

Reflexive Governance, Regulation and Meta-Regulation: Control or Learning?

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1. Introduction

A central achievement of regulation scholarship in recent years has been to problematise the idea of control. If the idea and practice of control is problematic then one possible solution is to find better ways of achieving the desired level of control. However, literatures which emphasise the role of institutions in shaping policy activities have placed particular emphasis on problems of knowledge and communication which underpin weaknesses in regulatory regimes. I argue in this chapter that an emphasis on knowledge shifts the central concerns of regulation away from control to learning. The central question which I address in the chapter concerns how we understand the ways that participants in regulatory regimes learn about their environment and the problems they face and the appropriate measures to take to address the problems. Following the themes of this book I seek to evaluate contrasting ideas about the mechanisms of and potential for learning within regulatory regimes presented by perspectives on reflexive governance that are found within the literature on regulation.

The application of ideas of reflexive governance to regulation provides part of the response to a disenchantment with traditional forms of government regulation on grounds both of expense and ineffectiveness. The

ineffectiveness critique has been particularly vigorous, noting the fragmentation of power associated both with processes of globalization and the growth importance of both corporate and NGO capacities (Black 2000: 600-601). An important question is to what extent reflexive forms of regulation may be identified which address these perceived problems. A central concern within the field is to seek to bridge the gap between conceptions of regulation that continue to place the promulgation of rules and the exercise of hierarchical control by government and agencies at the centre of model and those ideas which see the capacities of public bodies for direct control to be limited and consequently seek to harness the governing capacity of businesses and NGOs. Whilst much of the literature has been concerned with governmental regulation, practices of self-organisation and self-regulation have achieved increasing prominence. This is intriguing because there is necessarily a high degree of reflexivity about self-organising practices, but challenging because of concerns about legitimacy and effectiveness of self-regulatory regimes.

I address the dual challenges associated with the disenchantment with public regulation, on the one hand, and the concerns around the legitimacy of self-regulation on the other. Part of the answer lies in showing how the two may be effectively linked. Ayres and Braithwaite sub-titled their seminal contribution to regulatory theory, *Responsive Regulation*, with the phrase 'transcending the deregulation debate' (Ayres and Braithwaite 1992). What they sought to capture in that idea was that the quest for more effective and legitimate regulation should increasingly be concerned with working more effectively with the capacities for self-governance of regulated entities. This ambition has both an enforcement dimension – seeking to promote compliance by firms without formal enforcement, and a techniques dimension, promoting effective self-regulation through the threat of more intrusive regulation.

From the responsive regulation approach has emerged further ideas about linking of governmental capacity to self-governance including 'nodal governance' (Burris, Drahos et al. 2005) 'steering-at-a-distance' (Kickert

1995) , ‘smart regulation’ (Gunningham and Grabosky 1998), ‘really responsive regulation’ (Baldwin and Black 2008) and ‘meta-regulation’ (Parker and Braithwaite 2003). The strength of these approaches is that they recognise that the capacity to deliver on regulatory objectives lies primarily with those who are regulated, rather than those who regulate. Parker envisages a role for law in helping ‘to connect the internal capacities for corporate self-regulation with internal commitment to self-regulate’ (Parker 2002: 246). Within Parker’s conceptualization of meta-regulation reflexive learning has an important role in contributing towards self-regulatory capacity (Parker 2002).

I have suggested previously that law, and the hierarchical ambition that it represents, may provide only one of the possible mechanisms through which self-regulatory capacity might be affected by external steering (Scott 2008). In this chapter I further develop the idea that organisations with self-regulatory capacity may, under certain conditions, also be stimulated by their participation in communities and/or the discipline of competition in markets and other institutional settings. Just as community and competition provide alternatives to hierarchy as modes of control (Hood 1998; Murray and Scott 2002; Lessig 2006) so too they may provide alternatives to law in stimulating learning processes. Community, in this context, refers to participation in the making of and subjection to social norms and their application through mutual observation and application of social sanctions such as withdrawal of approval and ostracization. Learning in communities may be stimulated through the seeking of approval, a desire for belonging, and an altruistic concern to contribute to the development of community. Where such activities involve an engagement with other community members, an openness to changing views of interests in, and objectives of, outcomes, then they may have reflexive characteristics.

Similarly, subjection to competitive disciplines may also stimulate learning not only about what buyers may want, but also about an organisation’s own role and capacity for action within that market. Such community and competitive stimulants to learning may, I suggest, be characterised as meta-regulatory

effect whether in combination with each other and/or hierarchy or on their own. Though the boundaries of meta-regulation are not yet fully worked out, its core idea is that the self-regulatory capacities of individuals and organisations may be subjected to steering.

A reflexive conception of meta-regulation acknowledges that the capacities of individuals and organisations for self-regulation extends beyond implementation and compliance to include the setting of objectives, but suggests that the legitimacy of such activities is liable to be premised upon the inclusiveness and character of such self-regulatory processes. A primary focus on learning offers a means to understand the potential and limits of such ideas. Although the literature on reflexive governance has chiefly addressed policy making and related processes for making regulatory norms, it is arguably in the area of implementation that the greatest payoffs might be found from governing more reflexively. This is because successful reflexive processes may underpin greater understanding and commitment by those affected.

I start this chapter with an elaboration of concepts of reflexive governance in the context of regulation. I proceed then to suggest that much of the economic analysis of regulatory institutions, though it may involve learning, is essentially non-reflexive in character. I suggest that the challenges of engaging non-state and supranational capacity in addressing contemporary problems of regulation have been a key factor in opening up more reflexive ideas of learning within regulatory governance, first at the level of policy making and the setting of regulatory norms. The emphasis is on understanding the conditions under which thicker conceptions of proceduralization may contribute to more reflexive learning processes and how this thicker conceptualization of process may be extended to the implementation stages of feedback and behavioural modification in regulatory governance. I conclude by suggesting that an enriched conception of meta-regulation provides an effective way to conceptualise the linkage between the state and the widely diffused capacities which are capable of making regulation legitimate and effective.

2. Regulation and Reflexive Governance

A shift in the emphasis of governance mechanisms away from direct provision of services and welfare towards arms-length oversight of service providers has been characterised as the 'rise of the regulatory state' (Majone 1994; Levi-Faur 2005). Whilst there is no consensus on exactly what is connoted by the term regulation (Black 2002) a primary focus of the literature on regulation has been on the activities of agencies in monitoring and enforcing rules which attempt to control aspects of social and economic behaviour (Selznick 1985). This conception of regulation provides a starting point for analyses which significantly extend both the cast of actors involved in regulating, and the range of mechanisms which are deployed, seen by some as the logical extension of the modes of the regulatory state (Knill and Lenschow 2004) , and by others as evidencing the emergence of a 'post-regulatory state' (Scott 2004) (Zumbansen 2008) . Such analysis focuses on the limited capacity of government and its agencies to direct actors in social and economic fields as to what they should do. This critique offers a sustained attack on the idea of 'command and control' informed variously by concerns that governmental decisions will crowd out market activity, that governmental agencies have too limited knowledge and capacity to control directly the behaviour of others by reference to rules or that the communicative capacity of legal and political sub-systems limits the capacity for direct intervention in economic and social life.

Underpinning this last form of the critique is an anxiety that the law, once conceived of in terms of general principles of universal application, has become materialized such that legal rules take on a high degree of detail and also specificity as to whom they apply. Such a materialization of law, associated both with welfare state and regulatory growth, creates a variety of risks- that the integrity of the legal sub-system may be damaged, that the regulatory activity may be so juridified as to undermine its capacities, or that failures of communication mean that regulation has no effect – the 'regulatory

trilemma' ((Teubner 1998 (orig. pub 1987));see also (Nonet and Selznick 2001 (orig publ 1978): 100)).

There is increasing recognition of the regulatory capacity not only of other parts of government, such as departments and courts (Department of Commerce and Treasury 1995), but also for non-state actors such as businesses and NGOs (Abbott and Snidal 2009). The acknowledgement of the diffusion of regulatory capacity has tended to undermine classical conceptions of bilateral regulatory relationships as the intentional exercise of hierarchical power by agencies over others (Prosser 1999: 200). In its place has emerged a more complex institutional conception of regulatory spaces populated by a variety of actors with preferences and attributes which shape their behaviour within the broader environmental constraints and relationships characterised by 'interdependence of powerful organizations which share major public characteristics' (Hancher and Moran 1989). Equally the modalities of regulation are increasingly conceived of as extending beyond the hierarchical application of rules to include mechanisms which depend also or alternatively on competition, participation in communities and/or architecture (Lessig 1999; Murray and Scott 2002; Lessig 2006: 340-346). Such an approach suggests the emergence of 'regulatory pluralism' (Gunningham and Sinclair 1999).

If regulation is a process occurring within spaces which involve interdependent rather than hierarchical relationships then arguably effective action is likely to involve learning about the capacities and preferences both of oneself and others. Accordingly in this chapter I address the variety of ways in which institutionalist perspectives conceive of the modes of learning within regulatory regimes and the ways in which they have supplemented or displaced a traditional focus of regulatory scholarship on control with learning.

The displacement of control with a model of interdependence has two sets of implications. The more obvious implication is that regulation is no longer conceived of as simply something imposed on one by another. A more radical implication, not recognised within all institutionalist theories, is that it is not

only the implementation of a regime that is shaped by learning processes but also the objectives and overall orientation of the regime (Bratspies 2009: 605). Such an analysis gives recognition to the capacities of actors to shape regimes within interdependent relationships. It is consistent with a characterisation of governance more generally as multi-polar in the sense that power is located with governmental and non-state actors with a degree of interdependence between them (Perez 2007).

The interdependence analysis is troubling for some because it deviates from the tenets of democratic theory which suggest that regime objectives should be determined by elected politicians rather than by actors within a regime (Freeman 1997). Accordingly these observations require a degree or reconceptualising as to how the public interest is represented within public policy processes. In their introductory chapter to this volume Lenoble and Maesschalck define reflexive governance in the public interest as involving processes of collective action in which the 'members' normative expectations are "maximised" (Lenoble and Maesschalck 2010: **). In other words there is an outcome from the process that is not pre-determined but which is accepted by the participants because of the learning process within which they have engaged. Such a conception of public interest carries with it a requirement that all affected by a regime are able to participate in the applicable processes. Though we may be able to identify examples where this occurs, it provides a challenging general requirement (Calliess and Zumbansen 2010: chapter 2). Paradoxically the 'the enlargement of participation makes the definition and protection of the public interest precarious and problematic', as participatory processes are liable to reflect imbalances of power in society and risk excluding the larger polity (Nonet and Selznick 2001 (orig publ 1978): 102).

The problem of learning is exemplified by responses to the Global Financial Crisis of 2008 which has left both governments and banks scratching their heads over what went wrong in market and regulatory regimes in which, as they see it, regulators had broadly appropriate powers and market actors

were subject to broadly appropriate controls. It appears that neither governments nor market actors sufficiently understood the interdependence between market actors and between national regulatory regimes and, in particular, the nature and extent of the systemic risk created by the way the global financial markets had evolved (HM Treasury 2009: 35-45). On this analysis it is developing a better capacity for learning, rather than for control, that has potential to prevent the re-emergence of a crisis of this kind. Put another way, and contrary to a dominant view of the issue found in the press and popular literature, is it possible that the crisis was a product of too little engagement with the self-regulatory and learning capacity of businesses, rather than too much (Zumbansen 2009)? The issue of how the conditions for appropriate learning may be developed is primarily a question about institutions.

The focus on institutions provides a corrective to understandings of regulatory processes which are primarily linked to the attributes, motivations and behaviour of the individuals involved in such processes. With an institutional approach we understand the behaviour of actors as constrained by what can be done and imagined with institutional structures that are typically unresponsive to immediate functional demands. The concept of institutions is understood somewhat differently in each of the branches of the social sciences for which 'institutions matter' in shaping how things happen (Black 1997: 54). Nevertheless it possible to conceive of new institutionalist approaches as engaging with the idea that formal and informal institutions (including social and cultural norms exhibiting a degree of regularity) shape the way that regulation operates, determining to some degree what is knowable and doable both by regulators and by other actors within the regulatory space.

In their introductory chapter to this book Lenoble and Maesschalck distinguish the external perspective on learning and governance from internal perspectives. The dominant theoretical form of such external perspectives (in which the conditions of social learning are located outside the learning operation) is that of neo-institutional economics with its emphasis on markets

and quasi-markets, and evaluation through performance management and competition as alternatives to more traditional bureaucratic governance (Williamson 1996). The participants in such processes come to them fully formed, expressing preferences through market decisions and sometimes also through consultation or the pursuit of grievances. It might be argued that learning within the latter form is not truly reflexive since 'theoretical and practical validity claims are naively taken for granted and accepted or rejected without discursive considerations' (Habermas 1988 (orig publ in English 1976): 15).

The widespread adoption of forms of marketised governance of energy markets provides a central example of the external perspective (discussed extensively in the chapter by (Prosser, Adlard et al. 2010)), as do attempts to stimulate quasi-markets in health care through competition amongst providers to provide services to healthcare providers, even within fully public provision of healthcare (Vincent-Jones 2010). The Australian government directly links the objectives of its programme of regulatory reform to a set of regulatory performance indicators (RPI) (Francesco and Radaelli 2007: 41-44) permitting both a whole of government assessment of performance against the indicators, but also enabling laggard agencies and departments to be more readily identified. League tables are, of course, not without critics who point to weaknesses associated with the use of performance indicators in terms both of risks of gaming and of downgrading of important objectives which are difficult to capture within such indicators (Bevan and Hood 2006). In each instance consumers of services are expected to learn about quality and price of provision and to exert market pressures on suppliers through the choices they make. Their preferences, however, are not targeted by this approach, but are assumed to be stable.

Turning to the internal perspectives, Lenoble and Maesschalck distinguish three strands, each of which is progressively more reflexive - the deliberative, pragmatic and genetic. The deliberative strand emphasises dialogue between the key actors, emphasising their communicative capacities as a key resource for developing a regime. Accordingly the deliberative model seeks to promote

participation of key actors in decision making. Lenoble and Maesschalck suggest that important strands of thinking which seek to deepen this communication in a pragmatic way may be identified in the 'democratic experimentalism' literature associated with Charles Sabel and others (Dorf and Sabel 1998), and distinctly, in the work of Donald Schön and Chris Argyris (Argyris and Schön 1978). The experimentalist strand is chiefly concerned with the manner in which decision making processes promote experimentation through co-design of processes, benchmarking and monitoring. It lacks a focus on developing the capacities of the actors themselves (Lenoble and Maesschalck 2010). Schön's work adds this emphasis on enhancing the capacities of the actors. The ambition is to tackle 'the actors stereotyped behaviours or routines' (Lenoble and Maesschalck 2007). This literature has informed concerns within legal scholarship to develop a reflexive and proceduralized form of law, discussed below (Black 2000; Black 2001).

Their own 'genetic' approach, they suggest, constitutes a further deepening of this pragmatist trend. This last approach involves both the effective conditions to engage the reflexive capacity of the actors as required for the learning operation and, once that actors' commitments are established, 'the setting up of the institutional conditions likely to guarantee effective implementation of the actors' commitments' (Lenoble and Maesschalck 2007). This characterisation is open to the criticism that it is contradictory to describe commitments within such reflexive processes as fixed where, in principle such commitments should be open to re-negotiation even during the process of implementation as further discovery occurs through such processes.

Within the context of an examination of regulatory governance I have found the distinction between external and internal forms of reflexive governance helpful. Indeed, I would question whether the external forms are truly reflexive forms of learning. If reflexive governance is to meet some of the challenges of contemporary regulation it is important to identify examples of the internal forms of reflexive governance, but also to understand the conditions under which they might emerge and be valuable in supporting the development of

regulatory capacity. Two distinct properties of policy issues for decision have been linked to the emergence of more dialogic forms of decision making within regulatory governance. The first concerns policies over which there are very marked divergences of world view, and the second where a decision maker understands there to be a high degree of uncertainty surrounding the issue for decision (Bratspies 2009). In some instances these two sets of properties overlap. In the case of energy regulation in Canada the more reflexive forms of governance, involving elements of deliberation and experimentation were found in issues concerning effects of plant construction on first nations land rights and in the development of policies on renewable energy (Armstrong, Eberlein et al. 2007: 51-52). More reflexive governance forms offer mechanisms for addressing problems characterised by fairly profound conflict through seeking to engage the ideas, preferences and world views of those actors. The literature on decision making suggest that another area of potential application of more reflexive governance forms is where uncertainty exists to an extent that more conventional Weberian rational decision making might lack legitimacy. In their study of telecommunications regulation Hall, Scott and Hood contrasted the Cartesian-bureaucratic decision making style deployed where knowledge was available and objectives commanded a reasonable consensus with an adhocratic-chaotic decision style used in conditions where neither agreed objectives nor appropriate knowledge were fully available (Hall, Scott et al. 2000: chapter 8).

A critical element of this internal reflexive governance approach is the element of cognitive reframing which it supports, as the interests, ideas, and preferences of actors may be re-cast, underpinning change in their capacities and appetites (Vincent-Jones 2010). This provides a link to the sociological literature which is concerned to investigate the cognitive limits to action arising from relatively fixed world views and preferences and seeks ways to exploit the potential for stimulating re-framing of what is thinkable and doable in terms of preferences and capacities of key actors (Goffman 1974). Thus the operation of the process is not only or chiefly acting on the relevant policy or decisions, but rather on the participating actors themselves, with consequences for policies, decisions and, critically, implementation. A

radically reflexive process, in this sense may affect outcomes not only in terms of policy solutions and instruments, but also the way in which the problem is conceived.

If it is accepted that regulation is characterised by relationships of interdependence amongst many different kinds of actors, then it is helpful to conceive of regulation as occurring in regimes (Scott 2006). Regulatory regimes are conventionally thought of as systems of control which involve setting of norms or rules, feedback and behaviour modification mechanisms (Hood, Rothstein et al. 2001). Classical approaches to regulation tend to treat the institutional features of regulatory regimes as unproblematic, and focus on the regulatory rules and their enforcement by agencies. New institutional economic approaches to regulatory governance substantially focus on organisational choices and mechanisms of monitoring and control, working with an external conception of regulatory governance, and retaining a quite hierarchical conception of the regulatory capacity of the state. The application of an internal conception characterises reflexive regulation as

‘procedure oriented rather than directly focused on a prescribed goal, and seeks to design self-regulating social systems by establishing norms of organisation and procedure. At its core are participatory procedures for securing regulatory objectives and mechanisms that facilitate and encourage deliberation and mutual learning between organizations’ (Gunningham 2009)

Reflexive governance, in this sense, is involved with fostering learning that goes beyond simply learning about variety in governance instruments and extends to learning about the preferences and commitments of the actors themselves. Necessarily such processes require decisions about which organisational mixes to deploy as part of deciding what processes may be appropriate

3. Non-Reflexive Governance and the Economics of State Institutions

A central implication of the claim that institutions matter within the new institutionalist literature generally is that choices over appropriate organisations for regulating significantly affect the operation of regulatory regimes. The new institutional economics makes organisational choices central to its analysis of regulatory capacity. Choice of organisational structures is accompanied by the introduction of mechanisms to limit the downsides associated with any institutional choices. Such choices are not restricted to the decision as to whether to regulate through a government department (Department of Commerce and Treasury 1995), an agency or a court, but include also questions concerning the use of public enterprise or regulated private enterprise (Trebilcock and Prichard 1983) and the balance between public and self-regulation (Horn 1995) public or private enforcement (Shavell 1993) . Within the economic literature reflexivity generally has a limited role since the preferences and capacities of actors are assumed rather than problematised. This may be explained partly by the opposition created in the literature between hierarchies and markets. Markets are spaces in which actors learn about the preferences of others through interaction and law and regulation are external to that, correcting failures sporadically through exerting corrective control. Law is accorded a narrow controlling role. A richer and alternative conceptualization perceives law as being constitutive of markets with a potentially wider role in facilitating a variety of social interactions, of which market transactions is one (Shearing 1993) . Arguably the strands of literature addressing the problem of appropriate organisational choices for regulation which consider supranational and self-regulatory governance problematise the role of law and hierarchy in creating governance conditions in a more challenging way.

Within new institutional economic theory, regulation presents the problem of delegation and, associated with it, significant asymmetries of information as between both government and regulatory agencies and between regulatory agencies and regulated organisations. In the face of such high costs we may wonder why delegate at all. Part of the reason for delegating is that

government and legislature may not know enough to be able to specify exactly what is to be done. Agencies are established to develop expertise and to learn about the regulated sector as to use the discretion delegated to them to pursue the objectives of the legislature. Delegation also provides a degree of insulation from government, enabling countries to make credible commitments to stable policies in particular sectors (Levy and Spiller 1996). As is noted elsewhere in this book, within some parliamentary systems of government delegation to agencies is problematic, a feature which not only has the capacity to undermine the objectives of neo-institutional economics in supporting delegation to agencies, but also wider objectives for transferring governing and reflexive learning capacity to new actors and sites (Prosser, Adlard et al. 2010).

Because of the focus on delegation a chief concern of the economic literature is the problem of control over agencies (Horn 1995). Insofar as the approach is about learning, it is about learning what others are doing and how it may be controlled. In the case of regulatory agencies the risks are that they develop their own policies, deviating from those of the legislature (Shepsle 1992). In the case of firms it is assumed that they will seek to maximise profits and seek to avoid regulatory drags on their profits to the extent that they can. Cast in terms of learning, each of the actors in regulatory regimes needs to learn both about the actions of others and about what it should itself be doing.

A key approach to the learning about what others are doing include instituting of systems of monitoring over agents. Such systems include regular reporting requirements, but might also extend to exchanging staff, for example between agencies and government departments. The long-observed practices of agencies and regulated businesses recruiting from each other's ranks, the revolving door (Makkai and Braithwaite 1992), also establish a degree of monitoring. Considered in principal-agent terms classical regulatory theory, which conceives of private interests shaping regimes to suit their purposes (Kolko 1965; Peltzman 1976), can be recast with the regulated businesses as principals seeking to monitor and control regulatory agencies. Recruiting experienced regulatory officials is one of the mechanisms for doing this.

Institutional economics also assigns a role for markets in learning about regulatory performance and exerting a form of control over regulators. On one view the main form of such scrutiny emerges from the labour market for staff in agencies. Whilst such market oversight may be beneficial it may also encourage a variety of forms of rent-seeking behaviour. One example is the incentive on regulators to make regimes more complex through use of detailed rules rather than general principles, as such complexity increases the market value for former agency officials as employees in regulated firms (Horn 1995: 59-60). External labour markets are not the only form of control which deploys competition over reputational issues. It is increasingly common for both governmental and non-state bodies to pit regulators against each other in performance league tables. One example is the use of scoreboards for implementing legislation administered by the European Commission over the Member States (Mendrinou 1996). National officials and politicians are encouraged to jockey for position as the best implementers of EC measures, as indicated by formal transposition of EC directives.

Markets feature also in the mechanisms under which regulatory regimes are set in competition with one another to attract business activity to their jurisdiction. The origins of the theory of regulatory competition lie in Tiebout's observations about the potential for using competition as a mechanism for learning about appropriate levels of expenditure on public goods funded through local taxation (Tiebout 1956). The problem Tiebout was addressing is that it is difficult to ascertain from voters how much expenditure they are prepared to pay from taxation. Tiebout noted that consumer—voters may relocate to areas where taxes are lower or public services better (Tiebout 1956: 418). There are some fairly stringent assumptions as to when Tiebout's theory might operate, relating to the mobility and knowledge of voters, that are rarely likely to be met. However there are perhaps rather more instances of regulated firms which may deploy their knowledge and mobility to engage in regulatory arbitrage, though there is limited empirical evidence that firms do move in search of less stringent regulation or that governments 'race to the bottom' as might be expected (Radaelli 2004). Insofar as the theory of

regulatory competition is about learning (Zumbansen 2006: 550), it is concerned with the potential for regulatory regimes to innovate and find better and more proportionate ways to meet their public objectives without scaring away those regulatees who have the capacity to re-locate to more favourable jurisdictions. Competition within a single jurisdiction is also possible, as where self-regulatory regimes compete with each other, facing the upward pull of the reputation of the regime and the downward pull of potential and actual members seeking to minimise regulatory burdens (Ogus 1995).

Learning processes which depend on the variations in institutions and approaches in different jurisdictions have been the subject of diffusion studies which are only loosely concerned with competition. Puzzling over the growth in independent regulatory agencies in most European countries Gilardi, applying the insights of new institutional approaches to political science, suggests that this trend can be understood in part as a top-down process, as where EU legislation requires the setting up of independent agencies to regulate network industries (Gilardi 2005: 89-90). Bottom-up explanations look to political or other local factors in shaping change, notably the need for creating credibility in policies through isolating them to a degree through the creation of independent agencies (though this requirement has limited application in many sectors and is of greatest significance in network industries which require a high degree of capital investment) (Gilardi 2005: 87-88). Gilardi's third category, horizontal explanations are most explicitly linked to learning processes. Here the interdependences between countries are reflected in processes of emulation. He suggests that certain institutional structures have become 'taken-for-granted' and where they are not there may still be symbolic benefits to be gained by copying from others (Gilardi 2005: 90). The learning process here is about reshaping what is taken for granted as independent agencies have progressively become **a** and perhaps **the** normal form for state regulation in Western Europe. The process here engages states partly in competition for innovation within regulatory regimes that deliver more effectively but with fewer burdens on business, but partly also in community processes within which they learn about how others have solved problems.

4. Reflexive Governance Beyond the State

The challenges presented by supranational and non-state regulation have stimulated considerable innovation in both practice and thinking about the development of deeper learning processes within regulatory policy making. As such thinking must inevitably address the role of the state, it is frequently required to address also the relative role of community and market in stimulating not only control but also learning. The theory of regulatory competition has been largely concerned with understanding the behaviour of competing jurisdictions, it also bears on the choices to be made by federal or proto-federal governments as to whether to coordinate through harmonised regulation, or to permit competition between regimes. Mechanisms of coordination can be organised through hierarchical or community-based mechanisms. The European Union, for example, permits competition on levels of corporate and personal taxation (though with some scrutiny of overall fiscal policies through the Stability and Growth Pact) but has substantially sought to harmonise employment protection measures through law. In this context the development of the Open Method of Coordination (OMC) is of considerable importance as it has created more community-based mechanisms for coordinating policies among EU member states whilst seeking to take advantage of innovations at member state level through processes of surveillance, bench-marking and mutual learning (Hodson and Maher 2001) (Trubek and Trubek 2005). In this respect the OMC is similar to many of the processes coordinated by the Organisation for Economic Coordination and Development which use mechanisms of learning and soft coordination rather than top-down controls over member states' community of governments as an alternative to hierarchy (Schäfer 2006).

Sabel and Zeitlin have hailed the development of OMC as a key example of an experimentalist form of deliberative democracy involving (a) the setting of 'framework goals', (b) 'measures of gauging their achievement' (c) regular reporting on performance (d) periodic revision both of framework goals and of

reporting procedures (Sabel and Zeitlin 2008: 273-4). Consistent with ideas about fragmented governance, they do not suggest that these functions have to be located within a single organisational structure, and find that some version of the experimentalist mode extends beyond the use of OMC within the EU to include many other policy areas, having become central to contemporary EU governance (Sabel and Zeitlin 2008: 274). The partial displacement of the community method of law making by more deliberative mechanisms is of considerable significance because of its engagement of competitive and community-based processes as part of the regime both for developing and implementing regulatory policy in the EU. It offers a pluralized vision of policy making in which no one is in charge, but the learning of each of the participants is brought to the table both in assessing performance and revising goals.

If the move to supranational governance represents one central challenge for contemporary regulatory theory, then the acknowledgement of non-governmental power is another. Just as the EU recognises that the main capacity for both learning and implementation lies in the member states, so there is increasing recognition at national level that non-state actors have important capacities not only for implementing but also initiating and revising regulatory regimes (Black 2003). Perhaps the strongest examples of this phenomenon are found in the area of environmental protection where there are strong examples both of community and market governance emerging as alternatives to state regulation.

Problems associated with environmental damage take a variety of forms. Classical economics defines one set of problems as arising from externalities – harms such as pollution where the cost is not borne those taking the benefits of production. A second set of problems is associated with common-pool resources where individuals have incentives to exploit the resources excessively, even though the degradation of the resources will adversely affect all users. To both these sets of problems there has been an increasing recognition of the potential for reflexive solutions which to varying degrees engaging the self-organising capacity of those who might otherwise damage

the environment and of other key stakeholders within the regulatory space (Orts 1995; Richardson 2002: Chapter 3). A central challenge identified within the literature concerns the linkage of state capacity to self-organising capacity to create effective regimes. From the perspective of reflexive governance this is about harnessing the learning capacity associated with non-state actors. The regimes which we might consider range between those developed by individual companies through those of trade associations, other private organisations (such as standards bodies) and those developed collaboratively with NGOs and or governments. Recent research at the transnational level suggests that regimes which engage businesses, NGOs and governments are becoming increasingly common as the logic of interdependence asserts itself (Abbott and Snidal 2009).

At the level both of individual firms and trade associations the motivation for developing or engaging with non-state norms include concerns with protecting their reputations to reduce the stringency of externally imposed regulation (Gunningham and Sinclair 2002: 134). The concern with reputation creates a hybrid set of pressures which involve aspects of competition and community, which may be characterised as the 'social license to operate'. The social license comprises the implicit permission required of society without which no business can legitimately operate and may be experienced more or less intensively depending on the degree of engagement an industry has both with its geographic and broader communities. Examining the environmental performance of the pulp-mill industry Gunningham, Kagan and Thornton concluded that the pressures associated with the social licence have the potential to affect the content and implementation of the legal regime for regulatees but also constitute 'the primary source of beyond-compliance measures of the good citizenship variety' (Gunningham and Sinclair 2002: 51).

Key instruments for firms to address these concerns and deliver on their capacity for action are the development of codes of practice and standards. From the perspective of reflexive governance a central question is how these codes are developed. Whereas the processes for developing technical

standards have been reasonably well documented (Hallström 2004), we know rather less about the development of industry codes. In some cases governments take an interest in what would otherwise be purely non-state activity with a view to enhancing the non-industry participation (Baggott and Harrison 1986).

The relatively opaque character and limited participation of interested parties both tend to limit the reflexive claims of industry codes as compared with technical standards. There could be a significant role for governments here in facilitating more open and participatory processes. This could be done through the incentive of reduced external regulation for businesses participating in and complying with such codes and through seeking alignment between participation in such processes and the advancing of the reputational interests of affected firms. An example of such a facilitative role for regulators is found in the Victorian scheme for developing Environmental Improvement Plans (EIPs) in which what are effectively local environmental standards, together with processes for monitoring and securing compliance, are set through engagement between businesses and affected stakeholders, facilitated by the Environmental Protection Agency (Gunningham and Sinclair 2002: 159-162). The EIPs are characterised by strong degree of engagement between industry and stakeholders in defining both the nature of the problems and the solutions and by a significant degree of innovation in resolving environmental problems. Gunningham and Sinclair's evaluation suggests that they command the broad support both of industry and community stakeholders (Gunningham and Sinclair 2002: 168-9). They note also, that in the case of laggards, regulatory inspection is an ever-present threat to promote compliance (Gunningham and Sinclair 2002: 170-171).

In the case of common-pool resources the potential for self-regulation is somewhat different since the participants in the regime are simultaneously regulatees and beneficiaries. A further important strand of new institutional economics addresses the regulation of 'common pool resources', such as fisheries and irrigation systems, where narrow self-interest would encourage those with access to the resource to deplete it excessively ('the tragedy of the

commons' (Hardin 1968)). Elinor Ostrom has tracked the emergence of cooperative solutions amongst the resource-users to developing self-governance norms and mechanisms (Ostrom 1990). The regimes which she observed are characterised by a high degree of commitment amongst participants to making the norms work. What Ostrom defines, in essence, is the emergence of effective regimes of self-regulation in which the resource users deploy their capacity to participate in making the rules, monitoring for non-compliance and enforcement and dispute resolution through the application of graduated sanctions. An essential aspect of such regimes are the learning processes within which users learn about the resource they depend on and their own use of it and the use made by the community as a whole, and about how incentives and rules affect the sustainability of the resource for all (Ostrom 1990: 55-56). Ostrom's analysis deploys an external perspective on learning, since it does not look to or expect such regimes to exert changes in preferences of the members of the community. Arguably contemporary debates about climate change go further in their implicit or explicit advocacy of reflexive processes for the Community as a whole in dealing with a global issue with similar characteristic to the problem of common pool resources. An explicitly reflexive approach to climate change is of particular interest where it includes both interactive goal-formulation and interactive implementation amongst its key processes (Voss, Bauknecht et al. 2006: 435).

Whilst questions of organisational choice for regulation are of considerable importance (and of central interest to new institutional economics), regulation scholarship within political science and socio-legal studies tends to focus on the distinct processes of regulatory regimes – the setting of norms, feedback and monitoring and behavioural modification. The following sections of the paper consider the role of learning in these processes in particular evidence of the potential for the more reflexive governance processes evidenced both in policy processes and the scholarly literature.

5. Reflexive Policy Making in Regulation

It is arguable that the focus on formal and informal mechanisms of oversight which characterises the economic approach to organisational choices risks embedding ideas of distance and limited engagement between regulators and their constituencies. Such a focus may overstate the capacity of regulators to achieve their objectives. A central problem in regulatory policy making, captured in the idea of information asymmetries, is that much of the knowledge of how regulated activities operate, and where costs and benefits fall, lie with regulated actors and other stakeholders. This problem is partially addressed by policy making mechanisms which engage actors within regulatory regimes in a degree of learning and give recognition to the diffusion not only of interests but also of knowledge about the regime.

Whilst proceduralization of regulation has been an important theme in the European literature on regulatory governance, it is arguably in the United States that the most proceduralized examples of regulation have emerged. However, the form of proceduralization is legalized and arguably has few reflexive characteristics. The 1946 Administrative Procedure Act gives to interested parties a right to participate in rule making proceedings and the potential for judicial review of adverse decisions. For new institutional economics proceduralization is perhaps more about control than learning, permitting participants to engage in “fire alarm” oversight’ (Horn 1995: 49). The strength of such an approach from a learning perspective is that it enables regulators to collect knowledge and, to some extent test it with other participants within the process. Such an adversarial approach is never likely to get beyond external modes of learning, since it invites participants only to present their own position, frequently entrenched, rather than to engage in any significant form of dialogue over their positions (Freeman 1997). Where judicial review is available, but linked to less proceduralized decision making, it is possible that the threat of litigation may do more to encourage some degree of bargaining between interested parties and regulators, but still on a bilateral basis, thus inhibiting engagement with a wider range of actors (Hall, Scott et al. 2000: 178).

Elsewhere better regulation programmes within both the OECD and developing countries prioritise the development of more extensive consultative procedures over the making of regulatory policies (Kirkpatrick and Parker 2004). Such consultations are typically geared to getting better information about costs and benefits of proposed regulation, including the impacts on third parties, rather than engaging in a more extensive engagement over the nature of problems to be addressed and potential solutions (Brown and Scott 2009). Conceived of in terms of the broader literature on proceduralization such consultation mechanisms are a 'thin' form of proceduralization. Thin proceduralization accords with a liberal model of democracy under which the objective is to aggregate preferences and within which preferences are exogenous to the process and remain unchanged (Black 2000: 606-607). The learning envisaged is of the external rather than the reflexive kind.

A 'thick' concept of proceduralization entails a deliberative model such as that associated with the work of Habermas (Weithölter 1985; Habermas 1996; Black 2000: 607-8) (Prosser 1999: 209-213). and is more demanding in terms of a requirement to establish conditions for 'equal and uncoerced participation of all in a deliberation in which each recognises the other and puts forward arguments that the other is likely to accept' (Black 2000: 609). Applied to regulatory practice the thick version of proceduralization involves a variety of roles for regulators in mediating between participants in deliberative processes. These roles include translation between participants with different ways of expressing themselves (for example as between technical and lay understanding) and the mapping of discussions and seeking to resolve areas of difference (Black 2001:47-57).

As noted a rationale for re-casting regulation to support proceduralization and learning arises from a recognition of the limited capacity of governments and regulatory agencies to regulate because of the fragmented character of power within regulatory regimes. A radical implication of this insight is to conceive of non-state actors as having a central role in regulating with the possibility of state organisations engaging in processes of monitoring and indirect steering.

Cast as a question of institutional choice such an approach recognises that much of the capacity both to set and meet objectives lies with non-state actors.

If we give recognition to the central regulatory role of non-state actors then how are we to think of the ways they learn about what they should do? One approach is to suggest that if such actors have quasi-public power then they should be subjected to similar procedural requirements as those applying to public bodies (Kingsbury, Krisch et al. 2005). An alternative approach is to recognise the embeddedness of non-state actors, variously, in markets and communities, and to the extent possible rely on market and community mechanisms to promote appropriate solutions (Scott 2006). More likely it is not hierarchy, market or community, but each, together or separately which provides the reasons for non-state actors to develop their self-organising capacities in ways which seek to include others in their learning process in search of some version of the public interest which may align to their private interests. It is important to better understand the conditions under which such processes are stimulated and, where they are not, how processes of rebalancing or collibration through applying more law, more community pressure or more market discipline might correct this (Dunsire 1993) .

6. Monitoring and Feedback

A central function of an effective regulatory regime involves feedback mechanisms to detect deviations from the applicable norms. The effects of positive and negative feedback is a key insight of systems theory (Kooiman 2003: 200-202). Feedback has both thin and thick versions. Cast in conventional hierarchical terms feedback mechanisms typically involve public agencies gathering information through requiring reporting or the making of inspections and visits to those they oversee and, in some cases, receiving complaints. This is the thin version of feedback. Market mechanisms also provide a thin form of feedback, where consumers give voice to problems they have with products, and where league tables show how a regulator or a business is performing. Other examples include educational reforms which

seek to regulate schools through empowering parents by giving the right to choose schools and information about the performance of schools on which to make their choices. Such mechanisms encourage learning both among the consumer group and the supplier group as each becomes more sophisticated in their appreciation of appropriate levels of quality in educational provision. Such feedback does not typically involve a wider engagement over the appropriateness of the regime and its objectives.

Within a thicker and more reflexive conception of regulatory governance a primary role for feedback has less significance for day-to-day regulatory compliance and a greater role supporting the development of a regime through considering how effective it has been and whether its parameters require revision (Nonet and Selznick 2001 (orig publ 1978): 109) . As noted above it is a key feature of the experimental governance model of Sabel and Zeitlin that such feedback on performance should be linked to the revision of the regime. Such processes relate also to Argyris and Schon's conception of double-loop learning – with the potential to revise not only the regulatory settings, but also the 'underlying norms, policies and objectives' (Argyris and Schön 1978: 2-3).

The thicker conception of feedback, based on a central role for learning, is strongly articulated in Parker's model of meta-regulation, and in particular the concept of 'triple –loop learning' as an ideal both for self-regulatory governance and for the role of law within meta-regulatory regimes (Parker 2002: 298). For self-regulatory governance she envisages processes of evaluation and revision first within particular self-regulatory programmes, and secondly within the broader corporate management and thirdly through reporting to external regulators and stakeholders (Parker 2002: 278.). Adopting a similar perspective in the context of nursing home inspection Braithwaite *et al*/ observed that the self-taught individual inspector model in England inhibited learning when compared with the vibrant team exchanges that were observed between Australian and US inspection teams. Elaborating on triple-loop learning they suggest that the first loop is the feedback from an inspector to the nursing home, the mechanism through which 'the innovation

is diffused to all wings of the facility, all facilities in a nursing home chain or all provisions across one trust. The third loop is that the regulatory system diffuses the innovation to all nursing homes across the nation' (Braithwaite 2008: 168-9). Though modelled for a public regulatory regime the logic could equally apply to substantially self-regulatory regimes.

Some aspects of contemporary better regulation doctrine provide mechanisms which support a thicker role for feedback. So, for example, it has become routine to require reviews of new regulatory policies after their implementation and to link these to sunset clauses which bring about the end of a regime after a period of years unless it is renewed through a further process and positive decisions. Radaelli suggests that sunset clauses are a paradigmatic example of meta-regulation, in that they provide structural controls over the regulatory process (Radaelli 2007: 196). They also have a strong reflexive dimension. Official guidance in the UK on sunset clauses suggests they are not appropriate where a measure implements EU law (and cannot be revised significantly or withdrawn) or where the measure is likely to have a long term role, but may be appropriate where measures involve fast moving technologies or uncertain effects because of technological change, where they respond to particular crises or where there is a significant degree of opposition to a measure (Department for Business Industry and Skills nd). Broadly these are the conditions which would favour reflexive governance processes in regulation more generally, discussed above. Inevitably where such renewals do occur they are likely to involve revisions. It is an open question how reflexive the processes of review and revision will be in practice.

7. Changing Behaviour

A third central element to regulatory regimes is the mechanism for modifying behaviour that deviates from the norms of the system. Orthodox conceptions of this function focus on formal enforcement of regulatory rules. However, significant quantities of empirical research in a number of jurisdictions suggest that much regulatory enforcement has a more responsive quality to it, involving regulatory and regulatee in discussions over compliance and a

gradation of sanctions, formal and informal, available for application (Cranston 1979; Bardach and Kagan 1982; Grabosky and Braithwaite 1986; Hawkins 2002). From this research Ayres and Braithwaite combined theories of responsive law (Nonet and Selznick 2001 (orig publ 1978)) and game theory to construct an enforcement pyramid with informal sanctions of education and advice at the base, and more stringent sanction from warnings through to civil and criminal penalties and licence revocation at the top (Ayres and Braithwaite 1992) (Braithwaite 2008: 89). This widely observed and implemented model of enforcement permits agencies to engage businesses in learning as to how they may comply, but offers a reciprocal opportunity for agencies to learn why compliance may be problematic and, where enforcement officials have sufficient discretion, to allow some adaptation of the regime on the ground. The centrality of this pyramidal approach to enforcement to the model of 'responsive regulation' demonstrates the significance of implementation processes to contemporary regulatory theory.

How reflexive are such enforcement processes? Within the responsive regulation model the view of learning is essentially an external one, within which regulator and regulatee have positions on what they do and how they do it shaped by exogenous factors (Ayres and Braithwaite 1992). But the theory of responsive regulation has spawned a wider literature which uncovers examples of internal forms of reflexive governance. The literature on tax compliance provides examples of cognitive reframing addressing the problem of tax evasions such that tax compliance becomes 'the right thing to do' (Braithwaite 2009: 148). The central problem in such research is how to shift non-compliant tax payers into categories where they perceive themselves to be members of a tax-paying community, frown on evasion, with a willingness to report on the cheating of others (Braithwaite 2009: 148-9).

Tax enforcement may appropriately be a bilateral affair between tax authorities and citizens. In other instances actors other than agencies may have enforcement capacities of an informal or formal kind. The pyramidal approach to enforcement has been adapted to engage not only state agencies, but also businesses and NGOs in processes of enforcement

(Gunningham and Grabosky 1998: 397-404). Whilst the three sided pyramid has the virtue of engaging this wider groups of actors within the regulatory space, if the enforcement capacity of others is not coordinated, of course it risks disrupting relationships between regulator and regulatee, for example where an NGO uses enforcement capacities more stringently than the regulator, and in ways which may restrict learning by either enforcer or enforcee (Scott 2004: 159). A key challenge of reflexive regulation is to exploit the interdependence of key actors within regulated sectors so as to shift emphasis on the enforcement pyramid from control to learning. Arguably Braithwaite's reconceptualization of the three-sided pyramid as 'networked escalation' (Braithwaite 2008: 94-96), which incorporates the idea of capacity building – the strong helping the weak – offers the beginnings of a more reflexive approach to securing compliance.

8. Conclusion: Meta-Regulation and Reflexive Governance

The recognition of the limited power of state regulatory authorities, and, relatedly of the interdependence of the variety of actors who populate regulatory spaces presents profound challenges both to the theory and practice of regulation. Attempts to address asymmetries of information and rigid approaches to enforcement yield some progress in enhancing regulatory capacities. Whilst official programmes of better regulation give considerable emphasis to alternatives to classical regulation, and to the development of stronger processes of consultation and review, it has proved difficult to shift official regulatory practices away from a fixation with rules and control.

The more radical implications of interdependence are recognised within theoretical strands which attempt to make more of the capacity of businesses and NGOs both for self-regulation and regulation of others, alongside governments and agencies. Such an approach gives to government a role both in observing and facilitating more reflexive processes in the development and implementation of regimes. There are documented examples which correspond fairly well to deeper reflexive processes which might be expected

both to advance and perhaps change the understanding of both problems and solutions for participants and, because of this, command greater support. Such a role for government and agencies is well captured by the concept of meta-regulation – the steering of self-regulatory capacity – only if we conceive of meta-regulation as requiring an engagement between some approximation of all affected participants.

The implications for regulation are radical, if governments are no longer to determine objectives, but to delegate them to decision making within participatory regimes which they oversee. Regulation– ‘[is] a paradigmatic function of responsive law’ (Nonet and Selznick 2001 (orig publ 1978): 108) and such responsive law ‘may require a relaxation of central authority in the interest of more effective cooperative action’ (Nonet and Selznick 2001 (orig publ 1978): 100). The adoption of a more responsive form of regulation is a high risk strategy, since the necessary openness creates a degree of political contestation around the purposes of law ‘generating forces that help correct and change legal institutions but threaten to undermine institutional integrity’ (Nonet and Selznick 2001 (orig publ 1978): 78).

Furthermore government oversight need not be the only steering mechanism with meta-regulatory effects. Many examples of broadly based private regulation appear to have been stimulated either by market mechanisms or concerns about participation in communities, or both (as with Fair Trade and forestry regimes (Taylor 2005) (Cashore 2002)) with limited or no participation of government. Indeed, the ‘social licence to operate’ discussed above not only constitutes a social source of steering over the behaviour of firms, but also over the behaviour of governments in setting and enforcing regulatory norms (Gunningham and Sinclair 2002: 51). If meta-regulation is a primary concept for giving legitimacy to such diffused regulation then it must admit the possibility of market or community-based steering and not just regulation of self-regulation by government (Scott 2008: 175-178). There is considerable promise in the capacity of meta-regulation effectively to link self-regulatory capacity in a way that moves us beyond a preoccupation with control so as to

observe and support the development of learning processes in the shadow of state, market and community.

References

- Abbott, K. and D. Snidal (2009). *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*. The Politics of Global Regulation. W. Mattli and N. Woods. Princeton, Princeton University Press.
- Argyris, C. and D. Schön (1978). Organisational Learning: A Theory of Action Perspective. Reading, Mass, Addison-Wesley.
- Armstrong, B., B. Eberlein, et al. (2007). *The Electricity Reforms Market and Governance Models*. Louvain-la-Neuve.
- Ayres, I. and J. Braithwaite (1992). Responsive Regulation: Transcending the Deregulation Debate. Oxford, Oxford University Press.
- Baggott, R. and L. Harrison (1986). "The Politics of Self Regulation: The Case For Advertising Control.." Policy and Politics **14**.(#2.): 145-159.
- Baldwin, R. and J. Black (2008). "Really Responsive Regulation." Modern Law Review **71**: 59-94.
- Bardach, E. and R. Kagan (1982). Going By the Book: The Problem of Regulatory Unreasonableness. Philadelphia, Temple University Press.
- Bevan, G. and C. Hood (2006). "What's Measured is What Matters: Targets and Gaming in Healthcare in England." Public Administration **84**: 517-538.
- Black, J. (1997). "New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making." Law and Policy **19**(1): 59-93.
- Black, J. (2000). "Proceduralizing Regulation: Part I." Oxford Journal of Legal Studies **20**(4): 597-614.
- Black, J. (2001). "Proceduralizing Regulation: Part II." Oxford Journal of Legal Studies **21**(1): 33-58.
- Black, J. (2002). *Critical Reflections on Regulation*. CARR Discussion Papers. London.
- Black, J. (2003). "Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation." Public Law **2003**: 63-91.
- Braithwaite, J. (2008). Regulatory Capitalism: How it Works, Ideas for Making it Work Better. Cheltenham, Edward Elgar.
- Braithwaite, V. (2009). Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy. Cheltenham, Edward Elgar.
- Bratspies, R. (2009). "Regulatory Trust." Arizona Law Review **51**: 575-631.
- Brown, C. and C. Scott (2009). *Reflexive Governance in Better Regulation: Evidence from Three Countries*. Louvain-la-Neuve, Reflexive Governance Programme.
- Burris, S., P. Drahos, et al. (2005). "Nodal Governance." Australian Journal of Legal Philosophy **30**(30-58).
- Calliess, G. P. and P. Zumbansen (2010). Rough Consensus & Running Code: A Theory of Transnational Private Law. Oxford, Hart Publishing.
- Cashore, B. (2002). "Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority." Governance **15**: 503-529.
- Cranston, R. (1979). Regulating Business: Law and Consumer Agencies. London, Macmillan.
- Department for Business Industry and Skills (nd). *Impact Assessment Toolkit*. London, Department for Business, Industry and Skills.
- Department of Commerce and Treasury (1995). *Regulation of Access to Vertically-Integrated Natural Monopolies*. Wellington, New Zealand Government.

Dorf, M. and C. Sabel (1998). "A Constitution of Democratic Experimentalism." Columbia Law Review **98**: 267-473.

Dunsire, A. (1993). Manipulating Tensions: Collibration as an Alternative Mode of Government Intervention. Cologne.

Francesco, F. and C. Radaelli (2007). Indicators of Regulatory Quality. Regulatory Impact Assessment: Towards Better Regulation? C. Kirkpatrick and D. Parker. Cheltenham, Edward Elgar.

Freeman, J. (1997). "Collaborative Governance in the Administrative State." UCLA Law Review **45**: 1-98.

Gilardi, F. (2005). "The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe." The Annals of the American Academy of Political and Social Science **598**: 84-101.

Goffman, E. (1974). Frame Analysis: An essay on the organization of experience. Cambridge, Harvard University Press.

Grabosky, P. and J. Braithwaite (1986). Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies. Melbourne, Oxford University Press.

Gunningham, N. (2009). Regulatory Reform and Reflexive Regulation: Beyond Command and Control. Louvain-la-Neuve, Centre for Philosophy of Law.

Gunningham, N. and P. Grabosky (1998). Smart Regulation: Designing Environmental Policy. Oxford, Oxford University Press.

Gunningham, N. and D. Sinclair (1999). "Regulatory Pluralism: Designing Policy Mixes for Environmental Protection." Law and Policy **21**: 49-76.

Gunningham, N. and D. Sinclair (2002). Leaders and Laggards: Next-Generation Environmental Regulation. Sheffield, Greenleaf Publishing.

Habermas, J. (1988 (orig publ in English 1976)). Legitimation Crisis. Oxford, Polity Press.

Habermas, J. (1996). Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Cambridge, Polity.

Hall, C., C. Scott, et al. (2000). Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process. London, Routledge.

Hallström, K. T. (2004). Organizing International Standardization: ISO and IASC in Quest of Authority. Cheltenham, Edward Elgar.

Hancher, L. and M. Moran, Eds. (1989). Capitalism, Culture and Regulation. Oxford, Oxford University Press.

Hardin, G. (1968). "The Tragedy of the Commons." Science **162**(3859): 1243-1248.

Hawkins, K. (2002). Law as Last Resort: Prosecution Decision Making in a Regulatory Agency. Oxford, Oxford University Press.

HM Treasury (2009). Reforming Financial Markets. London, HM Treasury.

Hodson, D. and I. Maher (2001). "The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination." Journal of Common Market Studies **39**: 719-745.

Hood, C. (1998). The Art of the State. Oxford, Oxford University Press.

Hood, C., H. Rothstein, et al. (2001). The Government of Risk. Oxford, Oxford University Press.

Horn, M. (1995). The Political Economy of Public Administration. Cambridge, Cambridge University Press.

Kickert, W. (1995). "Steering at a Distance: A New Paradigm of Public Governance in Dutch Higher Education." Governance **8**(1): 135-157.

Kingsbury, B., N. Krisch, et al. (2005). "The Emergence of Global Administrative Law." Law & Contemporary Problems **68**: 15-61.

Kirkpatrick, C. and D. Parker (2004). "Regulatory Impact Assessment and Regulatory Governance in Developing Countries." Public Administration and Development **24**: 333-344.

Knill, C. and A. Lenschow (2004). Modes of Social Regulation in the Governance of Europe. The Politics of Regulation. J. Jordana and D. Levi-Faur. Cheltenham, Edward Elgar.

Kolko, G. (1965). Railroads and Regulation. Princeton, Princeton University Press.

Kooiman, J. (2003). Governing as Governance. London, Sage.

Lenoble, J. and M. Maesschalck (2007). Synthesis Report 2 - Reflexive Governance: Some Clarifications and An Extension and Deepening of the Fourt (Genetic) Approach. Louvain-la-Neuve.

Lenoble, J. and M. Maesschalck (2010). Renewing the Theory of Public Interest: The Quest for a Reflexive and a Learning-Based Approach to Governance. **. J. Lenoble and M. Maesschalck. **, **.

Lessig, L. (1999). Code: and Other Laws of Cyberspace. New York, Basic Books.

Lessig, L. (2006). Code 2.0. New York, Basic Books.

Levi-Faur, D. (2005). "The Global Diffusion of Regulatory Capitalism." The Annals of the American Academy of Political and Social Science **598**: 12-32.

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

Majone, G. (1994). "The Rise of the Regulatory State in Europe." West European Politics **17**: 77-101.

Makkai, T. and J. Braithwaite (1992). "In and Out of the Revolving Door: Making Sense of Regulatory Capture." Journal of Public Policy **12**: 61-78.

Mendrinou, M. (1996). "Non-Compliance and the Commission's Role in Integration." Journal of European Public Policy **3**: 1-22.

Murray, A. and C. Scott (2002). "Controlling the New Media: Hybrid Responses to New Forms of Power." Modern Law Review **65**: 491-516.

Nonet, P. and P. Selznick (2001 (orig publ 1978)). Law & Society in Transition. New Brunswick, Transaction Publishers.

Ogus, A. (1995). "Re-Thinking Self-Regulation." Oxford Journal of Legal Studies **15**: 97-108.

Orts, E. (1995). "Reflexive Environmental Law." Nortwestern University Law Review **89**: 1227-1340.

Ostrom, E. (1990). Governing the Commons: The Evolution of Institutions for Collective Action. Cambridge, Cambridge University Press.

Parker, C. (2002). The Open Corporation: Self-Regulation and Democracy. Melbourne, Cambridge University Press.

Parker, C. and J. Braithwaite (2003). Regulation. The Oxford Handbook of Legal Studies. P. Cane and M. Tushnet. Oxford, Oxford University Press.

Peltzman, S. (1976). "Toward a More General Theory of Regulation." Journal of Law and Economics **19**: 211-40.

Perez, O. (2007). The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance. Responsible Business: Self-Governance in Transnational Economic Transactions. O. Dilling, M. Herberg and G. Winter. Oxford, Hart Publishing.

Prosser, T. (1999). "Theorising Utility Regulation." Modern Law Review **62**: 196-217.

Prosser, T., H. Adlard, et al. (2010). Neo-Institutionalist and Collaborative-Relational Approaches to Governance in Services of General Interest: The Case of Energy in the UK and Germany in ***. J. Lenoble and M. Maesschalck. Oxford, Hart Publishing.

Radaelli, C. (2004). "The Puzzle of Regulatory Competition." Journal of Public Policy **24**: 1-23.

Radaelli, C. (2007). "Whither Better Regulation for the Lisbon Agenda." Journal of European Public Policy **14**: 190-207.

Richardson, B. (2002). Environmental Regulation Through Financial Organisation: Comparative Perspectives on the Industrialised Nations. The Hague, Kluwer Law International.

Sabel, C. F. and J. Zeitlin (2008). "Learning from Difference: The New Architecture of Experimentalist Governance in the EU." European Law Journal **14**: 271-327.

Schäfer, A. (2006). "A New Form of Governance: Comparing the Open Method of Coordination to Multilateral Surveillance by the IMF and the OECD." Journal of European Public Policy **13**(1): 70-88.

Scott, C. (2004). Regulation in Age of Governance: The Rise of the Post-Regulatory State. The Politics of Regulation. J. Jordana and D. Levi-Faur. Cheltenham, Edward Elgar: 145-174.

Scott, C. (2006). Privatization and Regulatory Regimes. Oxford Handbook of Public Policy. M. Moran, M. Rein and R. E. Goodin. Oxford, Oxford University Press.

Scott, C. (2006). Spontaneous Accountability. Public Accountability: Designs, Dilemmas and Experiences. M. W. Dowdle. Cambridge, Cambridge University Press.

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

Selznick, P. (1985). Focusing Organizational Research on Regulation. Regulatory Policy and the Social Sciences. R. Noll. Berkeley, University of California Press.

Shavell, S. (1993). "The Optimal Structure of Law Enforcement." Journal of Law & Economics **36**: 255-287.

Shearing, C. (1993). A Constitutive Conception of Regulation. Business Regulation in Australia's Future. J. Braithwaite and P. Grabosky. Canberra, Australian Institute of Criminology.

Shepsle, K. (1992). "Bureaucratic Drift, Coalitional Drift, and Time Consistency " Journal of Law, Economics, and Organization **8**: 111-118.

Taylor, P. L. (2005). "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change." World Development **33**: 129-147.

Teubner, G. (1998 (orig. pub 1987)). Juridification: Concepts, Aspects, Limits, Solutions. Socio-Legal Reader on Regulation. R. Baldwin, C. Scott and C. Hood. Oxford, Oxford University Press.

Tiebout, C. M. (1956). "A Pure Theory of Local Expenditure." Journal of Political Economy **64**: 416-424.

Trebilcock, M. J. and J. R. S. Prichard (1983). Crown Corporations: The Calculus of Instrument Choice. Crown Corporations in Canada. J. R. S. Prichard. Toronto, Butterworths.

Trubek, D. and L. Trubek (2005). "Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination " European Law Journal **11**: 343-364.

- Vincent-Jones, P. (2010). *From Collaborative to Genetic Governance: The Example of Healthcare Services in England*. ***. J. Lenoble and M. Maesschalck. Oxford, Hart Publishing.
- Voss, J.-P., D. Bauknecht, et al., Eds. (2006). Reflexive governance for sustainable development Cheltenham, Elgar.
- Weithölter, R. (1985). Proceduralization of the Category of Law. Critical Legal Thought: An American-German Debate. C. Joerges and D. Trubek. Baden-Baden, Nomos.
- Williamson, O. E. (1996). The Mechanism of Governance. Oxford, Oxford University Press.
- Zumbansen, P. (2006). "Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law." European Law Journal **12**: 503-533.
- Zumbansen, P. (2008). "*Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*." American Journal of Comparative Law **58**: 769-805.
- Zumbansen, P. (2009). *Post-Regulatory Law: Chronicle of a Career Foretold*. Faculty Seminar. Montreal, McGill University.

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