

Evaluating the Performance and Accountability of Regulators

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1. Introduction

The Global Financial Crisis came in the wake of significant reforms to the structures, processes, powers and rules of the regulatory regimes for financial markets in many of the countries adversely affected by the crash. It is striking that the reformed regulatory regimes lacked the capacity both to anticipate and prevent the crisis which engulfed the world. Furthermore, even after this experience, it remains unclear whether regulators account effectively for what they do. What we mean by accountability in this context depends on what we think accountability is for. If we think of accountability as an aspect of democratic governance, concerned with reassuring us that regulators uphold their public mandates, then we might envisage a formal type of accountability. However, a claimed virtue of much regulation, including in the financial sector, is that it is informed as much or more by technical than democratic concerns. Giving priority to the technical character of much regulation might lead us to downplay the formal mechanisms of democratic accountability, but we should do so only if we have in view mechanisms appropriate to the technical conception of regulatory roles. The issue is further complicated by the observation that much apparently technical regulation, whether carried out by public or private regulators, has capacity to profoundly affect interests and is therefore necessarily political, even though it may have technical dimensions.¹

In this article I follow the logic of an argument that regulation necessarily has political dimensions, even where it may appear technical. So I am asking questions about how we might best think about accountability processes which encompass both democratic and technical dimensions of regulation and how their respective concerns might be combined within accountability regimes. Conceived of in this way accountability needs to go beyond traditional public accountability forms, largely concerned with process, to include effective evaluation of performance in terms of better regulation, direct performance evaluation and more sophisticated forms of regulatory audit.

I consider the appropriateness and robustness of these mechanisms in light of significant trends which point towards continuing fragmentation of regulatory relationships generally and within financial markets in particular. Elements of this fragmentation include the gradual move in the centring of international financial markets from North America and Europe to Asia, a change

¹ T Bütte and W Mattli, *The New Global Rules: The Privatization of Regulation in the World Economy* (Princeton University Press, Princeton, NJ 2011)

accelerated by the Global Financial Crisis, and which is liable to reduce not only the market significance of New York and London, but also their concentration of public regulatory power. Second, there is the continuing pressure to move the emphasis of regulation from the national to the supranational and even the global level. Whilst the ambition of such trends may be directed toward seeking to harmonise and create more uniform and robust regulation, imperfect globalization of regulation is likely to create opposite outcomes, leading to further fragmentation. Third, there is the increasing recognition of the centrality of transnational private regulation in setting norms and in monitoring of compliance in financial markets. Taken together these fragmenting effects require a significant reevaluation of what effective accountability for regulators should mean.

Conceiving of accountability as embracing both technical and political requirements draws us towards a parallel world in which the efficiency and effectiveness of regulation is a core part of oversight concerns, alongside the issue of democratic concern with procedures. Policies of deregulation, regulatory reform, better regulation and smart regulation pursued in one form or another in most of the OECD member states are centrally concerned with promoting proportionate responses to problems defined as regulatory, with varying degrees of effectiveness. Distinct from better regulation are strategies of public sector audit concerned with promoting efficiency, economy and effectiveness in the expenditure of public monies, including on regulation. A further distinct set of concerns within regulatory policy are measures targeted at developing performance indicators and the evaluation of performance.

When we look at these concerns with process and effectiveness together it is helpful to conceive of the overall oversight or regulation of regulation as a legitimate and distinct set of concerns and operational activities of government, addressed not only to public regulation, but to increasingly important regimes of private regulation. Thus there is a discipline of regulating regulation, not fully recognized, and comprising a variety of different fields of activity and disciplines which should increasingly be concerned with promoting accountability based on both process and performance.

2. The Global Financial Crisis

The global financial crisis struck major financial markets in 2008 following a period of quite extensive reform of structures and process of financial regulators across many of the leading national regimes.² There was a good deal of confidence amongst regulators that, armed with new powers, new knowledge and new techniques they were more than equal to the tasks of protecting the public interest in financial markets. This confidence was based not simply in what they knew about regulation, but also what they thought they knew about efficient markets.³ As Julia Black argues it was not so much that the new tools of regulation were faulty, but rather that they were applied poorly,⁴ whether for reasons of lack of understanding, as some of the official reports, discussed below, suggest, or because of a combination of ideologies and interests which favoured the key actors in financial markets.⁵

² J Black, 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' (2012) 75 Modern Law Review 1037-1063.

³ J Froud and others, 'Stories and Interests in Finance: Agendas of Governance Before and After the Financial Crisis' (2012) 24 Governance 35-59: 40.

⁴ Black, : 1038.

⁵ Froud and others, : 44.

Many hypotheses have been advanced to explain the global financial crisis. A common thread running through many analyses is attribution of responsibility to weaknesses in the management of risk by market actors and second to poor understanding of and implementation of oversight regimes by regulators. Clearly market actors did things, and were permitted to do things, that were against the interests both of their own organisations and those of the states in which they were located. There was limited knowledge amongst banks and regulators of the systemic risks being created through extensive interdependence of transactions.

In subsequent inquiries each jurisdiction has sought to identify the causes of the problems which each faced from the financial crisis. In Ireland the Honohan report concluded that major responsibility lay with bank directors, but also with weaknesses in regulation. Honohan found that the Financial Regulator emphasised processes over outcomes and failed to develop independent evaluations of risks presented by banks. He noted that the undue deference shown to the banking sector constituted a form of regulatory capture.

‘Thus, it would have been known within the [Financial Regulator] that intrusive demands from line staff could be and were set aside after direct representations were made to senior regulators.’⁶

The British Turner Report identified weaknesses in the capacity of financial markets that had not been understood by banks or regulators. National regulators were depending on regulators operating in the home jurisdictions of banks doing business transnationally, but home regulators were typically looking only at the national and not the global footprint. Key examples included the collapse of Lehman Brothers and the Icelandic Landsbanki.⁷ The official EU investigation, chaired by Jacques de Larosière, identified failures in risk assessment by banks and regulators, but also poor sharing of information by regulators and over-dependence on ratings agencies.⁸

The United States Financial Crisis Inquiry Commission concluded that the crisis was avoidable.

‘The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public.’⁹

These now well-documented regulatory failings occurred in part because of technical and cognitive weaknesses, but also because of the political factors of deference to banks and to an ideology which believed in efficient markets.¹⁰

⁶ P Honohan, 'The Irish Banking Crisis Regulatory and Financial Stability Policy 2003-2008: A Report to the Minister for Finance by the Governor of the Central Bank' (Central Bank, Dublin 2010): 9.

⁷ Financial Services Authority, 'The Turner Review: A Regulatory Response to the Global Banking Crisis' (Financial Services Authority, London 2009): 36-38.

⁸ High Level Group on Financial Supervision in the EU Chaired by Jacques de Larosière, 'Report' (European Commission, Brussels 2009): 8-11.

⁹ National Commission on the Causes of the Financial and Economic Crisis in the United States, 'The Financial Crisis Inquiry Report' (US Government Printing Office, Washington DC 2011): xvii.

¹⁰ Froud and others, .

Independent regulation is, of course, supposed to be a *solution* to problem of politicians favouring powerful industrial interests.¹¹ It is striking that this cataclysmic regulatory failure occurred at time when the 'rise of the regulatory state' had occurred offering solutions to at least two sets of governance problems. The first of these problems is the risk that where the state regulates directly through government departments headed by elected politicians, decisions will be driven by consideration of short term political gain. Such political short termism yields, at best, regulation which is incapable of supporting the mature development of regulated markets over time and, worse, regulation the purpose of which is to support the interests of those major interests who are friendly with elected politicians, rather than the public interest.¹² The rise of the regulatory state has been about insulating regulatory decision making from both self-interested structures of self-regulation, and self-interested structures of politics – across financial, but also network industries, food and pharmaceuticals sectors, amongst others.¹³

The second problem is the limited technical capacity of elected government to undertake regulation in areas as complex as financial markets. The establishment of regulation with its governance through rules, with arms-length regulators is intended to support agencies in establishing a high degree of technical expertise, for example through recruitment practices which are somewhat distinct and perhaps on better terms than standard public sector recruitment activities, and with a clear orientation from the top towards purposive regulation rather than the wider array of political concerns which typically characterize departments and ministers.¹⁴

We tolerate the detachment of regulation from the normal mechanisms of control and accountability associated with the public service only because of an expectation that regulation will be apolitical and expert.¹⁵ If neither claim for regulation can be delivered on then this is a significant problem. The global financial crisis demonstrates a failure of regulation to achieve the very outcomes for which it is supposed to be strong. Failures of regulation more generally have presented a significant challenge to trust in regulation to deliver on public interest objectives.¹⁶

¹¹ M Thatcher and AS Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1-22.

¹² B Levy and P Spiller (eds), *Regulation, Institutions and Commitment* (Cambridge University Press, Cambridge 1996).

¹³ J Braithwaite, 'Accountability and Governance Under the New Regulatory State' (1999) 58 *Australian Journal of Public Administration* 90-97F Gilardi, *Delegation in the Regulatory State* (Edward Elgar, Cheltenham 2008)D Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of the American Academy of Political and Social Science* 12-32M Loughlin and C Scott, 'The Regulatory State' in P Dunleavy and others (eds), *Developments in British Politics 5* (Macmillan, Basingstoke 1997)G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77-101M Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25 *West European Politics* 125-147.

¹⁴ Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation'

¹⁵ M Thatcher and AS Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' *Ibid.* 1-22

¹⁶ Black, MK Borowicz, 'Financial Markets, Regulatory Failures and Transnational Regulatory Safety Nets: The Building of a Policy-Making Metaphor' in A Berman and others (eds), *Informal International Lawmaking: Cast Studies* (Torkel Opsahl, The Hague 2012).

So there is a significant challenge to trust in regulation. The Financial Crisis has resulted in calls for an end to self-regulation, challenges to the legitimacy of national regulation, challenge to markets and proposed solutions which involve a larger role for EU agencies and even global regulators.¹⁷ Other concerns apply across regulation more generally and these includes anxieties about ineffectiveness, distance from government and the relatively short relational distance between regulators and regulated firms.¹⁸ In short, regulation is now a problem which requires addressing, as much as it is a solution.

What we might call the political focus of regulation is frequently on the rule making, which, in many jurisdictions, continues to be undertaken by legislative bodies, even where implementation tasks have been assigned to specialist agencies. Although rule making does give rise to problems, partly because of risks of favouring particular interests and partly because of questions about the capacity to legislate effectively for technical areas of economic life, arguably key challenges to the legitimacy of regulation lie more with the manner in which regimes are implemented in terms of monitoring and enforcement.¹⁹

3. Fragmented Regulation

There is a tendency to think of regulation by reference to the strong tradition of independent federal regulatory agencies in the United States. Within the rather similar tradition of Canadian regulatory institutions, the powerful independent regulators have been characterized as 'governments in miniature' because of their tendency to take on powers to make rules, to monitor for compliance and to apply enforcement sanctions without the intervention of courts.²⁰ The US experience of powerful independent regulators is somewhat atypical, by international standards.²¹ Elsewhere it has been more common to find regulatory powers divided between different public bodies with, for example, rulemaking powers reserved to legislatures or ministers exercising delegated powers to make regulations or issue decrees, and power to apply formal sanctions reserved to courts or specialist tribunals. Within such regimes regulatory agencies tend to exercise restricted powers focused on monitoring and initiating enforcement actions, with advisory roles in respect of rulemaking.

If it is correct to suggest that regulatory power, even in the context of domestic public regulation, is somewhat fragmented, the tendency towards fragmentation is amplified considerably by the roles of supranational and international governmental bodies such as the EU institutions, the World Trade

¹⁷ C Scott, 'Regulating in Global Regimes' in D Levi-Faur (ed) *Elgar Handbook of Regulation* (Edward Elgar, Cheltenham 2012)

¹⁸ P Grabosky and J Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, Melbourne 1986) R Macrory, 'Regulatory Justice: Making Sanctions Effective' (Cabinet Office, London 2006) G Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in R Baldwin, C Scott and C Hood (eds), *Socio-Legal Reader on Regulation* (Oxford University Press, Oxford 1998 (orig. pub 1987)).

¹⁹ Grabosky and Braithwaite Macrory(.

²⁰ J Willis, 'Administrative Decision and the Law: The Views of a Lawyer' (1958) 24 Canadian Journal of Economics and Politics 502-511. B Doern and R Schultz, 'Canadian Sectoral Regulatory Institutions: No Longer Governments in Miniature' in B Doern and S Wilks (eds), *Changing Regulatory Institutions in Britain and North America* (University of Toronto Press, Toronto 1998) notes the retreat in Canada from assigning all regulatory powers to powerful regulatory agencies.

²¹ C Scott, 'Agencification, Regulation and Judicialization' in T Ginsburg and AHY Chen (eds), *Administrative Law and Governance in Asia: Comparative Perspectives* (Routledge, London 2008).

Organisation and various UN organisations such as the International Labour Organisation and the Codex Alimentarius Commission.²² Further fragmentation is attributable to the growing significance of private organisations such as standard setting bodies, for example the ISO, IEEE and CEN, and other private regulators which have proliferated across a wide range of fields in recent years including financial markets, environmental protection, fair trade, accounting standards, advertising and so on.²³

Accounts of the global financial crisis identified fragmentation both of markets and of regulation as a key cause of the problems, notably because financial markets actors operating across many jurisdictions seemed to be subject to inadequate controls in circumstances where the regulator in their home jurisdiction lacked power and capacity to monitor across all jurisdictions.²⁴ Equally, the vagaries of private regulation, notably by credit ratings agencies and through the standardization and extension of credit default swaps, effectively setting the terms for complex financial instruments, were also identified as key sources for failure to know about and to understand sufficiently the risks associated with complex financial products traded across jurisdictions.²⁵ It is unsurprising that one of the responses to the financial crisis was to seek to harmonise regulation at a global level to a greater extent. It is equally unremarkable that the pressures which have caused the emergence of fragmented regulation have equally inhibited moves towards harmonization. The challenges associated with accountability for regulation are as complex as the regimes to which accountability relates.

4. Accountability

Thinking about regulators generally, where they are national public agencies, they are typically designed in such a fashion that they have a degree of independence from elected politicians, accompanied by mechanisms of oversight or accountability.²⁶ The value attributed to independence derives from arguments that regulators should be oriented towards expert decision making, insulated from day-to-day political concerns and that if decision making is more political in character then it should be retained by elected politicians rather than delegated.²⁷ The fact of delegation makes accountability important but also problematic.²⁸

Addressing a crisis of trust in regulation is not straightforward. We might be concerned to target the fidelity of regulators to their mandate, which would suggest addressing procedural weaknesses in their activities, or alternatively we might be more interested in the outcomes of their activities, which would suggest a different form of evaluation altogether. We can think of both sets of concerns as being rooted in accountability for regulation.

²² J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge 2000).

²³ K Abbott and D Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, Princeton 2009).

²⁴ Financial Services Authority(

²⁵ High Level Group on Financial Supervision in the EU Chaired by Jacques de Larosière(

²⁶ Gilardi, M Maggetti, *Regulation in Practice: The De Facto Independence of Regulatory Agencies* (ECPR, Colchester 2012).

²⁷ Maggetti, Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation'

²⁸ Gilardi.

I have elsewhere argued that we can conceive of accountability upwards (notably to courts, legislature and ministers), horizontal (notably to other agencies such as ombudsman, supreme audit institutions and information regulators) and downwards (notably to regulatees and to intended beneficiaries of a regime).²⁹ These three modes of accountability map on to three forms of governance based, respectively on hierarchy, community and market.³⁰

Bovens has suggested that accountability is best conceived of as a relationship in which the organization being held to account has an obligation to explain its activities to another organization which may pose questions, make judgements and (possibly) deliver consequences for failings.³¹ But what is the content of these varied forms of relationship? Notwithstanding their different characteristics, I suggest that the dominant strand of even a broadly-based conception of accountability is compliance with rules. Thus, we might ask, did a regulator follow the prescribed procedures, did they spend the money and hire staff in accordance with public sector norms, did they exceed their powers or neglect to do something they were mandated to do? This is about public mandates and providing reassurance that they are complied with. In this context accountability is fundamentally about democratic governance, tolerant of delegation of powers, but ensuring that those to whom power is delegated do only that which is authorized in the form that is required.

Holding regulators to account for the substance of their actions in making rules, or in monitoring and enforcing them is less common and more challenging. It requires us to ask more difficult questions about how effective the regulator is and how they can demonstrate the quality and effects of what they do. The challenge for accountability is simultaneously to address technical weaknesses (substantive outcomes) and the fragile democratic legitimacy of regulation. These twin concerns are significant problems for public regulation. Both problems, technical credibility and democratic legitimacy, are even more significant for private regulators.

Private regulation remains central for financial regulation. Key examples of private regulators include the monitoring activities of credit rating agencies, used to assess the financial position of both banks and of sovereign governments, the International Accounting Standards Board, which determines the International Financial Reporting Standards, which provide the central requirements of both reporting and auditing requirements for financial performance of both private and public actors in most jurisdictions. Other important regimes include those for setting and interpreting the terms of derivatives transactions, largely determined by the private activities of the International Swaps and Dealers Association (ISDA), not to mention self-regulatory oversight of the conduction of accounting

²⁹ C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38-60.

³⁰ JL Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in MW Dowdle (ed) *Public Accountability* (Cambridge University Press, Cambridge 2005)

³¹ M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) *European Law Journal* 447-468.

and legal professionals who are so central to implementing both market and regulatory actions.³² Any accountability solution must address public and private regulation.³³

5. Beyond Accountability to Performance

I now come at this problem from a different perspective. If it is correct to argue, as I do, that democratic modes of accountability are, at best incomplete, what are the best available alternatives or complements and what is their capacity to capture aspects of performance? To what extent has the art of accountability taken in a concern to evaluate or to require regulators to evaluate their performance? A fully external performance evaluation is, of course, different from oversight of self-evaluation. The core question and one of intense interest to market and governmental actors is how do we know whether regulators are doing a good job or not?

This starting point is not immediately looking for solutions to the problem of trust in regulation, but rather observing an important trend in regulatory oversight towards performance evaluation and accountability. Turning to the performance evaluation of regulators I note that although a number of national bodies (for example the Australian Productivity Commission) and supranational organisations (notably the OECD) have begun to pursue the question of how to evaluate regulatory performance, the topic has had, at best a marginal role in contemporary regulatory science. There is, for example, no discussion of performance indicators and performance evaluation in two leading handbooks of regulation published in 2010 and 2012.³⁴

Performance evaluation provides a mechanism to address claims to technical expertise of regulators and thus the potential to evaluate regulators on their own terms. The OECD's work on the assessment of regulatory performance has found that there are few functioning examples of regimes available and that the task of evaluating regulatory performance is extremely challenging.³⁵

Demands for performance evaluation are increasingly prominent from market actors, governments and civil society organization. For national governments there is a concern for principals to know better whether regulators to whom they delegate power are up to the tasks they have been set, whether in financial markets or in other sectors such as food, communications, pharmaceuticals and prisons. For supranational bodies, not only the OECD, but also the EU and APEC, there are concerns to ensure not only that regulation operating across jurisdictions is effective at securing it permitted outcomes, but also that it is not pursuing non-legitimate (eg protective) purposes. With private regulation the very purpose of the regime is to achieve some effect such as enhancing the sustainability of forestry, or ensuring fair prices are paid to growers of commodities such as chocolate and coffee. Buyers of the products, both retailers and consumers, need to be confident that the promised conditions for production or purchase have been met or else there is no point in paying extra to have the protections of the regime.³⁶ For some areas of private regulation such as technical standards market take-up and market discipline may be sufficient. Effectiveness as judged by market actors is a key to legitimacy. For any regime evidence of ineffectiveness (eg in monitoring

³² Y Dezalay, 'Between the State, Law and the Market: The Social and Professional Stakes in the Construction and Definition of a Regulatory Arena' in WW Bratton and others (eds), *International Regulatory Competition and Coordination* (Oxford University Press, Oxford 1996)

³³ C Scott, F Cafaggi and L Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 *Journal of Law & Society* 1-19.

³⁴ R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, Oxford 2010) D Levi-Faur (ed), *Elgar Handbook of Regulation* (Edward Elgar, Cheltenham 2012).

³⁵ C Coglianesi, 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy' (OECD, Paris 2012).

³⁶ DA Kysar, 'Preferences for Processes' (2004) 118 *Harvard Law Review* 525-642

and enforcement) may damage credibility of an entire regime leading to withdrawal of support from market or governmental actors.

What existing mechanisms are there that offer at least some basis of accounting for regulatory performance? Since the early 1980s governments amongst the OECD member states have been seeking to apply a form of braking mechanism to their own urges to regulate to solve policy problems.³⁷ Without mechanisms originally referred to as deregulation, but now more commonly thought of as processes of better regulation there would be potential to ratchet regulatory requirements on businesses and others without evaluation of costs and benefits. Better regulation policies provide an example of regulation inside government where, typically, some cross-departmental unit is concerned with setting and overseeing requirements on departments and others responsible for setting regulatory rules, that they properly evaluate them at the outset, and sometimes through review of existing and not only new rules. The OECD has been a key proponent of such initiatives, setting its member states the challenge of building institutional capacity and political commitment for oversight of regulation.³⁸ Such regimes are now widely found in OECD member states, with aspirations to regulate performance of policy makers and rule-setters but with rather patchy effects on the ground.

Regimes of better regulation focus primarily on decisions around regulatory responses to policy problems with an evaluation process referred to generically (though it differs across jurisdictions) as a regulatory impact analysis (RIA).³⁹ The conduct of an RIA involves officials concerned with introducing regulation first, in considering alternatives, and second in evaluating potential costs, benefits and impacts of their proposed regime, rules or other actions.⁴⁰

Whilst RIA processes command wide support as a mechanism for requiring evaluation during the policy process for new regulation, they are also subject to widespread criticism. First, though most regimes require an evaluation of alternatives to regulation such as doing nothing or promoting self-regulation, many policy makers appear to commence RIAs only when there is already an administrative or political commitment to making rules (thus ruling out the less costly alternatives).⁴¹ Second RIAs are open to similar objections to cost benefit analyses generally that costs are often easier to pin down than benefits.⁴² In the case of RIAs this is particularly significant as business consultees are often better placed to argue about costs than is true for beneficiaries and benefits. There may therefore be an undue bias against regulation. A third concern addresses scope of better regulation regimes. Whilst the Australian Office of Best Practice Regulation seeks to apply better regulation principles to self-and private-regulation as well as public regulation, most regimes focus rather narrowly on government made rules, thereby excluding from considerations regimes which

³⁷ OECD, 'Regulatory Impact Analysis: Best Practices in OECD Countries' (OECD, Paris 1997) OECD, *Regulatory Reform* (OECD, Paris 1997)

³⁸ OECD, *Recommendation of the Council on Regulatory Policy and Governance* (Paris 2012).

³⁹ OECD, 'Regulatory Impact Analysis: Best Practices in OECD Countries' (

⁴⁰ SH Jacobs, 'Current in Trends in the Process and Methods of Regulatory Impact Assessment: Mainstreaming RIA into Policy Processes' in C Kirkpatrick and D Parker (eds), *Regulatory Impact Assessment: Towards Better Regulation?* (Edward Elgar, Cheltenham 2007) C Radaelli, 'The Diffusion of Regulatory Impact Analysis - Best Practice or Lesson-Drawing' (2004) 43 Eur. J. Polit. Res. 723-747

⁴¹ R Baldwin, 'Better Regulation: Tensions Aboard the Enterprise' in S Weatherill (ed) *Better Regulation* (Hart Publishing, Oxford 2007).

⁴² J Froud, R Boden and A Ogus, *Controlling the Regulators* (Macmillan, London 1998)

may be important and with potential for both costs and benefits, but in which rules are not made by state bodies.⁴³ It is perhaps most significant for my argument to note that better regulation regimes have been rather poorly applied to processes of implementation. In particular rather obvious issues concerning the costs and benefits of enforcing regulation in different ways are rarely subject to the scrutiny of better regulation, though separate processes for reviewing the efficiency and effectiveness of enforcement have been undertaken in some countries, for example the UK and Australia.⁴⁴

The ambition to set and evaluate performance of regulators against indicators moves us considerably beyond the territory of better regulation and much more into processes of implementation and impact of regimes on the ground. Performance evaluation is a key part of many government public management systems. In the UK, for example, reforms in the early 1990s which led to the separation of policy and operational tasks within government departments, with the latter assigned to 'next steps' or executive agencies, were accompanied by ambitions to adopt a new rigour in setting performance indicators as part of the mechanisms of control over public sector performance. An early review of the setting and oversight of performance indicators for the Department of Social Security agencies revealed an emphasis on process and quantitative efficiency in setting the indicators and a reluctance to tackle the more demanding quantitative effectiveness indicators.⁴⁵ Since that time the ambition to oversee and evaluate performance of public sector bodies generally and regulatory agencies in particular has remained high on the public management agenda.⁴⁶

Some better regulation units have examined aspects of how to better understand regulatory performance. Following an Inquiry into Victoria's Regulatory Framework in 2011, the Victorian Competition and Efficiency Commission concluded that there were a number of enhancements that could be made to the efficiency and effectiveness of regulation in the state. Their recommendations included the setting of clear regulatory objectives and the adoption of procedures across all regulators for monitoring and reporting on outcomes.⁴⁷ At the federal level Australian government has sought to benchmark regulatory performance as part of the policy of reducing regulatory burdens, in particular deriving from state and territory regulation, through national coordination. The studies published by the Productivity Commission as part of this process are substantially targeted at assessing efficiency of regulation rather than its outcomes and effectiveness. In its initial report the Productivity Commission distinguished regulatory design from administration and enforcement. Its proposed indicators on regulatory administration were chiefly focused on processes, such as frequency of reporting, provision for online contact and appeals.⁴⁸ Similarly with

⁴³ C Brown and C Scott, 'Reflexive Governance in Better Regulation: Evidence from Three Countries' (Reflexive Governance Programme, Louvain-la-Neuve 2009).

⁴⁴ Australian Law Reform Commission, 'Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation' (65 Australian Law Reform Commission, Sydney 2002) Macrory.

⁴⁵ N Carter and P Greer, 'Evaluating Agencies: Next Steps and Performance Indicators' (1993) 71 Public Administration 407-416.

⁴⁶ G Bevan and C Hood, 'What's Measured is What Matters: Targets and Gaming in Healthcare in England' (2006) 84 *Ibid.* 517-538

⁴⁷ Victorian Competition and Efficiency Commission, 'Annual Report 2011' (VCEC, Melbourne 2012):1

⁴⁸ Productivity Commission, 'Performance Benchmarking of Australian Business Regulation' (Productivity Commission, Canberra 2007): 126

enforcement the main focus was on such procedural matters as whether there was provision for enforcement and whether the relevant agencies published enforcement strategies.⁴⁹

Recognising clear interest amongst its member states for better understanding when regulators are doing a good job, the OECD has developed a programme to consider more fully how to evaluate regulatory performance in a way which examines outcomes and effects as well matters of process and efficiency. The OECD's own guidelines on regulatory policy recommend that member states measure the effects of regulatory policy against intended outcomes.⁵⁰ In their 2009 report, *Indicators of Regulatory Management Systems* the OECD's primary focus is on regulatory design with one chapter addressing measures to improve the quality of existing regulation and just two pages examining *ex post* regulatory review and evaluation with no direct focus on evaluating the performance of regulators.⁵¹ This provides some evidence of the difficulty of moving beyond the traditional better regulation policy concerns, focusing on rule making and regulatory design. The main impetus for offering a more challenging view of the potential for evaluating regulatory performance is found in three research papers by academics commissioned by the OECD.⁵²

In his OECD paper Cary Coglianese sets down an ambitious agenda for regulatory policy evaluation which requires robust indicators and a research design capable of supporting inferences as to the extent to which regulatory action caused changes in the identified performance indicators. He divides the types of relevant performance indicators into those relating to impact on the targeted problem, cost effectiveness (how much is spent for any level of impact) and the net benefits (a calculation of the positive outcomes less the costs attributable to negative impacts) indicating a preference for this last kind of indicator as best encompassing both the intent and the costs of regulation.⁵³ Two things stand out from Coglianese's propositions. First, measuring regulatory impact is extremely challenging. Second, and relatedly, efforts to assess performance by reference to process indicators such as timeliness of processing, availability of appeals etc, whilst they may be important for assessing legitimacy of regulatory actors, contribute little to performance evaluation in the sense that it is described by Coglianese.

The selection of performance indicators raises a number of challenges. As 'calculative practices' are increasingly recognized as tools of government, it is acknowledged that the very act of measuring may effect behaviour diverting attention of actors to the targeted numbers and away from other important aspects of their activities.⁵⁴ More generally the setting of targets creates risks that key actors will game the figures, prioritizing the demonstration of a satisfactory outcome over the delivery of the outcome.⁵⁵ The use of indicators to then evaluate the nature of outcomes and effects

⁴⁹ Ibid. (p. 127-8,

⁵⁰ OECD, *Recommendation of the Council on Regulatory Policy and Governance*: 1.6.

⁵¹ OECD, 'Indicators of Regulatory Management Systems' (OECD, Paris 2009).

⁵² Coglianese, D Parker and C Kirkpatrick, 'Measuring Regulatory Performance: The Economic Impact of Regulatory Policy: A Literature Review of Quantitative Evidence' (OECD, Paris 2012) C Radaelli and O Fritsch, 'Measuring Regulatory Performance: The Economic Impact of Regulatory Policy: A Literature Review of Quantitative Evidence' (OECD, Paris 2012).

⁵³ Coglianese: 7.

⁵⁴ P Miller, 'Governing by Numbers: Why Calculative Practices Matter' (2001) 68 *Social Research* 379-396.

⁵⁵ G Bevan and C Hood, 'What's Measured is What Matters: Targets and Gaming in Healthcare in England' (2006) 84 *Public Administration* 517-538.

deriving from regulation raises a range of methodological challenges. Coglianese highlights in particular the difficulties of separating desired outcomes from other outcomes by reference to the indicators and, more critically, working out what caused the relevant observed changes in behavior and relevant outcomes.⁵⁶ He describes the evaluation of regulatory performance in this way as a key aspect of evidence based policy, showing a preference for quantitative methods, where possible using randomized trials, as offer the best possibility of distinguishing the effects of regulation from other causes for observed outcomes.

Whilst better regulation policies have substantially neglected the evaluation of regulatory performance, the development of public sector audit has gradually evolved from its concerns with financial probity to address performance of public sector organisations.⁵⁷ Although the principal concerns of performance auditing in the public sector have been financial (the three Es of value for money – efficiency, effectiveness and economy), there has been some movement beyond financial performance to wider performance evaluation in some jurisdictions.⁵⁸ For Mike Power the ‘audit explosion’ has been one of the key characteristics of public sector management reforms.⁵⁹ The application of performance auditing methods to regulatory regimes has been most developed in the UK. ‘Regulatory audit’ was initially initially tied to better regulation and rule making in UK. The National Audit Office was asked to conduct performance audits in respect of a number of regimes.⁶⁰

Regulatory audit in the UK has become more generally concerned with enhancing the effectiveness of the regulatory state – using the substantially soft power of the public sector audit function. Regulatory audit processes have moved beyond assessment of RIA to addressing existing regulation and relations between regulators and regulated firms. The UK National Audit Office has been centrally involved with implementing the major review of regulatory burdens initiated in the Hampton report.⁶¹ This has involved cross sectoral programme to reduce regulatory burdens and included oversight by the NAO of processes engagement, risk analysis and evaluation.⁶²

One further form of scrutiny over regulatory performance has emerged through the development of forms of network governance both at national and international level. Network governance is a non-hierarchical mode for organizing and steering behaviour through such mechanisms as mutual surveillance, reporting, benchmarking and peer review.⁶³ Key examples include the OECD itself, which regularly reports on the performance of its member states in matters such as regulatory reform and regulatory performance, the development of European networks of regulators in areas such as energy, communications and competition, and thirdly the development of national networks

⁵⁶ Coglianese.

⁵⁷ J Lonsdale, P Wilkins and T Ling (eds), *Performance Auditing* (Edward Elgar, Cheltenham 2011)

⁵⁸ C Scott, 'Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit' (2003) 25 *Law and Policy* 203-219

⁵⁹ M Power, 'Evaluating the Audit Explosion' *Ibid.* 185-205

⁶⁰ E Humpherson, 'Auditing Regulatory Impact Assessment: UK Experience' in C Kirkpatrick and D Parker (eds), *Regulatory Impact Assessment: Towards Better Regulation* (Edward Elgar, Cheltenham 2007).

⁶¹ P Hampton, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (HM Treasury, London 2005)

⁶² E Humpherson, 'Auditing Regulatory Reform' in D Oliver, T Prosser and R Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, Oxford 2010)

⁶³ RAW Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press, Buckingham 1997) GF Thompson, *Between Markets and Hierarchies: The Logic and Limits of Network Forms of Organization* (Oxford University Press, Oxford 2003)

of regulators which, at least informally, compare performance of regulatory regimes across sectors.⁶⁴ The OECD has clear concerns to use its offices and largely soft networking authority to learn about, enhance and disseminate tools for regulating more effectively.⁶⁵

This discussion of the development of mechanisms for evaluating regulatory performance should not be limited to the initiatives of governmental and inter-governmental organisations. Private actors have played a key role in developing evaluative mechanisms. Key examples are provided by the various private tools for ranking the performance of regulators in league tables. In the European telecommunications sector an organization of new entrants to the market, the European Competitive Telecommunications Association (ECTA) produced over a number of years, 2004-2010, a 'Regulatory Scorecard' which compared European regulators on a number of key aspects of regulatory performance.⁶⁶ This evaluation combined evaluations of procedural matters with regulatory outcomes in terms of market liberalization across key market segments. This tool was developed to put pressure both on EU authorities and national governments to sustain and develop policies and implementing instruments which support access of new entrants to communications markets. A similar private league table has been produced to evaluate international performance of competition regulators by the private journal, *Global Competition Review*.⁶⁷

Whilst the ECTA and GCR rankings of regulators are developed entirely externally to the evaluated regimes, an equally significant development concerns the attempt to develop mechanisms for evaluating regulatory performance *within* private regulatory regimes. There are a number of market-led private regulatory regimes for which credibility with market actors is vital to their continuing success.⁶⁸ The *raison-d'être* for Fair Trade and Forest Stewardship regimes, for example, is that their activities make a difference in enhancing the income to small producers and enhancing the sustainability of forestry, respectively.⁶⁹ If their outcomes against these objectives were negligible confidence that their processes were good would not defend them from complete collapse since they are dependent on consumers and retailers choosing to buy products to which their labels have been attached.⁷⁰ The umbrella organization for these private labeling regimes, originally the International Social and Environmental Accreditation and Labelling Alliance, now just ISEAL Alliance, was established in 1999 to coordinate representations to government and to develop common

⁶⁴ J Corkin, 'Constitutionalism in 3D: Mapping and Legitimizing our Lawmaking Underworld' (2013) 19 European Law Journal 636-661B Eberlein and E Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' (2005) 12 Journal of European Public Policy 89-112D Levi-Faur, 'Regulatory Networks & Regulatory Agencification' (2011) 18 Journal of European Public Policy 810-829A Schäfer, 'A New Form of Governance: Comparing the Open Method of Coordination to Multilateral Surveillance by the IMF and the OECD' (2006) 13 Journal of European Public Policy 70-88.

⁶⁵ Radaelli, 'The Diffusion of Regulatory Impact Analysis - Best Practice or Lesson-Drawing'

⁶⁶ <http://www.ectaportal.com/en/REPORTS/Regulatory-Scorecards/Regulatory-Scorecard-Overview/> (last visited 2nd August 2013).

⁶⁷ <http://globalcompetitionreview.com/surveys/article/33562/australias-competition-consumer-commission/> (visited 2nd August 2013).

⁶⁸ B Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority' (2002) 15 Governance 503-529.

⁶⁹ B Cashore, G Auld and D Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (Yale University Press, New Haven, CT 2004)PL Taylor, 'In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change' (2005) 33 World Development 129-147.

⁷⁰ Kysar, .

sustainability standards for a group of private regulators which today includes a wide range of label-based regulatory regimes.⁷¹ Amongst its core activities, ISEAL has turned its attention to the development of macro-standards for its members which are concerned to differentiate its members from others and to promote their credibility.⁷² Of central interest is the work ISEAL has undertaken on credibility standards in respect of impacts of regulation. The ISEAL Impacts Code, adopted in 2011 requires the establishment of monitoring and evaluation programmes, defining of the intended change, establishment of appropriate indicators, data collection and evaluation, evaluation reports and learning and improvement. Thus it is reflexive in character, drawing on the learning capacity not only of the particular private regulatory regimes, but also on the experiences of other ISEAL members.⁷³ The combination of detailed requirements around performance, together with both external evaluation and oversight by ISEAL makes the Impacts Code considerably more advanced than any equivalent regime of substantive performance evaluation for public regulators. What is particularly intriguing is that the push for this private regime of performance evaluation provides evidence for the suggestion that effective meta-regulation may be driven by a combination of market and community pressures rather than from government and hierarchy.⁷⁴

6. Regulation and Post-Representative Democracy

Contemporary regulatory practices, combining public and private action, operating at national, transnational and international levels, continues to raise acute problems both of democratic legitimacy and of performance. In the wake of the financial crisis the question how can we know whether regulators are being effective remains one of central importance. The concerns with democracy and performance are sometimes presented as being mutually exclusive and the history of delegation to independent regulators reflects concern to loosen democratic control in order to promote technical capacity, insulated to a degree from political concerns.

Evidence of performance is increasingly important but raises significant challenges. How can we achieve greater transparency in performance and tie that transparency to capacity to use the knowledge for a substantive form of accountability but perhaps also participation? As I come to theorise the multiple mechanisms for overseeing regulatory performance in this section of the article I argue that democratic and technical concerns about regulation can be located within democratic theory in such a way that they are mutually reinforcing rather than inconsistent. A starting point is to note that the plausibility of representative democracy models is already called into question, since many citizens feel alienated from regimes in which first, executive power is more central than the power of directly elected legislative institutions, and second national governmental autonomy is comprised by both inter-governmental and private decision making and action on key issues. Traditional accountability narratives, emphasising parliamentary accountability, judicial review and financial probity struggle to address the challenges of public, private and

⁷¹ <http://www.isealalliance.org/our-members/full-members> (visited 2nd August 2013). A Loconto and E Fouilleux, 'Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance' (forthcoming) Regulation & Governance: 7.

⁷² Ibid., : 7.

⁷³ Ibid., : 8.

⁷⁴ C Scott, 'Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect?' in N Boeger, R Murray and C Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar, Cheltenham 2008).

supranational regulation.⁷⁵ This concern not require us to abandon ideals around representative democracy, but rather to suggest that the model is incomplete because of the distance between key nodes of power such as regulatory agencies, intergovernmental organisations and major firms, on the one hand, and elected institutions on the other. Put another way this approach does not discard traditional concerns of accountability and democracy, and in particular a focus on inputs and throughputs, but supplements then with a focus on outputs and outcomes. Observations of this kind lie behind the work of John Keane in seeking to elaborate a theory that better embraces the diffuse governance practice to which we are subject.⁷⁶

In particular Keane notes that there has been a significant level of institutional response to a challenge he characterizes as one of 'post-representative democracy'. As Keane himself notes, the innovations date back a considerable period. He observes the very wide range of structures which have emerged for soliciting and making transparent information about governance activities (both public and private), and processes for inclusion and participation. Examples include advisory bodies, town hall meetings, think tanks, advocacy services, networks, democratic audit, official enquiries, integrity commissions, reports and score cards, blogging, twitter and other social media, judicial activism, workplace tribunals, public interest litigation and international forums and summits.⁷⁷ I would add the development of value for money audit, public and private sector ombudsman schemes, and international bodies which have become increasingly inclusive of civil society and business organisations such as the International Labour Organisation.⁷⁸ I include regulatory agencies as key mechanisms in this list also. Regulatory agencies create sources of knowledge and authority that is partially independent of elected government and have capacity to challenge and hold elected governments to account in key areas of decision making sometimes through serial powers (in which either can veto) or sometimes parallel powers (in which either can act without the other).⁷⁹

Taken together these developments underpin what Keane refers to as 'monitory democracy' comprising a wide variety of new 'power monitoring inventions'.⁸⁰

*'Monitoring institutions play various roles. They are committed to providing publics with extra viewpoints and better information about the operations and performance of various governmental and non-governmental bodies... Monitory mechanisms are geared as well to the definition, scrutiny and enforcement of public standards and ethical rules for preventing corruption, or the improper behaviour of those responsible for making decisions, not only in the field of elected government, but in a wide variety of non-governmental settings. The new institutions of monitory democracy are further defined by their overall commitment to strengthening the diversity and influence of their citizens' voices and choices in decisions that affect their lives – regardless of the outcomes of elections.'*⁸¹ (my emphasis).

Keane ties these mechanisms of oversight and participation into democratic theory, arguing that the significance of democracy is to prevent rule by the few to ensure that 'the matter of who gets what,

⁷⁵ Corkin, : 657-8.

⁷⁶ J Keane, *The Life and Death of Democracy* (Simon & Schuster, London 2009).

⁷⁷ Ibid.: 692; Corkin, : 655.

⁷⁸ Abbott and Snidal.

⁷⁹ C Scott, 'Independent Regulators as Accountability Mechanisms' in M Bovens, RE Goodin and T Schillemans (eds), *Oxford Handbook of Public Accountability* (Oxford University Press, Oxford 2014).

⁸⁰ Keane: 691.

⁸¹ Ibid.: 693.

when and how should be permanently an open question'.⁸² This reminds us that nearly all regulatory decision making has political consequences in this sense – affecting interests.

7. Conclusion

In this article I have raised significant technical and theoretical challenges for the development of performance accountability over regulation. The technical challenges include finding ways to set performance indicators for regulatory bodies and to better understand how the actions of regulators affect outcomes, not just for financial regulation but more generally, and not just for public regulators but also for private bodies. There is some evidence that private regulators driven by market concerns may have stronger capacity to resolve some of these issues.

A broader question concerns who may have the interest and capacity to use information about regulator performance to monitor and hold to account. Again the track record of governments has not been especially strong, but perhaps governmental activity when accompanied by the activities of others, including inter-governmental bodies, regulatees, investors and NGOs, might constitute a stronger overall regime of monitoring over regulatory activity.

The dispersed model of monitory democracy, discussed in the last section of the article, has the virtue of matching the fragmented models found in contemporary regulatory governance. It offers the potential for oversight which is at least as diverse as the regulatory practices being scrutinized with the potential to conceive of oversight matching the activities being overseen in range and scope. But if we can make a virtue of this diffused monitoring democracy then this raises the question how much is enough? How much of these forms of scrutiny is required to be able to credibly defend a regime overall as giving rise to appropriate accountability for performance and at what point do the costs of diffused accountability become too great to be justified? A different but equally significant challenge is to how ask how regimes of scrutiny can be developed so as to feedback learning into the activities being overseen so that they go beyond accountability to promote development along appropriate lines shaped by the participation of the scrutiny actors.

I do not underestimate the technical and theoretical challenges of casting accountability for regulatory performance as comprising the aggregate activities of diverse actors deploying diverse methods. A starting point is to seek to understand particular regimes in these terms with the potential for interventions by public or private actors to address weaknesses which are addressed, both in terms of targeting and understanding performance and the effects of regulation on outcomes and the broader range of constitutional questions about participation and learning.⁸³

⁸² Ibid.: ***

⁸³ Corkin, .

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