

Regulatory Capitalism, Accountability and Democracy

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1. Introduction

Discussions of accountability in contemporary public life are commonly tied to notions of public power and democratic governance. A core narrative might suggest that public power is attributed to elected governments, and legitimated, periodically, through elections. Within such a democratic system the accountability mechanism *par excellence* is the election in which politicians can be removed from or given power. From such a core narrative a number of concerns flow. First, if we believe that elected governments find favour because of their election promises then we might expect parliaments to hold governments to account for keeping their promises. Second, notwithstanding the fact of elections, we might hold that certain meta-norms, often enshrined in constitutional documents, are not capable of being changed within ordinary political and legislative processes, and seek to ensure that governments are held to account for complying with such norms, both through judicial review and other review mechanisms, for example through parliamentary scrutiny and bureaucratic oversight. Third, if the core source of legitimate public power is through democratic processes of election, we should be concerned that when public power is delegated by the political principals, for example through legislation, then the agents should be monitored and held to account for keeping within the legitimate scope of delegation.

The invitation to contribute to this collection enables me to re-visit the themes of an article I published in 2000 (Scott, 2000) in light of the growth in the literature on accountability and regulation, changing practices of regulatory governance, and shifting concerns - and in particular an interest in better understanding the democratic credentials of regulatory accountability. A central focus of that 2000 article, 'Accountability in the Regulatory State' was on the problem of delegation and how mechanisms of oversight had adapted to extensive delegation, in particular to regulatory agencies. I noted that in the UK the traditional mechanisms of 'upwards accountability' - parliament and courts - were increasingly being supplemented by 'horizontal accountability' to agencies such as the National Audit Office (the Supreme Audit Institution for central government in England and Wales) and the Parliamentary Ombudsman (who handles grievances about central government departments and agencies generally) and even 'downwards accountability' to users through market-like mechanisms which provided both the possibility of compensation but also exit to another provider in the event that public services were poorly delivered (Scott, 2000: 42).

But already, at that time, I sensed there was something inadequate about tying accountability to delegation and noted the emergence of relationships of interdependence, often characterised by overlap, redundancy and network characteristics rather than linear properties (Scott, 2000: 49-55). Fourteen years on there is an increased challenge to orthodox narratives on accountability of regulation, tied as they are to traditional ideas of representative democracy, although those narratives are much more developed. The growth in regulation extends beyond the establishment in many jurisdictions of regulatory agencies to recognise and embrace the growth of private and supranational regulatory practices, displacing the concept of the regulatory state with 'regulatory capitalism' (Braithwaite 2008; Levi-Faur 2005). This trend creates a further challenge to democratic accounts of regulatory accountability because private and supranational regulatory actors are typically located further from elected politicians and, equally significantly, do not generally fall under

the requirements of traditional accountability regimes for public sector actors to whom power has been delegated.

So, contemporary regulatory governance, in this more diffuse form and characterised as regulatory capitalism, embraces public and private actors, and a wide range of mechanisms ranging from command and control through community and market modes, and even nudges and other design techniques. In this chapter I argue that while these trends may be perceived as a problem for democratic accountability, as traditionally conceived, they also have the potential to make significant contributions to enhancing democratic governance. This argument is dependent on supplementing representative models of democracy with other ways of conceiving of democratic governance, which go beyond the representative model, and offer ways to reconnect constituencies affected by regulation both to regulatees and to those exercising regulatory power.

I argue that many actors and mechanisms linked to regulation are capable of supplementing traditional modes of public accountability: by making regulation more transparent (for example by publishing data and/or comparing performance or outcomes); by increasing inclusiveness and opportunities for participation in some or all aspects of regulation – eg securing a wider range of views about the appropriate standards or rules so as to learn more both about problems and potential solutions, engaging those affected by a regime in monitoring for non-compliance, empowering a wider range of actors to enforce the standards in some manner. Such an approach invites us to evaluate regulatory regimes not simply by reference to their technical capacity, but also by reference to the extent to which they enhance or reduce representativeness in their processes. Against these criteria the setting and enforcement of norms within bilateral contracts, witnessed only by the parties, even where they have significant third party effects, tends to reduce representativeness and, against these criteria, offers a poor alternative to traditional public regulation. Conversely, a regime in which industry and civil society actors are able to secure participation of a wide range of actors affected by a regime in setting, reviewing, monitoring and perhaps even enforcing, may be viewed very positively. The democratic challenge of regulatory accountability can therefore be defined as finding combinations of actors and processes that tend to be enhancing of representativeness, seeking to increase the participation in regimes which are weak against the criteria, and perhaps acknowledging the needs to sustain traditional public regulatory regimes where, against these criteria, their processes offer a better alternative.

2. The Regulatory State and Regulatory Capitalism

The evolution of regulatory practices combined with changes in the way we think about regulation have each contributed to a substantial reconfiguration of the regulatory landscape. These changes are captured in the idea that regulatory governance is concerned not only with the regulatory modes and functions of the state, but rather with capitalist societies more generally (Levi-Faur, 2013). Thus we think of regulation now as not simply something done by the state to businesses (often through independent agencies) but also as engaging businesses and civil society actors in a variety of ways. Within the model of regulatory capitalism regulation is no longer conceived of as a mode of governing which is a monopoly of the state, but rather as a diffuse range of practices occurring typically through network arrangements (Braithwaite, 2008). Regulation is conceived of as involving the setting of norms, together with mechanisms of monitoring or feedback and for correcting behaviour which deviates from the norms (Hood et al., 2001, Black, 2002).

Norms may be set through legislation (primary or secondary) but also through contracts and, in many cases, are set through non-binding instruments such as soft law, codes and technical standards, frequently issued by intergovernmental and transnational private regulators (Abbott and Snidal, 2009). Instruments which are non-binding on issue may be made mandatory through adoption by legislation or through incorporation in contracts (Scott et al., 2011) .

Feedback is traditionally conceived of as agency monitoring, supported by legislative powers to inspect or to collect information. Many public agencies collect feedback through complaints processes, for example from competitors and/or consumers. Within market settings contracting parties routinely monitor the performance of other parties, and consumers and NGOs may also engage in either ad hoc or systematic monitoring (O'Rourke, 2003).

Behavioural correction is traditionally concerned with public agencies enforcing public rules (May and Burby, 1998) , but extends also to contracting parties enforcing their contracts, including collective contracts such as self-regulatory regimes (Verbruggen, 2013), third party enforcement (Kraakman, 1986) and a range of other behaviours exploiting market and community participation both to punish those who breach norms, but also to reward those behave well (Scott, 2010a, Braithwaite, 2002). These processes may involve highly informal applications of sanctions such as gossip, self-help remedies such as terminating or not renewing contracts, in some cases directly applied penalties provided for in legislation or in contracts, dispute resolution in both private (eg mediation and arbitration) and public fora (courts and tribunals). The availability of the courts as both appeal and enforcement mechanisms does, of course, constitute one form of accountability for regulators.

Thinking about public regulators, where they are national public agencies, they are typically designed in such a fashion that they have a degree of independence from elected politicians, accompanied by mechanisms of oversight or accountability (Maggetti, 2012, Gilardi, 2008) . The value attributed to independence derives from arguments that regulators should be oriented towards expert decision making, insulated from day-to-day political concerns (Thatcher, 2002) and that if decision making is more political in character then it should be retained by elected politicians rather than delegated (Prosser, 1997). Independent regulation is, of course, supposed to be a solution to problem of politicians favouring powerful industrial interests. The rise of the regulatory state has been concerned with insulating regulatory decision making from both self-interested structures of self-regulation (Moran, 2003), and self-interested structures of politics – across financial, but also network, food, pharmaceuticals sectors and so on (Levi-Faur, 2005). Clearly the more extensive the delegation the greater the problem for democratic governance.

Turning to private regulation firms frequently oversee their own activities(for example through developing and implementing corporate social responsibility (CSR) (Vogel, 2005) (Parker, 2002, Parker, 2007) , oversee others (for example through supply chain contracts providing for compliance and certification in respect of specified standards) (Blair et al., 2007), regulate themselves through

associations (such as self-regulation) (Black, 1996) , and in combination with others such as NGOs establishing private regulatory foundations (such as the Forest Stewardship Council) (Meidinger, 2003, Black, 1996), and engaging NGOs, both nationally and internationally, in addition to intergovernmental bodies such as the International Labour Organisation and the well developed institutions of the European Union. The idea of government, business and civil society organisations interacting with each other to varying degrees in different modes of regulation is captured by the idea of ‘the governance triangle’ (Abbott and Snidal, 2009).

The growth in regulatory agencies can be explained in a number of ways, not simply as a functional response to policy needs, but also as mimeticism driven by international obligations (such as membership of the EU), horizontal policy learning (for example within the OECD or APEC) and as bottom up responses to similar policy problems (Gilardi, 2005, Levi-Faur, 2005). With private regulators explanations are somewhat different. In some instances their establishment provides a response to perceived weaknesses in the market, for example seeking to standardize terms or products to reduce transactional and other costs. In other instances private regulation is concerned with enhancing reputation so as to strengthen market position. A third set of cases are driven by public actors encouraging or adopting private regulatory responses to address public policy problems. By definition private regulation is likely to have a high degree of insulation from government, and is typically valued precisely because it has different structures of governance and decision making from public actors (Scott et al., 2011) . Supranational regulatory regimes largely have their origins in concerns to address issues which states on their own cannot address, frequently because the effects of standards or behaviour cross boundaries. EU governance originated in concerns to reduce the adverse effects on trade of national regulatory rules, and so again, we would expect its regulation to be somewhat insulated from direct control of national electoral politics, even if some forms of democratic accountability emerge at the supranational level (which has happened in the EU, but not so much in the UN or other inter-governmental regimes).

Given the diverse forms of institutions and of practice there is clearly a significant accountability challenge associated with regulatory capitalism. I address this in the next section considering traditional accountability and how regulatory capitalism itself has within the seeds of a wider range of new modes of accountability which, as I argue in the following section, may be drawn within contemporary theories concerned with post-democratic governance.

3. Traditions of Regulatory Accountability

Changes in the ways both of thinking about and practising regulation create a significant accountability challenge. If we think of the initial challenge of the regulatory state being concerned with providing reassurance that public power delegated to public actors such as government departments and regulatory agencies is exercised properly (legally, consistent with mandates, with

respect for public finances and so on), the emergence of regulatory capitalism, with a wider range of actors and mechanisms pushes a traditional public accountability to and beyond its limits. We cannot pretend that all power exercised by inter-governmental institutions, by firms or by NGOs is delegated by elected governments. Even if we could, we would find it very difficult to assert traditional public accountability mechanisms over such widely distributed and diffuse actors (May, 2007).

The fragmented character of contemporary regulatory governance requires some further attention to concepts of accountability (May, 2007) (Lodge and Stirton, 2010). As Bovens has noted, accountability as an icon concept has received such diverse and intensive attention as to have become a dustbin idea requiring some work to salvage it as a useful analytical and evaluative concept (Bovens, 2007: 449). The editors to this volume note that 'the concept of accountability is rather elusive' (Bianculli et al., 2014). As part of the salvage operation Bovens offers what he refers to as the narrow definition of accountability which, with the editors of this volume, I propose to adopt:

'Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.' (Bovens, 2007: 450).

Working with this narrow definition of accountability, a key question is to ask what is the trigger or rationale for seeking mechanisms to hold actors to account. Arguably it is the fact of delegation which makes democratic accountability important for regulators. If delegation is the trigger then we might expect only those exercising delegated power to be of concern and in respect of the powers delegated to them. Such concerns with independent regulators, for example, may be addressed by sharpening 'intra-executive' scrutiny, but also parliamentary mechanisms of accountability (Black, 2013: 367-382). Such an analysis might substantially leave private actors out of any analysis. Another view suggests that much economic capacity can also be regarded as derived from the state (in some modern version of concession theory which once underpinned claims that companies were the product of state sponsorship or established only with state permission (Bratton, 1989: 1475) cf (Bamberger, 2006)). Thus there might be consensus to the extent that it is the possession of power which requires some form of accountability, but it may be contested whether it is the delegation of public power or some wider conception of power as deriving from state capacity which requires making of account. In his discussion of evaluative bases for accountability generally Bovens identifies a third rationale, beyond democratic control and addressing power, characterised as enhancing 'the learning capacity and effectiveness of public administration' (Bovens, 1998: 462). Only the first of these rationales suggests limiting the accountability quest to public bodies, and the latter two support the project of this volume in conceiving of accountability as being owed to citizens generally, whatever the precise character of power or detailed mechanisms of accountability. Further, whilst favouring the narrow definition of accountability generally, I remain attracted to the idea that relationships other than retrospective duties to account, and in particular the day to day interdependences between actors who in some sense share power, may serve as functional equivalents to accountability which may be more effective than the more traditional relationships (Scott, 2000). Thus I adopt the perspective of the editors to this volume that we should be alive to the potential of accountability relationships which may be voluntary or mandatory and informal as well as formal (Bianculli et al., 2014).

As noted earlier I have elsewhere argued that we can conceive of accountability upwards (to courts, legislature and ministers), horizontal (notably to other agencies such as ombudsman, supreme audit institutions and information regulators) and downwards (notably to regulatees and to intended beneficiaries of a regime) (Scott, 2000). As the editors of this volume note it is with the horizontal and especially the downwards mechanisms that mandatory and formal properties of accountability relationships are liable to be loosest (Bianculli et al., 2014). Accountability mechanisms which are compliant with Bovens' definition extend beyond traditional parliamentary, judicial and administrative mechanisms (the last including ombudsman, audit and related mechanisms which, as Bovens notes, frequently lack direct hierarchical authority, but can inform parliamentary or ministerial actions at one remove or 'diagonally' (Bovens, 1998: 460)) and extend also to various mechanisms of peer review and engagement and what Bovens terms 'social accountability: Interest Groups, Charities and other Stakeholders' (Bovens, 1998: 457). Social accountability mechanisms are supplemented by market-type mechanisms in which, for example, users are able to hold actors to account through such processes as feedback, evaluation, and generation of league tables (Mashaw, 2005)

The editors to this volume, following (Bovens et al., 2008), extend their analysis, linking the upwards mode of accountability to democratic ideals of holding government to its mandates, the horizontal mode to constitutional ideals of ensuring that government acts in compliance with key financial and administrative norms, whilst downwards accountability engages governments with feedback and learning. Such an analysis is premised on representative models of democracy. The horizontal and the upwards modes tends to overlap in their concerns with addressing delegated power especially where the constitutional and the democratic issues are part of the same analysis, since in the horizontal sphere the vindication of democratic values require funds to be spent for the purposes for which they are voted, on the one hand, while aspects of upward accountability, notably judicial review, are concerned with constitutional or meta-values such as legality and compliance with human rights rules, which are not part of the immediate democratic mandate of particular governments. Following the editors, the joining up of these different directions into a model of 360 degree accountability (Behn, 2001, House of Lords Select Committee on the Constitution, 2004) enables us to think of a continuum in which different purposes of accountability may be fulfilled in whichever direction accountability is owed or acknowledged.

In this chapter my interest in the linkage between accountability and democracy lies in exploring how the more diverse downwards accountability mechanisms may support a richer and post-representative form of democratic engagement. The focus on learning is significant, but equally important is the interest in modes of oversight and accountability which are democratic in the sense that they foster participation of affected actors. Much private regulation is not well tied to representative government through accountability mechanisms of the traditional kind. Market forms of downward accountability may be more significant. Similarly for regulators constituted through particular or general communities, including self-regulatory and NGO activities, we might expect horizontal or peer engagement mechanisms of accountability such as surveillance and benchmarking to have greater weight (Scott, 2006). The challenge for accountability is simultaneously to address technical weaknesses, such as the catastrophic economic consequences of the global financial crisis, while at the same time providing a narrative which bolsters the fragile democratic legitimacy of regulation. If this is a significant worry for public regulation, both problems – technical credibility

and democratic legitimacy - are even more significant for private regulators, especially where there is a strong transnational dimension.

4. New Accountability and Democracy

One way to address the accountability challenge of regulatory capitalism - fragmented public, private and supranational regulatory governance - is to examine the variety of modes of what we might call new accountability, that is of a kind that goes beyond traditional mechanisms. It is important here to consider how we should evaluate such modes. If we calibrate them by reference to the extent to which they are tied effectively to representative democratic institutions such as parliaments and related bureaucratic structures, we are likely to find many of them wanting. However, their proliferation and significance, together with the challenge of private and supranational regulation persuades me that we should seek a wider democratic narrative in which to locate them, based in pluralist approaches (Krisch, 2010: 264ff), with a focus on the ways in which governance processes which are more inclusive may also enhance accountability (Goodin, 2008: 33-34). For this wider narrative I deploy recent analysis of post-representative democracy, and in particular John Keane's concept of monitory democracy (Keane, 2009) {Corkin, 2013 #1915: 654-5}.

Keane's starting point in his history of democratic governance is the argument whilst the establishment of representative modes of democratic government have been very important to the spread of democracy around the world in the 20th century, there is something insufficient about representative democracy. This insufficiency is both descriptive and normative. Descriptively, representative democracy with its related bureaucratization of public action (Dowdle, 2006: 7) increasingly fails to capture the ways in which people, the demos, participate in steering and holding to account those involved with governance. Normatively, there are weaknesses in the dependence on the ballot box and associated apparatus through which elected governments are held to their mandates. In his monumental book, *The Life and Death of Democracy* (Keane, 2009), there is a focus on the emergence of new modes for participating in governance that provide a basis for developing a post-representative theory of democracy in which the potential of a wide variety of opportunities for a more direct form of governance is evaluated. The analysis is not wholly optimistic and certainly does not suggest we have reached a post-representative democratic nirvana. Similarly Peter May's detailed analysis of accountability for performance in regimes delegated to private actors suggests that we could be confident in these arrangements only with an expanded accountability toolkit (May, 2007). Such analyses are suggestive of the possibility that governance may be enriched through post-representative mechanisms. I examine this potential from the perspective of democratic accountability of regulation.

Keane refers to wide range of trends towards new structures for monitoring and controlling power as 'monitory democracy'. It offers, in essence, a new theorization of diffuse accountability structures. The innovations highlighted by Keane date back a considerable period. Working from his list, and supplementing it, they include amongst public sector bodies integrity commissions, a more active judiciary, and workplace tribunals. I would add the expansion of public sector audit to value for money and performance (Lonsdale et al., 2011), the development of new grievance handling machinery such as ombudsman schemes

(Birkinshaw, 1994), the establishment of consumer advocacy bodies (Black, 2013: 382-387) and the use of disclosure instruments in public policy (Graham, 2002) and, relatedly, the development of ‘governance by indicators’, which actually cross public and private governance domains (Davis et al., 2012)

I would add to the apparatus of monitory democracy regulatory agencies themselves. Regulatory agencies create sources of knowledge and authority that are partially independent of elected government and have capacity to promote transparency both of governmental and industry activity, and to challenge and hold elected governments to account in key areas of decision making sometimes through serial powers (in which either can veto) or sometimes parallel powers (in which either can act without the other) (Gilardi, 2008, Maggetti, 2012). Such an analysis addresses a potential fault line in democratic accountability in the observation that much regulatory doctrine is concerned with insulating regulators from the political sphere of elected government. This difficulty can be addressed by suggesting that independent regulators, under such a doctrine, are part of the apparatus of holding government to account in respect of regulatory policy domains (Scott, 2014). The significance of regulatory regimes for such accountability has been enhanced by the proliferation of mechanisms including the establishment of industry and consumer panels, dedicated user councils, standing stakeholder fora, and the extension of financial oversight into ‘regulatory audit’ (Humpherson, 2010).

The mechanisms of monitory democracy are not restricted to state activity, and there is much significant innovation amongst inter-governmental and private actors. Inter-governmental forms include the organisation of forums, summits, the open method of coordination (OMC), peer review and surveillance (eg OECD, APEC). I would include the ILO in respect of labour rights.

Equally significant is the capacity of non-state actors to use the apparatus of the state, for example through public interest litigation. Then there is an array of spontaneous private institutions and actions which include the development of think tanks, engagement in vigils, blogging, and other media scrutiny. Scrutiny by the media is amongst the longest established private modes of accountability and its capacity to report actions and to contest orthodoxy is counted amongst the core aspects of democratic governance (Maggetti, 2012: 142). More recent innovations include the idea of an investors’ forum to offer a more systematic oversight of the activities of companies (Kay, 2012), many of which exert regulatory power over themselves and others, as well as mechanisms for more democratic internal governance, with capacity to support learning both about appropriate means and ends (Parker, 2002, Bamberger, 2006). Private transnational forms include practices of monitoring human rights compliance by organisations such as Amnesty International. Amongst well established transnational private regulators, such as the major sustainability actors the Forest Stewardship Council and the Marine Stewardship Council, we have seen the emergence of the ISEAL Alliance as meta-regulator setting down standards for credibility and impact of regulation and requiring regulators to draw up performance indicators and to report on these matters and have their reports audited (Loconto and Foulleux, forthcoming). Professional and self-regulatory bodies such as those for the legal and accounting professions and also the advertising industry, have increasingly engaged majority lay participation in at least some aspects of their key decision making (for example complaint handling

in advertising). Such bodies have also committed to greater transparency, permitting the emergence of NGOs concerned with watching both public and private regulatory activities using blogs, and traditional and social media to disseminate their evaluations. The Global Competition Review, for example, publishes annual performance league tables of national competition authorities (<http://globalcompetitionreview.com/>, last visited 2nd February 2014). Other kinds of reports and scorecards are routinely deployed by both public and private actors.

Trends towards network modes of governance also have strong implications for accountability of regulators and for governance more generally (Slaughter, 2001, Slaughter, 2004, Goodin, 2008). It is clear from Keane's modelling of monitory democracy that he sees it as creating networked or nodal forms of accountability (Keane, 2009: 697). Both public and private regulators increasingly subject themselves to the discipline of participating in networks, sometimes for policy learning, and other times to facilitate operational cooperation (Levi-Faur, 2011). In each case the development of such networks enhances the knowledge of others in their peer group as to what the others do and how they do it, generating a form of accountability (Corkin, 2013). The OECD is perhaps the core example of such network governance, but its processes of surveillance and peer review are emulated also in the Open Method of Coordination within the EU (Schäfer, 2006). Various forms of networks of public regulators exist both within the EU, formal and informal, (Eberlein and Grande, 2005) and also at national level in many jurisdictions (Levi-Faur, 2011), and global networks (such as the international competition network) are becoming increasingly significant (Maher and Hodson, 2012). Network modes of accountability extend beyond public actors may, under some circumstances, make up for deficiencies in public accountability of non-governmental organisations, constituting a form of 'discursive accountability' within their own networks of actors, but also 'mutual accountability' with other kinds of actors such as those of the state (Goodin, 2008: 182-4).

What we are witnessing is a proliferation of accountability mechanisms to match the varieties of regulatory institutions and practices (Beer, 1966). Such a trend might most obviously be linked to concerns to demonstrate and enhance the effectiveness of regulation. But the trend can also be tied into contemporary thinking about reshaping governance to acknowledge the limited capacity of representative democracy to adequately underpin contemporary governance. (Keane, 2009) argues that the significance of democracy lies in its control over power, to prevent rule by the few to ensure that 'the matter of who gets what, when and how should be permanently an open question'. This concern is equally important with regulatory regimes which may appear technical in character. A recent study of global private regulation concluded that few regimes can avoid consequences for the interests of those directly and indirectly affected, and so they are all in that sense political (Büthe and Mattli, 2011). A distinctive concern is to what extent the mechanisms of accountability can promote learning by requiring key actors to reflect not only policy solutions but also on the definition of policy problems, with the potential for offering a wider array of outcomes which may command stronger support (Lenoble and Maesschalck, 2010, Dorf and Sabel, 1998, Sabel and Zeitlin, 2008)

Contemporary trends in regulatory governance exemplify a wider challenge for the capacity of representative democracy to capture and legitimate diffuse governance institutions and practices. Traditional accountability narratives, emphasising parliamentary accountability, judicial review and financial probity struggle to address the challenge. The problem of post-representative democracy is common to public, private and supranational regulation. If we do not accept the merely technical nature of regulation, but increasingly cannot link

regulation and its effects on interests to institutions of representative democracy we have a problem. Within regulation we might have legitimacy concerns of both process and outcome types. Who governs and how good are they at it? Evidence of performance is increasingly important but raises significant challenges. How can we achieve greater transparency in performance and tie that transparency to capacity to use the knowledge for a substantive form of accountability but perhaps also participation?

Keane argues that what I present as new accountability mechanisms have a wider significance for democratic governance than simply accountability and, in his arguments, have the potential to constitute a post-representative or monitory democracy. Transparency, and the ability to access 'high levels of information' constitute one part of the model (Keane, 2008). Linked directly to this is the capacity to collect and to disseminate 'a wide variety of viewpoints' about the way power is exercised. Drawing in the aspect of accountability which emphasises that there may be consequences, Keane suggest that 'monitory mechanisms are geared as well to the *effective public definition, public scrutiny and public enforcement* of standards and rules for preventing corrupt or improper behaviour by those responsible for making decisions in a wide variety of settings.' (Keane, 2008: 12) (emphasis in original). Finally, the democratic qualities of these new mechanisms involves their capacity to capture diverse voices and choices of citizens, thus enhancing 'representativeness' (Keane, 2008: 12)

In summary Keane provides a narrative for drawing together diverse mechanisms of accountability. This way of thinking about the democratic challenge of accountability for regulation should encourage us to look widely for the mechanisms of holding to account. These are likely to be different for single companies, for trade associations, for standards bodies, for multi-stakeholder private regulators, for national public agencies and for supranational regulators. This analysis might encourage us to evaluate particular regimes by reference to the extent to which they are able to constitutionalize the mechanisms of representative and/or monitory democracy either themselves (in the case of private regulators (Black, 1996)) or as part of wider governmental operations. Such a constitutionalization should extend beyond simply adopting familiar processes of administrative law (transparency, proceduralization, giving of reason and so on (Kingsbury et al., 2005) – though these aspects may be helpful) and include considerations of governance structures more generally – who participates? Who has knowledge and capacity to oversee and to blow the whistle on unacceptable practices, and then to visit consequences?

5. Conclusions

The institutions and practices of regulatory capitalism present a significant problem for democratic accounts of governance. To attempt to tie this very wide variety of regimes to traditional modes of accountability within a model of representative democracy is liable either to neglect key forms of regulatory governance or to seek to locate them within too narrow a range of accountability requirements. The alternative, discussed here, is to supplement accountability modes associated with representative democracy with the acknowledgement of a wide range of alternative mechanisms which, between them, contribute towards a form of monitory democracy. I think John Braithwaite has something like this in mind in his book on Regulatory Capitalism when he discusses combining 'nodal governance of networks from below and metagovernance of networks by institutions of representative democracy such as courts' (Braithwaite, 2008: 205). Such a

combination, he suggests, offers superior transparency and accountability than either approach alone. This alternative is not without a range of problems and outstanding questions.

First, in what sense is monitory democracy democratic? When working at its most effective it permits those with interests and capacity to scrutinise and perhaps participate in what others are doing. But these scrutineers and participants are self-selecting rather than the members of a general demos. In some regimes we may think that the key affected actors are correctly selected, whereas in others the beneficiaries of a regime may have no capacity to hold its operators to account. We may contrast the town hall meeting approach of engaging local residents with operators of local factors affecting environmental conditions and employment opportunities (Holley and Gunningham, 2006) with the complexity of other areas of regulation. Thinking about financial regulation, whether operated by public or private regulators, a good deal of expertise and commitment is required in many cases to be able to offer effective scrutiny. Powerful actors such as large investors may be able to participate, but not consumers (Richardson, 2008). An answer to this is to say these are the conditions under which public regulators are important as mechanisms of overseeing firms, schemes of private regulation, and perhaps also the behaviour of governments themselves as each negotiates interests through the elaboration and implementation of regulatory regimes. A second answer is to envisage a form of collaboration in which sectors which require enhanced capacity for scrutiny and participation should have established new institutions or processes, for example the funding of expert NGOs (Howells, 1998) or the creation of new forms of interaction, which address imbalances of knowledge and power (Dunsire, 1996).

A second question, is to what extent monitory democracy might move us beyond either narrow conceptions of democracy and the control of power, to envisage the contribution of diffuse scrutiny mechanism to learning and more reflexive modes of governance (Scott, 2010b). What are the conditions under which requirements on those deploying regulatory power to engage with mechanisms of oversight can do so in such a way that is not defensive but rather is open to reconceiving not only solutions but also the problems they address in new ways which are perhaps more effective but also, in some sense, more democratic?

Finally, if the establishment of diffuse modes of oversight, accountability and perhaps participation is positive both from a perspective of both procedural and substantive legitimacy, how much of such methods of democracy is enough? The establishment and operation of such mechanisms is not costless and there is a constant risk with regulatory governance generally that excessive emphasis on proceduralization generally may slow things down to an extent that effectiveness is called into question, or that delay and cost will be used to serve interests of particular parties.

These are three of the central challenges for reconceiving of the accountability of regulatory capitalism through the lens of monitory democracy. The purpose of this approach is not to discard the methods of accountability within representative democracy, but rather to imagine ways to supplement them when they are demonstrably insufficient.

References

- ABBOTT, K. & SNIDAL, D. (2009) The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State. IN MATTLI, W. & WOODS, N. (Eds.) *The Politics of Global Regulation*. Princeton, Princeton University Press.
- BAMBERGER, K. A. (2006) Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State. *Duke Law Journal*, 56, 377-468.
- BEER, S. (1966) *Decision and Control: the Meaning of Operational Research and Management Cybernetics*, London, Wiley.
- BEHN, R. (2001) *Rethinking Democratic Accountability*, Washington DC, Brookings Institution.
- BIANCULLI, A., JORDANA, J. & MARIN, X. F. (2014) When Accountability Meets Regulation: An Introduction. IN BIANCULLI, A., JORDANA, J. & MARIN, X. F. (Eds.) *Accountability and Regulatory Governance: Audiences, Controls and Responsibilities*. *, *.
- BIRKINSHAW, P. (1994) *Grievances, Remedies and the State*, London, Sweet & Maxwell
- BLACK, J. (1996) Constitutionalising Self-Regulation. *Modern Law Review*, 59, 24-56.
- BLACK, J. (2002) Critical Reflections on Regulation. *Australian Journal of Legal Philosophy*, 27, 1-35.
- BLACK, J. (2013) Calling Regulators to Account: Challenges, Capacities and Prospects. IN BAMFORTH, N. & LEYLAND, P. (Eds.) *Accountability in the Contemporary Constitution*. Oxford, Oxford University Press.
- BLAIR, M., WILLIAMS, C. A. & LIN, L.-W. (2007) The New Role for Assured Services in Global Commerce. *Journal of Corporate Law*, 33, 325-60.
- BOVENS, M. (1998) *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations*, Cambridge, Cambridge University Press.
- BOVENS, M. (2007) Analysing and Assessing Accountability: A Conceptual Framework. *European Law Journal*, 447-468.
- BOVENS, M., SCHILLEMANS, T. & HART, P. T. (2008) Does Public Accountability Work: An Assessment Tool? *Public Administration*, 86, 225-242.
- BRAITHWAITE, J. (2002) Rewards and Regulation. *Journal of Law and Society*, 29, 12-26.
- BRAITHWAITE, J. (2008) *Regulatory Capitalism*, Cheltenham, Edward Elgar.
- BRATTON, W. W. (1989) The New Economic Theory of the Firm: Critical Perspectives from History. *Stanford Law Review*, 41, 1471.
- BÜTHE, T. & MATTLI, W. (2011) *The New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton, NJ, Princeton University Press.
- CORKIN, J. (2013) Constitutionalism in 3D: Mapping and Legitimizing our Lawmaking Underworld. *European Law Journal*, 19, 636-661.
- DAVIS, K. E., FISHER, A., KINGSBURY, B. & MERRY, S. E. (Eds.) (2012) *Governance by Indicators: Global Power Through Quantification and Rankings*, Oxford, Oxford University Press.
- DORF, M. & SABEL, C. (1998) A Constitution of Democratic Experimentalism. *Columbia Law Review*, 98, 267-473.
- DOWDLE, M. W. (2006) Public Accountability: Conceptual, Historical and Epistemic Mappings. IN DOWDLE, M. W. (Ed.) *Public Accountability: Designs, Dilemmas and Experiences*. Cambridge, Cambridge University Press.
- DUNSIRE, A. (1996) Tipping the Balance: Autopoiesis and Governance. *Administration & Society*, 28, 299-334.
- EBERLEIN, B. & GRANDE, E. (2005) Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State *Journal of European Public Policy*, 12, 89-112.
- 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.
- GILARDI, F. (2008) *Delegation in the Regulatory State*, Cheltenham, Edward Elgar.
- GOODIN, R. (2008) *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn*, Oxford, Oxford University Press.

- GRAHAM, M. (2002) *Democracy by Disclosure*, Washington DC, Brookings Institution.
- HOLLEY, C. & GUNNINGHAM, N. (2006) Environment Improvement Plans: Facilitative Regulation in Practice. *Environmental and Planning Law Journal*, 23, 448-460.
- HOOD, C., ROTHSTEIN, H. & BALDWIN, R. (2001) *The Government of Risk*, Oxford, Oxford University Press.
- HOUSE OF LORDS SELECT COMMITTEE ON THE CONSTITUTION (2004) *The Regulatory State: Ensuring its Accountability*. London, House of Lords.
- HOWELLS, G. (1998) "Soft Law" in EC Consumer Law. IN CRAIG, P. & HARLOW, C. (Eds.) *Law Making in the European Union*. Dordrecht, Kluwer.
- HUMPHERSON, E. (2010) Auditing Regulatory Reform. IN OLIVER, D., PROSSER, T. & RAWLINGS, R. (Eds.) *The Regulatory State: Constitutional Implications*. Oxford, Oxford University Press.
- KAY, J. (2012) *The Kay Review of UK Equity Markets and Long-Term Decision Making*. London, Department of Business, Innovation and Skills.
- KEANE, J. (2008) *Monitory Democracy*. Milton Keynes, Open University.
- KEANE, J. (2009) *The Life and Death of Democracy*, London, Simon & Schuster.
- KINGSBURY, B., KRISCH, N. & STEWART, R. B. (2005) The Emergence of Global Administrative Law. *Law & Contemporary Problems*, 68, 15-61.
- KRAAKMAN, R. H. (1986) Gatekeepers: The Anatomy of a Third Party Enforcement Strategy. *Journal of Law, Economics and Organization*, 2.
- KRISCH, N. (2010) *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford University Press.
- LENOBLE, J. & MAESSCHALCK, M. (2010) Renewing the Theory of Public Interest: The Quest for a Reflexive and a Learning-Based Approach to Governance. IN SCHUTTER, O. D. & LENOBLE, J. (Eds.) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. Oxford, Hart Publishing.
- LEVI-FAUR, D. (2005) The Global Diffusion of Regulatory Capitalism. *The Annals of the American Academy of Political and Social Science*, 598, 12-32.
- LEVI-FAUR, D. (2011) Regulatory Networks & Regulatory Agencification. *Journal of European Public Policy*, 18, 810-829.
- LEVI-FAUR, D. (2013) The Odyssey of the Regulatory State: From a 'Thin' Monomorphic Concept to a 'Thick' and Polymorphic Concept *Law & Policy*, 35, 29-50.
- LOCONTO, A. & FOUILLEUX, E. (forthcoming) Politics of Private Regulation: ISEAL and the Shaping of Transnational Sustainability Governance. *Regulation & Governance*.
- LODGE, M. & STIRTON, L. (2010) Accountability in the Regulatory State. IN BALDWIN, R., CAVE, M. & LODGE, M. (Eds.) *The Oxford Handbook of Regulation*. Oxford, Oxford University Press.
- LONSDALE, J., WILKINS, P. & LING, T. (Eds.) (2011) *Performance Auditing*, Cheltenham, Edward Elgar.
- MAGGETTI, M. (2012) *Regulation in Practice: The De Facto Independence of Regulatory Agencies*, Colchester, ECPR.
- MAHER, I. & HODSON, D. (2012) Competition Agency Networks around the World. IN EZRACHI, A. (Ed.) *Research Handbook on International Competition Law*. Cheltenham, Edward Elgar.
- MASHAW, J. L. (2005) Accountability and Institutional Design: Some Thoughts on the Grammar of Governance. IN DOWDLE, M. W. (Ed.) *Public Accountability*. Cambridge, Cambridge University Press.
- MAY, P. (2007) Regulatory Regimes and Accountability. *Regulation & Governance*, 1, 8-26.
- MAY, P. J. & BURBY, R. J. (1998) Making Sense Out of Regulatory Enforcement. *Law and Policy*, 20, 157-182.
- MEIDINGER, E. (2003) Forest Certification as a Global Civil Society Regulatory Institution. IN MEIDINGER, E., ELLIOTT, C. & OESTEN, G. (Eds.) *Social and Political Dimensions of Forest Certification*. Regmagen-Oberwinter, www.forstbuch.de.

- MORAN, M. (2003) *The British Regulatory State: High Modernism and Hyper-Innovation*, Oxford, Oxford University Press.
- O'ROURKE, D. (2003) Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring. *Policy Studies Journal*, 49, 1-29.
- PARKER, C. (2002) *The Open Corporation: Self-Regulation and Democracy*, Melbourne, Cambridge University Press.
- PARKER, C. (2007) Meta-Regulation: Legal Accountability for Corporate Social Responsibility. IN MCBARNET, D., VOICULESCU, A. & CAMPBELL, T. (Eds.) *The New Corporate Accountability: Corporate Social Responsibility and the Law*. Oxford, Oxford University Press.
- PROSSER, T. (1997) *Law and the Regulators*, Oxford, Oxford University Press.
- RICHARDSON, B. J. (2008) *Socially Responsible Investment Law: Regulating the Unseen Polluters*, Oxford, Oxford University Press.
- SABEL, C. F. & ZEITLIN, J. (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, 70-88.
- SCOTT, C. (2000) Accountability in the Regulatory State. *Journal of Law and Society*, 27, 38-60.
- SCOTT, C. (2006) Spontaneous Accountability. IN DOWDLE, M. W. (Ed.) *Public Accountability: Designs, Dilemmas and Experiences*. Cambridge, Cambridge University Press.
- SCOTT, C. (2010a) Enforcing Consumer Protection Laws. IN HOWELLS, G., RAMSAY, I., WILHELMSON, T. & KRAFT, D. (Eds.) *Handbook of Research on International Consumer Law*. Cheltenham, Edward Elgar.
- SCOTT, C. (2010b) Reflexive Governance , Regulation and Meta-Regulation: Control or Learning? IN SCHUTTER, O. D. & LENOBLE, J. (Eds.) *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. . Oxford, Hart.
- SCOTT, C. (2014) Independent Regulators as Accountability Mechanisms. IN BOVENS, M., GOODIN, R. E. & SCHILLEMANS, T. (Eds.) *Oxford Handbook of Public Accountability*. Oxford, Oxford University Press.
- SCOTT, C., CAFAGGI, F. & SENDEN, L. (2011) The Conceptual and Constitutional Challenge of Transnational Private Regulation. *Journal of Law & Society*, 38, 1-19.
- SLAUGHTER, A.-M. (2001) The Accountability of Government Networks. *Indiana Journal of Global Legal Studies*, 8, 347-367.
- SLAUGHTER, A.-M. (2004) *A New World Order*, Princeton, NJ, Princeton University Press.
- THATCHER, M. (2002) Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation. *West European Politics*, 25, 125-147.
- VERBRUGGEN, P. (2013) Gorillas in the Closet: Public and Private Actors in the Enforcement of Transnational Private Regulation. *Regulation & Governance*, *, ***-***.
- VOGEL, D. (2005) *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, Washington DC, Brookings Institution.