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Agencification, Regulation and Judicialization: American Exceptionalism and Other Ways of Life

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1. Introduction

Much of the contemporary debate about the rise of regulation (or the regulatory state) in Europe, Asia and elsewhere, focuses on processes of agencification – the establishment of independent or semi-independent agencies and allocation to them of regulatory tasks, many of which were previously the responsibility of ministers or, in some cases, business undertakings. In some instances agencies are created to undertake new roles, not previously regarded as part of the tasks of government. This focus on agencies is a product both of the dominance of the American model of government in public policy thinking about regulation, and a reflection of the priority given to the establishment of independent agencies by international organisations such as the WTO and the OECD. In many countries regulation-by-agency has taken on the status of a solution in search of public policy problems.

Agencies, however, are not the only show in town. Whilst there are examples of the creation of regulatory agencies in all the EU member states and in most of the member states of the OECD, there are important regulatory functions which remain within the remit of government ministries (even where there are regulatory agencies in the sector), and also regulatory functions exercised by non-state actors. The regulatory state shift is characterised not only by the creation of agencies, but also by a separation of policy making and operational functions (sometimes within single ministries), and a tendency towards greater use of formal rules as the basis for standard setting and enforcement (Loughlin and Scott 1997). Proliferation of agencies is only part of the picture. Indeed, the fragmentation in governance capacity associated with non-state and supranational regulation, when combined with alternatives to legal rules as the basis for control, take us further from an agency-focused regulatory state model and, as I have argued elsewhere, towards a post-regulatory model of governance (Scott 2004).

This paper suggests that a regimes approach, which analyses the variety of state and non-state actors participating within any given regulatory space, might provide a better framework within which to understand the nature and contribution of agencies to regulatory activity. The regimes approach has important implications for understanding the nature and problems of judicialization, since our emphasis is on judicialization as it affects all of the actors in the regime, and not just agencies (where they exist). More generally this approach offers a different perspective on the critical question of state capacity for regulatory governance.

The paper starts with an analysis of the peculiar hold which the regulatory agency form has in discussions of the rise of regulation and proceeds to elaborate on the alternative regimes approach. The main part of the paper seeks to reconceptualise judicialization as it affects regulatory regimes, examining the different contexts within which judicialization might arise, and concluding with an assessment of both functional and normative implications.

2. Agencification: Pressures and Processes
Ideas of regulation, and in particular of the rise of regulation and the regulatory state are closely linked to an ideal-typical conception of regulatory agencies, which appears to derive largely from institutional structures in the United States. Though these structures are replicated (and perhaps even originated) at state level, it has been the Federal independent regulatory agency (FIRA) model which has captured the imagination of policy makers in both domestic and supranational governmental organisations. The FIRA model appears to have found its origins in the tribunal structure adopted for the Interstate Commerce Commission, established in 1888, which was in turn copied either from the British Railways and Canals Commission established in 1873 or from a number of state commission structures established in the 1860s and 1870s (Aitchison 1927: 293-4). The innovation in the ICC structure was that in addition to the tribunal-type powers to receive and issue determinations in respect of complaints relating to such matters as pricing and provision of common carriage on the railways, the Commission was also given authority and indeed a duty to keep itself informed of matters relating to the operation of the railroad industry, of its own initiative, and with related investigatory powers and without the requirement of a complaint (s.12). This duty was subsequently enlarged so as to permit enforcement of the Act on the initiative of the Commission, and not only in response to complaints (1889 – (Aitchison 1927: 317-8). The Commissioners had judicial-type appointments and, notwithstanding the innovation of the own-initiative investigatory powers, were substantially restricted to enforcement action triggered by complaints.

Subsequently the ICC sought to take on a greater own-initiative jurisdiction. Critically the ICC’s attempts to set rules concerning rates were struck down by the Supreme Court in 1897. Accordingly, it was only with express provision for rule making, introduced by legislation 1906 (Aitchison 1927: 326-7), that the ICC was able to fully take on the combination of rule making, investigatory and enforcement powers which typify the FIRA model of the twentieth century. Subsequently the ICC was assigned powers to regulate telecommunications, and these were transferred to the new Federal Communications Commission in 1934.

The origins of the ICC in the tribunal structure are critical to understanding the constitution and powers of FIRAs. First, the fact of the ICC being a tribunal, supported judicial-type appointment and independence of the Commissioners. Second, the origins in the tribunal model have sustained a focus on both complaints and adversarial procedures as the basis both for action and for processes within the FIRAs. The capacity for independent rule making was an add-on to the investigatory and complaint-handling power, and fell to be processed in the same legalistic fashion. A third, and related point, is that the combination of independence and legal process associated with the agencies underpinned the acceptability of extensive delegation of rule making powers to agencies.

2 Interstate Commerce Act 1887, s.13.
The timing and location of the evolution of the US FIRAs is also significant. The ICC emerged in a period of small government, and in which the courts, and by extension tribunals were important in resolving disputes often conceived of as being concerned with private rights over property (Epstein 1985). The gradual extension of the capacity of the FIRA from tribunal to full regulator occurred at a time when institutional alternatives were not available for resolving disputes that required not only adjudication but also sectoral rules. The New Deal period is widely seen as one of increasing power for independent agencies, and further steps were taken to structure the use of these powers juridically by the passage of the Administrative Procedure Act 1946. It is claimed that the distrust of government and its constraint by law and the courts is a distinctive feature of contemporary American government which distinguishes it from government in other jurisdictions (Kagan 2007; 104).

Skipping forward to the 1980s and debates about the ‘rise of the regulatory state in Europe’ (Majone 1994) and elsewhere (Levi-Faur 2005), the governmental and institutional context is very different. The rise of regulation, precisely converse to the nineteenth century US history, is largely, though not exclusively, a response to the problem of big government. In this dimension, governments struggling with unmanageable public enterprises were seeking mechanisms to shrink the state. Taking a lead in these reforms the UK government progressively transformed state owned enterprises (SOEs) into privately owned companies, and, at the same time established regulatory agencies (Prosser 1997). There is no sense in which the emergent agencies evolved from a court or tribunal structure. They were initially conceived of as mechanisms for controlling the worst effects of private monopoly, notably exerting controls over prices, ‘holding the fort’ until competition arrived under subsequent policies of liberalisation (Littlechild 1983). The functions assigned to these agencies derived partly from a separation of operational and policy functions exercised by the former SOEs, and partly from the oversight functions held by government ministries. These agencies, whilst originating with a focus on price control, acted as a magnet for a variety of other issues, including quality of service and related problems, and subsequently the array of functions linked to promoting competition in the various sectors (Hall, Scott and Hood 2000).

These new UK agencies then, in contrast with the US experience, grew out of functions transferred from SOEs and ministries, and in a context within which the undertaking and the ministry were both to remain of central importance to the governance of the sectors concerned. It is unsurprising that the new agencies were not to have the degree of independence associated with the US agencies. Ministers retained key powers, including over rule making. The limited capacity of the agencies to change the ground rules was, in most cases, subject to the consent of the regulated firm involved, or requiring of a report from an independent competition authority (Prosser 1997). Such limited rule changes as might be made were subject to being called in by the Minister at any time. Thus ministries remained deeply involved in day-to-day regulatory affairs, and maintained contacts not only with the agencies, but also directly with the former SOEs (Hall, Scott and Hood 2000). The tendency of this institutional history to support limited powers and independence for agencies was further supported by traditions within the Westminster
governmental systems generally under which powers to make rules are jealously guarded by legislatures and governments (Loughlin and Scott 1997).

Whilst the privatization context was significant to processes of agencification in the UK, it was not the only context. A further dimension to the big government problem was identified in the heart of the government machine itself, and many operational tasks such as payment of social security, the operation of prisons were transferred to agencies which remained legally part of the parent department, but with a degree of autonomy and their own chief executive, often appointed from outside the public service (James 2003).

The history of financial services regulation was also quite distinctive, in the sense that the often implicit regulatory function were, prior to 1986, largely being exercised through processes of self-regulation subject to light oversight from the Bank of England the UK Treasury (Black 1997). Without addressing fully the policy of liberalisation adopted for the financial services sector, it is sufficient to say that regulation within the domain has seen a progressive move from informal self-regulation to a more hybrid regime involving statutory self-regulators and a new agency, the Securities and Investment Board, established in 1986, to a more centralised regulatory regime now very largely the responsibility of a statutory agency, the Financial Services Authority, established in 2000 (Moran 2003). Thus the financial services story does represent a significant advance of government regulatory capacity into an area it had previously left to industry self-regulation. It was accompanied by reforms in other sectors where self-regulation in both contractual and statutory forms remains important, the former being illustrated by advertising self-regulation and some areas of consumer protection more generally, the latter by self-regulation of professions in areas such as law and medicine. Moran describes this process as a shift away from ‘club government’ towards regulatory governance (Moran 2003). This history is significant because it is so markedly different from American experience, but, in some ways closer to patterns of government in other countries which depend to a greater degree on implicit regulation and informal steering capacity in respect of non-state actors in order to govern.

The ‘rise of the regulatory state’ in the UK then was, perhaps, seeking to capitalise on some of the advantages of the US FIRA model, but under conditions where many of the features of the model were unavailable or unthinkable. What were the arguments in favour of the regulatory agency model? The main justifications put forward are related to the desirability of independence and expertise in the regulatory function (Thatcher and Sweet 2002: 131-134).

Independence is significant in at least two ways. Most obviously, and contrary to the experience of the SOE period, regulation is to be independent from the firms providing services so that no one firm has advantages in it capacity to set or enforce rules. Independence also relates to the relationship to government. To the extent that government has financial interests in former SOEs (notably through retention of shares) and/or strategic interests (for example in the protection of national champions) then it is desirable that the regulatory functions are exercised independently of those interests. A key reason for privatizing network industries was to remove the capacity of government
to prioritise macro-economic policies over the efficient running and pricing of the utility sectors (Prosser 1986). A somewhat wider point underlines the tendency within Westminster systems for pendulum-swing politics under which, for example, policies of privatization and regulation under one government, might be reversed under a succeeding government. The charging of agencies with regulatory functions, and more particularly the entrenching of regulatory rules within a form of contractual licence, reduces the scope for the exercise of governmental discretion and thus enhances the credibility of the regime amongst investors who are being asked to put private capital into former SOEs and new entrant competitors, in part as compensation for historic public under-investment (Levy and Spiller 1996).

The expertise argument in favour of agencies also takes a number of forms. First there is the suggestion that where regulatory functions are exercised within divisions of larger ministries there is a lack of focus and a tendency to movement of staff in and out of different parts of the organisation, where in many cases those staff have limited expertise and limited time to acquire it. Agencies may be in a position to recruit their own staff, rather than draw on generalist public servants. Related to this, where an agency can establish autonomy in terms of pay and conditions, it may develop greater flexibility in terms both of pay and terms of engagement so as to be able to attract a wider range of expertise to the organisation. A distinct but related element to the argument concerns the single-function nature of agencies, as compared to all-purpose ministerial departments. The pursuit of the agency’s functions may benefit both from the sustained focus of the organisation to its task, and to the public profile of agency heads which would rarely be accorded the head of a division within a ministry.

Somewhat distinct from both the independence and autonomy arguments, a key attraction of agencification for governments lies in the potential to transfer functions in difficult policy areas such that blame can be attached others when things go wrong. Within the Westminster systems the potential for blame-shifting is not as great as might first appear because it is difficult for ministers to insulate agencies to the extent that they can claim they were powerless to intervene when it was apparent that things were going wrong.

The early history of agencification in the UK in the 1980s and 1990s significantly undermines the claims both to independence and expertise in the new agencies. Whilst the new agencies possessed independent capacity for judgement, we have noted already they were constrained by the rights and powers both of firms and ministries in terms of their capacity for independence of action (Hall, Scott and Hood 2000). Independence was further constrained by procedural requirements linked to enforcement, which, as is typical within Westminster systems, required application to a court prior to any formal sanctions being applied to regulatees. The new UK agencies furthermore had limited capacity to capitalise on the potential for greater expertise as they were initially tied to employing ministry staff on ministry terms and conditions.

Over a period these limits on expertise and independence have eased somewhat as agencies have taken on rights to recruit their own staff, set their own pay and conditions and, in respect of some matters issue rules autonomously, and apply sanctions without
application to a court. In two fields in particular, competition policy and financial services regulation the agency form has evolved to permit direct application of sanctions, and in the case of financial services also to issue rules (Baldwin 2004). These gradual changes only slightly qualify the overall picture in which the making of rules largely remains with ministers and legislature, the formal enforcement of rules requires application to a court (which may or may not understand the objectives of the regime) leaving agencies with autonomous capacity largely only in respect of their monitoring functions. Agencies have been able to work within these limits to claim a larger amount of the policy space than their limited formal capacities might suggest, but it has not been through the exercise of legal capacity, and thus deviates significantly from the US model. The significance of self-regulation within the UK system is also at variance with the US. Paradoxically, self-regulatory bodies frequently do possess the full range of regulatory functions – to make rules, monitor for compliance and apply sanctions – without the necessity of recourse to others.

The US and UK history with agencies provide two starting points to thinking about agencification. Canada followed the US model quite closely for a period in the middle of the twentieth century, leading one Canadian commentator to coin the phrase ‘governments in miniature’ to capture the idea of the executive body with all the rule making, monitoring and enforcement powers of government in a single agency (Willis 1958: 504). But Canada has subsequently pulled back from that experience, pushing rule making powers back towards legislative institutions (Doern and Schultz 1998). Australia followed a model of agencies not dissimilar to that of the UK, though it favoured Commission structures over the single Director General model initially used in the UK. New Zealand initially rejected the creation of new agencies in favour of a combination of implicit ministerial regulation and the application of ordinary competition rules (Flood 1992). Difficulties with policies of liberalization have subsequently led to New Zealand towards the agency model for the network industries, whilst a need to institutionalise regulatory cooperation with Australia in such areas as food safety has led to some joint agencies being established.

Evaluating the broader European experience with the establishment of regulatory agencies, Fabrizio Gilardi has tested the hypothesis that the chief reason for establishing agencies is to maximize the credible commitment of governments to stable and predictable regulatory regimes by minimising their own capacity to intervene in the sectors concerned. Were such a hypothesis correct, Gilardi suggests, we would expect to find that agencies had a high degree of independence. Having developed an independence index, the patterns Gilardi found were quite mixed, both by sector and country. He found some evidence for the proposition that credibility, and thus independence, were more significant in the establishment of agencies in sectors where the market was being liberalized. But there were significant exceptions, for example in the decision of the German government to retain electricity regulation within government. Belgian and German governments gave to regulatory agencies in telecommunications only limited independence. In other sectors such as food safety and pharmaceuticals evaluation agencies tend to be less independent or functions retained within government. Financial
markets regulators tend to fall somewhere in between network industries and the food/pharmaceutical sectors in terms of independence (Gilardi 2002).

At the level of the European Union many new agencies have been created since the 1970s. But it is telling that these agencies typically only have limited powers and limited autonomy from the main executive organ of the Union, the European Commission. The European Environment Agency, for example, is chiefly a gatherer of information, whilst the Food Safety Agency, established in the wake of the BSE crisis of the 1990s, is chiefly an expert adviser to the European Commission (Scott 2005).

To an outsider the pattern in Asia appears diverse. During key phases of development many Asian states were characterized by highly centralized discretionary governmental power, with rather weak capacity for shaping the conduct of others. Modest transitions from development to regulatory state mode in some countries represents an attempt at developing more legally constrained and less direct forms of governance (Ginsburg 2007). It has been argued that the establishment of successful regulatory agencies requires a high degree of state capacity and consequently is more challenging to some of the weaker Asian state structures (Painter and Wong 2007). Malaysia created regulatory agencies across a number of key industry sectors linked to privatization, including energy and communications. Hong Kong and Singapore have also adopted agency models in some sectors, though in the Singaporean case, the agency for telecommunications regulation combined this sector with the broader industrial development function (Painter and Wong 2007). The decision of the Singapore government to accelerate the process of liberalization in the telecommunications sector, in order to comply with commitments to the WTO, tested the credibility of its commitment to the monopoly license issued to Singtel. US$1.2B in compensation was paid for the early ending of the monopoly in 2000 (Painter and Wong 2007: 184).

In Japan, with the exception of the historically weak Fair Trade Commission (FTC) in the area of competition policy, the preference has been to retain regulatory functions within super-ministries and also local authorities, while simultaneously deploying extra-legal means of persuasion to steer social and economic behaviour (Kagan 2000; Schaede 2000). As (Ginsburg 2007) notes in his paper, Japanese government has historically been highly dependent on administrative guidance which would be referred to elsewhere as ‘soft law’ (Snyder 1993). We might hypothesise that differing models generate very different relationships affecting behaviour within the regulatory space.

### 3. Regulatory Regimes

The dispersed nature of governance is key theme of contemporary studies of regulation. The institutional separation of capacity for making norms, monitoring compliance, and enforcement, observable within many regimes, supports an analysis which emphasises the operation of regimes rather than discrete actors (Eisner 2000). The concept of regulatory space alerts us to the many actors present within regulatory regimes:
ministries, firms, consumers and consumer groups, NGOs, supranational governmental and non-governmental bodies and so on (Hancher, 1989 #163; Scott, 2001 #187).

Understanding a regime requires an analysis of the often changing capacities and roles played by these actors and some understanding of both their worldview and interests shape they way they act. This pattern of fragmentation is accentuated if we recognise that formal legal capacities are only part of regulatory regimes. Even such formal legal capacities are often widely dispersed. Thus though legislatures and ministers may have exclusive right to make primary and secondary legislation, legally binding rules can also be set by contracts, as with self-regulatory regimes, in within supply contracts. Provision for monitoring (for example by third parties) and application of sanctions can also be provided for in contracts. The classic analysis of Christopher Hood supplements the legal authority to act with other tools of government based on ‘treasure’ ‘nodality’ and ‘organisation’ (Hood, 1984 #247). The capacity to encourage behaviour through expenditure of money, through the position at the centre of information networks and through the direct use of organisational capacity is, very obviously, not restricted to governmental actors.

The analysis is important not only for an understanding of what is going on within regulatory regimes, but also for understanding what may be possible in terms of governance capacity. Thus within states with weak capacity for legal provision and enforcement alternative instruments may be developed which place greater emphasis on expenditure (if the ‘treasure’ is available) or on the capacity of government to shape social and economic behaviour through education, information, advice and the deployment of informal authority to shape views and thus actions in respect of appropriate and inappropriate conduct.

Observations of the significance, capacity and effects of a wide range of actors within regulatory regimes underpin discussion of ‘decentred regulation’ (Black 2001) and ‘nodal governance’ (Burris, Drahos and Shearing 2005) which rather directly challenge the focus on regulatory agencies. The arguments in favour of this reconceptualisation have been put extensively elsewhere. The main focus of this paper is to examine the implication of the shift away from conceiving of agencies as the key actors within regulatory regimes for discussion of judicialization.

The focus on capacities and interests of actors in their interactions does not exhaust the insights offered by a broadly institutionalist approach. One of the key puzzles associated with judicialization in the EU members states lies in the variety of experiences (Thatcher 2002). As member states have liberalized key network industries it is notable that in some an explosion of litigation has resulted. Germany is a key example. Whereas in many others relations between ministries, regulators and an increasing number of firms continue to be governed in more bureaucratic fashion. This experience suggests that other institutional variations are at play, those these are difficult to specify with precision.

4. Judicialization within Regulatory Regimes
The concept of judicialization has been much discussed, particularly in the political science literature. There is a tendency to use the term to refer to the encroachment of judicial decision making on moral and political spheres where decision making would previously have been non-judicial (Shapiro and Sweet 2002). By extension judicialization within regulatory regimes might be taken to refer to a process of displacement of technical, bureaucratic or political decision making about regulation with judicial decision making through courts and tribunals. Whereas the emphasis, in Alec Stone Sweet’s work in particular, has been in a transformation from dyadic to triadic decision making, that is from bilateral and reciprocal relations, to one where bilateral disputes are adjudicated by a third party (a court or tribunal) (Shapiro and Sweet 2002), it has long been apparent that, with the possible exception of the United States, regulatory governance is typified as much by multilateral engagements in respect of decisions which could be characterised as polycentric (Fuller 1978). If this claim is correct then judicialization represents a narrowing of the basis of decision and framing it as involving an adversarial and bilateral dispute, where, in practice many parties and competing interests may be involved.

The focus on the incursion of courts and tribunals into decision making within the judicialization literature, whilst widely followed, neglects the possibility that the character of decision making within public and private bureaucracies might change, even though there is little evidence of greater involvement of courts and tribunals. Thus an agency might regard itself as being more constrained in its decision making, and involve its legal team from an earlier stage, or with greater intensity, in reaching conclusions, and might find that the legal teams of firms are more regularly involved in meetings in regulatory matters than hitherto, even though no tendency towards greater litigation is evident. Even if this transformation is not strictly within the concept of judicialization it does arguably come within the German concept of ‘juridification’, within which the governance of social and economic spheres comes progressively to be shaped by juridical norms and processes to a greater extent (Teubner 1998 (orig. pub 1987)).

Litigation is, of course, more visible than these more nebulous indicators of juridification, the latter being only discoverable in any systematic way through fairly micro-level empirical research. Thus, obvious evidence of judicialization may ground hypotheses about its effects on a wider trend to juridification. However the converse is not true. An absence of litigation does not provide evidence either way in respect of juridification.

A position on the nature and relative significance of agencies within the regulatory regimes of a jurisdiction is significant in shaping perspectives on the nature and effects of judicialization. Within the unique context of the United States we can see that the agency model which retains a central position within regulatory governance emerged from the judicial form of the tribunal and, though it was extended to incorporate more proactive investigatory and enforcement capacity, it nevertheless remained essentially judicial in its organisation and processes. Within this context the oft-criticised judicialization of regulation is readily explicable. It is not that the model was once non-judicialized and became infected. Rather the model adopted is a key part of the underpinnings of
“adversarial legalism” in the United States, and this is reflected in the centrality of regulatory processes in the both study and research in administrative law (Kagan 2003).

The pre-history of regulatory agencies in many European countries was not courts, but rather ministries and SOEs. Processes of privatization, liberalization and re-regulation in many sectors of the economy from the 1980s, some driven by domestic priorities, and others by European Community legislation, disrupted the essentially bureaucratic and non-judicial organisation of these economic and social activities, though it they did not challenge the polycentric character of decision making over the sectors involved. Competitive pressures unleashed by liberalization, and the arrival of new entrant firms from other member states, might have been expected to put pressure on the somewhat informal ways of governing, even within new and more arms-length regulatory regimes. The case of British Telecom was instructive. On the one hand they tried to maintain a senior position as dominant incumbent within a pattern of largely informal relationships with regulator and ministry within the regime established in 1984 (Hall, Scott and Hood 2000). On the other hand they took up opportunities to aggressively assert their rights to compete as new entrants in other jurisdictions, including the use of litigation as a key strategic instrument. While the UK regulator OFTEL (until 2003, subsequently OFCOM) has been the subject of relatively little litigation, the German telecoms regulator RegTP has been deluged (Thatcher 2002). But within both these regimes the picture with agencies involves only a small part of the story. In the next section I examine the range of potentially judicialized relationships, and the conditions which may lead to judicialization.

In some instances regimes have been re-programmed to significantly enhance the juridical element, often as the quid-pro-quo for the introduction of more stringent powers associated with agencies, for example by setting up specialist tribunals or appeals mechanisms within which regulated firms can challenge regulatory decisions. In the UK, for example, the ratcheting of agency powers over firms in competition policy generally, combined with the devolution of Commission enforcement powers, has been accompanied by the allocation of responsibility to a specialist Competition Appeal Tribunal (CAT), established in 2003, to hear appeals from decisions of agencies (and in some cases ministers) in respect of regulatory matters, and to hear actions for damages under competition law. The CAT is a judicial body but, in common with tribunals in England and Wales more generally, comprises a legally qualified chair accompanied by two experts, typically with expertise in economics. Similarly, the establishment of the Financial Services Authority in the UK in 2000 was accompanied by the creation of the Financial Service and Markets Tribunal to which appeals against FSA decisions could be brought. Intriguingly, while these two tribunals are kept very busy, a similar Irish tribunal for the communications sector – the Electronic Communications Appeal Panel (ECAP), though busy with three of four appeals against the Communications Regulator for its first two years, 2004 and 2005, has recently been abolished, having heard no appeals since 2005.

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4 Enterprise Act 2002, section 12, Sched 2.
5 Financial Services and Markets Act 2000, s132.
Whilst the ECAP case appears to be an intriguing exception, it appears to be nearly inevitable that the establishment of specialist tribunals to hear regulatory appeals, will tend to increase judicialization of regulatory decision making, taking affected regimes somewhat closer to the tribunal origins and adversarial style of the American agencies. Many of the US federal agencies retain a division of administrative law judges within the agency whereas the UK model has the tribunal wholly external to the agency. Within the European context the independent hearings officers within the European Commission Competition Directorate General perhaps come closest to the internal but independent judicial function (Doern 1995)

The analysis which follows is suggestive of the various relationships which might give rise to processes of judicialization. None of these scenarios should be viewed in isolation, since the takeoff of judicialization affecting one set of relationships is liable to spill over to other relationships within the regulatory space, though not in a predictable fashion.

a) Agency- Regulated Firm

In respect of the classic agency-regulated firm relationship we have two contrasting scenarios. Within the first the agency is unhappy with the compliance of the firm with rules set variously be legislation, ministers or the agency itself. Research over many domains suggests that though they may possess formal powers many enforcement agencies use education and advice to steer firms towards compliance and frequently save legal enforcement to the device ‘of last resort’ (Grabosky and Braithwaite 1986). This is less likely to be true where the infraction is regarded as so serious that not alternative to prosecution is possible, as with breach of health and safety rules resulting in serious injury or death, or failures in safety critical plant such as nuclear installations. In some instances agencies may use formal enforcement symbolically, to demonstrate the presence by making an example of one firm, encouraging the others (Hawkins 2002). Such strategies carry risks, and are liable to backfire where enforcement actions are unsuccessful in the courts. The unpredictability of responses of courts to what in many instances are rather unfamiliar processes of regulatory enforcement may encourage agencies to be cautious about litigation.

On the other side of the relationship regulated firms may use litigation to challenge regulatory decisions. Challenges may be on the basis of decisions made or sometimes decisions not made by an agency. Key decisions made by agencies might include allocation of licences or the making of rules. Where, as is common, these powers are retained within ministries the scope for legal challenge may be restricted to enforcement actions by agencies. Again firms are likely to be very cautious about litigating, aware that they too face reputational, and perhaps financial risks, from adverse decisions. On the other hand in concentrated sectors firms may have deeper pockets than regulators, and may use threats of litigation as part of a strategy of steering agencies towards their view of particular regulatory issues (Hall, Scott and Hood 2000). Under conditions of liberalization new entrannt firms, which have less stake in the relationship with an agency, may be thought more likely to litigate than is true of dominant incumbents. An added factor here is that where new entrants come from other countries they may lack the kind
of social embeddedness within social networks which tend to inhibit litigation. Network sectors provide a particular case where the interests of firms are diffuse and the competing strategies of differently placed firms may counterbalance each other in dealings with an agency (or, for that matter a ministry).

In those regimes which make extensive use of licensing the decisions of licensing authorities are liable to have a particularly significant impact. Within the common law world greater intensity in the application of principles of procedural fairness is applied where an authority proposes to remove a license from a firm than where a license is not to be renewed and, attracting list protection, where a license is not to be granted. Licences have been compared to property rights for this reason.

Thinking about regulatory regimes more generally, it is hypothesised within sociological research on law enforcement that where regulatees and enforcers have relatively low relational distance (because staff share history or training and/or there is frequent interaction) they are less likely to resort to litigation (Black 1976). Research on relations between enforcement agencies and regulated businesses (Grabosky and Braithwaite 1986) and between oversight agencies and public bodies has provided support for the hypothesis (Hood et al. 1999). The hypothesis may be of particular significance in regulatory spaces occupied simultaneously by sectoral and competition agencies. All other things being equal competition agencies are likely to have a higher relational distances to firms (less in common, less contact, etc) and accordingly more prone to escalating to formal sanctions processes. Something of this thinking lies behind the decision of the Australian government to abolish the sectoral regulator for telecommunications, AUSTEL, after only eight years, in 1997 and transfer its telecommunications competition regulation powers to the general competition authority, the Australian Competition and Consumer Commission (Kerf and Geradin). The relational distance hypothesis is developed chiefly to address enforcement behaviour of agencies, but may be equally valid in considering ways in which firms seek to ‘enforce’ against agencies.

Where the courts recognise that the power to make decisions on important social and economic matters within regulatory regimes has been allocated by legislation to agencies, common law courts may tend towards a non-interventionist approach, seeking to channel decisions within the regulatory framework. On the other hand, where a rights-based and adversarial conception of regulation takes hold, as in the United States, the courts may tend towards a more interventionist role.

b) Agency– Third Party (consumer, interest group)

In contrast to the very direct and often concentrated stake that regulated firms have in regulatory decision making, although consumers (whether industrial or residential) may, in aggregate be strongly affected, the effects they feel in isolation are likely to be much less central to their wellbeing than would be true for regulated firms. Accordingly we would expect such consumers to engage in less litigation. Litigation is, perhaps, most

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likely where consumers are relatively large and/or organised. It is often observed that large consumers of energy and telecoms services (i.e., large multinational firms) were a key driving force behind European Community policies on network liberalisation, but that involvement largely fell short of litigation (Sandholtz 1998). As to organized groups of consumers their effects in judicialization are likely to be sporadic rather than systematic.

c) Agency – Ministry

I have noted that in many countries it is difficult for ministries to give away autonomy to agencies. Within regimes where this proposition is true it is unlikely that ministers with other less drastic means to rein in agencies would need to litigate. Evidence of litigation would tend to suggest that an agency had become more independent than the ministry was comfortable with. There are a number of instances in the UK of third parties, rather than agencies themselves, challenging ministerial orders to agencies on grounds that they were *ultra vires* (Scott 1998a:36-38)

d) Agency – Self-Regulatory Body

In some jurisdictions self-regulatory bodies have significant roles within regimes which also involve agencies. Thus in the communications sector in Australia, there is both an industry ombudsman scheme and an industry standards body both operating within a statutory context alongside the regulator, the ACCC. The Telecommunications Industry Ombudsman scheme is explicitly concerned to maintain a conciliatory and non-juridical approach to dispute resolution (Stuhmke 2002). In the UK, similarly there is a self-regulatory ombudsman scheme, created under pressure from the agency in 2003, and to transfer low-level complaint handling away from the agency. Additionally the UK regulator OFCOM is dependent on a self-regulatory body, ICSTIS, for the regulation of terms and conditions and complaint handling relating to premium rate telephone services, and a separate self-regulatory body, the Advertising Standards Authority, for the regulation of broadcast advertising content. Litigation here is relatively unlikely since an agency is likely to have sufficient suasion with government that if it is not satisfied with the way a self-regulatory regime, nested within a statutory regime is operating, it may seek to displace self-regulation with statutory regulation.

A key exception to the general absence of juridical relations affecting agency links to self-regulation is where a meta-regulatory agency is established to oversee self-regulation, as has happened with medical and legal self-regulation in a number of jurisdictions including Australia and the UK. The UK Council for the Regulation of Health Care Professionals was established with specific powers to refer to the High Court unduly lenient disciplinary proceedings against healthcare professionals. Here the choice of judicialization was made by government in the way the regime was restructured.

e) Ministry-Regulated Firm

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7 NHS Reform and Health Care Professions Act 2002.
Where ministries retain enforcement capacities a central issue of regulatory style is defined by the extent to which formal enforcement is resorted to, as opposed to informal methods of suasion, where infractions are detected. In many jurisdictions ministries may prefer informal routes and reserve any formal sanctions to the most egregious of cases. Alternatively ministries may prefer to address long-standing problems with legislation rather than litigation. Where agencies are established to carry out enforcement the issue is not likely to arise. On the other side firms may use litigation processes to challenge the ways in which ministries develop regulatory regimes. The opportunity for such litigation is dependent on the institutional factors which characterise both constitutional and administrative law regimes in a particular jurisdiction. Thus, some jurisdictions, and notably the United States permit challenge to primary legislation on constitutional grounds (interference with property rights being a classic reason (Epstein 1985)). In other instances, notably the UK, opportunities are restricted to challenge of secondary legislation on relatively narrow administrative law grounds. Challenges by third parties may be possible, though is many systems of administrative law such third parties may lack standing where they are not directly affected. In the UK key challenges to ministers over rule making have concerned government implementation of EC legislation for the telecommunications sector (Scott 1998a:35-36).

f) Ministry – European Commission

Within the European Union a key source of judicialization in recent years has arisen from obligations associated with membership. Where administrative infringement proceedings by the European Commission fail to elicit compliance there is a judicial stage which may ultimately lead to fines (Mendrinou 1996). Sluggishness in implementing liberalisation measures in such areas as energy, telecommunications and postal services has, in practice, been a key cause of such litigation. Similar litigation risks are faced by ministries in respect of trade obligations such as those arising from membership of the WTO.

g) European Commission – Regulated Firm

There are few supranational regulators with direct enforcement capacity against firms. One of the few examples is the European Commission, but only in its competition policy role. Whilst the Commission has engaged in much administrative enforcement, and this has frequently given rise to legal proceedings at the suit of the undertaking targeted, recent reforms have transferred much of the enforcement responsibility to National Competition Authorities (NCAs) (albeit in parallel with the Commission’s responsibilities). Accordingly a decline in such litigation is likely (though it may be displaced to the national level). The Commission is not removed from the scene, but rather operates less directly, seeking to steer the enforcement conduct of NCAs through network activities (Maher 2002).

h) Firm – Firm
Some regulatory regimes are substantially built on the capacity of firms to enforce against each other. A key example was provided by the regime established to accompany privatization of telecommunications in New Zealand. In the highly contentious area of interconnection terms, essential for new entrants to gain access to the dominant incumbent infrastructure to provide competing services, the New Zealand Government opted to let the firms litigate using general competition rules relating to abuse of dominant position as the normative basis, rather than the detailed sectoral rules developed and implemented by agencies in most jurisdictions (Flood 1992). The result was a high degree of judicialization but a concern that the result was unworkable in terms of delivering competition, such that the government had to use ‘implicit’ regulatory powers to persuade the firms to find workable agreements (Scott 1998b). In more competitive sectors litigation by competitors may be more viable, and is a key plank of the US antitrust regimes which penalises infractions with treble damages as an incentive to the damaged competitor to enforce the rules.

Where contracts are used as the basis for regulation by one firm of another then judicialisation may be possible where things go wrong. However, we should note the general tendency, observed in socio-legal research, for reluctance amongs businesss people to resort even to strict contractual terms, let alone litigation (Macaulay 1963). Such contractual regulation may, of course, form part of a larger statutory or self-regulatory regime. For example a regulated or self-regulated firm may impose conditions in contracts in order to ensure its own compliance, and its position may be imperilled by breaches by the other party. An example is provided by the case of a retailer who requires accreditation of products as fairly traded, organic or compliant with the rules of the Forest Stewardship Council, who would risk reputational damage and possibly prosecution for misleading practices, if products acquired as being compliant were, in fact, not so. Thus damages may be sought where losses result.

i) Third Party – Regulated Firm

In general we might not expect third parties such as consumer and environmental groups to enforce rules directly against firms. However, in some instances the legal regime is adapted directly to encourage this. Consumer group enforcement of consumer protection laws has become a key principle of European Community consumer law, extending now beyond enforcement of rules on unfair terms in consumer contracts\(^8\) to a range of other issues. The theory underlying this is that such third party enforcement may compensate for a complacent regulator. However it creates the risk that the overzealous third party enforcer may disrupt effective but more consensual regulatory relations with litigation (Ayers and Braithwaite 1992).

j) Self-Regulatory Body – Regulated Firm

Self-regulation is frequently not simply a voluntary engagement for a firm, but a necessity if it is to trade effectively in its sector. Thus, the first point is that even though joining a self-regulatory regime may be formally voluntary it maybe a de facto pre-

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\(^8\) Unfair Terms in Consumer Contracts Directive 93/13/EEC Art 7(2).
condition to market participation. I should also observe at this point that compliance within self-regulatory regimes is not a voluntary matter. Any self-regulatory regime worth the name will have enforcement capacity against members. Where a self-regulator the powerful position which derives from the necessity for businesses to join if they are to participate in the market then is tantamount to a licensing authority, as well as frequently combining rule making and enforcement powers. Self-regulators often combine all the regulatory powers, but paradoxically the courts may give less intense scrutiny to decision making because any action contrary to the rules can be rectified by modification of the rules, an option not open to many government agencies (Scott 1998a: 38-41). In many jurisdictions self-regulatory bodies are considered to fall outside the scope of judicial review, leaving dissatisfied members to pursue contractual actions when dissatisfied with the conduct of the organisation.

5. Conclusions

The rise of the regulatory state, where this has been seen, frequently involves delegation of tasks to agencies on a greater scale than has been seen before. But this does not imply that the agencies which are created are regulatory agencies in the American style. The United States history is one in which greater powers have been given to agencies than elsewhere, and the accompanying legal constraints are a key part of the unique style of adversarial legalism associated with American government.

We should not assume that agencies are the be all and end all of regulation, nor that the diffuse patterns of delegation to agencies, where these are created are likely to lead to judicialization in the American style. Rather there seem to be some other, general factors at play creating pressures for judicialization, but also inhibitors, many of which appear to be peculiar to particular national systems (Thatcher 2002: 134-136). Within the European Union, a key source of judicialization in the member states, the development of the ‘new governance’ provides evidence of a move beyond legalistic ways of thinking about governing, towards mechanisms which give greater play to processes both of competition and, in particular the kind of community governance which develops within networks (Scott and Trubek 2002). Similar ideas are expressed in different terms in discussion of a shift from authority, as the modality of governance, to other modalities based on incentives and learning (Painter and Wong 2007: 178). These developments, it is claimed, form part of a wider pattern of democratic experimentalism (Gerstenberg 1997). Thus, to anticipate Ginsburg’s question, does judicialization represent a one way street or is there a way back?, there is some evidence that the EU governance structures are on the way back, in limited ways, in some sectors (Ginsburg 2007).

There is no judicialization index against which can be deployed to compare the extent of judicialization in different jurisdictions. For the reasons of institutional history, already noted, it would be surprising if any country emerges which could challenged the pre-eminent position of the United States as the most highly judicialized in its regulation, and public administration more generally. Processes of market liberalization might, all other things being equal, tend to push particular regimes towards greater judicial involvement,
as they put pressure on long-standing less formal governance relationships. Alongside this, the award of more stringent or complete regulatory powers to agencies has tended to be accompanied by more extensive rights of appeal, and in some cases institutionalization of these rights in new tribunals. This institutional choice is likely also to push regimes towards greater judicial involvement. A third factor, linked to liberalization, is the growth of regional and global trade regimes which create pressures both for dominant firms, but also for governments which sometimes cause resistance and then, pressure to articulate disputes in juridical terms. Whilst the more developed example is the EU, we have seen substantial litigation in the WTO appellate panel also. But these factor do not overwhelm the institutional cultures found within particular jurisdictions, so the responses to these pressures is mediated through peculiar national factors, which should lead us to expect apparently similar policy changes yielding markedly different instances of judicialization.

Are the effects of judicialization negative or positive? This is likely to depend on your point of view. For some, judicialization is a side effect of the breaking down of cosy relationships between governments and suppliers of utilities services, and financial and professional services. It is but part of a wider process in which the expectations placed on service providers are better articulated and more amenable to challenge, not only by government and by agencies but also by consumers and interest groups. Thus judicialization is part of process by which service providers are better and more transparently held to account for what they do. For others the spectre of judicialization is that it will create a world of more defensive and cautious service provision, in which litigation risks are recognised and minimised, at the expense of vitality and innovation within the sectors affected. Key social values maybe displaced by juridical values, and service providers will find themselves less able to focus on what they are supposed to do. The basis for decisions over polycentric issues is liable to be narrowed to a bilateral contest over rights in the particular case. At the outside the weight of expectation placed on the legal system, in terms of holding to account and ensuring proper delivery by service providers, may cause it to collapse or have its legitimacy challenged (Teubner 1998 (orig. pub 1987)).

Finally, there is the possibility that judicialization may imply different things in diverse jurisdictions. Thus for some jurisdictions it might represent simply a tendency towards formalization in the way that relationships are governed, whereas in others in might be perceived as a complete recasting of relationships from familiar to novel forms. Thus there may be reasons to perceive any judicialization trend differently in different spaces and different times.
References


