Accountability in the Regulatory State[1]

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Abstract

Accountability has long been both a key theme and a key problem in constitutional scholarship. The centrality of the accountability debates in contemporary political and legal discourse is a product of the difficulty of balancing the autonomy given to those exercising public power with appropriate control. The traditional mechanisms of accountability to Parliament and to the courts are problematic because in a complex administrative state, characterised by widespread delegation of discretion to actors located far from the centre of government, the conception of centralised responsibility upon which traditional accountability mechanisms are based is often fictional. The problems of accountability have been made manifest by the transformations wrought on public administration by the new public management (NPM) revolution which have further fragmented the public sector. In this article it is argued that if public lawyers are to be reconciled to these changes then it will be through recognising the potential for additional or extended mechanisms of accountability in supplementing or displacing traditional accountability functions. The article identifies and develops two such extended accountability models: interdependence and redundancy.

INTRODUCTION

The central problem of accountability arises from the delegation of authority to a wide range of public and some private actors, through legislation, contracts or other mechanisms. Debates over accountability have to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to be able to achieve their tasks, while at the same time ensuring an adequate degree of control.[2] Trust in mechanisms of accountability is thus a central precondition for the legitimate delegation of authority. In light of this analysis the distinction sometimes drawn between accountability and control - control implying *ex ante* involvement in a

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decision, while accountability is restricted to *ex post* oversight [3] - is not particularly helpful. This distinction, often found in public law accounts,[4] appears to neglect the observation that there is implicit in the capacity to call to account some element of control capacity.[5] It seems better to see control and accountability as linked concepts,[6] operating on a continuum. If we were to redraw the distinction it might be in terms that *managerial* control refers to the right to *ex ante* involvement in decision making, while *accountability-based* control refers to *ex post* oversight.

Accountability has long been both a key objective and key problem for the constitutional law analysis of the British state.[7] The ill-defined objectives lying behind the accountability concerns include the holding of public actors to the democratic will (through a concept of legality) and promoting fairness and rationality in administrative decision making. Central to this concern has been the concept of ministerial responsibility.[8]The problem derives from an acknowledgement that traditional mechanisms of accountability within the British state are weak instruments for achieving these objectives, and the problem is perceived to grow in scale the more state authority is delegated.

Setting out an agenda for the reform of public law in Britain in the mid-1980s Martin Partington called on public lawyers to develop extended conceptions of accountability in order to be able to cope better with the transformation of the British state.[9] Subsequently public lawyers have paid more attention to accountability mechanisms going beyond the parliament and the courts, including grievance-handling, audit and internal review.[10] But such analysis has persisted in a linear and partial view of accountability, and been overtaken by the new challenges presented to public law by transformations in public administration associated with the New Public Management (NPM) revolution, 'a strategy driven and fashioned almost entirely by a political-economic impetus and with virtually no legal or constitutional consciousness'.[11]

This article deploys a concept of 'extended accountability' to argue that the fragmentation of the public sector associated with public sector reforms, loosely

referred to under the rubric of 'the regulatory state', has made more transparent the existing dense networks of accountability associated with both public and private actors concerned with the delivery of public services. Traditional accountability mechanisms are part, but only, part of these complex networks, which have the potential to ensure that service providers may be effectively required to account for their activities.

DEFINING AND MAPPING ACCOUNTABILITY

Accountability is the duty to give account for one's actions to some other person or body. Normanton once offered a somewhat more expansive definition:

> 'a liability to reveal, to explain, and to justify what one does; how one discharges responsibilities, financial or other, whose several origins may be political, constitutional, hierarchical or contractual.'[12]

The concept of accountability has traditionally been drawn somewhat narrowly by public lawyers, to encompass the formal duties of public bodies to account for their actions to ministers, Parliament and to courts. Changes in accountability structures since the Second War have resulted in a recognition of some extended forms of accountability, as courts have been supplemented by a growing number of tribunals (for example in the immigration and social security domains) and new or revamped administrative agencies such as grievance-handlers and public audit institutions have played a greater role in calling public bodies to account.[13] Simultaneously parliament has enhanced its capacity for holding ministers and officials to account through the development of select committee structures,[14] in some cases linked to new oversight bodies such as the Parliamentary ombudsman and the National Audit Office.[15]

It is helpful to keep distinct the three sets of accountability questions: 'who is accountable?'; 'to whom?'; and 'for what?' With the 'who is accountable?' question the courts have been willing to review all decisions involving the exercise of public power, even where exercised by bodies in private ownership.[16] In the utilities sectors the exercise of public privileges, such as monopoly rights, by private companies carry with them responsibilities to account for their activities, both in domestic fora and EC law. In some instances, the receipt of public funds by private bodies renders

recipients liable to public accountability through audit mechanisms.[17] Considerable attention has been paid to this issue in the literature, with a consensus for the view that simple distinctions between private actors (not publicly accountable) and public actors (subject to full public accountability) are thus not sustainable.[18]

The 'to whom?' question has often been mingled with the 'for what?' question, for example in the distinction between legal accountability (to the courts in respect of the juridical values of fairness, rationality and legality) and political accountability (to ministers and to Parliament or other elected bodies such as local authorities and via these institutions ultimately to the electorate). Furthermore, while it might be helpful to think of 'administrative accountability' as accountability to administrative bodies such as grievance holders and auditors, in fact these mechanisms for accountability have conventionally been distinguished, with administrative accountability only indicating the former, while financial accountability is used for the latter.

Separating the 'to whom?' and 'for what?' we find three broad classes within each category. Thus accountability may be rendered to a higher authority ('upwards accountability') to a broadly parallel institution ('horizontal accountability') or to lower level institutions and groups (such as consumers) ('downwards accountability').[19] The range of values for which accountability is rendered can be placed in three categories: economic values (including financial probity and value for money (VFM)); social and procedural values (such as fairness, equality and legality); continuity/security values (such as social cohesion, universal service and safety).[20] Figure 1 sets out the possible configurations of the 'to whom?' and 'for what?' questions, producing nine possible pairs of co-ordinates.

Figure 1. Examples of Linkages Between Values and Accountability Institutions

For What? **To Whom?**	Economic Values	Social/Procedural Values	Continuity/Security Values
'Upwards' Accountability	Of Departments to Treasury for Expenditure	Of Administrative Decision-Makers to Courts/Tribunals	Of Utility Companies to Regulators
'Horizontal Accountability'	Of Public Bodies to External and Internal Audit for probity and VFM	Review of Decisions by grievance-handlers	Third Party Accreditation of Safety Standards
'Downwards' Accountability	Of Utility Companies to Financial Markets	Of Public/Privatised Service Providers to Users	Consultation requirements re: universal service requirements

The final remark to be made about traditional approaches to accountability mechanisms is that public lawyers almost universally regard them as inadequate.[21] This dissatisfaction exists notwithstanding the remarkable expansion of accountability mechanisms applied to the UK public sector in recent years.[22] It is rarely possible to discern how adequacy is actually being assessed. In its narrowest form, an adequate accountability system would ensure that all public bodies act in ways which correspond with the core juridical value of legality, and thus correspondence with the democratic will.[23] Such a Diceyan conception of accountability,was already in severe difficulty within Dicey's life time as discretionary authority was more widely dispersed with the growth of the welfare state. Even with the extension of juridical concerns to encompass rationality and fairness in decision making, and thus concerns to improve the quality of discretionary decisions,[24] this narrow model is also very weak at holding public bodies to account for decisions which affect the collectivity, but have little bearing on the welfare of any individual.[25] A broader approach might look for correspondence with a range of other values, such as value for money or openness. But such substantive tests of the

effectiveness of accountability mechanisms create difficulties of measurement and do not indicate any appropriate way to recognise the conflict between desired values which is inevitable within particular domains.

REGULATORY STATE EFFECTS

We are said to live in the age of the regulatory state. This refers to a shift in the style of governance away from the direct provision of public services, associated with the welfare state, and towards oversight of provision of public services by others. [26]This shift is, in part, a response to the recognition that 'total control' models of state activity fail to deliver desired outcomes. The problem can be expressed in a number of ways: the limited capacity of central state institutions to know what is best provided by state intervention[27]; the tendency of highly active states towards fiscal crisis[28]; the risk that state actors will be diverted from pursuit of public interest outcomes to the exercise of public power for the pursuit of narrower private interests[29]; and the limited capacity of the instruments of state activity (and notably law) to effect change in social and economic systems[30]

The response to these disparate concerns has been a withdrawal of central state institutions from much 'operational' activity (a trend mirrored in local government, and to a lesser extent in other public institutions such as the National Health Service), with the reservation to the centre of certain policy tasks, and a marked expansion in central oversight mechanisms.[31] In Osborne and Gaebler's phrase this is a shift from rowing to steering.[32] Figure 2 identifies the main characteristics of regulatory state governance and offers examples.

Figure 2: Main Characteristics of Regulatory State Developments

Characteristics	Examples
1. Separation of Policy from Operation	NHS Internal Market Next Steps Agencies Contracting Out/Market Testing Utilities Privatization
2. Creation of Free-Standing Regulatory Institutions	Utilities Regulators (eg OFTEL, OFGEM, OFWAT, OFREG) National Audit Office, Audit Commission Prisons Inspectorate, Social Services Inspectorate Service First Unit, Better Regulation Unit Financial Services Authority
3. Increased Formality/Shift from Discretion to Rules	Financial Services Service First (formerly Citizen's Charter)

The most obvious and fundamental feature of regulatory state governance is fragmentation of responsibility for provision and oversight of public services such as prisons and telecommunications. With prisons the welfare state model was reflected by the monolithic structure of the Prisons Department within the Home Office, responsible not only for its main tasks of containing and rehabilitating prisoners, but also the inspection and grievance handling functions over its own service. Fragmentation of the UK prisons sector has taken a number of forms. First, there has been in 1993 a separation within the Home Office of responsibility for policy (which is reserved to Ministers and their rump civil servants in Queen Anne's Gate) and responsibility for operational matters which has been delegated, via a 'framework document', to the Prison Service, legally still part of the Home Office, but located separately and with its own chief executive. Second, there has been a policy of contracting out the operation of prisons by a variety of mechanisms to private companies under legislation passed in 1991.[33] Additionally the inspection function was separated from the Prisons Department in 1981, though maintained within the

Home Office, and a separate grievance-handling mechanism (the Prisons Ombudsman) established in 1993.

A different form of fragmentation has occurred in the telecoms sector. Within the welfare state model the key actors responsible were the Minister and a public corporation, British Telecom, the Board of which was appointed by and answerable directly to the Minister. The Minister was accountable in the legal, financial, political and administrative senses noted above (Figure 3, left hand side). Fragmentation in telecoms is a product of policies of privatization of BT (1984), re-regulation of the sector through the creation of a semi-independent regulator, OFTEL (1984), and liberalization, under which many new firms have entered the market, particularly since 1992.[34]

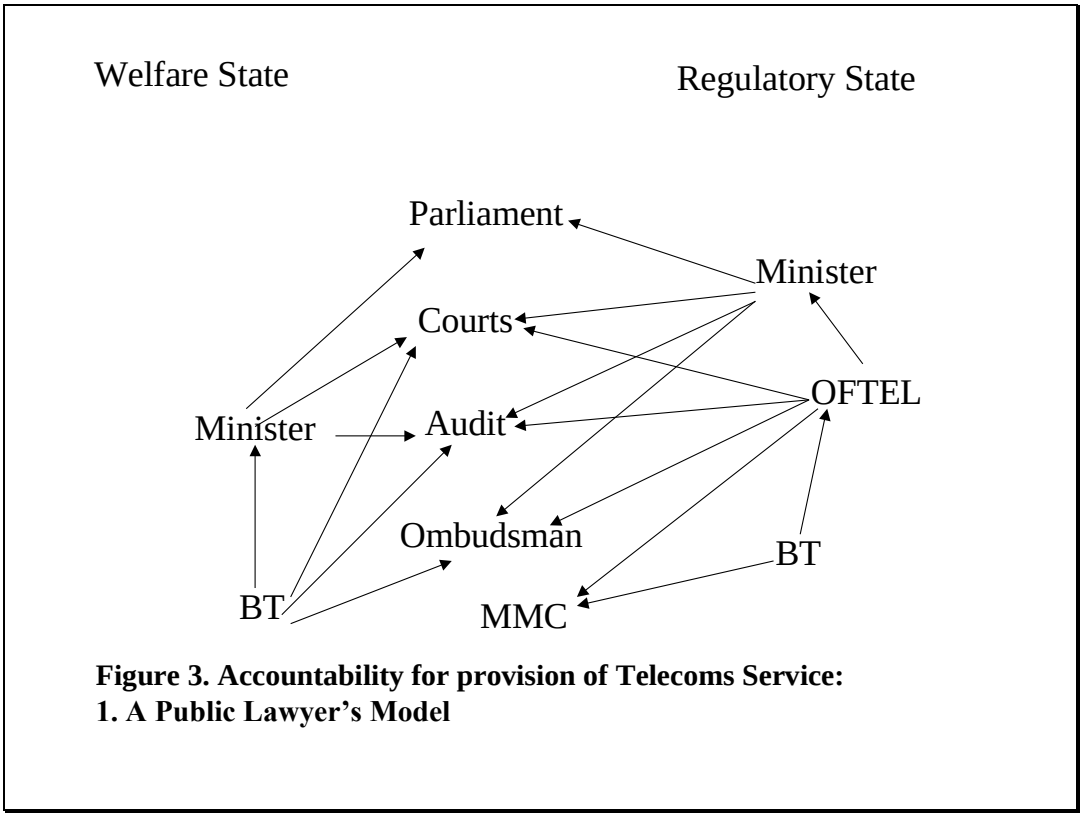


Figure 3. Accountability for provision of Telecoms Service:
1. A Public Lawyer's Model

Some public lawyers suggest that the transparency and need for specification of service standards associated with such innovations as creation of executive agencies and contracting out may 'sharpen accountability by defining goals, setting targets and monitoring performance.'[35] Such sharpened accountability may support traditional parliamentary oversight, but is more likely to enhance accountability to

other, intermediate institutions. Furthermore it seems clear that fragmentation is more a cause of concern than satisfaction both to public lawyers and to labour lawyers.[36] The role of traditional accountability mechanisms appears to be diminished, it is no longer clear *who* is accountable and there are problems with tracing the accountability linkages to the organizations who do the holding to account.[37]

Returning to the telecommunications example, privatization of BT removed it from the sphere of the orthodox mechanisms of Parliamentary, legal, administrative and financial accountability, apparently replacing these mechanisms with accountability to a regulatory agency for compliance with licence conditions (Figure 3, right hand side). The new regulator, OFTEL is subject to traditional mechanisms of legal, financial and administrative accountability and additionally has to present an Annual Report to the minister, [38] and refer its proposals on modifying licence conditions to a third party, the Monopolies and Mergers Commission (MMC[39]) if the licensee does not consent to them.[40]

With prisons the extent of accountability of the minister and the chief executive is blurred.[41] Under the last Conservative administration ministers required the Chief Executive of the Prison Service to answer parliamentary questions about prisons where they were deemed to relate to 'operational matters'[42] causing considerable frustration to Parliamentarians who felt unable to pin responsibility on anyone. The Labour Government elected in 1997 relocated responsibility for answering such questions with the minister.

Contracting out raises similar issues for advocates of traditional accountability models.[43] With prisons neither the directors of contracted-out prisons nor the chief executives of the companies employing them are directly accountable to Parliament (though this is true for Governors of publicly operated prisons too), though they are subject to each of the conventional forms of legal, financial and administrative accountability mechanisms for the public sector. We return to the analysis of the prisons and telecommunications sectors in the next section of this article, to show how the (inadequate and possibly diminishing) traditional accountability mechanisms

are being supplemented by new forms which enable us to conceive of an 'extended accountability' applying to actors within these policy domains.

EXTENDED ACCOUNTABILITY

The fragmentation of responsibility and accountability associated with the regulatory state has brought with it important new developments in all three of the dimensions of accountability discussed earlier (who? for what? to whom?). Indeed, extending accountability (of various forms) to actors previously immune, extending the range of values accounted for, and introducing new and more formal bodies for calling to account are central, instrumental features of regulatory governance. If we think of traditional accountability as encompassing the 'upwards' mechanisms of accountability to ministers, parliament and courts, with some recognition of the more formal horizontal mechanisms (such as grievance-handlers and auditors) then it is possible to conceive of a concept of 'extended accountability' within which traditional accountability is only part of a cluster of mechanisms through which public bodies are in fact held to account.[44]

We need to be clear that the extended accountability structures identified in this article, while they do not correspond to a traditional public law model, equally are not simply the product of an alternative neo-liberal model.[45] To be sure, the neo-liberal model of accountability through market mechanisms has been important. We need only think of the creation of internal markets (for example in the National Health Service), the changes to accountability for local service provision through the introduction of Compulsory Competitive Tendering (CCT),[46] encouraging users to hold service providers to account through league tables and enforceable quality standards, and the introduction of capital market disciplines through privatization. Such market or 'downwards accountability' structures are often characterised by a lack of distinctive normative content, effectively leaving the 'for what?' question to be filled in by the 'discovery procedure' of competition.[47] But the development of 'downwards accountability' mechanisms has not displaced the more traditional accountability mechanisms described above.[48] Market accountability forms have frequently been laid over hierarchical structures.[49] The investigation of any particular

policy domain reveals complex structures of extended accountability, best characterised as hybrid in character.[50]

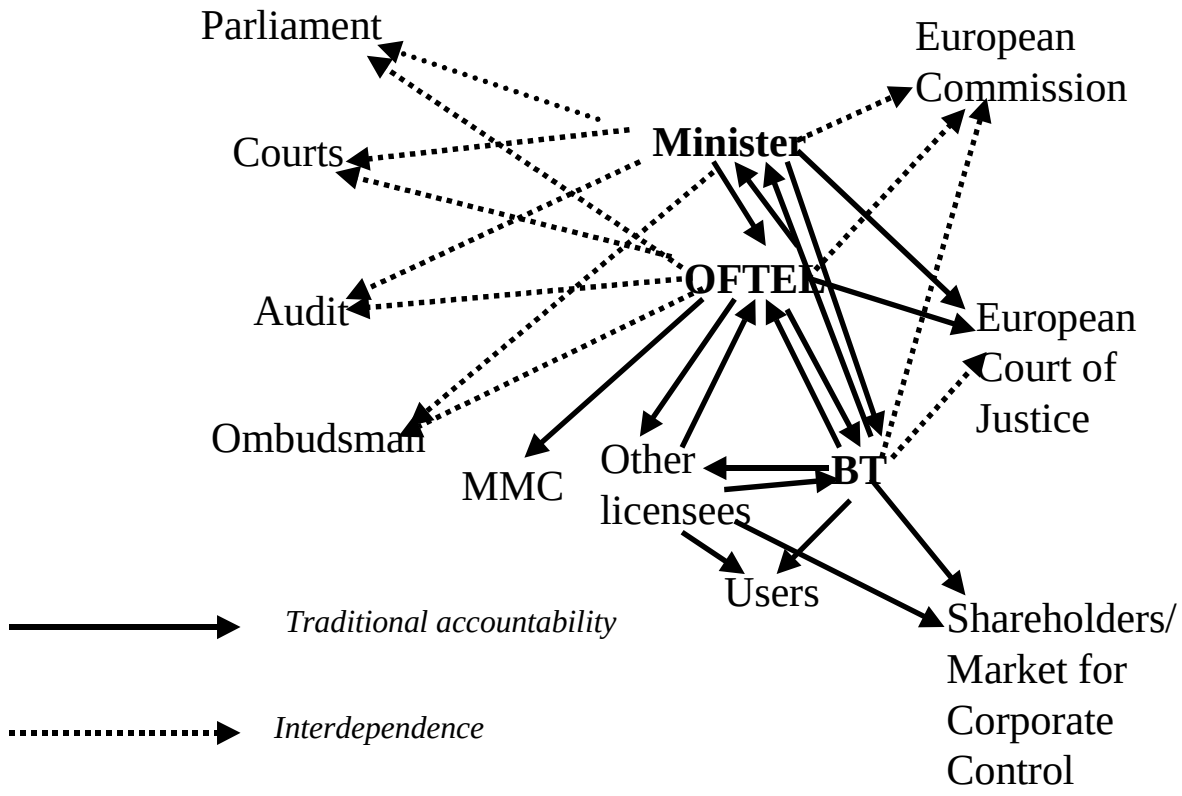
The extended mechanisms of accountability in the regulatory state are not linear in the way anticipated either by the public law literature[51] or neo-liberal prescription.[52] Rather they are premised on the existence of complex networks of accountability and functional equivalents within the British state structure.[53]Close exploration of the structures of extended accountability in the UK reveals at least two different models which have developed which feature overlapping and fuzzy responsibility and accountability: interdependence and redundancy. No domain is likely to precisely correspond to one or other of these models. There are likely to be elements of both identifiable in many policy domains, but for reasons of clarity the examples used in the following sections are presented in somewhat simplified and ideal-type form.

a. Interdependence

The identification and mapping out of relationships of interdependence within policy domains has been one of the key contributions of the recent pluralist literature in public policy. [54] The identification of interdependence has important implications for accountability structures. Interdependence provides a model of accountability in which the formal parliamentary, judicial and administrative methods of traditional accountability are supplemented by an extended accountability. Interdependent actors are dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition to action.[55] The executive generally, and the Treasury in particular has long had a central role in calling public bodies to account over a range of values, in a way that is often less transparent in the case of the more dignified, but arguably less efficient parliamentary mechanisms of accountability.[56] But these less formal and more hidden accountability mechanisms extend well beyond the capacities of central government, extending potentially to any actors, public or private, within a domain with the practical capacity to make another actor, public or private, account for its actions. Within the pluralist political science literature this conception is sometimes

referred to as ‘constituency relations’ or ‘mutual accountability’.[57] Indeed it maybe that the simple monolithic structures presented as the welfare state model are too simple, that they disguise intricate internal and opaque webs of control and accountability that are functionally equivalent to the new instruments of the regulatory state, but are less formal and transparent.[58] Among the more obvious examples were the consumer committees established for the Nationalized Industries with a brief to hold those public corporations to account from a collective consumer viewpoint.[59]

Figure 4. Accountability for Provision of Telecoms Services 2. Interdependence Model



This model is exemplified by the UK telecommunications sector (figure 4). Figure 4 shows that though BT is subject to diminished upwards accountability to parliament and courts (noted above), it has a new forms of accountability in each dimension – upwards to a new regulator, horizontally to the mechanisms of corporate governance and downwards to shareholders (and possibly also the market for corporate control) and users.[60] The financial markets arguably provide a more rigorous form of financial

accountability than applies to public bodies because there are so many individual and institutional actors with a stake in scrutinising BT's financial performance.[61] The accountability of BT to the regulator, OFTEL, is also more focussed, in the sense that OFTEL has a considerable stake in getting its regulatory scrutiny right, being itself scrutinised closely by BT, by other licensees and by ministers, in additional to the more traditional scrutiny by the courts[62] and by public audit institutions.[63] OFTEL's quest for legitimacy has caused it to develop novel consultative procedures, and to publish a very wide range of documents on such matters as competition investigations and enforcement practices.[64] Each of these other actors has powers or capacities which constrain the capacities of the others and require a day-to-day accounting for actions, more intense in character than the accountability typically applied within traditional upwards accountability mechanisms. This form of accountability, premised upon interdependence, is not linear, but more like a servo-mechanism holding the regime in a broadly acceptable place through the opposing tensions and forces generated. Such a model creates the potential to use the shifting of balances in order to change the way the model works in any particular case.

b. Redundancy

A second extended accountability model is that of redundancy, in which overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them. In common parlance redundancy is represented by the 'belt and braces; approach, within which two independent mechanisms are deployed to ensure the system does not fail, both of which are capable of working on their own. Where one fails the other will still prevent disaster. Redundancy in failsafe mechanisms is a common characteristic of public sector activities generally, and can be threatened by privatization. Equally explicit concern about risks associated with change may cause redundancy to be built in to oversight structures. Redundancy can be an unintended effect of certain institutional configurations. In practice examples of redundancy in accountability regimes appear to be a product of a mixture of design and contingency.

There are at least two forms to the redundancy model: traditional and multi-level governance. The traditional redundancy model is exemplified by the accountability

mechanisms for contracted-out prisons in the UK (figure 5).[65] Directors of contracted-out prisons are subject to all the forms of accountability directed at publicly operated prisons: upwards (legal (to the courts); financial (to the National Audit Office)); and horizontal (to the Prisons Inspectorate, the Prisons Ombudsman and Prison Visitors). But, contracted-out prisons are additionally subject to a further form of horizontal accountability with a requirement to account, day-to-day to an on-site regulator (called a Controller), appointed by the Prison Service to monitor compliance with contract specification. Unusually within the prisons sector controllers wield the capacity to levy formal sanctions for breach of contract. Some commentators have suggested that there is a structural risk with on-site regulators of capture by the director, in the sense of controllers over-identifying with the needs and limits to the capacities of those they are supposed to regulate.[66] However with the redundancy model of accountability were such capture to occur it would likely be identified by one or more of the others holding the director to account. [67]

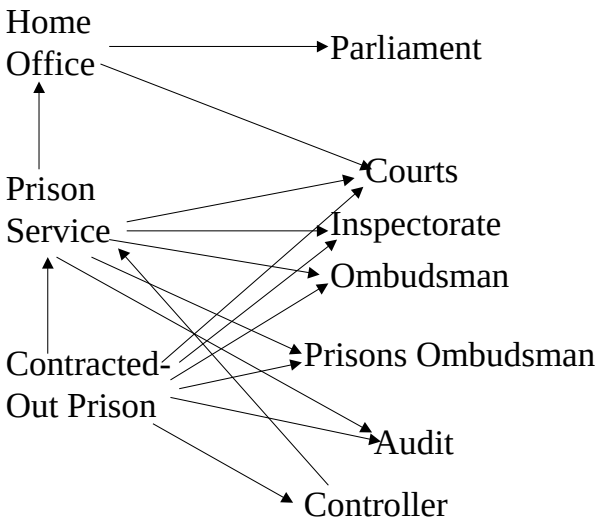


Figure 5. Accountability for Prisons Provision: Redundancy Model

The multi-level governance accountability model is exemplified by the mechanisms for accounting for expenditures made under jointly funded national and European Union expenditure programmes, notably under the European Structural

Funds. Redundancy is built into the accountability mechanisms deliberately by EU decision makers, by requiring joint funding, and therefore ensuring that both domestic and EU audit institutions necessarily take an interest in single expenditure programmes within member states.[68] It will be seen from Figure 4 that there is a redundancy element to the UK telecommunications regime because of the involvement of the EC institutions in the oversight of EC competition policy. Infringements of competition rules are potentially actionable under both UK and EC regimes. The element of redundancy is likely to be enhanced as UK competition rules are aligned with those of the EC by the Competition Act 1998, and competition and utilities regulators exercise concurrent jurisdiction.[69]

The multi-level governance redundancy model of extended accountability is likely to see further development in the UK arising out the devolution of considerable powers to a new Scottish Parliament and Northern Irish and Welsh Assemblies. In each of these jurisdictions new executives and parliamentary/assembly committees have the potential to develop and reinvent the parliamentary oversight already exercised over UK-wide or multi-jurisdiction public functions.[70]

HARNESSING EXTENDED ACCOUNTABILITY AND BALANCING ITS NORMATIVE CONTENT

The two extended models of accountability identified in this article operate not in the linear fashion advocated by public lawyers, in which particular institutions hold service providers to account for particular values. Rather the various accountability networks which operate uniquely within each policy domain have the character of a complex system of checks and balances in which particular forms of behaviour are inhibited or encouraged by the overall balance in the system at any particular time. In practice it is possible to see numerous examples of ‘opposed maximizers’ holding one another in check and how changes in one aspect of an accountability regime affects the overall balance.[71] This analysis does not judge whether the outcomes in any particular system at any particular time in terms of accountability are negative or positive, but rather offers a frame within which the mechanisms of accountability may be examined, and some idea as to how strategic interventions, through shifting of balances, might be made in order to correct a system which is malfunctioning (in terms of a failure to secure effective accountability).

Law is an important aspect of shifting balances in both the telecommunications and prisons sectors. The utilities regimes established on privatization have long been criticised for the inadequacy of their accountability mechanisms.[72] Liberalization in telecommunications tended to reduce the consensual nature of regulatory relations and has promoted increased incidences of judicial review and other litigation. The threat of judicial review, considered on its own, might be expected to act as a significant constraint on a regulator like OFTEL, and certainly there is evidence of such a constraining influence, found particularly in the way that major decision processes are built up with a clear eye on being able subsequently to demonstrate the fairness, rationality and legality of such procedures, and in some instances with frequent trips to counsel to seek opinions on how to draft policies in such a way as to be 'judge-proof'.[73] But considered in the round judicial review actions may reduce the power of others to hold OFTEL to account. Where BT uses its resources to challenge OFTEL by judicial review, this may reduce the capacity of other firms to hold OFTEL to account for its actions, as judicial review is seen to trump more immediate policy considerations. Other public bodies also may find that judicial review, paradoxically (and contrary to conventional administrative law wisdom), trumps policy. Following an unsuccessful action by BT to judicially review OFTEL's decision to introduce new controls on anti-competitive conduct the Director General of Telecommunications was able to see off the Public Accounts Committee's criticism of the licence modification that it would give him powers 'to become prosecutor, judge and jury' by pointing out:

> 'The people who matter, the judges, have denied all of that, so it is not a matter of what I think or what the Daily Telegraph thinks, it is a matter of what the courts of the land have decided about what the Telecommunications Act means, how I should exercise the discretion and how I should pursue my duties under that Act. That issue is now resolved, and I hope that some of that language that you quote will go away.'[74]

Balances of accountability are shifting in telecommunications in other ways. Accountability to consumers is likely to be enhanced through the creation of a separate Telecommunications Consumer Council.[75] Arguably the more robust public oversight by ministers of the conduct of regulation by regulators enhances the

accountability of such regulators to ministers. Since the election of the Labour Government in 1997, the first Rail Regulator has been the subject matter of a number of public warnings in the media that the Secretary of State expected him to take a tougher line,[76] and the Director General of the National Lottery was first publicly warned and then removed by the minister. Such unprecedented incidents must affect the perceptions of each of the utilities regulators of the accountability they owe to ministers.[77] The precise effect of such interventions on the overall accountability network remains to be seen.

With prisons the development of litigation strategies has been both supportive of and supported by the work of the prisons humanity regulators, and notably the inspectorate and the ombudsman, the regulators providing better information which may be used in litigation, litigation providing more robust definitions of appropriate norms relating to the treatment of individual prisoners. The contracting out process too has had marked effects not only on the accountability of the contracted-out prisons themselves, but also on the normative structure of oversight for prisons remaining subject to public operation. The more precise specification of standards associated with contracting out has spilled over into public prisons, giving a somewhat more precise normative structure for those involved in calling prisons to account,[78] while at the same time creating the potential for a form of 'yardstick competition' as bodies like the National Audit Office can directly compare the performance of comparable contracted-out and public prisons.[79]

The challenge for public lawyers is to know when, where and how to make appropriate strategic interventions in complex accountability networks to secure appropriate normative structures and outcomes. What I have in mind here is something like process of 'collibration' described by Andew Dunsire. Dunsire sees collibration as a stratagem common to a wide variety of processes by which balances are shifted to change the nature of the way that control systems (such as accountability mechanisms) work. [80] Such interventions may be applied to any of the three accountability parameters: who is accountable? for what? to whom? This offers the possibility of meeting Martin Loughlin's challenge for public law to 'adopt as its principal focus the examination of the manner in which the normative structures of law can contribute to the guidance, control and evaluation in government.'[81] The

value of such changes may lie not directly in the development of a single accountability mechanism, but rather in the effects on the overall balance within the regime.[82] The logic of the argument presented here is that conflict and tension are inevitable within the complex accountability webs within any particular domain, and that the objective should not be to iron out conflict, but to exploit it to hold regimes in appropriate tension.

To take an example, within a redundancy model of accountability for contracted-out prisons, how do we ensure proper accountability for the range of values, such as humanity, efficiency and security which might be deemed appropriate desiderata for a prisons regime. The orthodox answer would be to say that we have an inspector with a specific mandate to check on the humanity of prison regimes, and auditors to assess efficiency, and security people overseeing security. But this is only a partial answer. Within the redundancy model we have other mechanisms which directly or indirectly check on each of these values – the controller, company management, the prisons ombudsman, the European Committee for the Prevention of Torture and the courts. These mechanisms are in tension with another, in the sense of having different concerns, powers, procedures and culture, which generate competing agendas and capacities.[83] Within contracted-prisons corporate governance structures will hold directors to account for the expenditure of money, so that within an efficient redundancy system enough money but no more than is necessary to provide a humane regime will be spent. We might expect periodically that value for money norms or security norms might inhibit the achievement of humanity norms. The solution would not necessarily be to crank up the humanity regime, but rather to apply techniques of selective inhibition to the other norm structures so that their pull on the overall system was diminished somewhat. This might, for example, be through changing financial incentives or oversight structures, or through enhancing access of prisoners to grievance-handlers or judicial review

There are some rather obvious problems with relying on dense webs of accountability or functional equivalents to secure the achievement of key public law objectives in respect of governance regimes. Chief among these is a marked lack of transparency in the traditional informal arrangements of government, and in many of

the new mechanisms such as contracting out, [84] and a lack of scope for broad participation in decision making.

As with other values over which accountability is sought, there have been marked changes in respect of transparency accountability. As noted above, NPM reforms of the UK public sector have increased transparency in some aspects of public service provision, such as quality and value for money. But for the public lawyer the difficulty lies in securing an overview of any policy domain, rather than a perspective on one set of values. NPM reforms, because they fragment responsibility, may threaten this general transparency. The Freedom of Information Bill introduced by the Labour Government will make changes in all three facets of accountability for transparency, extending requirements to submit to the openness regime to various private actors, creating accountability for openness to a new Commissioner (who will take over the responsibility for overseeing the Code of Practice on Open Government currently exercised by the Parliamentary Ombudsman)[85], and redefining the normative content with new rules on what information must be made available to the public. But this accountability mechanism does not have a monopoly even over the accountability for openness. Openness is likely to be an important value, to a lesser or greater extent, in the existing formal and informal accountability mechanisms which involve parliament, ministers, agencies, courts, tribunals, auditors, etc. The new regime is likely to bring changes to each of these other parts of the accountability structure, quite possibly shifting the balance towards openness values, and bolstering the requirements to account for openness in all parts of the domain. We may note however that one of the central mechanisms of accountability affecting agencies and non-departmental bodies, the informal influence of ministers (with 'lunch-table directives'[86]), is unlikely to be touched by the new openness regime.[87]

Other values are also being pursued by the Labour government with renewed vigour. The Cabinet Office is both encouraging and policing the development of participatory structures for standard setting within the Service First programme (which replaces the Citizen's Charter programme) and has introduced a new co-ordination principle ('joined-up government') which is intended both to improve the co-ordination of policy across departments and to reduce the transaction costs for

citizens dealing with the state.[88] Again, the effects of these interventions are not clearly predictable and public lawyers will want to monitor and evaluate them for the their effects in shifting the normative balance within particular domains.

CONCLUSIONS

The transformation of public administration in the UK has made more transparent the dense networks of accountability within which public power is exercised. The constitutional significance of this observation is to suggest that there is a potential to harness these networks for the purposes of achieving effective accountability or control, even as public power continues to be exercised in more fragmented ways. Outstanding questions for this analysis are whether there are other models of accountability in the regulatory state not captured by the interdependence and redundancy models,[89] and whether it is possible to capture the complete set within an overall theory of extended accountability? Areas requiring further exploration are the role of voluntary organisations (such as prisons campaigners and consumer groups) and the media in rendering public and quasi-public bodies accountable.

Each of the two models of extended accountability discussed in this article presents difficulties for public lawyers and more generally. Neither model is directly 'programmable' with the public law norms (fairness, legality, rationality, etc). Interventions to secure appropriate normative outcomes must necessarily be indirect and unpredictable in their effects.[90] The interdependence model carries with it the risk that special interests, such as those of a particular firm or group of firms, may capture the regime through their overall weighting of power within it.[91] The redundancy model presents particular problems. If redundancy *per se* is a good characteristic for an accountability regime it is difficult to calculate how much redundancy is sufficient and how to know when an additional layer of accountability is inefficient and to be removed. Equally, there is also the risk within a redundancy model of simultaneous failure of different parts of the system for the same reason. Where, for example, information is successfully hidden from more than one part of the accountability network there is a risk of complete failure in respect of the matters for which that information is relevant.

Close observation of the structures of accountability in the regulatory state suggests that the public lawyers concerns, premised upon an over-formal conception of accountability, if not unfounded are then neglectful of the complex webs of extended accountability which spring up in practice. Indeed these extended accountability mechanisms already evidence a capacity to hold not only public but also private actors accountable for the exercise of power which is broadly public in character. Whilst not agreeing with Wilks and Freeman that it is possible to conceive of the accountability of a regulatory regime,[92] it is nevertheless helpful to think in terms of the *aggregate* accountability of each of the actors exercising power within a regime. [93]

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[1] Much of the data for this paper is drawn from two collaborative empirical projects on the regulation of the public sector (ESRC Grant no L124251015) and of the UK Office of Telecommunications (funded by the Leverhulme Trust, the Centre for the Study of Regulated Industries and the Suntory and Toyota International Centres for Research in Economics and Related Disciplines). I am indebted to my collaborators, in particular to Christopher Hood. I am also grateful to the following for comments on earlier drafts of this article: participants in a LSE Law Department staff seminar, May 1999, a LSE MSc Regulation programme seminar, May 1999, and the Law and Society Association annual meeting in Chicago, June 1999; and Julia Black, Martin Loughlin, Imelda Maher, James Penner, Richard Rawlings and the editors. I remain responsible for errors.

[2] B. Smith and D.C. Hague, (eds), *The Dilemma of Accountability in Modern Government: Independence Versus Control* (1971).

[3] P. Birkinshaw 'Decision-Making and its Control in the Administrative Process – An Overview' in P.McAuslan and J. McEldowney, (eds), *Law, Legitimacy and the Constitution* (1985) 152.

[4] cf. R. Baldwin and C, McCrudden who treat control and accountability as synonyms: *Regulation and Public Law* (1987) 35-45.

[5] P. Day and R. Klein suggest that holding to account is always likely to be premised upon some capacity to control: *Accountabilities: Five Public Services* (1987) 227-9.

Craig, a public lawyer, argues for the retention of a distinction between control and accountability: *Administrative Law* (3rd ed, 1994) 88-89.

[6] B. Stone 'Administrative Accountability in the 'Westminster' Democracies: Towards a New Conceptual Framework' (1995) 8 *Governance* 505

[7] Notwithstanding the importance accorded to the concept of accountability in contemporary political and legal discourse, neither A. V. Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, 1959) nor Sir Ivor Jennings *The Law and the Constitution* (5th ed, 1959) showed much interest in the accountability in these terms.

[8] Stone, op. cit. n.6, 506.

[9] M. Partington 'The Reform of Public Law in Britain: Theoretical Problems and Practical Considerations' in P. McAuslan and J. McEldowney *Law, Legitimacy and the Constitution* (1985) 196.

[10] See, generally, C. Harlow and R, Rawlings *Law and Administration* (1st ed, 1984, 2nd ed, 1997). On grievance-handlers see M. Seneviratne *Ombudsmen in the Public Sector* (1994); on audit see F.White and K.Hollingsworth *Audit, Accountability and Government* (1999); on internal review see R. Sainsbury 'Adminstrative Justice: Discretion and Procedure in Social Security Decision Making' in K. Hawkins (ed.) *The Uses of Discretion* (1992) and J. Hanna 'Internal Resolution of N.H.S. Complaints' (1995) 3 *Medical Law Review* 177..

[11] M. Loughlin, *Public Law and Political Theory* (1992) 260.

[12] E.L Normanton, 'Public Accountability and Audit: A Reconnaissance' in Smith and Hague op. cit. n.2, 311.

[13] Eg Craig, op. cit. n.5 , 88-89 uses a concept of traditional accountability to refer to accountability of public sector organisations to ministers, parliamentary select committees and the Parliamentary Commissioner for Administration (the Ombudsman). A helpful taxonomy of traditional accountability mechanisms in UK government is found in Patrick Birkinshaw, Ian Harden and Norman Lewis *Government by Moonlight* (1990) Appendix 2. An excellent account of the development of the Parliamentary Ombudsman's jurisdiction, the development of audit and the rise of the courts in reviewing administrative decisions is D. Woodhouse, *In Pursuit of Good Administration* (1997).

[14] G. Drewry (ed.) *The New Select Committees* (2nd ed, 1989); N. Lewis notes the parliamentary Public Accounts Committee has been pre-eminent in this aspect of the development of Parliament's capacity for calling public bodies to account, in particular because of its relationship with the National Audit Office which publishes reports which form the basis for subsequent PAC investigations: 'Regulating Non-Government Bodies: Privatization, Accountability, and the Public Private Divide' in J. Jowell and D.Oliver, *The Changing Constitution* (2nd ed 1989) 228-9.

[15] M. Elliott argues that in the financial sphere it was government not Parliament which led reforms in the accountability for public expenditure, as the relative financial autonomy of nationalized industries and local authorities became intolerable due to the fiscal problems faced by government from the mid-1970s: 'The Control of Public Expenditure' in J. Jowell and D. Oliver *The Changing Constitution* (2nd ed 1989) 188.

[16] *R* v *Panel on Takeovers and Mergers ex p Datafin* [1987] QB 815. See generally J. Black 'Constitutionalizing Self-Regulation' (1996) 59 *Modern Law Review* 24.

[17] White and Hollingsworth op.cit. n.10 88-89.

[18] Lewis op. cit. n.14; J. Black op. cit. n.16; J. Freeman 'Collaborative Governance in the Administrative State' (1997) 45 *University of California Law Review* 1; M. Aronson 'A Public Lawyer's Response to Privatisation and Outsourcing' in M. Taggart (ed) *The Province of Administrative Law* (1997); J. McLean 'Intermediate Associations and the State' in M. Taggart (ed) *The Province of Administrative Law* (1997); G. Teubner 'After Privatization? The Many Autonomies of Private Law' (1998) 51 *Current Legal Problems* 393.

[19] This distinction between 'downward', 'upwards' and 'outwards' accountability is made by H. Elcock 'What Price Citizenship? Public Management and the Citizen's Charter' in J. Chandler (ed.) *The Citizen's Charter* (1997) 33-37. Birkinshaw op.cit n. 3, 153 distinction between vertical and horizontal accountability is also helpful, but I have split the vertical accountability into the distinct upwards and downwards forms. An alternative way to classify the 'to whom?' question is set out by Stone, 510-511 and 522, in a five-fold classification. Thus he splits 'upwards accountability' into Parliamentary control and judicial and quasi-judicial review; 'horizontal accountability' into constituency relations and managerialism and has market mechanisms in what I call the 'downwards accountability' strand.

[20] I base this classification on C.Hood, 'A Public Management for All Seasons' (1991) 69 *Public Administration* 3,11. See also C. Harlow, 'Public Service, Market Ideology and Citizenship' ' in M. Freedland and S. Sciarra, *Public Services and Citizenship in European Law* (1998) 51-2.

[21] Representative of this view is C.Graham *Is There a Crisis in Regulatory Accountability?* (1995, reproduced in R. Baldwin, C. Scott and C. Hood *Reader on Regulation* (1998)) who argues that if there is a crisis of accountability in respect of the utilities sectors this is simply a product of a wider problem of poor accountability structures in the UK. See also D. Woodhouse op. cit. n.13, 37.

[22] R. Baldwin and M. Cave, for example, note with approval the development of the select committee structures within the House of Commons, but also suggest that its capacity to call ministers and officials to account is limited due to lack of time, resources and expertise: *Understanding Regulation* (1999) 288.

[23] This standard seems to be at the core of D. Woodhouse's 'public sector model of good administration', which she argues is being displaced by the New Public Management: op. cit. n.13, 37. See also J. Jowell 'The Rule of Law Today' in J.Jowell and D. Oliver *The Changing Constitution* (3rd ed 1994) 63.

[24] Sainsbury, op. cit. n. 10, 305-6.

[25] Birkinshaw op. cit. n.3, 159.

[26] G. Majone 'The Rise of the Regulatory State in Western Europe' (1994) 17 *West European Politics* 77; F. McGowan and H. Wallace 'Towards a European Regulatory State' (1996) 3 *Journal of European Public Policy* 56; M. Loughlin and C. Scott 'The Regulatory State' in P. Dunleavy, A. Gamble, I. Holliday, and G. Peele (eds) *Developments in British Politics 5* (1997).

[27] F. Hayek *Law, Liberty and Legislation Vol.2* (1976) 1-2.

[28] J.O'Connor *The Fiscal Crisis of the State* (1973); C. Offe *Contradictions of the Welfare State* (1984). A more detailed examination of the linkage between fiscal crisis and accountability mechanisms in the UK is provided by Elliott op. cit. n.15.

[29] J. Buchanan and G. Tullock *The Calculus of Consent* (1962); G. Stigler 'The Economic Theory of Regulation' (1971) *Bell Journal of Economics and Management Science* 3.

[30] N. Luhmann *The Differentiation of Society* (1982); G.Teubner 'Juridification: Concepts, Aspects, Limits Solutions' in Teubner (ed.) *Juridification of Social Spheres* (1987).

[31] C. Hood and C. Scott 'Bureaucratic Regulation and New Public Management: Mirror-Image Developments?' (1996) 23 *Journal of Law and Society* 321; J. McEldowney 'The Control of Public Expenditure' in J. Jowell and D. Oliver *The Changing Constitution* (3rd ed 1994) 206.

[32] D. Osborne and T. Gaebler *Reinventing Government* (1992).

[33] Criminal Justice Act 1991 ss.84-88; Criminal Justice Act (Contracted Out Prisons) Order 1992 (SI 1656); R. Harding *Private Prisons and Public Accountability* (1997).

[34] M. Cave 'The Evolution of Telecommunications Regulation in the UK' (1997) 41 *European Economic Review* 691.

[35] Craig op. cit. n.5, 110.

[36] Interestingly among the most anxious are scholars combining interests in public law and labour law: Gillian Morris 'Fragmenting the State: Implications for Accountability for Employment Practices in Public Services' [1999] *Public Law* 64-83; Mark Freedland 'Government by Contract and Public Law' [1994] *Public Law* 86-104.

[37] C. Harlow 'Accountability, New Public Management, and the Problems of the Child Support Agency' (1999) 26 *Journal of Law and Society* 150.

[38] Telecommunications Act 1984 s.55.

[39] The Monopolies and Mergers Commission has been reformed and re-titled the Competition Commission under the Competition Act 1998 s.45.

[40] Telecommunications Act 1984 ss.12-15.

[41] This is a criticism extended more generally to the development of next steps or executive agencies by specialists in both public law and public administration. D. Woodhouse op. cit. n.13, 9 is critical of the distinction argued for by the Cabinet Office of a distinction between responsibility, which often lies with officials in executive agencies, and accountability which remains with the minister. Craig op. cit. n.5, 91 cites Drewry and Butcher for the proposition that ministers have used next steps agencies to delegate responsibility while retaining a monopoly over accountability to Parliament.

[42] Craig op. cit. n.5, p91.

[43] For M. Hunt, focusing on problems of legal accountability the worry is about 'the capacity of English public law to respond appropriately to contractualisation by ensuring that constitutional values are observed by private actors performing public functions.' Hunt 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in Michael Taggart (ed) *The Province of Administrative Law Determined* (1997) 38. But, chiming with some of the themes of this article he hopes that the courts will be able to adapt, taking up an opportunity 'to assert their general public law principles over all exercises of power, regardless of the source of the power.' (at 38). Thus he puts the need for accountability of private actors for exercises of public power centre stage. See also Dawn Oliver's attempts to express the common values underlying public and private law: 'The Underlying Values of Public and Private Law' in in Michael Taggart (ed) *The Province of Administrative Law Determined* (1997); 'Common Values in Public and Private Law and the Public/Private Divide' [1997] *Public Law* 630; *Common Values and the Public-Private Divide* (1999). See also Freedland op. cit. n.36. Freedland is perhaps most representative of those so wedded to traditional accountability mechanisms (in this case legal accountability of contractors) that they downplay the potential for other mechanisms to act as functional substitutes. See especially 101-104. See also Woodhouse op. cit. n.13, 14.

[44] Klein and Day contrast simple modern models of accountability (loosely approximating to the traditional accountability of public lawyers) with complex modern models of accountability which recognise both the fragmentation of traditional service delivery mechanisms (for example through contracting out) but also new accountability mechanisms associated with them (eg through contractual relations between service provider and purchaser and between service provider and professional bodies): Klein and Day, op.cit. n. 5,11. Mark Freedland recognises also a potential for extended accountability in his critique of the Private Finance Initiative (PFI - by which private sector funds are brought into public sector capital projects by means of a leasing by private organizations to the public sector). He suggests that the key issue is amenability of PFI to parliamentary and judicial control but that other mechanisms of accountability, notably 'open government mechanisms are sufficiently well-developed in this context so as substantially to supplement and reinforce the more traditional mechanisms of accountability'. Freedland 'Public Law

and Private Finance – Placing the Private Finance Initiative in a Public Law Frame' [1998] *Public Law* 288, 294-5. See also Mark Aronson 'A Public Lawyer's Response to Privatisation and Outsourcing' in Michael Taggart (ed) *The Province of Administrative Law Determined* (1997).

[45] Woodhouse op. cit. n.13, 58; L Deleon 'Accountability in a "Reinvented Government" (1998) 76 *Public Administration* 539.

[46] K.Walsh, N. Deakin, P. Smith, P. Spurgeon and N. Thomas *Contracting for Change: Contracts in Health, Social Care and Other Local Government* Services (1997); P. Vincent-Jones 'The Regulation of Contractualisation in Quasi-Markets for Public Service' [1999] *Public Law* 304.

[47] F. Hayek *Law, Legislation and Liberty Vol.3* (1979) 67-70.

[48] We may note also that 'downwards accountability' is not restricted to market forms. Hood's egalitarian model of public management anticipates the maximization of what he calls 'face-to face' accountability mechanisms, which include election of officials, and scrutiny of their conduct in community fora: C. Hood *The Art of the State*(1997), 127-8. It seems fair to say that market mechanisms of downwards accountability have received more emphasis in the British NPM revolution, though recent commitments by the New Labour Government indicate a tendency towards more participation in standard setting among user groups and employee groups in the Service First programme than was found in the Citizen's Charter programme which it replaces: C.Scott 'Regulation Inside Government: Re-Badging the Citizen's Charter' [1999] *Public Law* 595.

[49] Competing norms and institutions have often arisen over particular sectors because of a reluctance or lack of capacity for following through on the logic of liberal reforms. A classic example is provided by rail privatization which was intended to free rail operating companies to decide on the frequency with which they ran trains on particular routes according to commercial criteria (and thus introducing downwards accountability to the market). However, this aspect of rail operation was also to be regulated, and to quell anxiety in Parliament the minister issued statutory directions to the regulator, the Office of Passenger Rail Franchising (OPRAF), indicating that he should approve frequencies of trains only where they did not deviate unduly from 'Minimum Service Levels' based on previous, publicly operated timetables. When judicially reviewed, OPRAF was held to have acted outside the

terms of these directions in approving timetables which deviated too much from previous timetables. See *R* v *Director of Passenger Rail Franchising ex p. Save Our Railways*, *The Independent,* 20 December 1995; Baldwin and Cave op. cit. n. 22, 301.

[50] Teubner op. cit. n.18, 406.

[51] Woodhouse op. cit. n.13, 8-9 notes the development of supplementary mechanisms of accountability, for example to consumers, and of chief executives of next steps agencies to ministers, but is critical of the fact that this brings us no closer to her ideal of a 'coherent set of arrangements'.

[52] Summarised by Woodhouse op. cit. n.13, 46 as the 'New Public Management Model of Good Administration'.

[53] Birkinshaw op.cit. n.3*,* 165-6; N.Lewis 'De-Legalisation in Britain in the 1980s' in P.McAuslan and J. McEldowney (eds) *Law, Legitimacy and the Constitution* (1985) 114.

[54]See e.g D.Marsh and R. Rhodes (eds) *Policy Networks in British Government* (1991); M. Thatcher 'The Development of Policy Network Analyses - From Modest Origins to Overarching Framework (1998) 10 *Journal of Theoretical Politics* 389.

[55] cf. D. Galligan *Discretionary Powers (*1986), 128-40 for a discussion of the practical constraints on the discretion exercised by administrative actors. D.C Hague discussed the role of 'social accountability' in supplementing formal accountability mechanisms, to connote circumstances where there was some form of accounting to a community affected by decisions in a particular policy domain: 'The Ditchely Conference: A British View' in Smith and Hague, op. cit. n.2, 76.

[56] Elliott op. cit. n.15*,*191.

[57] Stone op. cit. n.3, 517.

[58] For example, Hugh Heclo and Aaron Wildavsky's ethnographic study of Whitehall in the early 1970s found a village life regulated by informal accountability mechanisms of peer review: *The Private Government of Public Money* (London, Macmillan 1974). Day and Klein's study of accountability in five public services in the mid-1980s also found more complex models of accountability than a simple monolithic structure might imply: op. cit. n.5.

[59] Lewis op. cit. n.14, 236-7; T. Prosser *Nationalized Industries and Public Control* (1986).

[60] C.Hall, C. Scott and C. Hood *Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (forthcoming) Chapter 5.

[61] C. Scott 'Privatization, Control and Accountability' in J. McCahery, S.Picciotto and C.Scott *Corporate Control and Accountability* (1993).

[62] *R*. v *Director General of Telecommunications Ex p. Cellcom Ltd* (1999) 96(6) L.S.G. 31; *R*. v *Director General of Telecommunications Ex p. British Telecommunications Plc*, (QBD), December 20, 1996; *Mercury Communications Ltd* v *Director General of Telecommunications* 1996] 1 W.L.R. 48; [1996] 1 All E.R. 575; Scott, C. 'The Juridification of Regulatory Relations in the UK Utilities Sectors' in J. Black, P. Muchlinski and P. Walker (eds) *Commercial Regulation and Judicial Review* (1998).

[63] Oftel has been subjected to a remarkable degree of scrutiny by the National Audit Office and consequently also by the parliamentary Public Accounts Committee: National Audit Office, *The Office of Telecommunications: Licence Compliance and Consumer Protection* HC 529 (1993); National Audit Office*, The Work of the Directors General of Telecommunications, Gas Supply, Water Services and Electricity Supply: National Audit Office* HC 645,(1996); National Audit Office, *Countering Anti-Competitive Behaviour in the Telecommunications Industry* HC 667, (1998).

[64] Generally on this point see J. Black 'Talking about Regulation' [1998] *Public Law* 77, 103-4. The interdependent relations of OFTEL in creating effective accountability are important notwithstanding recent evidence of a tightening of the traditional mechanisms of both juridical and audit accountability over OFTEL's activities: Hall, Scott and Hood, op.cit. n.60, Chapter 5.

[65] C. Hood, C. Scott, O. James, T. Travers and G. Jones *Regulation Inside Government,* 118.

[66] Harding op.cit. n.33, 42-50.

[67] Harding op. cit. n33, 160, recognises the importance of the Chief Inspector of Prisons, though not other aspects of the accountability structure, in reducing what he sees as the considerable risks that contracted-out prisons regimes will be captured by private sector interests. Further redundancy is likely to be introduced in the UK by the extension of accountability in the downwards dimension with the drafting of a

Prisoners' Charter proposed by the Government: Cabinet Office *Service First: The New Charter Programme* (1998) para 4.22.

[68] Hood, Scott *et al.* op. cit. n.65, 175.

[69] T. Prosser 'Competition, Regulators and Public Service' in B. Rodger (ed) ********** (forthcoming).

[70] R. Rawlings 'The New Model Wales' (1998) *Journal of Law and Society* 461, 500-501.

[71] A. Dunsire'Tipping the Balance: Autopoiesis and Governance' (1996) 28 *Administration and Society* 299, 312-314.

[72] See the summary in Graham op. cit. n.21.

[73] Hall, Scott and Hood, op. cit. n. 60, Chapter 9.

[74] Trade and Industry Select Committee, 1996 *Third Report*, Session1996-97 (Telecommunications Regulation) HC 254, 48.

[75] Department of Trade and Industry *Consumer Councils: The Response to the Consultation* (1999). On the general argument that consumer capacities in the utilities sectors should be enhanced see A. McHarg 'Separation of Function and Regulatory Agencies: Dispute Resolution in the Privatized Utilities' in M. Harris and M. Partington (eds) *Administrative Justice in the 21st Century* (1999).

[76] Eg *The Guardian,* 3 November 1997. John Swift QC subsequently resigned at the end of his five year contract as rail regulator.

[77] Baldwin and Cave op. cit. n.22, 292-3.

[78] Hood, Scott *et al* op. cit. n.65,126.

[79] National Audit Office *Report by the Comptroller and Auditor General: Wolds Remand Prison* (1994).

[80] Dunsire op. cit. n.71, 318ff. See also Normanton op. cit. n.12, 313 (referring to the 'readjustment' of the 'balance of accountability' and, bringing in the accountability of private actors, J. Braithwaite 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of A Republican Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305.

[81] Loughlin op. cit. n.11, 264.

[82] Cf Black op. cit.n.64, 105: She argued that 'there is a need to structure the distribution of authority and the forms and occasions of participation and

accountability in such a way that they do not operate in conflict with each other or with the willingness and commitment of regulator and regulated alike to the conversation.'

[83] Hood, Scott *et al* op. cit. n.65, 119.

[84] Lewis op. cit. n.53, 115.

[85] Freedom of Information Bill, clause 7.

[86] Baldwin and McCrudden op. cit. n.4, 40.

[87] An exception to this is in the utilities sectors, where the government has undertaken to publish ministerial guidance on social and environmental matters, making such ministerial influence more transparent: Department of Trade and Industry *A Fair Deal for Consumers* Cm 3898, 1998.There is some scepticism as to whether this measure will really reduce the extent to which ministers wield informal influence over agencies.

[88] Cabinet Office *Modernising Government* Cm 4310, 1999.

[89] Freedland op. cit. n.45, 296-7 hints at a transparency model in which the commitment of the Treasury to publish on its web-site a wide range of documents (including articulations of the regulatory framework) relating to the Private Finance Initiative. A problem with this transparency as a form of accountability is that it does not indicate to whom the Treasury and others are to be accountable, and, relatedly indicates no conception of control.

[90] Dunsire op. cit. n.71, 321.

[91] Cf. L. Hancher and M. Moran 'Organising Regulatory Space' in Hancher and Moran *Capitalism, Culture and Regulation* (1989) 274.

[92] S. Wilks 'Utility Regulation, Corporate Governance, and the Amoral Corporation' in G. B.Doern and S.Wilks (eds) *Changing Regulatory Institutions in Britain and North America* (Toronto, University of Toronto Press, 1998) at p140; J.Freeman 'Private Parties, Public Functions and the New Administrative Law' 47 (Paper presented at the Law and Society Association Annual Conference, 1999). See also J. Braithwaite op. cit. n.80.

[93] See Hall, Scott and Hood op. cit. n.60, Chapter 5.