Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance

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Abstract

The centrality of regulation among the tools deployed by governments is well established in the social science literature. Regulation of public sector bodies by non-state organisations is an important but neglected aspect of contemporary governance arrangements. Some private regulators derive both authority and power from a legal mandate for their activities. Statutory powers are exercised by private regulators where they are delegated or contracted out. Contractual powers take collective (for example self-regulatory) and individuated forms. But a further important group of private regulators, operating both nationally and internationally, lack a legal mandate and yet have the capacity to exercise considerable power in constraining governments and public agencies. In a number of cases private regulators operate more complete regulatory regimes (in the sense of controlling standard setting, monitoring and enforcement elements) than is true of public regulators. While private regulators may enhance the scrutiny given to public bodies (and thus enhance regimes of control and accountability) their existence suggests a need to identify the conditions under which such private power is legitimately held and used. One such condition is the existence of appropriate mechanisms for controlling or checking power. Such controls may take the classic form of public oversight, but may equally be identified in the checks exercised by participation in communities or markets.

Introduction

Regulation has become the modality of choice for state activity in recent years, prompting claims that we live in the age of the 'regulatory state.'[1] These claims are based largely on the observation of the centrality of government regulation of business to modern governance arrangements and the displacement of governance modes associated

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I am grateful to participants at the joint Annual Law and Society Association and Committee for Research on the Sociology of Law annual meeting, Budapest, July 2001 and to Peter Cane, Sacha Courville , Christopher Hood, Peter Grabosky, Robert Kaye, Martin Lodge, Janet McLean, and Imelda Maher for comments on an earlier draft.

[1] J. Braithwaite "The New Regulatory State and the Transformation of Criminology" (2000) 40 *Brit J Crim* 222.and references cited therein.

with the welfare state such as public ownership, direct provision and integrated bureaucracies for policy making and operational tasks. More recently the growth industry in the regulation of public sector bodies by other parts of government has been identified, mapped and analysed. [2] This article provides an analytical framework for understanding a further, related trend, towards systematic oversight of government (akin to regulation) carried out by *private* (that is, non-state or non-governmental) actors. The role of private organisations – and in particular firms and NGOs – in modern governance has long been recognised, in particular in the public policy literature on networks.[3] However this literature has largely focused on policy making rather than implementation.[4] The literature on regulatory enforcement has analysed the interdependence of the private and public sectors in the implementation process.[5] However, systematic oversight by the private sector of public sector policy implementation has been substantially neglected both by public policy analysts and regulatory scholars and represents a significant lacuna in the literature.[6]

Private regulation of the public sector is far from new. A variety of private families and companies have exercised controls over particular states at various times since the inception of the nation state.[7] More recently both firms and interest groups have exercised something akin to systematic oversight in respect of state activities ranging from the

[2] C. Hood, *et al Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters*. (Oxford, Oxford University Press, 1999).
[3] D. Marsh and R.A.W. Rhodes, *Policy Networks in British Politics* (Oxford, Oxford University Press, 1992).
[4] An exception is provided by P. Grabosky, "Using Non-Governmental Resources to Foster Regulatory Compliance" (1995) 8 *Governance* 527.
[5] For example B. Hutter *Compliance* (Oxford, Oxford University Press, 1997); P. Grabosky and J. Braithwaite *Of Manners Gentle* (Oxford, Oxford University Press,1986); J. Freeman, "The private role in public governance." (2000) 75 *New York University Law Review* 543.; C.Hall, *et al Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (London, Routledge, 2000).
[6] For example there is no discussion of private regulation over government in H. Aquina and H. Bekke, "Governance in Interaction: Public Tasks and Private Organisations." in J. Kooiman (ed) *Modern Governance: New Government-Society Interactions* (London, Sage, 1992). or in other essays in that influential collection. Private regulation over government is also neglected in K. Ronit and V. Schneider. "Global Governance Through Private Organisations." (1999) 12 *Governance* 243. The potential for private oversight of government illegality is discussed by P.Grabosky, "Concluding Observations on Public Sector Illegality and Its Control." in P. Grabosky (ed)*Government Illegality* (Canberra, Australian Institute of Criminology, 1987).
[7] J. Braithwaite and P. Drahos., *Global Business Regulation* (Oxford, Oxford University Press, 2000) 27.

operation of economic policy through to policing.[8] In common with public regulation some of this private oversight is exercised over both public and private sector (by 'mixed economy' regulators - for example advertising and animal welfare), and some applies to the public sector alone (for example contracted-out public sector audit). Not all private oversight is intended to form a regulatory regime, but where it has regulatory effects it properly belongs within the set. An example of a regime which has the effect but not the object of regulating is the activities of credit rating agencies in assessing the appropriate rating for sovereign credit. Private regulators, though they may be lacking in formal power, are more likely than public regulators to operate 'complete' regimes (in the sense that they may set standards, monitor for compliance and carry out enforcement without the need for intervention from others such as government departments and courts). Put simply there is a tendency for some private regulators to be able to act more autonomously than would be true of public regulators.

This article sets out the case for the identification of a set of private regulators of the public sector and offers a means for classifying them based on the concept of legal mandates. Thus it offers an analysis and description of the range of forms which such private regulation takes in the United Kingdom. The concluding section examines the implications of the analysis both for the way we understand governance and regulation and for normative theories concerned with the control and accountability of governance institutions.

2. The Public and the Private

The key distinction underlying the analysis in this paper is that between the public and private sectors. This paper makes this distinction on a simple ownership basis (in common with much analysis in political science). Legal scholarship and judicial analyses have recently shifted towards a functional analysis as the test for what is public and private. Although legal analyses show a tendency towards using such a functional

[8] S. Schwarcz "Private Ordering of Public Markets: The Rating Agency Paradox." (2002) *University of Illinois Law Review* (forthcoming). P. Grabosky, "Law Enforcement and the Citizen: Non-Governmental Participants in Crime Prevention and Control" (1992) 2 *Policing and Society* 249.

distinction[9] the very invisibility of many of the private regulators of the public sector suggests that the logic of the functional approach is not fully applied. In particular, it appears to be reserved for questions about amenability to judicial review and not to wider questions of institutional design within which private actors fulfil significant public roles. Examination of statutory enactments under which the trigger for application is the 'publicness' of an organisation reveals no clear approach. Thus the functional approach is reflected in the provisions of the Human Rights Act 1998, which are to apply to acts of 'public authorities', defined as 'any person certain of whose functions are functions of a public nature'.[10] Conversely the Freedom of Information Act 2000, which applies openness rules to public bodies, operates by means of an exhaustive list of organisations to which the Act applies and generally uses an ownership approach.[11] If the functional analysis were followed through, we might expect private regulators exercising public functions to be treated as public for all purposes (rather than the more limited purposes of judicial review and human rights).

Private regulation of the public sector is distinctive in a number of ways. First, in contrast with private sector participation in policy making, there is a tendency towards the exercise of private regulatory functions within discrete, free-standing regulatory organisations. Second, and in contrast with public regulatory activity, the capacity to exercise regulatory power is not necessarily linked to the holding of a legal mandate. A further contrast with public regulatory activity is that there is a tendency for private regulators to take responsibility for all three elements of a regulatory regime: standard-setting, monitoring and application of sanctions, where it is more common (at least in European regulatory regimes) to find standard setting reserved to government

[9] J. Freeman, "The private role in public governance." (2000) 75 *New York University Law Review* 75:543.
[10] Human Rights Act 1998 s6(3)(b). It is clear that the Human Rights Act has indirect horizontal effects on private actors in any case through the duty of the courts to apply convention rights. This is said to give the courts at least a discretion, if not a duty, to apply interpret private law and private law relations consistently with the convention: G. Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999) 62 *Modern Law Review* 824, 843.
[11] Freedom of Information Act 2000, sched 1. The functional approach is reflected in the inclusion of persons providing medical and dental services under the National Health Service Act 1977 and equivalent Northern Ireland measures (paras 44, 45, 51) and of educational institutions receiving funding under s 65 of the Higher Education Act 1992 and equivalent Northern Ireland measures (paras 53, 55).

departments and application of sanctions to courts.[12] This feature is important because it tends to reduce the capacity for other organisations to check the power of private regulators through the existence of interdependent powers.[13] We might expect the courts to respond to such concentration of power within private regulatory regimes with more stringent scrutiny under judicial review. In fact the tendency has been in the opposite direction, with the Administrative Court (as it is now called) indicating that because contract-based private regulatory regimes are themselves the source of their own powers (rather than a legislature) then the application of the doctrine of *ultra vires* will be less strictly applied than it is to public authorities.[14]

Private oversight of the public sector has in common with public regulation a tendency towards internationalisation and globalisation.[15] Private overseers of national governments include among their ranks international NGOs such as Amnesty International, Transparency International and Greenpeace International. Transparency International also seeks to curb corruption in international organisations. These international overseers raise rather different issues from those operating purely nationally, since they are less likely be socially or economically embedded within society and the quality of their relations with democratic governments are likely to be different from that between governments and national groups.

[12] There has been a trend towards giving public regulators fuller powers in recent UK legislation. Thus the Financial Services Authority has been empowered both to make rules and apply administrative penalties Financial Services and Markets Act 2000 s138 (general rule making powers); s123 (penalties for market abuse); and the Office of Fair Trading has been empowered for the first time to issue administrative penalties without recourse to the courts : Competition Act 1998 s36 (power to impose penalties for breach of chapter 1 and chapter 2 prohibitions): I. Maher 'Juridification, Codification and Sanctions in UK Competition Law' (2000) 63 *Modern Law Review* 544, 558.

[13] C. Scott "Analysing Regulatory Space: Fragmented Resources and Institutional Design" [2001] *Public Law* 329.

[14] *R* v *Panel on Takeovers and Mergers ex p Guinness* [1990] 1 QB 146, 149; C. Scott 'Juridification of Regulatory Relations in the UK Utilities Sectors in J. Black, P. Muchlinski and P. Walker (eds) *Commercial Regulation and Judicial Review* (Oxford, Hart Publishing, 1998) 39-41.

[15] A full account is provided by Braithwaite and Drahos *op cit* n7, 41.

3. Oversight

Earlier research on public oversight of the public sectors has defined 'regulation inside government' as systematic arms-length control of one public sector organisation by another with some element of official mandate.[16] To have an effective regulatory regime there must be a standard setting element and monitoring and enforcement. These three elements need not be located in a single organisation and are not necessarily all located privately. Thus a regime may consist of publicly set standards monitored and enforced by private overseers. Private oversight of the public sector is different from this in at least two ways. First the external regulator is not a public sector organisation and, second, there may not be an legal mandate. Where there is an legal mandate an organisation which is privately owned may be classified as public for juridical purposes (on the basis of a functional analysis).[17]

It has been suggested that the bases of control for public regulation of the public sector extend beyond hierarchical oversight to include competition, mutuality and contrived randomness.[18] One explanation for the mixture of forms of control was that public regulators of the public sector tend to be deficient in formal powers, particularly in respect of rule-making and the application of sanctions. A regulator with no formal power to apply sanctions can nevertheless invoke competitive pressures and community disapproval, for example by publishing information, and can manipulate uncertainty, for example by carrying out random inspection. The weakness of formal authority is perhaps more common for private regulators of the public sector who many of whom lack any legtal mandate for their work. In some instances pure competition between private and public sector emerges.[19] What we are likely to find is a wide range of mixes of control

[16] Hood *et al op cit* n2.
[17] *R.* v *Panel on Take-overs and Mergers Ex p. Datafin Plc* [1987] Q.B. 815 [1987] 2 W.L.R. 699 [1987] 1 All E.R. 564 (exercise of public functions by a private body rendered it amenable to judicial review) ; *Foster* v *British Gas Plc* [1991] 2 A.C. 306 [1991] 2 W.L.R. 1075 [1991] 2 All E.R. 705 (special and exclusive rights may render a privatised utility public for purposes of public procurement rules).
[18] Hood *et al op cit* n2.
[19] It has been argued that the success of organized crime in some parts of Japanese society arises from the capacity of criminals to deliver institutions of property rights enforcement and protection services which

forms with greater capacity for hierarchical control among those regulators with formal authority, derived either from statute or contract, as discussed below.

4. Authority and Mandates

It is immediately apparent that private overseers are not all of one type. They are all privately owned. They all exercise some form of systematic arms-length oversight over some part of the public sector. The chief purpose of seeking to classify the army of private regulators is to define the whole set so as to prove a reasonably exhaustive analysis of the issues raised by the different forms which private regulation takes. The central dimension in which there is variety is in the nature of the mandate (Table 1). The concept of mandate is concerned with the source and nature of the authority to act. It has at least two dimensions: powers and duties. Public regulators typically have powers and duties derived from statute (though many public regulators of the public sector have strictly limited powers). Private overseers are more likely to have a permissive mandate (the power but not the duty to act). It is sometimes suggested that contractual mandates originate in voluntary agreement whereas statutory mandates establish relationships coercively. This may be correct up to a point, though we should note that many regulatory regimes originating in contract are effectively imposed participants in the regime. Private governance may be as coercive as its public counterpart.[20]

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the state fails to provide effectively: C. Milhaupt and M. West. "The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime." (2000) 67 *University of Chicago Law Review* 67:41. An appropriate response in these circumstances is for the state to improve the quality of the civil and criminal justice systems and attempt to control the problem of organized crime through competition rather than the exercise of hierarchical authority. In a different context the Protection and Indemnity Clubs which provide mutually based marine insurance are said to be in competition with EC competition authorities over the environmental regulation of shipping firms which is based on principles of mutuality antithetical to EC competition law rules:P. Bennett, Paul, (2000) 76 "Anti-Trust? European Competition Law and Mutual Environmental Insurance." *Economic Geography* 50.

[20] N. Duxbury 'Robert Hale and the Economy of Legal Force' (1990) 53 *Modern Law Review* 421, 434-437.

Table 1: Classification of Private Regulators

Mandate	**Modality**	**Key Examples**
Statutory	Quasi-Public Monitoring and/or Enforcement Coercive	(i) Contracted-Out Public Audit (ii) Private enforcement of criminal laws (eg RSPCA) (iii) Enforcement of civil laws with statutory mandate (eg Consumers' Association)
Contractual	(i) Collective (ii) Individuated Voluntary	(i) Advertising self regulation (ii) Service providers (eg insurance, certification of compliance with standards) (iii) Major service takers
None	(i) Litigation (eg civil proceedings, judicial review) (ii) Dissemination of Information (iii) Deployment of organisational capacities – eg direct action, boycotts, etc	(i) Financial Institutions (eg Credit ratings agencies) (ii) Interest groups (eg prison reform groups, Federation Against Software Theft) (iii) Investigative journalism

Some private overseers, like their public counterparts, have a clear and official mandate based in statute. A typical case occurs within systems where a public regulatory function is delegated or contracted out to a private organisation. Examples of the delegated regulatory power include controls over the care of animals, delegated to the Royal Society for the Protection of Animals (which operates in the manner of a specialised police service over public and private sectors – its functions include monitoring the welfare of police dogs[21]), self-regulation of medical practitioners employed by the

[21] Protection of Animals Act 1911; See H. Carter 'Cruel Police Dog Officers Jailed for Four Months' *The Guardian* 11 June 1998; A Gilligan 'RAF Under Fire for "Breaking" Dog Welfare Law' *Daily Telegraph* 21 June 1998. In the first of these incidents the RSPCA initially used a resource-based sanction – suspension of the supply of dogs to police forces pending an investigation (*The Times* 4 December 1997) - and then followed up with the exercise of its statutory power to prosecute.

National Health Service under a statutory regime, [22] and enforcement of consumer laws which derive from EC directives by the Consumers' Association.[23] Examples of contracting-out of public regulatory power over the public sector are found in the regimes of local authority audit assigned to the Audit Commission, [24] and schools inspection organised by the Office for Standards in Education (OFSTED).[25] On one measure this class of overseer is private, in the sense that the state has no element of ownership. But a functional analysis of the type used in public law litigation might suggest that these organizations are exercising public functions and should be subject to the full range of control applying to public bodies, not limited to judicial review but also including full parliamentary oversight.

Another class of private regulators is those who lack any form of statutory mandate but nevertheless have formalised powers of control derived from contracts (which may thus be characterised as voluntary in origin). There is a substantial literature on the role of contracts in state regulation of the private sector. [26] Such contracts are said to pose significant problems of transparency, accountability and efficiency.[27] The exercise of regulatory control *over* the public sector by contracts is an even more hidden phenomenon. This group of contractual relationships can be sub-divided between collective and individuated relationships. Key examples of the collective form are self-regulatory schemes which may govern public and private bodies in some aspect of their

[22] The main body which monitors and enforces standards for clinical conduct of the medical profession is the General Medical Council: Medical Act 1983.
[23] Unfair Terms in Consumer Contracts Regulations SI No 2083/1999 r11 and sched 1; The Stop Now Orders (EC Directive) Regulations SI no 1422/2001.
[24] Audit Commission Act 1998, s3; About thirty per cent of local audits are carried out by private auditors drawn from a panel of six major accounting firms: Audit Commission *How Your External Auditors are Appointed and How You Can Influence the Choice* (London, Audit Commission, nd).
[25] Education (Schools) Act 1992 ss3. 9, 10. A comparison between inspections carried out by local education authority (LEA) inspectors working in their own authority, LEA inspectors inspecting schools in a different authority and private teams of inspectors revealed that private inspectors failed a significantly larger proportion of the schools which they inspected. Whether this is because OFSTED allocated to private inspectors the more problematic cases or because private inspectors applied higher standards is not clear. But either way it suggests that private inspectors play a distinctive role in the regime: Hood *et al op cit* n2 150-151.
[26] For the UK See H. Collins *Regulating Contracts* (Oxford, Oxford University Press 1999) chapter 13; P. Vincent-Jones "The Regulation of Contractualisation in Quasi-Markets for Public Services" [1999] *Public Law* 304.
[27] J. Freeman "The Contracting State." (2000) 28 *Florida State University Law Review* 155.

operations. The Advertising Standards Authority, notionally a self-regulatory organisation, has a jurisdiction which appears to extend beyond those who are members of the Advertising Association, and thus its mandate cannot truly derive from contract.[28] Its decisions are given force by the fact of their recognition be media organisations generally and their capacity to withhold space in their publications from particular advertisers. In New Zealand the Court of Appeal has excluded one public authority, the Electoral Commission, from the jurisdiction of the private Advertising Standards Complaints Board on the basis both of a narrow construction of the Board's own codes (as excluding public advertisements not intended 'to promote the interests of any person, product or service') and on the broader ground that the scheme of the relevant Electoral Act gave rise to a presumption that Parliament had decided that it was for the statutory organisation and not some private body to determine how the Commission should carry out its functions in providing publicity on elections. [29] This latter basis for the decision could have very wide application in restricting private regulation over public bodies exercising statutory functions and appears to contradict the finding that the Advertising Standards Complaints Board was judicially reviewable precisely because it was exercising a public function. In some jurisdictions the development of self-regulation has outpaced privatisation leaving publicly owned utilities suppliers to be regulated by private self-regulatory organisations. An example is provided by the dominant incumbent Australian telecommunications operator, Telstra, which remains publicly owned but which is overseen by, *inter alia*, the self-regulatory Telecommunications Industry Ombudsman.[30]

An example of the individuated contractual controls is that of organisations providing various forms of professional services to public sector bodies. These service providers are exemplified by, though not limited to, insurance companies and certification bodies. Private accreditation and certification arguably plays a larger role in US public policy

[28] C. Munro 'Self Regulation in the Media' [1997] *Public Law* 6. A considerable amount of information about the self-regulatory regime is provided by the ASA at www.asa.org.uk (visited 17 October 2001).
[29] *Electoral Commission* v *Cameron* [1997] 2 NZLR 421.
[30] K. MacNeill 'Self-Regulation: Rights and Remedies – The Telecommunications Experience' in C. Finn (ed) *Sunrise or Sunset: Administrative Law in the New Milennium* (Canberra, Australian Institute of Administrative Law, 2000).

than in the UK, though this is most commonly in the accreditation of private companies offering public services such as health care and education.Thus accreditation supports public regulation of the private sector rather than acting as private regulation of the public sector.[31]

Insurers have the capacity to set standards for the conduct of public sector bodies in respect of risk through contractual terms and monitor and enforce compliance via decisions on payment and premium levels. While a certain amount is known about how insurers manage their relations with private clients, and the control systems which are created, [32] there is very little evidence available as to how widely public bodies take out insurance policies (as opposed to self-insuring) and even less relating to the extent to which insurers use their contractual power to 'regulate' the conduct of public bodies. However, we may hypothesise that changes in the way private insurers 'control' their clients are also affecting the public sector. Recent research suggests a tendency among insurers following neo-liberal logic to create greater segmentation of risk, attempting to target high risk clients more accurately so as to charge higher premiums or refuse insurance, while benefiting lower risk clients who no longer have to share the coverage of the high risk groups.[33] This trend is already undermining certain public policies, such as compulsory third party motor insurance (increasingly difficult for high risk individuals to obtain) and private health care (where government policies in support of private health insurance, for example in Australia and the United States, have been premised upon a substantial cross-subsidy between healthy and unhealthy insureds). The effects of this trend on insurers' control over the public sector may be positive, encouraging public sector organisations to so manage their activities as to be within lower risk groups. But equally it creates the possibility of an acceleration of the trend among higher risk

[31] *Private Accrediation in the Regulatory State* special issue (1994) 57 (4) *Law and Contemporary Problems* .See especially C. Havighurst "The Place of Private Accrediting Among the Instruments of Government'' (1994) 57 *Law and Contemporary Problems* 1, 5-10.
[32] The classic socio-legal study is C. Heimer, *Reactive Risk and Rational Action: Managing Moral Hazard in Insurance Contracts* (Berkley, University of California Press, 1985). See also N. Reichman 'Managing Crime Risks: Towards and Insurance Based Model of Social Control' in S. Spitzer and A. Scull (eds) *Research in Law, Deviance and Social Control* (Greenwich, CT, JAI Press, 1986).
[33] R.Ericson, D. Barry, and A. Doyle, "The Moral Hazards of Neoliberalism: Lessons from the Private Insurance Industry." (2000) 29 *Economy and Society* 532.

organisations to self-insure, denying the public sector as a whole the virtuous effects of oversight by insurers of risks in those sectors. Alternatively public sector organisations may be encouraged to withdraw from certain high risk activities (even though public sector participation may provide social or economic benefits which markets would not provide).

Certification of public sector bodies' compliance with standards such as ISO 9000 (quality management) and ISO 14000 (environmental management) gives third party certification organisations considerable power to steer the management of those bodies by reference to standards set by private standards organisations such as the national British Standards Institute and the International Standards Organisation. As with insurance, these relationships and their management are not much documented. A further form of individuated contractual power arises where private organisations take services from public sector providers in sufficient quantity that the contract for services effectively becomes an instrument of regulation.[34]

The third class of private overseer is the organisation which has no legally binding mandate derived from statute or contract. Though there is no legal mandate, conventionally understood this group may nevertheless have power to seek behavioural modifications from public sector bodies. This power is neither voluntary nor coercive. The main resources relevant to the holding of governance power generally are authority, information, organisation and wealth.[35] For those who lack formal authority, power is derived from having the wealth to bring public interest litigation, either in public or private law, the possession of information and the resources to disseminate it, and the

[34] H. Collins *Regulating Contracts* (Oxford, Oxford University Press, 1999) discusses the reverse issue, of government using contract as a regulatory instrument over the private sector – 311-315. An instance of the phenomenon I am discussing might theoretically arise in one of the sectors where public bodies remain important suppliers of services as with the postal sector and possibly the reconstituted rail infrastructure company which will emerge from the collapse of Railtrack plc.

[35] C.Hood *The Tools of Government* (London, Macmillan, 1983) 4-6 refers to these four basic resources of government as 'nodality' ('the property of being in the middle of an information or social network'),'treasure', 'authority' and 'organisation'. I have not only adapted his terms but also suggest that they are the resources of governance more generally (that is applying beyond governmental actors).

capacity to deploy organisational resources, for example in the form of direct action (such as boycotts and physical blockades).

Public interest litigation and the threat of litigation are widely deployed by pressure groups as a means to enforce or develop standards on public sector bodies. Examples of such judicial rule making abound in connection with prisons, social security and housing.[36] The capacity of pressure groups to use litigation as *part* of their overall strategies, for example to raise prison standards, is dependent upon judicial interpretation of rules relating to standing to sue and rights of intervention in actions commenced by others. With prison rules pressure groups are able to cite standards of humanity which command widespread support (though they may vary in interpretation). In other domains, such as social security, where there is less consensus over appropriate standards, litigation is more problematic since victory at law can be reversed by legislation. Accordingly Prosser concluded that in the social security domain a valuable role for the courts was for setting process standards for decision making. In other instances though a legal action might be unsuccessful it could be a prelude to political campaigning.[37]

We may speculate that the modest liberalisation of these rules engineered by the Administrative Court will give to pressure groups greater capacity to use litigation in support of their overall objectives. Loosening of the rules on standing appears to displace restrictive rules under which only those affected by administrative decisions could apply for judicial review and creates a greater possibility that the Administrative Court be used for a 'generic enforcement function'.[38] There has also been a greater willingness of the courts to permit interest groups to intervene as third parties to actions. In light of these

[36] For prisons see M. Loughlin and P. Quinn 'Prisons, Rules and Courts: A Study in Administrative Law' (1993) 56 *Modern Law Review* 497. A major US study is M. Feeley and E. Rubin *Judicial Policy Making and the Modern State* (Cambridge, Cambridge University Press, 1998) (especially on the role of the Public Interest Law Firm in opening to scrutiny the standards of the Santa Clara jail system in California at 111-128). The seminal study of litigation over social security rights is T. Prosser *Test Cases for the Poor* (London, CPAG, 1983). On housing see I. Loveland *Housing Homeless Persons: Administrative Law and the Administrative Process* (Oxford, Oxford University Press 1995), chapter 10.
[37] Prosser *op cit* n36, 83-84.
[38] C. Harlow, "Public Law and Popular Justice" (2002) 65 *Modern Law Review* 1-**. The seminal case is probably *R* v *Secretary of State for Foreign Affairs ex p World Development Movement* [1995] 1 WLR 386, in which a pressure group successfully challenged the grant of funds by the government for the construction of the Pergau Dam in Malaysia.

developments we might expect judicial review to be used more widely in support of interest groups' objectives in controlling public sector actors. It has been argued that if English law is to develop a principle of 'citizen standing' then its application should be reserved to cases involving 'the most important of the public's interests'.[39]

An example of information-based regulation is the systematic oversight of the finances of public and private organisations by credit ratings agencies. Here the main instrument of control is the publication of information. This process has been most important, in the terms of this article, in the development by the four main international ratings agencies of ratings for 'sovereign credit'. Factors affecting the assessment are liable to include the stability of government arrangements and the independence of the judiciary, in addition to perceptions of the prudence or otherwise of fiscal policies. Agencies aim to provide a gradation between highly speculative to extremely safe credit.[40] Ratings agencies derive their power from trust in the information which they produce. They have been characterised as 'global mediating organizations'.[41] The Southeast Asian economic crisis of 1997 has been partly attributed to excessive trust in those ratings agencies which were too sanguine about the economic stability of nations such as Thailand.[42]

Where the media maintains effective systematic oversight (as with some investigative journalism – for example systematic scrutiny of local corruption by local journalists) then it may come within this third class of mandateless regulators. Certainly the media exerts considerable information power in contemporary society.[43] However the capacity of newspapers to carry out such systematic investigation is limited. The kind of long term research required of investigative journalism is both very costly and somewhat at odds

[39] P. Cane 'Standing Representation and the Environment' in I.Loveland (ed) *A Special Relationship? American Influences on Law in the United Kingdom* (Oxford, Oxford University Press, 1995), 150.
[40] A.Rhodes, "The Role of the SEC in the Regulation of the Ratings Agencies: Well-Placed Reliance of Free-Market Interference" (1996) 20 *Seton Hall Legislative Journal* 293.
[41] J.Pixley, "Impersonal Trust in Global Mediating Organizations." (1999) 41 *Sociological Perspectives* 647.
[42] L.Jacque, "The Asian Financial Crisis: Lessons from Thailand." (1999) 23 *Fletcher Forum of World Affairs* 87.
[43] J. Curran and J. Seaton *Power Without Responsibility: The Press and Broadcasting in Britain* (London, Routledge, 1997, 5th ed).

with the general day-to-day cycle of media activity.[44] A contemporaraneous account of the Watergate Affair suggests that only a handful of newspapers would have had the resources to carry out the investigation necessary to make a significant impact on the story and, of those, only one, the Washington Post, chose to devote only the time of two relatively junior journalists to the task.[45] A further reason that news and other media editors might not pursue investigative journalism is the risk associated with liability for defamation – either that the chilling effect of a threat of a defamation action may prevent a story being run, or the actual costs of defending an action subsequently.[46] A UK empirical study found that these considerations were likely to inhibit local and regional press more than national news media, and in turn those national media which employed their own in-house lawyers were likely to show less caution than those who relied on outside advice.[47]

Examples of the deployment of organisational resources are provided by the efforts of NGOs in organising direct action to inhibit states from activities which breach the NGO's standards. Greenpeace is a world leader in such direct action,[48] but it is far from the only example. A leading case study for the application of private organisational capacities in controlling government arose in the anti-Apartheid movement in the 1980s. International governmental support for sanctions against South Africa had largely been restricted to arms embargoes. The international anti-apartheid movement provided leadership in encouraging its supporters to boycott firms which invested in South Africa leading to the initiation of financial sanctions against South Africa, not by governments, but by the

[44] J.Waterford, "Investigative Journalism and Government Illegality." in P. Grabosky (ed) *Government Illegality* (Canberra, Australian Institute of Criminology, 1987).
[45] L. Chester, C. McCrystal, S. Aris and W. Shawcross *Watergate: The Full Inside Story* (London, Angus & Robertson 1973). The journalists' own account is C. Bernstein and B. Woodward *All the President's Men* (London, Secker & Warburg, 1974).
[46] S.Renas, C. Hartmann and J. Walker 'An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?' in E. Dennis and E. Noam (eds) *The Cost of Libel: Economic and Policy Implications* (New York, Columbia University Press, 1989).
[47] E. Barendt, L. Lustgarten, K. Norrie and H. Stephenson *Libel and the Media:The Chilling Effect* (Clarendon, Oxford University Press, 1997).
[48] H. Tsoukas describes the methods used by Greenpeace in its efforts to stop Shell abandoning a defunct oil rig at sea – an action targeted both at the multinational oil producers and governments which allowed them to do this: 'David and Goliath in the Risk Society: Making Sense of the Conflict between Shell and Greenpeace in the North Sea' (1999) 6 *Organization* 499. See also P. Wapner 'Politics Beyond the State – Environmental Activism and World Civic Politics (1995) 47 *World Politics* 311.

Chase Manhattan Bank in 1985. These private financial sanctions snowballed, causing businesses within South Africa to actively lobby government for reform of the Apartheid system.[49] One analysis suggests that the greatest success of the Anti-Apartheid Movement came 'not from lobbying the federal [US] government to legislate restrictions, but rather from directly confronting the corporation with boycotts, stock divestments, shareholder activism, and through persuading state and local governments to link municipal contracts to withdrawal from South Africa'.[50] Thus the banks were pressured to act as regulators of the South African government.

Many of the mandateless private regulators deploy more than one set of resources. Thus pressure groups such as the prisons reform groups are likely to deploy both the information strategies and interest litigation. Similarly international NGOs such as Greenpeace use litigation, information dissemination and direct action in concert.

5. Setting Standards

The values which private regulation of the public sector promotes are diverse and include efficiency, greenness, security and humanity. The public-private interface in the making of the applicable standards takes at least three forms : publicly-set standards; privately-set standards; public and private standards in competition.

In some regimes the applicable standards are set publicly but monitoring and perhaps enforcement are the responsibility of private regulators. For efficiency, an example of such a public/private mix is provided by contracted-out public audit. For humanity, the private monitoring and enforcement of public rules against cruelty to animals provides an example. Such publicly-set standards tend to be monopolistic in character, although that tendency may be mitigated to some extent by diffuse monitoring and enforcement practices as with public audit. The negotiation of the meaning of standards in regulatory

[49] K.Schwartzman,"Can International Boycotts Transform Political Systems? The Cases of Cuba and South Africa." (2001) 43 *Latin American Politics and Society* 115.
[50] K, Rodman, "Public and Private Sanctions against South-Africa." (1994) 109 *Political Science Quarterly* 313.

settings makes it impossible to fully separate the monitoring and enforcement processes from standard setting.[51]

Privately-set standards are a characteristic of the more complete private regulatory regimes, as with those established for self-regulation of advertising and by credit ratings agencies. In these domains either there are no public standards, or public standards provide only a floor (as with rules against misleading advertising). Such standards may be monopolistic, as with advertising self-regulation in the UK, or competitive, as with credit rating agencies. Credit rating agencies participate in markets where the maintenance of their reputations is very important.

In some regulatory domains publicly set standards are in competition with privately set standards. Anexample is the prisons humanity regimes where standards set by the Home Office are challenged by implicit or explicit standards set by the prison reform groups. By definition these groups see their role as seeking to raise prison humanity standards and they do this not only by lobbying but also by monitoring prison standards and seeking to develop higher standards (for example in respect of rights to legal representation of prisoners) through litigation. Litigation thus provides an example of how the monitoring and enforcement process may result in the standards being reset. The private regulator is using litigation to initiate a judicial standard setting process and to put forward its preferred model.

There is considerable variety in the sources of standards deployed by private regulators who lack any formal authority or mandate. Many such organisations develop their own conception of appropriate standards (for example for humanity regimes in prisons or protection of the environment) and will monitor public sector organisations for compliance with those standards. These standards can be used as the basis for 'enforcement' which uses informational and/or organisational resources (such as publication of information or boycotts). However, when it comes to any attempt to

[51] N. Reichman, "Moving Backstage: Uncovering the Role of Compliance Practices in Shaping Regulatory Policy." in K. Schlegel and D. Weisburd (eds) *White-Collar Crime Reconsidered* (Boston, Northeastern University Press, 1992).

enforce the standards formally through the courts such organisations are restricted either to the enforcement of official standards (whether established by legislation or by judges) or to pressing the case for new judge-made standards to be developed and applied (as has commonly occurred with much litigation over prison standards).

Some private regulators have no particular interest in developing their own standards and rely almost exclusively on legislative standards (although they may lobby to have legislative standards revised from time to time). Such an approach to standards is exemplified by the British groups which seek to privately police intellectual property laws – the Federation Against Software Theft (FAST) and the Federation Against Copyright Theft (FACT). Both organisations are mixed economy regulators, in the sense that they oversee compliance, primarily with copyright legislation, by both public and private sectors. Their activities are akin to private policing of these laws.

Those private regulators who never use litigation as a mechanism of formal enforcement are clearly not restricted to the application of official standards. An example is provided by the activities of credit rating agencies in providing ratings for sovereign debt. The ratings agencies are free to set their own standards and criteria by which to assess the credit-worthiness of national governments and to decide whether or not to make these standards public. Equally, international NGOs such as Transparency International and Greenpeace International are free to set their own standards and criteria by which to assess the conduct of national governments.

6. Monitoring and Enforcement

Research on public regulators of the public and private sectors reveals a wide variety of mechanisms for asserting control. In many cases formal enforcement actions – the application of civil or criminal penalties and revocations of authorisations – sit towards the apex of a pyramid in which lower level strategies of education, advice and warnings

are routinely deployed to secure compliance.[52] Some regulators of the public sector, such as prisons and schools inspectorates, lack the power to apply formal sanctions and are dependent on public or private censure or on informing others who do have formal powers to act.[53] A similar picture of variability in powers to enforce emerges with private regulation of the public sector.

As with regulation generally, we should not assume that hierarchical control is the only mechanism by which controls over public sector activities can be exercised. A central element of recent public sector reform activity has been to subject public sector actors to the private controls of the market. In a significant proportion of its market the publicly owned Post Office is in competition with private postal and parcel companies. However, the extent of control through the market should not be overstated as in many sectors where there appears to be public/private competition (such as health and education) it is frequently the case that the private sector is providing a different product. This product differentiation occurs in the postal sector too.[54] Arguably competition between state schools, fostered by the publication of league tables of performance, provides a more significant (if controversial) competition-based control.

Some private overseers resemble public regulators of business in that they possess strong formal powers (for example of prosecution or removal of authorisations) which can be deployed sparingly in support of more routine educational and advisory strategies. This group is rather rare. The RSPCA and the General Medical Council are examples. Since the GMC acts chiefly through formal hearings it is less likely to use its power to apply sanctions in the pyramidal manner of an inspection-based regulator and more likely to select what it deems to be the appropriate arrow from its quiver of sanctions in any particular case coming before it. Others among the statutory private regulators do not possess such formal powers. Thus private auditors and schools inspectors, operating within statutory regimes have only the power to report on what they find.

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[52] I. Ayres and J. Braithwaite *Responsive Regulation: Transcensing the Deregulation Debate* (Oxford, Oxford University Press, 1992).
[53] Hood *et al op cit* n2.
[54] Case C-320/91 *Corbeau* [1993] ECR I-2533.

A rather larger group is constituted by those private overseers who possess contractual power as the basis for enforcement. In cases of collectivised contractual power (as with self-regulation), quite elaborate regimes for the monitoring and application of sanctions may be devised which resemble public regulatory regimes. Whereas in public regulatory regimes some penalties are only capable of being applied by courts (notably criminal penalties and injunctions), in private regimes the penalties are applied by the regulator itself. These range from censure through fines and expulsion.[55] The Advertising Standards Authority, a private regulator of both public and private sector, used it position of 'nodality' at the junction of media and advertising industries to develop a new sanction for serious breach of its rules when it required the Commission for Racial Equality, a public agency, to submit all poster advertisements to the Committee on Advertising Practice for pre-vetting prior to publication.[56]

The mandateless private overseer has no legal power and is dependent on the deployment of other resources. Some private overseers deploy wealth in litigation. For some organisations such litigation involves the identification of appropriate test cases which are used as a means not only to enforce in the particular case but also to establish or develop standards of wider application. This involves the distillation of issues, calculation of the risks of the test case strategy (for example that an unfavourable interpretation of the legal position may be endorsed by the courts) and, where an action by an individual is being supported, the identification of an appropriate individual. There is a substantial body of research on test case strategies.[57] An effective test case strategy may be deployed at the apex of a pyramid of informal enforcement strategies. It is clearly dependent upon their being some arguable legal case. However because of the uncertainty, cost and delay of bringing test cases this strategy may not lend much credible threat to this lower level activity as far as the regulatee is concerned.

[55] C.Scott and J. Black *Cranston's Consumers and the Law* (London, Butterworths, 2000, 3rd ed) Chapter 2.
[56] Advertising Standards Authority *Annual Report 1998* 28. The sanction was lifted from the CRE after a two year period without further infringement: Advertsing Standards Authority *Annual Report 2000*.
[57] T. Prosser *op cit* n36; C. Harlow and R. Rawlings *Pressure Through Law* (London, Routledge, 1992).

Some mandateless regulators use legal processes note merely in the form of test cases but as part of routine enforcement. Thus the Federation Against Software Theft (FAST) acts in a policing role on behalf of its members in raiding premises, applying for cease and desist orders and pursuing civil litigation where it finds breach of intellectual property laws. FAST's Digital Crime Unit, established in 1989, investigates breaches of criminal law and collects technical evidence for use by customs officers, trading standards departments and the police in support of prosecutions.[58] Thus in the criminal sphere FAST operates a central monitoring role but requires cooperation from state agencies for enforcement.

A key example of information as the basis for control is the regular publication by Transparency International (TI) of its Corruption Perceptions Index, which uses a league table format to criticise countries with a reputation for being corrupt.[59] TI combines this publication with a strategy of working with civil society organisations in particular countries to build the societal 'pillars' which aim to squeeze corruption out of government systems. Where the private overseer has good information and that information has salience in the media we might expect the threat of publication to be capable of grounding lower level strategies of education and advice. However, not all private overseers will see this as part of their function. Credit rating agencies do not seek compliance with any particular set of norms, but rather seek to describe the risks associated with any particular borrower. Thus for such agencies publication of information is the only strategy – and a very powerful one. The significance of the ratings offered by the agencies is that the better the rating (that is the lower the risk identified) the easier it is for borrowers to borrow and the more favourable are the interest rates.[60] Thus the effect is to public bodies incentives to minimise the general risks associated with their operations that are relevant to their capacity to repay debt.

[58] Information provided at FAST's website http://www.fast.org.uk/ (visited 17/10/01).
[59] http://www.transparency.org/documents/cpi/2000/cpi2000.html (visited 17/05/01).
[60] Schwarcz *op cit* 8 .

7. Conclusions

The concept of private regulation of the public sector set out in this article encompasses a wide range of processes governing diffuse public organisations and activities. Common to each is the identification of the systematic deployment of private power in controlling what are regarded as public activities. The emergence of private regulatory power in these forms is not surprising and its identification represents an elaboration of well-established understandings of the interdependence of public and private power in contemporary governance arrangements.

The exercise of statutory regulatory power by private bodies generally forms part of well established and fairly well understood regimes. Among the more intriguing questions raised by such power is what is the appropriate mix of the public and the private in different aspects of the regime. How much role should private bodies have in standard setting? What advantages are to be gained from mixing public and private monitoring as occurs with schools inspection and local audit? Collectivised contractual power, in the form of self-regulatory regimes, is perhaps the best documented of the different private regulation phenomena discussed in this article. The subjection of public bodies to private self-regulation raises few novel issues that have not been well-canvassed in the context of arrangements for the independence and accountability of self-regulatory bodies generally.[61]

The two forms of private regulation of the public sector which have the greater novelty (at least in exposition) are those involving individuated contractual power and those which do not derive from a legal mandate. Clothed in the form of commercial contracts contractual regulation of the public sector is remarkably hidden, to the extent that there is virtually no literature on the phenomenon. This group of private regulators together with some members of the group with no formal mandate are striking for the extent to which they wield regulatory power over the public sector outside normal modes of control and accountability. A central hypothesis emerging from the analysis is that regulatory power

[61] J. Black "Constitutionalising Self-Regulation" (1996) 59 *Modern Law Review* 24.

does not need the backing of statutory authority to be effective and important. This hypothesis could be tested both in the domain of private regulation and more generally. These observations raise a number of normative questions. Any dependence on private regulation within the wider architecture of contemporary governance must recognise important limits to private regulatory capacities. Many private regulators lack the clout they would have if they were public agencies and if that leads to weakness in fulfilling public mandates then they may need to be enhanced (for example by changing rules which inhibit investigative journalism or the capacity of NGOs to pursue litigation). Conversely some non-statutory private regulators operate complete regimes in the sense of having the capacity to set standards, to monitor and enforce without the intervention of other organisations. Where this is the case they wield more power than those public regulators which are constrained by the need to follow standards set by legislatures or government departments and to pursue litigation in order to apply legal sanctions. There is thus a remarkable concentration of private power over public organisations. This is perhaps most striking with those private regulators operating internationally whose judgements on such matters as financial or fiscal credibility, probity or greenness significantly affect decisions of notionally democratic governments. This question is particularly pertinent when applied to international private overseers which have the capacity to provide a counter-balance both to democratic and undemocratic government. Credit agencies and NGOs exemplify the 'private, oligarchic forms' which are said to dominate contemporary, globalized governance structures.[62]

To identify substantial power is not to argue that private regulators should necessarily be subject to similar control and accountability mechanisms as those which apply to public regulators. It is both a strength and a weakness of private organisations that they are subject to different forms of control from the public sector. On one account the effective delegation of public functions to private bodies magnifies a problem of accountability which already existed with agencies.[63] But arguably the relative independence which

[62]P.Cerny "Globalization and the erosion of democracy." (1999) 36 *European Journal of Political Research* 1.
[63] J. Freeman "Private parties, public functions and the new administrative law." (2000) 52 *Administrative Law Review* 813.

private regulators have from government could insulate them to a greater degree from the political intervention which has tended to bedevil notionally independent public agencies. An alternative response is to undertake more detailed analysis of particular regimes than has been attempted here with a view to identifying the range of mechanisms through which particular private regulators are held in check or made to answer for their activities. Some regulators, such as those carrying out contracted out audits and inspections, are subject to direct oversight by public bodies. Private regulators can be more tightly embedded within public regimes, as happened in 1988 with the Advertising Standards Authority whose enforcement powers were linked to the new injunctive powers of the Office of Fair Trading.[64]

Others, such as professional associations[65] and non-governmental organisations, may be strongly embedded within a wider community which offers a legitimate alternative to control through democratic government channels. Such experience could be developed to build communities of private overseers to share best practice and act as mutual checks on one another (as happens within the mixed public/private British and Irish Ombudsmans' Association).[66]

A third group, such as financial and accreditation institutions, may effectively operate within a market within which the quality of their judgements is assessed and may lead to diminished loyalty where they prove defective.[67] However the viability or appropriateness of competition may depend on the sophistication of the 'consumers' of the information.[68] Accordingly we might be most concerned about those private regulators which operate monopolistically within their domains and in a fashion which is

[64] Control of Misleading Advertisements Regulations SI 1988/915 (as amended by SI 2000/914). The relationship created by the Regulations between the ASA and the Office of Fair Trading is examined in *Director General of Fair Trading* v *Tobyward* [1989] 2 All ER 266. The OFT's injunctive power has never been used against a public body.
[65] For example the statute-backed self-regulator of the medical profession, the General Medical Council, has a council of 104 members 75 per cent of whom are doctors. The constitution of the GMC is currently under review: General Medical Council *Effective, Inclusive and Accountable: Reform of the GMC's Structure, Constitution and Governance* (London, General Medical Council 2001), 6.
[66] Brief details of the association are provided at http://www.bioa.org.uk/ (visited 17 October 2001).
[67] Pixley *op cit* n41.
[68] Havighurst *op cit* n30, 10.

detached from wider communities. Where private regulators are setting standards at odds with democratic values (for example insurers more risk averse than public sector bodies, prisons reformers more humane than Parliament) a possible response is to build democratic representation into private regimes. This is a reverse take on the classic proceduralisation prescription which seeks to build civil society into public decision making.[69] An alternative possibility is to think of a reverse form of 'co-regulation' within which the regime of private regulation stimulates public involvement in such matters as setting standards or enforcement priorities

An important counter to international private power generally is the formation of networks of governments and regulatory authorities, often organised around particular scientific and technical areas.[70] Arguably this tendency represents an application of the law of requisite variety, seeking to meet the challenges of private networks of power through the development of equivalent or interdependent governmental communities. But in the delicate equilibria which arise from such arrangements it is often none too clear who is in charge. Incentives may lie in opposite directions. For example, a few months after Ireland was censured by the European Council for breach of European guidelines relating to fiscal policy in a national budget[71] the private rating agency, Standard and Poor's, raised Ireland's long term sovereign credit rating to AAA.[72]

Private regulation of the public sector deserves to be recognised as a significant and growing constraint on governmental activities both nationally. The phenomenon presents both new possibilities for reviewing and checking the exercise of public power and old problems of controlling and accounting for the exercise of power in new forms. It requires further analysis to understand the conditions under which private regulators are most potent and effective and to examine whether the constraints which apply to private regulators within particular domains are adequate or need reconfiguration.

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[69] J. Black 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597.
[70] A-M. Slaughter, "The Accountability of Government Networks." (2001) 8 *Indiana Journal of Global Legal Studies* 347. Braithwaite and Drahos *op cit* n7.
[71] D. Hodson and I. Maher 'The Open Method as New Form of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39 *Journal of Common Market Studies* 719, 736.
[72] Standard and Poor's 'Ireland's Rating Raised to "AAA", 3 October 2001 press release.