal lawyers operate through a deeply set (and, often, un–self-reflexive) faith in ICL's promise of ending impunity (Koller 2008). This could be the product of who populates the ICL field as:

> the boundaries between academia, advocacy, and practice are perhaps at their most narrow in the field; international criminal justice is symbolically and uncritically equated in mainstream academia with the triumph of the human rights movement. (Byrne 2013: 1000)

A number of socio-legal accounts have highlighted how legalisation of conflict has provided new opportunities for international lawyers. Where once lawyers tended to act in response to conflict, they began to act pre-emptively by defining 'the scope of the problem itself' (Levi and Hagan 2012: 38). Lawyers now increasingly act as brokers who can frame a range of crises in highly expert idioms that then preclude the authority of other non-legal experts. Such reframing of problems also assures jobs and prestige as '[l]awyer-brokers play a key role in building and legitimating the market in their services and expertise' (Dezalay and Garth 2012: 279). One of the best ways of consolidating authority is through institution building (Kauppi and Madsen 2014: 328), which is exemplified by the proliferation of the ICL field, which can boast an upward trajectory of ICTs, ICL journals and ICL university courses.

For Hagan and Levi, the end of the Cold War presented new opportunities for lawyers, particularly in North America, to internationalise the governance of war crimes. Thus, lawyers were seminal in the emergence of what Sara Dezalay calls the conflict field. Within the conflict or international criminal justice field, lawyers and legalisation were what

came to dominate governance practices. In particular, 'justice' came to be understood in increasingly narrow and legalistic ways. Thus, for Kamari Clarke (2009: 13), much of ICL's success is a product of select actors and institutions being able to obscure and silence other justice narratives.

If we understand ICL as an unmediated relationship between international law and the individual—whether as victim or accused—then, for Cogan, this is illustrative of the regulatory turn within international law more broadly, which straddles the contradictory traditions of human rights and law enforcement. This contest is epitomised by ICL itself:

> With the reduction in the fear of governmental power, the limits on the ability to enforce human rights through state action dissipated significantly. The move to create international criminal tribunals (especially the International Criminal Court); the specification of international crimes (such as war crimes and crimes against humanity); the increasing demands of human rights treaty bodies for states to take positive action, including coercive action, to apply and enforce the law against individuals in their private capacity; the elaboration and criminalization of violations of human rights norms … and the attempted innovations in the concept of universal jurisdiction represent, to many, a natural extension of the human rights movement. (Cogan 2011: 359–60)

The crucial word in this quotation is 'natural', capturing how ICL has built on and, in many instances, colonised other transnational fields, including the human rights field.

Perhaps the best way of understanding ICL's reach is through an examination of ICTs and their disproportionate focus on the global South. The blueprints for all later ICTs were the two UNSC-created ad hoc tribunals mentioned above, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia in the mid-1990s. Based on Chapter VII of the UN Charter, their jurisdiction prevailed over all other domestic and international legal forums. Yet, unable to deal with the vast number of potential perpetrators, both tribunals required domestic counterparts to fill at least some of the gaps in their purview. These two examples were used as laboratories for the newly emerging ICL field and it was crucial that they served as exemplars of international standards. Such aspirations, as well as the nature of the hearings themselves, have produced incredibly lengthy and costly trials whose outcomes could never be satisfying to everyone.

A range of civil society, state and IGO actors, building on the example of these two ICTs and the lessons learnt, was galvanised to work towards the establishment of a permanent international criminal tribunal, the ICC (Tallgren 1999: 359–60). The UN General Assembly requested the International Law Commission (ILC) to work on a draft statute for the court and, during the mid-1990s, a series of meetings was convened in New York that brought together state and civil society actors. This activity culminated in the Rome Conference of 1998, which was sealed with the signing of the ICC Statute, which came into force in 2002 with 60 ratifications (there are now 122 parties). This statute and the court itself were and remain the highpoint of ICL governance, but it is important to note the ICC's many limitations in the face of such hope and the nature of its work to date. In particular, the court is restricted in its capacity due to finite resources and an imperfect jurisdictional reach. The court's jurisdiction is founded, first, via referral to the prosecutor by a state party (Article 14); second, through a referral by the UNSC (Article 13); and third, on the initiative of the prosecutor her/himself (Article 15). Although it may seem strange for states to initiate cases themselves—especially over contentious civil conflicts, as in the examples of Mali, the Democratic Republic of Congo, the Central African Republic and Uganda, so-called 'self-referrals' in fact indicate how the ICC tends to rely on state-centric accounts for some of its work (Nouwen 2012: 336; Robinson 2011). For example, Uganda's self-referral in relation to the situation in the north of the country with the Lord's Resistance Army was a way of legitimising its own narrative about the conflict (Nouwen and Werner 2010: 948). In contrast with Uganda, the conflict in Darfur came under the court's remit through UNSC referral. Although Sudan's president has been indicted, he remains able to travel widely across the African continent, indicating the deep distrust about at least part of the ICC's current focus, where its docket is populated almost exclusively by African situations (the exception being Georgia, along with a number of non-African jurisdictions under preliminary examination). Clarke (2009: 46–9) goes as far as to describe the court's work as the tribunalisation of African violence, amounting to a new scramble for Africa. These examples illustrate how ICL is increasingly being used as a way of framing conflict and the development of post-conflict societies across the global South.

ICL's reach is not based solely on ICTs, however, as it also extends directly into the domestic realm in a number of ways, including through a range of more localised tribunals. Closely linked to the

institutional legacies of the ICT on Rwanda, the ICT on the former Yugoslavia and the ICC are mixed, hybrid or internationalised tribunals that tend to oversee transitions by bringing together domestic and international norms and practice within the affected state. Examples include Cambodia, Timor-Leste, Bosnia, Sierra Leone and Kosovo. Where the 'international community' has deemed the domestic setting to be unaccommodating to a trial process, it is also possible to move domestic criminal proceedings outside the crime site, such as the ICT for the former Yugoslavia and the Special Tribunal for Lebanon (Burgis-Kasthala 2013) in The Hague and the ICT for Rwanda in Arusha, Tanzania.

4. ICL normativities: Protecting humanity through individual criminal responsibility within and beyond the state

This overview of international and mixed international criminal tribunals above highlights how states, IGOs, NGOs as well as lawyer-brokers have all been crucial in contributing to ICL as an exemplar of the regulatory turn within international law more broadly. As introduced above, Cogan's (2011) notion of this regulatory turn is distinguished from a dominant Cold War approach of mediated law as between international governance and the individual to a growing post–Cold War emphasis on unmediated or direct regulation of the individual. ICL came early to this trend through the 1948 Genocide Convention and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. By the turn of the century, the regulatory turn in:

> international law manifested itself in three ways: the establishment of direct international duties and their direct enforcement; the expansion of mediated law's coverage and the increasing specificity in which that law was outlined; and the extension and the particularising of facilitative law and processes. (Cogan 2011: 346)

Although it would appear that ICL is particularly reliant on the first element of direct international duties and their *international* enforcement through the proliferation of ICTs, in fact, its greatest reach arises from both unmediated and mediated laws at the *domestic* level. For, although ICTs are a crucial element of ICL's development,

their limited capacities mean that domestic criminal prosecutions of international crimes are as or more important for consolidating the reach of ICL. States have enacted legislation as required by treaty, but some have also acted pre-emptively to preclude possible international adjudication. Most generally, states can invoke ICL norms through the resort to universal jurisdiction for a range of international crimes irrespective of their location, the perpetrator or the victim. A well-known example of this is the Pinochet case,[2] which relied on a universalist interpretation of torture as crime. In 2000, the UK House of Lords determined that a former head of state was extraditable for alleged crimes of torture committed during his rule and, even though he never faced trial in Spain due to ill health, this did not detract from the principle of universal jurisdiction. Such recognition of ICL's domestic dimension is also embodied in the notion of complementarity within the ICC, where domestic jurisdiction is the rebuttable presumption for alleged crimes (Articles 17–20). As ICL's central concern is impunity, it is not significant whether a fair trial occurs domestically or internationally. Under the policy of ICC complementarity, states are required to demonstrate how their criminal justice systems are adequate in responding to allegations before the court, highlighting how ICL can have far-reaching effects on domestic jurisdictions. The ICC can underscore such practices through entering into partnership agreements with host states, such as in the case of Libya. Other states, IGOs and NGOs can also play a facilitative role in this policy of 'positive complementarity', whose 'explicit aim is to catalyse developments at the domestic level' either directly or indirectly (Nouwen 2013: 104).

Whether an ICL trial occurs domestically, internationally or in some hybrid forum, the common result is the framing of individual criminal responsibility for acts that often straddle the fields of IHL, IHRL and ICL. Recalling the most elementary dimension of crime, we need to ask here what is the harm being regulated, who is deemed to be the perpetrator, who is the victim and which social world informs underlying narratives of harm and criminality? Although ICL often does play out domestically, it is crucial to recognise not simply its international dimension (as the product of crimes created by states), but also its global quality as a practice that constructs 'humanity' as its source, telos and site of regulation (Corrias and Gordon 2015). Regardless of whether humanity as a constituency or political community exists, the idea of

2 *R v Bow Street Magistrates Ex P Pinochet* [2001] 1 A.C. 147. House of Lords.

humanity serves as the central trope in the dominant ICL narrative of progress through law. In this narrative, states are the ones who facilitate ICL's reach, but states are rarely the ones responsible for its breaches, particularly states from the global North. Recalcitrant states may be brought within the fold through capacity building and criminalisation, while, ultimately, individuals are the ones who are held out and sanctioned as enemies of humanity for the most serious of acts (Dubber 2011: 932), including genocide, crimes against humanity and war crimes. The most 'political' of crimes—aggression—implicates the state more than any other crime and perhaps, then, it is why this offence has been so difficult to institutionalise within current ICL structures. Once the ICC potentially considers allegations of aggression after 2017, however, the difficulties of criminalising political projects will only highlight more starkly the particular biases inherent in a resort to individual criminal responsibility for (certain, probably non-Western-instigated) wars of aggression.

5. Conclusion

International criminal law is an increasingly prominent example of the globalisation of regulation (see Drahos, Chapter 15, this volume) vis-a-vis conflict-torn and post-conflict states, whose reach extends far beyond the prosecution of rogue individuals; its broader remit is to reconfigure 'incapable' states and societies in the global South. This globalisation of criminal law can be contrasted with a globalisation that aimed at repairing relations through principles of restorative justice and responsiveness (see Braithwaite, Chapter 7, this volume). Despite its name:

> [the] project of international criminal law is *global*, rather than international, insofar as it concerns itself not with the interaction of nations or with nations taken individually, but with individuals' relationship to humanity globally speaking; the offender of international criminal law offends humanity anywhere and everywhere, regardless of national affiliation. (Dubber 2011: 934, emphasis in original)

The ICL project is also a political one that seeks to confine questions of social redress and repair within extremely limited registers. Where once justice could capture a variety of practices, when invoked through the international criminal justice field, it has become synonymous with

trials of individual criminal responsibility. ICL governance, then, relies on techniques of depoliticisation and juridification to advance liberal and neoliberal rationalities for often divided and peripheral societies.

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Section 5: Crime and regulation

RegNet has been a meeting place for those interested in criminology and regulation. A praxis-style project in which crime stimulates creative regulatory theory that in turn underpins mechanisms and processes of regulatory response to crime was under way before RegNet's formation. Braithwaite's (1982) model of enforced self-regulation addresses the problem of corporate crime, as does his earlier and classic work, *Corporate Crime in the Pharmaceutical Industry* (1984). The chapters in this section show how RegNet researchers have continued this praxis-style project.

Russell Brewer's opening chapter analyses how network and nodal theories, which are described in other chapters in this book, help us to understand the transformations taking place in the delivery of security in the modern world. Susanne Karstedt, deriving from regulatory studies the principles of context independency, scale independency and sequencing, argues that they enable criminology to connect with and move between micro and macro-worlds of criminality, thereby potentially increasing the repertoire of solutions for both. Heather Strang's chapter explains the influential experimental work started in the 1990s by an ANU-based research group around reintegrative shaming—work that was continued by RegNet's Centre for Restorative Justice and that contributed hugely to theory and innovation in restorative justice. Julie Ayling uses the lens of meta-regulation, showing how one might develop preventive approaches to transnational environmental crime. Roderic Broadhurst and Mamoun Alazab discuss another transnational

problem, spam. They show how the networked delivery of spam requires an enforcement response based on a network of public and private actors. The network theme—this time on the need for states to govern the security of cyberspace through networks—emerges again in Lennon Chang and Peter Grabosky's chapter.

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26

Controlling crime through networks

Russell Brewer

1. Introduction

Scholars have, for some time now, chronicled a significant transformation in the way policing is organised, and have acknowledged the increasingly pluralistic and networked nature of crime control (see, among others, Bayley and Shearing 2001; Fleming and Wood 2006; Brodeur 2010). No longer is the state regarded as holding a monopoly over policing (Bayley and Shearing 2001). Instead, controlling crime has become shaped by networks that integrate the public police with a host of other actors involved in the authorisation and delivery of security, including various state, as well as non-state, actors. Much research has explored the confluence of these multiple actors in various crime control contexts and has served to establish key theoretical strands within this burgeoning scholarship that view security as being delivered through networks (Dupont 2004, 2006a; Fleming and Wood 2006; Wood and Dupont 2006). This body of work suggests that the relationships between actors vary, ranging from highly coordinated, coproductive alliances to differing forms of contestation (Shearing and Wood 2003; Crawford 2006a). Several scholars have also sought to elucidate the nature of these connections and, in particular, the various ways in which information and resources actually flow across networks to deliver security (see Marks et al. 2011, 2013). One important thread emerging from this

scholarship recognises that assessing the nature of these flows involves the consideration of social structures—particularly through its macro-structural properties (Dupont 2004, 2006c). These very dimensions have been subject to empirical examination in some recently published work by the author (Brewer 2014, 2015), offering fresh insights into how the distinct patterns of connections within security networks shape the ways in which criminogenic conditions are controlled and responded to.

This chapter will probe key theoretical and empirical developments and account for how various state and non-state actors shape flows across networks. It begins by outlining a theoretical foundation for this work, detailing the evolution of crime control as it has unravelled in recent years, the pluralisation of policing arrangements and the emergence of networked approaches within the criminological literature. After establishing these important theoretical strands, this chapter then draws on findings from several recent empirical studies of security networks to explain and reconcile emergent structural forces that serve to shape network flows and influence security outcomes. It is argued here that a better understanding and appreciation of these forces, and the various contexts for which they operate, is necessary as policing networks continue to diversify. This chapter concludes by tying these findings in to broader debates occurring within criminology about the governance of security and the need to establish regulatory approaches to account for these developments.

2. Delivering security in the modern state

To fully comprehend the complex interweaving of state and non-state actors involved in contemporary policing and its complex social undertones, it is first necessary to give conceptual consideration to precisely how the propagation of non-state orderings within the modern state has drastically altered the delivery of public security. The ascendency of neoliberalism as the prevailing economic and political paradigm has generally coincided with widespread privatisation, marketisation[1] and the dispersal of systems of governance. The state's longstanding primacy as the central 'guarantor of security' was not unaffected by the broader

1 Marketisation refers to instances where public institutions operate in some ways as market-oriented firms replete with market-oriented goals and objectives (that is, increased economic performance, competition) and market-type relationships (Salamon 1993). This process can occur, for example, through the reduction of subsidies and the deregulation of certain state-funded sectors.

transformation occurring across the modern state, as it, too, was heavily altered by a 'new public–private paradigm' (Johnston and Shearing 2003: 32–5). Bayley and Shearing's (1996: 586) much celebrated transformation thesis provides an account of these developments, proclaiming the 'end of a monopoly' in policing by public constabularies—ushering in a new line of scholarly inquiry seeking to account for the dispersal and restructuring of more traditional security roles within developed economies. In a later piece, Bayley and Shearing (2001: 1) argue that:

> Gradually, almost imperceptibly, policing has been 'multilateralized': a host of non-governmental groups have assumed responsibility for their own protection, and a host of non-governmental agencies have undertaken to provide security services.

Systems of social control have, as a result, become fragmented—being forced to restructure into an 'array of interlaced networks and institutions that transcend the classical public/private divide' and incorporate an increasingly diverse cast of state and non-state providers of security (De Maillard 2005: 326). The complexion of such networks is crowded and includes various government agencies and multinational corporations operating within the same sphere as small businesses, communities, associations and even individual actors (Castells 2000; Holley and Shearing, Chapter 10, this volume).

The literature is not in complete agreement as to the extent to which such fragmentation is a product of the transformation thesis, as Bayley and Shearing (1996, 2001) suggest. Instead, some scholars (for example, Jones and Newburn 1998, 2002; Newburn 2001; Hoogenboom 2010) argue that the nature of diversification witnessed is merely representative of a modern state (and its police) reinventing itself along contemporary hybrid structures that formally capture new (but often pre-existing) agents of social control, who have always coexisted with state policing agencies and continue to do so (such as tram conductors, bouncers, ushers, shopkeepers, and so on). What is consistent across this diverse discourse, however, is the widespread recognition of an expansion of policing networks within the modern state, accompanied by a pervasive shift in the governance of security emphasising these public/private orderings. The factors explaining the origins of such profound changes are numerous and interlaced—revising the roles of both public constabularies and other non-state auspices over an extended period. Some, like Bayley and Shearing (1996, 2001), contend that such emergent governance arrangements are reflective of parallel shifts

occurring within the modern state itself: fledgling economies throughout the 1970s, the rise of mass private property (see Shearing and Stenning 1983; Kempa 2004) and the decline of the Keynesian welfare state being some of the most salient drivers (for further treatment of these concepts, see Newburn 2001; Dupont 2004; Reiner 2010). The parallel emergence of a 'risk society' has also been significant—featuring risk management as the key technology providing a 'systematic way of dealing with hazards and insecurities induced and introduced by modernization' (Beck 1992: 21; see also Haines, Chapter 11, this volume). The application and institutionalisation of this 'technology' within the modernising state have had considerable implications for the way criminal justice institutions operate, and the way crime policy is conceived: shifting away from a more traditional and episodic 'bandit-chasing', deviant individual focus to one that resituates crime control as its primary focus (Buerger and Mazerolle 1998). Such developments have also been aided considerably by the proliferation of powerful information, communication and surveillance technologies throughout the 1990s, which have enabled previously bounded agencies, organisations and individuals to expand the limits of their roles and responsibilities (Dupont 2004).

With the exception of a number of countries where the state has aggressively retained its primacy, the resultant revisions to the complexion of policing represent far more than the simple devolution of the existing roles of state institutions into subordinate orderings, but instead represent a blurring of such responsibilities in a technologically facilitated risk-based exercise designed to control and respond to crime (Johnston 2000; Bayley and Shearing 2001; Waring and Weisburd 2002; Dupont 2004; Hoogenboom 2010). Determinism has not been a factor in limiting the types of private and public actors becoming involved (or the extent of their involvement) in this exercise, or the degree to which they cooperate with or compete against one another in pursuit of internal and external security objectives. Rather, the uncertainty associated with the fragmentation of responsibility over security has compelled actors to seek order by coordinating with others (but not necessarily with all others). This has prompted the establishment of new channels of communication, the forging of new social connections (or ties) among previously disparate actors (or nodes) and the formation of alliances to tackle crime problems (Dupont 2004). The shared models emerging throughout this process are expansive, yet multifaceted, interweaving state authorities and non-state actors into an 'increasingly complex and differentiated patchwork of security provision' (Newburn 2001: 830).

3. Making sense of the melange

Taking stock of these developments, and making sense of the inherent complexities driving the provision of security in the twenty-first century, has proved a challenging, yet fertile, domain of scholarly inquiry. Within this burgeoning literature, the concept of 'networks' has provided a useful framework for portraying these complexities, and has attracted considerable attention from policing scholars involved in their study. The usage of this concept has, however, been driven largely by intuition about what a network is or how it should behave—drawing theoretical assumptions about neat, highly coordinated assemblages that presuppose activities of coproduction via horizontal partnerships (Brodeur and Dupont 2006; Dupont 2006a). This literature has interrogated the pervasiveness and utility of these assumptions largely using narrative or statistical data—concluding that policing relations are, in fact, characterised by a 'complex mosaic' of 'more-or-less awkward relations' that are 'poorly organised and co-ordinated', 'suffer duplication', 'are marked by competition and mistrust' (Crawford 2006a: 466–7) and thus offer 'little evidence of the development of a co-ordinated system of policing' (Jones and Newburn 1998: 197; see also Newburn 2001; Crawford et al. 2005). This work also sheds light on several important considerations surrounding the study of plural policing with which the application of network theories must grapple. For one, the provision of security within this increasingly pluralised 'patchwork' is incredibly difficult to trace, its boundaries porous and the true diversity of its memberships unclear. Nodes form networks across numerous plains of existence that overlap and intersect: they can be localised within communities, they can be inter-institutional, they can be transnational, they can also be entirely virtual and, importantly, they can change over time (Dupont 2004). Discrete networks can also be vastly different in terms of their scope and operating contexts, and ties can (and are) mobilised through a multifarious web of regulatory, contractual, voluntary and informal arrangements (Cherney et al. 2006; Dupont 2006a). Nodes are not necessarily bound by shared values or overarching objectives either, and are instead more appropriately characterised as a medley of overlapping (but also potentially competing or conflicting) interests and interdependencies (for example, Castells 2000; Newburn 2001; Crawford et al. 2005; Crawford 2006a; Brewer and Grabosky 2014; Brewer 2015). As a consequence of all these characteristics, the formation of connections among nodes and development of distinct

patterns of relationships have seen pluralised policing networks unfold in unique and sometimes unexpected ways. These myriad developments have considerable consequences for the provision of security and warrant further empirical attention.

To date, very few studies of policing (and, indeed, across criminology more broadly) have scrutinised the structural features of such networks (Dupont 2006a) or, in particular, employed network science (based in graph theory and widely used across other disciplines) to capture and explain precisely *how* the myriad links and interdependencies formed among security actors (no matter how strong, fleeting or diverse) serve to shape outcomes (Papachristos 2011). Several scholars have called for a need to move away from untested theoretical assumptions and employ methodologies to verify the multiplex nature of policing (which may be captured through network approaches): the extent to which nodes form connections, share resources (or do not), develop trust (or do not) and align interests (or do not) (Johnston and Shearing 2003; Fleming and Wood 2006; Johnston 2006). A substantial body of work emanating from within the discipline of sociology has long recognised the importance of accounting for a node's positioning within a network, as well as the meanings behind regular patterns of relational ties that emerge within networks—in other words, its *social structure* (Marsden 1982; Wellman 1988). However, only a handful of studies to date have adopted a network orientation in elucidating the complex social structure underpinning plural policing.[2] Dupont's (2004, 2006a, 2006b) pioneering research took important first steps in establishing concrete methodological and analytical parameters surrounding the study of *security networks*[3] using relational data. Using social network analysis (SNA), this body of work undertook the onerous task of mapping the social structure (that is, the extent of connections and the placement of nodes) of localised security networks. Subsequent research by the author (Brewer 2014, 2015) has employed similar methods to build on these contributions and further develop understandings of how the diverse connections between nodes

2 The dearth of research in this space is surprising, considering the number of studies that have adopted a network orientation to examine so-called 'dark networks' (Raab and Milwaard 2003). Several notable studies have, for example, applied social network analysis to various forms of criminal networks (for example, Bright and Hughes 2012; Morselli 2009; Bichler and Malm 2015).

3 Dupont (2006a: 168) posits that 'security networks form around the authorisation and delivery of security, through a range of processes and services that extend from identification of needs and the resources available to respond to them, to the management of risks and the deployment of human technological assets'. Nodes can vary in specification; they may be 'institutional, organisational, communal or individual agents' that fall either directly or indirectly within this remit.

and their emergent social structures influence security outcomes by shaping the flow of network assets (that is, information and resources). With respect to these findings, the following discussion will tease out one important narrative surrounding the unexpected priority of some nodes over others, and a resultant concentration of control within a network structure. This commentary will reiterate that security networks do not operate as egalitarian horizontal structures, and instead demonstrates that only a select few nodes within a given network are adequately positioned to 'fully exploit the opportunities this form of governance yields' (Dupont 2004: 78).

4. Locating the positions of power and control over policing

The modelling undertaken of discrete security networks, first by Dupont (2006a, 2006b) and then by Brewer (2014, 2015), offers unique insight into *how* security is being delivered that has not previously been canvassed. Although these studies vary in terms of jurisdiction, size and scope, they both nonetheless feature consistent attributes pertaining to the interdependencies that exist between public and private nodes, the formation of distinct patterns of relational ties connecting nodes, and the emergence of complex structures that govern flows across security networks.

First, this body of work clearly articulates the extent of the diversity of both public and private nodes involved in the provision of security, and that sufficiently dense networks can afford copious opportunities for exchange. This is not to suggest, however, that all actors (public and/or private) operate on a level playing field, each having equal access to opportunities across the network. Rather, a node's reach within a security network is affected by the extent to which its connections and activities are confined within distinct subgroups, or clusters. The abovementioned studies have shown the extent to which providers of security tend to concentrate activities among distinct subgroups, which, in many ways, serve to limit their capacities to connect to, and access resources across, the broader network. Brewer's (2014) study of networked policing on the waterfronts of Melbourne, Los Angeles and Long Beach, for example, demonstrates that such patterns are reflective of tendencies among nodes to remain active within the confines of others who share similar values and interests, operating most effectively within parochial

silos and not concerning themselves with opportunities that may exist externally to that cluster. On Melbourne's waterfront, for example, nodes had a tendency to restrain their activities within a single cluster, where their duties, skills and functions remain non-overlapping and narrowly constrained to the point of specialisation. Public constabularies were shown to concentrate their connections among other institutional nodes involved in sharing intelligence and undertaking joint operations, and were regarded by nodes contained within other clusters as largely 'being left to their own devices', as 'only being interested in the glamour crimes' and as being 'way too far removed from industry and from the front line' (Brewer 2014: 138).[4] Private stakeholders, on the other hand, were also very much aligned with, and connected to, other organisations sharing similar commercial interests. Owners of infrastructure were chiefly concerned with ensuring business continuity (and interacted with other related actors on that basis), while those involved in moving/clearing cargo also served their own internal interests. Such activities served to further distance (and, in some cases, alienate) these nodes in the eyes of external parties, promulgating the perception of 'closed shop' environments where crime problems were being addressed discretely (if at all) via 'in-house solutions' (contrary to legislative requirements that involve notifying public agencies contained within other clusters) (Brewer 2014: 138).[5] These findings are significant in that they clearly illustrate a division of responsibility over network assets (information and resources), which in turn impacts on precisely where (and with whom) power resides within security networks. As such, opportunities for engagement and the flows of network resources are concentrated within, and are at risk of being fragmented across, distinct pockets of network activity.

This is not to suggest that crosscutting networking opportunities are futile within security networks. To the contrary, the research suggests that certain actors are sufficiently well connected within security networks to create opportunities for linkages, and effectively control the flow of network assets among less-connected actors. Studies of security networks to date have modelled control of such flows through a determination of which nodes actively occupy the most central (and, hence, most powerful) positions within a given network's structure. Measures of centrality have

4 Observations made by a maritime union representative and reiterated by other industry stakeholders interviewed for Brewer's (2014, 2015) research.

5 Views expressed by numerous state and federal officials (law enforcement and regulators) interviewed for Brewer's (2014, 2015) research.

frequently been used by researchers of security networks (for example, Dupont 2006a, 2006c; Brewer 2014) and elsewhere (for example, studies of criminal networks; see Note 2) to identify those nodes that hold the most connections and, thus, the greatest opportunities to connect with, influence and direct flows towards others. Relatedly, Brewer's (2015) study also emphasised the significance of brokerage roles undertaken by certain nodes within security networks, who are strategically placed to bridge 'structural holes' (Granovetter 1973) and connect otherwise isolated nodes. This research showed that public actors—and public constabularies, in particular—are both centrally and strategically situated network players. Such findings are perhaps unsurprising given the exclusive control governments have over essential security assets, which include specialised 'security equipment', the 'legitimate use of force' and access to 'restricted crime-related information' (Dupont 2006a: 175). What is striking about the social structures detailed by Brewer's (2015) study of Melbourne's waterfront, however, is that the network core is not exclusively the domain of the police; rather, entrepreneurial private nodes—in this case, the Port Corporation and terminal operators—also assume privileged positions to become the *most strategically placed nodes within the entire network*. In this respect, security networks have pluralised to such an extent that private nodes are increasingly becoming central players in the provision of security, and take a leading role in creating network paths, bridging structural holes and controlling flows across the entirety of the networks—thus targeting and creating opportunities for connection, especially among those disadvantaged and constrained by their structural positions within clusters.

5. Security networks and the governance of security

The structural elevation of private actors in crime control contexts is not an entirely unexpected phenomenon. Several years ago, Crawford (2006a: 466) noted that 'developments in the security market', including those undertaken by private actors, represent yet another thread that needs to be recognised of plural policing activities that coexist and intertwine. Indeed, over the past several decades, criminological scholarship has sought to clarify the extent of these developments—through empirical approaches that may serve to ground understandings of the conceptual placement of state and non-

state actors in an increasingly pluralised environment and to enhance prevailing debates surrounding the governance of security. The notion of 'anchored pluralism' (Loader and Walker 2006) represents one established perspective that has received considerable attention within the criminological literature, arguing that public constabularies exhibit distinct attributes that reinforce (anchor) their central position in the collective provision of security (for example, perceptions of legitimacy, symbolic power and cultural authority, access to resources and its position of being a backup of last resort). The empirical findings considered above support this perspective to a limited extent, showing that while public police serve as 'anchors' in some respects (they do maintain control over some network flows, as well as a symbolic position of authority), the network 'does not depend on [the police] to mediate its exchanges on a routine basis' (Dupont 2006a: 177).

In light of this, a nodal perspective (see further, Holley and Shearing, Chapter 10, this volume) better captures and explains the patterns of relations and coordination of security networks than does a purely state-centric view. The ascendency of private nodes to prominent network positions provides clear evidence of a shift towards 'corporate-anchored pluralism', with private actors becoming a primary site of governance existing outside the state (see Johnston et al. 2008). The impact of increasingly dominant privately centred structures underpinned by competitive logics (that is, loss prevention) has been foreshadowed in the theoretical literature exploring 'private governments', highlighting, in particular, the capacity of private nodes to actively steer 'the flow of events to promote security' (Shearing 2006: 11; see also Macaulay 1986). We have learned from the research canvassed in this review that private actors have considerable influence over controlling flows within security networks—particularly in terms of 'build[ing] bridges between disconnected parts of the market and organisations where it is valuable to do so' (Burt 1992: 18). Brewer's (2015) study of Melbourne's waterfront shows that private actors can (and do) broker network flows along such lines and, to the extent possible, exercise control over segments of a security network in support of 'club goods' (Crawford 2006b) that benefit the maritime industry over broader 'public goods' concerning crime reduction. By way of example, this has led to network flows that often preference the expedited movement of cargo, ships and trucks (guarding against disruptions) over the provision of thorough and time-consuming screenings, investigations and reporting. Moreover, specific security undertakings often tend to be orientated towards addressing

vulnerabilities most pertinent to commercial interests (that is, mitigating internal risks), emphasising 'volume criminality' such as vandalism, trespassing and container thefts over international 'glamour crimes' such as terrorism and drug trafficking, which present more far-reaching consequences.[6] Such capabilities introduce a conundrum where private actors can, through their control over certain network assets, effectively usurp government and the public interest and potentially seize control of the authorisation and delivery of security within a range of settings.

The consequences of such developments are significant. Their implications have been forecast in the scholarly literature with some trepidation. Loader (2000: 329), for example, posits the downside risks associated with a policing paradigm characterised by diminishing state involvement and control, suggesting:

> [the] rapid expansion of commercial provision and competitive logics not only threaten to see the private sector replace the state as suppliers (or 'rowers') of policing across a range of settings; it also, more significantly, creates a situation in which government finds it ever more difficult to exercise its 'steering' functions, whether in terms of effecting some control over the distribution of policing goods, or of bringing service providers to democratic account.

Relatedly, Crawford et al. (2005: ix) advocate an 'urgent need to … secure suitably robust forms of governance and regulation to ensure policing is delivered in accordance with democratic values of justice, equity, accountability and effectiveness'. To this end, Loader (2000: 333) further suggests a need to 'begin to formulate conceptions of democratic regulation appropriate to the diverse instances of policing as governance that are currently unfolding beyond the state' and, quoting Valverde et al. (1999: 31), proposes a need to develop and put in place 'mechanisms … to ensure at least some measure of democratic accountability within bodies that might be formally "private" but which are performing more and more governmental actions'.

An important thread present within this scholarship suggests that, if left unchecked, the propagation of such social structures may ultimately produce serious dilemmas for governance, specifically resulting from the potential for abuse of corporate power by privileged private nodes. While it certainly is important to identify and mitigate against such

6 Views expressed by numerous state and federal officials (law enforcement and regulators) interviewed for Brewer's (2014, 2015) research.

downside risks, it must be acknowledged that these developments also have a bright side—particularly in terms of enhancing crime-control network functionality and producing efficiency gains via an emergent capability to 'bridge [social] structures and allow the unfettered access to information and resources, build trust, and link otherwise disconnected nodes' (Brewer 2014: 178). These private actors effectively serve as 'conduits of exchange', and thus have potential to create resiliency within otherwise fragmented security networks—enabling structural deficits to be overcome and thus providing access to resources across the network.

While monitoring the influence of private actors via appropriate regulatory measures is pertinent given the aforementioned risks, their implementation requires careful planning. Given the attendant successes (enhanced network activities, distribution of resources, and so on) observed by the author in his previous studies, a strong case can be made that such patterns should, in the right contexts, be not only recognised, but also encouraged. For example, Osborne and Gaebler (1992: 19) argue that true innovation can be an important by-product of 'empowering' private actors, by 'pushing control out of the bureaucracy'. Accordingly, restraints on private providers aiming to 'guarantee universal compliance to democratic principles' should take care to celebrate the diversity in the authorisation and delivery of security, preserve the drive of private actors to create certainty and order, and reap the crime control benefits associated with such activities (Dupont 2006c: 105). Any such undertaking should adopt a meta-regulatory framework (Parker and Braithwaite 2003; Cherney et al. 2006) that makes possible the careful 'regulation of regulation' (for a depiction of how such a framework might be conceived, see Dupont 2006c: 104–10).

6. Conclusion

This chapter provides an overview of the key theoretical and empirical developments around security networks. Through its review of the limited research available using social network methodologies, it demonstrates that the structural composition of such networks is crucial to garnering a nuanced appreciation of the pluralisation of policing and the security networks that have evolved, and continue to evolve, as a result of that process. The studies canvassed in this chapter clearly illustrate that security networks are invariably messy. They vary immensely across time and space, they can be extraordinarily diverse in

terms of size, scope and membership, and the unique patterns that form through the multiplicity of connections between nodes can have broader implications for the governance of security. More research is required to understand these attributes and, in particular, their applicability in other networked policing contexts. Such work would, again, benefit from the application of SNA methodologies as a means to unpack these complex nodal patterns.

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27

Scaling criminology: From street violence to atrocity crimes

Susanne Karstedt[1]

1. Criminology and regulation: Adopting principles

In 2000, John Braithwaite argued for the 'transformation of criminology' and even for its abandonment as a discipline in favour of all-encompassing 'studies of regulation' (2000: 223). As he noted then, this was not to happen in the near future, and, indeed, it did not happen. What happened, and what he had started a decade earlier, was an invasion of regulation theory, concepts and ideas into criminology, which, in many and prolific ways, changed how criminologists think. Most influential among these were the principles and practices of restorative justice, which became the most successful criminal justice innovation worldwide since the adoption of the panopticon prison in the nineteenth century (Parmentier et al. 2011).

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However, there are more lessons to be learned for criminology and more conceptual tools to be imported from the regulatory framework. These are foundational principles rather than developed practices. This chapter will explore the potential of the basic principles of regulation theory and concepts for criminology, and will use the exemplary case of extreme and high-level violence. It will focus on three principles that I identify as most important in this area: *context independency*, *scale independency* and *sequencing*.

These three principles are representative of the definition of (responsive) regulation as 'a general theory of how to steer the flow of events' (Braithwaite 2014: 432; Parker and Braithwaite 2003). This certainly is in stark contrast with traditional and, in particular, aetiological, criminology with its focus on the offender and controlling them. It has, however, much in common with more recent theoretical and conceptual developments in criminology such as routine activity theory and situational and environmental crime prevention; these are frameworks that focus on the crime incident rather than on the individuals involved. In this way, criminology and regulatory concepts share a common perspective on the dynamics of events, the role of actors within these and their decision-making processes (for example, Leclerc and Wortley 2014). The common perspective includes the principles of intervening in the flows of events. Consequently, both criminological and regulatory perspectives address proximate factors rather than distal or root causes, and promote interventions that are based on the former rather than on the latter.

Context and scale independency imply that we can move: between different types of the same event, for example, violence in pub brawls and violence between ethnic groups; between different types of events, for example, tax evasion and violence; between the local and the global and between micro and macro-contexts; or between different types of actors such as corporations and militias. Sequencing is a principle that originates from the focus on the 'flows of events' and implies a move along with the flow, following its original dynamics and changing its trajectory at different stages in different ways.

The overall aim of this chapter is to demonstrate how these principles can inform the use of criminological knowledge and research for the prevention of incidents of mass violence and atrocity crimes, as well as for interventions when they evolve. The plan of the chapter is, first, to define the set of circumstances in which contemporary mass violence

takes place. The next sections will then explore the ways in which criminological knowledge and research evidence can be gauged for violence prevention and intervention in such contexts. I move on to ways of using knowledge and evidence from such large-scale violence to the smaller scales of street crime and gang networks. This is a process of both *scaling up and scaling down*, of moving from micro to macro-contexts and vice versa.

2. Contemporary landscapes of mass violence and atrocity crimes

The term 'atrocity crime' as used here is now widely adopted for massive violence committed by state and non-state actors. It includes the international crimes of genocide, war crimes and crimes against humanity, such as torture or forced disappearance, as well as ethnic cleansing (Scheffer 2006; Karstedt 2013a; UN 2014). Contemporary contexts of mass violence evolve in a landscape of long-term and multifaceted conflicts, extreme violence and state fragility (for an overview, see Karstedt 2013a). The majority of mass killings since World War II have been part of civil wars and ethnic conflicts (Kalyvas and Balcells 2010). These conflicts typically occur below the level of the nation-state and independent of its boundaries.

These are conditions and environments that Christian Gerlach (2010) describes as 'extremely violent societies'. This defines a (temporary) condition of society where violence has become endemic and encompassing. First, violence becomes 'multipolar': different groups become victims of massive attacks of physical violence, including mass killings, systematic sexual violence and enforced displacement, and mass violence oscillates between these different forms of violence. Next, participation in these events spreads across the boundaries of different groups and, consequently, the lines between different types of involvement and non-involvement become blurred, as does the distinction between victim and perpetrator groups. Further, diverse groups of perpetrators participate for multiple and often changing reasons, ranging from domination or ethnic hatred to access to resources and criminal exploitation of the population through extortion and taxation. Groups include state government forces, paramilitary forces and militias, rebel forces and warlord groups—all of whom engage in complex and shifting alliances with each other or government forces. The conflict

in the Great Lakes Region of Africa involving Rwanda, Burundi and the Democratic Republic of the Congo (DRC) is an exemplary case. Between the 1950s and the 1990s, Hutus and Tutsis changed place as victims and perpetrators more than once (Prunier 2009). The final crisis and mass atrocities in Darfur, Sudan, were the last in a series of conflicts that reached back across half a century and targeted different groups; they all included atrocities on a massive scale (Flint and de Waal 2008).

Atrocity crimes are increasingly committed by non-state organised actors such as paramilitary groups, who often are encouraged, empowered and guided by state actors such as the police or military or other powerful actors such as opposition leaders. These developments were first visible in Central and Latin America from the 1980s onwards (Guatemala, Colombia) (Rothenberg 2012), and then in Yugoslavia in the 1990s, Darfur (Hagan and Rymond-Richmond 2009), DRC (Autesserre 2010) and the Central African Republic. The engagement of state forces such as the military and the police in paramilitary action creates a situation where laws and restraint are easily and deliberately ignored; this is fertile ground for forced displacement, torture and widespread sexual violence, as, for example, in Guatemala (Rothenberg 2012). Such atrocities are often linked to other criminal activity, including weapon and drug trafficking or illegal natural resources exploitation.

We can track these developments in the declining incidents of mass atrocities and their death toll, as shown in Figure 27.1. There is a rapid decline after 1990 in the number of incidents, which mostly—with the exception of the Rwandan genocide—coincides with a substantive decrease of victims. With a considerable lag, campaigns of one-sided violence by state actors (police, military and paramilitary units organised by the state) against civilians—that is, noncombatants—as well as the number of victims started to decline in the second half of the 1990s; this mainly concerns atrocity crimes on a smaller scale (Human Security Report Project 2011; Sikkink 2011). However—and in line with the contextual patterns of extreme violence as described above—the involvement of non-state actors such as militias, paramilitary defence groups, rebel groups and warlord armies has risen from a low 30 per cent in 1997 to more than 80 per cent of all conflicts globally in 2007 (Human Security Report Project 2011, 2013). Hence, they are increasingly responsible for the massive violence, atrocities and dispossession committed against populations, and for the 'horizontal violence', in contrast to state-led 'vertical' violence.

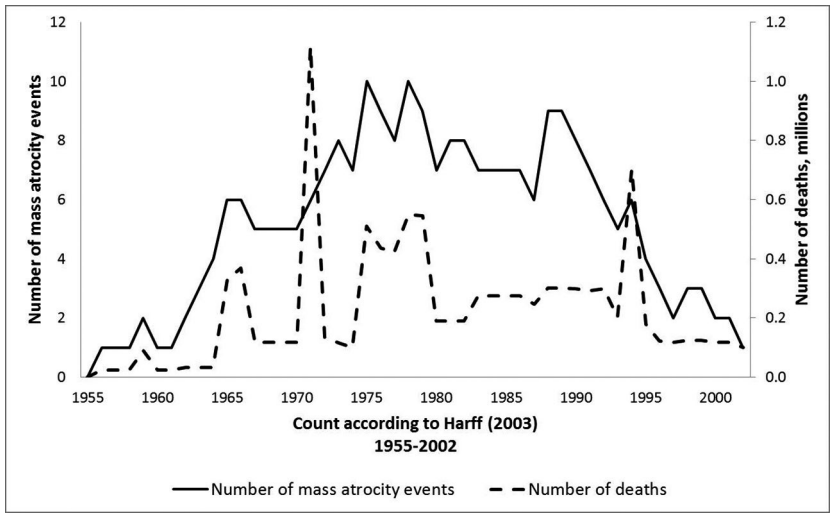

Figure 27.1 The global dynamics of violence, 1955–2002: Mass atrocities and deaths

Source: Author's work, adapted from Harff (2003).

These contextual patterns have been measured with a Violent Societies Index (VSI), which addresses the typical combination of different types of violence. It includes battle deaths, (repressive) state violence, terrorist attacks and interpersonal violence (homicide).[2] Table 27.1 shows the top-20 'violent societies' across the 2000s, and demonstrates a number of distinctive features. First, most of these societies experienced mass atrocity events, either between 2000 and 2012 or previously. Second, those societies that had been among the most violent societies in the first half of the decade remained in this group in the second half until 2012. Extreme violence is entrenched and path-dependent; this applies equally when the most violent countries are tracked over a much longer period, from 1980 to 2009 (Karstedt 2012). State violence is most consistently correlated with all other types of violence, and it is a strong predictor for levels of other types of violence across both five-year and 10-year periods. In particular, where state violence had been high, homicide

2 For each of the types of violence, a scale from one to 10 was constructed from available data sources. The VSI covers the period since 1976; as homicide rates were not available for the whole period and for many of the countries, one version of the VSI (VSI30) includes only battle deaths, state violence and terrorist attacks. A second version, VSI40, includes homicides and covers the period since 1995. The VSI40 is used here. For details, see Karstedt (2012).

levels tended to be high in the following years (Karstedt 2013b, 2014).[3] State-led violence consistently seems to be most detrimental for the social and institutional fabric of societies, and its impact on societies is the most long-lasting.[4]

Table 27.1 Violent Societies Index: Top 20 countries, 2000–2012

	2000–06		2007–12	
Rank	**Country**	**VSI**	**Country**	**VSI**
1	Colombia	23.3	**Pakistan***	**16.1**
2	Russia*	15.1	**Colombia**	**14.8**
3	India*	13.6	**Honduras**	**13.3**
4	Israel*	13.0	**Jamaica**	**12.6**
5	Nepal*	12.8	**India***	**12.3**
6	Algeria*	12.8	**El Salvador***	**11.4**
7	El Salvador*	11.7	**Russia***	**11.1**
8	Jamaica	11.3	**Philippines***	**10.3**
9	South Africa*	11.2	**Venezuela**	**10.3**
10	Philippines*	11.1	**Israel***	**10.2**
11	Uganda*	11.0	Syria*	9.6
12	Brazil	10.7	**Brazil**	**9.6**
13	Honduras	10.5	**South Africa***	**9.5**
14	Indonesia*	9.6	**Thailand**	**9.5**
15	Pakistan*	9.3	**Guatemala***	**9.1**
16	Venezuela	9.0	Yemen*	9.1
17	Guatemala*	8.8	Mexico	8.7
18	Haiti	8.3	Dominican Republic	8.6
19	China*	7.9	**Uganda***	**8.1**
20	Thailand	7.8	**China***	**7.6**

* Previous mass atrocity

Note: Countries in bold were included in the top-20 countries, 2000–06.

Sources: Author's work based on Violent Societies Index, VSI40, including homicide rates; see Karstedt (2012: notes 4, 5).

3 The correlations across countries were calculated for selected years in each decade (Karstedt 2012).

4 See Karstedt (2015) for the impact of state violence on trust in police and justice in transitional and post-conflict societies.

At the micro-level of local communities and individual involvement, clearcut divisions into perpetrators, bystanders, collaborators and victims are increasingly blurred. Here, local dynamics and family and friendship bonds play a role, as Fujii (2009) has shown for the recruitment process into violent groups and participation in violence. Looting, arson and damage to property, as well as assaults on the population and sexual assaults can be immediate precursors of massive violence, but often are not taken further than this. These types of violent action are used to threaten and intimidate the population and enforce displacement where resources are exploited. These are conditions where organised criminal groups become involved. Exemplary for these changes were two militia leaders who operated in the north of the DRC, Mai Mai Checka and Bosco Ntaganda. Both led militias and rebel groups who were involved in illegal resource exploitation and forms of organised crime, and committed atrocity crimes including sexual violence and slavery. Their forces and groups committed mass atrocities serious enough for the International Criminal Court (ICC) to issue arrest warrants and for the United Nations Security Council (UNSC) to send an intervention force with an explicit mandate to use force (Braithwaite 2013; UN News Centre 2013).

These types of violence and the actors involved have much more in common with violence in the streets of Baltimore and Rio de Janeiro, and with gang violence, than the model of state-led and hate-induced atrocity crime would suggest (Alvarez 1999). Pre-existing factors such as ethnic tensions and hatred, or discrimination per se, are not sufficient for mass atrocities to happen, nor are these root causes easily addressed. Such types of violence and their context lend themselves to policing and justice strategies rather than military interventions (Hills 2015: 1). It is from this vantage point that criminological knowledge and research evidence can contribute to prevention and intervention.

3. Scaling up: From street crime to atrocity crimes

Regulation theory includes deterrence as a regulatory strategy; however, deterrence is used in a sequenced and 'dynamic' approach and as a 'tough deterrent peak' that 'drives action down to the dialogic base of the pyramid' (Braithwaite 2014: 433). Equally, action can be driven up to the top of the sanction pyramid, if dialogue fails at its broad base.

Where domestic and international communities intervene in contexts of extreme violence, the threat and the use of force against (potential) perpetrators as well as the threat of legal prosecution and sanctions combine at the top of the sanction pyramid. The former is a matter of control and the use of technology and manpower; the latter resides in the credibility of international and domestic criminal justice to bring perpetrators to justice. This implies both a dynamic and a sequenced use of deterrence rather than static and 'passive deterrence' (Braithwaite 2014: 433).

There is presently little evidence that international prosecution and sentencing can act as such a deterrent at the peak of the regulatory pyramid and bolster dialogue at its base. Akhavan (2009) provides anecdotal evidence from Uganda and Sudan that leaders of militias and armed groups feared defection as a consequence of arrest warrants issued by the ICC. Sikkink (2011) and Olsen et al. (2010) conclude from systematic research that criminal justice prosecution works as a deterrent only in combination with other truth and reconciliation measures, which, however, are located more at the dialogic base of the sanction pyramid than at its top.

Criminological research provides systematic evidence that deterrent effects seemingly reside in policing, police presence and certainty of being arrested and prosecuted rather than in the threat of long prison sentences (Durlauf and Nagin 2011). Recently, a set of newly implemented and evaluated policing practices termed 'lever-pulling policing' has shown promising results in terms of reducing violence, mainly related to drug markets, gun use and gang activity (Braga and Weisburd 2012; Corsaro et al. 2012). These practices are based on the principles of 'dynamic concentration of deterrence' (Kleiman 2009; Kennedy 2008), which move deterrence from a static and passive principle to a sequenced and dialogical one. They are based on the characteristics that most violent settings share. Both street crime and situations of extreme violence are highly concentrated in 'hotspots' (Raleigh and Hegre 2009). Raleigh et al. (2010) found that entrenched and repetitive violence was, on average, concentrated in 15 per cent of a country's territory. Spatial analyses of extreme violence and mass atrocities thus confirm that they are as highly concentrated in hotspots as violence and crime generally, and that a comparably small number of communities suffer extreme victimisation while many others are spared (Hagan et al. 2005; Rothenberg 2012; Braithwaite 2012). However, concentrated violence on the street level and in violent conflicts is simultaneously contagious, and spreads to

proximate areas if conducive conditions prevail there (for US street crime, see Mears and Bahti 2006; for conflicts and violence, see Buhaug and Gleditsch 2008). With these common characteristics, violence is an exemplary case for exploring scale and context independency.

The strategies of lever-pulling policing and 'dynamic deterrence' are based on four principles: selective focusing; communication and dialogue; future orientation; and a broad range and escalation of intervening actions (Kennedy 2008; Kleiman 2009). First, the police focus resources on selected and known offenders, which often are leaders of networks and gangs (Bichler and Malm 2015). Second, police engage in directed and targeted communication with this group. This involves identifying networks, leaders and followers, and communicating the deterrent threat and its potential escalation to this group. Third, and importantly, the threat does not address past crimes but is directed at future criminal activity of this group and its leaders. Finally, the group will be informed as part of the communication strategy that the police will use all resources and mechanisms available in case of noncompliance ('pulling all levers'). 'Dynamic concentration of deterrence' refers to the practice of successive targeting of perpetrator groups: if the deterrent threat fails with the selected leadership group of perpetrators, the resources are deployed towards the next level, and the larger group. Thus, ordinary members are becoming involved in putting pressure on their leaders to comply (Kleiman 2009).

In a number of programs, the deterrent threat has been part of a broader offer for routes out of violent action. In such programs, the deterrent threat was communicated in meetings, which included community members, as well as social and welfare services; it was thus complemented by offers of support and positive incentives for compliance. When applied to spatial clusters of criminal activity (hotspots), the principle of concentration of deterrence has been successful: focused, intermittent and non-permanent deployment of police to the small number of hotspots significantly reduced crime and violence there, and often in adjacent areas, resulting in a substantive reduction of the overall rate of crime and violence (Weisburd et al. 2011).

In which ways can these principles be scaled up from street crime to high-risk conflict zones? Violence in these contexts is mostly violence against all members of a group and, as such, is *indiscriminately* deployed. Can such *indiscriminate* violence be met by programs of *selective* deterrence? Krain (2005) shows that interventions in such contexts

that directly challenge perpetrators and restrain and disarm them are effective in slowing and stopping mass violence. The concentration of resources and targets makes these practices particularly adaptive to an environment where control is contested, where the capacity of protective forces is low and where criminal justice agencies are institutionally weak. Public commitment to targeted and intensive enforcement for future crimes and not crimes in the past thus can support the monitoring of specific types of violence (for example, sexual violence) or of a group of known and identified perpetrators. Concentration, selectivity and direct communication may address the major problem of credibility in creating security and deterring violent action. These strategies might also generate safe zones, as targeted groups take refuge in communities with known clusters of (law) enforcement and deterrent action (Czaika and Kis-Katos 2009).

Strategies of concentrated dynamic deterrence address networks of perpetrators. Atrocity crimes are collective action and violence, most often committed by groups who are organised, trained and part of a command chain; most of the violence, therefore, is structured in terms of timing, location and use of weapons (Verwimp 2006). The 'webs of violence' through which perpetrators transmit threats and fear, and social networks and neighbourhood ties that facilitate recruitment and involvement (Fujii 2009), provide channels for targeted messages of deterrent threats. Local and regional leaders at the lower levels might be more susceptible to both threats of deterrence and positive incentives for compliance than the highest level of leadership (Braithwaite 2013). As successful gun-control programs in violence and gang-ridden cities in the United States demonstrate, concentrated deterrence supplemented by incentives for handing in guns can significantly reduce violence (Kleiman 2009; Kennedy 2008). Peacebuilding programs that included arms control, or flanked concentrated deterrence with offers of welfare and support, have been successfully implemented in conflict zones (Braithwaite et al. 2011).

The practices of dynamic deterrence are genuinely embedded in local contexts. Consequently, those who use them need to have at least sufficient knowledge of local actors, conflicts and potential allies and opponents; otherwise, these strategies fire back and fuel conflict and violence (Autesserre 2012). They can be used by a broad range of actors regardless of whether their task is protection of victims or prosecution of perpetrators: local authorities who try to build up resistance and defence against atrocity crimes, national law enforcement and enforcement of

international criminal law. Concentrated deterrence practices can be used in establishing safe zones for victims, preventing recruitment into violent groups and activities, restraining leaders of collective violence or encouraging defection of subordinates. They meet their greatest challenge when confronting extremely ruthless opponents, the governments and their military and security forces—all strictly organised and hierarchical forces. Here, the limits of regulatory theory and of the role it assigns to dynamic deterrence become obvious (Braithwaite 2014).

4. Scaling down: Peacebuilding in states and gang-ridden communities

Scaling down implies that strategies for the 'regulation of states' can be applied to the 'regulation by states' (Braithwaite 2014: 452), and to their domestic crime and justice problems. At the level of states and the international system, the dynamic escalation of deterrent and forceful action is common. It is based on prioritising dialogue and communication before escalating. Most recently, it has been flanked by internationally led peacebuilding programs in conflict-ridden states and regions that encompass both peace settlements and transitional justice. Increasingly, peace and justice are seen not as antagonistic, but as parts of a framework of sequencing 'truth, reconciliation and justice' (Braithwaite and Nickson 2012). Can we scale down from evidence on peace negotiations, peacebuilding and settlement to violence reduction and prevention in urban neighbourhoods?

The answer is: yes, we can. The exponentially growing number of peacekeeping and peacebuilding missions since the end of the Cold War provides a solid database for case and quantitative studies (Human Security Report Project 2011: Overview). Most important for scaling down are three results of this research. First, mediation—whether resulting in ceasefires or full or partial settlements—is successful in more than half of the cases, and only 4 per cent fail completely (Regan et al. 2009). This is confirmed for regional conflicts in South-East Asia and Oceania, with a strong positive relationship between mediation and reduction of violence (Möller et al. 2011). Second, interventions, peace operations and the presence of a peacekeeping mission significantly reduce the risk of recurrence of violence (Doyle and Sambanis 2006; Fortna 2008). Such forces are particularly important to provide security for groups in disarmament and demobilisation programs (Human

Security Report Project 2011: 72–3). Third, peace agreements are successful in terminating violence in two-thirds of the cases, while violence recurs and is resumed within a five-year period in a minority of 32 per cent of the cases (Human Security Report Project 2013: 175). However, if violence is resumed, it is at a reduced level of overall violence (Human Security Report Project 2013: 176).

For securing and policing gang-ridden neighbourhoods, two conclusions can be drawn. Mediation is nearly always the better option to end violence, which should not only involve police forces but also follow models from peacekeeping by engaging 'groups of friends' from local neighbourhoods, or even other cities. Further, where violence is entrenched and at high levels, efforts at communication, dialogue and mediation need to be repeated as often as a deterrent approach. A single-shot intervention does not seem sufficient and, in a substantive number of cases, violence will be resumed; however, returning to previous levels will be a rather rare outcome. Successful mediation is mostly based on numerous failed attempts.[5]

Scaling down does not necessarily imply the transfer of these models to more stable environments, better functioning contexts or established and democratic criminal justice systems. Gang-ridden neighbourhoods in Central American cities neither have the local capacity for nor can they rely on a functioning system of criminal justice or on noncorrupt police forces. Doyle and Sambanis (2006) caution that the mechanisms of peacebuilding probably will not be successful where local institutional and economic capacity are at a low level or non-existent. It is therefore important in scaling down to know the local context and to engage local actors in building capacity. Violent actors often include members of the police forces and they are part of the violence problem rather than contributing to its solution.

5. Towards a criminology of multiple scales

Moving the scale of criminology from small worlds to larger ones and back again has proven to be a productive strategy. It owes much to the links that have been established between criminology and regulatory studies, and, in particular, to three regulatory principles: context

5 Personal communication from John Braithwaite, based on data from the Peacekeeping Compared Project, June 2015.

independency, scale independency and sequencing. All three principles encourage a focus on 'flows' and dynamics, and moving between scales. When moving up in scale, much can be learned from micro-contexts of networks, families and neighbourhoods for larger collectivities and extreme violence. When moving down in scale, much is to be gleaned from conflict and extremely violent societies for addressing the problems of gang and violence-ridden neighbourhoods. Scaling down from the international and state levels to the neighbourhood level and up again has the potential to provide fresh insights for both levels. Should we think of crime-ridden neighbourhoods as failing states? Failing states are like bad neighbours and peers: they export violence and are contagious (Karstedt 2013b).

I would therefore like to encourage a criminology of multiple scales. This will be a criminology that moves easily between the different scales, between the local neighbourhood and the global sphere, between gang networks in a local neighbourhood and the organised crime actor into which some states degenerate, or between local and global hotspots of violence (Braithwaite 2012; Karstedt 2013b). Moving our theories up and down the scale will provide fresh insights, and help to reshape and refine them (Braithwaite 2014). Moving evidence-led practices from the large to the small scale and vice versa will greatly enhance our repertoire of crime prevention. Thus, criminologists could profit from research on peacekeeping that finds that mediation seems to be the best option to end violence (Human Security Report Project 2013: 175). In return, criminologists could offer principles of hotspot policing to conflict and violence-ridden countries. In this endeavour, criminology will greatly profit from regulatory studies and theory.

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28

Experiments in restorative justice

Heather Strang

1. Introduction

Restorative justice famously is a story both ancient and modern. It describes both the oldest means of nonviolent conflict resolution and the most recent framework for remedying long-recognised deficits in our criminal justice system. Its ancient form refers to traditional justice responses that entailed offenders making amends to their victims mainly through restitution, to restore order and peace after a conflict and to avoid the consequences of feud and vengeance (Weitekamp 1999). It remains pervasive in many different renderings throughout the world (Braithwaite 2002), but its lineage through the Pacific region has been especially important in the development of recent formulations of restorative justice. This history has been particularly significant in New Zealand and Australia, which, in large measure, have been the locations for many of the intellectual and practical developments in restorative justice (RJ) over the past 25 years.

In this chapter, I will discuss the recent history of RJ, especially in Australasia. I will describe the circumstances that led to both the establishment of a fledgling RJ program in Australia in the early 1990s and the events that saw that program become the subject of the largest piece of criminological research ever conducted in Australia. This research project, known as the Reintegrative Shaming Experiments (RISE), was based at The Australian National University (ANU) in

the precursor to the Centre for Restorative Justice in the Regulatory Institutions Network (RegNet), and ran from 1995 until 2010 in its data collection phase, while data analysis continues to this day. I will discuss the setting up and running of this study, especially the collaborative arrangements for its conduct worked out between Canberra police officers and academics. Finally, I will assess the value of the RISE project today in the context of the growth of restorative practices worldwide.

2. Definition and origins

Today, the term 'restorative justice' covers a multitude of justice innovations that have taken place across the Western world over the past several decades. With roots in so many indigenous and preindustrial traditions of conflict resolution, new programs based on principles of reparation and reconciliation sprang into existence from the mid-1970s in North America in reaction to a widespread sense of dissatisfaction with the formal justice system, especially from the perspective of crime victims (van Ness 1986; Zehr 1990; Wright 1991). Victim–offender mediation (VOM) and victim–offender reconciliation programs have been used in limited areas of the United States since that time (Umbreit et al. 1994, 2000; Nugent et al. 2003), though without making serious inroads into mainstream criminal justice.

At the same time, European traditions of mediation in criminal matters going back many decades continued to flourish. This usually took the form of an out-of-court agreement between a victim and offender, sometimes but not always managed face-to-face and without other participants; in the case of 'shuttle mediation', a negotiator speaks with each party separately and attempts to reach a settlement that pleases all parties with no meeting at all. Meanwhile, by the late 1980s at the other end of the world, New Zealand was contemplating revolutionary changes to its justice system based on traditional Māori and Pacific Island conflict-resolution practices in which entire communities came together following disputes in which a member of one group had harmed a member of the other.

These disparate origins have led to a flowering of imaginative alternatives and additions to formal justice procedures and, at the same time, considerable confusion and disagreement about what constitutes the

sine qua non of restorative justice. This confusion has led to the term encompassing a continuum from the crudest form of punitive payback through to the softest kind of resolution of trivial juvenile offending.

One way of addressing the definition problem in RJ is to describe it in terms of the way it works. The United Nations definition (UN 2002), for example, defines an RJ program as one that uses restorative processes and seeks to achieve restorative outcomes. Furthermore, a restorative process means:

> any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. (UN 2002: 3)

More useful, perhaps, than this process orientation is Braithwaite's (2002: 14) proposal to focus on the content of RJ values. He suggests these should include respect for human rights specified in international human rights agreements, and notes that the principles found there include both emotional and material restoration after the harm caused by the crime. This broad view has the advantage of excluding categorically many programs that presently clutter the scene internationally—those that bear the 'RJ' label but which do not subscribe to these values.

Beyond these considerations, however, are some important aspects of the process itself without which the RJ label is, at the least, inappropriate. Indeed, it might be argued that process can sometimes trump values in deciding what is important in RJ (see Braithwaite and Strang 2001). Braithwaite's (2002) description of an RJ *conference*—the model that became the subject of the RISE program—usefully operationalises the values and the process:

> Once wrongdoing is admitted … the conference is a meeting of … two communities of care. First there is a discussion of what was done and what the consequences have been for everyone in the room (the victim's suffering, the stress experienced by the offender's family). Then there is a discussion of what needs to be done to repair those different kinds of harm. A plan of action is agreed upon and signed by the offender and usually by the victim and the police officer responsible for the case. (Braithwaite 2002: 26)

These definitional difficulties in RJ have more than semantic importance. The looseness around what kind of justice intervention has the 'right' to be called RJ has led to problems with the interpretation of the

body of research now available on the effectiveness of RJ as either a diversion from conventional justice or an addition to conventional justice (Strang and Sherman 2015). There have been many studies conducted on the effectiveness of some of these versions, but none that approaches the rigour of the RISE program, which was squarely focused on RJ conferencing as the model to be tested.

The Canberra RISE program has had enormous impact on RJ internationally as well as in Australia. The development of RISE and the significance of its findings for RJ worldwide are the themes of the remainder of this chapter.

3. Restorative justice in Australasia

The year 1989 was a critical one for RJ, though at the time few people could recognise it. It saw the introduction in New Zealand of the *Children, Young Persons and their Families Act*[1]—a landmark piece of legislation that completely altered the principles and procedures for dealing with juvenile offending. It also saw the publication of Braithwaite's *Crime, Shame and Reintegration*. Neither of these mentioned the term 'restorative justice' and it is hard now to appreciate that the term was virtually unknown at the time. As Braithwaite (2002: 26) observed, at this time:

> [F]or all of us, practice was ahead of theory, and it was well into the 1990s before the North American label 'restorative justice' subsumed what had been developing elsewhere for a long time.

But both these developments were fundamental to the establishment of restorative justice practices in the mainstream justice systems of Australia and New Zealand and, later, internationally.

Prior to the introduction of this new legislation, New Zealand had been struggling with a growing juvenile justice problem, especially in its indigenous communities (Maxwell and Morris 1993). Māori people especially were distressed about the increasing rate at which their young people were being arrested, charged and prosecuted through the courts and receiving custodial sentences in juvenile detention centres. They agitated for greater involvement of families in the resolution of offending behaviour, along traditional lines of resolving such matters

1 Available at: legislation.govt.nz/act/public/1989/0024/latest/DLM147088.html.

(Power 2000). This legislation was a direct response to these concerns and led to the establishment of the New Zealand Family Group Conference (FGC) program.

FGCs were very much the model for a program set up in Wagga Wagga, New South Wales, in 1991 by NSW police officer Sergeant Terry O'Connell, following a visit he made to New Zealand. A colleague of his, John McDonald, an advisor on juvenile crime to the then NSW Police Commissioner, also visited New Zealand to observe FGCs. It was McDonald who read Braithwaite's *Crime, Shame and Reintegration* and recognised that this theory fitted both what he had observed in New Zealand and what was then being operationalised in Wagga Wagga. After many conversations and observations of O'Connell's RJ conferences, Braithwaite was convinced the program was robust enough both in its theoretical underpinning and in its execution to warrant the most rigorous evaluation of its effects.

By 1993, Braithwaite had embarked on an arduous journey both to gain the necessary permissions to expand the 'Wagga program' under the auspices of the NSW Police, whose officers would facilitate the conferences, and to raise funds for a rigorous evaluation of the program. As it turned out, getting the finance—difficult though it was to put together given the scale of the planned evaluation and the multiple funding sources—was a simpler affair to manage than the politics of policing at that time. After almost a year of negotiations, the NSW Police Commissioner, beset with difficulties of his own, declined to expand the program or to support the evaluation. Within a few days of this decision, however, the Australian Capital Territory (ACT) Chief Police Officer agreed to host a Canberra RJ conferencing program facilitated by ACT police officers, which would be the subject of the four RISE randomised controlled trials (RCTs).

4. Setting up the RISE program

Over six months in the first half of 1995, an RJ program, based on O'Connell's 'Wagga model', was set up in Canberra in collaboration with the Australian Federal Police and located inside the ACT Police. The fledging RISE research team taking shape in The Australian National University's Research School of Social Sciences Law Program at that time worked closely on the training of the police officers who

would actually facilitate the RJ conferences that would be the subject of the RISE evaluation (see Strang 2012). We also planned and delivered information days to more than 600 operational officers across four major policing districts, both to familiarise them with RJ principles and practice and to explain the process by which they would be asked to refer eligible cases into RISE.

It was essential for every officer to understand the principles of randomisation and why treatment integrity was essential to the reliability and validity of the findings. It was only by engaging the cooperation of all these officers—if not always their enthusiasm—that cases could flow into RISE, because we depended entirely on them for referral into the study. As might have been anticipated, not all officers were interested in either the program or the evaluation, but the fact of such widespread exposure to RJ meant that, at the least, the term was familiar across the ACT Police Service and there was a high level of awareness of the kind of cases needed for referral into RISE.

The setting up and running of RISE involved establishing unusually close relationships between Canberra police and Canberra academics, which turned out to be a learning experience on both sides. As I have written elsewhere (Strang 2012: 214), successful research partnerships on the scale of the RISE program mean the cultivation of 'a set of human relationships and social networks between the research team and the leadership of the agency and the operational staff involved in program delivery'. This inevitably entailed multilayered understandings of the task in working towards a common purpose, often between individuals with little shared experience in their professional lives, yet all of whom could find satisfaction in what they accomplished jointly.

It was not only with the police that good relations were needed. In the months before the start of random assignment in July 1995, while a great deal of activity was under way with police training and while the finer details of the management of RISE were still be worked through, John Braithwaite and I embarked on a charm campaign across the ACT criminal justice system. No stone was left unturned in the magistrates' courts, across government departments and among both Crown prosecution and defence lawyers, especially those who worked in the Children's Court. We were not always warmly received. Canberra's defence lawyers, in general, were particularly defensive. They were concerned about the ethics of random assignment, they told us, and were especially concerned that juveniles would not have the benefit

of their advocacy if they were diverted from court to RJ conferencing. They remained unconvinced of the wisdom both of the program itself and of testing RJ, throughout RISE.

Canberra's media proved another headache as we attempted to make both the RJ program and RISE itself better known to the Canberra community. They tended towards the view that RJ was another too-soft approach in dealing with juvenile crime, and wrote about it mostly in those terms. *The Canberra Times* was often at odds with us, with both its then crime reporter and its then editor taking a firm stand against our work, each for their own reasons. As for the public at large, RJ was largely unknown and they were generally indifferent to it.

5. RISE research design and case referral

From the outset, the objective of the RISE research team was to test the effectiveness of the RJ program in the most rigorous way possible, and with a variety of offenders and offences. RISE would therefore employ a randomised research design—the 'gold standard' for evaluation on the model of clinical testing of drugs and surgical procedures in medicine. The cases to be referred to the research team by the police were to be fed into a random assignment process that would decide whether eligible cases in the four offence categories would be dealt with in court (as they would normally be treated) or instead diverted to RJ conferences. It was agreed that these categories would be: juvenile offenders admitting property offences against a personal victim; juvenile offenders admitting shoplifting from large stores (no personal victims); offenders up to the age of 29 years admitting violent offences; and adults admitting drink-driving offences following a random breath test (see Strang 2002: Chapter 4 passim).

The inclusion in RISE of a large drink-driving experiment (900 cases) proved to be a useful way of communicating with the Canberra public at large about RISE. By their nature, random breath tests (RBTs) are indeed random and scoop up a random sample of Canberrans, or at least of Canberra drivers, and ACT police officers were conducting more than 100,000 RBTs each year. Every offender was required to bring supporters to the conference—in the case of drink driving, five supporters were expected—and it was estimated that more than 3,000 people had direct experience of RJ this way.

The drink-driving experiment gave the research team a steady stream of cases and we were able to complete data collection for this offence within two years. By contrast, it took five long years to obtain enough cases in the other three experiments, with far more modest numbers sought. In that period, police officers referred 173 juvenile property cases, 113 juvenile shoplifting cases and 100 youth violence cases. This was not a huge haul, and many cases that would have been eligible for RISE were never referred for reasons briefly discussed below. Nevertheless, it was a large enough number of cases to reach robust and valid conclusions on the major outcome measures we specified.

The process of case referral from apprehending police officers to the research team now seems crude, but, at the time, it was cutting edge. It entailed providing every police officer with the RISE 'hotline' number to a mobile phone (radically new technology for the time) in the custody of a member of our core research staff on a rostered basis 24 hours a day, seven days a week, for the five-year life of the experiment. Officers had been trained about the type of cases we wanted in RISE; they also knew that they were by no means compelled to give us all such cases—only those they were comfortable about processing *either* by court *or* by conference.

The concept of random assignment is by no means an intuitive concept and proved a particularly tricky one with officers for whom certainty about the way to proceed in any given case was essential in many ways to their identity as police. But this research design was fundamental to the evaluation: none of us in the RISE team was interested in undertaking anything less rigorous and the advantages of an RCT were self-evident to us for establishing whether a causal relationship existed between the treatment and the outcomes. But the question of the ethics of random assignment often proves problematic in the operational environment (Strang 2012). For the research staff, it was easy to divide the ostensibly eligible cases into those that *must* go to court and those for which court or diversion to RJ were equally appropriate, given that we were in a condition of equipoise about the relative effectiveness of each in reducing reoffending: we simply could not tell which was better. For police officers whose culture and training were all about certainty, the number of cases were relatively few for whom they were willing to suspend that certainty and leave it to the sealed envelope held by the research team to decide which way they would be treated.

The slow trickle of cases referred by the police caused the research team to come close to despair on occasion, as we struggled with the perennial problem when conducting experiments: case flow, case flow, case flow. Although much has been written about this issue (see, for example, Boruch 1997; Strang 2012), nothing prepared the RISE research team for such a lengthy and drawn-out data collection period—not to mention the additional funding needed to keep RISE going.

Throughout these five years, the research team kept up relentless contact both with senior police officers and with junior officers throughout the ACT. While any kind of tangible encouragement—even cakes and biscuits—was frowned on by senior police management, we put great effort into maintaining good personal relations with all officers. This proved to be the most reliable way of getting case referrals, although, inevitably, most of them ultimately came to us from a small number of committed officers.

At the planning stage, outcome measures were very much focused on offenders and especially the potential of RJ to reduce offending, given the preoccupation of government and the public with this goal of criminal justice policy. Nevertheless, it was agreed that, as well as the question of reoffending, there should be two other major outcome measures in comparing RJ and court treatment. The impact of RJ on participating victims was a focus of interest to the research team from the outset, even if at this early point victims' views were additional rather than a priority (but see Strang 2002). As well, we recognised that RISE presented an ideal opportunity to add to a growing theoretical and empirical evidence base on perceptions of both victims and offenders about procedural justice and police legitimacy as vital aspects of effective criminal justice (see, for example, Tyler 1990; Tyler et al. 1997; Sunshine and Tyler 2003).

The views of both victims and offenders in the RJ conferences and in court were sought via face-to-face interviews. This was a major logistical exercise, with over 60 interviewers involved in the first wave of interviewing alone, conducted within six to eight weeks of the finalisation of the case. Ultimately, two more waves of interviewing took place, two years and then 10 years after random assignment, each bringing its own set of problems in tracking down participants in the experiment and persuading them to be interviewed.

In addition to the program of interviewing, the RISE team aimed to observe every court case and every RJ conference for the offenders in the experiment. This also required numerous staff members, not only to make and record the observations, but also to keep track of the numerous court appearances and the often complicated processes for setting up the conferences. In addition, we attempted to interview every offender and every victim and many of the supporters of both in every case. RISE must sometimes have seemed to its ANU colleagues like an enormous cuckoo in the nest, employing not only a core research team but also trailing a small army of ancillary observation and interview staff. At its peak, RISE consisted of around 10 observers and 20 interviewers working with the core team of five, who managed both ongoing collaboration with the police and courts and the enormous amount of data being generated.

Even as data collection continued with the addition of new cases into the experiment, from 1997 onwards, a parallel program of data collection began that entailed the re-interviewing of RISE offenders and victims two years after their initial random assignment. The purpose of these interviews was to assess the longer-term consequences of case disposal by court and by RJ conferencing.

Finally, a follow-up of both victims and offenders began in 2005 on the tenth anniversary of the first cases coming into RISE. This wave of interviewing tracked the intake of cases over the period 1995 to 2000, and the last of this third wave was completed in 2010.

6. Impact of RISE in Australia and internationally

Over the past 20 years, the RISE research team has published extensively on the findings of the experiments. The mass of data relating to findings gathered by observation of RISE cases disposed of both by court and by RJ conferencing, and by the interviewing of participants in those cases, is summarised in a major report published on the website of the Australian Institute of Criminology (Strang et al. 2011).

Results concerning reoffending patterns among offenders in the four RISE experiments, in all their complexity, have been reported elsewhere (see Sherman et al. 2000; Sherman and Strang 2007, 2012; Strang et

al. 2013), but, in brief, the following claims can be made without equivocation about the effects of RJ compared with court over the two years following disposition:

- The juvenile/youth violence experiment showed that RJ reduced reoffending significantly more successfully than did court.
- The juvenile property experiment showed that, across all offenders, court reduced reoffending significantly more successfully than did RJ. This was due to the dramatic backfiring effect of RJ with Aboriginal property offenders; for white offenders, there was no significant difference between court and RJ.
- The drink-driving experiment showed that court reduced reoffending better than RJ.
- Across all experiments there were significantly higher perceptions of procedural fairness among both victims and offenders whose cases were dealt with by RJ than by court.
- In both the property and the violence experiments, victims expressed much higher levels of satisfaction with RJ than with court (see Strang 2002).

These results were received both nationally and internationally with huge interest, providing at last, as they did, a rigorous assessment of the effects and effectiveness of RJ compared with the processing of these kinds of cases through the court in the usual way. RJ is now widely used throughout Australia, though predominantly for juvenile offenders admitting to minor crime; Larsen's (2014) report describes in detail the current situation in each state and territory.

Nowhere were these results more eagerly received, however, than in the UK Home Office, which was extremely interested in the potential in England and Wales of an initiative with a strong evidence base that successfully reduced violent offending. The new Blair Government, elected in 1997 with a promise to be 'tough on crime, tough on the causes of crime', was putting substantial resources into crime research, with special attention given to RJ. Funding was made available for a series of follow-up experiments in the United Kingdom with a focus on the effects of RJ on violent crime. But, this time, eligible offenders were to be mostly adults, and RJ was not to be tested as a diversion from normal justice through the courts but, instead, as an addition to it.

In 2001, members of the RISE research team were successful in winning the Home Office funding to undertake this research. The reach was much greater, however, encompassing eight experiments in different locations, with different kinds of offences and offenders with different levels of seriousness. This time the team concentrated on the development and management of the experiments, rather than purely on program evaluation, which was to be carried out independently by the University of Sheffield. Our operational partners were the London Metropolitan Police for the robbery and burglary experiments, the Northumbria Police for the property and violence experiments and prisons and probation authorities in the Thames Valley area of southern England for the experiments on the most serious violence cases.

These experiments took place between 2001 and 2004 and have been extensively reported on by the Sheffield University team (Shapland et al. 2006, 2007, 2008). They revealed, across all the experiments combined, a 27 per cent reduction in reoffending for offenders who experienced RJ in addition to normal justice processing, compared with those offenders randomly assigned not to receive RJ. It indicated as well that it was most effective for serious crime and appeared more effective for adults than for juveniles. In addition, there were exceptional levels of satisfaction among participating victims, with the additional benefit of significant reductions in post-traumatic stress symptoms among victims who had met their offenders in an RJ conference compared with those who had not had this experience (Angel et al. 2014).

Restorative justice conferencing now has the benefit of more numerous and more rigorous evaluations than perhaps any other criminal justice program. Some might say the world of RJ practice has been little influenced by this long program of research, bedevilled as it is by the cautiousness of policymakers around the Western world about applying it to those very cases for which research shows it to be most effective. Thus, RJ is still rarely used for serious and violent crime (but see, for example, Strang 2014) and instead is usually implemented precisely for those cases where evidence shows it to be least effective and sometimes even counterproductive: trivial offending by juveniles. Governments these days are unwilling to pay for *additional* services of the kind that RJ repays so well and instead tend to focus on using RJ practices as an alternative to more expensive criminal justice procedures. At the same time, a not infrequent consequence of these policies is net widening, with many additional lawbreakers, especially juveniles, being brought

into the justice system in cases that would not have been proceeded with when so-called 'restorative practices' were not available (see Strang and Sherman 2015).

Nonetheless, the RISE team that gathered at ANU in 1995, and continued their work in RegNet's Centre for Restorative Justice, has much to be proud of. Nelson Mandela, on the occasion of his receiving an honorary Doctor of Laws at ANU in September 2000, inscribed his name on the sign for the centre—an inspiring moment for the team and a wonderful endorsement of our work. The quality and integrity of this long program of research are exceptional and the findings far-reaching. RISE, as well as the high-calibre research in the United Kingdom that built on it, is available for the world to see whenever scholars and practitioners need rigorous evidence about what RJ conferencing really can do.

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29

Prevention of transnational environmental crime and regulatory pluralism

Julie Ayling

1. Introduction

Transnational environmental crime includes offences such as the illegal taking and trafficking of wildlife and timber, the international dumping of toxic waste and the trade in illicit ozone-depleting substances. Several features distinguish the current regulation of transnational environmental crime (TEC) from the regulation of environmental behaviour at the domestic level.

Domestically, there is increasing use of the concepts of responsive regulation and smart regulation, involving regulatory pyramids, combinations of policy instruments and a broad range of regulatory actors (see John Braithwaite, Chapter 7; and Gunningham and Sinclair, Chapter 8, this volume; Gunningham 2009; Pink 2013). However, states have, when dealing with TEC, almost exclusively focused on law enforcement, at the peak of the regulatory pyramid. The exploration of other possible responses to TEC—at the lower levels of the regulatory pyramid and harnessing actors other than the state—is still in its infancy. This is largely because recognition of the enormous environmental, social and economic consequences of TEC, both for individual countries and at a global scale, is a relatively recent phenomenon.

Second, responding to TEC is often more complex than responding to domestic environmental harms. TEC crosses borders, so, if it is to be dealt with comprehensively, cooperation between jurisdictions is necessary. The transnational nature of the crimes also means they require varying degrees of organisation, ranging from simple small-group transactions to complex networked business models. Increasingly, we are seeing the involvement of organised criminal groups in many TECs, including groups known for other transnational crimes such as drug trafficking and terrorism. This trend raises concerns for states about national and international security.

Third, prevention rather than just control is crucial in dealing with TEC. Transnational environmental crime can result in the complete demise of an environmental resource (for example, the extinction of a species) or in irreversible damage to the environment that has global implications. Prevention requires a whole-of-society approach; however, preventive approaches are still fairly rare even at the domestic level of environmental regulation, and certainly in the field of organised crime.

This chapter demonstrates how a combination of regulatory and criminological theories suggests some additional ways of approaching the prevention of TEC.

2. Current responses to transnational environmental crime

Together with legal economic activities (mining, logging and urban expansion) and climate change, TECs pose serious threats to biodiversity, human wellbeing and the preservation of healthy ecosystems. The monetary value of all organised transnational environmental crime has been estimated at between US$70 billion and US$213 billion (AU$92–280 billion) annually (Nellemann et al. 2014). There has been a rapid escalation in the volume of some forms of TEC in the past few years, such as the illicit trade in 'luxury' goods like ivory and rosewood, related mostly to an upswing in demand from the growing middle classes of developing countries.

An understanding of the nature of TECs and how to respond to them has been slow in coming and is still patchy. In many jurisdictions, laws to deal with these crimes are inadequate, penalties are low, enforcement

of such laws as exist is lax and these crimes are viewed as victimless and therefore of low priority. However, calls for action to combat TECs have increased over the past couple of years. These calls have come from both states and international organisations such as the United Nations (UN) General Assembly, the European Parliament, the Asia-Pacific Economic Cooperation (APEC) Forum, the G8 and the International Criminal Police Organization (INTERPOL). This is due largely to a new recognition of the broader social, economic and political implications of TEC. A recent report by the UN Environment Programme (UNEP) and INTERPOL (Nellemann et al. 2014), dealing with the illicit trade in wildlife and forest resources, points out that this trade not only damages environmental sustainability, it also obstructs sustainable economic development, reduces domestic revenues, interferes with livelihoods and undermines good governance and the rule of law, particularly in still-developing nations. The prospect of the extinction of certain iconic species such as rhinos, tigers and elephants if illegal poaching is left unchecked has also helped motivate states to think more deeply about how to respond to these threats. So, too, has evidence of a growing involvement on the part of both organised crime and 'terrorist' groups (militias, insurgent groups) in perpetrating many of these crimes.

However, responding to TEC is a tough challenge. Many TECs are complex in nature, involving diverse offenders, victims, motivations, modi operandi and outcomes.[1] In addition, these crimes cross borders, complicating the task of responding to them. There is, therefore, no 'one-size-fits-all' solution. Policing strategies, penalties and other responses need to be tailored to the particular crime and its specific context.

Until now the chief response of states and international organisations has been to strengthen law enforcement. Transnational environmental crimes do not lack legal frameworks, with an abundance of applicable

1 Consider, for example, the variety of crimes that can be categorised as 'wildlife crime' (Wyatt 2013): crimes involving the taking and trading of a variety of nonhuman animals and plants, serving different markets such as those for collectors' items or traditional medicines, perpetrated by differently motivated offenders ranging from opportunistic individuals to highly organised crime groups, and resulting in different victims at varying distances from the actual act, including the species, humans (both individuals and societies), states and the environment itself.

treaties[2] and many interested international, regional and domestic institutions.[3] Funding and support for law enforcement operations and new technologies for detection and investigation, as well as better resourcing and training of frontline enforcement agencies of various types (police, rangers, customs agencies, port and airport officials, and so on), have increased in recent years. But law enforcement is an expensive business and the financial outlay by states has not kept up with the need.

Moreover, so far, these investments have had a limited impact on TEC, particularly in terms of its prevention. This is well illustrated by data on poaching and trafficking of rhinoceros horn—a product highly valued in many Asian countries for its supposed medicinal benefits as well as for the status its possession brings (Milliken and Shaw 2012; Ayling 2013b). As Figure 29.1 illustrates, poaching of rhinos in South Africa increased by more than 9,200 per cent between 2007 and 2014. Figures issued by the South African Department of Environmental Affairs indicate that, while arrests for poaching increased from 2010 (when figures first became available) to 2014 and there was a small drop in 2015, poaching has shown little sign of diminishing.

2 For example, 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS or Bonn Convention); 1987 Vienna Convention for the Protection of the Ozone Layer (Vienna Convention) and Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol); 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention); 1992 Convention on Biological Diversity (CBD). It should be noted that these treaties predominantly regulate trade rather than criminalise it.

3 For example, at the international level, there are intergovernmental organisations such as the CITES Secretariat, INTERPOL, the UN Environment Programme (UNEP) and UN Office on Drugs and Crime (UNODC), and organisations involving partnerships between states and civil society such as the International Union for Conservation of Nature (IUCN), TRAFFIC and the International Network for Environmental Compliance and Enforcement (INECE); at the regional level are bodies such as the Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN), the Asian Environmental Compliance and Enforcement Network Initiative (AECEN) and the Australasian Environmental Law Enforcement & Regulators network (AELERT); and, at the domestic level, there are governmental environmental ministries and subnational networks.

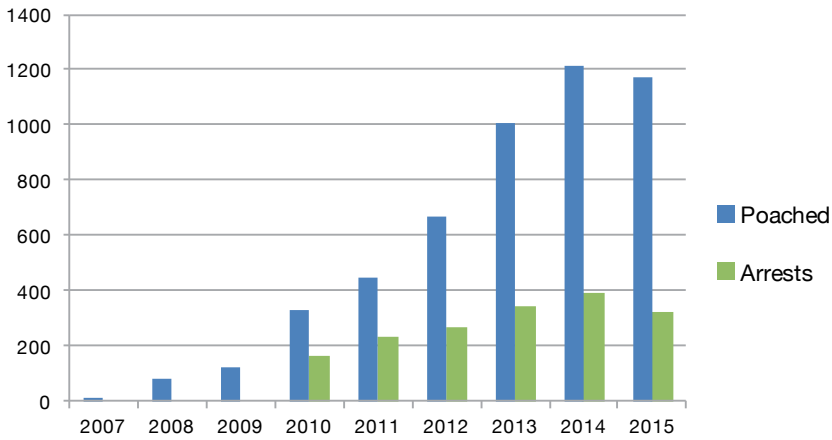

Figure 29.1 Rhinoceros poaching statistics, South Africa

Source: Author's research; data drawn from South African Department of Environmental Affairs.

It is not surprising that traditional law enforcement techniques only go so far towards preventing transnational environmental crimes. Deterrence theory tells us that the efficacy of deterrence is dependent on offenders' perceptions of the likelihood of punishment (Beccaria 1995; Erickson et al. 1977; Williams and Hawkins 1986; Nagin 1998). However, punishment is anything but likely for most perpetrators of TEC. As well as weak penalties and problems with investigation and enforcement, there are often impediments to law enforcement efficacy relating to intra and interstate agency capacity and coordination and public corruption.

So, the issue is: if the capacity of law enforcement to prevent TEC is imperfect, what else can be done? By using both regulatory and criminological theories, we can go some way towards answering that question.

3. Beyond law enforcement

Third parties—non-state, non-offending actors—have the potential to be active participants in crafting and implementing strategies to prevent TEC; that is, to be involved in its 'policing'. Policing as a concept encompasses crime prevention and law enforcement activities by many more actors than simply traditional law enforcement agencies. Over recent decades, policing has become *multilateralised* or *pluralised*

(Bayley and Shearing 2001; Brewer, Chapter 26, this volume). Pluralised policing is largely a product of the turn to neoliberalism in the late twentieth century that 'hollowed out' the state (Rhodes 1994) as greater efficiency in public administration was sought and more emphasis was placed on markets to solve problems, including environmental ones (Gunningham 2009). This new hybrid governance of policing (Grabosky 1995b)—involving not only state institutions but also business, community groups and individual citizens—reflects wider societal shifts from state-centric 'government' to 'decentred, at-a-distance forms of state regulation' (Braithwaite 2000: 222) and towards governance performed by many actors (Rhodes 1997).

4. Identifying third parties

The third parties that have the most potential to be effective providers of TEC policing are those that are positioned at what Bullock et al. (2010: 2) call 'pinch-points for intervention'—that is, at places along the crime script[4] where opportunities occur to disrupt or derail the crime. This is known in criminology as a situational crime prevention (SCP) approach because it focuses not on the offender but on manipulating the crime's social and physical settings to prevent the crime. SCP seeks to reduce opportunities for crime by increasing the efforts and risks and diminishing the rewards associated with the crime.

Generally, SCP has emphasised potential interventions by traditional law enforcement agencies in the crime script. However, often third parties, not police or other law enforcement agencies, are the ones who will be on hand at pinch-points to influence the course of the crime.

What kinds of roles can and do such third parties play in relation to TEC? Routine activities theory (RAT) suggests one answer. RAT underpins the situational crime prevention approach and has been summed up by Eck (2003: 88) as follows:

> [A] crime is highly likely when an offender and a target come together at the same place, at the same time, and there is no one nearby to control the offender, protect the target, or regulate conduct at that place.

4 The crime script consists of the different steps that make up the particular crime. Crime scripts vary from crime to crime and commodity to commodity (see Cornish 1994).

Controlling offenders (handlers), protecting victims (guardianship) and regulating conduct in places where crime takes place (place management) are all roles that various third parties positioned along the crime script may be able to perform to help prevent TEC. Thinking again about rhinoceros poaching, we might, for example, imagine a situation in which a community group involved in a conservancy,[5] or a company engaged in an industry such as forestry or mining, employs at a decent wage those who might otherwise poach rhinos (thus, handling potential offenders), guards the rhinos on their patch and manages the potential crime site by preventing poachers' access to the area with fencing and secure gates.

Mapping the third parties who could possibly play the roles of handlers, guardians and place managers in different TEC scenarios would be a first significant step towards a better understanding of how various transnational environmental crimes might be prevented. Of course, there will be many third parties who are able to play only one or two of these roles, not all three. Banks and other financial parties, for example, are in a position as potential handlers to be vigilant about to whom they lend and in checking suspicious transactions, especially when those transactions form patterns over time. Indeed, lists of third parties who may play an intervention role to prevent TEC will often include financial parties and transport and warehousing firms. Other possible roles for third parties include demand reduction (through, for example, consumer education) and anticorruption activities (detection, prevention).

5. Coordinating prevention: The role of the state

It is one thing to identify the many non-state, non-offending parties who can play a part in preventing TEC. It is quite another to assume that all those parties will be ready, willing and able to undertake that task. Crime prevention can be an onerous and unwelcome job. And, where third parties do have the capacity and willingness to act, as is the case with many non-governmental organisations (NGOs) dedicated to protecting wildlife and forests, not all of them may be in agreement over strategies. Diverse ideologies can lead to clashing agendas and different ideas about appropriate responses to environmental harms, including

5 A conservancy is a grassroots organisation dedicated to protecting and preserving the environment of a designated area. Many hundreds of conservancies exist across Africa.

how important it is to stay within the limits of the law (White 2012). In short, third parties face a range of transaction and negotiation costs that complicates their ability to effectively act and collaborate on crime prevention.

So, it is important, then, to think about how the capacities of third parties to prevent TEC can be harnessed. The aims of ensuring that those who can contribute to prevention do, and that any contributions are actively constructive, will be best served if there is some coordination of activities to that end.

Who is in the best position to do this job of coordination? States are really the only ones that have a full array of mechanisms (see below) available to catalyse preventive action by a wide range of actors, including the ability to coerce intransigent third parties. Of course, states may not always be capable of coordinating crime prevention activities. Weak states sometimes lack capacity to tackle crime problems at all, and civil society and private transnational institutions may then step in to compensate for this inadequacy in innovative ways. However, to coordinate a whole-of-society response to prevent a cornucopia of crime problems that are transnational in nature is something that requires a greater reach than is typically within the power of a single private party. Strong states can support weak ones in this endeavour, as they already do in relation to state-led actions to control TEC.

Although some of the academic literature relating to TEC has dealt with SCP and the role of non-state actors (see, for example, Graycar and Felson 2010; Wellsmith 2010; Schneider 2012; Lemieux 2014), the ways in which governments could systematically catalyse the broad potential of those third parties to contribute their own capacities in the pursuit of preventive outcomes have not been a focus.

6. Catalysing third parties: Mechanisms

The coordinating role the state can play in relation to third parties is not limited to regulation as traditionally understood, but extends beyond rulemaking to purposefully influencing the flow of events in any of a number of ways (Parker and Braithwaite 2003). The theory of responsive regulation indicates that the manner in which states approach the task of regulation needs to be context sensitive—that is, alive to the (non)compliance stance of the potential regulatee and able to adapt

to any changes in that stance (see John Braithwaite, Chapter 7, this volume). This suggests that states should consider adopting a repertoire of regulatory strategies for TEC prevention and choose between them according to the intended regulatee. In this way, the state can 'responsibilise' third parties and encourage or command them to use their capacities to prevent TEC.

The strategies the state can use to harness the capacities of third parties to enhance security generally have been examined by Grabosky and his colleagues (Grabosky 1995b; Cherney et al. 2006). These range along a continuum of mechanisms, from coercive to non-coercive, allowing the state to choose a strategy that takes into account the seriousness of the situation it faces and how willing a particular third party is to contribute their capacities. Brewer (2014) has represented these strategies diagrammatically (Table 29.1).

Table 29.1 Mechanisms used to facilitate community coproduction

Mechanism	Description	
Conscription	Mandating/commanding external institutions through such mechanisms as legislation to carry out prescribed functions to limit the opportunities for crime	Most coercive
Required private interface	Requiring that targets of regulation interface with another *private* actor who is well placed to detect, prevent and disclose illegality on the part of their clients	
Required record-keeping and disclosure	Requiring the keeping and disclosure of records to prescribed authorities, with the aim being to enhance self-awareness and vigilance on the part of managers	
Cooptation of external interests	Actively seeking the cooperation of external institutions in furtherance of crime control. The formality of these arrangements can vary, from detailed contractual specification to informal requests persuading external institutions to take crime control actions	
Conferring entitlements	Using new or pre-existing entitlements to persuade third parties to take crime control actions	
Incentives	Offering incentives as a means of inducing institutions or individuals to comply with policies/processes/procedures aimed at discouraging crime	
Education/capacity-building	Providing training and educational programs to raise awareness among external parties regarding agency responsibility and the capacity to prevent criminal activity	Least coercive

Source: Adapted from Brewer (2014: 52).

While there is not the space in this chapter to examine these strategies in any detail,[6] they are briefly summarised below, together with one or two examples of how relevant third parties have been or might be catalysed to play a role in preventing TEC.

Conscription

The state could legislatively impose mandatory obligations on third parties to carry out certain actions or to report certain information, with penalties for noncompliance.

Example: The state could require privately held stockpiles of ivory and rhino horn to be registered on a secure government-operated register or actually surrendered to government for safekeeping or disposal, with the dual aims of reducing the amount of stock potentially available for trading on the black market and deterring market speculation, which provides an incentive for poaching (Mason et al. 2012).

Required private interface

By requiring potential offenders to 'use the machinery of private institutions', the state can harness the capacity of third parties (the private institutions) as 'gatekeepers' at the legal–illegal interface.

Example: Governments could require private businesses involved in the logging of timber concessions to have their records audited by formally accredited professional institutions to ensure that harvest, export and financial records match up and comply with legal allowances.

Required record-keeping and disclosure

The state often requires record-keeping to ensure that it has access to information, but record-keeping requirements also open the possibility that the record-keeper (third party) will spot anomalies that indicate that a crime may be or is being committed and either report this to the authorities or personally intervene to close a criminal opportunity.

6 For a more detailed description and further examples, see Ayling (2013a).

Example: Online auction houses such as eBay could be required to keep records of all attempts to trade endangered species products through their sites, thus requiring these third parties to undertake a surveillance role that could assist in closing down a trafficking opportunity.

Cooptation of external interests

Formal and informal partnerships between states and non-state actors (third parties) are common in the environmental area at a domestic level, and are becoming increasingly common with respect to TEC.

Examples: In many African countries, state-registered conservancies are charged with protecting and conserving the environment of a designated area, often with state funding and sometimes funded by their own activities (for example, tourism). Such public recognition of the important role of local residents in environmental protection can significantly increase the value a community ascribes to its area's biodiversity and its willingness to take TEC prevention measures. The existence of motivated conservancies may itself have a chilling influence on criminal activity.

NGOs often work in partnership with international organisations to respond to TEC. For instance, the International Fund for Animal Welfare (IFAW) has long collaborated with INTERPOL on anti–ivory trafficking projects and currently helps to train law enforcement and customs officers at major East African airports in investigative techniques for wildlife crime (INTERPOL 2013).

Conferring entitlements

The state could create rights for third parties and the ability to enforce them in ways that will assist in TEC prevention.

Example: Private enforcement provisions already exist under domestic environmental statutes in some jurisdictions such as the United States and Australia.[7] A further broadening of legislative standing requirements or the creation of additional rights could encourage third parties to take preventive action, say, with respect to other third parties with guardianship or place management responsibilities.

7 US: *Endangered Species Act* 16 USC §1531 et seq., 1973; Australia: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s. 475.

Incentives

Using incentives can be more powerful than other more coercive strategies because they are often perceived as more legitimate (Grabosky 1995a). Direct incentives include the use of rewards for providing information to authorities or for capturing crime perpetrators; indirect incentives include tax deductions, administrative privileges and prizes.

Example: The US *Lacey Act* criminalises trafficking in the United States of wildlife taken in contravention of any foreign law. Under the Act, a reward account has been set up into which some of the fines levied under the Act are deposited and used to provide financial incentives for information leading to the arrest and conviction of violators.[8]

Education and capacity-building/facilitation

Education, capacity-building and other facilitative measures can enable third parties to better make use of their capacities to further the aim of crime prevention.

Examples: Training could be given in environmental law, investigatory skills, criminal justice processes and rules of evidence to NGOs and community groups that wish to assist with law enforcement activities. States could also assist these groups financially as they engage in consumer education programs and the development of certification schemes. For example, significant funding was provided by Austria towards the establishment of the Forest Stewardship Council (Bartley 2007).

7. Regulatory risks

Less intrusive regulation can be extremely powerful but regulating at a distance is not without risks and difficulties. The transnational nature of environmental crimes such as wildlife and timber trafficking makes coordinating crime prevention efforts complex. Organised criminal groups are adept at taking advantage of differences in regulation between

8 See 16 USC § 3375(d).

states, so, although it is hard, making efforts to coordinate efforts across jurisdictions not only in relation to law enforcement but also on third-party regulatory measures is worthwhile.

Potential third-party mobilisations also need to be thoroughly assessed for their likelihood of furthering the aim of preventing the targeted TEC and for possible unintended and undesirable consequences. This may require third parties to be verified as worthy of the state's trust, especially when being funded for crime prevention activities. Accountability mechanisms for third-party actions also need to be put in place. These mechanisms may need to be situated outside state jurisdictions to ensure a corruption-free process—perhaps in existing or bespoke intergovernmental or international bodies. Evaluation of TEC prevention measures is also desirable to ensure that states can learn what works in this area and not engage in constantly reinventing the wheel.

8. Conclusion

Reducing the impact of TEC needs a whole-of-society approach and calls on the state to take on, as it has in other areas of regulation, a much greater steering role. A more systematic approach to harnessing the many capacities of third parties for policing TEC, involving coordination by national governments alone or in combination, could be guided by work already done in relation to strategies for the coproduction of security generally. Although there are challenges to achieving this kind of coordination, it is clear that there is a need to go beyond law enforcement to counter criminal networks perpetrating TEC with a networked response that draws together the good work in the field already being done by third parties, albeit in an ad hoc way, both as individual initiatives and in partnership with or at the behest of governments.

As outlined here, coproductive regulatory strategies are readily applicable in the area of TEC prevention. This chapter has suggested that what is needed is the mapping of relevant third parties for particular types of TEC and the planning of appropriate responsive strategies that make use of their varied regulatory capabilities, including as guardians of TEC victims, handlers of TEC offenders and place managers of TEC sites.

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Spam and crime

Roderic Broadhurst and Mamoun Alazab[1]

1. Introduction

Unsolicited bulk, mass emails, or 'spam', pose a global challenge because they form a major vector for the dissemination of malware. Spam takes many forms and has many varieties. Spam can merely carry annoying but benign advertising; however, it can also be the initial contact for cybercriminals, such as the operators of a fraudulent scheme who use emails to solicit prospective victims for money or to commit identity theft by deceiving recipients into sharing personal and financial account information.

Legislation criminalising or limiting spam has been introduced in more than 30 countries (OECD 2004) but there is no mutual agreement on its definition. Spam is difficult to define precisely, but broadly includes any unsolicited electronic message, usually sent as a bulk transmission. Definitions vary depending on whether the emphasis is on lack of consent (unsolicited) or the content of the email. The Australian Communications and Media Authority (ACMA 2004, 2014) defined

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spam as 'unsolicited commercial electronic messages', which may not capture the versatility of spam. Under this definition, a single electronic message can be considered spam if it is unsolicited. On the other hand, Spamhaus (2014) considers an email is spam if it is both unsolicited and sent in bulk.

Despite international efforts initiated under the 2004 London Action Plan On International Spam Enforcement Cooperation[2] to further global cooperation and public–private partnerships to address spam-related problems, spam remains a significant cost and risk (UNODC 2013). The action plan brings together 27 states and agencies (Australia, Belgium, Brazil, Canada, Chile, China, Denmark, Finland, Hong Kong, Hungary, Ireland, Japan, Latvia, Lithuania, Malaysia, Mexico, Netherlands, New Zealand, Nigeria, Norway, Portugal, South Korea, Spain, Switzerland, Sweden, the United Kingdom and the United States), non-governmental agencies (for example, Spamhaus Project, M3AAWG), telecom and information security companies (for example, Verizon, McAfee) and corporate and consumer groups to implement anti-spam activities. The London Action Plan invites and encourages informal cooperation among states. It acts as a clearing house, establishes for each participant a designated contact point for spam-related problems and engages the private sector in anti-spam activities. The plan encourages crime prevention as well as improvements in the investigation of spam-related crimes such as online fraud, phishing and virus dissemination.

Thus, the plan is an example of how informal and pluralistic attempts at regulation of a costly and harmful global activity arise when much of the behaviour occurs beyond domestic borders—outside the sovereignty of the state. When states alone lack the capability to suppress spam, they must rely on mutual interest among states and a host of non-state actors to perform tasks that are usually the province of law enforcement agencies. So, via partnerships, states seek to steer private actors and multinational corporations (especially in information technology and related domains) that often have the means to monitor and interdict to play a regulatory role (see Grabosky, Chapter 9; and Tusikov, Chapter 20, this volume).

2 See: londonactionplan.org/.

Although levels of malicious spam may seem insignificant at the individual level, it is estimated that in 2013, approximately 183 billion emails were sent and received every day, so the number of malicious communications can be substantial. Symantec (2013) estimated that about 30 million spam emails are sent each day, and, as we show, significant proportions include malware. It is not surprising that a huge amount of spam emails are necessary because it has been estimated that, for a spam advertisement to be profitable, one in 25,000 recipients need to open the email and make a purchase in an underground market (Symantec 2008). Spam sent in 2010 earned its operators US$2.7 million (AU$3.5 million) in profit from fake sales in pharmaceuticals alone (Krebs 2012), while the cost of spam to internet services providers (ISPs) and users worldwide reaches into the billions of dollars (Anderson et al. 2013). A recent study on the economics of spam (Rao and Reiley 2012) calculated that spammers may collect gross global revenues of the order of US$200 million (AU$262 million) per year, while some US$20 billion (AU$26 billion) is spent fending off unwanted emails.

Spamhaus, a non-profit spam monitor operating since 1998, maintains the Register of Known Spam Operations (ROKSO) and estimates that about 100 spam operations or spam 'gangs' are active and may be responsible for as much as 80 per cent of the spam present in cyberspace at any one time. These simple and often virtual crime operations may comprise small groups of up to five people who first

> acquire a list of victim email addresses from a specialised harvester, rent a botnet[3] … join a spam affiliate programme and include a link to an illegal market site on his spam emails. (Stringhini 2015: 36)

Once this process is in place, the spammer receives a cut of the affiliate market earnings generated by his/her victims.

Spamhaus can make traces via aliases, addresses, redirections, locations of servers, domains and Domain Name System (DNS) setups to a relatively small hardcore group, who:

3 A botnet is a group of computers that have been infected by some form of malware. They respond to instructions from a remote computer through command-and-control servers, to send bulk spam, make denial of service attacks, install other malicious code (such as fake antivirus software) and steal sensitive information, such as harvested passwords and credit card and bank account numbers, to be used or sold.

> pretend to operate 'offshore' and hide behind anonymity. Some pretend to be small 'ISPs' themselves, claiming to their providers that the spam is being sent not by them but by non-existent 'customers'. When caught, almost all use the age old tactic of lying to each ISP long enough to buy a few days or weeks more of spamming and when terminated simply move on to the next ISP already set up and waiting. (Spamhaus 2015)

Spam emails with hidden malware or uniform resource locators (URLs) that direct users to malware are common methods used by cybercriminals to find new victims. For example, spammers may want to expand their botnets or cybercriminals may use them to propagate their computer intrusion software (that is, software developed as 'crimeware') to harvest passwords, credit card accounts, bank accounts and other sensitive personal information. The need to develop preventive methods to help reduce the propagation of malware via the frequently used medium of spam emails is the focus here. Before presenting our results, we briefly describe our data and how criminals disseminate spam emails.

Unlike 'low volume–high value' cybercrime that targets financial services and requires advanced hacking capability, spam enables malware to reach 'high volume–low value' targets that are less likely to have effective antivirus measures in place. Such malware is distributed through two types of spam: those with an attachment that contains a virus or trojan horse that installs itself in the victim's computer when opened; and those with a hyperlink to a web page where the malware is downloaded on to the compromised computer.

Spam thrives on the acquisition of active email addresses and these addresses are harvested in three different ways: first, by searching for email addresses listed on websites and message boards; second, by performing a 'dictionary attack', which is a combination of randomly generated usernames with known domain names to guess correct addresses; and finally, by purchasing address lists from other individuals or organisations such as in underground markets (Takahashi et al. 2010). Once email addresses are harvested, spammers distribute spam by using botnets, and this technique is used by large spam botnets such as Storm Worm, Grum and Bobax (Stringhini et al. 2012). Spam often contains a malicious attachment or a link to legitimate websites that have been compromised by a web attack toolkit (for example, Blackhole).

Botnet-based spam emerged around 2004 as a novel distribution network and is responsible for almost all large-scale spam campaigns. Beside its potential for crime, spam is problematic because of its sheer volume, which impedes the flow of legitimate internet traffic. Spam volumes are estimated to be about 30 million spam emails each day (Symantec 2013).

A recent innovation involves attacking computers indirectly by concealing intrusions in an intermediary website or 'waterhole'—that is, sites the target is likely to visit and which also host malicious code on the landing page (see Figure 30.1). Cybercriminals also create links in spam messages that point to exploit portals hosting malware—an alternative approach that avoids the need to hack legitimate websites before planting malicious code.

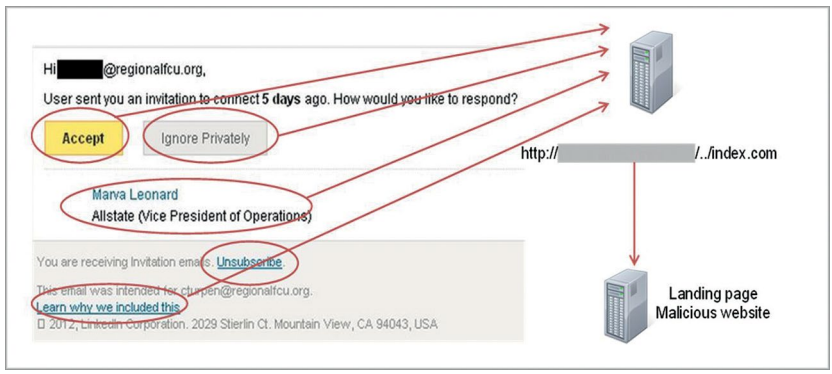

Figure 30.1 Example of a redirection link 'waterhole' attack
Source: Authors' work.

Our analysis shows that 40 per cent of our dataset consists of emails that have been distributed more than 50 times and sometimes more than 1,000 times, suggesting that these spam emails have been sent by different groups, using botnets to distribute them (Alazab and Broadhurst 2016).

2. Dataset and results

We use three real-world datasets (DS) of spam emails collected in 2012. Emails are identified as spam in two ways: first, an email user may determine that an email is spam; second, emails may be collected and identified as originating from known spamming networks. Both scenarios are captured in our real-world DS. For each email, we

extracted attachments and URLs, uploaded them to VirusTotal and scanned for viruses and suspicious content. We considered an attachment or URL to be malicious if at least one scanner showed a positive result.

The first dataset, the HABUL DS from the HABUL Plugin for 'Thunderbird', uses an adaptive filter to learn (machine learn variants of spam text) from a user's labelling of emails as spam or normal email. The second dataset is an automated collection from a global system of honeypots and spam-traps designed to monitor information about spam and other malicious activities, which we labelled the 'Botnet DS'. The third dataset is formed from spam emails reported by Australians and sourced from the spam intelligence DS (provided by the Australian Communications and Media Authority), which we labelled the 'OzSpam DS'. While the spam in the HABUL DS has been viewed by a potential victim, the Botnet DS and OzSpam DS contain spam that circulated all over the world, but without the certainty that the emails have reached their intended targets.

Altogether, about 13.5 million spam emails were collected, which included nearly half a million attachments and over six million URLs. The proportion of spam that carried malicious code in attachments or through hyperlinks in the body text of the email varied across the different sources. For example, 1.38 per cent of HABUL attachments and 13 per cent of HABUL hyperlinks were identified as malware and this was similar to the OzSpam DS, which identified 10.5 per cent of hyperlinks and 0.77 per cent of attachments as malware. The Botnet DS, however, had fewer suspect hyperlinks (0.52 per cent), which was as expected given the method applied, but approximately similar proportions of malware in the attachments (0.95 per cent) forwarded with the spam mail.

For each dataset, there were peak periods of spam that contained malicious content or did not contain it, and which suggested different types of spam (mass propagation) campaigns. These campaigns usually shared similarities in the content of their emails, and this alone may indicate the risk of malicious content.

Four main methods of attack were noted: social engineering and spear phishing, compressed files, right-to-left override email attacks and URL shortening. These are discussed in further detail below.

Social engineering and spear phishing

Cybercriminals favour social engineering tactics to persuade their victims to click on a malicious URL or download malware because it is easier than trying to insert malware remotely (such as via trojan horses) so that key-loggers can obtain banking passwords or other sensitive information. In examining the malicious attachment file names in our data, we found a trend towards referencing trusted business labels (for example, labels or brands related to shipping) rather than other labels or general names.

Spear phishing is a spamming method that targets selected users or groups via a compromised computer that can then be used as a 'zombie' computer capable of importing malware (key-loggers, crypters, and so on) to steal banking passwords and other confidential data. Spear phishing emails are personalised, and often try to impersonate a trusted source to avoid anti-spam detection at the system level. The most commonly found shared file types using purloined brands had the file extension '.zip', and were responsible for 76 per cent of the total number of spear phishing email attachments during our monitoring period. File extensions bearing other common formats—such as '.pdf', '.xls', '.doc', '.jpg', '.txt' and '.gif'—accounted for the remaining 24 per cent of malware, and, of these, .jpg and .txt extensions accounted for most. Spammers have also learnt to focus only on sending a single malicious attachment and to craft the payload necessary to get that attachment to the end user.

Compressed files

Spam emails can carry different types of files as attachments; however, it appears that files disguised under the extension .zip are the most common malware file type. The majority of spam filters block email attachments with the '.exe' file extension, but do not reliably scan archived and zipped documents, therefore encouraging spammers to compress executable files (.exe) into an archived form such as .zip. Our analysis showed that .zip files represent the majority (90 per cent) of malicious files.

There are malware formats that also try to get a recipient to download them using the double extensions method (for example, as 'per.doc.exe'). Other detection avoidance measures use double extensions ('.jpg.exe') to try to trick users or filters. Recipients will see .jpg or .pdf and may feel

comfortable to open up what seems to be an image or a standard pdf file. Our analysis of the three DS confirms that these simple avoidance methods are still commonplace.

Right-to-left override email attacks

Usually when executable files are decompressed their appearance provokes suspicion. So spammers conceal executable files with fake icons to make them appear as harmless file extensions, such as .pdf, .doc, .xls or .jpg, and employ the Unicode's right-to-left override (RLO) technique, which reverses the character ordering from right to left and so changes the order of characters.

Spammers thus use the RLO technique to deceive users into downloading and executing the malicious file hidden in an attachment under the cover of a fake file name extension, and the technique is often combined with very long file names that disguise the .exe file name extension. To make the process even harder, the malicious file names manipulated in this method are also delivered within .zip files or archives.

URL shortening

A service called 'URL shortening' has become popular and also enables methods to disguise or obfuscate spam/malware. This service allows long URLs to be transformed into much shorter URLs and thus enhances the likely use of the link. Spammers use URL-shortening services, even establishing their own.

Spammers redirect a link through many different shortened links: rather than leading straight to the spammer's final destination website, the links point to a shortened URL on the spammer's fake URL-shortening website, before redirecting to the spammer's final website and its hidden malicious content. This service has become more common because of its simplicity, automated capability and anonymity. Popular URL-shortener websites such as Google URL Shortener and Bit.ly provide an easy interface that allows users to convert long URLs into short ones. Information security companies have warned that attacks using URL-shortening services are on the rise, and our data showed that URLs shortened via Twitter accounted for 56 per cent of these events.

3. Responses: Joint investigations and legal interventions

Technological or legal responses alone are not as effective as those that combine technical methods with sound law enforcement practices and process. Coordinated operations were needed to take down several complex botnets (for example, McColo, GameOver ZeuS, Grum, Coreflood, Rustock). The advantage of using legal processes is that it mandates the removal of all the top-level domain names associated with spam. The examples noted also showed the benefits of international police cooperation, even though the investigations were unable to disarm the techniques used or arrest the offenders involved.

In June 2014, the US Justice Department and the Federal Bureau of Investigation (FBI) announced a national and international effort to disrupt the GameOver ZeuS botnet (US Justice Department 2014). It was a joint effort by investigators at the FBI, Europol and the United Kingdom's National Crime Agency as well as security firms CrowdStrike, Dell SecureWorks, Symantec, Trend Micro and McAfee and academic researchers at Vrije University in Amsterdam and Saarland University in Germany. The GameOver ZeuS botnet spread mainly through spam email and was thought to be involved in the theft of banking and other credentials from individuals and businesses all around the world. These combined technical and law enforcement responses to complex cybercrime activities also depend on the role of private information security businesses to achieve the most effective solution (OECD 2006; Krebs 2014).

A recent study of spam and phishing identified the location of high-risk ISPs that acted as 'internet bad neighbours', and found that spam originates from a small number of ISPs. The majority of 'bad' ISPs were concentrated in India, Brazil, West Africa and Vietnam. Typically, cybercrime is executed in a jurisdiction that is not party to multilateral enforcement agreements such as the Council of Europe's Cybercrime Convention, which enables mutual legal assistance across borders to facilitate the investigation of a cybercrime event, while the victim is located in another jurisdiction (Broadhurst 2006). For example, 62 per cent of all the addresses serviced by Spectranet, an ISP in Nigeria, were sending out spam (Moura 2013). In 2009, the US Federal Trade Commission, for example, closed the ISP 3FN service, as it was found to be hosting spam-spewing botnets, phishing

websites, child pornography and malicious web content (Federal Trade Commission 2009). However, Trend Micro (2010) reported that the service was back in business a few days later—reinvented and established outside US jurisdiction.

Laws, regulations and policies can, however, sometimes hinder the effectiveness of public or private actions. Policies such as 'network (net) neutrality' or common carrier policies (EC 2009) can hinder ISPs and other network providers from acting to eliminate criminal traffic from their networks because of the risk of breaching network neutrality regimes. Even in states where laws do not specifically preclude action, the conventional approach is to minimise possible interventions by ISPs and other actors that could counter or eliminate undesirable behaviour (such as hate mail, spamming). A potential policy change would be to reframe network neutrality laws or practices to allow for the alteration of internet traffic flows that indicate a high risk of being malicious. Under some interpretations of privacy laws, such as the US *Electronic Communications Privacy Act* (*ECPA*), companies that detect illegal activity on their networks are unable to voluntarily share information with other parties (for example, other ISPs or information security firms) about such activities to prevent further illegal activity. For instance, corporations are concerned about sharing non-redacted spam and phishing mail feeds, for fear of unintentionally violating their customers' privacy rights under the *ECPA* (Barrett et al. 2011). Similar concerns prevail in Australia and have the effect of fragmenting collective countermeasures and creating barriers to applied research on such problems.

4. Discussion

Spam as a prime means for social engineering continues to be a popular way to spread and inject malware on digital devices. Household users and small enterprises are most vulnerable to cyberattack due to factors such as the cost of maintaining up-to-date security. Thus, the oft-repeated cliché that our security is only as good as our weakest link applies.

Existing detection and defence mechanisms to deal with email spam containing malicious code are mostly reactive and ineffective against constantly evolving spam email formats that hide ever improving malware payloads and capabilities. There is an urgent need to identify new malware-embedded spam attacks (especially in the increasingly

common URL approach) without the need to wait for updates from spam scanners or blacklists (Tran et al. 2013). Machine-learning methods of identifying spam and other spam-filtering methods aim to be highly responsive to changes in spamming techniques, but have not been sufficiently flexible to handle variations in the content or delivery methods found in spam emails (Blanzieri and Bryl 2008; Alazab 2015).

The widespread use of botnets shows how spammers manipulate the networks of infected computers and servers around the world to ensure high volumes of spam are delivered. The increased role for networked crime groups has also impacted on the scale and sophistication of cybercrime. The emergence of bespoke email content tailored to entice a specific victim or victim type via spear phishing also poses dangers that require equally targeted education and crime prevention efforts. The use of spam emails remains an important and underestimated vector for the propagation of malware.

In short, fighting spam requires a combination of technology and relevant, up-to-date laws and policies as well as the constant reformulation of crime prevention practices to keep abreast of the evolution of spam–malware techniques. This, as we noted in the introduction, requires effective partnerships between the state, private actors and multilateral groupings of states, corporations and consumer groups that can tackle the cross-jurisdictional nature of spam and malware propagation. Shifts in malware attacks to new vectors using spam-like methods often based on astute and tailored social engineering also need constant attention. A good example is the shift to Twitter and other new media, where, for example, URL-shortening methods may prosper. While effective civil measures (including anti-address-harvesting laws) are in place to mitigate commercial misuse of spam in Australian cyberspace, the challenge lies in the integration of countermeasures that can further suppress the spam–malware vector. In addition, maintaining the high-level industry–government–law enforcement agency coordination required for successful disruption of malware-driven spam campaigns and other cybercrime must be at the forefront of government-led initiatives. To maximise such cooperation, a reassessment of the co-regulatory burdens on industry may be required and proposals to deregulate the current e-marketing and spam industry codes of practice, for example, may be welcome if they encourage more self-help and help secure continued partnership with government in the fight against cybercrime.

In spam emails, 'crimeware as a service' is more evident than ever and it involves selling exploits and tools for computer trespass. Once attack tools are in place, buyers can rent them to deliver attacks. Individuals and businesses need to increase their awareness of the dangers of spam emails, especially targeted attacks (for example, spear phishing) and create effective policies and practices to prevent their distribution. Botnets generally account for the global dissemination of spam. The widespread uses of botnets show how spammers manipulate the networks of infected computers and servers around the world to ensure high volumes of spam are delivered. The increased role of networked crime groups has also impacted on the scale and sophistication of cybercrime (Broadhurst et al. 2014). Trends in spam designed to create botnets also show increasing malware complexity that exploits new opportunities arising from automated financial activities (for example, GameOver ZeuS and CryptoLocker). The internet has also become the preferred platform on which to deploy spam attacks to intentionally disrupt or subvert these automated services and also to launch denial of service (DDoS) attacks (for profit or ideological motives). These tools have far-reaching implications for the evolution of cybercrime, which need to be explored and investigated. Spear phishing is a good example of offender innovation. By using personal information already gathered through deception or by inserting a remote access tool via an email with apparently *relevant* content from a trusted sender, this method can circumvent countermeasures.

The forms of social engineering used in spam emails have also become more sophisticated, personalised and compelling, thus improving their ability to deceive many users into malware self-infection. Given the limitations in what may be learned by technical investigations to identify new attacks and trends, turning to what victims experience and what we can learn from them will be increasingly important. Victim studies will be most useful if experimental and observational studies that compensate for the absence of technical knowledge about the modus operandi of the cyberattack can be employed. Constant education and the development of crime prevention practices that focus on methods of deception are crucial and need to be as current as the novel and advanced forms of malware that present on the internet.[4] Informal regulatory practices such as those sponsored by global efforts like the London Action Plan

4 For example, SCAMwatch (scamwatch.gov.au/); and ACMA's Cybersmart (cybersmart.gov.au/).

serve as examples of how groups of actors ('coalitions of the willing') can influence the behaviour of cybercriminals (who continue to enjoy the safe havens provided by rogue states and bulletproof ISPs), despite the limits of sovereignty and the failure to create an international regulatory regime to combat cybercrime.

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31

The governance of cyberspace

Lennon YC Chang and Peter Grabosky

1. Introduction

The challenge of discouraging undesirable conduct in cyberspace is, in many respects, similar to the management of misconduct 'on the ground'. In terrestrial space, most social control is informal. Cultures—whether they are cultures of indigenous peoples or of the modern university—have their social norms, to which most of their members adhere. Minor transgressions tend to elicit expressions of disapproval, while more serious misconduct may be met with ridicule, ostracism, some form of 'payback' or expulsion from the group or organisation.

With the rise of the modern state, formal institutions of social control have evolved to provide rules of behaviour, forums for the resolution of disputes between citizens and institutions for policing, prosecution, adjudication and punishment of the most serious transgressions. However, it is now generally accepted that governmental agencies of social control are neither omnipresent nor omnipotent, thus creating a demand for supplementary policing and security services. These state institutions are accompanied by a variety of non-state bodies that 'coproduce' security. Such entities vary widely in size and role, from large private security agencies and the manufacturers and distributors of technologies such as closed-circuit television (CCTV), to the good friend who keeps an eye on her neighbour's house at vacation time.

This wider notion of policing terrestrial space has been nicely articulated by scholars such as Bayley and Shearing (1996) and Dupont (2006) (see also Brewer, Chapter 26, this volume).

Cyberspace differs only slightly from terrestrial space in its response to antisocial behaviour. Most of us who use digital technology do the right thing not because we fear the long arm of the law in response to misconduct, but, rather, because we have internalised the norms that prevail in our culture (on compliance generally, see Parker and Nielsen, Chapter 13, this volume). Most of us take reasonable precautions to safeguard things of value that might exist in digital form. Nevertheless, because there are deviant subcultures whose members do not comply with wider social norms, and nonchalant citizens who are careless with their digital possessions, there is a need for formal institutions of social control in cyberspace. So, too, is there a need for the coproduction of cybersecurity.

One characteristic of cyber-deviance that differs significantly from terrestrial misconduct is that cross-national activity is much more common. Very early on in the digital age it was said that 'cyberspace knows no borders'. The nature of digital technology is such that one may target a device or system physically located on the other side of the world just as easily as one in one's own hometown. A successful response to transnational cybercrime thus requires a degree of cooperation between states—cooperation that may not be automatically forthcoming.

The governance of cyberspace is no less a pluralistic endeavour than is the governance of physical territory. This chapter will provide an overview of regulatory and quasi-regulatory institutions that currently exist to help secure cyberspace. In addition to state agencies, we will discuss a constellation of other actors and institutions, some of which cooperate closely with state authorities and others that function quite independently. These range from large commercial multinationals such as Microsoft, Google and Symantec; other non-governmental entities such as computer emergency response teams (CERTs); groups like Spamhaus and the Anti-Phishing Working Group; and hybrid entities such as the Virtual Global Task Force and End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT), both of which target online child sexual abuse. In addition, there are independent, 'freelance' groups such as Cyber Angels, which exist to promote cybersafety, and ad hoc, transitory collectives that engage in independent patrolling and investigation of cyberspace.

Other groups, such as Anonymous, and whistleblowers such as Edward Snowden, challenge apparent cyberspace illegality with sometimes questionable methods of their own. Anonymous attacked sites related to child pornography in 2011 (Operation Darknet) and Edward Snowden's disclosures revealed questionable practices by the US National Security Agency.

The next section of this chapter will briefly review some of the more important published works on the social regulation of digital technology. We will then discuss, in order, state, private and hybrid regulatory orderings. The chapter will conclude with some observations on regulatory orderings in cyberspace, through the lens of regulatory pluralism.

2. Literature on the regulation of cyberspace

Current literature on the regulation of cyberspace is no longer focused on whether cyberspace can be regulated. Instead, discussion focuses on how cyberspace *is* regulated and who are the regulators. It is generally conceded that the state cannot adequately control cyberspace via laws and regulations. Even when laws and regulations are kept up to date with developments in technology, the functions and effectiveness of laws and regulations will be limited; the transnational dimensions of much cyber illegality and the architectures of digital technology all but guarantee this (Grabosky et al. 2001; Katyal 2003). Other regulatory methods such as code and system design, self-regulation by the private sector and co-regulation via public and private cooperation have been proposed as alternatives with which to govern cyberspace.

Code and architecture

As pointed out by Professor Lawrence Lessig (1999), the internet was built for research and not commerce. Its founding protocols are inherently unsecure and are designed for the sharing, rather than the concealment, of data. The subsequent devolution of access to the computer network from government and research bodies to individual private users has provided a gateway for cybercriminals and cyber-deviant entrepreneurs.

Lessig (2006) argued that cyberspace is substantially regulated by *code*—computer programming and system architecture. In this book, *Code: Version 2.0*, he notes that the internet is built on simple protocols based on the Transmission Control Protocol and Internet Protocol (TCP/IP) suite. Cyberspace is simply a product of architecture, not of 'God's will'. Lessig argued that the internet is the most regulable space that we know, since, through its architecture, it can reveal who someone is, where they are and what they are doing. When the machine is connected to the internet, all interactions can be monitored and identified. Thus, anonymous speech is extremely difficult to achieve.

Lessig (2006) described the code embedded in the software or hardware as 'West Coast Code', as it is usually 'enacted' by code writers on the West Coast of the United States such as in Silicon Valley and Redmond, Washington, the headquarters of Microsoft. It is different from the 'East Coast Code'—the laws enacted by the US Congress in Washington, DC, complemented by state legislation. Although each code can work well alone, Lessig pointed out that the power of East Coast Code over West Coast Code has increased, especially when the West Coast Code becomes commercial. A classic example was seen in 1994 when the US Government enacted the *Communications Assistance for Law Enforcement Act* (*CALEA*). Under this Act, telephone companies are required to create a network architecture that serves well the interests of government, making wire-tapping and data retrieval easier.

Similarly, Katyal (2003) speaks of digital architecture and its relationship to cybercrime. He suggests that the architectural methods employed to solve crime problems offline could provide a template to help control cybercrime. This will become even more obvious as digital technology pervades modern society, and as the divide between the real-space and cyberspace diminishes. Katyal proposes four principles of real-space crime prevention through architecture: 1) creating opportunities for natural surveillance; 2) instilling a sense of territory; 3) building communities; and 4) protecting targets of crime (2003: 2262).[1]

To elaborate, Katyal maintains that current proliferating claims in cyber law are too grand and should not be seen in a binary formula, such as 'open sources are more/less secure' and 'digital anonymity should be encouraged/discouraged' (2003: 2261–2). Based on the architecture

1 As the building of communities and protecting targets of crime focus on collaboration with other institutions, these will be introduced in a later section.

of 'natural surveillance', he argues that open source platforms such as Linux might not necessarily be more secure than closed source software such as Microsoft Windows. Although the open source platform might attract more people to view the code to improve security for reward or to enhance their reputation, only those with a technological background can achieve these objectives. The number of such people is much smaller than the pool of people available for natural surveillance offline. Therefore, Katyal (2003) suggests that a closed platform can be a better security model than an open source platform when natural surveillance is low.

Katyal (2003) also emphasises the importance of territoriality. Territoriality can be easy to define in the real world, however, it is usually hampered by the anonymity of users in cyberspace. He suggests that a 'verified pseudonymity' using Internet Protocol logging (IP logging) would be helpful for law enforcement agencies to identify criminals. IP logging attaches a designated address number to each computer connected to the internet. It can facilitate crime investigation or even deter crime from happening. As some skilled criminals might 'mask' their IP logging, Katyal (2003) suggests that a verified digital identity involving biometric information such as a fingerprint scan might eliminate this concern. He called this 'pseudonymity' as it will not disclose the user's identity online. However, when it comes to crime investigation or prosecution, the government would be able to link the IP logging to a person by matching the biometric information. One notes that this capacity may be directed against human rights activists as well as cybercriminals.

Although both Lessig and Katyal focus on the architecture of code, they have different opinions on the involvement of state power. Katyal (2003) disagrees with Lessig's (1999) fear that if code is to be regulated by government, it will lose its transparency and become an architecture of control. Katyal (2003) argues that freedom of information laws might play an important role in maintaining the transparency of regulation (at least in those jurisdictions where such laws exist). Direct government regulation will also generate effective architecture that provides security and builds both trust and commitment.

Self-regulation/private regulation

Apart from code and architecture, markets themselves can serve as regulatory institutions. Compared with laws enacted by government, 'self-regulation offers greater speed, flexibility, sensitivity to market circumstances, efficiency, and less government intervention' (Gunningham et al. 1998: 52). It has also been regarded as a form of responsive regulation—regulation that responds to the particular circumstances of the industry in question. Commercial activities within the private sector, and the influence they exert on and through markets, are having a significant effect on regulation (Grabosky 2013).

Feick and Werle (2010) observe that voluntary, private self-regulation coordinated the early architecture of the internet. Debate relating to the regulatory arrangement of the internet is divided into two main camps. On one side, some argue there is too much regulation of the internet. They believe that network neutrality rules are unnecessary and dispensable. Others, however, argue for more regulation, particularly of technical infrastructure. Some scholars have even regarded responsible self-regulation as the only legitimate form with which to govern cyberspace (Johnson and Post 1996; Murray 2012).

Three forms of self-regulation are commonly identified (Gunningham et al. 1998: 51): voluntary or total self-regulation (without government involvement), mandated self-regulation (involving direct government involvement) and mandated partial self-regulation (partial government involvement) (Braithwaite 1982). It is quite rare to see pure self-regulation. Most self-regulation has some government involvement in directing, shaping or endorsing the regulation (Tusikov 2016). The Internet Corporation for Assigned Names and Numbers (ICANN) is an example of self-regulation with government involvement. ICANN is a non-profit organisation that operates the internet's Domain Name System (DNS). However, it is contracted by the US Department of Commerce and overseen by the US Government (Murray 2012). Similar situations can also exist at the nation-state level, especially in critical infrastructure industries such as banks, telecommunications and electricity. For example, in 2006, the Internet Society of China, a Chinese Government–endorsed industry association, announced the 'Self-Regulation against Malicious Software' to regulate abuse from malicious software and prevent its spread. Members who signed the self-regulation protocol are required to protect the cyberspace environment and do their best to control malicious software. They also have a duty

to report any malicious software found and to share that information with other companies. Most of the large telecommunication companies and internet service providers (ISPs), such as China Telecom, CNNIC, Yahoo!, Baidu and Sina, signed up to this self-regulation agreement (Chang 2012).

Nonetheless, one can still find examples of regulation of online behaviour without intervention from the state. To tackle online infringement of copyright, the Recording Industry Association of America (RIAA), an association formed by music companies in the United States, conducts its own investigations to locate the IP addresses of those who are illegally sharing music. It then contacts the ISPs to identify the perpetrators and may sue them directly and/or enlist the support of ISPs in controlling offending behaviour (Tusikov 2016). Nonetheless, the RIAA's might is always successful in identifying the user, even though they have no coercive power to force the ISPs to give the information to them (Shiffman and Gupta 2013). This also illustrates the weakness of private regulation.

Distributed security/Wikified crime prevention

For offline crime, police play an important role in investigation and prevention. However, a higher level of cooperation with states, the private sector and even individual users is required to tackle online crime. Governing risk through a national approach is no longer sufficient (Ericson 2007). New approaches need to be taken to secure cyberspace. Brenner (2005) proposed a 'distributed security' scheme to emphasise that government, users (individual and organisational) and computer architects should all share responsibility for cybersecurity. Similarly, Chang (2012) proposes the idea of 'wiki cybercrime prevention' to address the necessity of mass collaboration between the government and the private sector when sharing information on security incidents and establishing early warning schemes.

Brenner (2005) argues that, unlike crime in the real world, cybercrime is not typical one-to-one victimisation. Because of the automation of such crime, cybercriminals can commit a huge amount of crime with very little effort. Due to limited resources and a reactive strategy, law enforcement agencies may not be able to deal with this problem. Brenner proposes four measures to improve law enforcement's reactive strategy: 1) the Convention on Cybercrime; 2) law enforcement strikeback

techniques; 3) civilian strikeback techniques; and 4) more officers. However, she argues that these are not only insufficient to deal with cybercrime, they might also add to the problem, as strikeback techniques might produce collateral damage to legitimate systems in a hospital or a telecommunications company.

Supporting the idea that 'the monopolization of policing by government is an aberration' (Bayley and Shearing 2001: 1), Brenner (2005) contends that it is essential to involve the private sector in responding to cybercrime and in cybercrime prevention. She proposes a new concept—a 'distributed policing strategy'—that relies mainly on active citizens rather than active police. The distributed policing strategy is different from the idea of community policing, as it shifts the focus of law enforcement from reaction and punishment to deterrence and prevention. Normally, community policing focuses on cooperation between police and the public to create a secure place where crime is not tolerated. It is established on the basis that participants want to live in a secure neighbourhood. However, as Brenner argues, this strategy cannot easily be applied to cybercrime prevention, as cybercrime is a distributed crime that has no central and binding focus such as a physical neighbourhood.

Brenner (2005) suggests that, to let civilians be active and responsible for the prevention of cybercrime, obligatory conduct might be more effective than voluntary conduct. An individual user or organisation might be required by law to install security software or to report illegal activity. The alternative is a lengthy hiatus, as it takes a long time to form and internalise a norm that it is everyone's responsibility to prevent cybercrime. Brenner considers that 'do not' laws might be better than 'do' laws, which impose an obligation to take certain preventive measures. 'Do laws' will 'not only impose an unprecedented obligation to prevent cybercrime; they produce criminal activities *even though no crime was committed*' (Brenner 2005: 15, emphasis in original).[2] She also stresses that, as software plays an important role in cyberspace, it should be seen as national infrastructure, rather than as a 'civil product'.

2 For example, internet users are required to set up a password to secure a wireless connection. They will be fined if they fail to do so and unauthorised people take advantage of this open connection to conduct criminal behaviour such as illegally downloading data (see also Grieshaber 2010).

Malicious computer activities are the 'infectious diseases' of the virtual world. They are pandemics and can be hard to control. Therefore, for cybercrime prevention, risk management measures become particularly important in the prevention of malicious activities from spreading and in reducing harm to society. Chang (2012) also emphasises the importance of civilian participation in cybercrime prevention. Learning from infectious disease prevention models, he advocates 'wiki cybercrime prevention'. Chang (2012) argues that cybercrime can easily become a 'chain reaction', as most public and private sectors are sharing the same closed-code software. Therefore, it is important to discover the breach or vulnerability used for the attack and to share this information with other users immediately to reduce damage to society. That is, it is important to develop 'early warning' and 'information sharing' systems.

This is not a completely new idea as there have been attempts to establish models of 'wikified' cybercrime prevention. For example, in 2002, the US *Federal Information Security Management Act* (*FISMA*)[3] established a reporting system to protect both national security and non–national security related computer systems in government agencies (including government agency contractors). In most countries, there are CERTs to deal with reporting and information sharing. However, as the recent experiences of Sony Pictures, Target and Home Depot suggest, when institutions such as banks, large retailers and telecommunications companies share their adverse experiences, they risk reputational damage, administrative punishment, law suits, audits, public shaming and further onerous reporting requirements. These risks might inhibit the willingness to report (Chang 2012). For example, banks might suffer from unexpected audits and be penalised for administrative system or prudential failure, even if the reporting was voluntary. Moreover, existing hydra-headed reporting systems might also discourage reporting. According to Chang (2012), some industries are required to report computer incidents to as many as five competent authorities within a defined time. They would prefer not to disclose the incident to avoid additional work at the very time they are busy fixing the problem.[4] To minimise those concerns, Chang (2012) suggests the reporting should be voluntary, confidential and non-punitive, as is the practice in the Aviation Safety Reporting System (ASRS 2008). If a company's voluntary reporting has successfully prevented malicious cyber activities

3 *Federal Information Security Management Act*, 44 USC § 3541, et seq.

4 For an overview of data breach notification laws in the United States, see NCSL (2015).

from spreading and causing more serious damage, the government should even consider praising or rewarding the reporting company or agency to acknowledge its contribution. Information security companies could be used for intermediation or as a gateway in the reporting system. By reporting through an information security company, victims can have their identity well protected. Furthermore, an incident might be caused by human error or a conflict between software and hardware within the organisation; these can all be resolved before disclosure to avoid alarmist public reaction.

3. Regulatory institutions in cyberspace

The previous section introduced different regulatory methods involving different agents, including state regulatory institutions, private sector bodies and even individuals. This section introduces some important regulatory institutions in cyberspace.

State regulatory institutions

Among regulatory institutions, the most significant are state agencies. No matter which regulatory method is used, there is intervention or involvement from state regulatory institutions. Despite the revolutionary idea that 'code is law', Lessig (2006) demonstrated the importance of law made by state regulatory institutions. Even with self-regulation, one can see the influence of government in the form of constructing, shaping, promoting and/or facilitating self-regulation (Tusikov 2016).

Legislation still plays an important role in combating cybercrime despite some libertarians strongly opposing government use of law and regulation to intervene in the development of cyberspace (Barlow 1996; Goldsmith and Wu 2006; Grabosky et al. 2001; Katyal 2003). However, as mentioned earlier, state regulatory institutions have limitations when it comes to regulating cyberspace due to the decentralisation and de-territorial character of cyberspace. The cross-border character of cybercrime restricts the effectiveness of laws and regulations. Issues such as legal consistency among states and collaboration in investigating cybercrime have been raised (Chang 2012).

International agreements and conventions encourage harmonisation of cyber laws and regulations, and seek to build cooperation among nations in responding to cybercrime. For example, three decades ago, the Organisation for Economic Co-operation and Development (OECD) published *Computer-related Crime: Analysis of Legal Policy*, which emphasised the importance of establishing common criminal law and criminal procedural law to protect international data networks (OECD 1986). From 2001 onwards, the United Nations (UN) has adopted resolutions encouraging its member states to take proper actions against cybercrime. It called on its members to note the Convention on Cybercrime (Budapest Convention) drafted by the Council of Europe. The Budapest Convention is the first and only international convention to encourage harmonisation of cyber laws and regulations, and to build cooperation among nations in controlling cybercrime. It is open to Council of Europe member states and non-member states. It is currently the most accepted convention on cybercrime, with 51 states ratified/acceded as of December 2016 (Council of Europe 2001). Key members include European nations and the United States.

Nevertheless, most countries in Latin America, the Middle East and Asia-Pacific, including Brazil, Russia, China and India, are not signatories to the Budapest Convention because they were not involved in the drafting or, as is the case with less-affluent countries, they lag behind in developing domestic cybercrime laws to the requisite standards (Broadhurst and Chang 2013). This reduces the effectiveness of the convention as it applies to less than half of the world's internet users and, as Archick (2006) argued, most of the 'problem countries' are not actively involved in the convention. In 2012, a new global cybercrime treaty was proposed by China, India, South Korea and a number of other regional countries at the twelfth UN Congress on Crime Prevention and Criminal Justice in Salvador, Brazil. Although the proposal did not gain much support from Western countries, it might provide a good basis for a new, more inclusive convention.

Bilateral and multilateral state–state cooperation

To control cross-border cybercrime, states need to sign agreements with other states covering areas such as substantive criminal law, as well as procedural laws covering such matters as arrest, search and seizure, evidence collection and extradition. These can be bilateral agreements negotiated directly by the respective authorities in two countries or

multilateral agreements or treaties negotiated through international or regional organisations (on the difficulties of multilateral negotiation, see Downie, Chapter 19, this volume). The Budapest Convention was envisaged as being *the* multilateral agreement against cybercrime; however, due to its limited membership, it cannot be regarded as a truly global platform for mutual assistance on cybercrime investigation. Therefore, most states still need to enter into mutual assistance agreements either bilaterally or multilaterally.

Normally, bilateral mutual assistance agreements provide more efficient and reliable bases for cooperation in crime matters than multilateral agreements, as they are negotiated by the two parties based on their mutual trust and confidence in successful pre-existing relationships (Chang 2013). The disadvantage of bilateral agreements is that it can be rather time-consuming to reach agreement with many partner countries. Also, due to political concerns, it may be difficult for jurisdictions such as Taiwan and China or South Korea and North Korea to reach agreement. That said, some collaboration can be seen between Taiwan and China against telecommunications crimes. For example, in an action called 'Operation 0310', 692 suspects were arrested in a joint investigation against telecommunications fraud syndicates in June 2011 (Mainland Affairs Council 2012).

4. Non-state actors

Non-state actors also play important roles in the governance of cyberspace. As in the discussion of code and architecture, self-regulation and wikified cybercrime prevention, here, we can see evidence of non-state actors (see Tusikov, Chapter 20, this volume). Here, we will discuss three crucial non-state actors as regulatory institutions in cyberspace: commercial companies, non-profit organisations and grassroots bodies or individuals.

a) Commercial organisations

Commercial companies, especially information technology companies, are playing critical roles in the governance of cyberspace. Some of them take up the role voluntarily while others are forced to participate under government laws and regulations. As mentioned earlier, Lessig (2006) argued that government can control cyberspace by regulating the code. Similarly, Goldsmith and Wu (2006: 68) remind us not to 'overlook how

often governments control behaviour not individually, but collectively, through intermediaries'. In the real world, doctors and pharmacists are used as gatekeepers to prevent drug abuse and bartenders are given responsibility to prevent their alcohol-affected customers from driving. Internet content providers are asked to take down copyright-infringed music and films, as well as indecent content that may come to their attention. Quite independently of government, the multibillion-dollar information security industry exists to protect the digital assets of its customers.

b) Non-profit organisations

There are also many non-profit organisations that act as regulatory institutions in the cyber world. ICANN, mentioned earlier, is a non-profit organisation that regulates the distribution of domain names. The World Wide Web Consortium (W3C) is a non-commercial collective of volunteer organisations. The work of the W3C has political and regulatory consequences since internet standards are not purely technical, having underlying commercial interests, political preferences and moral evaluations (Feick and Werle 2010).

In the domain of third-party cooperation against cybercrime, CERTs are prominent non-governmental organisations that share information on malicious cyber activities. CERTs are organisations that provide incident response to victims. It not only helps to safeguard information security within one country, but also collaborates with other CERTs at international and regional levels.

There are also other non-profit organisations that deal with different types of issues in cyberspace—for example, Spamhaus, the Anti-Phishing Working Group and ECPAT. In addition, independent groups such as Cyber Angels promote cyber safety and engage in independent investigation of cyberspace.

c) Grassroots bodies

Other groups, such as Anonymous, and individuals such as Edward Snowden, challenge cyberspace illegality with questionable methods of their own. Cyber crowdsourcing—the power of netizens conducting crime investigation by using social networking tools—has been shown to be a formidable form of private regulation. This is especially the case in Asia (Chang and Poon 2016; Grabosky 2013). Cyber crowdsourcing has been

successfully used to identify viruses and malware. The US Government has also been harnessing the power of cyber crowdsourcing to combat cybercrime. It has recently established the 'Neighborhood Network Watch' program, which educates internet users on cybersecurity and encourages them to report suspicious behaviour related to terrorism (Shiffman and Gupta 2013). This can also be seen as 'wiki cybercrime prevention'.

Hybrid regulatory orderings

There are three basic ways by which commercial companies collaborate formally with government as regulators of cyberspace: such cooperation can be commanded by law, it may flow from commercial public–private partnerships or it can be entered into on a pro bono basis by the commercial actor (Ayling et al. 2009). An example of coercive collaboration is the requirement that telecommunications carriers design systems in such a way as to facilitate surveillance by state law enforcement agencies. The *CALEA* legislation noted above is but one example.

Commercial joint ventures have been established between law enforcement agencies and private commercial entities. The New York Police Department (NYPD) and Microsoft jointly developed the 'Domain Awareness System' to track surveillance targets using databases and surveillance cameras around New York City. The system is designed to be licensed for use by other law enforcement agencies, with profits to be shared by the NYPD and Microsoft (City of New York 2012).

The private sector may also provide goods and services to law enforcement agencies free of charge. In 2014, a memorandum of understanding was signed between Microsoft and the Jakarta Police Department to educate the public on the danger of using pirated software. Through the training, they wished to increase awareness and cybersecurity protection for customers and businesses (Cosseboom 2014). Similarly, Intel's McAfee security branch has signed an agreement with European law enforcement to establish joint operations to control cybercrime (Kirk 2014). Such acts of corporate largesse are obviously in the donors' interests. Whether they are entirely consistent with the policy priorities of the recipient is another matter (see Tusikov, Chapter 20, this volume).

Big companies are not the only ones to play a role in governing cyberspace; small and medium-sized companies also contribute via information sharing. InfraGard, an information sharing and analysis effort established by the US Government with business, academic institutions, state and local law enforcement agencies and other participants, is a good example

of how commercial companies can contribute as regulatory institutions to protect cybersecurity. Another example is the Virtual Global Task Force, which provides information, training and investigation in furtherance of child protection. Commercial partners include Blackberry, PayPal and Microsoft.

5. Conclusion

There is no 'one-size-fits-all' prescription for securing cyberspace. Governments differ in their willingness and capacity to contribute to the solution. In situations where states, alone or in concert, are not in a position to ensure cybersecurity, a variety of private and hybrid actors may be able to assist. We refer to these, because of their influence, as *quasi-regulatory* institutions. We have noted how the information security, telecommunications, software and entertainment industries each contribute their own solutions for cybersecurity. Ideally, these will serve the public's interest as well as that of the institution. Individual users also bear some responsibility for managing their own resources and information. Ad hoc collectives also provide quasi-regulatory services at the grassroots.

To the extent that these various regulatory and quasi-regulatory institutions function in an efficient and effective manner, so much the better. Those who continue to look to the state for leadership in cybersecurity are likely to favour a degree of coordination under state auspices. One should, however, be cautious about expecting the state to deliver beyond its capacity. In all but the most draconian jurisdictions, a degree of spontaneity on the part of non-state actors is both inevitable and desirable. This spontaneity may be beneficial when it results in constructive, creative outcomes. But such success is by no means guaranteed. Regulatory space is contested, and resulting relational interactions between institutions are often complex. One must be alert for initiatives that are part of the problem, rather than part of the solution. Institutions and initiatives should be accountable, whether they exist under commercial or private auspices.

The appropriate institutional configuration for cybersecurity will vary over time and place, depending on the security setting in question and the prevailing capacities of individual participants. Efforts by the private sector may in some situations compensate for shortcomings on the part of government. Some states may be in a position to raise the security

consciousness of their citizens, while others are not. But there is little doubt that cooperation across sectors is the general direction in which we should be heading.

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Section 6: Regulating for health

Judith Healy was an early leader at RegNet on health regulation, examining the ways in which responsive regulation might be used to improve the performance of the healthcare sector. Scott Burris's visits to RegNet were crucial to the work on nodal governance, as well as its application to health policy and regulation (see his 'Governance, microgovernance and health' in *Temple Law Review*). RegNet doctoral students such as Buddhi Lokuge and Warwick Neville undertook hugely important work, the former on managing the risks of pandemics and the latter on one of Australia's most important health initiatives, the Pharmaceutical Benefits Scheme. Buddhi Lokuge has gone on to pioneer initiatives in the complex field of Indigenous health (see Lokuge and Burke 2014). The governance of health, as the chapters in this section demonstrate, has grown into an area of major work for RegNet.

The extraordinary and almost daily advances in medical technology seemingly open the door to a possible world in which it is the best of times for the health of citizens everywhere. But, as Sharon Friel makes clear in her chapter, many regulatory institutions impact on the health of citizens, distributing risks in very unequal ways. Inequality stalks capitalism and probably nowhere is this more evident than in the case of health outcomes. For example, patent cartels and patent globalisation mean that access to medicines is massively unequal both within and across countries. Scott Burris introduces the reader to the methods being used to probe the causal fields that surround health outcomes. Judith Healy, using the assumptions of meta-regulation, argues that approaches

derived from responsive regulation and nodal governance can be used by patients to turn themselves into active regulators in their own cause rather than remaining passive regulatees shuffling through a world of medical command. The National Research Centre for OHS Regulation has been one of RegNet's longest running centres, with funding from the Australian Research Council and Safe Work Australia. Harmful work environments kill about two million workers globally each year. Elizabeth Bluff, one of the directors of the centre, opens her chapter with this startling estimate and analyses how good uses of the broader version of regulation described in Chapter 1 of this volume can save lives.

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32

Scientific evaluation of law's effects on public health

Scott Burris

1. Introduction

Law has played an indispensable role in improving public health over the past 100 years. Laws and legal practices also have significant unintended effects on health. Just as in other realms of regulation, however, it is not enough to assert the important roles of law in public health. If law matters to public health, we have to be able to show how, under what circumstances and to what degree. We have to produce *evidence*. Public health law research (PHLR) is the field devoted to creating and disseminating that evidence.

This chapter describes scientific theory and methods for investigating the development, implementation and effects of public health laws, enforcement strategies and other basic forms of regulation. Part one is an introduction to the basic concepts of PHLR. Part two is devoted to special questions of measurement that arise when law is the independent variable, and describes new tools for measuring law. Part three describes theories that researchers from diverse disciplines can use to study *how* law influences behaviour—the mechanisms or processes through which a rule manages to have measurable effects on health. Finally, part four considers the various study designs for PHLR.

2. Law, health and science

Public health law research (also referred to as 'legal epidemiology') is *the scientific study of the relation of law and legal practices to population health* (Burris et al. 2010, 2016). This includes both direct relationships between law and health and relationships mediated through the impacts of law on health behaviours and other processes and structures that affect population health. Both 'law' and 'health' are broadly conceived in PHLR.

Consistent with the general approach in studies of regulation and governance (Braithwaite et al. 2007), PHLR's conception of 'law' is not confined to 'law on the books'—constitutions, statutes, judicial opinions, and so on. PHLR is necessarily concerned with the psychosocial mechanisms through which compliance is achieved, the range of state and non-state regulatory techniques that may be deployed and how law operates as a social practice embedded in institutions and implemented by agents (Stryker 2013). It is part of, not distinct from, the social environment whose influence on health is the focus of social epidemiology.

In the tradition of social epidemiology, health is understood as a product of the interaction of genes, people and places, and not simply, or even primarily, a consequence of consuming healthcare services (Berkman and Kawachi 2000). Most things human beings do, and most characteristics of our environments, have some impact on the level and distribution of health in a population (CSDH 2008).

This view of law and epidemiology suggests two broad roles for law in the production of health. First, law helps build and maintain the social, economic and physical worlds in which we live, learn, work and play. It authorises, structures and protects institutions and statuses, validating and protecting current distributions of power and resources and prescribing methods for change. Second, law acts as a mechanism through which social structures are transformed into a level and distribution of health in a population. The life course of a person with the status 'poor', for example, will often be shaped by experiences with legal rules, institutions and agents that are quite different from those of better-off people (Sarat 1990).

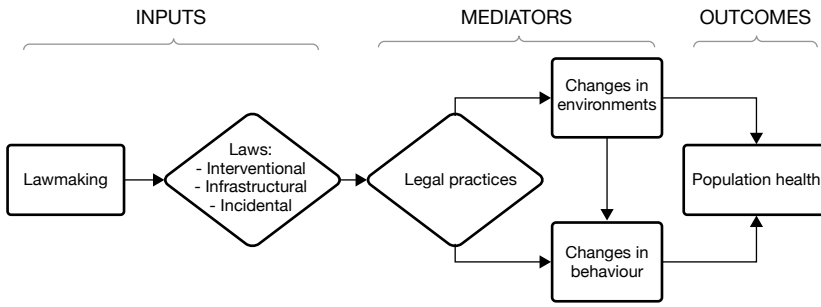

Figure 32.1 Logic model of public health law research
Source: Author's work.

The spectrum of PHLR studies is depicted in Figure 32.1. Moving from left to right, we begin with studies of the lawmaking process, observing and analysing the factors that influence which laws are enacted and that shape the specific characteristics of the statutes and regulations adopted. In these studies, public health laws themselves are the outcome of interest and political and other factors are the explanatory variables. Next, studies of legal practices focus on the implementation of the law on the books, including how the law affects the structure or operation of regulatory systems. The completeness of implementation and the effectiveness of mechanisms for ensuring compliance with the law are critical elements influencing the law's effect on health outcomes. Legal practice studies explore these influences as mediators of the statute's or regulation's impact on health.

The core of PHLR involves study of the effects of the law on environments and health behaviours. Laws and their implementation affect social institutions and environments by creating or reducing opportunities, increasing or decreasing available resources, expanding or reducing rights and obligations and creating incentives and penalties. Research in this area examines processes and how they shape the conditions for people to be healthy. Law may affect health behaviours both directly and by shifting the environmental conditions that make particular behavioural choices more or less attractive. For example, drink-driving laws may directly influence driver behaviour through fear of punishment, but also indirectly through the social environment by changing attitudes towards the behaviour. Ultimately, changes in environments and behaviours lead to changes in population-level injury and death.

3. Measuring and monitoring law

When law is being evaluated in quantitative research, the very first methods question is how to capture the attributes of law in a way that will be accepted as reliable by the scientific community. In any study involving laws in multiple jurisdictions that vary across time (for example, studies of state/provincial laws or cross-national studies), accurate measurement of law allows the research to fully exploit the natural experiment that such variation creates. For decades, a small cadre of scientists, including lawyers, has been creating scientifically reliable legal datasets, but there was until recently little in the literature in the way of articulated, shared standards cutting across topical silos. In the past few years, however, both new methods papers (Anderson et al. 2013) and new tools (Public Health Law Research Program 2015) have emerged in PHLR to define standards and support more efficient and accurate measurement of the attributes of statutes and regulations.

Measuring law for scientific purposes is quite different from the way lawyers measure law in traditional legal research. Legal research is typically focused on assessing how a rule may be applied to a particular situation, and is typically focused on current law. In contrast, scientific research is focused on measuring underlying dimensions of law whose importance is derived from theory, and relating those dimensions to other phenomena. To meet scientific standards, a dataset must be created through transparent and reproducible methods, which requires an explicit protocol and variables that are sufficiently objective to be consistently measurable by different researchers. Achieving sufficient reliability requires strict quality-control procedures and, typically, redundant research processes using multiple independent coders.

A dataset of US state laws addressing the use of mobile phones by drivers provides an illustration (Ibrahim et al. 2011). The research encompassed all laws directly addressing the use of mobile communications devices by drivers enacted by US states between 1992 and 2010. Given that 39 states had passed more than 300 iterations of these, which were being coded for 20 variables, the project was not small, either in the collection of the law or in its coding.

Both the regulatory strategy and its targets had evolved over the years, which points to the need for both formative research and a recursive approach to coding. Earlier statutes referred to 'cellular telephones' or

'mobile telephones'. As technology developed, producing more devices capable of being used by a driver to communicate, drafters used broader terms, such as 'mobile communications device', and began to address behaviours such as text messaging. Whether the term 'cell phone' in a traffic law would cover a wi-fi-enabled iPad being used for a Skype call could be quite important for a lawyer applying that law to a particular case, but, for creating legal data, it sufficed to observe that the term 'cell phone' is used to specify the device whose use the law regulates. In addition to the prohibited behaviours, the dataset captured the extensive variation in which categories of drivers were covered, the penalties and the enforcement mechanisms.

Along with a lack of explicit methods guidance, this sort of legal measurement has also been hampered by a lack of tools. Collecting and coding laws on paper are tedious, and require a second data-entry step that costs time and introduces a risk of clerical error. Spreadsheet software is also prone to entry error in datasets with many columns and rows; more importantly, it requires manual merging to collect and compare the work of multiple coders. Commercial database software supports forms that reduce clerical error, but generally does not allow multiple coders to work in the same file. Software for free-coding text is sometimes used, and has the advantage of storing and allowing the coder to see the text on the coding form, but is not optimised for quantitative coding with a predetermined coding scheme. In recent years, at least two web-based solutions have emerged that significantly improve matters. Google Forms allows users to build a coding form that feeds data to a spreadsheet and supports simultaneous and redundant coding work. LawAtlas, developed by the Public Health Law Research Program, was designed for coding and publishing legal data. It allows the creation of custom coding forms, stores the legal texts, allows the coder to code and view the text on the same window and supports simultaneous redundant coding. Data can be downloaded into a spreadsheet.

Scientific research methods and software that supports efficient coding and publication have made possible the ongoing collection, analysis, interpretation and dissemination of information about important public health laws. This practice, which is emerging under the label 'policy surveillance' (Chriqui et al. 2011), efficiently satisfies two basic conditions for the effective use of law and law reform to improve health: the creation of data for evaluation and the rapid dissemination of health policy activities to speed up the diffusion of innovation.

4. Interdisciplinary approach to the mechanisms of legal effect

A scientific approach to understanding *how* law influences health is crucial to assessing *whether* it does so. Theoretically grounded research illuminating mechanisms of legal effect is important in several ways for public health law research and practice. Theories of how law influences structures, behaviours and environments are used to *define the phenomena to be observed*. This enables researchers to properly identify effects to measure: tell us where to look, at what point in time we might expect to see effects, how effects might evolve over time and what sort of intended and unintended effects to look for. Because much PHLR is necessarily observational, data on how law works *support causal inference* by providing evidence of plausible mechanisms to explain an observed association. Theory also helps unpack a law into regulatory components that may make varying contributions to the overall effect, and helps identify dose–response relationships between specific legal components or dimensions and health-related outcomes. In a similar fashion, this kind of evidence can guide *reform and implementation*. Assuming confidence that law is causing an effect, research on how it does so provides important guidance on ways to influence the magnitude of the effect, reduce unintended consequences or produce the effect more efficiently. Understanding how law works can also guide legislators and regulators to craft innovative interventions aimed at newly recognised problems (Anderson and Burris 2014).

a) Defining the phenomena to be observed

Law is just one of many factors in a web of causation that shapes health outcomes. A theory of how law will influence the outcome can be used to generate a causal diagram that depicts the process, and the relation of law to *other* potential causes (Swanson and Ibrahim 2013). Consider a law aimed at the emerging problem of concussion in youth sports. Between 2009 and 2012, nearly all US states passed similar laws aimed at ensuring that athletes suffering a possible concussion in school sports activities were identified and removed from play pending medical clearance (Harvey 2013). The underlying theory of the 'problem' was that kids were not being identified because athletes, coaches and parents were not able to diagnose possible concussion, were unaware of the serious risks or were unwilling to report because of social norms of

'playing tough' or enduring injury for the sake of the team. The regulatory intervention based on this analysis was to require education for athletes, coaches and parents, removal from play for possibly concussed athletes for a set period and medical clearance before resuming participation. Generally, these laws did not include regulatory oversight or penalties.

Both socio-legal and behavioural theories can illuminate plausible mechanisms through which the law's approach might work, and guide evaluation of whether it actually does. As is often the case in PHLR, consistent data on the incidence of concussion in the target population are not available, so, in the short and medium terms, other measures of legal impact will be needed—and that is where theory is so valuable.

It is clear that information is the primary mechanism through which this law is intended to change behaviour. The legislation itself sends information about the seriousness of the issue. Its primary requirement is that information be provided to coaches, parents and players. One straightforward thing to measure in evaluating the law is the extent to which substantive knowledge of the risk and the symptoms of concussion grows among the targets. But mere knowledge is not enough to assure that behaviour will change. The law will be optimally effective only if beliefs about the danger, and the norms of sporting behaviour, begin to change. Coaches, parents and teachers must all start to see concussion as a bigger problem, and social norms must emerge that make it unacceptable to ignore possible injuries or to fail to seek immediate medical attention. We can draw on many different kinds of theories to figure out how to measure these normative effects.

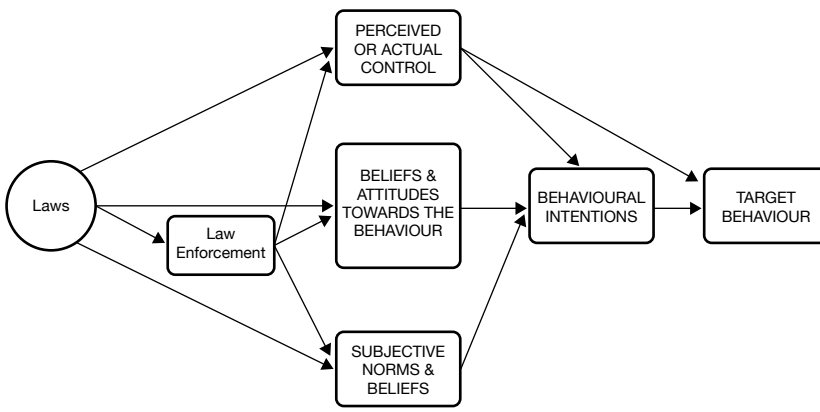

Figure 32.2 Law in the theory of planned behaviour

Source: Author's work.

The theory of planned behaviour is a widely used tool in social psychology (Ajzen 1991). It explains behaviour in terms of the factors that lead an individual to form an intention to perform the behaviour. A simplified version is applied to the law in Figure 32.2. Behaviour is theorised to be a product of constructs that drive behavioural intent, including attitudes towards the behaviour and its consequences; perceptions of the normative value of performing the behaviour, including perception of how others will view it; and beliefs about the difficulty of performing the behaviour given external or internal constraints. These well-defined constructs can be measured using validated instruments, and can readily be applied to investigate whether a concussion law might be influencing behaviour. Student athletes, for example, could be surveyed over time to determine whether attitudes about concealing a concussion were becoming more negative, whether perceptions about the 'heroism' of such behaviour were changing and whether the law or changing norms were giving them a greater sense of self-efficacy to request medical attention (Register-Mihalik et al. 2013; for further discussion of this kind of theory in PHLR, see Flay and Schure 2013).

Another way to think about measuring the emerging impact of the law is to draw on a theory more familiar to regulatory scholars. Tyler's procedural justice model posits that people are more likely to comply with laws they regard as legitimate and that they have experienced as fairly enforced (see also Murphy, Chapter 3, this volume). Figure 32.3 depicts Tyler's model as it applies to the concussion law, which suggests that compliance with the law can be understood as depending on two related sets of beliefs about the legitimacy of the concussion law and the fairness of its application. We can measure how parents, coaches or students feel about the legitimacy of the legislature issuing mandates about sports; the greater is the legitimacy accorded to the legislature's action, the more likely it is people will feel an obligation to comply as citizens. Likewise, perceptions of procedural fairness in the application of these rules will increase their legitimacy and independently promote compliance.

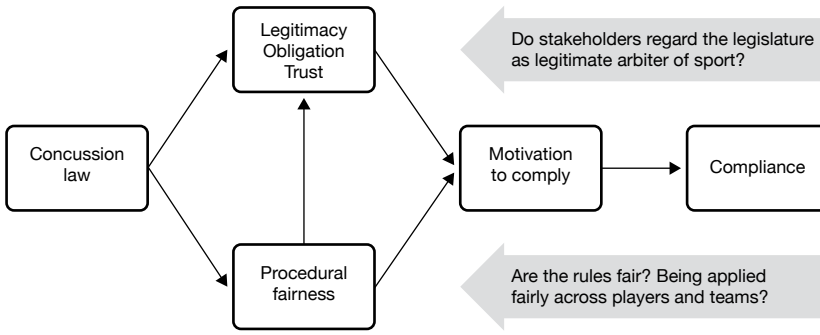

Figure 32.3 Procedural justice and compliance
Source: Author's work.

These theories identify phenomena that can be readily measured to assess whether the law is having any impact, and whether that impact is in the desired direction. They will not tell us whether the law is reducing concussions, but they are relevant to causal inference, as we discuss next.

b) Supporting causal inference

Like most research on how law influences health, evaluations of the implementation of concussion laws will be observational. They may demonstrate a correlation between the law and a reduction in injury, but have less capacity to support an inference that law *caused* the outcome. The rate of concussion is caused by many factors, only some of which have been or can be observed. In any sort of study of causation in a complex system, even experimental evidence of causation is bolstered by research that reveals more of the system's elements. Defining the mechanism of effect—an observable, plausible chain of events between the law and the outcome—can help us decide whether an inference of causation is warranted and how confident we should be.

There are many possible explanations for a correlation between a reduction in youth concussions and a law requiring removal from play. The most obvious is that the same community concern about concussion that produced the law has also produced greater awareness of the dangers of traumatic brain injury. Several kinds of research findings could bolster the inference that the law has contributed to the reduction in harm:

- Knowledge of the law influences self-reported compliance or an intention to comply.

- Knowledge of the law is associated with the belief that playing after a concussion is unwise, that one's peers disapprove of playing after a concussion and that refusing to play (or allow an injured athlete to play) is a feasible behaviour.
- People who know about the law and report compliance or an intention to comply regard the law as legitimate and fairly applied.

If the observed behaviour and attitude in the regulated population are consistent with these hypotheses, and the enactment and implementation of the law are correlated in time with a reduction in harm, we can proceed with more confidence that the law is helping the situation.

c) Guiding reform and implementation

Having provisional confidence that a law is having an effect on health outcomes is not the end of the inquiry. Logically, we should desire that law has the largest positive effect it can have, with the fewest negative effects. Research that documents the mechanisms of legal effect can make a valuable contribution to making law work better. Documentation of implementation can identify practices that enhance or reduce the law's impact. Negative side effects may be largely the result of how the law is enforced or implemented, rather than an inevitable consequence of the law's terms or design.

In the youth concussion example, early research found that student attitudes towards concussion reporting had the greatest impact on their intention to report (Register-Mihalik et al. 2013). In Washington state, which passed the first of these laws, both athletes and parents are required to review and sign a concussion information form as a condition of participation, but implementation research three years into the regime showed that only 39 per cent of athletes and 58 per cent of parents had completed the form (Chrisman et al. 2014). Other findings indicated that many students were getting limited education from their coaches, but also that how much a coach knew about concussion was not linked with their willingness or ability to identify athletes in their charge who were playing on after suffering one (Rivara et al. 2014). These findings would suggest that greater emphasis on compliance is needed and that, if there are any substantial declines in repeat concussion, it will be difficult to attribute them to the law. Advocates and policymakers can use this information to allocate resources and attention to compliance.

5. Study designs

The objective of PHLR is to improve knowledge of whether a law *causes* a change in population health. The level of confidence in a causal interpretation of an observed relationship between law and health hinges on the quality of the research design. PHLR is not fundamentally different to other realms of evaluation, but there are some special difficulties and opportunities to address.

The randomised controlled trial (RCT) is routinely referred to as the 'gold standard' for determining whether an intervention caused an effect. Its strength lies in comparing two populations that are identical except for exposure to the intervention. Truly random assignment to treatment and control groups is the essence of the experimental design. Researchers rarely have the opportunity to randomly assign people to be exposed to a law, but some version of that is occasionally possible. The key is usually to cooperate with officials who are keen to learn whether their intervention works. For example, researchers at Temple University cooperated with the Philadelphia Police Department to test the effect of increased foot patrols on violence. The study randomly assigned patrol areas to the treatment (increased foot presence) and control conditions (Ratcliffe et al. 2011). Because opportunities for RCTs arise so rarely, it is worthwhile to extract as much value as possible for as long as possible. Between 1994 and 1998, the US Department of Housing and Urban Development randomly assigned clients to two different treatments and a control group to test the impact on poor people of policies that helped them move from high to low-poverty neighbourhoods. Many researchers used the data to test the health and social effects of differing housing support policies over an extended period. For example, a 2011 study reported on health outcomes more than 10 years out (Ludwig et al. 2011).

Another approach is to isolate one element of a policy, or the mechanism of legal effect, for experimental testing. The Behavioural Insights Team of the UK Cabinet Office worked with the Courts Service to test approaches for increasing compliance with fine payment orders. The default treatment was a (costly) bailiff's visit. The experiment tested five different mechanisms of enforcement. One test was a message of some kind versus no message, but the study also used behavioural theory to construct hypotheses about personalised versus non-personalised messages and various forms of personalisation. Two inexpensive trials

produced the finding that a properly personalised text message could increase payments by £3 million (AU$5 million) and avoid 150,000 bailiff visits annually (Haynes et al. 2012).

While randomised studies could and should be used more in regulatory evaluation, there is a distinguished line of studies in PHLR that takes advantage of the natural experiments that arise when law changes over time or varies across jurisdictions. Indeed, 'effectively combining many design elements into a single study can produce real-world legal evaluations with higher overall levels of validity and strength of causal inference than randomized trials' (Wagenaar and Komro 2013: 309). These elements include many repeated measures; multiple comparison jurisdictions, groups and outcomes; and multilevel structures. Careful attention to theory can also help by identifying the proper time resolution for measuring effects and hypothesising their form. For example, is a new law likely to have an immediate effect at the time its passage is publicised or only after enforcement? Do we expect a drop-off in compliance over time and, if so, how steep?

A classic example of a study taking effective advantage of a natural experiment was conducted by Alexander Wagenaar in the late 1970s (Wagenaar 1981). The US states of Maine and Michigan, which changed the legal age for possession and consumption of alcoholic beverages, were compared with New York state, where the legal age had been 18 for half a century, and Pennsylvania, which had a consistent legal age of twenty-one. This was the first level of comparison. Second, nested within each state, the focal age group affected by the change in law (18–20-year-olds) was compared with younger and older age groups. Third, nested within each age group, alcohol-related car crashes were compared with non-alcohol-related crashes. Fourth, to address the possibility that changes in the law might be changing the reporting of alcohol involvement, two measures of alcohol-related crashes were observed: normal crash reports by police officers regarding drivers' drinking, and single-vehicle night-time crashes, which were known to have a high probability of involving a drinking driver and which, as a measure, did not rely on officer reports of drinking.

For each cell in this hierarchical design, outcomes were measured monthly for many years before and after the legal changes. There were reductions in crashes beginning in the first month after the new law, but only in the 'experimental' states that raised their legal drinking age (and not in the comparison states), only among teenagers (not among drivers 21 and over, who were not affected by the change in legal age

from 18 to 21) and only among alcohol-related crashes (and not among non-alcohol-related crashes, measured with two measures of alcohol-related crashes). These findings supported a highly confident inference that this particular law caused a change in car crashes. Replications in other states that raised the legal age confirmed this pattern of effects.

Public health officials and policymakers considering alternative laws and regulations want to know not only how many disease or injury cases are averted, but also whether it is worth it in terms of the costs involved. Methods for cost-effectiveness and cost–benefit analyses are well described, and there are numerous resources available to assist in building studies (see, generally, Miller and Hendrie 2013). There are, however, some special considerations that arise in designing economic studies of regulatory interventions.

Laws are typically meant to influence behavioural choices. They will require individuals to stop doing things that they enjoy doing, or profit from, on the grounds that these behaviours are deleterious to the common good or, paternalistically, are actually less beneficial than the actor believes. A law requiring motorcyclists to wear a helmet does not just raise the cost of the activity by the price of the helmet; it also deprives the rider of the pleasure of wind blowing through her hair, and reduces her freedom of choice. Costs like these count as social costs. Deciding how to value them can be difficult. It is not just a question of setting an initial price. We know from many instances that regulatory commands initially seen as impositions—such as required safety belt use in vehicles—can become normal behaviours preferred by those who initially resisted them.

Laws are not free to pass, implement or enforce. For example, in 1985, Miller and colleagues estimated the costs of mandating the installation of high-mounted brake lights on cars to reduce rear-end crashes. They specified 15 distinct work tasks, as well as the costs of the administrative notice and comment procedure, and estimated that implementation and administration constituted about 4 per cent of the regulation's total costs (Miller and Hendrie 2013). Health laws may have spillover effects, both positive and negative. Bicycle helmet laws have been found, at least in Australia, to reduce bike use. Motorcycle helmet laws have been observed to reduce motorcycle thefts—presumably, because thieves who happen to be without helmets are deterred from riding without them (Miller and Hendrie 2013). Finally, laws not explicitly aimed at health can nonetheless have important health effects. Income support laws, for example, may have significant effects on the health of children (Komro et al. 2014).

Finally, qualitative research is a mainstay of regulatory research (see Henne, Chapter 6, this volume). Qualitative research complements quantitative approaches by providing more in-depth or nuanced information on how laws are designed or implemented, and how available health outcome measures might not fully encompass all legal effects. Results from such qualitative studies then feed back into improved measurement and design of quantitative studies. Qualitative research can be used to explore the mechanisms of legal effect suggested by theory, but can also deploy 'grounded theory' methods to inductively develop a theory of legal effect through the research process.

A study by Biradavolu and colleagues (2009) illustrates how standard qualitative research techniques can be used for regulatory research. The research reported was part of an ethnographic study of a sex-worker collective established in a small Indian city to support sex-workers' own efforts to prevent HIV/AIDS. The way police treated sex-workers was an important influence both on their overall quality of life and on their risk for HIV infection. The researchers were interested in whether collectivisation influenced sex-workers' interaction with police. Over time, as part of their overall project, the team learned about interactions with police through interviews with sex-workers, their intimate partners, police, madams, lawyers and clients as well as observation of the collective's activities.

The theme of regulation was an obvious way to think about the function of the police in relation to the sex-workers, and traditional socio-legal theory provided a solid context for understanding the gaps between Indian law on the books and the actual 'law on the street' imposed by police officers. Sex work itself is not illegal in India, and sex-workers have civil rights, but, in practice, police extorted bribes, delivered beatings and arrested sex-workers on other charges. The primary object of this study, however, was to learn more about sex-worker agency. The study explored how *sex-workers* regulate *police*, framing their analysis within a definition of regulation as any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within the acceptable limits of the regime (whether by enforcement action or by some other mechanism). (Scott 2001: 283)

The study revealed that the sex-workers, through their collective, were able to build an effective regulatory pyramid. The collective educated the police and the public about their rights and the role of sex-workers

in preventing HIV. Along with information, they deployed deterrence: sex-workers began to assert their rights vocally when threatened with unjustified arrest. If that failed, sanctions escalated and networked sex-workers quickly reported arrests to the collective, which responded by sending representatives to the police station to intervene:

> For especially egregious abuses, such as physical assault … written complaints were filed with superior officers and more nodes of the network, such as the media or political groups, were tapped into to put pressure on the police. At the peak of the pyramid was … challenging police abuse in the courts. (Biradavolu et al. 2009: 6)

6. Conclusion

It is universally accepted that a drug should not be used on patients until it has been tested and found to be both safe and effective. Laws, by contrast, are commonly applied in large doses to millions of citizens without any testing whatsoever. This has something to do with the difference between pharmaceuticals and regulations, but a point remains: public health laws are treatments and it is important to know whether they work, and with what side effects. Public health law research is the field devoted to this inquiry, drawing on a wide range of behavioural theories and research methods.

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33

Governance, regulation and health equity

Sharon Friel

1. Introduction

Whatever your beliefs about society, your political views, your outlook on life or your material circumstances, the enjoyment of adequate health is vital to the pursuit of whatever life you have reason to value. Health is intrinsic to living—no matter what one's walk of life. But health is not simply an instrument for the purposes of other social functions; it is an end in itself. Health is the product and reflection of society's attention to an adequate standard, available to all, in the conditions in which its population lives.

In spite of impressive initiatives by institutions worldwide, health issues are constantly in the news: famines, wars, early death and escalating healthcare costs from obesity, diabetes, cancers and mental illness, deaths and injuries from traffic accidents and extreme weather events, and the prevailing communicable disease killers such as malaria, tuberculosis and now Ebola keep the world busy (AP-HealthGAEN 2011; Frieden et al. 2014; Murray et al. 2012).

No country is immune from these concerns but such life and death experiences are not distributed evenly between or within nations. It seems remarkable that, today, a man living in the east end of Glasgow, where this author is from, is at risk of dying 15 years earlier than a man living

in the west end of Glasgow (GCPH 2014). Within a prosperous country such as Australia, is it fair that the poorest 20 per cent of the population can still expect to die younger (six years, on average) than the richest 20 per cent of the population (Leigh 2013), and that those who are more socially disadvantaged (by income, employment status, education) and Indigenous Australians also have a higher risk of depression, diabetes, heart disease and cancers (AIHW 2015)? People born in Papua New Guinea die, on average, 21 years earlier than people born in Australia (WHO 2014a).

It does not have to be like this. The causes of health inequities are complex, arising from the interaction of a variety of political, economic and social factors (CSDH 2008); health inequities are human-made.

To some extent, there is eagerness, globally, among many politicians, different levels of policymakers, researchers and non-governmental organisations (NGOs) to address these inequities. The World Health Organization (WHO) Commission on Social Determinants of Health (CSDH) assessed the global evidence and made recommendations on what could be done to rectify the economic and social policies that have contributed to global and national-level health inequities (CSDH 2008). The political declaration of the United Nations (UN) high-level meeting on non-communicable diseases in September 2011 positioned these diseases as matters of concern for the highest level of global governance (UN General Assembly 2011). As the Millennium Development Goals approach the end of their current form, countries and institutions reflect on the successes, failures and opportunities to improve the lot of the world's poor (UN General Assembly 2000).

This chapter will assert, however, that, in spite of major advances in understanding the causes of health inequities, persistent poor governance at national and global levels, indifferent policy choices and suboptimal regulation underpin and perpetuate twenty-first-century health inequities. The specific aims of the chapter are twofold. The first is to define health equity such that the reader locates health and disease in the wider societal context and not simply as medical issues. Second, the chapter aims to draw attention to the political, economic and social drivers of health inequities and, in so doing, demonstrate what governance and regulation for health equity could look like. The argument will be that the use of multiple intersectoral policy instruments, involving a broad range of actors, is necessary to address

the 'causes of the causes'—the fundamental structures of social hierarchy and the socially determined conditions these create in which people grow, live, work and age, and which ultimately affect health equity.

2. A theory of health equity

Universal as it is in principle, health manifests in practice very differently for different people around the world. There are many explanations for this, ranging from the personal to the political.

Poor people behaving badly

For many years, peoples' behaviours received a lot of attention as a potential explanation for health differences. Various psychological theories dominated the health behaviour literature through the later part of the twentieth century. The focus was on personal beliefs, attitudes and expectations, thereby drawing attention to the idea of individual control and self-regulation (Becker 1974; Fishbein and Ajzen 1975; Leventhal et al. 1998; Bandura 2005).

Towards the end of the twentieth century, the underlying theory driving the behavioural explanation of social inequalities in health had shifted. Building on Weber's work of rationality and lifestyles, Abel and Cockerham suggested that people's health-related behaviours are based on choices from options available to them according to their life chances, and this varies depending on people's social position (Abel 1991; Cockerham et al. 1993). This concurs with the empirical evidence worldwide that more of those with poor health also have poor lifestyle behaviours such as smoking and unhealthy diets, and are from lower socioeconomic groups (Wilkinson and Marmot 2003).

Beyond the proximate to society

While health *inequality* can be defined as the difference in health between different social groups and nations, health *inequity* is that part of the difference that could be avoided or remedied. If there is no necessary biological reason for the often staggering differences then they are not inevitable. And, if such differences in health are not inevitable, the failure to avoid or remedy them is to be found in political and social arrangements, and constitutes a failure of social justice.

But there are different ways of interpreting health (in)equity. On one hand, it can be seen as equality of people's opportunities to seek health; on the other, health equity can be seen as the societal obligation to work towards a reasonable equality among people in health outcomes. Two leading intellectuals, Rawls and Sen, invoke issues of regulation and governance through their theorising of the ways in which both structure and agency are fundamental to the pursuit of social justice, and embrace issues of opportunity and outcome.

The social production of health

Rawls's theory of justice operates on a contract basis, where people are asked, hypothetically, to choose the structure of society they want from behind a veil of ignorance, thereby ensuring impartiality and pursuit of arrangements that are fair for all:

> [N]o one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities … This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain. (Rawls 1971: 11)

Operationalising this contract, Rawls's theory focuses heavily on the structures that provide opportunity and is organised around the importance of 'just institutions', including governments, markets and systems of property. Rawls also describes primary goods such as income, education and power as intrinsic to the pursuit of social justice (Rawls 1971). In essence, he is referring to the structures in society and the functioning of them in a fair and just way—many of the things described in the social production of disease/political economy of health argument, which is organised around notions of power, politics and economics (Navarro 2000).

Located within the political economy of health model is dependency or world systems theory, which is often used to understand differences between nations (Wallerstein 1974). Dependency theory suggests that the differences in health, and the differences in the conditions needed for health, between rich and poor countries reflect historical and current

international capitalist arrangements, often unequal, and the enormous differentials of national wealth and poverty that these generate (Stiglitz 2013).

Within countries, the health experienced by different groups corresponds very closely with their place in the social hierarchy or with their different living and working conditions. Empirical studies from around the world provide compelling evidence of a persistently graded relationship between social position and health. Generally, the further down the social ladder, the greater is the risk of poor health and premature death (Di Cesare et al. 2013; Marmot et al. 1991; Labonté et al. 2005).

At the core of a political economic explanation of health inequalities within countries is the Marxist belief that material disadvantage directly affects the variation in mortality and health outcomes, and that class relations underwrite the associations between social position and health outcomes (Scambler 2007). It is believed that material circumstance is structurally determined, evolving from political, economic and social contexts, and that individuals across the range of social positions are exposed to significantly differing daily environments as a result. In all societies, rich and poor, the materialist hypothesis suggests that social infrastructure—in the form of legislation and regulatory protections and controls, social protection systems and services such as education, health services, transportation and housing—is vital for health.

Freedoms and control

While opportunities for health are vital, they alone are not enough. The function of a just society is to do more than simply open the way for individuals to make use of their opportunities; it is to organise in such a way that, where people are deprived of opportunity to lead meaningful lives, such effects can be detected and changed. Sen (1999; 2009) does this by extending Rawls's argument through the introduction of people's capabilities or substantial freedoms: real opportunities based on natural and developed potentialities, as well as the presence of governmentally supported institutions, to engage in political deliberation and planning over one's life—that is, having the freedom to lead a healthy and flourishing life.

Freedom relates to agency and empowerment, which operate along three interconnected dimensions: material, psychosocial and political. As discussed earlier, people need the basic material requisites for a decent life, but they

also need to have control over their lives. Theorists such as Bourdieu and Weber argue that peoples' choices and their health are affected not only by the socioeconomic resources that they have available to them, but also by the very existence of a social structure and an individual's perception of where they lie within that and their experience of that grouping (Bourdieu 1989; Cockerham et al. 1993). This has been demonstrated empirically worldwide but the landmark study was that of UK civil servants, where Marmot and colleagues identified a strong social gradient in health outcomes across economically secure occupational positions. Based on these findings, it was postulated that the relationship observed between social position and noncommunicable diseases and mental health is mediated through psychosocial factors such as stress and social relations (Marmot 2004). Similarly, Wilkinson's work has demonstrated that, in developed countries, it is the relative distribution and not the absolute level of income that is related to life expectancy, and the social consequence of this relative income is a causal factor in health inequities (Wilkinson and Pickett 2010).

Governance and power

There is continuity between the previous two dimensions of empowerment through a third, which is to do with power and participation and the form of governance they combine to create: the degree to which individuals and communities are empowered to influence their nations' processes of governance and to influence the decisions that affect the conditions in which people live (Popay et al. 2008).

Farmer (1999), Navarro and various other political scientists argue that health inequities flow from the systematically unequal distribution of power and prestige among different social groups. Global, national and local politics and modes of governance, economic, physical and social policies and infrastructure and cultural norms generate and distribute power, income, goods and services. These are distributed unequally across the social hierarchy (Navarro 2000).

This manifests in inequities in both material and psychosocial conditions through the inequities in the daily conditions in which people are born, grow, live, work and age, meaning that who you are and where you live will affect access to quality and affordable education and health care, sufficient nutritious food, conditions of work and leisure, quality of housing and built environment and your social relations. Together, these factors affect health and health inequities (Marmot et al. 2008; Friel 2013).

Addressing the distribution of power involves fostering a process of 'political empowerment'—broadly defined as the process whereby people, or groups, gain control over the decisions that affect them and increase and release their 'capacity to act' (agency) to effect change in the areas they define as important. Political empowerment, therefore, is a fundamental medium of social interaction, constituted both at the level of individuals (how much people can exercise control and decision-making over the course and content of their own lives) and at the level of communities (how people can effectively apply their collective values and interests to the way societal resources are distributed). Health equity depends on the political empowerment of individuals and groups to represent their needs and interests strongly and effectively and, in so doing, to challenge and change the unfair distribution of material and psychosocial resources to which all men and women, as citizens, have equal claims and rights (UN ECOSOC 2000).

3. The determinants of health equity in practice

So, what does all this mean for regulation and governance? The conventional biomedical model of health often directs health regulation towards medicines, health services or personal behaviours (Bandura 2005; Ratanawijitrasin and Wondemagegnehu 2002). These are important and are discussed by Healy (Chapter 34) in this volume.

But the exposé made in this chapter of the wideranging determinants of health inequity highlights that a conventional approach is insufficient to improve health equity globally and locally. Policy and regulation for health equity are complex, needing to address issues of, for example, trade, tax systems, food systems, the behaviour of multinational organisations or urban planning. The intersectoral nature of the determinants of health inequities demands a holistic response (see Burris, Chapter 32, this volume). It is no use, for example, getting the physical built environment right if the underlying social inequities prevail.

There also is an increasing array of actors, institutions and interests at stake (Kickbusch 2012). Returning for a moment to Rawls's veil of ignorance, clearly, from a health perspective, the present arrangements are far from what we might choose under conditions of impartiality—suggesting deliberately unfair arrangements. But, as Sen reminds us,

creating 'just institutions and structures' is necessary but insufficient. Supporting people's freedoms and opportunities and enabling people to realise their potential are essential. One might argue that responsive and smart regulation is in order (Ayres and Braithwaite 1992; Gunningham et al. 1998).

Regulatory approaches and health equity

Let me use the example of inequities in obesity to illustrate a range of possible equity-oriented regulatory mechanisms. Obesity is the result of an imbalance in energy consumed (via diet) and energy expended. In high- and middle-income countries, obesity is more common among socially disadvantaged groups (McLaren 2007; Ezzati et al. 2005).

Three major social changes over the past 50-plus years—globalisation, marketisation and the increasing power and impact of the business sector (Nye and Kamarck 2002)—are highly related to obesity and, in particular, diet.

One of the instruments of these social changes, trade liberalisation, sits often uncomfortably with health and diet-related inequities. Without doubt, trade agreements influence the distribution of power, money and resources between and within countries, which, in turn, affects people's daily living conditions and the local availability, quality, affordability and desirability of products including food (Friel et al. 2015).

Health concerns relating to trade agreements have tended to focus on two areas: the protection of multinational intellectual property rights and the implications for access to essential medicines; and the privatisation of health care and health-related services (Labonté 2014; Blouin et al. 2009). However, as the scope and depth of trade agreements have expanded over recent decades, two further areas have been receiving greater attention: the reach of trade agreements into 'behind-the-border' issues affecting domestic policy and regulatory regimes (Labonté 2014; Thow et al. 2015); and trade and investment in health-damaging commodities (particularly tobacco, alcohol and highly processed foods) and the associated global diffusion of unhealthy lifestyles, which is particularly relevant for obesity (Hawkes et al. 2009, Stuckler et al. 2012).

Administrative regulatory capacity is essential to deal with these trade–diet risks. At the national level, countries must understand that free-trade agreements carry health and social risks and costs (Walls et al.

2015). Internationally, agencies such as WHO can play an important role to support countries to implement trade agreements, as well as provide technical guidance and support with respect to ensuring health concerns are represented at the international level.

Equitable food marketing requires binding international codes of practice related to healthful food marketing, supported at the national level by policy and regulation (Cairns et al. 2013). Restricting exposure to advertising of foods high in fat, salt and sugar is widely considered to be one of the most cost-effective child obesity prevention approaches available and may contribute to reducing dietary inequities due to the higher exposure and vulnerability of low-income children to marketing (Magnus et al. 2009; Loring and Robertson 2014). Reliance on voluntary guidelines may result in differential uptake either by better-off individuals or by institutions and provides little opportunity for private-sector accountability (Galbraith-Emami and Lobstein 2013).

Economic instruments can help regulate dietary intake, and involve domestic healthy food production subsidies and food taxes. According to modelling literature, regulatory approaches that combine taxes on unhealthy foods with subsidies on healthy foods such as fruits and vegetables are likely to have the greatest positive influence on inequities in healthy eating (Thow et al. 2010; Ni Mhurchu et al. 2013; Nicholls et al. 2011).

Urban planning levers hold promise in providing solutions to the problems of land use mix and equitable access to healthy food. The city of Sam Chuk in Thailand restored its major food and small goods market with the assistance of local intersectoral action inclusive of architects. In general, urban design and planning would be greatly aided by routine health-equity impact assessment of food retail placement, neighbourhood walkability, transport networks and street safety.

Without material and psychosocial resources, however, having nutritious food available and physically accessible means little. Prudent social policy initiatives such as social protection schemes and national wage agreements can provide material security if based on healthy standards of living, and if they reflect the real cost of healthy eating (Friel et al. 2006).

Unfortunately, the dominant focus is not on the above but on individual-level action to make people eat more healthily. The regulatory and governance arrangements are missing the heart of the problem (Friel et al. 2007).

Smart governance for health equity

Given the view that health is universal among basic human needs, maintenance of a population's health is a fundamental task of social organisation, and one in which the stewardship role of the state is central.

Government action can, broadly, take three forms: 1) provider or guarantor of human rights and essential services; 2) facilitator of policy and regulatory frameworks that provide the basis for equitable health improvement; and 3) gatherer and monitor of data about populations that generate information about health equity (Blas et al. 2008).

However, the context for governing health has changed, with much more interdependence between countries and problems. Globally, increasing acknowledgement of the need for collective action among states for shared benefits—including environmental protection and human security, among others—offers real opportunities to advance global health equity and also the arguments in favour of fair representation and equitable inclusion in existing and new global institutions.

Traditionally, society has looked to the health sector to deal with concerns about health and disease. However, action to address health equity necessarily moves outside the health system and cuts across many government departments, NGOs and service providers, business, a plethora of advocacy groups and international institutions. Policies and regulation must encompass key sectors of society, not just the health sector. That said, the health sector is critical to global change. It can champion action at the highest level of society, demonstrate effectiveness through good practice and support other ministries in creating policies that promote health equity.

Given the complex context in which health inequities arise today, there are obviously many other actors and institutions who must also play a role in the coproduction of health equity (WHO 2014b). With this come different power constellations, processes, interests and ideological positions nested within different political systems and cultures at different levels of governance (Kickbusch 2005). We must remember that good governance

involves many faces; as Rawls noted, we need fair and just institutions, but, returning to the notion of empowerment, we also have other mechanisms through which to enable actors and their agency.

Formal civil society organisations have enabled improvements to social determinants of health at all levels of society, through advocacy, monitoring, mobilisation of communities, provision of technical support and training and by giving a voice to the most disadvantaged sections of society. New social movements such as informal workers' alliances in low and middle-income countries, including fair-trade basic food producers and anti–child labour campaigns, are now also developing and affecting employment conditions in ways that are good for health.

Some argue, however, that the current global arrangements of norms and regulations render some actors structurally weak (Ottersen et al. 2014). To what extent can agency change the effects of structure? In part, the answer lies in agent-constructed webs of influence (see Drahos, Chapter 15, this volume) and exploiting networks of nodal governance to change flows of power and influence (see Holley and Shearing, Chapter 10, this volume). There are lessons from history on how to pursue health and health equity using soft forms of power and networked governance (see Box 33.1).

Box 33.1 Lessons from Doha

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was signed in 1994. It mandated 20-year patent terms for signatory countries. However, at the insistence of many low- and middle-income countries, the TRIPS agreement incorporated a number of flexibilities (health safeguards) for countries to bypass patents to protect public health (for example, in circumstances of emergency). The rights to use these safeguards were reaffirmed in the 2001 Doha Declaration on Public Health and the TRIPS agreement. How did this happen? Analysis by Drahos (2003) points to four elements of good governance: 1) good technical analysis of legal and economic issues; 2) clever framing of issues by advocacy groups; 3) circles of consensus, building unity among developing countries; and 4) networked governance, with a broad-based coalition of states integrated with NGO networks.

4. Conclusion

Health inequities are emergent structural properties of complex systems—changing only when systems change. If one were to take a Marxist approach then change would mean a replacement of the capitalist neoliberal order. However, as others in this book highlight, capitalism

has proven to be highly adaptive (see Levi-Faur, Chapter 17, this volume). A regulatory capitalism that embraces values of responsiveness and smartness may help to bring capitalism's basic arrangements for health equity closer to what citizens might choose for themselves under conditions of Rawlsian impartiality. The example of Doha and TRIPS demonstrates that it can be done; networked governance opens up capitalism to these kinds of possibilities.

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34

Patients as regulatory actors in their own health care

Judith Healy

1. Introduction

This chapter discusses the ways in which an individual patient can be a regulatory actor in ensuring that the treatment he/she receives is safe and of good quality. While health policies now promote patients as regulatory actors, this is not an easy role for patients to undertake. This is so for several reasons, including the weight of knowledge and power inherent in health professionals (particularly doctors) compared with patients. Building on my earlier work (Healy 2011a; Healy 2011b: Chapter 9; Healy and Dugdale 2009), this chapter addresses the following regulatory concepts, dilemmas and questions:

- Why regulate: What is the rationale for patients to act as regulators?
- Information asymmetry: Do patients have sufficient information to regulate?
- Power asymmetry: What powers can patients exert through pyramids of supports and sanctions?
- Networked regulation: Who can patients enlist to strengthen their influence?
- Transparency: Are patients told when things go wrong?
- Trust: Does information erode therapeutic confidence in one's doctor?

To begin with the first question, why should policymakers enlist patients as regulators and what is the justification for stronger regulation in health care? Virtually everyone during their lifetime consults health professionals, takes medication and undergoes procedures. The main reason for engaging people in regulating their own health care, therefore, is the pragmatic one that we are the ones who suffer most keenly the consequences of unsafe or poor-quality health care. From a patient's point of view (and we are all patients), we should have a say; we are too trusting in leaving it all to the doctors.

The complacent assumption about the safety and quality of modern health care has been shaken over the past decade. Health care can be a risky business. Studies from several high-income countries, including Australia (Runciman et al. 2000), report that between 4 and 12 per cent of patients experience an adverse event in hospital—in other words, you, as a patient, have about a one in 10 chance of something going wrong. Even in the best of hospitals, therefore, some form of unintended error can occur in a person's care. Further, substandard health services are not uncommon. For example, a population-level survey of adult patients in the United States found that only about half had received the treatment recommended in clinical protocols (McGlynn et al. 2003).

The concept of a patient as a regulatory actor invokes the principle of personal responsibility. But is it fair to ask people to take more responsibility for the quality and safety of their own health care? Patients are only one type of regulatory actor in a complex healthcare system, and health authorities are in the process of strengthening governance by a range of actors. Clearly, there are limitations to expecting sick people to engage as regulatory actors given lessened capacity during illness. There are also other barriers to participation including a class barrier of fewer resources, both educational and financial, a cultural barrier of different expectations and language, a knowledge barrier given the esoteric nature of medical expertise and a power barrier given the unequal relationship between doctors and patients. Nevertheless, some of these barriers can be surmounted, and this chapter goes on to discuss such strategies.

2. Concepts of patients

The term 'patient' is used in this chapter mainly because it is difficult to find another appropriate word. While 'patient' implies passivity (contrary to the argument here), alternative words also carry dubious connotations, such as 'consumer' and 'customer'. The last two terms imply that health care is entirely a commodity rather than a public good—a value position that is not endorsed in this chapter.

The metaphors of 'exit' and 'voice' suggest how individuals can influence service providers (Hirschman 1970). 'Voice' is a political concept that fits a citizen participation paradigm, referring to the ability of a person to influence a service provider while continuing to use the service. This assumes an active not a passive person who can ask for information, negotiate options, fill out surveys, use complaint procedures and join an interest group. 'Exit' is an economic concept that fits a market model paradigm and refers to a person's ability to leave a service and go elsewhere, which assumes that a person has the capacity to leave a service, that other options are available and that the person is able to obtain or pay for another service and can make an informed choice—all of which are somewhat problematic assumptions in health care.

This chapter draws on the model of responsive regulation developed by John Braithwaite and colleagues, and the regulatory pyramid in particular, since this offers a framework for considering actors and strategies (see John Braithwaite, Chapter 7, this volume). The users of health services can be conceptualised as regulatory actors in terms of six roles (and accompanying strategies): informed patients, selective consumers, vocal complainants, entitled citizens, active partners and aggrieved litigants. The ways in which a patient can exert influence draw on mechanisms that range upwards in a regulatory pyramid, from voluntary strategies at the base (asking for information, giving consent), to market strategies (responding to a survey, making a complaint), to enforcement strategies (asserting one's rights, suing for malpractice). These concepts are depicted in Figure 34.1, with informed patients at the wide base of the pyramid (since this strategy is most commonly used) rising to active partners and aggrieved litigants towards the apex.

This pyramid is a hybrid form of two pyramids: a sanctions-based and a strengths-based pyramid (Braithwaite et al. 2007: 319; Braithwaite 2009: 28). 'Informed patients' and 'active partners', for example, draw on the strengths of patients themselves in supporting a good standard of health care by being better informed and by participating in decisions. 'Vocal complainants' and 'aggrieved litigants', in contrast, are examples of patients who invoke sanctions against poor services and professional malpractice. Regulators could devise two pyramids—supports and sanctions—and offer a range of mechanisms that patients might use from base to apex. Further, the pyramid can be embellished with the addition of network partners at different levels (Braithwaite 2009: 30), whereby patients seek to enlist others in their efforts to obtain good-quality health care.

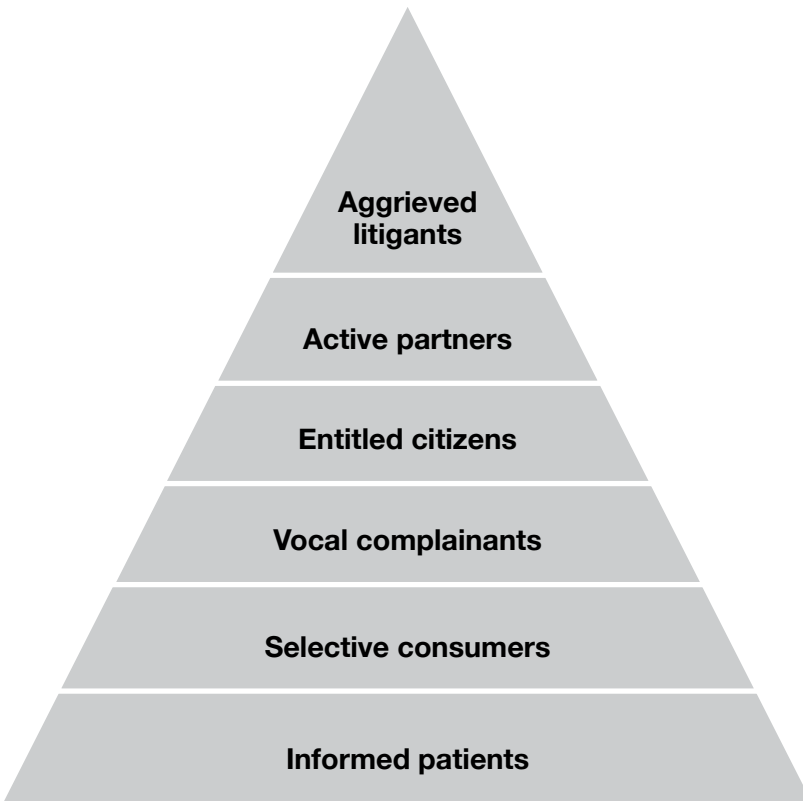

Figure 34.1 Patients as actors on a responsive regulation pyramid
Source: Adapted from Healy (2011b: 285).

3. Informed patients

The doctor–patient relationship is changing from the centuries-old medical tradition of 'trust me, I'm a doctor'. The doctor in this paternalistic model decided the treatment and told the patient little other than to secure compliance with the regime: 'take the antibiotics with each meal'. Patients were not asked for their views and were expected to follow instructions:

> Little more than a decade ago, doctors made the decisions; patients did what they were told. Doctors did not consult patients about their desires and priorities, and routinely withheld information—sometimes crucial information, such as what drugs they were on, what treatments they were being given, and what their diagnosis was. (Gawande 2002: 2010)

Health authorities now commonly use an information strategy to empower or, at least, educate patients. This is a big task since the health services field is an example of what economists refer to as a market characterised by information asymmetry. Redressing this imbalance calls for improving the supply and accessibility of information as well as its take-up by the public. In other words, healthcare providers need to be better communicators, while patients need to be more health literate. Health literacy is a crucial attribute if people are to make informed decisions (Nutbeam 2008). Defined as the capacity to acquire, understand and use information for health, health literacy is a risk factor in poor health outcomes: such patients have higher risks of hospitalisation, have longer hospital stays, are sicker when they seek medical help, are less likely to comply with treatment and are more likely to make errors with their medication (Institute of Medicine 2004). In other words, poorly informed patients experience lower-quality and less safe health care. Recommendations on reforms to the Australian healthcare system consequently include calls for action to improve health literacy.

An information strategy aims to enable patients to make informed decisions. Good professional practice calls for a doctor to explain and obtain consent before a procedure. Moreover, 'informed consent' is a legal requirement in many countries, including in Australia under common law, whereby all competent adults have the right to consent to and refuse medical treatment. If consent is not established, there may be legal consequences for health professionals. This requirement also establishes another layer of protection against adverse events, according to a systematic review of consent procedures (Shojania et al. 2001).

Exactly what constitutes 'informed' consent to tests and treatment remains, however, a matter for conjecture, while offering a readily understood medical explanation is a challenge when people lack health literacy.

Most people can relate to the experience of coming away from a consultation with a doctor and being unclear what was said, not necessarily because the doctor did not explain, but because anxiety got in the way of asking, listening, understanding and remembering. A manual produced for health professionals by the National Health and Medical Research Council (NHMRC 2006) suggests practical strategies to engage in better two-way communication with patients. Health authorities now put out material on many health topics. Since people can be confused by myriad internet websites that offer information (and misinformation) on health conditions and treatments, and doctors complain about their patients asking for the latest quack remedy, health authorities have set up credible websites. For example, the Australian Department of Health (in partnership with state health departments) runs HealthDirect Australia, an internet gateway that offers information on health and wellbeing and provides links to other specialist websites.

4. Selective consumers

Policymakers promoted consumer choice in the neoliberal reforms that swept across health sectors from the 1980s onwards. Consumer exit, more than citizen voice, was the preferred demand-side regulatory mechanism. The citizen rights rationale is that people are entitled to information that can directly affect them; the informed consumer rationale is that people need reliable information on success rates and risks to choose between providers and procedures; the market rationale is that informed consumers will choose high performers and so motivate others to improve. The concept of a selective consumer involves three elements. First, people must be able to articulate what they want from health professionals and health services. Second, they must have access to information for making informed choices. Third, they must be able to leave a service and go elsewhere. While consumer choice is an important principle, there are limitations to the concept of a selective healthcare consumer. As noted earlier, relying on patients to regulate their own health care may not be feasible or reliable in some cases:

> Hospital director: We are a major trauma hospital and patients aren't competent in much of our emergency work. In some we don't even get consent because they are straight to theatre. Also, most of our patients are really sick. Second, if a patient has something that is not pretty simple, it's difficult to get them to tell you that back reliably. Also, I don't think many patients are confident enough to challenge professionals. Unless you are part of the health culture, it's difficult to question professional advice; people just tend not to do it. (Healy 2008)

Choice is a key consumer principle that is expected to push health services to improve. Patient choice of doctor is a strongly held principle in some countries, including Australia, whereas in some others people are expected to enroll with a particular general practitioner (GP) practice. The extent of patient choice in relation to specialists and hospitals also varies. In some countries, including Australia, patients must have a referral from a GP to qualify for reimbursement for specialist care, while, in other countries, patients can bypass a GP gatekeeper and go directly to specialists.

Some governments use patient choice as a demand-side regulatory mechanism, since the economic rationalist assumption is that patients will choose high performers and so put pressure to improve on poor performers. The consumer choice principle assumes, however, that patients can make an informed choice. But it is not easy for a person to access information on which to make a choice. One method is access by the public to a medical register, which is the norm in many countries. For example, the Federation of State Medical Boards in the United States posts information on a doctor's full disciplinary history. The public has access to much less information on medical practitioners in the Australian states (Healy et al. 2008). This has been improved under the *Health Practitioner Regulation National Law 2009* (Cth), whereby a national register for each of the 14 health professions has been set up that offers the public access to information on practitioners including their qualifications and any restrictions or conditions placed on practice by a board or tribunal.

Public reporting is being widely adopted as a promising regulatory strategy. For example, government agencies in the United States and the United Kingdom post information on hospital scores, surgery success rates and adverse events, as do private sector agencies, such as the US Leapfrog Group and the UK 'Dr Foster' website. In Australia, state health departments have been slow to publish performance indicators

for their public hospitals. The Australian Government in 2010 set up the MyHospitals website, with performance measures now being developed further by the National Health Performance Authority. While there is a strong public interest case, public reporting so far appears to have had a limited impact on people choosing better-performing health services. Public reporting does have an impact, however, as systematic reviews have found that reputational pressure exerts a significant impact on provider behaviour, since hospitals and surgeons care greatly about their reputations (Marshall et al. 2004).

What might be the reasons for the lack of impact on patient choice? First, it is early days for public reporting and the public is not yet familiar with this approach. Second, the information presented is usually too complex and geared more to professionals than to the public. Third, people may opt for convenience and familiarity in going to the nearest or known provider. Fourth, people are suffering from information overload since so many providers do so much public reporting—mostly glossy, confusing and self-serving—such as banks, electricity companies and schools. Finally, the public trusts hospitals and doctors, or else trusts the health authorities to regulate where necessary. Public reporting is likely to have more impact in future as the concept of performance indicators becomes better understood, and as people become more discerning users of health care given greater public knowledge about the variability of quality and safety.

5. Vocal complainants

Patient 'voice'—that is, the expressed views of patients—can exert pressure to improve the safety and quality of health care, with two main avenues being consumer surveys and formal complaints procedures. Patient opinion now is regarded as a legitimate indicator, among other measures, of healthcare quality. Patient satisfaction is a measure of quality from the patient's perspective and so offers a different view to collections of data from health service managers and practitioners. Patient satisfaction surveys have become the norm in many health services—although people are wearying of being asked by all manner of companies to rate an encounter. Australian state health departments now publish the results of patient surveys across different hospitals, although consumer surveys must be interpreted with caution since an overall satisfaction question generally obtains a satisfaction rating of

more than 80 per cent. While consumer surveys arguably are a relatively reliable way of gauging patient views, anecdotal accounts can be telling. While many are testimonials by grateful patients, others tell tales of poor treatment. The personal stories of patients who experienced a medical error can be a powerful way of influencing policymakers.

All public hospitals in Australia have internal complaints procedures, as required for over a decade by intergovernmental hospital funding agreements, although hospital brochures prefer to avoid the word 'complaint' and instead ask 'what would you like to tell us?'. People can complain to a designated staff member or can take their complaint outside to an independent agency: each state and territory has a healthcare complaints commissioner or similar title (Walton et al. 2012). For example, in 2013–14, the NSW Health Care Complaints Commissioner received 4,767 written complaints, investigated 226, took 14 to a professional standards committee and prosecuted 67 matters.

6. Entitled citizens

The fundamental right of citizens to good health care is set out in some countries in a constitution, bill of rights, legislation or codes of practice. Such formal entitlements offer leverage in demanding quality health care. The idea of patient rights flows from the United Nations (UN) 1948 Universal Declaration of Human Rights in that a person has a fundamental right to good health and to good health care. Views on patients' rights differ across countries depending on social and political norms, and there are still some echoes of attitudes depicted in Solzhenitsyn's novel *Cancer Ward*, in which patients had to battle with the doctors for information about their treatment:

> [Doctor] It's strictly against the rules for patients to read medical books …
>
> [Patient] What is the diagnosis?
>
> [Doctor] Generally speaking, we don't have to tell our patients what's wrong with them … (Solzhenitsyn 2003: 41)

Since at least the 1980s in Australia, the state has been expected to consult with its citizens on matters that affect them. Patient participation has been adopted in the health sector and health managers are expected to be adept in managing consultation with patients and many other

vested interests, including patient advocacy groups (Dugdale 2008: 194). Major changes in health policy are generally not undertaken without a round of consultations.

What sort of standards can patients reasonably expect from their health services? Both patients and providers need some guidance. 'Patient charters' are produced that encapsulate such standards rather than legally enforceable 'rights'. The Australian Charter of Healthcare Rights, endorsed by the country's health ministers in 2008, required the states to ensure that their public hospitals post a patient charter. A charter must inform patients they are entitled to free access to public hospital treatment, to be treated as a public or a private patient within a public hospital, set out the process by which patients can complain about hospital services and explain how complaints can be made to an independent complaints body.

Nordic countries led the way in passing patients' rights legislation—for example, Norway passed the *Act on Patients' Rights 1999*, which included the right to choose a hospital, to have access to a specialist evaluation within 30 days of referral, to a second opinion, to be fully informed, to give informed consent and to have access to complaints procedures. New Zealand also stresses a rights approach in its Code of Health and Disability Services Consumers' Rights. Australia does not have a 'bill of rights' (except in the Australian Capital Territory) in relation to citizen rights in general or to patients' rights in particular, and no legislation at national or state level sets out a comprehensive statement of patient rights. The law in Australia has concerned itself with specific aspects, such as ensuring that a person gives consent to health care, breach of contract between a doctor and a patient involving medical negligence and a person's right to access their own medical information (McIlwraith and Madden 2006).

Although many countries have informed consent legislation, patients are not necessarily legally entitled to know when an error occurs in their medical treatment. Many studies have found that most patients are not told about a medical error and that most believe they should be told (Studdert 2009). The Australian Commission on Safety and Quality in Health Care advocates that health professionals tell their patients when something goes wrong and has produced guidance on 'open disclosure'.

7. Active partners

Citizen participation strategies are pursued in the health sector with the intention of redressing the unequal power relationship between professionals and patients. The citizen participation concept suggests a democratic paradigm where a person is an active partner in decision-making. This approach aligns with community development principles that broadly are about removing conditions of domination (for example, by health professionals) and increasing the self-determination of individuals by lifting restrictions (for example, by providing accessible and good health care) and by increasing capacity (for example, through information and empowerment). In transactions between people and health services, the therapeutic argument is that involving patients as partners in the process results in satisfied patients and in better health outcomes. The quality argument is that patients understand their own needs best and can help ensure the safety and quality of their own care. The governance argument is that consumers can regulate their own health care: in market terms, they are coproducers of their own health care and, in citizenship terms, they are active participants.

Most health sector boards and advisory councils now include consumer representatives, but the issue of who best represents healthcare users remains problematic. Boards are more likely to seek members from consumer organisations (substantive representation) than to aim for a microcosm of the consumer population (descriptive representation) or to seek members through a democratic voting procedure (formal representation).

The claim is that research shows that patients who are more involved with their care tend to get better results (Agency for Healthcare Research and Quality 2008). The evidence for this claim is strong, particularly in the area of chronic care management, where people have a long-term commitment to understanding and being involved in the management of their own health care. The World Health Organization (WHO) World Alliance for Patient Safety has set up an international network of patient organisations to enlist consumers in helping to drive the patient safety movement. Health services now enlist patients as partners in a range of activities that involve them in contributing to treatment decisions, checking the accuracy of records and processes, monitoring their own treatment and being involved in self-management (Coulter and Ellins 2007). For example, people now have the right to read their own medical record, which previously was regarded as the property of the healthcare

provider; and asking patients to verify information is an effective safety check given the many errors that can creep into medical records. Patients increasingly are involved in monitoring and managing their own health, particularly those with chronic conditions such as asthma and diabetes.

While people, in theory, can be active partners, in practice, many, or perhaps most, need to be reassured that it is okay to question, let alone challenge, doctors and nurses. This reticence by patients is deeply embedded in the healthcare culture. Patients are reluctant, for example, to remind doctors and nurses that they should wash their hands before physically examining them. For example, a survey of patients in English public hospitals found that although 71 per cent said that patients should be involved in improving hand hygiene, only 26 per cent said they were willing to remind staff to clean their hands (Davis et al. 2008). Some countries produce brochures to encourage people to speak up. For example, a US brochure, 'Ask Me 3', urges patients to ask at least three questions during a visit to the doctor: 'What is my main problem? What do I need to do? Why is it important for me to do this?' The Australian Commission on Safety and Quality in Health Care puts out 'Ten Tips for Safer Health Care', which exhorts people to 'speak up if you have any questions or concerns'.

Stephen Schneider, who was diagnosed with a rare type of lymphoma, is an example of a patient who was an active partner in discussing and deciding his treatment decisions with top US clinicians (Schneider 2005). The title of his book says it all: *The Patient from Hell: How I Worked with My Doctors to Get the Best of Modern Medicine and How You Can Too*. He acknowledged, however, that he was better qualified than the average patient to research the condition and treatment options, and that many patients may need a knowledgeable advocate to help them on their patient journey.

There are limits to the regulatory power of an individual, of course, so the concept of networked regulation suggests ways that one person can enlist other people and groups in a regulatory enterprise (Braithwaite 2009). One of the reasons that people entrust others—whether governments or health insurance funds—to purchase health services on their behalf is that it is difficult for a lay person to make an informed decision on a procedure, doctor or hospital, because this often requires considerable medical and technical knowledge, so it is easier to trust one's doctor to make the decision (Dugdale 2008: 132). The role of health broker in negotiating decisions is undertaken by a person's general physician in many health systems, and by a health maintenance organisation in the

case of the US private health insurance model. The increasing complexity of health care has prompted the role of a trusted intermediary (broker, case manager, advocate) who can manage interactions with health services and insurance funds on behalf of a patient.

The strategy of enlisting others with greater powers also aligns with the idea of nodal governance, whereby a regulator seeks to exert influence through a concentration of regulators at a particular location in a regulatory field (Burris et al. 2005; Holley and Shearing, Chapter 10, this volume). For example, the Australian Commission on Safety and Quality in Health Care gathers together experts and policymakers as leaders on strategies to improve health care. A patient can recruit more powerful actors who have the capacity to connect together and pull the various strands of power. An individual patient may therefore exert influence through a better informed family member or friend, a health ombudsman or lawyer, or through groups that range from self-help groups based on mutual assistance between peers to formal organisations run by a board and employing professional staff. Large non-governmental organisations (NGOs) advocate on behalf of their clients or on behalf of a defined population group and might also engage in research, prevention and treatment.

8. Aggrieved litigants

Some observers propose 'regulation by litigation' as an effective strategy for regulating health care. Compensation for medical injuries in common law countries, including Australia, is a fault system based mainly on the tort of negligence—torts being civil wrongs where compensation is sought. Several categories of charges by patients against health professionals can arise, including negligence and criminal charges, such as assault (McIlwraith and Madden 2006). The main arguments for patients being able to sue healthcare providers are that it is a necessary avenue of last resort for aggrieved patients and, second, that it has a salutary impact in ensuring better and safer health care (Hirsch 2009). The counter view, however, is that fear of being sued makes health professionals more likely to cover up rather than learn from their mistakes, and that the experience of litigation is traumatic and costly for all concerned. Further, since many cases are settled out of court, the opportunity for wider learning is limited, since medical indemnity insurance funds are not keen to publicise and so promote more litigation by patients.

Figure 34.2 The salutary threat of litigation
Source: CartoonStock.

9. Concepts and conclusions

The responsive regulation model works well as a predictor and working model when applied to the distinctive and complex context, culture and behaviour of health professionals. While much of the regulation literature focuses on regulatory authorities, the responsive regulation model developed by John Braithwaite and colleagues broadens this perspective to encompass a variety of actors (state and non-state) and a variety of mechanisms (from persuasion to enforcement). Regulation from this

perspective is defined broadly as steering the flow of events (Ayres and Braithwaite 1992). The pyramidal framework promotes the view that it is better to begin with respectful and cheaper strategies at the base. This allows virtuous actors to voluntarily comply with reminders about standards, while rational actors calculate that it is in their interests to comply. This makes sense in relation to the health sector since the great majority of health professionals seek to do good, not harm. The main point here, however, in relation to patients as regulators is that patients must be able to escalate from softer to stronger actions (both supports and sanctions) if required.

The two pyramids—supports-based and sanctions-based—offer a more nuanced framework for how patients can support better health care and how they can invoke sanctions to insist on compliance with standards and to punish malpractice. The concepts of networked and nodal governance are important in that they offer empowerment strategies whereby individual patients recruit others to strengthen their influence over the health system.

The behaviour of patients as regulators can also be depicted in terms of a ladder of actions. A classic paper by Arnstein (1969) applied a power analysis to citizen participation in depicting a ladder with eight rungs, beginning with the bottom rung of manipulation and ascending upwards through therapy, information provision, consultation, placation, partnership and delegated power to the top rung of citizen control. While most people are willing to step on to the bottom rung to answer a consumer survey, very few want to climb to the top rungs or become a board member. This changes the idea of a ladder to something more resembling a pyramidal shape.

There has been a dramatic change in the nature of the encounter between health professionals and patients; the days are gone when patients hardly dared question their doctor. Admittedly, we have to be quick with our questions given the usual 10-minute GP consultation. The policy thrust, at least in well-developed healthcare systems, is to promote the ways patients/the public can have more say and to require health services to be more transparent in reporting on their performance. While patients are wise to be more cautious, the counter argument is that patients must be able to trust their doctors in a crisis, and, further, trust in one's doctor is said to have a therapeutic effect (Mechanic and Meyer 2000).

What is the evidence that patients can be effective regulators? Research on patients as regulatory actors remains sketchy, with few rigorous systematic reviews so far undertaken. While there is considerable research on methods to impart information and to improve patient health literacy, a structured review concluded that the role of patients as regulatory actors was still in its early stages and that safety outcomes were difficult to measure (Coulter and Ellins 2007). The available evidence for the different strategies can be summarised as follows:

- Informed patients (that is, people who are health literate) have better health outcomes.
- Selective consumers have had little impact but this may strengthen with better public reporting on health services' performance.
- Vocal complainants can secure individual redress but it is unclear to what extent systemic improvements follow.
- Entitled citizens are well accepted in democratic societies and legislation and codes of patient rights are arguably influential in improving service delivery.
- Active partners who are involved in decisions on their own health care have better outcomes, as shown in studies of chronic disease management.
- Aggrieved litigants can secure compensation but some argue that defensive medicine is a barrier to quality medicine.

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35

The regulation of work health and safety

Elizabeth Bluff

1. Introduction

This chapter is about regulating the harmful effects of work, which globally results in around two million deaths each year (ILO 2003). A further 270 million people suffer traumatic injuries and 160 million are affected by diseases arising from their work. Clearly, for many people, work falls short of sustaining their physical, mental and social wellbeing, as envisaged by the International Labour Organization (ILO) in its Convention Concerning Occupational Safety and Health and the Working Environment (ILO 1981).

As in other fields, in work health and safety (WHS), the concept of regulation ranges from state regulation in the form of legal obligations and public agencies that promote, monitor and enforce compliance to the wider non-state mechanisms in local, national and transnational domains that influence enterprise conduct (Black 2001). This chapter applies this broader, 'decentred' conception of regulation, together with Parker and Nielsen's (see their Chapter 13, this volume) holistic and plural model of business compliance, in examining the regulation of WHS through a series of interrelated conceptual themes, as follows (Parker and Nielsen 2011).

Taking *enterprise behaviour* as the starting point, nine practices are outlined, which, if rigorously implemented, sustain better protection for health and safety at work. Enterprise behaviour is, however, motivated by business *goals and priorities*, and influenced by *organisational capacities and characteristics*. In turn, *non-state institutions and actors* in enterprises' social and economic environments shape their motivations and capacities, with positive or adverse consequences for WHS. After examining these issues, the chapter turns to *state regulation*, including WHS laws and the role of state regulators, which seek to influence motivations and capacities and, through these, actions and outcomes for WHS. While the empirical research and theory canvassed in this chapter are applicable in different countries, the challenge of regulating transnationally in the context of global supply chains warrants specific attention, and this is the focus of the final section.

2. Enterprise behaviour: Preventive practices

Empirical research suggests nine practices for effectively managing WHS to prevent work-related injuries, disease and deaths, as outlined by Johnstone et al. (2012). First, risk management is the central focus of WHS management as, to ensure health, safety and wellbeing, the enterprise must rigorously and comprehensively identify potential sources of harm, implement and maintain measures to eliminate or minimise risks and give preference to measures that design out or control risks at the source (see also 'Laws for WHS' below). Second, initiatives to manage WHS are led by senior managers and are planned, resourced, implemented and reviewed to ensure their effectiveness. Third, attention to WHS is integral to other organisational decision-making and functions, and forms part of the responsibilities of managers, supervisors and workers, commensurate with their roles. Fourth, WHS knowledge and skills are developed across the enterprise and are not confined to particular individuals, even if the enterprise employs or engages WHS professionals or practitioners to facilitate WHS management (see also 'Organisational capacities' below).

A fifth practice is open and constructive communication about WHS matters among managers, supervisors and workers, and active worker participation through operational meetings (staff or toolbox) or health and safety representatives and committees. Priorities for participative problem solving are risk analysis for tasks and work roles, inspections

of the work environment and response to incidents and hazardous exposures. Sixth, monitoring and investigation of these events, and the underlying reasons for them, are crucial to minimising their impact, as are prompt first aid, access to medical treatment and emergency response. Seventh, enterprises have arrangements in place to consult, cooperate and coordinate on WHS matters with their wider workforce of contractors, subcontractors, agency and other precarious workers, as well as their suppliers, customers and end-users of their products and services (see also 'Laws for WHS' below).

The eighth practice for effective WHS management is succinct documentation, which assists the enterprise to communicate WHS arrangements internally and to demonstrate compliance with WHS legal obligations to regulators and external stakeholders. Last, independent audits enable the enterprise to evaluate the capacity of its arrangements to prevent work-related injury, disease and death, and to draw information from a cross-section of managers, supervisors and workers, documentation of arrangements and observation of work and work environments.

Practices such as these can sustain the commitment to, capacity and arrangements for an enterprise to self-regulate and comply with its legal obligations for WHS. On face value, they seem straightforward, but, in reality, many different factors and processes affect the willingness and capacity of enterprises and their workers to address WHS matters effectively. First among these are motivational factors.

3. Goals and priorities that motivate enterprise behaviour

As the factors that drive or energise action and behaviour, motivations play a significant role in shaping the conduct of enterprises. Socio-legal scholars have characterised enterprise motivations as legal, economic, social and normative, or a subset or amalgam of these (Kagan et al. 2011; May 2004). Legal motivations derive from the perceived authority of the law and the threat of penalties if noncompliance is detected, while economic motivations relate to regulatees' commercial goals to maximise profit. Social motivations stem from regulatees' desire to earn the approval and respect of significant people with whom they interact

(to be seen to do the right thing) and normative motivations arise from regulatees' desire to conform to internalised norms or beliefs about right and wrong.

For WHS, empirical studies have established the contextualised and plural nature of enterprises' motivations, which may provide positive rationales for taking preventive action or negative justifications for not doing so. For example, a study of UK enterprises concluded they were motivated to address WHS if poor safety standards had the potential to threaten business survival, if there were serious and well-recognised health risks for their operations and/or if they were large and highly visible to the inspectorate or local community (Genn 1993). When none of these conditions was met, firms subordinated safety to profitability goals. Profitability was also the driving force behind Australian construction firms' responses to work-related fatalities and, while influential and large firms were able to accommodate safety, smaller firms and those prone to competitive pressures chose between profit and safety (Haines 1997).

In contrast, for Australian enterprises from a cross-section of industries, motivations included a normative sense of moral and ethical duty to provide a safe workplace, economic concerns relating to insurance, reputational concerns and the threat of prosecution and penalties (Jamieson et al. 2010). For enterprises such as machinery manufacturers, motivations derived from a mix of legal and technical standards[1] and/or the economic goal of ensuring the marketability of machinery and firm profitability, and these tended to outweigh a sense of moral duty to protect human safety (Bluff 2015a).

Recognising the contextualised and plural nature of motivations goes some way towards explaining workplace actions and outcomes for WHS. It does not, however, completely account for enterprise behaviour, which is also shaped by organisational capacities and characteristics. These, like motivational factors, are highly contextualised.

1 See, for example, international (International Organization for Standardization: ISO), European (European Committee for Standardization: CEN), US (American National Standards Institute: ANSI) and Australian (Standards Australia: AS) standards.

4. Organisational capacities and characteristics that shape decision-making and action

Safety and socio-legal scholarship have recognised the central role of capacity, including knowledge and skills, in enterprise self-regulation and action on WHS (Hale and Hovden 1998; Nytrö et al. 1998; Parker and Nielsen 2011). Furthermore, work itself is a significant source of WHS knowledge and skills as learning takes place through participation in work activities and interactions (Billett 2001; Brown and Duguid 1991), including through observation of others' behaviour, conversations and storytelling and questioning and problem solving (Bluff 2015b; Gherardi and Nicolini 2002; Sanne 2008). In these respects, knowledge comprises individuals' personal stocks of information, skills, experiences, beliefs and memories (Alexander 1991).

One implication of this is that opportunities to participate in sound WHS practice and problem solving, and to observe and interact with competent practitioners, foster better learning about WHS. Yet a lot of WHS information and training are not grounded in authentic work experiences, and instead attempt to 'transfer knowledge' through information materials or training (face-to-face or online). A further implication is that, as learning about WHS is situated in work activities and interactions, there are multiple bases for constructing WHS knowledge and skills, and these go beyond authoritative sources such as legal and technical standards or advice and information from WHS regulators. To the extent that enterprises do engage with WHS regulatory and professional communities of practice, this is facilitated by WHS professionals and practitioners who help to source information, promote workplace dialogue around WHS, support risk management and highlight the costs and legal consequences of not taking preventive action (Broberg and Hermund 2007; Hale et al. 2010; Jamieson et al. 2010).

Moving beyond issues of capacity, certain enterprise characteristics pose significant challenges for WHS. For example, enterprise restructuring, outsourcing, engaging workers as (sub)contractors or hired labour, conducting business in supply chains and franchising arrangements have reduced enterprises' control over work, weakened chains of responsibility, contributed to the fracturing and complexity of work

processes and increased the proportion of workers in flexible, less secure, temporary, part-time or casual employment or working as self-employed contractors (Johnstone et al. 2012; Quinlan et al. 2010). In supply chains and franchising arrangements, there is a stark contrast between the commercially powerful enterprises at the apex of these arrangements and the often small enterprises or self-employed individuals (including outworkers) who produce and supply the goods or services under poor conditions for WHS, remuneration, hours of work, job security and access to workers' compensation and rehabilitation (Frazer et al. 2008; James et al. 2007; see also 'Laws for WHS' and 'WHS in global supply chains' below).

Enterprise size is a key characteristic influencing willingness and capacity to address WHS matters. The difficulties that smaller enterprises, and their workforces, experience in dealing with WHS matters are multifaceted, ranging from limited resources and management expertise to competitive pressures, lower positions in contracting (or franchising) hierarchies, shorter life cycles and inadequate worker representation (Lamm and Walters 2004; MacEachern et al. 2010). Moreover, effective strategies for building WHS capacity in small enterprises are resource-intensive as they require face-to-face discussions and practical problem solving for real risks facilitated by WHS advisers, as regulators or consultants (James et al. 2004; Stave et al. 2008).

These are just some of the ways that organisational capacities and characteristics may impact on WHS. Diversity in these aspects contributes to differences in how, and how well, enterprises address WHS matters.

5. Non-state institutions and actors in enterprises' social and economic environments

From the preceding discussion of organisational arrangements and relationships it is clear that multiple external actors may influence the operations of an enterprise and, in turn, that enterprise may influence others. Also, an enterprise's interactions with external actors and the distribution of responsibilities, resources and power between them, can critically affect the enterprise's willingness and capacity to address WHS matters and comply with its legal obligations.

In regulatory theory, the role of regulatory actors beyond the state agencies that set, monitor and enforce legal obligations is recognised in the concepts of regulatory space and decentred regulation (Black 2001; Hancher and Moran 1989). As well as enterprises' customers or clients, and parties in supply chains and franchising arrangements, other influential non-state actors for WHS include industry and professional associations, unions, insurance companies, providers of education and training, WHS consultants and technical standards bodies. In principle, these non-state actors may foster awareness of WHS and regulatory systems and positively influence WHS outcomes, but, in practice, the information they provide may be less than robust and their influence may run counter to regulatory goals or, in business relationships, they may limit a (small) enterprise's room to move on WHS (Bluff 2015a; Hutter and Jones 2007; Lamm and Walters 2004).

All of this signals the need for regulators to pay attention to the influence of non-state actors. As Haines (1997) proposes, it may be necessary to map the dynamics within, outside and between enterprises that influence their decisions and actions, as a starting point for regulation.

6. State regulation of WHS

Laws for WHS

Governments in developed and some developing countries have established laws aimed at protecting health and safety at work. The focus here is on these preventive WHS laws, noting, however, that levies, financial incentives and penalties, performance standards and audits under workers' compensation and rehabilitation schemes are among the wider regulatory mechanisms with government authority, which may require or encourage enterprises to improve their management of WHS (Johnstone et al. 2012; Verbeek 2010).

In framing WHS legal obligations, policymakers employ different types of standards, as described by Johnstone et al. (2012; see also Bluff and Gunningham 2004). *General duties* (or *principles*) define the obligation in terms of broad goals, while *performance outcomes* and *performance targets*, respectively, specify a required outcome or standard of exposure, as for a chemical or noise. The flexibility of these performance-based standards

contrasts with *prescriptive standards*, which specify the required action and may achieve this by calling up or giving evidentiary status to detailed technical standards issued by (non-state) national and international standards bodies.

Other options are *process-based standards*, which, as the name suggests, set out ways to address WHS matters—for example, processes for managing WHS risks and consulting workers. In some countries, processes are combined in a systematic strategy to manage WHS, as with the European Framework Directive on measures to encourage improvements in safety and health (EC 1989). This strategy is developed more fully in requirements for 'internal control', which mandate a preventive system to plan, organise, implement and review compliance with WHS legal requirements (Saksvik et al. 2003; Walters et al. 2011; see also 'Enterprise behaviour' above). Such requirements dovetail with global developments in WHS management systems, although the latter are typically promulgated by non-state sources, ranging from large corporations to national and international standards bodies (ILO 2001; Walters et al. 2011). Complementing process and systems standards are *documentation standards*, which require the regulatee to record the action they take to comply—for example, documenting risk assessments, safe work methods and plans for managing WHS.

A key development in WHS policy and standard-setting is the emphasis on controlling risks at the source. One aspect of this is a focus on safe design, based on the premise that a highly effective way to protect people from harm is to eliminate or control risks at the design stage (Safe Work Australia 2012; Schulte et al. 2008). To this end, legal obligations may extend to entities that design, develop, construct or manufacture systems of work, workplaces, machinery and equipment, substances and materials. A second aspect is regulatory innovation targeting enterprises with real control and influence over WHS in supply chains for goods and services. A recent example is Australian WHS laws requiring a person conducting a business or undertaking (PCBU) to ensure, as far as reasonably practicable, the health and safety of all persons who carry out work for them, as contractors, subcontractors, hired (agency) labour, outworkers or otherwise. And, from the top to the bottom of a supply chain, each PCBU must discharge their obligations to the extent that they have the capacity to influence and control particular WHS matters (Johnstone et al. 2012: 306–10, 470–1). There are also separate chain of responsibility laws aimed at ensuring minimum industrial and WHS

standards for workers in textile, clothing and footwear, long-haul truck transportation and cash-in-transit supply chains (Johnstone et al. 2012: 471–7; Rawling and Howe 2013).

As well as requiring enterprises to establish, implement and monitor arrangements to address WHS matters, laws for WHS constitute arrangements for their administration and enforcement. That is, they couple self-regulation with inspection and enforcement by the state in a form of enforced self-regulation (Ayres and Braithwaite 1992).

The role of state WHS regulators

The preventive WHS laws provide for external support, inspection and enforcement by state regulators, who may utilise a variety of different approaches and mechanisms to foster willingness and capacity to comply with WHS laws (Bluff 2011: 32–54; Johnstone et al. 2012: 101–6). They may raise awareness and provide information through their websites, advisory services, workshops and forums, as well as the general and social media. In their direct interactions with regulatees, they may adopt a *cooperative* approach (also called an accommodative, facilitative or compliance approach) in which they preference advice and persuasion as means to elicit compliance. They may be more *insistent* by setting out clear expectations and signalling the need for a prompt response—for example, by issuing a notice requiring action to remove or control hazards. Or, they may apply a *coercive* approach (also called a sanctioning or deterrence approach), which involves some form of sanction, such as issuing an infringement notice or on-the-spot fine, or pursuing prosecution and court-imposed sanctions. As provided for in the relevant WHS laws, the types of sanctions imposed by courts may include fines, jail sentences, injunctions, undertakings or different types of orders, which can impact on economic motivations and reputational concerns, as well as requiring enterprises to address weaknesses in their capacity and arrangements to comply with the law (Gunningham and Johnstone 1999: 256–8).

The strongest evidence that inspection improves WHS performance comes from the United States, where a series of studies conducted over several decades demonstrates that inspected firms have improved performance for risk control or reduced work-related injuries, illnesses or workers' compensation claims, as measured for the particular study (see for example, Baggs et al. 2003; Gray and Scholz 1993; Mendeloff

and Gray 2005; Weil 2001). There is also evidence of prosecuted enterprises implementing additional actions to manage risks (specific deterrence), but less evidence that prosecution of others prompts non-prosecuted enterprises to take appropriate preventive action (general deterrence), as communication of information about cases may be unreliable or differences in business operations may make comparisons difficult (Jamieson et al. 2010; Schofield et al. 2009; Bluff 2015a; Thornton et al. 2005).

While there is some evidence that different types of enforcement can encourage improvements in WHS performance, there are many unanswered questions about how WHS regulators can most effectively employ the array of mechanisms and approaches available to them. For example, should WHS regulators apply *risk-based regulation*, deploying their regulatory resources and determining how to respond to noncompliance based on assessments of risk (Black 2010)? Should they implement some of the types of regulatory responsiveness that fall under the approach of *responsive regulation* (see John Braithwaite, Chapter 7, this volume), using a judicious mix of cooperative mechanisms to build capacity to comply, but, when necessary, applying more insistent and deterrent mechanisms to address persistent noncompliance (Braithwaite 2011)? If they employ responsive regulation, what should trigger an escalation in their response? Is it a regulatee's uncooperative attitude and behaviour, the gravity, frequency or seriousness of noncompliance or something else (Nielsen 2006)? And, if regulators encounter resistance from regulatees, should they move to sanctions or, as *motivational posturing theory* suggests (see Braithwaite, Chapter 2, this volume), should they put more effort into building trust, respect and shared understandings with these regulatees (Braithwaite 2009)?

A further issue is what constitutes 'compliance'. Is it *self-regulation* in the sense of willingness, capacity and arrangements to sustain ongoing preventive action and/or is it *substantive compliance* with regulatory goals such as eliminating or effectively minimising risks (Walters et al. 2011: 8–9, 152–5, 194–5; Parker 2002: ix–x, 27, 43–61)? And, whether the focus is self-regulation or substantive compliance, is it helpful to conceive WHS regulation as an interaction between the regulator and a single enterprise or are their benefits in networked interventions whereby regulators engage with a cross-section of enterprises operating within

the same markets, supply chains or industry sectors[2] and the industry, union, professional, insurance, training and other bodies with whom they, and their workers, interact (Bluff et al. 2012; Gunningham et al. 1998; see Gunningham and Sinclair, Chapter 8, this volume)?

These are all live debates in WHS regulation. While regulatory theory and empirical research in other fields of regulation suggest promising directions, the diversity of enterprises, the risks arising from their operations and the persuasive influence of non-state institutions and actors demand careful consideration of 'what works' for WHS regulation, how, why and in what contexts. We also need to better understand how enterprise characteristics and capacities, motivations and operating contexts influence their actions and behaviour for WHS, and how regulators can take these variables into consideration in designing and implementing their interventions. We need to better define the types of knowledge and skills that inspectors require to elicit improvements in WHS performance, which is likely to be a mix of WHS knowhow and communication and relational skills, to build rapport and cooperation with regulatees and their stakeholders.

7. WHS regulation in global supply chains

A very great challenge for WHS is regulation in the context of global supply chains, where corporations conduct production, extraction, transportation or other operations in developing countries. State regulation in these countries is often absent or too weak to provide meaningful protection for WHS, and work conducted there is beyond the reach of developed countries' laws, such as Australian chain of responsibility obligations (see 'Laws for WHS').

There are, however, a number of international institutions and actors in the transnational regulatory space for WHS. Key among these is the ILO, which promulgates conventions and supports the development of WHS programs at regional, national and local levels (Rosenstock et al. 2006). Others are global industry associations and corporations, international standards bodies, insurance companies, global unions, non-governmental organisations (NGOs) and social movements.

2 For example, those that design/develop, construct/manufacture, import/supply/deliver and purchase particular types of products and services within the same markets.

For example, corporations may develop codes of conduct, the success of which depends on them having the self-interest to ensure compliance by their suppliers (Kolk and van Tulder 2005). For their part, global unions have negotiated international framework agreements with more than 100 corporations, which apply to their operations throughout the world (Global Unions n.d.). Trade development NGOs such as Fairtrade International have set standards (drawing on ILO conventions and national legislation) and support their implementation in around 70 producer countries, with inspection and certification (by FLO-CERT) of supply chain participants from point of production to point of sale (Dragusanu et al. 2014). FairWear campaigns have similarly sought to improve working conditions, but through ethical networks of union and social movement participants (Burchielli et al. 2004).

The above examples highlight the different participants in emerging, hybrid forms of global labour governance, which bring together state and non-state bodies to secure action on WHS and other labour standards issues (Marginson and Meardi 2014). A significant example is the legally binding Accord on Fire and Building Safety in Bangladesh, negotiated in response to the collapse of the Rana complex, in which more than 1,100 people died and 2,500 were injured. Participants in this networked governance are the 190 apparel corporations from 20 countries that have signed up to the accord, two global unions and numerous Bangladeshi ones, four campaign and advocacy organisations and the ILO as the independent chair for the accord. Among other matters, the accord requires thorough and credible safety inspections by skilled personnel and commitments by customer companies to ensure their supplier factories implement required corrective actions.

The indications are that, globally, as within nations, no single source of state or non-state regulation is adequate to ensure continuing and effective action on WHS. Rather, successful strategies harness a combination of participants and regulatory mechanisms, including empowering non-state actors as surrogate regulators (see Gunningham and Sinclair, Chapter 8, this volume).

8. Conclusion

This chapter began with some grim statistics about the prevalence of work-related deaths, injuries and diseases. While WHS laws and regulators are central players in efforts to reduce this toll, much more is at stake in determining whether enterprises are willing and able to effectively protect their workforces. Understanding the contextualised and plural nature of regulatees' motivations, the situated nature of learning about WHS and the influence of non-state institutions and actors is essential to explaining enterprise actions and outcomes for WHS. Also influential are organisational characteristics and relationships that lessen the potential for sound learning about WHS and compound non-state regulation of work.

A necessary starting point for improving WHS performance is to understand how these 'variables' play out in particular industry, sector and enterprise domains, whether these are national, regional or transnational in scope. The optimal mix of regulatory mechanisms and approaches for improving WHS will be the one that reinforces the positive influences and tackles the negative impacts in particular circumstances and contexts. And all of this requires careful planning and strategic choices, grounded in comprehensive information and analysis, in designing and implementing regulatory interventions.

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Section 7: The regulation of commerce

This section provides examples of the substantive regulation of commerce that have been important to RegNet scholars as sources of insight into theory development, as well as for the application of regulatory theory. John Wood synthesises a complex history to reveal the long-run success of consumer regulation—a success to which he was a major contributor (see the Preface). Imelda Maher, the first director of RegNet's Centre for Competition and Consumer Policy, illustrates how regulation is more constitutive than contradictory of competition and how the enforcement of competition law in transnational contexts is increasingly based on an architecture of networked governance. The institution of tax was the object of a multidisciplinary research effort carried out by the Centre for Tax System Integrity (CTSI), the largest of many centres that have been housed within RegNet. Among other things, its work on compliance and responsive regulation had a practical and successful influence on the way in which the Australian Tax Office engaged with those with tax obligations—for example, in the 'cash economy' and by corporations in the context of transfer pricing. Greg Rawlings, a former member of the CTSI, discusses the successes and failure of states and the Organisation for Economic Co-operation and Development (OECD) in dealing with tax havens and profit shifting by multinationals. Kyla Tienhaara's chapter outlines how the investor state dispute-settlement mechanism, now to be found in many hundreds of trade and investment agreements, allows for the private

regulation of public regulatory sovereignty. Neil Gunningham and Darren Sinclair, drawing on their work in mining regulation, show that solutions inspired by meta-regulation may founder when they run into resilient informal systems with deep roots. Here, the insights of legal pluralism are needed (see Forsyth, Chapter 14, this volume). Jeroen van der Heijden also explores the limits of creative governance solutions, this time in the context of urban sustainability and resilience. Collaborative governance and voluntary programs within cities are producing instances of success when it comes to energy efficient, low-carbon buildings, but these instances are yet to reach the scale and increase in growth required if cities are to reach a new sustainable equilibrium with their surrounding ecosystems. States remain central nodes in webs of regulation when it comes to scaling up regulatory solutions. The limits of new regulatory approaches in the context of the paradigm of new environmental governance and approaches such as experimentalism, adaptive governance and collaborative governance form the topic of Cameron Holley's chapter.

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Consumer protection: A case of successful regulation

John TD Wood

1. Introduction

In *The Wealth of Nations*, the philosopher and economist Adam Smith expounded his view that:

> Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer. (Smith 1776: Book IV, Chapter VIII, vol. ii, para. 49)

He was making an important contribution to how we should view the market when we consider key aspects of consumer protection, and added to a long history of practical protection.

2. Background

From the time of the earliest recorded codification of laws, those of King Hammurabi of Babylon (1795–50 BC), we find examples of consideration of consumer protection measures: matters dealing with fairness in the marketplace and ensuring that measurements are correct and goods safe. Thus, the *Code of Hammurabi* contained the following examples:

> 104. If a merchant give an agent corn, wool, oil, or any other goods to transport, the agent shall give a receipt for the amount, and compensate the merchant therefor. Then he shall obtain a receipt from the merchant for the money that he gives the merchant.
>
> 108. If a tavern-keeper (feminine) does not accept corn according to gross weight in payment of drink, but takes money, and the price of the drink is less than that of the corn, she shall be convicted and thrown into the water.
>
> 229. If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.
>
> 233. If a builder build a house for some one, even though he has not yet completed it; if then the walls seem toppling, the builder must make the walls solid from his own means.[1]

Needless to say, consumer protection can, and has, appeared in many guises and has taken many different forms over the centuries and decades. Governments, alerted to practices considered injurious to the health, safety or economic welfare of the community, have, from time to time, been sufficiently roused to bring in legislative measures to cure the ill. Sometimes they have even been moved to prevent the ailment arising.

There are, then, consumer protection measures in statutes that deal with explosives and other hazardous substances, in the controls for therapeutic goods, in building codes, in the regulation of supply and use of chemicals, in the supply of energy, in requirements for the incorporation of entities, in road traffic rules, in vehicle design rules, and so on.

Throughout the world, various of these have, from time to time, been the principal focus for consumer concern. In developing economies, consumer attention is frequently given simply to the basics of living: adequate and clean drinking water, weatherproof (and often disaster-proof) and safe shelter and adequate and uncontaminated food.

In the contemporary world, discussion of government involvement in consumer affairs tends to relate to:

1 As set out in the *Code of Hammurabi* (available at: commonlaw.com/home/legal-history-and-philosophy/code-of-hammurabi; Johns 1987).

- the mandating of fair-trading practices in the marketplace and prohibition of anticompetitive conduct
- regulation of the supply and use of hazardous goods and services
- establishment of minimum or mandatory standards for goods and services
- fiduciary oversight and regulation of the practices of suppliers of economic and financial services
- the regulation of telecommunication and energy services
- maintenance of a system of weights and measures
- requirements for transparency and for information disclosure in consumer transactions
- the control of fit and proper persons to carry out commercial activities
- harmonisation of international standards and practices.

Illustrative of developments in consumer protection over the years in Australia and elsewhere are the following sectors.

3. Weights and measures

This has been one of the oldest areas of market control. The checking of weighing devices—or implements and vessels for measuring volumes of oil, wine and grain—goes back a very long time. Beer measures became especially important, which is why standard-sized drinking vessels came into use—for example, English 'pewters' and German 'steins'. The United Kingdom gained a *Weight and Measures Act* in 1795, which was duplicated in New South Wales in 1832. This legislation, in a more contemporary form, first came into force at the time of World War I—for example, the *Weights and Measures Act 1915* (Qld).

To recognise the national importance given to weights and measurement, the *Weights and Measures (National Standards) Act 1948* was enacted by the Federal Parliament and the National Standards Commission established.

In more recent times, the needs of a national marketplace have been recognised, so that matters dealing with everything from units of measurement through to packaging and labelling are dealt with through uniform trade measurement legislation (for example, see the *Trade Measurement Act 1993* (SA)).

4. Public health and food

Control of medicines became essential following the growth of patent medicine sellers—the 'snake oil merchants'—at the turn of the century, and as more scientific knowledge became available about the effects of some of the cures that had been merrily dispensed by Victorian medicos, such as laudanum and arsenic.

Similarly, the growth of food processing plants and food preparation places, with the inevitable increase in food poisoning, led to food hygiene rules and inspectors. The *Public Health Act 1902* (NSW) covered the sale of unadulterated food, food standards, pollution, fraudulent ingredient labelling and injurious food. Subsequently, the companion *Pure Food Act 1908* established rules and inspection regimes.

In both cases, it was concern with contamination and adulteration and, in the case of drugs, deceptive sales practices, which led to the legislative action. These statutes came into being as much to protect reputable businesses from disreputable competitors as to look after the interests of consumers.

The Australian legislative models, again, drew on overseas precedent, in this case the UK *Sale of Food and Drugs Act 1875* and the US *Food and Drugs Act 1906*. Interestingly, given the then preoccupation of many of the male citizens of the country, one of the first pieces of legislation protecting the 'purity' of products was the *Liquor Adulteration Act 1855* (Qld).

5. Dangerous people!

The first statutory schemes to protect consumers were designed to prevent undesirable people from carrying out various occupations. Hence, the *Hawkers and Pedlars Act 1849* (Qld); the *Pawnbrokers Act 1857* (Tas.); the *Landlords and Tenants Act 1899* (NSW);

the *Book Purchasers Protection Act 1899* (NSW) (an early example of regulation of door-to-door sales); the *Second-hand Dealers and Collectors Act 1906* (ACT); the *Money-lenders Act 1912* (WA); and the *Auctioneers and Agents Act 1941* (NSW). Because of profiteering due to shortages in some areas following World War II, and as a means of controlling inflation, price control legislation was also introduced (for example, the *Prices Act 1948* (SA)). This form of regulation was extended to some individual products at different times—for example, beer and petrol prices in 1981 (*Fuel Prices Regulation Act 1981* (Vic.)) and, most recently, by Part VB of the *Trade Practices Act 1974* (Cth), to protect consumers against exploitation following the introduction of a new tax system.

Another form of regulation also entered the statute books with the stated intention of protecting the consumers of professional services, although it was really more about safeguarding the interests of those already accredited, from competition. Thus, legal practitioners (*Legal Practitioners Act 1881* (Qld)), veterinary surgeons (*Veterinary Act 1918* (Tas.)), architects (*Architects Act 1921* (NSW)), medical practitioners (*Medical Act 1894* (WA)), dentists (*Dentists Act 1919* (Tas.)) and accountants (*Public Accountants Registration Act 1945* (NSW)) received their own protection.

In recent times, this form of licensing was more broadly used to require certain minimum qualifications for entry into other occupations where it was considered that either disreputable practices had occurred or the consumer was potentially at risk if professional standards were not maintained or proof of good behaviour not required. Thus, in various jurisdictions, we saw regulation of activities ranging from those of psychologists to those of travel agents and those of financial advisers and planners.

6. Building

Local government controlled house building, and the development of regulation in the form of ordinances developed rapidly in Australia because of the very high levels of building.

After World War II, these controls became as concerned with matters affecting the health of occupants—such as ventilation, light penetration, plumbing, sewerage and drainage—as with the strength of the building's

structure. More recently, standards relating to energy efficiency and conservation have been developed to ensure the sustainability of building projects (see van der Heijden, Chapter 41, this volume).

7. Post-sale consumer protection

Concern about the inequality of bargaining power of parties in the marketplace gave rise to the first specific consumer protection laws, the sale of goods legislation of the late nineteenth century (for example, the UK *Sale of Goods Act 1893*), which spread through the British Empire into the early days of the twentieth century and was the origin of all sale of goods legislation in the Australian states and territories, and a key component of the consumer protection provisions of the *Trade Practices Act 1974* (Cth).

8. Defective products

The liability of manufacturers for their defective products was first recognised by the courts in the United States in 1916 when, in relation to the rapidly booming automobile industry, strict liability for mistakes in the manufacturing process was imposed on the makers of Buick cars. In the English law, it was the famous case of the mouse in the ginger beer bottle (*Donoghue v Stevenson*) in 1932 that established the liability of manufacturers, and which was followed in this country until the 1977 amendments to the *Trade Practices Act 1974*. These were subsequently enhanced by the product liability provisions enacted as Part VA of the Act.

9. The new affluence and debt

As the gigantic manufacturing apparatus that had been brought into being to supply goods for the war effort during World War II was turned back to civil production, the affluent West saw a boom in the production of consumer goods. Coupled with the technological revolution that the war had also inspired, a new range and variety of products rapidly emerged into the consumer marketplace. Many of these were far more complex in engineering and design than their precursors, and, because of mass production techniques, far more accessible to a broad spectrum of the community.

The rapid expansion of commercial radio, with its enticing advertisements, and the advent of television provided further impetus to consumerism's rapid advance.

To complement this new and burgeoning consumer market came new methods of financing purchases. Following the Depression, the domestic market had boomed and, with banks retaining conservative lending practices and generally inaccessible to the man (and certainly the woman) in the street, consumers got caught up in schemes offering payment by instalment programs, called hire purchase. In some cases, the interest rates and practices of the companies offering this 'service' were unconscionable, with harsh contracts, extortion and inequality between the parties. As a result, a form of regulation was introduced by the various hire purchase laws of the late 1930s and early 1940s. See, for example, the *Hire Purchase Agreements Act 1941* (NSW). The *Credit Sales Agreements Act 1957* (NSW), covering the purchase of goods on credit from retail stores, and the *Hire Purchase Act 1960* (NSW), dealing with finance obtained from credit providers for goods that were not owned until the entire sum was paid off, followed.

As access to a range of financial services widened, with finance companies (often owned by the major banks) being established and new products developed, the first attempts at achieving nationally uniform credit legislation began in 1972—not finally succeeding until 22 years later. Finally, recognition was given to the importance of national regulation with the introduction of the *National Consumer Credit Protection Act 2009* (Cth).

10. Kennedy, Moloney, Hutchison and Nader and the era of the consumer activists

US President John F Kennedy announced on 15 March 1962, in a directive to the Consumer Advisory Council, that consumers had some basic rights—namely:

- the right to safety
- the right to be informed
- the right to choose
- the right to be heard.

He also forecast the establishment for the first time of an Office of Consumer Affairs. It was President Johnson who ultimately carried this out, and who also established the position of Presidential Adviser on Consumer Affairs, the first occupant of which was the labour activist Esther Petersen.

Later in that same year, an extremely influential report (*Final Report of the Committee on Consumer Protection*) was published in the United Kingdom. Known as the Molony Report after the chair of the committee that produced it, the report contained some 2,000 proposals and recommendations following its examination of significant areas of consumer need and of existing legislation, as well as of the need for further protection of the consuming public.

The major recommendations were:

- the establishment of a Consumer Council to 'ascertain and review the problems experienced by the consumer and to devise and advance the means of resolving them' (Moloney 1962)
- the revision of hire purchase legislation
- the consolidation and revision of the merchandise marks legislation
- the amendment of the *Sale of Goods Act 1933*
- the registration of Seals of Approval, and the amendment, in a number of minor respects, of the *Trade Marks Act 1938* (Moloney 1962).

Meanwhile, in Australia, the first female member of the West Australian Legislative Council, Ruby Hutchison, initiated the Australian Consumers' Association at a meeting in Sydney Town Hall in 1959. Established as a non-profit independent organisation undertaking product testing, it saw itself as a response to the ever-growing consumer complaints about poor-quality goods and services.

In 1965, Ralph Nader published his definitive book on a corporation's (General Motors) lack of concern for its consumers (and its critics), *Unsafe at Any Speed*. His work in establishing specific-purpose consumer groups (popularly known as 'Nader's Raiders') in the United States was paralleled in Australia with a plethora of groups at the state and territory level over the next 20 years that covered fields from health care to credit counselling, and from product safety to food and nutrition.

11. The consumer protection acts

All governments in Australia had their attention drawn to the safety of a wide range of consumer products following Nader's campaigns, the establishment by the US Federal Government of the Product Safety Commission and the results from a growing number of product tests carried out by the Australian Consumers' Association. The first government response was in Victoria, where the Consumer Protection Council, to advise the government on consumer protection issues, was established in 1965. It was, however, the NSW *Consumer Protection Act 1969* that became the general model for the rest of the nation and established both the Consumer Affairs Council and the Consumer Affairs Bureau under the Commissioner for Consumer Affairs. The bureau's primary responsibility was to advise consumers and handle their complaints—the first time a government had provided such a service.

When considering why it was this particular era (1965–75) that finally saw the advent of government consumer affairs agencies and wide-reaching consumer protection legislation, a NSW Department of Consumer Affairs' publication in 1987 suggested the following factors:

- The rapidly increasing VARIETY of goods and services which modern technology made available and which became increasingly difficult for the consumer to evaluate;
- The growing size and complexity of the production and distribution system which placed the buyer at an increasing distance, both physically and psychologically, from the seller;
- The high level of SOPHISTICATION IN MARKETING AND SELLING PRACTICES in advertising and other forms of promotion;
- The REMOVAL OF THE PERSONAL ELEMENT from the buyer/seller relationship as a result of large shopping centres and supermarkets, mass-marketing methods and the consumer's greatly increased mobility;
- The PRE-PACKAGING OF GOODS which again made it difficult for consumers to assess what they were getting in terms of value for money and operational ability;
- The increasingly COMPLEX TERMS AND CONDITIONS on which goods and services were sold;
- The many and varied forms of CONSUMER CREDIT and their widespread availability;

- The CONFLICT OF INTERESTS between standard business practices and consumers' needs;
- The increasing availability of RENTAL SCHEMES, as against direct purchase, for a wide range of goods;
- The growth of LARGE CORPORATIONS, MULTI-NATIONAL COMPANIES AND MONOPOLIES which often placed the consumer at a disadvantage in the marketplace in terms of bargaining power;
- POOR ACCESS TO LITIGATION AND REDRESS—the court system being too costly for the average consumer to gain redress for problems with everyday goods and services. This added yet another layer to the general sense of powerlessness. (NSW Department of Consumer Affairs 1987).

12. The national perspective

With the advent of the Whitlam Labor Government in 1972, consumer affairs, for the first time, was given national attention. The outstanding product of this was the *Trade Practices Act 1974* (*TPA*). Considered by many internationally as the best model of consumer legislation, its architect, then Attorney-General, Lionel Murphy, drew, as was his wont, on the best of US and English law and his creative ideas and those of his advisers. The Act amalgamated a strict regime for dealing with restrictive trade practices (vastly improving provisions contained in an earlier Act)[2] with groundbreaking consumer protection provisions. He described the legislation's purpose thus:

> In consumer transactions, unfair practices are widespread. The existing law is still founded on the principle known as *caveat emptor*—meaning 'let the buyer beware'. That principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule. Now the marketing of goods and services is conducted on an organized basis and by trained business executives. The untrained consumer is no match for the businessman who attempts to persuade the consumer to buy goods or services on terms and conditions suitable to the vendor. The consumer needs protection by the law and this Bill will provide such protection.[3]

2 *Restrictive Trade Practices Act 1965* (Cth).
3 Senator the Hon. LK Murphy QC (1973), CPD Senate, vol. 57: 1013–14.

A consumer affairs division was also established to provide policy advice to the first Federal Minister for Consumer Affairs.[4] With the Act coming into force and with the Trade Practices Commission engaging in active enforcement, the consumer protection landscape in Australia was changed forever.

This was nowhere better demonstrated than in the landmark prosecution of the Sharp Corporation of Australia by the Trade Practices Commission for false and misleading advertising.[5] The Federal Court fined Sharp $10,000 for each of 10 counts—a total of $100,000, which was a huge sum for the time and one that sent a very strong message through corporate Australia, the advertising industry and the media.

13. What the statutes protect

The consumer protection laws adopted over time by the federal, state and territory governments deal with the following matters:[6]

- prohibition or regulation of undesirable or unfair practices
- prescription of terms to be implied into contracts made with consumers
- prescription of standards of goods and services to be provided to consumers
- regulation of dangerous goods and services
- protection of public health and safety
- establishment of bodies to receive complaints from consumers, to investigate those complaints and to take action (including, if necessary, action in the courts) to rectify any justified complaints
- establishment of machinery to promote the education of consumers
- licensing and ongoing regulation of the types of people or organisations who may be permitted to supply certain types of goods and services to consumers.

4 The first Federal Minister for Consumer Affairs was the Hon. Bill Morrison MP, who was Minister for Science and Consumer Affairs. He was succeeded by the Hon. Clyde Cameron MP.
5 *Hartnell v Sharp Corporation of Aust. Ltd* (1975) 5 ALR 493.
6 The list builds on an original one in Goldring and Maher (1976).

14. International action

In 1960, the International Organisation of Consumers Unions (IOCU) was formed by the consumer organisations of Australia, the United States, the United Kingdom, Belgium and the Netherlands that believed they could increase their strength by building networks across national borders.

The IOCU grew rapidly over the next few decades and, in 1995, it was renamed Consumers International (CI). Currently, it has more than 240 member bodies from 120 countries. It also has regional offices in Africa, Asia and the Pacific and Latin America and the Caribbean; subregional offices for West and Central Africa and for Central America; and a Programme for Developed Economies and Economies in Transition; as well as its head office in London.

The IOCU took the four consumer rights enunciated by President Kennedy in 1962—the rights to safety, to be informed, to choose and to be heard—and added four of its own:

- the right to redress
- the right to consumer education
- the right to a healthy environment
- the right to the satisfaction of basic needs.

The IOCU then set about trying to get some form of international recognition of these rights, to stimulate much wider adoption by national governments of effective consumer protection laws. The late 1970s and early 1980s gave evidence of the growing power of multinational corporations and the limitations on national governments in trying to gain redress for consumers if such corporations offended.

Consequently, the IOCU also worked very hard to obtain United Nations (UN) acceptance of a draft code of conduct for transnational corporations. While this campaign ultimately failed, much of its work ended up in codes adopted by some international business groups and in the rules of the UN Conference on Trade and Development (UNCTAD).

However, its lobbying efforts, particularly those of Anwar Fazal, then director of the Regional Office for Asia and the Pacific and a former IOCU president, and Esther Petersen, the IOCU's Special Representative to the United Nations, inspired some progressive administrators within

national governments to support another initiative. Eventually, despite some vigorous opposition from the United States, the UN Guidelines for Consumer Protection (UNGCP) were adopted by the General Assembly on 9 April 1985 (UN 1985).

Australia readily accepted its international responsibilities in relation to the guidelines and, in February 1990, sponsored a workshop for countries from the South Pacific, which recommended the establishment of a South Pacific Consumer Protection Programme (SPCPP). At a UN regional seminar on consumer protection for Asia and the Pacific in June 1990, jointly sponsored by Australia, the Australian Government announced its funding of the SPCPP through the IOCU's Regional Office for Asia and the Pacific, then in Penang, Malaysia.

Consumers International in recent times has been lobbying for the extension of consumer rights in the revision to the UNGCP that was adopted by a resolution of the General Assembly on 22 December 2015 (UN 2015). CI worked towards a range of new recommendations in the guidelines to adapt them to the globally networked age, including recommendations on digital issues, financial services, privacy, irresponsible marketing and access to knowledge.

15. Global regulation or laissez faire?

In many respects, the consumer movement was in the vanguard of those who recognised the importance of cooperation between nations to ensure that consumer protection was placed on the agenda of those bodies that emerged from the umbrella of the United Nations to set the global agenda for the way in which regulation and harmonisation of approaches to food, health, standards and trade, among others, would develop.

It is fair to say that, from time to time, Australia has played a major role in some of these intergovernmental forums. Unfortunately, there has only been one international intergovernmental forum, outside the European Community, dealing with consumer policy: the Consumer Policy Committee of the Organisation for Economic Co-operation and Development. However, while it has been quite influential in shaping policy debates on such matters as financial services, distance selling and e-commerce, as a forum, it does not include the majority of nation-states.

16. Deregulation, privatisation and fair trading

The late 1980s witnessed a significant realignment of government priorities away from regulatory activity to a focus on economic enterprise, as the philosophy of economic 'rationalists' gained the ascendancy. Regulatory impact statements, requiring a thorough assessment of the effects of a proposal on those to be regulated, became universal requirements. Adam Smith's dictums on the subject of consumer sovereignty were erased from the memory banks and government 'Consumer Affairs' agencies became known as 'Fair Trading Departments'. Where, in the past, they had been either standalone bodies or part of the 'neutral' legal portfolio, most were gradually absorbed into business or industry portfolios where the consumer affairs function was very much the junior interest. Following the 1998 Australian federal election, for the first time in 25 years, there was no minister with 'Consumer Affairs' in their title, and the consumer affairs policy division was absorbed into the Treasury.

As is so often the case, however, the end of the century saw a turn of the wheel. Public reaction to the poor consumer behaviour of many privatised utilities throughout the world has had the effect of governments considering, or actually, stepping up regulation again.

17. National uniformity

The lack of uniformity between the laws of the states and territories has been one of the longest running 'comic' serials in Australia. In the food sector, for example, the first mention of the need for uniformity occurs as early as 1852 in comments attributed to Sir Henry Parkes.

As the realisation that Australia was increasingly competing in an international marketplace gradually dawned on policymakers, efforts to achieve uniformity in the field of consumer protection were stepped up.

From 1984 onwards, but especially up to 1993, there was a rapid acceleration in efforts made by the federal, state and territory consumer affairs ministers through their regular meetings[7] to achieve

7 Initially called SCOCAM (Standing Committee of Consumer Affairs Ministers) and later renamed MCCA (Ministerial Council on Consumer Affairs).

uniformity across the raft of consumer legislation. Much of the effort concentrated on replicating the provisions of the *TPA* in state and territory legislation. Starting with the provisions in Division 1 of Part V of the *TPA*, dealing with unfair practices, it moved through provisions dealing with post-sale consumer protection; Division 1A dealing with product safety and recalls; and then on to uniform consumer credit legislation; compensation for the failure of travel companies; and trade measurement. In the early 1990s, the charge to deregulation saw a further round of reform through agreement between governments on the need for mutual recognition of each other's schemes for regulation of goods and services generally. In effect, with a few exceptions, this meant states and territories had to recognise schemes for occupational licensing and standards for various products and services, even if these had lower standards than their own.[8]

Similarly, following the achievement of closer economic relations with New Zealand, the two countries agreed on a similar scheme of mutual recognition that was entrenched in nationally uniform legislation.[9]

Finally, on 1 January 2011, the Australian Consumer Law (ACL) commenced.

The ACL includes:

- a national unfair contract terms law covering standard form consumer contracts
- a national law guaranteeing consumer rights when buying goods and services
- a national product safety law and enforcement system
- a national law for unsolicited consumer agreements covering door-to-door sales and telephone sales
- simple national rules for lay-by agreements
- new penalties, enforcement powers and consumer redress options.

8 See, for example, *Mutual Recognition Act 1992* (Cth) and *Mutual Recognition (Australian Capital Territory) Act 1992*.

9 See, for example, *Trans-Tasman Mutual Recognition Act 1997* (Cth) and *Trans-Tasman Mutual Recognition (South Australia) Act 1999*.

The ACL applies nationally and in all states and territories, and to all Australian businesses. For transactions that occurred prior to 1 January 2011, the previous national, state and territory consumer laws continue to apply.

The full details of the ACL are contained in the *Competition and Consumer Act 2010* (Cth), replacing the *Trade Practices Act*.

18. The advent of the industry ombudsmen

With the obvious failure of sole self-regulatory schemes, new co-regulatory mechanisms started appearing. The emergence of industry-based dispute-resolution schemes took place in the late 1980s (with the United Kingdom at the fore, initiating both the insurance and the banking ombudsman schemes). These were a reflection of consumer, government and (some) industry concern that there was a considerable imbalance in the relative bargaining position of the parties when it came to resolving complaints. Previously, affected consumers had to either take a dispute to court or rely on a consumer protection or fair trading agency to take up the matter as a breach of relevant laws. The court option was prohibitively expensive and consumer protection bodies simply did not have the resources to pursue other than a fraction of complaints. Besides, many of the complaints related to service quality and information that were not covered by any statute. The emphasis, when action was taken, was, thus, on prosecution rather than consumer redress and compensation.

Consumer activism and media interest exposed large numbers of unsatisfactory and unacceptable practices in various industries. These ranged from incomprehensible contract terms through to failure to respond to complaints and repair mistakes or, indeed, to provide any relevant information to bewildered consumers.

Initially, the focus was on the financial services sector, but utilities rapidly came in for the same sort of scrutiny. This was accelerated in various countries with the privatisation of previously state-owned monopolies. Other sectors that attracted attention and various external dispute-resolution (EDR) systems included real estate agents, funeral directors, legal services, public and private health services, and so on.

Until recently, with the exception of Scandinavia, where there is a range of consumer complaints boards with a general remit and consumer ombudsmen for particular sectors, the development of these forms of EDR schemes has been concentrated in English-speaking Commonwealth countries.

In Australia, there has been an evolution of the various schemes with, for example, a number of financial services schemes joining together to form the Financial Ombudsman Service, and with the rationalisation of governance in some schemes.

19. External dispute-resolution principles

The first external schemes began with the Australian Banking Industry Ombudsman in 1990; the Claims Review Panel (general insurance) and the Life Insurance Complaints Service in 1991; and the Telecommunications Industry Ombudsman in 1993. All schemes, however, still left much to be desired.

Thus it was that work first commenced on the development of principles that should be the basis against which industry dispute-resolution schemes should be measured. They emerged in 1997 as the 'Benchmarks for Industry-based Customer Dispute Resolution Schemes', and set out a series of recommended principles, purposes and key practices. The principles were:

1. **Accessibility:** The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.
2. **Independence:** The decision-making process and administration of the scheme are independent from scheme members.
3. **Fairness:** The scheme produces decisions that are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria on which its decisions are based.
4. **Accountability:** The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlights any systemic industry problems.

5. **Efficiency:** The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.
6. **Effectiveness:** The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

These benchmarks are now in wide use in both Australia and New Zealand and have played a key role in the examination and review of EDR schemes. In addition, they are prescribed by the Australian Securities and Investments Commission (ASIC), in Regulatory Guide 139, as criteria that must be met by any EDR scheme seeking approval in the financial services sector.

20. Conclusion

Consumer protection has advanced as the middle class has prospered around the world. With increased disposable income has come increased market and political power. The product of networked activism, together with effective compliance and enforcement by strong institutions such as the Australian Competition and Consumer Commission (ACCC)—based on well-designed statute law—has been a well-regulated and efficient market (see also, Maher, Chapter 39, this volume). But principles-based regulation has also played a major role, as evidenced in the outcomes achieved by, for example, industry-based dispute-resolution schemes such as the Telecommunications Industry Ombudsman or the Financial Ombudsman Service. In the end, one of the principal reasons consumer protection regulation has predominantly been a success is that, when such regulation is effectively articulated and enforced, everyone wins: consumers, because of the protection of quality and safety of products and services, and business, because of increased consumer trust.

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37

Shifting profits and hidden accounts: Regulating tax havens

Gregory Rawlings

1. Introduction

In 1998, a UK Home Office investigation into financial services regulation in the Channel Islands and the Isle of Man found that there were some 15,000 nominee company directors on Sark, the world's smallest semi-sovereign self-governing jurisdiction. These directors, also known as 'signers', sat on the boards of companies incorporated in the United Kingdom, Ireland, Panama and the Isle of Man, but seemed to have very little idea of what 'their' companies actually did. One islander alone was the director of 3,000 such companies. Yet while Sark had 15,000 company directors, the island's population stood at just 575 (Edwards 1998: 88). Following a 1999 UK court decision that condemned sham nominee directorships and subsequent regulatory reforms in the financial services sector in the Channel Islands, the 'Sark Lark', as it was known, appeared to come to an end. However, while the island lost some of its appeal as a centre for nominee directorships, its directors were keen to continue their careers as professional signers elsewhere.

More than 14 years later, the UK newspaper *The Guardian* revealed that a group of 28 nominee directors had been able to continue offering services to tens of thousands of secret offshore companies by relocating

themselves across the world. These offshore corporate directors, whose services were for hire to companies incorporated in major markets and specialist finance centres, were discovered in Cyprus, Dubai, Mauritius, St Kitts and Nevis (particularly Nevis) and Vanuatu. As *The Guardian* reported, 'many still keep in touch on Facebook' (Leigh et al. 2012). Collectively, they sat on the boards of 21,554 companies incorporated in the British Virgin Islands (BVI), the United Kingdom, Ireland and New Zealand. One woman, with 12 addresses listed with the British Companies Register, 'controlled' 1,200 companies from the Caribbean island of Nevis. She continued to list a cottage on Sark, which provided a physical location for these companies' numerous addresses. The corporations 'controlled' from Nevis were involved in Russian property development, pornography and online gambling (Ball 2012a). Despite UK officials declaring that they would not tolerate the abuse of company directorships from Sark as far back as 1999, the island continues to provide a favourable location for 'signers' to provide their services. In 2012, two island residents on Sark sat on the boards of 8,239 companies (Ball 2012b).

The ability of company directors to bypass national regulations governing transparency, disclosure and due diligence, not to mention the sheer number of corporations involved, is emblematic of the continuing importance of tax havens, or offshore finance centres (OFCs) or international finance centres (IFCs), in contemporary global economic processes. These nominee company directors provide services for the ultimate owners of corporations whose identities remain obscured by layers of confidentiality, anonymity and privacy that are shielded by special purpose entities (SPEs), trusts and foundations incorporated in multiple jurisdictions with diverse approaches to fiscal norms and commercial regulations.

Despite decades attempting to regulate tax havens and, in some cases, close them down, countries continue to prosper by offering regulatory flexibility in tax, finance and corporate management. Just when one area of offshore financial activity (such as banking) appears to be making major advances in regulatory reform, another new area of previously unforeseen commercial value suddenly finds tax haven markets to be particularly useful. Improvements in sharing information, transparency and data matching between tax havens and major economies have been offset by developments in e-commerce, whereby apps, software and search engines can register their intellectual property (IP) in one

jurisdiction, gain advertising revenues in another and pay taxes in a third country (invariably, a tax haven) and, if not strictly meeting its definitions, reaching an agreement with competing governments to make it as such. Tax havens continue to offer products and services for trusts, banking, private charities and foundations, transfer pricing, mutual funds, SPEs, international business companies/corporations (IBCs), payrolls, superannuation (pension) funds, shipping registration, offshore equity income and asset stripping. Moreover, archetypical tax havens (tropical islands, crown dependencies and alpine principalities) have increasingly been joined by countries that were never designed for this purpose. These include major members of the Organisation for Economic Co-operation and Development (OECD) that continue to compete among each other for highly mobile capital by offering tax concessions, regulatory reforms and attractive IP protections. Just as tax havens provide multiple spaces for financial and fiscal 'freedom' and 'innovation', ways of managing them have been characterised by networks of competing regulatory projects, from setting international standards of best practice through to bilateral agreements designed to share information. Yet the release of information has not stopped regulatory arbitrage for taxable profits. If anything, it has just made it more transparent. The regulation of tax havens and aggressive tax planning remains a deep problem because globally networked markets have become more and more dynamically efficient in providing these services, or, as John Braithwaite (2005) puts it, they have become efficient 'markets in vice'. The importance to democracy of maintaining the integrity of the tax institution was a major theme of the Regulatory Institutions Network (RegNet) Centre for Tax System Integrity, with research on tax havens being a major strand of its work.

This chapter examines tax havens, offshore finance centres and the challenges of multiple, competing and contradictory regulatory initiatives. It provides an overview of the rise, consolidation, resilience and adaptation of tax havens and offshore finance centres. This is followed by an exploration of the transactions OFCs facilitate and resulting regulatory risks and responses, both in the havens themselves and in taxing states. Many of the latter have become, paradoxically, tax havens themselves and this transformation, or dualistic character of low tax costs and financial liberalisation, is one of the major challenges that regulators face today.

2. Tax havens: Rise, resilience and consolidation

A tax haven, or OFC/IFC, is a jurisdiction (country, self-governing territory and/or a federal state or province with fiscal autonomy) with low or no direct taxation, strong confidentiality, anonymity and privacy provisions governing transactions, costs and capitalisation and a suite of wideranging, but flexible and permissive company incorporation laws and policies characterised by comprehensive regulation in some areas (for example, criminal penalties against unauthorised disclosure), and relaxed regulation in others (for example, laws governing directorships may be minimal or non-existent). There are also a number of states that 'ring fence' domestic taxable economic activity covering residential income, profits and losses from international non-resident investment, which is either exempt from taxation or is liable at low or concessional rates. This includes jurisdictions with active 'onshore offshores' such as the Netherlands, Singapore, Luxembourg, Switzerland, Ireland, the United Kingdom and the American states of Delaware, Wyoming, Montana and Nevada. The ability of these 'non-tax havens' to operate akin to 'tax havens' in specific circumstances presents one of the most serious regulatory challenges for orthodox taxing states in the contemporary fiscal world.

Tax havens are particularly attractive to the wealthy, or high net worth individuals (HNWIs), also known as high wealth individuals (HWIs). There is evidence that the wealthy have sought safe and secure refuges for their assets for centuries. Chinese merchants found safe havens from imperial taxes and tributes outside the empire some 3,000 years ago (Seagrave 1995). In the late eighteenth century, French aristocrats fleeing the revolution started depositing money in Switzerland, with secret numbered accounts available by the end of the nineteenth century (Palan 2003: 103). In the decades leading up to World War II, wealthy individuals, families and some companies started to secretly move funds to low-tax regimes abroad, including Nova Scotia, the Bahamas and Jersey, while glamorous destinations such as Monaco and Tangier combined private banking, luxurious homes abroad and gambling in high-end casinos for mobile millionaires.

Tax havens started to proliferate exponentially after World War II (see Table 37.1 for a listing). The 1944 Bretton Woods agreement carefully regulated domestic and international financial markets

through government control over foreign exchange rates and cross-border capital flows. While most major economies signed the Bretton Woods agreement, there were still lacunae within the post–World War II international financial architecture that allowed money to be moved offshore. Due to Cold War rivalry, interest rate differentials and regulatory arbitrage between major markets, companies, governments, banks and individuals started to open US dollar accounts outside America in the 1950s (Hampton 1996; Palan 1999; Picciotto 1999; Schenk 1998). This protected US dollar holdings from confiscation in the event of hostilities between rival powers and also allowed account holders to earn higher interest rates abroad. These US dollar accounts kept internationally were referred to as eurocurrencies or eurodollars, which were defined as any currency banked or traded outside of its country of origin. This coincided with technological advances enabling money to be booked by telegraph from one jurisdiction to another; it did not have to physically move but could be transferred by debiting and crediting cross-border ledger entities. This provided new opportunities for smaller countries and territories, which enjoyed fiscal autonomy and were not bound by the regulatory order of the Bretton Woods system. Eurodollar funds started to flow into fiscally autonomous European territories such as British-governed Hong Kong, Bermuda and the Bahamas, together with the crown dependencies of Jersey, the Isle of Man and Guernsey. Independent states that historically had reputations for bank secrecy (or quickly introduced it), such as Andorra, Monaco, Liechtenstein and Switzerland, continued to develop, expand and promote their financial centres as safe havens where money could be securely deposited, managed and anonymously reinvested into the world's major onshore money markets (Hampton 1996; Palan 1999; Picciotto 1999).

In the 1960s and 1970s, tax havens and OFCs expanded both in number and by value of deposit. Enjoying English common law, other UK overseas territories that had never historically had income tax were able to introduce offshore legislation by statute allowing for OFCs (Picciotto 1999). In these ways, territories such as Cayman Islands and the New Hebrides (Vanuatu) became OFCs. Tax haven deposits increased rapidly. In 1968, the total funds kept offshore were valued at US$10.6 billion (AU$13.9 billion) (Picciotto 1999: 58). By 1978 this had increased to close to US$500 billion (AU$657 billion). This continued to grow through the 1980s and into the 1990s. Between 1985 and 1995, the volume of funds remitted from G7 countries into the Caribbean and Pacific increased to US$200 billion (AU$263 billion) per annum, which was far in excess of foreign direct investment

(FDI) in these areas (OECD 1998: 17). This coincided with a rise in the number of jurisdictions offering offshore financial services. Countries that chose to remain British territories augmented their offshore legislation, such as the BVI, which in 1984 pioneered the IBC (Maurer 1995), while others that became independent kept their centres and introduced new products and services. By the mid-1990s, almost every independent and self-governing territory (with the exception of the French overseas departments) in the Eastern Caribbean's Lesser Antilles had become a tax haven. Moreover, rapidly growing economies such as Singapore, Dubai and Hong Kong were actively competing with established market leaders such as Switzerland as centres for wealth management. Offshore assets continued to grow. In 1994, the International Monetary Fund (IMF) calculated that US$2.1 trillion (AU$2.8 trillion) was kept offshore, or 20 per cent of total private worldwide stocks of wealth (IMF, cited in Palan 1999: 23). In 1998 the UK Home Office estimated that this had increased to more than US$6 trillion (AU$7.9 trillion) (Edwards 1998). The OECD suggested it had reached between US$5 and US$6 trillion (AU$6.6–7.9 trillion) in 2007 (Owens 2007: 17). In 2012, the UK-based think tank the Tax Justice Network (TJN) commissioned research by the economist James Henry, which found that between US$21 and US$32 trillion (AU$27.6–42 trillion) was kept offshore (TJN 2012).

Thus, between the 1970s and the turn of the twenty-first century, the amount of money kept offshore has increased massively. The number of jurisdictions offering offshore financial services has similarly expanded considerably and now includes countries that were not historically considered tax havens (such as the United Kingdom, the Netherlands and individual US states). The market has become segmented into areas of offshore specialisation with jurisdictions focusing on particular niches. The BVI provides IBCs, the Cayman Islands hosts major American mutual funds, Bermuda offers captive insurance facilities, Switzerland, Singapore and Dubai have emerged as major centres of wealth management, while Luxembourg, Ireland and the Netherlands provide convenient locations for profit shifting, corporate domicile and bespoke tax deals between multinational corporations and accommodating governments. Major financial centres such as London and New York continue to process, manage and reinvest funds that flow in and out of tax havens by way of stocks, shares and pension funds. The entire global financial system has become interlinked with the onshore/offshore marketplace, in ways that mutually entangle and enmesh tax havens with their taxing state counterparts.

Table 37.1 Jurisdictions with tax havens, offshore/international finance centres and/or specialist financial products, services and/or incentives

Jurisdiction	Listed by OECD, 2000	Advance commitment to the OECD, 2000	Primarily benefits non-residents only	Primarily benefits residents only	Defunct/closed down/ no longer active
Andorra	✓				
Anguilla	✓				
Antigua & Barbuda	✓				
Aruba	✓				
Austria			✓		
Bahamas	✓				
Bahrain	✓				
Barbados	✓				
Belize	✓				
Bermuda		✓			
British Virgin Islands	✓				
Brunei					
Cayman Islands		✓			
Campione d'Italia				✓	
Cook Islands	✓		✓		
Cyprus		✓	✓		
Delaware					

Jurisdiction	Listed by OECD, 2000	Advance commitment to the OECD, 2000	Primarily benefits non-residents only	Primarily benefits residents only	Defunct/closed down/ no longer active
Djibouti					
Dominica	✓				
Dubai					
Gibraltar	✓				
Grenada	✓				
Guernsey/Sark/Alderney	✓				
Hong Kong					
Ireland (Eire)			✓		
Isle of Man	✓				
Jersey	✓				
Labuan					
Liberia	✓				
Lichtenstein	✓				
Luxembourg			✓		
Maldives	✓				
Malta		✓			
Marshall Islands	✓				
Mauritius		✓	✓		
Monaco	✓				

Jurisdiction	Listed by OECD, 2000	Advance commitment to the OECD, 2000	Primarily benefits non-residents only	Primarily benefits residents only	Defunct/closed down/ no longer active
Montana					
Montserrat	✓				
Nauru	✓				
Netherlands			✓		
Netherlands Antilles[1]	✓				
Nevada					
New York			✓		
New Zealand			✓		
Niue	✓				✓
Norfolk Island					✓
Panama	✓				
Puerto Rico			✓		
Samoa	✓		✓		
San Marino		✓			
Seychelles	✓				
Singapore					
St Christopher (Kitts) & Nevis	✓				
St Lucia	✓				
St Vincent & the Grenadines	✓				

Jurisdiction	Listed by OECD, 2000	Advance commitment to the OECD, 2000	Primarily benefits non-residents only	Primarily benefits residents only	Defunct/closed down/ no longer active
Switzerland					
Tangier					
Tonga	✓				✓
Turks & Caicos Islands	✓				
United Kingdom[2]			✓		
US Virgin Islands	✓				
Vanuatu	✓				
Wyoming					

[1] The former Netherlands Antilles was dissolved in 2010, with its member states/islands becoming either integral parts of or self-governing countries within the wider Dutch kingdom. However, this jurisdiction existed at the time of the OECD's 2000 listing.

[2] In addition to non-resident activities, the low-tax regime in the United Kingdom is also available to HNWIs classified as British Non-Domiciliaries ('UK non-doms'). Such persons are resident, but not domiciled, in the United Kingdom. These are usually people who have immigrated to the United Kingdom as investors, but maintain their domicile elsewhere. This status can be transmitted across generations. However, it only extends to a very small, but wealthy, minority of the UK population. Most UK residents do not directly benefit from its low/no-tax OFC/IFC facilities. The United Kingdom is a 'tax haven' only for non-residents and UK non-doms.

Sources: OECD (2000: 17) (for jurisdictions listed by the OECD). See also Rawlings (2005, 2007) for a discussion of jurisdictions operating as tax havens and OFCs/IFCs that were not listed by the OECD. For more extensive and comprehensive listings and discussions of low-tax jurisdictions, see: lowtax.net.

3. Risks, markets and practices: Tax havens and regulatory challenges

Low or no-tax jurisdictions combined with a lack of transparency and access to information about beneficial account holders present specific fiscal risks to OECD members and emerging markets alike. Significant revenues are forgone because of the use of OFCs. In 2008, the US Senate found that up to US$100 billion (AU$132 billion) a year was being lost in tax revenues as a result of offshore activities (Gravelle 2013: 1). In 2013, the UK-based overseas development charity Oxfam estimated that US$156 billion (AU$205 billion) per annum in tax revenue disappeared as a result of OFC use—enough to end global poverty (Oxfam International 2013a). Oxfam also concluded that US$38.4 billion (AU$50.5 billion) in tax revenues was being moved out of Africa each year as a result of trade mispricing—a form of profit shifting, whereby companies undervalue prices of exports that can then be sold at market rates abroad with the difference recouped offshore (Oxfam International 2013b).

Offshore finance centres are involved in a far wider range of activities than just accepting deposits in their banks. Money is actively managed, lent, reinvested, borrowed, used as collateral, pooled in collective investment vehicles and channelled through secondary markets back into onshore stock exchanges, property developments and industrial enterprises. All of these pose specific tax risks. Tax havens are host to a range of financial activities facilitating the active investment of funds. Even where money is deposited in an offshore bank, clients will expect a reasonable rate of return and, in an era of historically low interest rates, this will mean that it is reinvested and traded in shares, bonds, property, hedge funds, foreign exchange markets and venture capital enterprises. Corporations will use OFCs to finance joint ventures, mergers and acquisitions and attract new sources of capital.

Table 37.2 Risks to revenue collection due to tax havens and OFCs/IFCs

Low tax risk	Medium tax risk	High tax risk	Invariably illegal/illicit tax risks
Offshore recruitment/human resourcing for non-residents	Offshore banking	Profit shifting	Not declaring reportable offshore income
Offshore payrolls for non-residents	Private charities and foundations	Transfer pricing	Fraud
Shipping registration	Credit finance	Back-to-back loans	False invoicing
Aircraft registration	Special purposes entities/vehicles	Asset stripping	Concealing reportable financial activity
	International business companies/ corporations	Offshore trusts	Money laundering
	Corporate restructuring	Thin capitalisation	
	Offshore invoicing	Round tripping/round robin finance	
	Offshore stock markets	Double book-keeping	
	Offshore mutual funds	IP & patent registration	
	Offshore superannuation and pension funds	E-commerce	
	Shifting residence/domicile	'Intangibles'	
		Trade mispricing	

Source: Author's work.

Transfer pricing or profit shifting makes extensive use of tax havens and OFCs. Corporations establish subsidiaries in low-tax jurisdictions and then sell goods and services to them at low prices, reducing overall income for headquarters but realising it offshore. In this way, profits can be shifted to low or no-tax jurisdictions. While rules, policies and laws have been introduced to prevent the abuse of transfer pricing, it has become a particular regulatory challenge with IP licensing and online e-commerce developments. As Drahos (2013: 91) observes: 'The sale or licensing of intellectual property rights is used to shift income from high tax jurisdictions to low tax jurisdictions.' As a result, a number of e-commerce companies such as Google, Apple, Amazon and Facebook have been able to use offshore centres to reduce tax liabilities in their US domicile and the countries where they operate. In Australia in 2013, Google paid virtually no tax. The company claimed it had paid AU$7 million on a AU$46 million profit; however, the company's profits from its Australian operations were actually somewhere in the vicinity of AU$2 billion, which had been shifted offshore, and its tax bill was in fact just AU$466,802 (West 2014).

One of the ways companies are able to shift profits and thus lower their tax liabilities is through what is referred to as the 'double Irish–Dutch sandwich' (Gravelle 2013: 11). Using this strategy, for example, Google registered IP rights in Ireland. This then established a subsidiary, which sold advertising into the rest of Europe. 'Sandwiched' between the Irish parent company and its affiliated European sales firm was a subsidiary incorporated in the Netherlands, which channelled royalty payments from the sales firm back to Ireland. The Irish parent company, however, then claimed that it was not in fact managed in Ireland, but in Bermuda, whose zero per cent tax rate was applied rather than Ireland's 12.5 per cent. The American rate of 35 per cent was nowhere to be seen (Gravelle 2013: 11; Wood 2014). Since the discovery of the double Irish–Dutch sandwich in 2010, it was revealed that a number of information technology companies had been using this or similar methods of profit shifting to reduce taxes, including Apple, Twitter and Facebook (Wood 2014). Facebook alone transferred 'USD $700 million [AU$920 million] to the Cayman Islands in a Double Irish' (Wood 2014). Like Bermuda, the Cayman Islands also has no tax on company profits. Combined with transfer pricing, IP registration and patent mobility, multinational corporations are provided with opportunities for enormous global flexibility in shifting profits and relocating proprietary rights, lowering (and even cancelling out) taxes in the process. As Drahos (2013: 91) has

demonstrated in his account of the regulatory challenges presented by parent offices and their globalisation, 'the scale of the problem has grown in magnitude'.

Even though the double Irish–Dutch sandwich has been closed in its current form under US pressure, whenever regulatory authorities discover and end one arrangement, others are quick to emerge and take their place. As *Forbes* tax columnist Robert W Wood (2014) wrote: 'Tax people will be scrambling to create new structures, but there's some breathing room. And when new structures are developed, I'll bet Ireland will have a role.'

Individual OFCs are seldom used in isolation, especially archetypical island state tax havens with low populations and small domestic markets where large transactions raise red flags of tax risk for revenue authorities. Instead, they form parts of wider structures involving multiple jurisdictions. Tax planners working for HNWIs and multinational corporations find countries with economies of substance (Netherlands, Singapore, Ireland and the United Kingdom) to be particularly attractive in arranging legal structures because of the network of double taxation agreements they are party to (which means that taxes are not paid twice and deductions can be claimed, sometimes to cancel them out altogether). These jurisdictions do have tax systems that can be quite high, but they 'ring fence' international operations (which are taxed at low or zero rates) off from domestic activities, which continue to be charged at regular rates. Companies and their lawyers and accountants can also conclude specific deals with particular governments to exempt them from local taxes even where they might ordinarily be payable. The European Grand Duchy of Luxembourg, which straddles the boundary between a medium-sized economy and an archetypical tax haven, has given hundreds of multinational companies special concessions and private agreements allowing them to avoid not only its 29 per cent company tax rate, but also taxes elsewhere, including in the corporations' home countries. In November 2014, 28,000 pages of tax agreements between Luxembourg's government and 340 multinational companies were leaked to the media, illustrating how these firms incorporated, organised and 'managed' subsidiaries and local parents out of Luxembourg to reduce and avoid their overall total tax bills, using variations of the double Irish–Dutch sandwich, together with other forms profit shifting,

IP flexibility, research and development deductions, back-to-back loans, interest rebates and transfer pricing (Bowers 2014). The Luxembourg authorities approved these tax agreements as perfectly legal.

There are active and synergistic relationships between OFCs and major financial markets and emerging economies. Money is invariably parked only temporarily in tax havens, before it is reinvested onshore, often sheltering under the tax-free domicile with which foreign incorporation provides it. Common law OFCs, such as those found in countries that are current or former UK territories, are able to draw on the precedents of trust and equity to manage HNWI and multinational corporate assets, income, profits and, from time to time, even losses (which can then be claimed as tax deductions back home). Through establishing trusts in OFCs, wealthy individuals can deny a beneficial connection with their property (which technically ceases to be 'theirs') and thus any income earned from it is accrued tax-free (or incurs minimal taxes) (see Rawlings 2011).

Companies, as opposed to individuals (although often the two are the same and this distinction is not mutually exclusive), find SPEs or special purpose vehicles (SPVs) that can provide corporate structures for subsidiaries that are particularly convenient for tax minimisation purposes. The BVI specialises in these as IBCs. Despite having a population of fewer than 30,000 people, the BVI has 459,000 globally active trading IBCs (TJN 2013). They are particularly attractive for investments into China. In 2009, the BVI, one of the smallest countries in the world, ranked as the second-highest source of FDI into China—the largest nation on Earth (Maurer and Martin 2012: 532; Vlcek 2014: 538).

Since OFCs proliferated in the 1970s, new ways to tax offshore profits and income have been developed. These include implementing controlled foreign company (CFC) rules whereby offshore income is treated as locally earned for tax purposes unless it can be proved otherwise, targeted listings of specific jurisdictions and applying direct measures to transactions involving them (for example, imposing withholding taxes or disallowing deductions) (Sharman and Rawlings 2006) and treating trust distributions as taxable dividends. However, the complexity of these arrangements can make taxing offshore structures challenging at the least, and impossible at the most. Moreover, these regulatory measures

are based on the disclosure of offshore investments and arrangements. They become particularly difficult to enforce where taxpayers secretly hide assets, income and profits offshore.

Until the turn of the twenty-first century, tax havens focused on providing financial regimes based on secrecy, privacy and confidentiality, to the extent that clients could be completely anonymous and virtually 'unknown'. This is still a feature of many OFCs. For example, the auditor who leaked the 28,000 pages of tax agreements with the Luxembourg Government has been charged with criminal offences relating to the 'theft' of information and its 'illegal' release to the media. The legal action against this whistleblower has been condemned internationally and reflects the increasing intolerance for tax evasion that is facilitated by excessive layers of confidentiality, anonymity and secrecy. As a result, multilateral organisations such as the OECD have been at the forefront of advancing efforts designed to reduce tax evasion by improving transparency, accountability and access to information about clients, monies and entities based in, and organised out of, tax havens and OFCs. These efforts are beginning to show signs of success.

4. Closing the gaps: Between bilateral bundles and multilateral advances

The regulation of tax havens has bilateral, unilateral and multilateral characteristics. The main multilateral organisations involved in pursuing new policy initiatives to improve the regulation of tax havens and offshore finance include the OECD, IMF, World Bank and the G20. In 2000, the OECD identified 35 tax havens, in addition to advance letters of commitment to the principles of transparency and exchange of information from six other OFCs/IFCs (OECD 2000; see also Table 37.1). Despite initial hostility from the tax havens—a term that was soon dropped in favour of more neutral classifications such as 'participating partners'—the OECD reached out to these jurisdictions and, in 2001, formed the Global Forum on Transparency and Exchange of Information for Tax Purposes. Members of the forum, which included OECD states and the participating partners, concentrated on establishing peer-reviewed benchmarks for international best practice in improving financial transparency in banking, accounting and funds management processes and exchanging this information between countries. A number of bilateral tax information exchange agreements

(TIEAs) were concluded between OECD states, an increasing number of interested non-OECD countries and the participating partners (the 'former' tax havens) (Rawlings 2007). Until the Global Financial Crisis (GFC) erupted in 2008, these TIEAs were negotiated bilaterally, contained caveats preventing 'fishing expeditions' and usually included provisions requiring a local court order before information about beneficial account holders in contracting states could be supplied. They necessitated expensive and time-consuming investigations with no automatic rights of access. The TIEA framework established by the OECD before 2008 was 'not a "multilateral" agreement in the traditional sense. Instead, it provide[s] the basis for an integrated bundle of bilateral treaties' (OECD 2002: 5).

The OECD's efforts in establishing best practice global regulatory norms, guidelines and policies were advanced as a result of the GFC. Although tax havens and OFCs did not cause the GFC, they were involved in some of the more dubious, opaque and troubling corporate structures and debt-saturated arrangements that were at its core. For example, many subprime mortgage funds, collective investment vehicles and huge stockpiles of debt were domiciled offshore in tax havens, benefiting from regimes of secrecy, to the extent that in some cases even parent headquarter companies had no idea of their liabilities together with the retail banking sector whose credit systems almost came to a halt as a result.

In the wake of the GFC, which brought to light even more scandals involving tax evasion, the OECD, with a mandate provided by the G20, has moved towards establishing truly multilateral regulatory measures to reduce risks associated with OFCs. In 2009, the Global Forum on Transparency and Exchange of Information was restructured. Originally emerging out of the 2001 listing of tax havens, by 2014, the Global Forum had 124 members, including most tax havens, OECD member states, related multilateral organisations and representatives from emerging markets. In 2014, the forum established the Common Standard for the Automatic Exchange of Information. This complements, but also moves far beyond, the extensive range of TIEAs that now exist between states, and allows information to be obtained directly from banks and other financial institutions (including trust companies) without specific court orders, warrants or expensive investigations. Some 65 countries and territories, including major OFCs/IFCs, have committed to the standard. In related developments, the 1988 Convention on Mutual

Administrative Assistance in Tax Matters was amended in 2010 and became available for states to sign in 2011. By 2014, 84 jurisdictions, including financial centres previously classified by the OECD as tax havens, had signed. The convention strengthens international cooperation between states to collect and assess taxes and recover monies owing and enshrines the Automatic Exchange of Information Standard between signatories.

5. Conclusion

These initiatives pioneered by the OECD (in conjunction with other multilateral organisations such as the IMF, World Bank and European Union, together with leading state actors such as the United States) have invoked principles of responsive regulation, cooperation and consensus rather than sanction, penalty and threat against tax havens. Indeed, the OFC states have been brought on board to such an extent that they are considered partners readily committed to ending global tax evasion. So successful have these strategies been that the OECD has consigned its 2000 tax havens listing 'to history'. As it observed in its assessment of the work of the Global Forum:

> There have been many positive changes in jurisdictions' transparency and exchange of information practices since that time … no jurisdiction is currently listed as an uncooperative tax haven by the OECD. While these lists are not replaced by the progress report, they should be seen in their historical context. (OECD 2013: 23)

However, this does not necessarily mean that tax havens have ceased to exist. If anything, they are stronger than ever. Yet tax havens are not confined just to distant islands and high alpine sovereign valleys. Major onshore markets, in conjunction with their niche offshore auxiliaries, continue to provide highly attractive features that allow for the extensive minimisation of taxation through taking advantage of regulatory lacunae, diversity and exceptions in legal regimes, policies and principles. Transfer pricing, profit shifting and the ability to register IP in low or no-tax jurisdictions have become fundamental in maintaining offshore markets, affording multinational companies, especially those dealing with technologies and patents, enormous flexibility in driving down costs, including their fiscal obligations (see, for example, Drahos 2013). Even with advancements in transparency and access to financial account information kept offshore, this will not necessarily prevent

the rapid and widespread movement of assets, property and income from one jurisdiction to another in search of lowered tax costs, which is increasingly and openly occurring as a continued risk to the fiscal foundations of contemporary economies and an increasingly sceptical taxpaying citizenry who do not have the same opportunities for global mobility.

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Investor–state dispute settlement

Kyla Tienhaara

1. Introduction

In 2011, in a small court in Ecuador's Amazon jungle, a judge ordered the American oil giant Chevron to pay US$9 billion (AU$12 billion) in damages for pollution in the region caused by drilling activities in the 1970s and 1980s. The company quickly denounced the landmark ruling as illegitimate. More than a year before the final ruling had been issued, Chevron had already taken steps to initiate an investor–state dispute against the Government of Ecuador under the terms of a United States–Ecuador bilateral investment treaty (BIT). The company seeks to avoid paying the $9 billion by convincing an international tribunal that the courts of Ecuador are corrupt and that the government is ultimately responsible for any environmental damage and associated health issues experienced by local residents.

In the same year, only days after a tsunami struck Japan, leading to the Fukushima nuclear disaster, German Chancellor Angela Merkel announced the closure of Germany's oldest operating nuclear power plants. Shortly thereafter, the government moved to phase out all nuclear power by 2022. While German society has embraced this policy move, unsurprisingly, nuclear power companies in the country did not. In 2012, after months of threatening to take the government to arbitration, the Swedish energy company Vattenfall finally launched its case under the provisions of the Energy Charter Treaty, an international

trade and investment agreement in the energy sector. Press reports have suggested that Vattenfall will claim €4.7 billion (AU$7 billion) in compensation for the closure of its two nuclear power plants. The company reached a settlement with the government in a previous dispute over the regulation of a coal-fired power station.

On the other side of the world, Australia was introducing legislation in 2011 that requires that all tobacco products be sold in plain brown packaging. Health warnings would still be included on cigarette packets, but logos would disappear. Several companies challenged the legislation as an expropriation of their intellectual property in Australia's High Court. They lost. However, one company was also able to pursue its case for compensation in international arbitration. Philip Morris International restructured its investment through its Asian subsidiary to access arbitration under a BIT between Hong Kong and Australia. The company was no stranger to arbitration, as it had already launched a dispute against Uruguay for similar tobacco packaging requirements.

Over the past decade, there has been an explosive increase in cases of investor–state dispute settlement (ISDS). Until the mid-1990s, only a handful of cases had emerged. Then, following a few high-profile cases, everything changed. Between 2003 and 2013, one arbitral body registered more than 30 new cases every year and more than 50 cases in each of the last three years of that 10-year period (UNCTAD 2014). As of the end of 2014, there were 608 known cases. By then, 101 governments had responded to one or more ISDS claims (UNCTAD 2015).

As the above examples demonstrate, what is notable is not just the number of disputes that have arisen, or the number of states that have been involved, but also the particular nature of disputes that have emerged. Rather than solely involving straightforward incidences of nationalisation or breach of contract, modern investor–state disputes often revolve around public policy measures and implicate sensitive issues such as health and environmental protection.

How did such matters become the purview of unelected ad hoc panels whose expertise lies in the realm of commercial law? The answer is not immediately evident. It could be argued that states themselves are the ones responsible. Governments have quietly been negotiating bilateral and regional investment agreements (collectively referred to as international investment agreements (IIAs)) that provide foreign investors with considerable legal protection and access to international

arbitration. There are more than 3,200 such agreements in existence (UNCTAD 2015). Governments, particularly in developing countries, also sign contracts directly with foreign investors that contain similar privileges (or 'rights', depending on one's view).

However, although states may have opened the door to ISDS, they arguably did not anticipate that arbitral tribunals would reach so far into the public policy domain. IIAs were ostensibly created to promote foreign investment in developing countries and designed to protect investors from discrimination and particularly egregious conduct on the part of the host state. While the performance of investment agreements in helping states to attract investment is debatable, the success investors have had in convincing arbitrators to stretch the traditional meaning of clauses on 'expropriation' and 'fair and equitable treatment' is undeniable.

This chapter examines the system of ISDS and its importance in global affairs. First, the basis for the system—a complex web or 'spaghetti bowl' (as it is sometimes called) of bilateral and regional investment agreements—is outlined. Second, the authority of arbitral tribunals, and how this authority has expanded over time, is discussed. The chapter then turns to the cost of investment arbitration for states, both in hard monetary terms and in terms of the unquantifiable costs of 'regulatory chill'. Finally, the current backlash from some states against investment arbitration is examined. The chapter concludes that the future for ISDS is not bright, as, increasingly, even the traditional champions of the system (developed countries) are beginning to question its merit.

2. The spaghetti bowl

As there is not an unlimited supply of investment that is equally distributed around the world, it is often argued that states must compete for foreign direct investment (FDI). Governments compete for investment by providing incentives (such as tax holidays, loan guarantees and cash grants) and also by differentiating their legal jurisdictions from those of their competitors. In this latter sense, legal reform has become an important tool for developing countries in their bid to attract FDI.

Domestic measures, although important for signalling, are limited by the 'credible commitment' problem—that is, governments cannot demonstrate to investors in a meaningful way that a country's 'investment environment' will not simply be changed once investors have established

themselves in the country and have substantial sunk costs. Furthermore, due to the perceived or real corruption of the courts in many countries, investors do not view local remedies as a neutral or fair option for the resolution of disputes. This is the reasoning behind the development of the system of ISDS.

The first proposal for ISDS emerged in the 1959 Abs–Shawcross Draft Convention on Investment Abroad (Newcombe and Paradell 2009). Businesspeople rather than governments drafted this document, but it provided a model that proved to be extremely attractive to developed countries and was taken up by the Organisation for Economic Co-operation and Development (OECD) in its Draft Convention on the Protection of Foreign Property of 1962. While the OECD draft convention was never adopted due to opposition from some member states, it was revised in 1967 and approved by the council of the OECD as a model for BITs.

The first BIT containing an ISDS clause was signed between Italy and Chad in 1969. While the pace of BIT signing was initially slow, this changed in the 1990s. In the period following the 1982 debt crisis, most developing countries shifted from an antagonistic or ambivalent approach to FDI to the active courting of foreign investors (Van Harten 2007). In this environment, BITs—designed to provide investment *protection*—were presented to developing countries as vehicles for investment *promotion*. This 'mechanism of reward' (in the terminology of Drahos, Chapter 15, this volume) was central to the spread of BITs. Unfortunately, research suggests that BITs may not actually have any impact on flows of FDI (Yackee 2008; Aisbett 2009).

In addition to hoping to attract FDI, many governments in developing countries were pressured by developed countries and international finance institutions to sign BITs. José Alvarez, a former member of the US BIT negotiating team, has acknowledged that a BIT is 'hardly a voluntary, uncoerced transaction' (quoted in Garcia 2004: 316). The most economically and politically powerful developing countries have managed to avoid BITs; Brazil has signed several, but never ratified one, and China's BITs have historically been quite strictly circumscribed.

OECD countries participate in BITs almost exclusively with developing countries; while there is an increasing number of global South–South BITs, there is a dearth of agreements between industrialised nations. On the other hand, there are a number of bilateral and regional

free-trade agreements between developed countries that have chapters on investment, the most famous being the North American Free Trade Agreement (NAFTA). NAFTA's Chapter 11 on investment marks a significant milestone in investment law, despite the fact that the language of many of the provisions in the agreement is essentially drawn, with relatively minor modifications, from BITs that the United States had concluded prior to 1993. It is noteworthy because investors have extensively employed ISDS under Chapter 11, marking a new era of investment arbitration, and arguably triggering the current surge in disputes brought under other agreements. Despite the fact that the investment chapter was largely aimed at constraining Mexico, investors have made claims against all three signatory countries and Canada has actually faced the largest number of disputes.

Attempts have been made to enshrine ISDS in a global treaty on investment. In 1995, negotiations on a multilateral agreement on investment (MAI) were commenced under the auspices of the OECD. While the OECD is not a global forum, the MAI, once completed, would have been opened up for signature by any country. However, disagreements among members of this 'like-minded' club were more intractable than expected and ardent opposition to the agreement from civil society also complicated the negotiations. In 1998, the MAI talks fell apart. There remains debate over whether non-governmental organisations (NGOs) and the 'anti-globalisation' movement 'killed' the MAI through their campaigns to pressure governments or if, instead, OECD countries simply failed to find common ground on certain key issues (Graham 2000; Muchlinski 2001).

In 2003, debates about an MAI once again came to the fore, at the World Trade Organization (WTO) Ministerial Conference in Cancun, Mexico. These talks were also a dramatic failure. In a classic example of forum shifting (see Drahos, Chapter 15, this volume), the United States and other countries have since refocused their efforts on negotiating regional agreements, such the United States–Central America Free Trade Agreement (CAFTA) and the Trans-Pacific Partnership (TPP) Agreement, as well as more BITs. These 'minilateral' agreements are easier to negotiate and generally garner less attention from NGOs (although this has not been the case with the TPP). The result is effectively near global coverage of investment protection (particularly because corporations can shift nationality; see below), but in a complex and confusing patchwork of rules.

3. The expansion of arbitral authority

IIAs appear deceptively mundane at first glance. Essentially, they are reciprocal agreements between states to provide investors from one state with legal protection when they are operating within the territory of the other state(s). The precise content of IIAs varies to a certain degree. Generally speaking, IIAs contain provisions on national treatment, most-favoured nation treatment, fair and equitable treatment/the minimum standard of treatment and expropriation (Sornarajah 2004). However, these standards are very vague and they are consequently open to a considerable amount of interpretation. Experience has demonstrated that minor variations in wording can have substantial consequences for governments.

As there is no global treaty on investment, there is also no international investment court (although the European Union has recently proposed the creation of one). Instead, one-off arbitral tribunals review the cases launched by investors and interpret the provisions in IIAs. Procedurally, these tribunals follow established arbitration rules, typically those developed by the United Nations Commission on International Trade Law (UNCITRAL) or the International Centre for Settlement of Investment Disputes (ICSID). Regardless of what rules are chosen by the investor, the tribunal will have three members: one chosen by the investor, one chosen by the state and a third who is mutually agreed on and will act as president. Barristers and retired judges are not the only ones who are frequently appointed as arbitrators, but also professors, who, in many cases, also have careers as leading private lawyers.

From the historical context in which IIAs were first developed, one can extrapolate what states intended to give arbitrators authority over: the resolution of certain types of disputes that might arise between a government of one party to an IIA and an investor from one of the other parties to the IIA. Their intention was not to extend protection to all investors, but only to those who were domiciled in one of the other parties to the IIA. Furthermore, their intention was not to delegate to arbitrators the authority to resolve every possible type of dispute that could arise between an investor and a government. The expansion of arbitrator authority in recent years stems from arbitrator movement away from the intentions of states both in terms of *who* should be protected under IIAs and *what* constitutes a breach of treaty.

On the issue of *who* should be protected, there are ongoing debates about the definition of the fundamental terms 'investor' and 'investment', but another fundamental problem is 'treaty shopping'—when a multinational corporation establishes a holding company in one IIA party to access arbitration when a dispute arises over its investment in the territory of another IIA party (Van Harten and Loughlin 2006). One oft-cited example of a treaty shopping investor is the American firm Bechtel. When a dispute arose over its investment in Bolivia, Bechtel established a subsidiary in the Netherlands to access arbitration through that country's BIT with Bolivia (the United States–Bolivia BIT was not in force at the time). As noted in the introduction, Philip Morris International also engaged in treaty shopping to bring a suit against Australia, although, in this instance, the strategy backfired as the panel ruled that it did not have jurisdiction over the case.

Tribunals that have determined that they do have the jurisdiction to hear the claims of treaty shopping investors have expanded arbitration beyond what was intended by states when they established *reciprocal* relationships with other states through IIAs. Domestic investors have even used this method to gain access to treaty protection against their own government. Sornarajah (2010: 280) argues that it 'could never have been the intention of any state' to protect domestic investors through IIAs, as the unambiguous aim of these agreements was to protect and promote *foreign* investment.

In terms of *what* constitutes a breach of an IIA, prior to the mid-1990s, when ISDSs began to flourish, only very dramatic actions by a state that were clearly directed at an investor (for example, an expropriation of property or a blatant act of discrimination) were seriously contemplated as breaches of international law. However, in more recent cases, several standard investment provisions have been interpreted in such a broad manner that it would appear that (at least some) arbitrators believe that it is within their purview to review any state regulatory action, or indeed inaction, that has a negative (not necessarily devastating) impact on a foreign investor or investment.

The clearest example of this is the arbitration-induced evolution of the 'fair and equitable treatment' standard. Several tribunals have moved away from the traditional customary international law understanding of this term (requiring states to provide a 'minimum' standard of treatment including access to justice) and have advocated a 'plain meaning' interpretation that requires a state to: comply with the tenets of

'good governance', maintain a 'stable and favourable investment climate' and meet the 'legitimate expectations' of foreign investors. Such a capacious standard effectively allows tribunals to review any regulatory measure, even if it was enacted in the public interest (for example, to protect the environment; see further Tienhaara 2009).

The evolution of the fair and equitable treatment standard illustrates very well the idea that the regulatory state and regulatory capitalism are not solely about deregulation, but instead involve the creation of new rights and an element of re-regulation (see Scott, Chapter 16; and Levi-Faur, Chapter 17, this volume). To comply with the fair and equitable treatment standard, as defined by some tribunals, states are not only required to refrain from certain actions that would interfere in the operation of an investment, but also obliged to proactively take certain steps (for example, to ensure transparency when policies that affect investors are being developed). In other words, the state is being asked to do both more and less at the same time.

By expansively interpreting both *who* is protected by IIAs and *what* IIA protection entails, arbitrators have pushed the bounds of the authoritative space that had been carved out for them by states. In some respects, ISDS tribunals resemble the transnational non-state regulatory regimes discussed by Tusikov (Chapter 20, this volume). Although the 'rules' of investment protection are ostensibly created by states (undoubtedly with input from corporate lobbyists), they are so vague that they are only given meaning when they are applied to specific facts and are filtered through the ideological lens of an arbitrator. As such, arbitrators are effectively creating rules and acting as regulators. Given the absence of appropriate accountability mechanisms to accompany such a role, there is an understandable feeling (expressed even by those within the system) that the legitimacy of ISDS is increasingly in doubt (Van Harten 2007; Sornarajah 2010).

4. How BITs bite

It has been said that 'the awards of arbitrators are more widely enforceable than any other adjudicative decision in public law' (Van Harten 2007: 5). IIAs often explicitly obligate states to recognise awards, thus allowing investors to seek enforcement in the local courts of the host state. Furthermore, where an IIA provides for enforcement

under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), an investor can seek enforcement in the domestic courts of any state party to the convention. Awards may also be enforceable under other arbitration treaties such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Tribunals are given a significant degree of discretion to determine damages, which may include a company's 'lost future profits'. Many ISDS claims now exceed US$1 billion (AU$1.3 billion) and, although the compensation actually awarded is generally much lower than what is sought, the impact on the public purse can be substantial. The Czech Republic was obliged to pay more than US$350 million (AU$460 million) in compensation to a Dutch investor, which, according to one report, meant a near doubling of the country's public sector deficit (IISD 2007). In 2014 the US$1.77 billion (AU$2.33 billion) award against Ecuador (brought by Occidental Petroleum)—previously the largest known ISDS award in history—was vastly outstripped by a mind-boggling US$50 billion (AU$66 billion) award against Russia in its high-profile dispute with the oil company Yukos.

Even if a state wins a case it may be costly. International arbitration was originally seen as a cheaper and quicker alternative to domestic courts, but it is actually very expensive and cases can drag on for years. An OECD survey shows that legal and arbitration costs for the parties in ISDS cases have averaged over US$8 million (AU$10.5 million), with costs exceeding US$30 million (AU$39 million) in some cases (Gaukrodger and Gordon 2012). Australia is reported to have spent AU$50 million in its dispute with Philip Morris—a case that never even proceeded to the merits phase.

The considerable procedural costs associated with arbitration as well as the risk of having to pay large awards have led some scholars to suggest that the mere threat of an investor–state dispute could chill the development of regulation in the public interest. Peterson (2004: 139) notes that 'practicing lawyers do admit that they hear rumours of investors applying informal pressure upon host states while brandishing an investment treaty as a potential legal stick'. In a globalised world, ISDS cases may also be initiated in one jurisdiction by investors hoping to deter the development of policies in other jurisdictions. This may, in part, explain Philip Morris's disputes with Uruguay and Australia over

plain packaging of cigarettes—that is, the company may be hoping that the threat of arbitration will deter the development of similar labelling policies in other countries.

Occurrences of regulatory chill are incredibly difficult to prove (effectively, one has to find evidence of something that *has not happened*). Nevertheless, several scholars have put forward case studies that suggest that investor threats of arbitration had an impact on the development of specific policies (Schneiderman 2008; Tienhaara 2009, 2011).

5. Once BITten, twice shy

There is evidence that government officials in developing countries historically had a poor understanding of the risks posed by signing IIAs. For example, the Attorney-General of Pakistan, Makhdoom Ali Khan, has claimed that BITs 'are signed without any knowledge of their implications' and it is not until 'you are hit by the first investor–state arbitration [that] you realize what these words mean' (quoted in Peterson 2006). It is also made very clear in a government document from South Africa that BITs have had unanticipated policy consequences in that country: 'Prior to 1994, the RSA [Republic of South Africa] had no history of negotiating BITs and the risks posed by such treaties were not fully appreciated at that time' (DTI 2009: 5).

In fact, even the few developed countries that have faced investor–state disputes appear to have been taken aback by the scope of investment treaties, as interpreted by tribunals. For example, Stiglitz (2008: 460–1) suggests that US President Bill Clinton was unaware of the potential of NAFTA's Chapter 11 to be used to challenge government regulation, and goes on to point out that if:

> the United States, a country with a great deal of experience adopting such agreements, was not fully aware of NAFTA's import, developing countries are even less likely to understand the complexities of such agreements.

The absence of evidence of any clear benefits of IIAs in terms of increased FDI flows, coupled with increasing concerns about the costs of the system, has led many countries to reconsider BITs and the inclusion of ISDS clauses in trade agreements. Reactions have ranged

from the careful qualifying of certain treaty standards in new agreements to the more radical rejection of and withdrawal from BITs and arbitral institutions.

Despite the fact that the United States has never lost a case, there is considerable opposition to ISDS from both left-wing and right-wing political parties and groups in America (even the Cato Institute has come out against ISDS; see Ikenson 2014). Nevertheless, the government has opted to continue to strongly support the system while introducing a number of reforms. The content of the US Model BIT (used as a template in all IIA negotiations) was revised in 2004 and 2012 to clarify the meaning of several provisions and also to increase the transparency of the ISDS process.

Other countries, such as Canada and Colombia, have also revised their model BITs in ways that restrict the discretion of arbitrators. Interestingly, Norway—a country that ceased signing BITs in the mid-1990s due, in part, to concerns about their policy implications—formed a working group to develop a new model in 2006. However, the public debate about the new model was so polarised—one side arguing that the model did not provide investors with enough protection and the other suggesting that it would restrict the government's ability to regulate in the public interest—that, in the end, it was shelved (Vis-Dunbar 2009).

Norway's initiatives in this area, though ultimately unsuccessful, have been much more innovative than those taken in other Western European countries, where BITs have, by and large, remained short, simple and vague documents. However, as a result of the 2009 Treaty of Lisbon, the negotiation of IIAs now falls under the exclusive competence of the European Commission (EC). In April 2011, the European Parliament released a resolution on the future of European international investment policy, which expressed the parliament's 'deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses' and called on the European Commission to 'produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements' (European Parliament 2011: para. 24).

The debate about ISDS in Europe has since intensified. Negotiations for the Comprehensive Economic and Trade Agreement (CETA) with Canada concluded in October 2013, but, in January 2015, France and Germany requested that the European Commission review the treaty

and remove or modify the ISDS provisions. In part, this is an attempt to also steer the ongoing negotiations in the Transatlantic Trade and Investment Partnership (TTIP) with the United States. The results of a public consultation on ISDS in the TTIP resulted in over 150,000 submissions, the majority of which expressed opposition to its inclusion in the treaty.

Australia has also had a complicated relationship with ISDS. The Australia–United States Free Trade Agreement, signed by the conservative Howard Government in 2004, excluded ISDS. Australia subsequently negotiated several agreements containing ISDS, but, in April 2011, the Gillard Labor Government discontinued this practice. The Gillard Government's policy was that it would not support:

> provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses … [or] provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. (DFAT 2011)

The Abbott Government then abandoned this policy, opting to approach ISDS on a case-by-case basis, accepting it in treaties with South Korea and China but excluding it in one with Japan (which is rendered irrelevant in the event that the TPP comes into force). The change in policy provoked a Greens senator to propose a piece of legislation that would prohibit the government from agreeing to ISDS in any treaty in the future (Whish-Wilson 2014).

Developing countries have, by and large, been most affected by ISDS and have also reacted the most strongly against it. BITs have been unilaterally terminated by Venezuela, Bolivia, Ecuador and South Africa (UNCTAD 2013). It has also been reported that Indonesia is considering terminating all of its BITs. In 2015, India released a model BIT that is a radical departure from traditional agreements, and is particularly notable for its exclusion of any reference to 'fair and equitable treatment'.

Bolivia, Ecuador and Venezuela have all denounced the ICSID Convention. In explaining the move, Bolivia's Trade Ambassador Pablo Solon suggested that arbitration is expensive and biased against developing countries (Fairies 2007). The first seeds of Bolivian discontent with ICSID were likely sown during the controversial *Aguas Del Tunari* case (a dispute over a water privatisation contract, often referred to as

Bolivia's 'water war'). At the time Ecuador made its denunciation, the country was facing more than US$12 billion (AU$16 billion) worth of ICSID-based ISDS claims. The withdrawal of these countries from ICSID does not affect ongoing cases and future cases may still arise under other arbitration rules. Nevertheless, the move away from ICSID sends a strong message to the international community that these countries are dissatisfied with ISDS.

6. Conclusion

The future of ISDS is uncertain. Although some governments continue to sign IIAs, they are doing so at a much slower pace than in the 1990s. While this is in part a result of the inevitable exhaustion of potential treaty partners, it also reflects increasing doubts about the value of the system. As the number of new treaties declines, the content of those that do emerge is also evolving in a way that reduces arbitrator discretion and, thus, authority.

At the same time, record numbers of investors are making use of ISDS through existing IIAs. As cases pile up and more information about these cases becomes available (in part due to increases in the transparency of the ISDS process), opposition from civil society intensifies. Complaints about ISDS are not limited to one end of the political spectrum; farmers who want to be able to 'lock the gate' to coal-seam gas exploration companies share the same concerns about ISDS as do environmental NGOs.

Strong reactions against ISDS are also no longer confined to 'radical left-leaning' governments in Latin America; steps to withdraw from ISDS or limit its application have been taken by governments with very different perspectives on broader issues of globalisation and trade liberalisation. What appears to be the common thread linking governments that have taken action on this issue is a negative experience with arbitration. This would tend to suggest that, in the coming years, as more states are exposed to ISDS claims, discontent with the system will grow.

Alternatively, it is possible that arbitrators will recognise that the writing is on the wall (as they did when ISDS was identified as being overly 'secretive') and will begin to self-regulate to avoid further circumscription of their powers or the complete abandonment of the

system. However, such restraint may equally doom ISDS to obscurity because, if the main clients of the system (only investors can bring suits) do not view it as beneficial (for example, if they do not have a high likelihood of winning), they will look elsewhere for the means to achieve their objectives.

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The networked (agency) regulation of competition

Imelda Maher

1. Introduction

The regulation of competition, as a phrase, is, at first glance, contradictory. How can we write of regulating competition when regulation and competition are classically viewed as alternatives or opposites? Competition law is concerned with deterring restraints on competition in the market mainly by prohibiting anticompetitive agreements and abuse of market dominance and by requiring prior approval of mergers that are likely to restrict competition.[1] Thus, the competitive market, seen as a public good, is facilitated as the best mechanism through which to empower the consumer (Drexl 2004). Regulation, on the other hand, is classically seen as the control, order and influence of conduct through standard-setting, monitoring, compliance and enforcement (Hood et al. 2001: 23). It is closely associated with state control of the market where there is market failure and is seen as addressing particular markets—notably, utilities. It is supervisory and instrumental in nature. Competition law is generally applicable across all markets, is associated with a more rule-based doctrinal approach and is prohibitory in nature. The two phenomena are thus portrayed as opposites.

1 See, for example, the model competition law of the United Nations Conference on Trade and Development (UNCTAD 2010).

However, this clearcut distinction obscures the extent to which regulation and competition overlap (Maher 2004). Thus, the traditional notion of regulation as command and control has dissipated in favour of more nuanced definitions where the emphasis is on 'steering' by the state rather than 'rowing'; where private and meta-regulation have decentred the state as market regulator (Coglianese and Mendelson 2010); and where competition has been introduced into classic regulatory domains—telecommunications being the best example (Baldwin et al. 1998: 24). Similarly, a shift can be seen in competition law, where a more instrumental quality has emerged, with instruments of market control appearing as part of the 'toolkit' of competition agencies. This hybridisation suggests the classic regulation/competition dichotomy needs to be more nuanced (Dunne 2014a). They can be viewed on a continuum, with command-and-control regulation at one end of the spectrum and the ordinary workings of a market based on contract law and property rights at the other end. Competition law lies somewhere in between because it constrains freedom of contract to the extent necessary to ensure competition (Maher 2004).

2. Instruments and institutions

Competition regimes use organisational forms and instruments that are regulatory in nature to ensure markets remain competitive. As well as the classic deterrence approach to anticompetitive behaviour with fines, injunctions and even criminal sanctions, competition regimes have developed hybrid legal instruments that straddle competition and regulation (Dunne 2014a). For example, in the United Kingdom, market studies constituting a review of a particular market may lead to a wide range of competition or regulatory actions, while sectoral studies in the European Union (EU) may lead to further individual investigations and sanctions.[2] Thus, a European Commission pharmaceutical sector inquiry in 2009 led to proceedings with a fine of €60 million (AU$89 million) imposed in one instance (Jones and Sufrin 2014: 728).[3] Competition litigation may also lead to a regulatory-type outcome, for example, in disputes involving intellectual property rights (IPR). If the IPR holder's conduct is deemed anticompetitive, the outcome may be to require mandatory licensing with monitoring systems to ensure the licences

2 *Enterprise Act 2002*, ss. 131–4 and Regulation 1/2003 OJ 2003 L 1/1, Article 17.
3 *AstraZeneca AB and AstraZeneca plc v. Commission* [2012] ECR I-770, Case C-457/10P.

are offered on a 'fair, reasonable, and non-discriminatory' (FRAND) basis. Similarly, where access to an essential facility (the classic example of which is a port) is deemed necessary to prevent anticompetitive practices, the remedy may be mandatory and very different from the traditional cease and desist (and fines) approach found in competition law (Hellström et al. 2009). A legislative variation on this can be found in Australian competition law (Dunne 2014a: 253).[4]

In terms of organisational form, competition regimes, like regulatory regimes, are characterised by agencies that operate at arm's length from the executive. Agency networks are an increasingly common feature of both regimes. Networks have emerged as a result of the shift from government to governance (Rhodes 1997); from 'rowing' to 'steering'; from greater delegation of executive functions to agencies; the liberalisation of markets; the exponential growth in markets as a result of globalisation; and recognition of the importance of information in securing particular policy and enforcement outcomes. Competition networks can be seen as part of this trend, especially in the transnational context where jurisdictional overlap creates incentives for communication and coordination. This overlap arises in three main contexts: between the competition agency and sectoral agencies; where there are multiple competition agencies enforcing the same rules; and internationally, given so many competition disputes are not limited to single jurisdictions but there is no international competition regime. The exponential growth in national competition regimes in the past 25 years, from 23 in 1990 to 127 in 2013, has also vastly increased the risk of jurisdictional overlap and the need for coordination of enforcement and information-sharing across borders (Capobianco et al. 2014: 21).

3. Networks

Börzel (1998: 260) defines networks as:

> a set of relatively stable relationships which are of non-hierarchical and interdependent nature linking a variety of actors, who share common interests with regard to a policy and who exchange resources to pursue these shared interests acknowledging that co-operation is the best way to achieve common goals.

4 *Competition and Consumer Act 2010*, Part IIIA.

Networks as a form of governance can be contrasted with hierarchy and markets. They may be heterogeneous or homogeneous, sites of interest mediation with a strong interdependence between the state and private actors that are largely informal and a response to the wide dispersal of resources in the modern state (Börzel 1998).

Transgovernmental networks based on discussions among government subunits, including non-executive agencies, have been a feature of supranational and international governance for over 100 years. There are three broad categories: information exchange, enforcement coordination and harmonisation (Slaughter 2004: 44, 52). Competition networks are concerned with information exchange and enforcement coordination. Harmonisation—the mandatory adoption of common international standards—is not a feature even in the EU, which is a highly integrated supranational regime. Voluntary convergence of procedural or substantive rules, which encourages commonality while allowing for national variation, is found in many competition networks (Gerber 2010: Chapter 8). For example, in the EU, the European Competition Network (ECN) developed a nonbinding model leniency program (immunity from fines for those who bring cartels that operate secretly to the attention of the competition agency) (EC 2012a). Member states committed to use their best efforts within the limits of their competence to align their programs, culminating in the adoption of 26 leniency programs out of 28 states in six years (EC 2012b). Nonetheless, competition networks are primarily information and enforcement networks, with the majority information networks where the information being exchanged is 'soft' or 'grey' information about the internal operations and the challenges faced by agencies. The most valuable information—confidential information garnered following investigation—can be exchanged only where there is a statutory base. A rare example is the ECN.[5]

Sokol (2011) sees all transgovernmental and transnational networks operating within a soft law paradigm—that is, measures are capable of practical effects and possibly even legal effects (Snyder 1995: 64; Ştefan 2008: 753). Consensus, peer pressure and policy learning are the preferred methods of securing change. Soft law has been preferred even where binding legal norms are available—for example, the Organisation for Economic Co-operation and Development (OECD) may enact

5 Article 12, Regulation 1/2003 OJ 2003 L 1/1.

binding legal norms,[6] but it has not done so in the competition sphere, instead relying on soft law measures, primarily recommendations.[7] The United Nations Conference on Trade and Development (UNCTAD), as a subsidiary organ of the United Nations (UN), enjoys the status of an intergovernmental body and has enacted conventions in other fields, but relies on soft law measures to advance competition law in developing countries (Sokol 2011: 198). The exception is the ECN, which was set up (albeit minimally) by formal binding norms.[8]

Because networks operate mainly on the basis of soft law, their impact depends on political support, especially from the United States and the European Union. Braithwaite and Drahos (2000) show how the American model of competitive mega-corporate capitalism globalised and, alongside it, its commitment to competition rules. The EU emerged as a global competition law player when it rejected the Boeing/McDonnell Douglas and General Electric/Honeywell mergers that the United States had approved and when it spearheaded (unsuccessfully) a World Trade Organization (WTO) competition regime[9] (Maher 2012b). US rules are often seen as a surrogate for an international standard (Gerber 2010: 106), which may explain effective US resistance to a WTO competition regime (Freyer 2006: 154). Sokol (2011: 199) notes the powerful snowballing effect when the United States and European Union support an initiative such as the International Competition Network (ICN) and how the lack of such support is damaging, for example, for the UNCTAD model competition law (Gerber 2010: 144). China enacted a competition law in 2008 and in the future it, as well as the other 'BRICS' countries (Brazil, Russia, India and South Africa) may be regarded as equally influential in the competition sphere (Maher 2012a). For now, however, while it is a member of the Asia-Pacific Economic Cooperation (APEC) forum, China is not a member of the ICN or the OECD.

6 *Convention on the Organisation for Economic Co-operation and Development*, Paris, 14 December 1960, Art. 5.

7 The OECD published is first recommendation on competition policy in 1967. See: *Recommendation of the Council Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade*, 5 October 1967, C(567) 53/final (since revised).

8 Reg. 1/2003 OJ 2003 L 1/1, Art. 11–12.

9 See *Communication from the EC and its Member States*, WT/WGTCP/W/152, 25 September 2000.

The significance of political influence is most apparent in the failure of the EU initiative to include competition within the WTO and the US-supported compromise resulting in the ICN (Janow and Rill 2010). A WTO working group was set up to discuss competition law following the Uruguay Round in 1996.[10] The proposal was that members would have competition laws incorporating some core principles including nondiscrimination and a ban on cartels, a voluntary code on cooperation and provision of technical assistance. The initiative failed because of the unwillingness of the United States to see a binding international regime and the concerns of developing countries that competition laws would be imposed on them, the omission of antidumping and export cartels, that technical assistance would not be forthcoming and that the main beneficiaries would be Western multinational corporations securing access to their markets (Bhattacharjea 2006). The ICN is a very loose form of enforcement cooperation, seen as necessary by the United States given the European Union's rejection of the General Electric/Honeywell merger and one that went some way to meet EU preferences for an international framework (Maher 2012a). Thus, efforts to create binding norms were jettisoned to be replaced with softer governance through networks where the emphasis is on information sharing and consensus building and where competition law is taken as a given with the emphasis on how it is enforced rather than its relationship with the state, trade or whether it is appropriate (Sum 2013). Competition networks now include those found in international bodies (OECD, UNCTAD), regional groups (APEC, the Association of Southeast Asian Nations, Nordic Cooperation, the ECN, the European Free Trade Association Network, the European Competition Association) and networks set up just for competition matters—for example, the Lusaphone Network, the Ibero-American Forum and the African Competition Network (Maher and Papadopoulos 2012). At the same time, there is exponential growth in competition regimes, which is partly voluntary, partly a response to the World Bank or International Monetary Fund (IMF) initiatives, partly arising out of regional and bilateral trade or competition agreements and partly as a result of technical assistance programs (Maher 2012b). The proliferation of networks points to coordination problems, duplication of effort, a risk of systemic incoherence and overload and a narrow managerial approach to competition enforcement that eschews wider and more controversial concerns. At the same time,

10 WTO, *Ministerial Declaration*, 13 December 1996, WT/MIN(96)/DEC/20, 36 ILM 218.

the bottom-up and consensual approach allows for necessary variation in regimes and differences in approach, which may, in the long term, ensure a more responsive regulation of competition, although the extent of influence from actors such as international bodies, the European Union and the United States (and other actors depending on the network) is nonetheless an important caveat on what is understood within these networks as consensus.

Finally, these networks can be distinguished from epistemic communities, which are not defined by any particular membership, have no executive functions and are relatively amorphous but share expertise and a common discourse (Haas 1992). There is an important epistemic community of academics, bar associations and competition law practitioners in the international competition sphere (van Waarden and Drahos 2002). Such a knowledge community seeks to influence policy indirectly through its knowledge and expertise, which are acknowledged and drawn on by agencies. Given the extent to which the episteme and networks in the competition sphere overlap and are self-referential, competition law and policy may not adequately reflect wider trends in society. The episteme is also dominated by those with the greatest expertise and knowledge—that is, those from the European Union, United States and other Western states. It is not clear to what extent this expertise can be garnered to create dynamic and experimental spaces where agencies and other actors can engage to address common concerns and share best practice with a view to developing competition law in a manner widely perceived as a public good.

Competition agencies and sectoral regulators

As a significant feature of competition law practice, networks operate at different levels of enforcement and with different levels of intensity (Maher, forthcoming). Below, we explore those arising out of the interface of regulation and competition, those within states and polities where there are multiple enforcement bodies and, finally, regard is had to the largest international network, the ICN.

As a consequence of the liberalisation of sectors that historically had state monopolies or special or exclusive rights (for example, communications, energy), competition was introduced alongside regulatory mechanisms necessary to prevent market failure. The potential overlap of jurisdiction in Australia was addressed by conferring regulatory, as well as competition, powers on the competition agency in

relation to telecommunications and energy.[11] In the United Kingdom, there is concurrent jurisdiction in competition law for the competition agency, the Competition and Markets Authority (CMA), and all sectoral regulators in their respective fields (communications, gas and electricity, health services and, to a limited degree, water, rail and civil aviation) (Dunne 2014b; UK Government 2014). Only one body will apply the competition rules in any instance but a mechanism is required to decide which one.[12] This is the UK Competition Network (UKCN), set up via a CMA guidance note (CMA 2014: 54). The network decides on case allocation through close cooperation. It is a forum for strategic dialogue and actively engages in peer review. It facilitates information sharing, staff training and secondment, the sharing of best practice and improved advocacy and the timely provision of information for the *Annual Report on Concurrency*. Hence, the 'flavour' of the network is nonhierarchical, with the guidance at pains to point out that its parameters and operations were agreed to by all its members. The CMA can remove a case from a regulator but this is seen as a remote possibility given the emphasis on close cooperation (CMA 2014: 60). The network—central to enforcement—is not mentioned in statute. Instead, its operation is set out in soft law—in an annex to the guidance note with a commitment to flexibility (CMA 2014: 1.13). Despite the shortcomings of the previous regime (only two competition cases were brought by regulators over 13 years; Whish and Bailey 2015: 465), the relatively informal and flat network model was retained under the 2013 Act but bolstered by giving substantive priority to competition law, while the minister ultimately has the power to remove competition jurisdiction entirely from a regulator, albeit following consultation. Cooperation is still seen as the best way to secure effective and appropriate enforcement of competition.

Plurality of competition agencies

Competition networks are also found in federal structures. In the United States, the two federal enforcement agencies, the Federal Trade Commission and the Department of Justice, have a clearance mechanism to decide which of them will deal with a case (US Department of Justice 2014: Chapter VII). However, jurisdiction also is partially shared with state attorneys-general, who, in addition to enforcing state antitrust

11 *Australian Trade Practices Amendment (Telecommunications) Act 1997* and *Competition and Consumer Act 2010*, Part IIIAA.

12 *The Competition Act 1998 (Concurrency) Regulations 2014*, SI 2014 No. 536.

(competition) laws, can bring actions for damages on behalf of citizens[13] and seek injunctive relief for any violation of federal antitrust law. A state-to-state network of antitrust enforcement agencies emerged from the longstanding National Association of Attorneys-General in the 1980s, partly in response to a reduction in federal antitrust enforcement under the Reagan administration (Cengiz 2012: 126–40). The network facilitates multistate actions, creates opportunities for cost-sharing and cooperation in settlements and engages in policy initiatives introducing guidelines, filing amicus briefs and proposing federal bills. This informal, nonhierarchical network is a loose form of cooperation as there are constraints on information sharing and members are free to pursue their own actions. The original confrontation between the federal and state agencies that led to the creation of the network dissipated in the 1990s allowing for greater cooperation between federal and state enforcement agencies. Thus, an informal nonstatutory network was the response to a perceived crisis in enforcement and the informal cooperative structure also facilitated rehabilitation between federal and state agencies.

In China, there are three bodies responsible for the enforcement of competition law: the Ministry of Commerce is responsible for mergers, the National Development and Reform Commission has primary responsibility for pricing and the State Administration for Industry and Commerce is responsible for antimonopoly actions and other non–price-related antitrust enforcement (Huyue Zhang 2011). An umbrella body, the Anti-Monopoly Commission, appointed by the State Council, is responsible for supervision, coordination and guidance of work under the law.[14] Despite the potential for overlapping jurisdiction between the three bodies, at the moment there is no mechanism for them to coordinate their activities. However, flexibility is retained as they are not specifically mentioned in the legislation, allowing scope for jurisdictional remits to change or be amalgamated; a less drastic initiative proposed is a 'cooperation mechanism' to avoid overlap (Emch 2014), although it is not clear if such a network will emerge.

The European Union, as a supranational entity, operates in a regulatory space between a federation and a purely international body and hence the ECN is at the interface of a common single legal order and multiple regimes. Within the EU, competition law is enforced by the European Commission, an executive body responsible for application of EU law.

13 *Hart-Scott-Rodino Antitrust Improvements Act 1976*.
14 Antimonopoly Law 2008, Art. 9.

Following a radical overhaul of the system at the turn of the century, competition law enforcement was (re)delegated to national competition agencies, which enforce EU as well as national competition laws (Maher 2010: 717). With a minimum of 29 competition agencies, there was a real concern about coordination. The response was to establish a network under legislation with the details in a nonbinding notice[15] and where the rule of thumb is that if more than three jurisdictions are involved, the commission assumes jurisdiction. The European Commission remains first among equals with the ultimate power to remove a case from a national agency—thus, the shadow of hierarchy underpins the system.[16] The inherent flexibility in the network has worked well (Wilks 2007). This can be explained in part by the strong commitment to confidentiality among the agencies, the fact they enforce common rules and that they can share confidential information, limited only by the extent to which it can be used for criminal actions, all within the context of a highly integrated economic union. This enforcement network, allowing for exchange of confidential information, is the most formalised competition network and yet operates mainly through informal legal structures, where, once again, the emphasis is on peer review and learning with an exceptionally high level of trust.

International Competition Network

Finally, the ICN operates in an entirely different context from the ECN. Straddling the divide between the OECD and UNCTAD, with 126 members, it is by far the largest competition network. It is the key forum for the discussion of competition issues following the collapse of the WTO initiative. With no offices, it operates virtually but for an annual meeting of members and non-governmental advisers (from academia,[17] business and mainly law firms). Working groups devoted to consideration of particular topics (for example, mergers, advocacy, cartels) engage between meetings and the website is a major resource for information on best practices in enforcement, all overseen by a 15-member steering group (Maher and Papadopoulos 2012).[18] Its aim is to advocate for best practices, to develop proposals for convergence and to facilitate cooperation between agencies through policy learning. It does

15 European Commission, *Notice on Cooperation within the Network of Competition Authorities* [2004] OJ C101/43, Art. 11, Reg. 1/2003.
16 ibid., Art. 11(6), Reg. 1.
17 The author has been a non-governmental adviser.
18 See: internationalcompetitionnetwork.org.

this by creating templates, toolkits and manuals and running workshops. Although it is seen as influential (Gerber 2010: 116), questions have been raised as to how it will develop following initial activity addressing 'low-hanging fruit'—notably, merger notifications—while more challenging issues such as the intersection of international trade and competition and the relationship between competition law and state enterprises are largely absent (Sokol 2011: 201). It is also questionable how much convergence is either possible or desirable given the varieties of competition regimes and the contexts within which they operate (Jessop 2013).

As a transgovernmental network that is horizontal and decentred facilitating informal contact and exchange of nonconfidential information between government officials who share a common functional interest (enforcement of competition law), the ICN is currently the only acceptable forum through which the challenge of enforcement of competition laws across and within national boundaries is addressed, mainly because it operates entirely on the basis of consensus.

4. Conclusion

While competition law and regulation are seen as different, in recent years, the instruments and organisational nature of competition law have overlapped. The regulatory tool of the network has become a defining feature of competition law at the national and transnational levels—a trend also seen in other areas of regulation (see Holley and Shearing, Chapter 10; Drahos, Chapter 15; Tusikov, Chapter 20; and Brewer, Chapter 26, this volume). Braithwaite (2008) notes the extent to which corporations and non-governmental organisations (NGOs) have been transformed into networks, with those states which fail to adapt to this private networked governance failing to adapt to global governance. The rejection of a top-down WTO regime and the emergence of competition networks can be seen in this context as nimble responses to market dynamics. With the emphasis on information sharing, consensus and policy learning, the networks do not interrogate the values underpinning competition law but only its enforcement. This narrow functional concern, with the emphasis on expertise, knowledge and resources, allows for influence to be exerted by the best-resourced and most influential competition regimes—that is, the United States and European Union as well as other OECD states. Wider interrogation of contentious issues such as the state, the market, trade and competition

remain sidelined for now. There is currently no prospect of more formal international competition rules, leaving networks as the main forum for engagement on competition matters. The challenge is to ensure consensus does not preclude taking full account of 'varieties of competition' where different successful narratives, cultures and experiences support competitive markets (Dowdle 2013).

Further reading

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Trust, culture and the limits of management-based regulation: Lessons from the mining industry

Neil Gunningham and Darren Sinclair

1. Introduction

For over a decade, private enterprise and governments in North America, Western Europe and Australasia have been experimenting with an innovative approach to standard-setting variously termed 'process-based', 'systems-based' or 'management-based' regulation (Coglianese and Lazar 2003). In contrast with traditional prescriptive standards (which tell duty holders precisely what measures to take) or performance standards (which specify outcomes or the desired level of performance), this approach involves firms developing their own process and management system standards and developing internal planning and management practices designed to achieve regulatory or corporate goals. Such standards—whether they are imposed by the firm on its various operations (internal regulation), by governments on firms or by industry associations on their members (external regulation)—have the considerable attractions of providing flexibility to enterprises to devise their own least-cost solutions to social challenges, of facilitating their going beyond compliance with minimum legal standards and of being applicable to a broad range of circumstances and to heterogeneous enterprises.

For present purposes, such initiatives will be termed 'management-based regulation'. This form of regulation is now to be found in a diversity of policy domains including environmental protection, food safety, occupational health and safety (OHS), rail regulation, sustainable forestry, toxic chemical reduction and trades practices (Coglianese and Lazar 2003; Coglianese and Nash 2006).

Taken one step further, management-based regulation can become a form of meta-regulation or 'meta risk management'. In this form, government (or a corporation seeking to regulate its multiple facilities), rather than regulating directly, risk manages the OHS management of individual enterprises or facilities. Under such an approach, the role of regulation ceases to be primarily about inspectors or auditors checking compliance with rules, and becomes more about encouraging the industry or facility to put in place processes and management systems that are then scrutinised by regulators or corporate auditors to ensure their appropriateness and effectiveness. Rather than regulating prescriptively, meta-regulation seeks to stimulate modes of self-organisation within the firm in such a way as to encourage proactive internal self-critical reflection about its performance (Parker 2002; Grabosky, Chapter 9, this volume).

So how effective are management-based and meta-regulation? Are government regulators or corporate decision-makers wise to put so many of their eggs into this basket? To the extent that this form of regulation falls short of expectations, is this inevitable or can its shortcomings be overcome? And what is the relationship between management-based regulation and organisational trust? Is it the case, as some have claimed (Gunningham and Sinclair 2009), that 'culture eats systems for breakfast'? These and related questions will be addressed below.

2. Management-based regulation: What the literature tells us

At their best, management-based initiatives have the capacity to influence the internal self-regulation and norms of organisations and make them more proactive and responsive (rather than merely reactive) to social concerns. In theory, they will encourage enterprises to 'build

in' regulatory considerations at every stage of the production process, to improve their social performance and to achieve behavioural change (Coglianese and Nash 2006: 250).

However, to what extent these theoretical benefits will be realised in practice is a matter for empirical inquiry. Such inquires have to date produced rather mixed results (Bluff 2003; Coglianese and Lazar 2003: 724). Some studies have found a positive relationship between the introduction of management systems and environmental outcomes (Thomas 2011); others have not (Tyteca et al. 2002; Hertin et al. 2008)—leading an edited collection concerned to understand how management-based initiatives have worked to date to conclude that 'we know little about the conditions in which' management-based initiatives work (Coglianese and Nash 2006: 20).

There could be a variety of reasons for these mixed results. Some companies may have adopted such systems (which in environmental protection are usually voluntary) for cosmetic reasons—such as to maintain public legitimacy—rather than to substantively improve performance. If that is the case, the principal problem may be not with the system itself, *but with the motivations of those who adopt it*. Indeed, it may be that management systems, like other process-based tools, are just that—tools—and they can only be effective when implemented with genuine commitment on the part of management and ownership on the part of the workforce. In short, it may be that *management* matters far more than management systems or management-based strategies more broadly.

This, however, should not lead to a focus simply on individual members of management because much organisational behaviour is group behaviour, and, in the context of the corporation, it is more fruitful to explore compliance with rules (whether corporate or state based) at the collective rather than the individual level.

In this context, one factor that can have a particularly powerful impact on group behaviour in general and on rule compliance in particular is organisational culture—defined as 'the way we do things around here' or, in more formal terms, as involving 'shared values (what is important) and beliefs (how things work) that interact with a company's people, organizational structures and control systems to produce behavioural norms' (Uttal 1983, in Reason 1997: 192). However, not infrequently, the beliefs and values of those who are expected to implement

a management system are not congruent with its aspirations, in which case edicts from regulators or (in the case of internal regulation) from senior management may be met with creative compliance (McBarnet and Whelan 1999), resistance, 'ritualism' (Merton 1968; Braithwaite 2008: 140–56) or various other forms of tokenism.

Trust is one aspect of culture that is often of great significance, particularly in areas of social regulation such as the environment or OHS. According to the literature, for example, effective worker participation is crucial to improved OHS. However, such participation is unlikely to be effective in the absence of constructive dialogue between employers and employees (Gallagher 1997: 6.2). Constructive dialogue, in turn, is unlikely to take place in the absence of trust. Trust is often referred to as the lubricant for open and frequent safety communication (Reason 1997), as enhancing cooperation (Morgan and Hunt 1994), promoting the acceptance of decisions (Tyler 2003), improving knowledge sharing (Dirks and Ferrin 2002), supporting all aspects of organisational functioning (Bijlsma and Koopman 2003) and resulting in enhanced safety performance (Barling and Hutchinson 2000: 77). Trust can therefore become a central issue for social regulation in areas such as OHS.

The above literatures raise issues that go to the heart of the question: to what extent can management-based regulation achieve business or regulatory goals? This, in turn, raises the questions: Are policymakers, trade associations and corporations mistaken in their belief that those required to develop and implement plans, systems and other management-based strategies will improve their performance as a result? Is reliance on monitoring, measuring, accountability and extrinsic motivation misplaced? Might it be that management commitment or culture (or specific cultural issues such as trust) is far more important to achieving desired outcomes than management-based initiatives alone?

In the following section, we explore the above issues through the lens of OHS management and regulation in the Australian coalmining industry, summarising the implications of empirical research we undertook within two large coalmining corporations. Limitations of space, however, preclude a fuller description of the research itself or of our methodology. These can be found elsewhere (Gunningham and Sinclair 2012).

3. Mine safety in Australia: Management-based regulation and its consequences

Although the mining industry confronts a number of serious OHS challenges, since the 1990s, statistics (which it is unlikely can be manipulated, including fatality statistics) suggest it has achieved substantial improvements in safety (Galvin 2005). This has coincided with an increased corporate focus on management-based initiatives as the central means of improving OHS, with a heavy emphasis on sophisticated systems, auditing and other process-based mechanisms. Indeed, such systems are now a regulatory requirement in the two principal coalmining jurisdictions of Australia: New South Wales and Queensland.

Below, we describe the findings of two case studies, designed to examine the experiences of two mining companies that, for various reasons, have relied substantially on management-based regulation to attempt to achieve improvements in their OHS performance or to meet regulatory requirements. While the two companies have different histories and management philosophies, there are similarities in how they sought to address OHS and in the outcomes they achieved. Either because they were driven by corporate concerns to improve OHS (Minerals Inc.) or by a combination of growing pains, peer pressure and government regulation (Coal Company), they relied heavily on a range of management tools to achieve their objectives.

In the language of this chapter, they relied substantially on either internally or externally driven management-based regulation with a particular emphasis on OHS management systems, standards and audits. Yet, notwithstanding the virtues of this approach, in practice, they both struggled, often unsuccessfully, to implement management-based regulation and, through it, to improve OHS outcomes. Why was this so?

A lack of organisational trust was certainly one of the most important problems, for our evidence shows that, without trust, the effectiveness of management-based regulation may be severely and sometimes fatally compromised. The most striking lack of trust at Minerals Inc. was between workers and management. At their worst-performing mines, such mistrust was deep-seated and longstanding. The reasons for this often related indirectly to the adversarial and bitter history of the mining

industry, and directly to past site-specific incidents in which workers felt betrayed by management. Geographic isolation, parochialism and high management turnover sometimes exacerbated these problems.

But, as the Coal Company study reveals, a lack of trust between other groups was sometimes equally, if not more, important. We found corrosive mistrust between a variety of parties: corporate and mine site management; workers and middle management on one hand and senior mine management on the other; one group of workers and another; and middle management and the mine manager. We also found that corporate management can have its own distinctive culture, being locked into past practices and beliefs, and seemingly incapable of adjusting to the needs of managing an increasingly complex organisation. Within this mindset, corporate management at Coal Company were the ones who lost the trust of mine management.

All this suggests that trust—one important manifestation of workplace culture—needs to be understood not at the company level, and often not even at the mine-site level (although, in some respects, different mines do have distinctive cultures), but rather at the level of subcultures (and sometimes countercultures) that manifest themselves within different groupings within individual mines. These are what are likely to contain the most deep-seated values and norms, which are most likely to shape behaviour in general and the effectiveness of management-based regulation in particular.

At both companies, organisational mistrust was generated not just by local factors (such as how workers were treated by mine management), but also by broader factors (such as the adversarial history of mining). These factors commonly interacted, generating perceptions that often amplified mistrust and shaped behaviour. For example, where there was a history of mistrust then all management action on OHS (however genuine) was likely to be dismissed by the workforce as insincere. This resulted in a lack of commitment to management's OHS initiatives—a classic illustration of Thomas and Thomas's (1928) dictum that what is perceived to be real is real in its consequences.

An overlapping but distinctive theme was the conflict of loyalties experienced by different levels of management within the mine site hierarchy. This was most graphically illustrated by the experience of deputy under-managers (the lowest level of management), who, in both companies, felt torn between their obligations as members

of management and their loyalties to their crew 'mates' as colleagues. To a lesser extent, other levels of management experienced the same tension—as, for example, where middle management sided with the workforce against the mine manager or where mine managers, while conscious of their obligations to corporate management, nevertheless felt acutely the needs of their own mine and of their own management team and workforce. This, too, had a negative influence on the effectiveness of management-based regulation.

A further theme was that a failure to obtain commitment from and engagement of middle management and the workforce was detrimental to implementation of management-based initiatives. This, too, was related to trust, though more so with workers than middle management. Our interviews suggested that lack of engagement was a particular problem with regard to the latter. Workers, already burdened with a range of duties and demands on their time, commonly viewed the additional requirements of applying management-based regulation as yet one more imposition. Importantly, they could not see the need for the imposition. They perceived that there were ulterior motives ('they want to cover their arse') and, as a result, they resented complying with the directions.

Finally, and closely related to the previous themes, there was the issue of unequal power. Workers often felt vulnerable and threatened by management initiatives. Increasingly pressured into individual contracts of employment, they are often unable to advocate collectively through trade unions capable of acting as a countervailing force. Middle management, too, feared that management-based regulation might be a means of placing them under greater senior management scrutiny and control. Deputy under-managers' allegiance often remained with the crew from which they had come. They felt uncertain whether higher management would support any safety initiatives they undertook or whether they would be 'hung out to dry'. In an industry with such an acrimonious history, such issues were never far from the surface. As we will see, they were particularly prone to arise in the situation where the tension between 'safety and profit' was most stark: deciding whether to halt production on safety grounds.

The most common response by both workers and middle management to mistrust, divided loyalties, lack of commitment (the three characteristics often being related) and/or a perception of powerlessness was ritualism. They would go through the motions without any conviction that this would achieve anything of substance. For example, participation in

behavioural-based safety programs was perfunctory (particularly for those based on supervisor/subordinate observations), incident reporting was trivialised or ignored, systems were honoured more in the breach and sophisticated electronic monitoring systems were sidetracked.

It will be apparent that ritualism and resistance are unlikely to be overcome—or management-based regulation to succeed—in the absence of engagement with the culture or, more accurately, the various subcultures identified above. Cultural change is never easy to achieve. Indeed, some organisational theorists have argued that an organisation may be incapable of shaping its own culture (Schein 1983), while others argue that 'you only meddle with organisational culture if you've got little choice, lots of resources and lots of time' (Sinclair 1993: 68). However, we disagree with these pessimistic conclusions. In our case studies, the top OHS ranked mine sites of both enterprises shared a cluster of characteristics—largely as a result of strategic management intervention. While not all these characteristics were present at all these mines, the more of these characteristics that were present, the more likely a mine was to have minimised mistrust, to have overcome divided loyalties and a lack of buy-in and to have achieved a high OHS performance. Accordingly, our findings are consistent with the general approach of Reason (1997), who suggests that safety culture is actually a product of various interdependent subcultures, and that these can be socially engineered to a significant extent.

Among the cluster of characteristics we identified as important in overcoming mistrust, four, in particular, must be emphasised. First, there was strong evidence that organisational trust was strongly influenced by the extent to which the mine manager (the visible manifestation of 'the corporation' at site level) was genuinely committed to OHS improvement. This seemed to be a particularly important indicator of managerial leadership. At one high-ranking mine, for example, workers and middle managers spoke highly of the mine manager's leadership role. They said he engaged with the workforce, he did 'lots of things to be seen around the workforce—and chase[d] up all the complaints' (crew member). Crucially, he was willing to place OHS ahead of production, to the extent of shutting down the mine (at great expense) to address a safety issue. In contrast, at low-performance, low-trust mines, there were widespread complaints concerning management's willingness to cut corners and sacrifice safety to maximise production.

Second, a common refrain—which resonates with Tyler's work (2003; see also Murphy, Chapter 3, this volume) concerning the importance of procedural fairness—was the preference that workers had for a mine manager who 'gives it to us straight' (as one crew member put it). As long as workers' complaints had been heard and investigated, and they had received feedback (even when being told that no further action would be taken), their levels of acceptance and trust were high. Workers (and deputies) at many lower-performing mines, however, expressed their frustration with what they perceived as conflicting messages and the inconsistent responses and attitudes of different managers.

Third, workers seemed far more likely to 'take on board' and implement OHS initiatives if they had a high degree of ownership of them. This was achieved by engaging them in the creation of these initiatives, or, in the case of corporate initiatives, by involving them in how these policies were interpreted and adopted at individual mine sites. Perhaps the best illustration concerns an attempt by management to introduce behavioural-based safety observations—usually resisted by the workforce because it is seen as a 'blame the worker' approach. Yet such an initiative was enthusiastically adopted at one mine. This was primarily because a high-status and influential group of miners was engaged at an early stage and came to feel that it was 'their' initiative.

Finally, it is striking that the strategies that corporate management relied on under management-based regulation—namely, an emphasis on accountability mechanisms that make it difficult for managers to avoid their OHS responsibility, coupled with surveillance, various performance tracking devices and auditing aimed at transparency—were antithetical to measures that our findings suggested had a positive impact on OHS. We found that in imposing stringent oversight and control, accountability and discipline, corporate management risks a number of counterproductive consequences. For example, the use of surveillance systems:

> has deleterious effects on the social climate of groups. The use of surveillance implies distrust which decreases people's ability to feel positive about themselves, their groups and the system itself. (Tyler 2008: 810)

This, in turn, lowers motivation, creates an adversarial relationship and encourages the sort of resistance and ritualism described earlier.

What made a difference, in the best OHS performing mines in our sample, were various mechanisms that provided workers and site management with more, rather than less, autonomy and discretion. These were the various approaches that served to gain worker or middle management commitment. They provided greater ownership of and participation in OHS initiatives, which involved greater communication and feedback. This involved providing deputies and middle management with greater training, mentoring and managerial support (albeit not control). Collectively, these actions served to gain or regain trust. The key is to ensure that informal systems 'support the formal system by enhancing cohesion, initiative and morale' (Selznick 1992: 235). Only in this manner may the gap between formal regulation and informal local norms be successfully bridged.

In short, trust and a number of related factors are vital in obtaining the consent and support of managers and workers to win their 'intrinsic motivation'. Once these groups accept and take ownership of the rules and regard them as reasonable and their purpose laudable, compliance becomes a matter of voluntary cooperation. People follow not just the letter, but also the spirit of management-based regulation and external monitoring costs become low. Workers and managers become 'active participants in creating and maintaining conditions of social order' (Tyler 2008: 873). This is largely irrespective of surveillance and other external controls. In Reason's (1997) terminology, it becomes possible to build in a culture of 'mindfulness'. This is not to imply that management-based regulation has no value. It remains an important technology of governance, but one that can only work effectively in tandem with a supportive workplace culture built on trust, engagement and commitment.

4. Conclusion

Many regulators and corporations have concluded that management-based regulation has considerable promise, particularly in encouraging enterprises to take greater responsibility for developing their own systemic approaches to regulatory or business challenges, and to create their own best means of identifying and managing risks. Nevertheless, to what extent or in what circumstances this promise will be realised in practice remains largely an open question. This is particularly so when it comes to applying management-based regulation to the multiple facilities of large corporations.

Our case studies suggest that, in the mining industry at least, management-based regulation was vulnerable to failure for a variety of often interrelated reasons. At Minerals Inc., this approach was applied across the corporate portfolio, but it proved far more effective at mines where levels of trust between workers and management were higher. Moreover, management-based regulation was sometimes unable to overcome a combination of mine management resistance, middle management inertia and the unwillingness of deputies to take managerial responsibility and implement management systems at the mine site. At Coal Company, the attempt to shift from a flexible discretionary approach to uniform mandatory management standards applying across the board failed not only because some mine managers remained unconvinced of corporate management's commitment or capability and an absence of mine site ownership, but also because of a lack of understanding of what was required to make management-based regulation work at a corporate level, coupled with an organisational history and management philosophy in which a belief in the virtues of decentralisation was deeply embedded. These pathologies were compounded by high levels of mistrust between workers and management at some mines.

On the basis of this study at least, it would appear that corporate systems and other tools of management-based regulation only work well when OHS is institutionalised, and when it gets into the 'bloodstream' of the organisation at site level. Only when the formal systems (audits, reporting, monitoring, and so on) are supported by informal systems (trust, commitment, engagement, means of overcoming conflicting loyalties) will they be fully effective.

These findings have important implications for regulatory theory. They suggest that the claim that management-based regulation—or meta-regulation more broadly—can overcome many of the traditional challenges of regulating complex organisations is overstated. On the contrary, this study suggests that management-based regulation (or indeed meta-regulation) confronts much the same challenges as other forms of regulation (albeit on a different scale). The result is that management-based (or meta-) regulation may simply relocate the problems (from outside to inside the firm), rather than solving them. We have insufficient evidence to say whether the mining industry, with its distinctive history of conflict and polarisation, is unrepresentative in

this respect. In this industry at least, management-based regulation is substantially constrained by low organisational trust, minimal mine site commitment and divided loyalties.

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Urban sustainability and resilience

Jeroen van der Heijden

1. Introduction

For some 7,000 years, cities have been governed through traditional top-down mandatory regulation and other governance instruments—building codes and zoning legislation, predominantly—implemented and enforced by governments; initially by city governments, later, by national governments. This approach has worked reasonably well to ensure a safe and healthy built environment, but not so well for addressing climate change mitigation (urban sustainability) and adaptation (urban resilience) at city level.

Cities are considered unsustainable sources of resource consumption and waste production, greenhouse gasses included, and are a key contributor to climate change. At the same time, cities are highly vulnerable to climate change risks, such as extreme weather events. Traditional top-down mandatory regulatory interventions are often unable to address these risks. They take a long time to develop, implement and achieve their effects and they require fairly sophisticated regulatory bodies and regulatory capacity (not in place all around the world). An additional complication is that new or amended regulatory interventions apply only to buildings and cities of the future, not to the buildings and cities of today. These are often exempted from regulatory changes—a process known as 'grandfathering'.

Seeking to respond to these regulatory problems, governments around the world have been experimenting with novel regulatory and governance tools for urban sustainability and resilience; they have been very active in collaborating with firms and citizens in the development and implementation of such tools, and firms and citizens have even developed and implemented such regulatory and governance tools without any governmental involvement at all. These new tools can be considered a continuation of developments mapped, explored and interrogated by Regulatory Institutions Network (RegNet) scholars in the past: the move from prescriptive to performance-based regulation (for example, May 2011), from deterrence-based regulatory enforcement via responsive regulation to smart regulation (Ayres and Braithwaite 1992; Gunningham et al. 1998) and from mandatory regulatory interventions to more voluntary ones (Gunningham 2009).

This chapter seeks to explore and interrogate the range and content of traditional and contemporary regulation and governance for urban sustainability and resilience (to the extent possible in a short contribution; an extensive discussion is available in van der Heijden 2014). In the conclusion, it touches on some important issues that regulatory scholars may wish to take up in future studies, including the changing role of cities in governing urban sustainability and resilience. Throughout the chapter, it becomes clear, also, that cities and the built environment more generally are intriguing areas for regulatory scholarship—yet, they have received strikingly limited attention from regulatory scholars to date.

2. Traditional regulation and governance for urban sustainability and resilience

For a long time, governments have sought to govern urban sustainability and resilience through direct regulatory interventions such as building codes and zoning legislation. These are normally expressed in standards that seek to steer behaviour in such a way that harmful results are prevented or a desired outcome is achieved. Governments have experimented with various types of standards to achieve sustainable and resilient cities, buildings and infrastructure (May 2011). In addition to direct regulatory interventions, governments have sought to govern urban sustainability and resilience through subsidies and (other) economic incentives.

Statutory regulation

Over the past three decades, statutory regulations for urban sustainability and resilience have changed considerably. Traditionally, these were expressed in prescriptive standards that stipulated rather precisely what is expected from regulatees. A hypothetical example is: 'a wall should have at least 10 cm of insulation.' Such prescriptive standards often faced criticism: their one-size-fits-all approach often conflicted with particular local circumstances (for example, what to do with a heritage building when adding the 10 cm of insulation means that it loses its characteristic appearance?). They are also critiqued for hampering technological innovation.

Seeking to overcome the straitjacket of prescriptive standards, governments have moved to performance-based standards that specify the performance of a good or service, but do not specify how that performance is to be achieved. In the Netherlands, for example, the building codes set rather ambitious energy requirements (expressed in a numeric energy performance index) for new buildings, but do not stipulate how performance is to be achieved (it is left to builders to choose between highly insulating building materials and low energy-intensive equipment, among other things). Reaching even further are goal-oriented standards that link the behaviour of individuals, goods or services to a regulatory goal. A hypothetical example is: 'a building should be energy efficient.' Both types of standards are normally considered to give those regulated an incentive to find a solution that is both effective in terms of meeting the standard and efficient in terms of costs, which, in turn, is expected to stimulate (technological) innovation.

Yet, these types of standards come with their own complications. Where prescriptive standards are fairly clear on what complies and what does not, performance-based and goal-oriented standards allow a lot of leeway. Regulatees and regulatory authorities may differ in their interpretation of standards. Also, not all regulatees may desire to innovate and use the latest technologies. Further, they may not wish to indicate how they comply (as is normally done with performance-based and goal-oriented standards) but prefer to submit to inspection as to whether they do comply (as is normally done with prescriptive standards). Responding to such issues, governments have begun to introduce standards that combine goal-oriented, performance-based and prescriptive standards. The Australian building codes are a typical

example. These state the regulatory goals that buildings and building parts are expected to meet, but also provide accepted solutions on how to meet these goals in prescriptive terms.

Subsidies

Governments have also been active in seeking to steer urban sustainability and resilience through subsidies. Subsidies are often a form of financial support aiming to promote beneficial economic or social outcomes. Subsidies may be introduced for various reasons. Take the example of subsidising the instalment of solar panels by households, as is done in a wide range of countries around the globe. Such subsidies may serve different goals: supporting the market for solar panels by increasing household demand; addressing the negative consequences of using fossil fuels by supporting a transition to renewable energy; and changing households' attitude towards solar panels by making them a more normal aspect of daily life as more and more people install them on their houses.

Yet, while subsidies are, at first glance, an easy tool for governments to steer urban sustainability and resilience, they are also the topic of some controversy. There is a risk that subsidies will not achieve their goals: what can governments do if the money is spent, but the regulatory outcome is not achieved? Subsidies are also critiqued for making the already well-positioned in society even better off. In the example of subsidies for solar panels, such subsidies are available only to those who can afford the upfront costs of solar panels.

Subsidies are sometimes even considered harmful. In this case, a typical example comes from the state of New York, USA. In the late 1960s, more and more people were moving to the state and wanted to live in scenic locations near rivers on floodplains. While planning legislation allowed for the development of floodplains, there was an issue. Private insurers provided flood insurance at market rates (read: high rates because of high risks), but homeowners were not willing to pay the premium for this insurance at market rates. In response, the federal government introduced the National Flood Insurance Program to provide homeowners with low-cost flood insurance. For decades, the program worked well, but the insurance program has experienced a major blow from the various hurricanes that have plagued the state of New York since 2005. Before Hurricane Sandy hit in 2012, the program was already US$17 billion (AU$22.5 billion) in debt from payouts resulting from earlier hurricanes

(Katrina, Rita and Wilma), and it is expected that this debt will grow to an astonishing US$30 billion (AU$40 billion) due to payouts resulting from Sandy. To recover from this debt and to mitigate future financial risks, the program's rate will go up 25 per cent a year until it reaches levels that actually reflect the risk from flooding. Instead of paying about US$500 (AU$660) a year for flood insurance, homeowners are more likely to face fees that reach into thousands of dollars yearly. It goes without saying that this has resulted in considerable civil unrest (this example, and the others in this chapter, are discussed in greater depth in van der Heijden 2014).

Economic incentives

As well as direct regulatory interventions and subsidies, governments apply a range of other economic instruments to steer urban sustainability and resilience. The two best known are taxes and tradable permits. Such taxes seek to correct the prices of production and consumption by including the costs of negative externalities. For instance, in a number of European countries, taxes apply to the extraction of sand, gravel and rock for the cement industry. The environmental costs of these activities would not normally be included in the price of cement and the taxes seek to address this particular issue. The critique of such taxes, however, is that they give the illusion that harmful behaviour is accepted because the behaviour is paid for; (large) firms may consider such taxes as just one of the costs of doing business.

In line with environmental taxes, tradable permits seek to overcome market failures. However, they not only correct the price of production and consumption, they also often seek to put a limit on the amount of negative externalities. Carbon emission trading is a typical example. The cities of Tokyo and Beijing, for example, introduced city-wide carbon trading schemes in 2014, and other cities in China and elsewhere are experimenting with similar schemes. Under such city-wide carbon emission trading schemes, a city government may set a maximum (a 'cap') to the carbon emissions it expects to be produced. It can then issue permits that allow the holder to produce a certain amount of carbon emissions. For instance, the city's major commercial property owners receive a permit that stipulates how much carbon their buildings are allowed to emit. If a holder produces less than it is allowed, it can trade its permit with a producer that seeks a quota of carbon emissions larger than it holds under its own permits. It is then expected that a price

will be achieved that expresses the market costs of carbon emissions. Further, under a tradable permit scheme, it is expected that producers will seek modes of production that (cost-)effectively reduce their carbon emissions below the cost of buying permits—for instance, by owning or occupying energy-efficient buildings.

The application of city-wide carbon trading schemes is a rather novel approach and it remains to be seen whether it will achieve the desired outcomes. Such schemes can, again, be critiqued for providing the illusion that undesired behaviour is allowed—because one pays for it. The 'cap' may prevent actors in the construction industry from reducing their carbon emissions to zero as long as the costs for emissions are lower than the cost of preventing them. Neil Gunningham and Peter Grabosky identified such issues in their highly influential *Smart Regulation* (Gunningham et al. 1998).

3. Novel regulation and governance for urban sustainability and resilience

Aiming to overcome problems with direct regulatory interventions, governments have begun to seek new regulatory and governance systems, processes and tools. In particular, insights into the causes and consequences of (anthropogenic) climate change, specifically at the city level, have spurred national and city governments around the globe to trial such novel systems, processes and tools. What is of interest is that city governments often collaborate with each other in international city-to-city collaborations in such trials; governance for urban sustainability and resilience has become both more local and more global. Governments are, further, actively involving firms and citizens in their trials and experiments. Experimentation, the involvement of citizens and firms in development and implementation and localisation are all characteristics of a larger trend of collaborative governance that RegNet scholars and others have been writing about for some time now (Gunningham 2009).

At the same time, firms and citizens have been very active in the development of voluntary programs that seek to improve the performance of their participants, but without the force of law (Potoski and Prakash 2009). Often governments are involved in their development and

implementation at some distance. Again, a variety of (collaborative and voluntary) regulatory and governance systems, processes and tools for urban sustainability and resilience is in place.

Government-to-government collaborations

While government-to-government collaboration can be found at the local, regional and national levels, the most well-known and best-documented examples are the international Local Governments for Sustainability (ICLEI), a network of more than 1,000 cities and local governments working together to achieve urban sustainability and resilience, and the C40 Cities Climate Leadership Group, a network of the world's largest cities that collaborate to reduce greenhouse gas emissions through increased urban sustainability. Through such networks, cities work together in the development and implementation of novel governance tools for urban sustainability and resilience. The scale of such networks implies that experiments with similar tools can be carried out in different cities, but overseen by a similar group of actors. Together, the cities may even have sufficient funds available to involve professional researchers and communication support. This has resulted in high-quality research results that are communicated in a highly accessible manner. Further, the sheer size and global coverage of these two networks make them highly visible, and, particularly through their involvement of the mayors of the world's largest cities, these networks have a considerable voice.

But there are some downsides to this type of collaboration. They run the risk of becoming elite networks that exclude non-members from lessons learned and other advantages. The highly accessible websites of such networks often provide a wealth of case studies, best practices and lessons learnt, but they all have members-only sections that provide more information or information well before it is made public. Also, it remains to be seen whether lessons from the major cities that are often active and leading in these networks reach smaller cities within these networks and, more importantly, those outside these networks. The majority of cities around the world have a population of less than 100,000 inhabitants and it appears that these are somewhat underrepresented in the currently dominant international government-to-government collaborations.

Other collaborations and networks

Besides such government-to-government collaborations and networks, others have also been introduced. Governments actively collaborate with firms and citizens seeking to overcome barriers faced by traditional regulatory interventions. A typical example is CitySwitch Green Office in Australia. Under this nationwide program, city governments work together with tenants to improve the energy efficiency of offices. By participating in the network, office tenants come to agreements with city governments about their future environmental performance, and the city governments then provide support to help them meet these goals. Certain city governments provide financial support to tenants, while others facilitate meetings and ensure an ongoing supply and distribution of information. On a national level, the program helps to share best practices and lessons through a website, workshops and seminars; in addition, a yearly awards ceremony showcases top-performing participants and attracts media attention for the program as a whole.

Not all such collaborations, however, are government led. In 2006, Cisco, an international developer of networking equipment, initiated a collaboration with the cities of Amsterdam, San Francisco, Seoul, Hamburg, Lisbon and Madrid—the SMART 2020: Cities and Regions Initiative. The initiative seeks to understand whether and how urban carbon emissions can be reduced through innovative computer and information technology, and how current regulatory and other barriers may be overcome. Another example is the Australian Resilience Taskforce, a collaboration of a number of key players in the Australian insurance and construction industries and government. The taskforce argues that current Australian building regulation does not set adequate requirements to ensure the resilience of, particularly, existing buildings to extreme weather events. It has developed a rating tool that allows it to rate the resilience of buildings to extreme weather events. When linked to insurance policies, the rating tool may provide considerable incentives for building owners to improve their buildings: a building with a high rating may face reduced insurance premiums, while a building with a low rating may face increased premiums.

Again, such collaborations and networks come with advantages and disadvantages. Through collaboration with regulated (local) actors, city governments have an opportunity to build on the experiences and expertise of these actors. This may result in more effective governance tools than those developed by somewhat distant bureaucrats.

In addition, regulatees may consider tools that have been developed in collaboration with them as more legitimate. Yet, the often voluntary nature of such collaborations comes at a cost. There is only so much that can be asked of participants as they may decide to step out of the collaboration when the cost or effort of participation outweighs the rewards for doing so. One may also question why regulatees seek to become involved in such collaborations. In the case of Cisco and the Australian insurance industry, there are clear rewards for these actors for collaborating with governments: once the solutions developed in these collaborations are implemented, they will be at the forefront to provide products and services. Here, the dividing line between self-interested lobbying and collaboration in the interest of the 'greater good' becomes quite thin.

Negotiated agreements and covenants

Specific forms of collaboration are negotiated agreements and covenants. These partly address the problems with collaborations flagged above. Under a negotiated agreement or covenant, an individual, a firm or a group of firms pledges to achieve a particular goal and the government, in return, commits itself to a related objective—for instance, supporting private sector actors in achieving their goal or not introducing regulation during the span of the agreement or covenant. Typical illustrations of these are the Climate Change Sector Agreements between the State Government of South Australia and business entities, industry sectors, community groups and regions. The state of South Australia aims to significantly reduce carbon emissions, well beyond goals set by the federal government. To achieve these goals, it needs its large firms and most-polluting sectors to take action voluntarily, and it understands that it needs to offer something in return for such action. In an agreement with the commercial property sector association, for instance, the state government seeks reduced carbon emissions from commercial properties. It has agreed with the association that it will promote the benchmarking of the energy performance of existing buildings and will develop and implement educational and promotional strategies to encourage property owners and tenants to improve their buildings' environmental performance. In return, the Government of South Australia will financially and administratively support the actions undertaken by the commercial property sector, publicly acknowledge the achievements of

the sector association and its participants and has committed to realign various government policies and programs that are of interest to the property sector.

Such negotiated agreements are a popular tool applied throughout the world. Yet, empirical evidence on their performance is currently lacking. Additional research is needed to understand whether negotiated agreements and covenants for improved urban sustainability and resilience face similar constraints as those reported in other areas—partly resulting from the high private interests on the side of firms participating in such agreements and the risk of regulatory capture—or whether more positive outcomes may be expected.

Certification and classification

Aside from such collaborations, negotiated agreements and covenants, a wide range of voluntary programs (Potoski and Prakash 2009) has been implemented, seeking to improve urban sustainability and resilience. Space limits the discussion to one example here. Perhaps the best-known and most widely applied voluntary and market-driven tools for urban sustainability and resilience are certification and classification. These tools normally allow for the assessment of the particular performance of buildings, infrastructure or cities (for example, energy performance, carbon emission) and their ranking into a particular class. A particular identifier is given that can be used to market this performance. To illustrate, for developers, investors, property owners and occupants alike, it is easy to understand that on a scale that ranges from poor performance to high performance—say, one to five stars or bronze to gold—a five-star or gold-class building is better than a one-star or bronze-class building. Certification and classification form an information-based regulatory tool.

Since the early 1990s, hundreds of such certification and classification tools have been introduced around the world. The best known is the Leadership in Energy and Environmental Design (LEED), which is often considered the world's most positive example of what can be achieved in terms of urban sustainability and resilience through voluntary programs. LEED was implemented in the United States in 1993, and is now applied in 135 countries and territories. It boasts billions of square metres of built space certified as having high levels of environmental performance in the United States alone. Municipalities in the United

States are widely adopting the voluntary LEED standards as mandatory requirements in their own jurisdictions. But if things sound so good at the outset, there likely is a flipside as well.

Some questions arise, for instance, when looking at the actual transformative impact of LEED since it was introduced some 20 years ago. While LEED boasts high absolute numbers, its relative impact is marginal: at best, 3 per cent of all built space in the United States is currently LEED certified, and most of this has only a moderate LEED certification, which implies that it performs barely better than non–LEED-certified built space. The highest LEED certification possible has been applied to less than 0.2 per cent of all built space in the United States over the course of 20 years—yet, policymakers, practitioners and academics alike still consider LEED the prime example of what voluntary and market-driven tools can achieve at the city level. Further, there is criticism regarding the adaptation of the tool by municipalities: the rules underlying LEED certification lack the kinds of accountability structures of rules developed by governments. Thus, while it can be a shortcut for municipalities that lack funds or staff to develop their own sustainable building codes, the adaptation of privately developed regulation brings considerable risks.

4. Conclusion

Urban sustainability and resilience are an intriguing area for empirical and theory-driven regulation and governance research. The use of both traditional and novel regulatory and governance tools, processes and systems to govern urban sustainability and resilience, the wide variety of actors and (vested) interests involved in cities, the wide range of contexts that cities provide and the rapid growth of city networks that seek to bypass national regulatory standards are but a few aspects that should inspire scholars to explore regulation and governance questions in this setting. Strikingly, however, cities and the built environment more generally have to date received little attention from regulatory scholars.

In this chapter, I have briefly discussed a range of traditional and novel governance interventions that seek to achieve urban sustainability and resilience. The discussion of direct regulatory interventions for urban sustainability and resilience largely confirm and contribute to existing regulatory theories developed by RegNet scholars and others

(see various discussion in this book; Baldwin et al. 2011). It goes without saying that these traditional regulatory and governance interventions for urban sustainability and resilience come with pros and cons. In terms of pros, it could be argued that such interventions provide governments with a means to be deeply involved in governing urban sustainability and resilience. With the wide range of actors involved in city, building and infrastructure developments, the technical complexities of such developments, the large economic interests involved and the wide range of negative externalities of such developments, it almost goes without saying that it is unreasonable to expect that 'the market' will come up with effective solutions to achieve urban sustainability and resilience. Governments may be in the right position to set long-term and large-scale goals and seek to realise these through direct regulatory interventions.

However, the wide range of actors, technical complexities and large economic interests involved in city, building and infrastructure developments are exactly what make it difficult for governments to introduce effective direct regulatory interventions. The development of these often takes a lot of time, which means this type of governance tool often cannot keep up with technological innovation. The vast economic interests involved mean that governments often face resistance when they propose regulatory change. Such resistance comes from firms with considerable vested interests, but also from households that do not want to see new regulation that requires them to upgrade their existing homes.

At first glance, novel governance systems, processes and tools such as collaborative governance and voluntary programs come with many pros. They bring together relevant stakeholders to work, in collaboration, towards governance interventions that are tailored to a specific local context. This is expected to result in increased effectiveness, efficiency, accountability and legitimacy of governance tools. But when scratching a little deeper under the surface of collaborative governance and voluntary programs some questions arise. Who should be involved in the development and implementation of novel governance tools for urban sustainability and resilience: all actors affected by a future governance intervention? In a city context, 'all' actors quickly add up to hundreds or thousands of people and organisations. It goes without saying that such large collaborations will face collective action problems (for example, they will find it difficult to reach consensus on a governance intervention that is supported by everyone involved). However, not including all

the people and organisations affected means that some get a say over what others will have to do. This raises questions about the democratic accountability of collaborations in general and of voluntary programs when governments adapt these as public regulation.

While collaborative governance is widely pursued and preferred by governments, businesses, civil society groups and individuals, the question remains how this governance ideology can be translated into governance processes that indeed live up to these promises. The examples discussed in this chapter have flagged a range of (potential) problems with collaborative governance for urban sustainability and resilience (for example, collaborations may become elite groups, participants may seek to pursue only their own interests and there is a risk of regulatory capture). Scholars interested in collaborative governance may wish to look at the wide range of examples available in the area of urban sustainability and resilience to better understand what conditions and what types of collaborations are in fact promising alternatives for traditional direct regulatory interventions. Similar concerns hold true for the application of voluntary programs that seek increased urban sustainability and resilience. The questions remain why individuals and organisations would want to participate in such programs, under what conditions these programs can achieve their intended goals and how such programs can have a transformative effect. The wide range of voluntary programs that has been introduced in the area of urban sustainability and resilience should give scholars enough insight to answer such questions.

Of course, it is unlikely that a single governance system, process or tool will be sufficient to achieve improved urban sustainability and resilience. It is likely that various systems, processes and tools will need to interact—and, in cities, often a wide variety of systems, processes and tools are implemented. Such governance mixes, and the wide range of traditional and novel governance systems, processes and tools that operate side by side in various contextual settings, should allow for empirically rich studies that can help to strengthen, refine and even develop new theories on regulation and governance; again, Neil Gunningham and Peter Grabosky's *Smart Regulation* (Gunningham et al. 1998) is a typical example from RegNet scholarship that is interested in such policy mixes.

It seems therefore that urban sustainability and resilience, and cities and the built environment more generally, make for ideal areas in which to study governance systems, processes and tools. They have remained, however, largely outside the scope of regulation and governance scholars

to date. In this chapter, I have only scratched the surface of a range of traditional and novel governance tools (see further van der Heijden 2014). I hope that future regulation and governance scholarship will have a stronger focus on this area of significant importance.

That leaves me to raise a final issue that strikes me as odd when looking a urban sustainability and resilience in particular, and cities more generally, through a regulation and governance lens: there is no strong theorising on urban governance. There is a strong literature on urban politics and urban studies, but not a similarly well-developed urban regulation and governance literature (a similar argument is made by some of the authors referred to in the Additional Reading list). This is odd for many reasons, and many interesting regulation and governance questions beg to be answered. To name a few:

- Cities are extremely complex arenas with many actors and interests involved: how is it that anything gets regulated, governed and realised at all at city level?
- Cities also appear to become more important as non-state actors in international negotiations and governance processes: how do cities combine this role as (often very strong) non-state actors in the international sphere with their fairly weak administrative roles (such as the enforcement of building codes) under regional or national governments?
- Some cities rival in size the output of multinational companies or even countries (London, for example, produces more carbon emissions and consumes more resources than some small nation-states): what does this imply for the governing of global common goods and societal problems?
- Finally, the trend of city-to-city collaborations such as those described in this chapter indicates the emergence of a new (non-state) economic and governing (super)power: why do cities seek to participate in such networks, and do such networks hold more potential to address pressing global risks than international state-to-state negotiations and agreements do currently?

In sum, the city as an actor and area of regulation and governance (and institutions and networks) provides scholars of regulation and governance with many promising research avenues to explore.

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Environmental regulation and governance

Cameron Holley[1]

1. Introduction

The world is speeding down an unsustainable path (UNEP 2012). Biodiversity loss, water scarcity, pollution and climate change are threatening the life-support functions of our planet (UNEP 2012). These threats persist because of many factors, not least an ongoing crisis of governance (Lange et al. 2013). Since the birth of modern environmental regulation in the 1970s, designing and implementing effective, efficient and legitimate regulation and governance have remained a continuing challenge for governments and society.

Initially, governments and their agents managed environmental problems through enforcement of strict rules and standards set out in legislation and treaties (Gunningham 2009). However, with the rise of neoliberal ideals in the 1980s, governments began to shift their attention away from this Westphalian vision of state power through hierarchy. Instead, environmental degradation was, in many cases, to be curbed via market-based approaches, voluntarism and other 'light-handed' policy initiatives such as partnerships and cooperation (Gunningham

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and Holley 2010). Yet, by the end of the 1990s, continuing ecological degradation and the increasing complexity of social and environmental problems saw a new shift towards environmental governance (Driessen et al. 2012) or what is increasingly being called 'new environmental governance' (Holley et al. 2012). The new environmental governance (NEG) emphasised collaboration, integration, participation, deliberative styles of decision-making, adaptation and learning. As with many other issues discussed in this book, NEG may equally be described as polycentric governance, where governments, non-governmental organisations (NGOs), the private sector and civil society form many centres of decision-making and action that are formally independent of each other, but that can either function independently or constitute an interdependent system of relations (Ostrom 2010: 643). Although NEG is still an evolving concept, a growing number of scholars and policymakers believe it can substantially improve the effectiveness, efficiency and legitimacy of responses to environmental problems.

This chapter provides an overview of the recent NEG trend and maps the shifts in environmental regulation and governance that led us here. It also highlights recent debates and unresolved challenges for governing the environment. In such a short chapter, much of what will be discussed will inevitably caricature the wealth of global experience and debates. For example, this chapter primarily focuses on domestic Anglo-Saxon jurisdictions (for other contexts, see, for example, Dubash and Morgan 2012; Sofronova et al. 2014), but consideration is also given to related trends at the international level. It also does not consider a range of related fields and subfields, such as disaster governance (Djlante et al. 2013), risk governance (Renn 2008) or rights (Kotzé and Du Plessis 2010).

The chapter commences with a brief discussion of traditional environmental regulation before examining the shift to markets, light-handed approaches and early forms of partnerships. Finally, it turns to the recent NEG approach, discussing theory and examples, before highlighting recent debates, including whether NEG can deliver more effective, efficient and legitimate performance, and the relationship of NEG to more conventional regulatory approaches. As we will see, the shift between regulation, markets and NEG is ongoing and has not seen each stage entirely replaced with another. Rather, different phases very often coexist and relate to each other in a variety of ways

(see, for example, Gunningham and Sinclair, Chapter 8, this volume; Driessen et al. 2012: 157). The chapter concludes with a brief summary and key references.

2. Traditional environmental law and regulation

The development of international and national environmental laws arose against a backdrop of states exercising sovereignty over natural resources within their territorial boundaries (Gess 1964). It was only natural, then, that the early environmental protection of the 1970s relied on the nation-state or, at the international level, groups of states, acting primarily through treaty-based intergovernmental organisations (de Burca et al. 2013; Abbott and Snidal 2009: 505). A raft of issue-specific international rules (for example, on world heritage, trade in endangered species and pollution from ships) was developed and overseen by international organisations such as the United Nations Environment Programme (UNEP) (Kelemen and Vogel 2010). Under this approach, states believed they understood environmental problems clearly, that they could be defined in advance and managed through mandatory rules (de Burca et al. 2013: 730).

A similar example was the so-called command-and-control approach to environmental regulation adopted by domestic Western governments. Evoking Hobbes's *Leviathan* (1985), this involved centralised legislatures setting blanket environmental targets, such as emission standards, exposure levels or technology standards (the command). Delegated agents, such as environmental protection agencies, were then empowered to police compliance and impose penalties where standards were breached (the control) (de Burca et al. 2013; Gunningham et al. 1998).

At least in some circumstances, these state-centred approaches to law and regulation were relatively effective, achieving a number of gains in halting and reducing environmental degradation (Cole and Grossman 1999; Najam et al. 2006). However, they also suffered from a number of weaknesses that limited their effectiveness.

For example, at the international level, 'treaty congestion' and fragmentation led to claims that international environmental law was too unwieldy, incoherent and ineffective to confront increasingly serious global environmental challenges (Najam et al. 2006; Scott 2011). Similar claims were levelled at domestic systems, where the centralised and uniform nature of command-and-control regulation was increasingly criticised as costly, cumbersome, inefficient and insensitive to local contextualities (Stewart 2001; Karkkainen 2006; Holley et al. 2012). This insensitivity, along with the tendency of governments to administer regulation through departments that are fragmented along ecologically arbitrary, human-defined boundaries, made it increasingly difficult for traditional regulation to address more complex environmental problems, which often involved multiple polluters and required a more holistic and integrated management approach (Freeman and Farber 2005; Durant et al. 2004; Holley et al. 2012: 2). Adversarial enforcement by 'stick'-waving agencies, particularly in the United States, also produced counterproductive resistance from regulated individuals and enterprises (Lazarus 2004).

As a result of these weaknesses, state-centred hierarchy was no longer seen as the *exclusive* response to *all* environmental problems (Durant et al. 2004). Instead, by the 1980s, new market-based instruments, partnership and light-handed approaches were being explored, particularly relating to more complex environmental issues such as resource extraction and in sectors resistant to external intervention.

3. Market-based instruments, partnerships and light-handed approaches

The unpopularity of traditional environmental regulation was fuelled in part by the rise of neoliberal economists in the public domain during the 1980s. According to those working within this governance paradigm, Adam Smith's vision of an 'invisible hand' would, if allowed to materialise, lead rational, self-maximising individuals to promote 'public interests' without the need for forceful government interference (Smith 2007). Environmental degradation was occurring as a consequence of a failure of markets to properly value environmental resources (Cutting and Cahoon 2005: 55; Roma 2006: 534). What was needed was the creation of market signals that would place a value on and charge appositely for the use of scarce assets (Holley et al. 2012: 2).

Although public opposition prevented wholesale deregulation, a variety of government-supported, market-based instruments would eventually emerge, such as 'cap-and-trade' schemes, along with a mixture of subsidies and, to a lesser extent, pollution taxes (Gunningham and Holley 2010). Prominent market-based instruments introduced to address point sources of pollution over subsequent decades included the acid rain sulphur dioxide trading scheme developed in the United States (Stavin 1998), climate markets spurred by the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Agreement (McKibbin and Wilcoxen 2002) as well as water rights and trading (Godden 2008). Economic incentive–based schemes, subsidies and other market approaches, such as land acquisitions and payments, were also increasingly adopted to address more complex 'second-generation' issues (Farrier 1995: 399–405).

Yet, despite some successes, many market-inspired approaches have proved to be less environmentally successful than command-and-control approaches (Howes et al. 1997). In part, this is because of a variety of practical and contextual difficulties faced by governments who seek to develop and rely on market mechanisms. Although *free markets* in theory mobilise knowledge (Hayek 1945), most *market-based* instruments are similar to command-and-control instruments in their requirement for centralised planning and knowledge, which are necessary for setting the right tax level, charge or even cap. Setting these levels can often be difficult for policymakers in the absence of an existing market reference (Sabel et al. 1999; Freeman and Farber 2005). Tradable rights/pollution likewise need a level of compliance and enforcement machinery similar to traditional performance-based regulation (Holley and Sinclair 2012). Regulated businesses also historically opposed the introduction of economic initiatives such as taxes and charges, preferring the certainty of regulation to the uncertainty of novel approaches (Gunningham and Holley 2010).

An alternative to direct regulation more popular with businesses (and increasingly cashed-strapped domestic government regulators) was a variety of voluntary and light-handed initiatives that emerged during the 1980s and 1990s. These included business-led voluntary and self-regulatory approaches such as Responsible Care (Lenox and Nash 2003). While they achieved limited success, they typically failed to deliver acceptable levels of industry-wide compliance, particularly where the

gap between the private interests of business (not least, making a profit) and the public interest in environmental protection was substantial (Gunningham and Sinclair 2002: 145–55; Freeman and Farber 2005).

Stronger, but reconfigured, roles for domestic state regulation were accordingly pursued. These approaches typically maintained a state underpinning, but looked to engage with business and NGOs in ways that were considered more effective and efficient, while also maintaining the cooperation and trust of regulated actors. This was primarily achieved by accounting for, and facilitating the use of, non-state knowledge and capacities and harnessing related motivational drivers, such as profit, social licence (for example, negative business publicity by NGOs) and other informal sanctions (Gunningham and Sinclair 2002).

These reconfigured approaches varied in form, and have been thought about and analysed using a variety of theories. These included environmental partnerships and negotiated agreements in Europe (Orts and Deketelaere 2001); tripartite arrangements between regulators, communities and industry (Ayres and Braithwaite 1992), such as environmental improvement plans in Australia (Holley and Gunningham 2006); informational-based regulation, embodied most prominently in the Toxic Release Inventory in the United States (Karkkainen 2001); eco-modernisation that facilitated cooperation and the uptake of new technologies in Europe (Mol and Sonnenfeld 2000); and reflexive law approaches, where firms developed their own process and management system standards, designed to achieve regulatory goals (Orts 1995).

While each of these approaches provided greater flexibility to enterprises, including facilitating beyond compliance activities, in the absence of more coercive intervention by domestic state regulators, their impact has (for the most part) been very modest and tended to operate more or less at the margins (Gunningham and Holley 2010).

Even so, what is unique about these flexible and cooperative programs is that they signified some of the first steps towards what has become NEG thinking and practice (discussed below), where non-state actors take on a greater role in the 'steering' and 'rowing' of environmental governance (Osborne and Gaebler 1993).

This trend was mirrored by unique international changes. For instance, new transgovernmental environmental networks of state officials and private actors emerged to combat the abovementioned international

inertia and fragmentation (Slaughter 2004; de Burca et al. 2013). International organisations also sought to use their mandates and expertise to extend governance beyond the point of state agreement and deepen the application of rules. They did this through partnerships, involving other organisations and actors, and establishing and diffusing new niches of environmental governance, including the uptake of integrated water resource management and community-based biodiversity management (de Burca et al. 2013: 734; Glasbergen et al. 2007; Andonova 2010).

A different instance of non-state-led international networks and partnerships was the Forest Stewardship Council (FSC) certification scheme, established by civil society organisations (de Burca et al. 2013). Although the FSC does not necessarily have authority from, or over, states, its rules proved influential in the commercial marketplace (Overdevest and Zeitlen 2014; de Burca et al. 2013: 734).

These developments, both internationally and domestically, opened up new forms of non-state auspices and influence, in ways that arguably pioneered NEG. However, as we will see below, what makes the NEG phase distinct from these earlier developments is that it demands levels of collaboration, participation, flexibility and adaptability that would have been unimaginable some years before (de Burca et al. 2013; Holley et al. 2012).

4. New environmental governance

The NEG enterprise involves collaboration between a diversity of private, public and non-governmental stakeholders, who, acting together towards commonly agreed (or mutually negotiated) goals, hope to achieve far more collectively than individually (Holley et al. 2012: 4). It relies heavily on participatory dialogue and deliberation, flexibility (rather than uniformity), inclusiveness, knowledge generation and processes of learning, transparency and institutionalised consensus-building practices (see, generally, de Burca and Scott 2006; Trubek and Trubek 2007).

There is no firm agreement on a definitive 'model' of NEG (van der Heijden 2013). Rather, various terms and theories have been developed to describe and prescribe how NEG operates. These include 'experimentalism' (de Burca et al. 2013), 'post-sovereign environmental

governance' (Karkkainen 2004a), 'collaborative governance' (Freeman 1997), 'adaptive governance' (Chaffin et al. 2014) and 'global environmental governance' (Okereke et al. 2009).

These perspectives vary in their emphasis, encompassing different schools of thought and applying varying institutional and political approaches to a range of environmental problems. Experimentalism, for example, draws inspiration from pragmatism (Dewey 1946), while adaptive governance draws more on social-ecological systems and adaptive management (Holling 1978; Berkes and Folke 1998). However, these theories are bound by a number of common characteristics. These include a focus on the virtues of flexibility, participation, deliberation, collaboration, learning and adaptation. These common features have led a burgeoning group of scholars to collectively refer to these approaches as NEG (Karkkainen 2004b; de Burca and Scott 2006; Holley et al. 2012).

Consistent with evolving understandings of new governance, not all the above characteristics need to be present for a particular practice or program to fall within this category; indeed, there are very few single institutional forms that fully capture the idea of NEG in its entirety. However, the more characteristics that are present, the stronger is the claim that they fall within the category of NEG (de Burca and Scott 2006; Holley et al. 2012).

Domestic programs that fall within this category typically involve a variety of non-state actors assuming administrative, regulatory, managerial and mediating functions previously undertaken by the state (Gunningham 2009; Ostrom 2010: 643). Prominent examples include the establishment of 56 regional natural resource management bodies in Australia (Holley et al. 2012); collaborative approaches to water management in New Zealand (Holley and Gunningham 2011); and the endeavours of multiple agencies and stakeholders to address competing demands on water resources in the Bay Delta in the United States (Holley 2015).

NEG has also been identified internationally (and in the interaction between international and domestic levels) with the emergence of open-ended standards, multilevel networks, deliberation for the internalisation of international norms, as well as significant decisions and implementation roles being taken by non-state actors (Cottrell and Trubek 2012: 362). This has included the European Union's Water Framework Directive

(Trubek and Trubek 2007) and Forest Law Enforcement Governance and Trade initiative (Overdevest and Zeitlen 2014); the Partnership for the Development of Environmental Law in Africa (Kimani 2010); the Inter-American Tropical Tuna Commission (de Burca et al. 2013); and management of the Great Lakes in the United States/Canada (Karkkainen 2004a).

It is an open question whether NEG sufficiently accounts for the practical differences *within* these evolving environmental governance examples and theories (Karkkainen 2004b). Using a generalised rubric of 'new governance' to lump together different theories and practices does risk NEG becoming little more than a 'catchall term' (von der Porten and de Loë 2013; Karkkainen 2004b). For this reason, scholars are beginning to try to dissect different modes of environmental governance (Driessen et al. 2012). Even so, at this stage of the inquiry, there are, arguably, considerable benefits to be gained from grouping different theories and scholarship within a NEG framework. Consistent with emerging understandings within the new governance literature itself, a generalised understanding of NEG (with apposite attention to differences) can facilitate the linking and comparison of theories, as well as testing, developing and reformulating thinking (Lobel 2004; Karrkainen 2004b). Doing so can ensure a better understanding of what is occurring, and offers a constructive approach for developing a normative vision capable of influencing the direction of the sprawling governance theory in the environmental arena (Lobel 2004: 501–6; Walker 2006).

Certainly, the shift to NEG has to some extent been shaped by specific contexts and influences (de Burca 2010), but, generally speaking, it has come about because of the perceived capacity of these more collaborative and adaptive approaches to deliver benefits in circumstances where traditional approaches cannot (Holley et al. 2012: 4). For example, prescriptive regulatory standards—and even caps/taxes in some market-based instruments—depend on a degree of centralised knowledge (for example, to set suitable standards, prices or caps) that is often not available. In contrast, the sort of collaborative, participatory and deliberative approaches contemplated by NEG are said to lead to problem solving that is inclusive of local circumstances and able to capitalise on the unique local knowledge and other capacities of multiple public and private actors (Holley et al. 2012: 4). The direct involvement of these actors in deliberative styles of governance (albeit varying from local citizens to international NGOs) can also foster stakeholder ownership

and 'buy-in', giving a greater voice to marginalised interests (in contrast with an exclusive reliance on bureaucratic expertise in hierarchy or on price and competition in markets) (Sabel et al. 1999; Holley et al. 2012: 4).

NEG's learning and adaptation focus, meanwhile, is thought to ensure that it copes better with the dynamism, uncertainty and complexity of environmental problems than either traditional regulation (which can easily ossify, freezing standards at a particular point in time, or by adopting a one-size-fits-all approach) or other market-based approaches (where significant post hoc program corrections to pollution levels and permits set from the centre prevent new entrants or become very difficult without undermining the security of ownership rights on which the market itself depends) (Holley et al. 2012: 5). Instead, NEG ideals—be it adaptive management, pragmatism or other forms of knowledge generation (Lobel 2004)—are said to enable governance processes that 'learn' more easily from changing circumstances 'on the ground' (and can also promote accountability via peer review) (Sabel et al. 1999: 3; Durant et al. 2004: 4; Lobel 2004: 502; Orts 1995).

Yet, despite the promise of these benefits, it is uncertain whether they can be achieved in practice (Driessen et al. 2012; van der Heijden, Chapter 41, this volume). Indeed, NEG has faced a litany of criticisms, including claims that it leads to lowest common denominator solutions, rent-seeking, dominance by self-interested economic actors, disenfranchised environmental interests and problems sustaining participation after initial bursts of enthusiasm (Holley et al. 2012).

Considerable empirical research is still required to resolve these arguments about the impacts of NEG, as the principles and practical conditions are what will enable successful NEG experiments to be replicated (Karkkainen 2006; Holley et al. 2012: 9).

One particularly fruitful area of research regarding these issues has focused on whether and how NEG interacts with earlier phases of environmental regulation—principally, command and control, which remains a bedrock of point source pollution control in most countries (Karkkainen 2004b; Lobel 2004; Gunningham 2009: 159). Scholars have tentatively identified a range of possible relationships between traditional command and control and NEG, each of which has differing implications for 'success'. Some of the most underexplored hypotheses include: 'gaps', where law and collaboration conflict and potentially

inhibit mutual success; 'NEG in the shadow of the law', a constructive relationship akin to Ayres and Braithwaite's (1992) regulatory pyramid, where regulation should be set precisely for the purposes of inducing otherwise reluctant people to embrace NEG; and 'integration', where the two approaches are merged into an integrated system (Trubek and Trubek 2007). While debates over these hypotheses continue, a range of NEG theories is increasingly recognising that NEG very often needs to operate in hybrid form within conventional approaches—to act as backstop, to prevent abuse and to incentivise actor participation (Holley and Gunningham 2011; de Burca et al. 2013).

More generally, the few studies that have attempted to grapple with NEG's performance increasingly suggest that it is no panacea for the globe's continuing environmental problems (as perhaps it was once thought to be) (de Burca et al. 2013; Holley et al. 2012). This may be a particularly important realisation, as we now, arguably, confront new global challenges in the era of the 'Anthropocene'. This new classification of the modern planetary epoch signifies a new role for humankind: from a species that had to adapt to changes in its natural environment to one that has become a driving force in the planetary system (Biermann 2014: 57). Such developments may call for increased attention to not only making NEG 'work', but also new ways of governing global problems and systems (see, for example, Stevenson and Dryzek 2014; Biermann 2014).

5. Conclusion

Over the past 40 years, the environmental governance landscape has shifted significantly, but it also remains multifaceted, covered with both new and old policy approaches (Driessen et al. 2012). A good example of this is the current response to climate change, which involves not only market-based instruments, but also hierarchy, as well as NEG approaches (see, generally, Dryzek et al. 2011).

In the Anthropocene, where environmental problems such as climate change will likely affect generations, the journey of governing environmental problems is far from complete. In many ways, both international and domestic environmental governance remain something of a continuing experiment: keeping what works and finding new ways to do things better when they don't work. While the recent shift to NEG

remains a work in progress, the reformation will no doubt continue, however unevenly, suggesting there is all the more reason to learn *now* from both successes and failures so we can build a more effective and democratic approach for environmental governance in the future.

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Section 8: Regulatory futures

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Regulating capitalism's processes of destruction

Peter Drahos[1]

1. Introduction

Three large-scale processes of change currently confront regulatory networks and institutions everywhere: eco-processes collapse, techno-processes collapse and financial processes collapse. Collapse, such as the filing for bankruptcy by Lehman Brothers in 2008, is always the product of a process. This chapter focuses on characterising the processes of change with which actor networks either knowingly or unknowingly engage as they attempt to influence the flow of events while being situated, at least in most cases, within a variant of capitalism.

This chapter is not intended to be a piece of forecasting about the outcome of these processes. That is much more a game for futurists employing scenario building or those who have managed to capture real-world processes through their formal models of complex systems. Rather, in this chapter, the goal is to provide a clear statement of the long-term governance challenges facing regulatory capitalism. We begin with a discussion of capitalism and regulation.

1 My thanks to John Braithwaite and Martin Krygier for their comments on this chapter. My thanks also to Jeroen van der Heijden for his patience and reflections as I paced up and down my room trying to explain the ideas of the chapter.

2. Capitalism and regulation

The 42 chapters of this book support the view that regulation by state and non-state actors permeates the activities of state and non-state actors. Actors are, in other words, part of a systems duality and circularity in which they sometimes function as regulator and on other occasions as regulatee. The dual regulator–regulatee role holds true for all actors, irrespective of size. Credit ratings agencies such as Standard and Poor's and Moody's Investors Services, which regulated the credit worthiness of states through their ratings prior to the Global Financial Crisis (GFC), have, post GFC, found themselves on the receiving end of regulatory reform. This happened after their self-interested rating of complex financial instruments was exposed.

The scale and intensity of regulator–regulatee relationships will most likely increase. Information and communications technology (ICT) is delivering rising interconnectedness, creating more opportunity for these relationships to be created. Digital divides still remain, especially in Africa, but, according to the International Telecommunications Union (ITU), 3G mobile broadband now covers 89 per cent of the four billion people living in urban environments and 29 per cent of the 3.4 billion living in rural regions (ITU 2015). It is the pace of ICT's global extension that is impressive compared with communications technologies from earlier eras such as telegraph and radio. If Marshall McCluhan's observation that the medium is the message holds true then perhaps networks will bring a new and global resonance to Heraclitus's observation that 'all is flux'.

The rise and rise of regulation has led to the identification of another species of capitalism: 'regulatory capitalism' (see Levi-Faur, Chapter 17, this volume). Capitalism has turned out to be a system (or systems) for which much has been predicated. One can study capitalism territorially, as Galbraith (1993) did in *American Capitalism: The Concept of Countervailing Power*, or as Huang (2008) does in his *Capitalism with Chinese Characteristics*. Others have distinguished among oligarchic capitalism, state-guided capitalism, big-firm capitalism and entrepreneurial capitalism (Baumol et al. 2012). Hall and Soskice (2001), drawing on the comparative capitalism literature, develop a varieties-of-capitalism approach in which liberal market economies and coordinated market economies occupy opposite ends of a spectrum. In their investigation of capitalisms, the focus is on how firms solve

various types of coordination problems. Another cluster of predicates such as knowledge capitalism, information capitalism and post-industrial capitalism draws attention to the increasing role of knowledge in the production and distribution of services and products in some capitalist economies—a phenomenon first systematically studied by the economist Fritz Machlup (1962). These and many other predications of capitalism seem to bear out Schumpeter's observation that it is 'by nature a form or method of economic change and not only never is but never can be stationary' (1976: 82).

The description of capitalism as regulatory seems oxymoronic, at odds with the idea of capitalism being a method of perpetual change. Perpetual change implies freedom rather than regulation. It suggests that capitalism does best when the state turns itself into a watchman of public order and avoids intervention in the market. This belief drives neoliberal initiatives of privatisation and deregulation, but is it an accurate description of capitalism's evolution?

The first signs that neoliberalism did not offer a good description of what was happening in capitalist systems came towards the end of the 1980s as regulatory scholars began to point out that the Thatcher and Reagan eras had not led to anything like the uniform decrease in regulation in the United States and United Kingdom that might have been expected (Ayres and Braithwaite 1992: 7–12). Small government had seemingly delivered big regulation. This was not following a neoliberal script. Patterns of regulation seemed to follow privatisation and deregulation. When states privatised public assets such as health services, telecommunications, water, electricity, railways and so on, they had to either create or strengthen independent regulatory agencies. The lists of regulators in countries grew longer, especially in the 1990s, a decade in which the impact of the neoliberal privatisation initiatives of the 1980s should have produced a decline in the number of agencies (Levi-Faur 2005: 18–19). Regulation of one kind or another kept breaking out at different levels of governance. Voluntary standard-setting initiatives such as those to be found in fair trade were seeing the emergence of fair trade organisations and certification systems, creating, in effect, regulatory standards with which supermarkets and multinational food producers were increasingly engaging (Hutchens 2009). It appeared as if there was a regulatory version of Newton's third law: for every deregulatory or privatisation initiative, there was an opposite regulatory reaction from somewhere within the system.

Levi-Faur and Jordana coined the term 'regulatory capitalism' to describe a system capable of generating regulation from many actors, at different levels and using a variety of instruments to communicate and enforce their chosen norms (Braithwaite 2008: xi). Regulatory capitalism represents, in contrast to laissez-faire capitalism and welfare capitalism, a shift in governance functions in which the state, broadly speaking, does more 'steering' and business more 'rowing' (Levi-Faur 2005: 16). Welfare states had developed systems for directly provisioning the entitlements of citizens in areas such as education, employment, health, disability and age pensions and child care. Regulatory capitalism reorganises many of the processes of the welfare state. Many social entitlements are delivered through third-party organisations that are paid by governments to provide them. Citizens, as the holders of welfare rights, find themselves entering networked worlds made up of government agencies and third-party providers (Goldsmith and Eggers 2004). Governments spend much more time monitoring, checking, supervising and testing the activities and services of providers.

The reorganisation of regulation across capitalism's many sectors has been achieved through the use of networks. Networks are not a new form of organisation, but their use in markets and by governments has been dramatically accelerated by ICT. Information technologies contribute to their own spread, as well as the spread of other technologies, creating feedback loops of all kinds, and thereby creating a process that 'endlessly amplifies the power of technology' (Castells 2010: 31). Corporations harness information technology networks to develop longer and more complex supply and production networks (Dunning and Lundan 2008: 489–90). In these networks, China often ends up being the final assembly point for a product, the parts of which will have come from other countries that make up the links in a global chain of production (Athukorala and Yamashita 2009). For example, Apple's products begin their life as research and development initiatives in the United States, with parts coming from countries such as Malaysia and Taiwan and software from other multinationals such as Toshiba, with the last stop in the production network being China, from where the finished products are exported back to eager customers in the United States. It is not so much that command and hierarchy cease being characteristics of the firm in this 'post-industrial' or 'informational' age, but rather that corporations have more options to reorganise production and distribution, as well as their tax affairs, using contracts and networks.

Globally dominant corporations are not peculiar to regulatory capitalism. The British Empire was served by one of history's most powerful trading corporations, the British East India Company. Few industries have been dominated by private corporations in the way the oil industry was dominated by the seven majors in the first half of the twentieth century (Sampson 1976). What is different for today's multinationals is the way in which they can rapidly become objects of regulatory strategies formulated by other actors. For example, large companies in the textile, footwear and clothing industries, which, through the clever use of contracts, insulate themselves from the reach of labour laws to generate cost pressures on homeworkers, may find themselves on the receiving end of community-based initiatives such as Australia's FairWear initiative and ultimately supply-chain legislation that imposes liabilities where none previously existed (Marshall 2014). Fossil fuel companies—to take another example of how regulatory capitalism can generate regulation from any quarter—are seeing non-governmental actors developing strategies aimed at encouraging institutional investors to divest their holdings in these companies (Ayling and Gunningham 2015).

Regulatory capitalism is a distinctive system precisely because regulatory initiatives can be generated from any part of its technology-enabled networks. One can see it as the coevolved complementarity to capitalism's restless economic nature in which each new accumulation phase or impulse of capitalism coexists with a regulatory phase or impulse. Through this coevolutionary process, regulatory capitalism generates various public principles of conduct, such as procedural fairness, respect for human rights and restorative justice, that serve to reduce the risk of societal destruction. Such a risk, Polyani (2001) argued, looms over a society in which the principle of the self-regulating market has assumed a tyrannical status, driving out all other principles. This way of describing regulatory capitalism might be taken to imply that it is more adaptive than previous forms of capitalism. Many of the chapters in this book suggest that the problem-solving capacity of regulatory capitalism is superior to its predecessors. Even if one cannot write the regulatory equivalent of QED after initiatives emerging out of regulatory capitalism in fields such as human rights, migration, cybercrime or tax evasion problems, one might nevertheless see them as Pareto improvements or improvements judged by some other criterion.

The remainder of this chapter probes the idea that regulation is a source of capitalism's adaptivity in a little more detail. Towards the end of his book on regulatory capitalism, John Braithwaite (2008) asks whether it is a 'good thing'. His answer, which is based on his identification of regulatory capitalism's systemic capacity to produce global markets in vice or virtue, is that it is a mixed bag. The question being asked here is slightly different. Is regulatory capitalism sufficiently adaptive to cope with the three existential challenges described in the next section? As will become apparent, the labels used to distinguish the challenges represent simplifications of complex and interacting processes, but it is a simplification that is both convenient and necessary for present purposes. The aim here is to show that the adaptivity of regulatory capitalism will be globally tested by different types of processes.

There is little doubt that regulatory capitalism, because of its globalised and networked nature, is in a better position than any previous form of capitalism to uplift regulatory capacities and capabilities from the nodes of its countless networks to develop interventions in its systems. This intervening agency does depend heavily on an entrepreneurship that sees soft-wiring solutions where others see only hardwired structures. Washington lobbyists saw the possibilities for globalising intellectual property rights where government officials saw only treaty impediments (Drahos with Braithwaite 2002). Social entrepreneurs saw opportunities to create fair trade for poor farmers where most saw only domination by commodity cartels. These and many other examples of agency that produce a rewiring of some of capitalism's networks are, however, examples of sector or domain-specific solutions. Our interest here is in the broader adaptivity of the system to existential challenges thrown up by the macro-processes identified in the next section. The purpose is to make clear that the superior adaptivity of regulatory capitalism at sector or domain levels does not necessarily translate to the macro-processes of existential crisis that confront capitalism in this century. Putting it at its simplest, regulatory capitalism's capacity to deal with crises within its parts may fail it when it faces a crisis that affects it as a whole. As we will see, the sources of crisis in capitalism are more varied than those that Marx first identified from his economic data—data gathered from a nineteenth-century liberal capitalism that too often turned a blind eye to what was happening to the women and children trying to survive on its dangerous factory floors. The contradictions between labour practices and the promises of capital were evident enough. Over time, welfare and then regulatory capitalism helped to align these practices with

liberalism's promises of what ought to happen in a society where all were, at least formally, bearers of rights. Regulatory capitalism now confronts processes of collapse on a scale and scope not envisaged by Marx and to which his data do not speak.

3. Three processes of collapse

Ecosystems processes

Early on in *Silent Spring*, Rachel Carson asks what has silenced the voices of spring. The first large-scale study of this and many other environmental questions is not her book, but the 1972 report by Meadows et al. entitled *The Limits to Growth* (*LG*). This study of the world's future relied on what is, by today's standards, ancient computing technology. Around that time, Intel's first processor was capable of processing about 60,000 instructions per minute. Today's processors operate in hundreds of millions of instructions per minute. Despite its age, the *LG*'s analysis of the trajectory of world population, industrialisation, pollution, food production and resource depletion has proved to be much more robust than one might have anticipated, especially since its formal world model plots these trajectories to 2100. In 2008, Graham Turner published a paper in which he compared three key *LG* scenarios with independently obtained historical data from 1970 to 2000. Of the three scenarios, the scenario described by *LG* as the standard run (where the world system follows a business-as-usual path) lined up well with the actual historical data. In the standard-run model, food production, industrial output and population grow exponentially, consuming non-renewable resources to the point where resource extraction consumes too much investment and the industrialised food system collapses, bringing about eventual population decline.

Since *LG*, we have much more understanding and evidence concerning processes of ecological change. The work of the Intergovernmental Panel on Climate Change (IPCC) is well known. Equally important, but less well known, is an initiative known as the Millennium Ecosystem Assessment that was launched in 2001.[2] Involving more than 1,360 scientists from 95 countries, it produced a series of technical studies

2 See: www.millenniumassessment.org/en/index.html.

and reports on changes in ecosystems and the likely consequences for human wellbeing. Economic growth has impacted on these ecosystems to the point where some 15 out of 24 major systems are in global decline (Millennium Ecosystem Assessment 2005: 1).

Obviously, ecosystems processes can be described in scientific terms in many different ways, but, for our purposes, we will say that these are nonlinear processes containing feedback loops and exponential growth patterns. Exponential functions played a critical role in the systems modelling done in *LG*.

Techno-processes collapse

Large-scale extinction of humans through a technological process may be an accident or intentional. The world became much more conscious of intentional extinction after 'Little Boy' and 'Fat Man' exploded over Japan in 1945. Some of the scientists who had built these atomic bombs formed an organisation called the Atomic Scientists of Chicago. Through a publication called the *Bulletin of the Atomic Scientists of Chicago*, they began to inform the public of the dangers of nuclear energy. In 1947, the bulletin showed on its front cover a clock set at seven minutes to midnight, with midnight being the moment of apocalypse.[3] Since 1947, the bulletin has warned of two other riders of the apocalypse: carbon technologies leading to climate change and biological developments that threaten biosecurity. Technological developments continue to open up new scenarios. The cheap printing of millions of war robots would enable aggressors to launch wave after wave of attack against carefully chosen key economic centres—something both difficult and costly to defend against.

How might one characterise the processes of techno-collapse? One obvious feature of these processes is to say that they are examples of innovation. Clearly, this raises the rather large issue of how best to characterise innovation. Over the past few decades there has been within economics a shift towards analysing innovation using various kinds of evolutionary models (Foster and Metcalfe 2001). The evolutionary economics literature on innovation is large. For present purposes, we draw on the idea advanced by Richard Nelson (2001) that technology and institutions are characterised by a coevolutionary relationship.

3 The *Bulletin of the Atomic Scientists of Chicago* is available at: thebulletin.org/.

Technologies do not arrive courtesy of Promethean delivery, but rather are endogenous, their future path dependent on institutional responses to them.

Financial processes collapse

The GFC of 2007–08 was a reminder that capitalism's markets of financial intermediation bust as well as boom. How do we characterise the processes that lead to financial crises? Marx believed that crisis was a structural property of capitalism, linked to the tendency of profit to fall and ultimately to a contradiction between the forces of labour and capital. One can label this a dialectical process, but, ultimately, there is not much specificity in the idea, especially when compared with the models of financial behaviour being developed within economics. Much more sophisticated models have emerged within economics to explain the instability of capitalism's financial systems. An early example of this is Minsky's financial instability hypothesis, which is based on the idea that instability is linked to expectations generated during euphoric phases of the economy (for a formal model, see Keen 1995). For present purposes, the processes behind capitalism's fluctuations or instabilities can be roughly characterised as belonging to the family of nonlinear dynamics in which system chaos plays a prominent role.

Summing up, the governance systems of regulatory capitalism face three distinct existential challenges: ecosystems collapse, techno-collapse and financial systems collapse. These challenges are best thought of as ongoing processes of change to which regulatory capitalism is currently responding and to which it will have to continue to respond adaptively if it is to survive in the long term. In the case of ecosystems, capitalism has to confront nonlinear dynamics containing exponential functions; in the case of techno-collapse, there are processes of coevolution in which institutions play a crucial role; and, in the case of financial collapse, we have nonlinear dynamics characterised by chaotic behaviour.

Section 2 suggested that regulatory capitalism, through its many networks of regulatory intervention and governance, has increased rather than decreased its adaptive capacities. Section 5 discusses in more detail the question of how these improved adaptive capacities fare in the face of the processes of change described in this section. Before moving to this, the next section identifies a core feature of capitalism that will shape its systemic responsiveness to these processes: commodification.

4. The tragedy of commodification

Ever higher levels of commodity production and exchange are a fundamental characteristic of capitalism. Marx, in explaining capitalism as a distinctive system of commodity production, borrows a distinction from Adam Smith between use value and exchange value (Fine 1984: 20–3). Some things, such as ecosystems, have a use value without necessarily having an exchange value. Capitalism, as a system of commodity production, relies on property rights in the process of converting things that have use values into commodities—that is, things with exchange values. It is through new property rights that capitalism expands the horizons of its commodification possibilities (Drahos 1996). For example, mathematical algorithms have use values (think of the algorithm of addition that underpins your checking of the restaurant bill), but they do not have an exchange value until property rights are defined in ways that allow for their appropriation (for example, by allowing the patentability of algorithms).

Piketty (2014), in his recent treatment of capitalism, draws from Marx the 'principle of infinite accumulation'—the idea that capital necessarily accumulates and concentrates in fewer hands. For our purposes, it is important to emphasise that continued capital accumulation is only possible if capitalism keeps on generating new commodification possibilities. The generation of these possibilities depends most deeply on the institution of property. New forms of property rights such as intellectual property rights create new asset classes and these assets become part of financial capitalism, underpinning, for example, the price values of new financial instruments such as different types of derivatives. Property along with contracts constitute processes of propertisation that are fundamental to capitalism's method of change and expansion. While one can identify many different types of capitalism, the one thing that unites them is the expansion of their commodity horizons through propertisation. One can think of the propertisation process of capitalism as a bias or weight in the system, meaning it will tend to land on a commodity rather than commons solution more often than not. This bias manifests itself in various ways, including in the influential idea associated with Hardin (1968) that the commons leads to a 'tragedy' of destructive overuse—a tragedy that the propertisation of the commons can prevent. The problems of this propertisation bias are too great to explore here, but, among other things, it ignores the role of the intellectual commons in serving multiple generations of creators

and its function of diffusing knowledge (Drahos 1996). Solutions based on the blind application of property rights risk another kind of tragedy: the tragedy of commodification.

5. Capitalism and processes of collapse: Some reflections

As indicated at the outset, this final chapter is not an attempt at forecasting. It does not present a model of any kind, but simply sketches the essential characteristics of regulatory capitalism and identifies the deeper processes of change with which its systems of networked governance must engage. This final section of the chapter looks back to some historical examples of how well networked governance has coped with the processes of change. However, as any financial adviser would point out, past performance is not necessarily a guide to future performance. That said, the historical performance of networked governance might offer some insights into how this form of governance responds to the three types of processes described earlier. We begin with processes of techno-collapse.

Obviously, for a system to respond to a doomsday technology, it must have some warning of its existence or imminent arrival. Where knowledge of a technology is dispersed throughout the nodes of a network, there are at least more sources from which a warning might be sounded. Historically, scientific nodes have acted as a warning system. For instance, soon after the invention of recombinant DNA technology in 1975, which allowed for a gene from one organism's sequence to be cut out and spliced into the genetic sequence of another, a conference of concerned scientists held at Asilomar, California, produced some guidelines for the experimental use of the technology. Recently, more than 1,000 researchers involved in artificial intelligence projects issued an open letter warning of the dangers of an arms race driven by the increasingly rapid developments in artificial intelligence (Gibbs 2015).

The responses to nuclear technology were shaped by various social movements such as the peace, antinuclear and environmental movements, their influence aided by nuclear accidents such as those at Three Mile Island and Chernobyl. These accidents were also important in catalysing other networked regulatory responses. Three Mile Island, for example, led to the formation in 1980 of the Institute of Nuclear

Power Operations, an industry body aimed at promoting safety in the industry, with a global version in the form of the World Association of Nuclear Operators, established in 1989 (Braithwaite and Drahos 2000: 301). The detonation of a nuclear bomb in 1952 by the United Kingdom showed the United States that a strategy for dealing with a doomsday device based on the premise of central control by a single actor was unlikely to work. Instead, the history of nuclear power regulation, beginning with President Eisenhower's 'Atoms for Peace' program, has been one of creating and strengthening networks for the control of technology for both military and civilian purposes. The coevolutionary relationship between these regulatory networks and nuclear technology has, in the case of nuclear power operators, led to the adoption of a strong safety culture (Rees 1994), along with decades of investment in the development of safer and more fuel-efficient reactors. In the case of nuclear weapons, the nonproliferation regime has been an important regulatory accomplishment, especially if one keeps in mind that in the 1960s there were predictions from people such as President John F. Kennedy that, by the 1970s, there could easily be 15 to 25 nuclear powers in the world (Mueller 2010: 89–90). Today there are nine countries with stockpiles of nuclear weapons (Kristensen and Norris 2016).

In the military sector, the coevolutionary process, this time between military-industrial security networks and nuclear technology, has produced large stockpiles of different types of weapons. One might plausibly argue that the probability of techno-collapse scenarios involving nuclear war has been reduced because of decades-long initiatives such as the strategic arms limitation talks and agreements concluded between the United States and the Soviet Union (and later Russia), but, given the continued existence of large stockpiles of nuclear weapons along with their much greater explosive power compared with earlier generations of weapons, it is clear that this probability has not been reduced to zero. Pakistan, for example, which appears to be increasing its nuclear stockpile at a faster rate than India, is seen as an outlier in the global nuclear order (Dalton and Krepon 2015) and reports of it agreeing to supply Saudi Arabia with nuclear devices continue to appear (Kaye 2015).

Perhaps—and it is only a perhaps—a networked governance that is dense with globally connected research networks, as well as civil society actors that track dangerous technologies, does increase the probability of early warnings about the emergence of doomsday technologies. The history of nuclear power regulation also suggests that networked

governance can globalise a safety culture in a way that command-and-control regulation cannot. However, the case of nuclear technology also demonstrates that coevolutionary processes can dramatically increase the scale of consequences of a technology. Military-industrial networks have been the institutional drivers of an evolution from simple bombs and planes to nuclear weapons systems of great power and flexible delivery. The networked governance of capitalism will, within its networks, have coevolutionary processes that will for the foreseeable future continue to deliver an ever greater variety of forms of destructive technological capability. Moreover, states will continue to compete to acquire such capabilities, suggesting that the rate of these coevolutionary processes is not likely to decrease.

Before we move on to consider financial collapse, we should note that capitalism's capacity to deal with processes of techno-collapse will also be affected by propertisation. The Asilomar conference of 1975 around the dangers of DNA was a good example of how scientists were able to start a self-regulatory process that ultimately led to the greater involvement of states in the regulation of gene technology. Since Asilomar 1975, however, biotechnological research has become more intertwined with commodification through the patent system (Palombi 2009). Paul Berg, one of the organisers of the 1975 conference, has suggested that it would be much more difficult to organise an equivalent conference today because at that time most of the attending scientists were working for public institutions whereas today 'many scientists now work for private companies where commercial considerations are paramount' (2008: 291). Berg has a point. The capacity of states to manage the risks of pandemic influenza in 2004–05 was significantly weakened by patents over key medicines (Lokuge et al. 2006).

More abstractly, the propertisation bias of the system works against the warning-call function of some nodes in the network. One might counter argue that it is improbable that the propertisation process would capture all the nodes and so losing some nodes would not be a problem as long as there were some left to sound the call. The problem with this line of thinking is that it does not recognise the importance of having many warning nodes. Asilomar 1975 was influential precisely because it represented a consensus among leading public researchers working on DNA technology. Having a large number of uncompromised nodal actors potentially available to assess technologies in a public-minded

way is critical to dealing with the risk of techno-collapse. The warning call of one bird is easy to miss in a world full of noise. One is less likely to miss a screeching flock.

Turning now to financial collapse, if one looks to financial history, crisis and collapse seem to be permanent features of global capitalism. The Great Depression, the Organization of the Petroleum Exporting Countries (OPEC) inflation shock of the 1970s and the international debt crises of the 1980s that began with Mexico's inability to service its debt are all examples of crises with large-scale repercussions. In fact, it is difficult to find decades in the twentieth century without significant financial crises. The 1990s saw Mexico take the lead with the peso crisis of 1994, then there was the East Asian crisis of 1997 and the Russian rouble crisis of 1998 saw out the decade. The first decade of the twenty-first century opened with the collapse of the dot.com bubble and Argentina, a crisis stalwart, ran into severe problems in 2001–02 with its currency peg to the US dollar. The effects of the GFC of 2007–08 continue and the eurozone crisis, which ended the first decade, looks set to dominate the next if it is not surpassed by a new Asian crisis with Chinese characteristics. This is far from being a complete list of crises in these decades. Moreover, if we added the many high-profile individual banking failures that have occurred over the decades, such as the Herstaat Bank in 1974, BCCI in 1991 and Barings in 1995, or the lingering banking crises such as the one that beset the Japanese banking system from around 1990, one can plausibly claim that crisis is a multilevel feature of capitalism's financial systems. And, of course, as Kindleberger (1978) has shown, crisis and contagion in financial systems form part of capitalism's earliest history.

Any given financial crisis tends to trigger a debate about the virtues of heavy versus light-touch regulation. Our interest here is more abstract. Capitalism's financial processes are part of the family of nonlinear dynamics with chaotic properties. The history of financial regulation suggests that such a characterisation is not unreasonable. Economic systems exhibit a degree of chaos without being examples of extreme states of chaos (Potts 2000: 87). History also shows that the system has, despite its many multilevel crises, not randomised. Put simply, while we can point to many cases of dramatic perturbations, such as falling currency values, capital flight, bank runs and crashing stock markets, we also see recovery and stability. The hypothesis here is that, over time, capitalism has developed a networked governance approach to global

financial regulation that is characterised by the integration of more nodes into regulatory networks and the evolution of independent nodes that have developed tools for the management of perturbations. It is this networked regulatory governance that has acted to stabilise the chaotic properties of the system. An example of nodal integration in the financial system is the incorporation during the 1990s of key developing countries into the Bank for International Settlements (BIS).[4] Formed in 1930, the BIS is the single most important forum for cooperation among central banks. Other examples of nodal integration include the integration of banking supervisory authorities from key developing countries such as Brazil, China and India into the Basel Committee on Banking Supervision, the principal international forum for cooperation on matters of banking supervision.

The evolution of independent institutions of central banking is perhaps the single most important regulatory accomplishment of financial capitalism. The anteroom of the Bank of England may look like a London gentlemen's club of an earlier era, but it and other central banks have become repositories of data and experience concerning the management of global systems. Whatever one thinks of the successes of central banks in managing crises, history suggests that they are better than the alternative of having political hands on the tiller of complex systems. Each new crisis has brought experience with tools of intervention, from which central banks have been able to learn. The Bank of Japan's use of quantitative easing procedures in 2001 provided the US Federal Reserve with some valuable learning when it came to launching its own quantitative easing program in 2008. Regulatory capitalism's networks of financial governance have been able to stabilise systems in crisis and to generate periods of stability, although, as many Greek citizens would no doubt point out, choices about techniques of stabilisation are still error prone, affected by politics and come at great social cost.

Turning now to ecosystems collapse, here, regulatory capitalism's networked governance also confronts processes belonging to the family of nonlinear dynamics with an emphasis on feedback loops and exponential functions. Based on the evidence coming from sources of aggregated scientific data such as the IPCC and the Millennium Ecosystem Assessment, regulatory capitalism's greatest challenge may well be survival governance in the face of accelerating rates of ecosystems

4 For the dates, see: bis.org/about/chronology/1990-1999.htm.

collapse. In core form, the problem is how quickly networked governance can respond to processes with exponential trajectories. The obvious variable here, which the *LG* study highlighted in all its various models, is time. In cases of exponential growth (and decline), time can rapidly run out, as it does in the case of the French story about a lily in a pond that doubles in size every day, meaning it would cover the pond in 30 days. On the twenty-ninth day, with the pond half covered, those looking after the pond have one day to save it. Many climate scientists would say that, because of the feedback effects they are already observing, we have little time in which to act to stop the earth system from shifting to an equilibrium likely to be disadvantageous for mammalian life.

One of the strengths of regulatory capitalism is that its interventions can begin from anywhere within its networks and then, through diffusion mechanisms, can quite rapidly globalise. The system is not dependent on one actor for initiating regulatory responses. Even if individual governments fail to act, other nodal actors from other parts of the system's networks, such as those in business or social movements, may initiate responses to the dangers of ecosystems collapse. Naturally, this still leaves the question of whether regulatory capitalism can scale a response to processes occurring at the earth system level. Regulatory capitalism offers a better chance of success than previous capitalisms, but prospects of it saving the twenty-ninth day may not be high.

Turning now to the possible effects of propertisation on ecosystems collapse, we saw earlier that propertisation creates a bias in capitalism's evolutionary operation, pushing it into the expansion of its commodity horizons. This may well be an important advantage when it comes to financing adaptive responses to ecosystems crises. The movement to encourage investors to divest from fossil fuel needs the complement of investment in renewable energy technologies. This has been happening for some time, with the World Bank issuing green bonds in 2008 (World Bank 2015). More recently, the lure of tax equity financing has seen multinationals such as Google partner with renewable energy companies—the incentive for Google being the tax benefits that accrue to the renewable energy company (Martin 2015). Innovative financing, which is underpinned by propertisation, will be critical to scaling responses to avoid ecosystems collapse.

However, propertisation also creates a drag on the speed of network responses within regulatory capitalism. Schumpeter's metaphorical description of capitalism's 'creative gales of destruction' is beguiling

but quite inaccurate. Industries that have globalised are not swept away overnight by gales, leaving a cleared building site for use by the next generation of entrepreneurs. Globalised industries such as oil and gas build up huge capital stocks that they continue to deploy for their survival and expansion. As the fracking revolution in the United States has shown, these companies continue to invest successfully in innovation (Downie and Drahos 2015). Propertisation is crucial to entrenching these companies within regulatory capitalism's networks of economic production. The response of the state has been to regulate these global industries, but the regulation is much more the product of joint negotiation than it is unilateral declaration by the state. The entrenchment of fossil fuel industries in capitalism's networks of production means that changing capitalism's energy systems from fossil to renewable fuels is much more likely to be a long, drawn-out affair involving complex contests among networks than a rapid, smooth transition to new renewable energy systems. Gales of destruction will arrive, but they are more likely to be products of changing earth system dynamics than entrepreneurial agency.

6. Conclusion

Networked actors have always been important to capitalism's evolution. The glaring gaps between the 'is' and 'ought' of capitalism were already being decreased during Marx's time, and continue to be narrowed, by networked actors. Examples of such actors in the early phases of capitalism include the various abolitionist movements that progressively ended slavery in European and other states, trade unions and the suffragettes. Examples of other movements that have caused capitalism to pivot globally in a direction different to the one it might have taken are the environmental and consumer movements. Cometh the moment of crisis, cometh the networked actor, or so it seems in the case of capitalism. As we have seen, regulatory capitalism appears to be reaching new heights of adaptivity and resilience through information technology networks. New ideas for strengthening it, for making it work better and for saving it can emanate from any one of its many nodal centres and diffuse to other parts of its networks. Specialist movements, such as the free software movement, the access to medicines movement, indigenous peoples' movements, peoples' seed movements and so on, function as

countervailing agencies creating contests with corporate capital where none existed before. Capitalism's networks—now much more neural in character—hum and crackle with ideas and contests about its future.

This is one, admittedly optimistic, view of regulatory capitalism's capacities to generate and uplift into its regulatory systems the ideas needed to improve and save it. In this view of capitalism's networks the future is much more plastic, less path-dependent, something that can be shaped through concrete ideas and interventions. And so it makes sense and is a practical public good for leaders in ideas about regulation such as Neil Gunningham to continue to identify and synthesise the best innovative practices in environmental regulation or for Christine Parker to show how corporate self-regulation might be improved if the corporation is made sufficiently permeable to outside influences that shift it from the amoral profit-maximising fiduciary to a fiduciary that has internalised social duties. These ideas and the many others described in the chapters of this volume—such as meta-regulation, smart regulation, responsive regulation, restorative justice and nodal/networked governance—show the beauty and importance of ideas about regulation. Generated at low cost, they can generate massive lifesaving and system-saving returns. There is everything to play for.

How does the propertisation bias of capitalism affect this optimistic reading of its future? As we have seen, propertisation does compromise the warning-call function of nodes in capitalism's systems and, more worryingly, does set up the possibility of tragedies of commodification. The continued deepening globalisation of intellectual property rights sets up a system of private taxes on future generations of innovators and, as already pointed out, property rights are being used by industries to entrench themselves in ways that make Schumpeter's idea of creative destruction by entrepreneurs look fanciful. The coal and oil industries need to be managed out of existence in the next two decades, if the world is not to descend into a struggle for survival, its states crowded around resources like dying animals around a shrinking waterhole. And yet, under the cloak of property rights, networks of corporate capital continue to invent new monopoly privileges for the purpose of entrenching themselves ever more deeply in networks of production, thereby compromising the adaptive function of free markets. The cold logic of commodification is about obtaining resources and maximising the rent extraction process. Public goods and assets are there to be raided.

The effects of these raids on equality, equity and the environment are something over which the weak can wring their hands. Marx's insights into this dimension of capitalism remain valid today.

The answer to the question 'what is to be done?', perhaps somewhat predictably from someone who has been at the Regulatory Institutions Network for a long time, is to continue to develop the countervailing regulatory ideas to capitalism's commodification logic. A global discourse of information environmentalism that exposes commodification logic is needed (Cunningham 2014). Histories of innovation not dependent on commodification have to be spread to create the realisation that there are alternative paths of innovation (Shao 2013). A positive inclusive version of the intellectual commons in which people are included by design has to replace access regimes in which access is dependent on winning a game of legal rights (Drahos 1996). And, closer to home, scholars should oppose university managers who think that the mission of the university is to be a propertised knowledge factory, churning out paid-for commodities instead of what it should be: a communal place for creating radical and free ideas that allow people to choose different futures. There truly is everything to play for.

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