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Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes

Julia Black*

Abstract: The legitimacy and accountability of polycentric regulatory regimes, particularly at the transnational level, has been severely criticised, and the search is on to find ways in which they can be enhanced. This paper argues that before developing even more proposals, we need to pay far greater attention to the dynamics of accountability and legitimacy relationships, and to how regulators respond to them. The article thus seeks to develop first, a closer analysis of the significance of the institutional environment in the construction of legitimacy, the dialectical nature of accountability relationships, and the communicative structures through which accountability occurs and legitimacy is constructed. Secondly, it explores how regulators respond, or are likely to respond, to multiple legitimacy and accountability claims, and of how they themselves seek to build legitimacy in complex and dynamic situations. This analysis, as well as being of intrinsic interest, could be of use to those trying to design accountability relationships or seeking to build them on the ground. For until we understand the implications of the pressures for accountability and legitimacy, the 'how to' proposals which are proliferating risk being simply pipe dreams: diverting, but in the end making little difference.

INTRODUCTION

How to render polycentric regulatory regimes legitimate and accountable is one of the central questions preoccupying social scientists, and even some policy makers. Polycentric or decentred regulatory regimes are those in which the state is not the

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sole locus of authority, or indeed in which it plays no role at all. They are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated, and their boundaries are marked by the issues or problems which they are concerned with, rather than necessarily by a common solution. Such regimes pose a number of challenges which writers across a range of disciplines - law, political science, international relations, development studies - are all engaged in delineating and addressing. Indeed the issues to which the 'governance turn' is giving rise is drawing commentators like moths round a light.

These challenges are principally functional, democratic, normative and systemic, as outlined below. Of these, the first three are often articulated as concerns about legitimacy and accountability. Solutions proposed include developing systems of extended accountability,¹ network accountability,² enhanced democratic governance,³ or adopting functional equivalents to the structures of accountability which are to be found in constitutional settlements, at least of liberal democratic states, such as judicial review⁴ or enhanced role for parliaments or for executive oversight bodies such as auditors and ombudsmen.⁵

This paper takes a different perspective. The usual set of accountability questions: who, to whom, how, for what, in accordance with what standards and with what effects, are not addressed, at least not directly.⁶ Instead the paper takes the far less common perspective of those on whom the demands are being made, and asks how they respond. What does it mean to the regulator for it to be legitimate or accountable? What happens when these different accountability and legitimacy demands are made, and indeed what role do the objects of the accountability and legitimacy demands play in shaping those demands? These questions are of interest in their own right; they are also the logically prior questions that have to be asked before any 'how to' proposals can be made.

¹ C. Scott, 'Accountability in the Regulatory State' (2000) 23 *Journal of Law and Society* 38.

² C. and R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2007) 13(4) *European Law Journal* 542, in the EU context.

³ See for example at the global level, J. Cohen and C. Sabel, 'Global Democracy' (2005) 37(4) *NYU Journal of International Law and Politics* 763, for a good micro-level discussions of some of the issues see K. Dingwerth, 'The Democratic Legitimacy of Public-Private Rule Making: What Can We Learn from the World Commission on Dams?' (2005) 11 *Global Governance* 65; J. Clapp, 'The Privatization of Global Environmental Governance: ISO 14000 Standards and the Developing World' (1998) 4 *Global Governance* 295; M. Froomkin, 'Habermas@Discourse.Net: Towards a Critical Theory of Cyberspace' (2003) 116 (3) *Harvard LR* 751.

⁴ See e.g. R.B. Stewart, 'The Global Regulatory Challenge to US Administrative Law' (2005) 37(4) *NYU Journal of International Law and Politics* 695.

⁵ Particularly in the EU context see recently the special issue of the *European Law Journal* on Accountability and Multi-Level Governance in the EU, edited by C. Harlow, A. Benz and Y. Popadopoulos (2007) 13(4) *ELJ* 444; C. Harlow, *Accountability in the European Union* (Oxford: Oxford University Press, 2002), ch 7.

⁶ For an excellent recent iteration of these questions see J. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', Yale Law School Research Paper No 116 (Yale, 2007) available at <http://papers.ssrn.com/abstract=924879>.

The argument developed here is in principle applicable to all regulators, state and non-state,⁷ or indeed any organisation on whom legitimacy and accountability demands are made, or which itself seeks to enhance its legitimacy and accountability. However, the site in which the issues are explored is that of transnational regulators in polycentric regulatory regimes.⁸

These regulators are chosen because they provide the 'hard case' for legitimacy, authority and accountability. Each of the accountability questions listed above is particularly difficult to answer with respect to such regulators. Take, for example, the social and environmental accreditation bodies, such as the Fair Trade Labelling Organisation (FTLO) or the Forest Stewardship Council (FSC); or financial regulators such as the International Accounting Standards Committee Foundation (IASC) and International Accounting Standards Board (IASB), or the Basle Committee on Banking Supervision (BCBS). Each of these bodies has a different element of state involvement. For example, there are no governmental actors represented in the FTLO, the FSC or the IASC or IASB, but the Basle Committee is comprised of banking regulators from the G7 countries. However, they share the characteristic that their activities are not based on or mandated by national, supranational or international law. Moreover, there are no clear existing structures such as courts, legislative committees, national auditors, ombudsmen and so on to which recourse can be made to render them accountable; they have no clear jurisdictional boundaries; and there is no easily identifiable set of potential democratic participants in their processes. Yet, as will be explored further below, the need of such regulators (and others like them) for legitimacy is particularly strong as they have to promote a strong motivational response from those whose behaviour it is they seek to change, but often without the infrastructure of legal authority to fall back on.

Thinking about how accountability, legitimacy and authority are created in this context, it is suggested, requires us to have a far more fine grained analysis of the social basis of legitimacy, the role of authority and the nature of the interrelationship of legitimacy, authority and accountability than is developed in debates which have state, supranational (EU) or even international bodies in their sights. Thus, it will be argued, polycentric regulatory regimes draw attention to the significance of the institutional embeddedness of the networks through which regulation occurs and in which the regulators are situated. This institutional embeddedness, it is argued, is critical for understanding how legitimacy is

⁷ The terms 'state' and 'non-state' are used throughout to distinguish in broad terms those regulators which have a legal mandate (including administrative bodies in the EU and international organisations founded by treaty) and those which do not – whilst recognising that in practice the two are interrelated in a myriad of different types of relationship. Further, as polycentric regimes are often characterised by the interaction of state and non-state actors in a regulatory regime, polycentricity is not taken to be equated with the exclusive presence of non-state actors.

⁸ By regulator I mean organisations that engage in sustained and focused attempts to alter the behaviour of others according to defined standards or purposes in an attempt to address a collective problem – this includes for-profit firms and non-profit organisations as well as the more familiar state-based regulatory agency.

constructed, both by those making legitimacy claims and by the regulator who is responding to them, often by making legitimacy claims of their own.

Legitimacy and accountability are distinct concepts, and the article examines the relationship between them. It argues that both are relational concepts which are institutionally and discursively constituted. The article draws on the conceptual dimension of the decentring analysis to emphasise the dialectical nature of accountability relationships, and implications of the communicative structures through which accountability occurs. In the regulatory context, accountability relationships are sought both by regulatory organisations and those outside them in order to create and validate perceptions of legitimacy amongst different legitimacy communities and, in the case of the latter, to prompt an organisational response to those claims. However, as actors within and outside the regulatory regime have different perceptions as to the relevance and validity of different legitimacy claims and as to the nature of the accountability relationships that need to be developed, regulators face multiple claims. Whilst they may be able to meet some of these, where the claims are incompatible they face a legitimacy dilemma. Moreover, even if there is not a dilemma as such, engaging in multiple accountability relationships can be impossible without transforming the organisation, which may cause it to lose legitimacy in the eyes of others, or preventing it from engaging coherently in other accountability relationships. Accountability relationships are dialectical, and accountability tools are not neutral technical instruments but technologies embodying their own logics and interpretive schemes. Each is an interpretive and discursive schema through which participants in the accountability relationship make sense of their own and each others' roles, which is constitutive of their relationship and which is shaped by it.

This argument has significant implications for understanding how organisations can and do respond to multiple legitimacy claims. First, different accountability or legitimacy mechanisms are not necessarily substitutable, as some may suggest,⁹ as not all will satisfy every legitimacy community. That much is familiar. But the second question is critical – why do organisations respond to some claims and not to others. The article argues that how organisations respond to these competing legitimacy claims is structured by the particular institutional context in which the regulatory regime, and the individual organisation, operates. Regulators are not ciphers – the insights of the ‘ungovernability’ of actors apply as much to them as those they seek to regulate. They can be active participants in the debate on their own accountability and legitimacy, not just a passive recipient. They may actively seek to build legitimacy, for example by enhancing their accountability relationships with particular legitimacy communities. Alternatively, faced with demands to create accountability relationships, they may exhibit the same strategies of avoidance, defiance, manipulation, compromise or acquiescence in response to pressures for their accountability and legitimacy as any organisation

⁹ Eg Scott, n 1 above.

does in response to any norms which others seek to impose on them.¹⁰ As a result, legitimacy claims and their associated accountability relationships may end up in the equivalent of Teubner's regulatory trilemma – they are ignored, co-opted, or destroy that which it was they sought to render accountable.¹¹

Until we understand better the dynamics of legitimacy and accountability relationships, and in particular how organisations actually, or are likely to, respond to different legitimacy claims, we are grasping in the dark. Journals are full of proposals for how to improve accountability and legitimacy of regulators at any level, but very few of these contain more than a passing reference to how the regulator will respond. This paper aims to start redressing that gap. In not offering a quick fix solution to the problem, it may disappoint – but if it helps to move the debate on, it will have done its work.

The argument proceeds in three main stages. First, that accountability and legitimacy are distinct communicative, dialectical relationships which are socially and discursively constructed. Secondly, that they are contested: different legitimacy communities make different legitimacy claims which they seek to validate through developing varying accountability relationships. Thirdly, building on that analysis, that we need to recognise what the implications for regulators might be of attempting to meet multiple, conflicting, legitimacy claims. Regulators may attempt to create and manipulate perceptions of their legitimacy amongst others. But their scope for strategic action may be bounded, and in any event structured by their institutional environment. Moreover, the communicative activity of 'rendering account' may have transformatory effects on the organisation, with implications for its ability to meet multiple legitimacy claims. However, drawing on work on the impacts of accountability on a range of different types of organisation and on work on organisational responsiveness, the paper suggests a range of ways in which regulators may respond to multiple legitimacy claims. Before embarking on that analysis, however, the paper briefly sets out the broader institutional and conceptual context in which the arguments are developed.

SETTING THE SCENE: GOVERNANCE AND DECENTRED REGULATORY REGIMES

The arguments developed here are not necessarily confined to polycentric regulatory regimes, or even non-state regulators, though that is the site in which they are explored. The arguments could in principle apply to state regulators, EU regulators, private firms, or NGOs – any organisation on which accountability and legitimacy claims are made; but as each site has its own particular configuration of actors and institutional structures, not to mention its own set of academic

¹⁰ See further below.

¹¹ G. Teubner, 'Juridification - Concepts, Aspects, Limits, Solutions' in G. Teubner (ed), *Juridification of the Social Spheres* (Berlin: de Gruyter, 1987).

commentators, exploring these questions more specifically in those contexts is well beyond the scope of this paper.

It is worth specifying more closely what decentred, or polycentric, regulation is, and its relationship with the notion of governance. The decentred, or polycentric, analysis of regulation has three dimensions: organisational, conceptual and strategic. Organisationally, it draws attention away from individual regulatory bodies, be they at the national or global level, and emphasises instead the multitude of actors which constitute a regulatory regime in a particular domain. Decentred and polycentric regulation are synonyms, and will be used interchangeably here, but which draw attention in different directions. ‘Decentring’ draws attention *away* from the state – it denies that there is necessarily a central role for the state in regulation and seeks to draw attention from it; ‘polycentric’ is a term which acts more positively to draw attention *to* the multiple sites in which regulation occurs at both a sub-national, national and transnational level.

Conceptually, the decentring analysis has a particular understanding both of the nature of the regulatory problem and the nature of state-society and intra-state and intra-society relationships, an understanding which is relevant for analysing the dynamics of both regulatory and accountability relationships, as discussed further below. A proviso is in order: the act of naming a constellation of theoretical perspectives as ‘decentred regulation’ suggests a theoretical harmony which in reality is not present, and there are tensions and contradictions in the underlying theoretical bases of the analysis.¹² Much of the theoretical analysis is rooted in systems theory,¹³ though others have reached similar conclusions via other analytical routes or have used systems theory only lightly in their work.¹⁴ Foucaultian influences are also strong.¹⁵ Nevertheless, there is sufficient commonality between the key threads of the various iterations of ‘decentring’, even though the term is not necessarily always used, for them to cohere around key central themes.

¹² For discussion see J. Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103-147; *id.*, ‘The Decentred Regulatory State?’ in P. Vass (ed) 2006-7 *CRI Regulatory Review* (Bath: Centre for Regulated Industries, 2007).

¹³ G. Teubner (ed), *Juridification of the Social Spheres*, n 11 above; . G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin: de Gruyter, 1986). G. Teubner and A. Febbrajo (eds), *State, Law, Economy as Autopoietic Systems* (Milan: Dott. A. Giuffrè Editore, 1992); G. Teubner, L. Farmer and D. Murphy, *Environmental Law and Ecological Responsibility* (Chichester, New Yourk, Wiley, 1994); R. Veld *et al.*, *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Dordrecht: Kluwer Academic Publishers, 1991).

¹⁴ R. Rhodes, ‘The Hollowing Out of the State’ (1994) 65 *Political Quarterly* 138; R. Rhodes, *Understanding Governance* (Buckingham: Open University Press, 1997).

¹⁵ M. Foucault, ‘Governmentality’ in G. Burchell, C. Gordon and P. Miller, *The Foucault Effect: Studies in Governmentality* (London: Harvester, 1991); N. Rose and P. Miller, ‘Political Power Beyond the State: Problematics of Government’ (1992) 43(2) *British Journal of Sociology* 173; N. Rose, *Powers of Freedom* (Cambridge: Cambridge University Press, 1999); C. Scott, ‘Regulation in the Age of Governance: The Rise of the Post Regulatory State’ in J. Jordana and D. Levi-Faur (eds) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Cheltenham: Edward Elgar, 2004) 145-174.

At the conceptual core of a decentred analysis, at least as it is drawn here, are five central notions: complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private.¹⁶ Decentred analysis emphasises the causal complexity of social problems and the complexity of interactions between actors in society (or systems). Critically for the debate on accountability, it draws attention to the implications of the fragmentation of both power and knowledge between different actors for the construction and operation of regulatory regimes. It emphasizes the existence and complexity of interactions and interdependencies between social actors, and between social actors and government in the process of regulation.¹⁷ It rejects a linear conception of regulation, in which regulatees are assumed to comply with regulatory requirements, and instead problematises the response of different actors to attempts by others to regulate them, emphasizing their operational autonomy. Regulation is dialectical: both regulator and regulatee are at once autonomous of and dependent on each other.¹⁸ Finally, it recognizes that the collapse of the public / private distinction in socio-political terms, and requires a rethinking of the role of formal authority in regulation. Both state and non-state actors engage in the function of regulation, both separately and in different types of interrelationship, and indeed state actors may be regulated by non-state actors.¹⁹ A hierarchy of state – non-state cannot be assumed, but nor should polycentric regulation be assumed to be regulation solely by non-state actors.

The third dimension is strategic or functional. The hallmarks of the regulatory strategies which can both characterize decentred / polycentric regimes and which the conceptual analysis suggests are necessary, are that they are hybrid (combining governmental and non-governmental actors), multi-faceted (using a number of different strategies simultaneously or sequentially), and indirect.²⁰ Decentred regulation thus engages the strategies of ‘smart regulation’ or ‘new governance’ which have been described in a wide range of writings on regulation.²¹ Whilst

¹⁶ See Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-Regulatory” World’, n 12 above.

¹⁷ See e.g. J. Kooiman, ‘Findings, Speculations and Recommendations’ in J. Kooiman (ed), *Modern Governance: New Government-Society Interactions* (Sage, London, 1993), 253; Rhodes, *Understanding Governance*, n 14 above, 50-59; Rose, n 15 above, ch 1; L. Hancher and M. Moran, ‘Organizing Regulatory Space’ in L. Hancher and M. Moran (eds), *Capitalism, Culture and Economic Regulation* (Oxford: Oxford University Press, 1989).

¹⁸ A. Giddens, *The Constitution of Society* (Cambridge: Cambridge University Press, 1984).

¹⁹ E. Meidinger, ‘Look Who’s Making the Rules: International Environmental Standard Setting by Non-State Organisations (1997) 4 *Human Ecology Review* 52-54; B. Cashore, ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market Driven (NSDM) Governance Systems Gain Rule Making Authority’ (2002) 15(4) *Governance* 503-529; M.E. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); T. Risse-Kappen (ed), *Non-State Actors, Domestic Structures and International Institutions* (Cambridge: Cambridge University Press, 1995); C. Scott, ‘Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance’ (2002) *Jnl of Law and Society* 56.

²⁰ G. Teubner, ‘After Legal Instrumentalism: Strategic Models of Post-Regulatory Law’ in G. Teubner (ed), *Dilemmas of Law in the Welfare State*, n 13 above.

²¹ See for example N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998) 38-50; J. Braithwaite, ‘The New Regulatory State and the

many of these writings still focus principally on the role of state actors in regulation, decentred analysis emphasizes that such strategies are or should not be assumed to be unique to the state.

Decentred or polycentric analyses of regulation have a clear resonance with notions of governance.²² ‘Governance’ is a much debated term, but most definitions revolve around the observation that both public and private actors are involved in activities of steering or guiding ‘the governed’ in ways that may or may not be interrelated. To follow Rosenau, both governments and governance consist of steering mechanisms through which authority is exercised to preserve the coherence of the governed and enable it to move towards desired goals.²³

Regulation is a particular form of governance. All forms of regulation are governance, but not all forms of governance are regulation. Regulation is a distinct activity which engages with a particular social problem: how to change the behaviour of others.²⁴ One of the analytical difficulties encountered once one moves beyond the site of the state as the locus of analysis is where to draw the line between non-state regulators and other organisations. To that end, the understanding of regulation deployed in the decentred analysis here is that regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes in order to address a collective issue or resolve a collective problem. The strategies deployed usually involve some combination of standard-setting, information-gathering and behaviour-modification, including but not limited to the imposition of legal and non-legal sanctions.²⁵ The point of the polycentric analysis is that not all functions are necessarily performed by a single organisation; rather they may be dispersed amongst actors in a regulatory regime, including market actors, civil society

Transformation of Criminology’ (2000) 40 *British Jnl of Criminology* 222; C. Parker, ‘Reinventing Regulation within the Corporation: Compliance Oriented Regulatory Innovation’ (2000) 35(2) *Administration & Society* 529); D. O’Rourke, ‘Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards Monitoring’ (2003) 31 *Policy Studies Journal* 1; J. Freeman, ‘The Private Role in Public Governance’ (2000) 75(3) *New York University Law Review* 543.

²² The literature is huge. See for example, J. Rosenau and E-O. Czempiel, *Governance without Government: Order and Change in World Politics* (Oxford: Oxford University Press, 1992); J. Pierre (ed) *Debating Governance: Authority, Steering and Democracy* (Oxford: Oxford University Press, 2000); J. Pierre and B. Peters, *Governance, Politics and the State* (London: Macmillan, 2000); I. Bache and M. Flinders, *Multi-Level Governance* (Oxford: Oxford University Press, 2005).

²³ J. Rosenau, ‘Strong Demand, Huge Supply: Governance in an Emerging Epoch’ in I. Bache and M. Flinders, n 22 above; J. Rosenau, *The Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997). There are then various refinements and variations: ‘multi-level governance’ tends to be used in the context of the EU (for discussion see G. Marks and L. Hooghe, ‘Contrasting Visions of Multi-Level Governance’ in Bache and Flinders, n 22 above; international lawyers tend to prefer the term ‘global administrative law’ to describe the phenomenon at the transnational level: see B. Kingsbury, N. Krisch and R. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

²⁴ Governance more broadly is often taken to encompass the ‘rowing’ aspects of state activity (mainly welfare provision) as well as the ‘steering’ aspects, to use Osborne and Gaebler’s notorious phrase: D. Osborne and T. Gaebler, *Reinventing Government* (New York: Penguin Press, 1992). This is not intended to run counter to the ‘network’ analysis of governance – the concern in drawing the distinction between regulation and governance is on what is attempted, not how it is done.

²⁵ J. Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1.

organisations, non-state regulators and international and national state-based actors, who are interrelated in a myriad of different ways. A regulatory regime is the set of interrelated units which are engaged in joint problem solving to address a particular goal; its boundaries are defined by the definition of the problem being addressed, and it has some continuity over time.²⁶

CHALLENGES OF POLYCENTRIC REGULATORY REGIMES

Decentred or polycentric regulatory regimes pose a number of challenges at any level, national, supranational or transnational. Of these, four challenges in particular are central to current debates. These challenges are functional, systemic, democratic and normative. Functional challenges revolve around the problem of coordination: networks of organisations within a regulatory regime may be characterised by complex interdependencies and may lack a central locus of authority. There may not be a body whose role it is to act as the lead interpreter of the regimes' rules or principles, for example, or to otherwise steer or coordinate the activities of the multiple participants in such a way that the regime moves towards the resolution of the problem which it both defines and is defined by.²⁷ Systemic challenges revolve around issues of fragmentation of social systems. For lawyers this is particularly the challenge posed to both the identification and identity of law by the presence of numerous normative orders, an issue debated in international law in terms of the nature of 'soft law' and in legal theory journals in terms of the challenges of legal pluralism.²⁸ Which norms are 'law' and which are not; what are the implications of fragmentation within law by regulatory norms, or of the porosity of national and transnational legal systems, or indeed of the extensive by-passing of law in many governance regimes – each of these questions poses a challenge for understanding law and for law's understanding of itself.²⁹ Democratic challenges arise from issues of representation: who should be involved in the decision making structures of the various components of the network; to whom should such bodies be accountable and how.³⁰ Normative challenges stem from normative concerns as to the goals and operation of the regulatory regime: from competing conceptions of 'the good' that should be

²⁶ C. Hood, H. Rothstein and R. Baldwin, *The Government of Risk* (Oxford: Oxford University Press, 2001) 9-17.

²⁷ For discussion see e.g. W.J.M. Kickert, E.H. Klijn, J.F.M. Koppenjan (eds), *Managing Complex Policy Networks* (London: Sage, 1997); E. H. Klijn and J.F.M. Koppenjan, 'Public Management and Policy Networks in the Public Sector: A Theoretical Study of Management Strategies in Policy Networks' (1995) 73(3) *Public Administration* 437; E. H. Klijn and J.F.M. Koppenjan, 'Public Management and Policy Networks. Foundations of a Network Approach to Governance' (2000) 2(2) *Public Management* 135; M. Castells, *The Rise of the Network Society: Economy, Society and Culture* (Oxford: Blackwell, 2000).

²⁸ The leading work is N. Luhmann, *Social Systems* (Stanford: Stanford University Press, 1995).

²⁹ Eg S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37(4) *NYU Jnl of International Law and Politics* 663.

³⁰ See e.g. Cohen and Sabel, n 3 above; C. Skelcher, 'Jurisdictional Integrity, Polycentrism and the Design of Democratic Governance' (2005) 18(1) *Governance* 89; Dingwerth, n 3 above.

pursued.³¹ These challenges, especially the latter, are not unique to polycentric regimes, but are enhanced by them. Of these, it is the functional, democratic and normative which are often articulated in terms of the legitimacy and accountability of the regimes as a whole and of different actors within them, and it is to these issues that we now turn.

THE BROAD PARAMETERS OF THE ACCOUNTABILITY AND LEGITIMACY DEBATES OF TRANSNATIONAL REGULATORY REGIMES

The legitimacy and accountability of regulatory organisations even at the state level has long been the subject of debate. Writing in the 1930s, Landis observed that the literature on the administration ‘abounds with fulmination’,³² in particular at the ‘inappropriate’ combination of legislative, judicial and executive functions within regulatory agencies and their lack of accountability. The adequacy of the accountability of the national ‘regulatory state’ has continued to be questioned, and ever-increasing controls over the activities of regulatory agencies have been sought by academics, politicians and the public alike.³³

The problem of accountability is enhanced at the supranational level, again at the transnational level, and reaches its peak in decentred or polycentric regulatory regimes at any level which are characterized by a strong, but not necessarily exclusive, presence of non-state regulators.³⁴ The ‘governance turn’ revealed a plethora of non-governmental actors at the national, supranational and global levels who are performing what had been traditionally seen as core ‘governmental’ functions: welfare provision and regulation.³⁵ Accountability and legitimacy concerns are of course not confined to regulators or quasi-regulators but extend to those who in much broader terms are seen as exercising significant amounts of power over actors, both internally and externally. For example, the demands for

³¹ See e.g. N. Krisch, ‘The Pluralism of Global Administrative Law’ (2005) 17 EJIL 246. The re-description of international law in terms of ‘governance’ has also been criticized as disguising or even seeking to neutralize the normative and political dimension of international legal regimes: M. Koskienniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) *Modern Law Review* 1.

³² J.M. Landis, *The Administrative Process* (New Haven: Yale University Press, 1938) 4.

³³ See for example in the C. Sunstein, *After the Rights Revolution* (Cambridge, Mass.: Harvard University Press, 1990); R. Stewart, ‘Madison’s Nightmare’ (1990) 57(2) *Univ Chi LR* 335; G. Majone, ‘The Regulatory State and its legitimacy problems’ (1999) 22(1) *West European Politics* 1; D. Curtin, ‘Holding Quasi-Autonomous EU Administrative Actors to Account’ (2007) 13(4) *En Law Journal* 534.

³⁴ For discussion see for example Skelcher, n 30 above; Capp, n 3 above; Dingwerth n 3 above; D. Kerwer, ‘Holding global regulators accountable: the case of credit rating agencies’ (2005) 18(3) *Governance* 453; *id.*, ‘Rules that Many Use: Standards and Global Regulation’ (2005) 18(4) *Governance* 611.

³⁵ In the regulatory context, see e.g. A. M. Slaughter, ‘The Accountability of Government Networks’ (2001) 8 *Ind J. Global Legal Studies* 347; J. Braithwaite and P. Drahos, *Global Business Regulation* (Oxford: Oxford University Press, 2000); C. Cutler, V. Haufler and T. Porter (eds) *Private Authority in International Politics* (New York: Suny Press, 1999); R.A. Higgott, G.R.D. Underhill and A. Bieler, *Non-state actors and authority in the global system* (London: Routledge, 2000).

corporate social accountability, the calls for improving the representativeness or transparency of international regulatory and standard setting bodies, or for enhancing the legitimacy of international non-governmental organisations (INGOs), all have at their base the same central concern: that power is being exercised in a way which is insufficiently accountable to others. As a result, organisations are, to use Power's evocative phrase, being turned 'inside out'.³⁶ The details of their internal decision making structures and processes, including their incentive structures, audit and risk management processes, are seen as critically relevant to those outside them.

Amongst this plethora of actors, non-state regulators occupy a curious position. Whilst it is recognised that both state and non-state actors are often engaged in myriad of different relationships in a regulatory regime, the terms 'state' and 'non state' are used throughout to distinguish between those which have a legal mandate and those which do not. Examples of the types of regulators focused on here include bodies whose membership is not comprised of governmental regulators, such as Transparency International, Responsible Care, or ICANN, social and accreditation bodies such as the FSC or FTLO, standard setters such as the International Organisation for Standardization and the IASC, as well as bodies, such as BCBS or the International Organisation of Securities Commissioners (IOSCO), that are made up of government officials.

Such regulators may have a clear organisational structure, such as Transparency International,³⁷ the Forest Stewardship Council,³⁸ or the standard setting bodies such as the International Organisation for Standardization (ISO).³⁹ Such structures may be federated, such as Responsible Care, which develops and implements a code of practice for the chemical industry. It has a central organisation but then allows regional bodies to develop which shape the Code in ways which make it relevant for their own regions.⁴⁰ It may be that there is no central organisational structure, only a body of written norms which firms themselves have decided to apply, but there is no central locus of authority to which they can turn to discuss the proper interpretation or application of the

³⁶ M. Power, *The Risk Management of Everything* (London: Demos, 2005).

³⁷ For discussion of TI's role see H. Wang and J. Rosenau, 'Transparency International and Corruption as an Issue of Global Governance' (2001) 7 *Global Governance* 25.

³⁸ On which see Cashore, above n 19; E. Meidinger, C. Elliott and G. Oesten, *Social and Political Dimensions of Forest Certification* (Kessel: Remangen-Oberwinter, 2003).

³⁹ See e.g. S. Furusten, 'The Knowledge Base of Standards' in N. Brunsson, B. Jacobsson and associates (eds), *A World of Standards* (Oxford: Oxford University Press, 2000) (on ISO 9000); Clapp, n 3 above (ISO 14001). For discussion of the dynamics of other transnational regulators see e.g. Braithwaite and Drahos, n 35 above; N. Brunsson and B. Jacobsson, *A World of Standards* (Oxford: Oxford University Press, 2000); P. Pattberg, 'The Institutionalization of Private Governance: How Business and Non-Profit Organizations Agree on Transnational Rules (2005) 18(4) *Governance* 589.

⁴⁰ For discussion see e.g. Gunningham and Grabosky, n 21 above; J. Moffet, F. Bregha and M.J. Middelkoop, 'Responsible Care: A Case Study of a Voluntary Environmental Initiative' in K. Webb (ed), *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Ottawa: Carleton Research Unit for Innovation, Science and Environment, 2004).

principles. The Equator Principles provide a good example.⁴¹ These is a set of principles for sustainable development which many banks require borrowers to comply with when issuing loans for infrastructure development, mainly in the energy sector (dams, pipelines etc). There is no one organisation which is responsible for issuing, interpreting or revising the Principles, however. The ‘regulators’ are the banks, regulating both themselves and others to ensure compliance with the Principles, at least in the initial loan documentation. Non-state regulatory regimes in this case have the organisational form of co-ordinated systems of corporate social responsibility, rather than taking the form of a single agency regulator which parallels a governmental body.

Indeed the range and variety of transnational regulatory regimes is significant, and in an attempt to impose some analytical order a minor academic industry has developed drawing up typologies. These are usually based on one or more of four dimensions: organisational structure, as above (e.g. unitary (e.g. ISO); federated (e.g. TI); fragmented (e.g. Equator Principles)); relationship to governments (e.g. mandated (e.g. IASB standards in the EU), co-opted (e.g. FSC in the UK)); membership (e.g. governmental officials; INGOs; individuals; industries; associations); functions (e.g. standard setting (e.g. ISO, BCBS); monitoring (e.g. FSC, FTILO); information sharing (e.g. BCBS), often in combination); and patterns of interrelationship (e.g. hierarchical, networked, multi-level).⁴²

Whilst they may vary along all these dimensions, most significantly in their relationship with states, transnational regulatory regimes, do however share several central characteristics.⁴³ They are organised around particular issues or regulatory domains (environment, food, trade, financial services) rather than geographical regions. They are characterised by an interpenetration of international, transnational and national and sub-national decisionmaking and there is frequently an overlapping of jurisdictions within and between regimes; there is no pattern to their institutional interrelationships and they are often linked through negotiation and informal communications. The regimes are characterised by the aims of achieving harmonisation and standardisation, or at least principles of mutual recognition or equivalence between regulatory requirements; they are often driven by operation of the global economic order (trade, financial services) but are not necessarily confined to that (food, environment). There is frequently significant porosity between national and international / transnational legal regimes. National legal regimes are penetrated by global norms; even though most are not binding

⁴¹ For discussion see M. Forster, P. Watchman and C. July, ‘The Equator Principles – Towards Sustainable Banking?’ (2005) 6 *Jnl International Banking and Finance Law* 216; *id.*, ‘The Equator Principles – Making a Difference?’ (2005) 7 *Jnl International Banking and Finance Law* 253; P. Watchman, ‘Banks, Business and Human Rights’ (2006) 2 *Jnl International Banking and Finance Law* 26.

⁴² For good discussions which adopt one or more of these approaches see A.M. Slaughter, *A New World Order* (Princeton: Princeton University Press, 2002); Braithwaite and Drahos, n 35 above; Cassese, n 29 above; Rosenau n 23 above.

⁴³ See e.g. Cassese, n 29 above, Stewart, n 4 above and Braithwaite and Drahos n 35 above for examples and discussion.

on nation states, many adopt them. On the other hand, global norms can themselves reflect the norms of dominant states.⁴⁴

Such regulatory regimes are subjected to a number of concerns relating both to what they do and to how they do it, though these often vary with the form the regimes take.⁴⁵ Substantively, they (mainly the financial and trade-related bodies) are criticised for being technocratic, dominated by liberal economic ideology; as insufficiently sensitive to environmental, consumer, labour and other social interests; and as ignoring or paying insufficient attention to the concerns of developing countries.⁴⁶ Procedurally, they are criticised on the grounds that, because they develop outside national constitutional settlements or at the transnational level outside the treaty system, they escape accountability through the mechanisms of consent of either domestic or international law. Moreover, they are criticised as non-transparent; as lacking, or only having very attenuated, consultation processes; as undemocratic; and as failing to have adequate, or any, systems of redress: those affected by their decisions are excluded from the decision making process and have no way of calling them to account politically or legally.⁴⁷

These criticisms are not new, and national regulatory bodies have been criticized on similar lines.⁴⁸ Moreover, not all the criticisms are always valid with respect to every regime: the FSC is far more inclusive in its membership than the IASB, for example. But transnational, non-state regulators pose the difficulty that the usual panoply of constitutional mechanisms which characterize liberal democratic constitutional systems is not necessarily available.⁴⁹ Despite the arguments on the constitutionalisation of individual regulatory bodies, even those constituted within the international law framework,⁵⁰ and the identification of an emergent global administrative law,⁵¹ these initiatives are nascent and rudimentary. Transnational regulators do not (yet) operate within a constitutional framework, and even that which applies to non-state regulators at the state level may be attenuated or uncertain.⁵²

The issue of jurisdiction is also complicated in the transnational context: such regulators do not fit neatly within existing legal and territorial jurisdictional

⁴⁴ See *ibid.*

⁴⁵ See e.g. Kerwer, n 34 above.

⁴⁶ See Clapp, n 3 above; Kerwer n 34 above; Dingwerth, n 3 above; B. Bull, M. Boas and D. McNeill, 'Private Sector Influence in the Multi-Lateral System: A Changing Structure of World Governance?' (2004) 10 *Global Governance* 481;

⁴⁷ See e.g. Slaughter, n 35 above; Stewart, n 4 above for review.

⁴⁸ Including the lack of legal accountability if systems of judicial review are deemed inadequate.

⁴⁹ And as Scott argues, even consideration of the accountability of state regulators has to recognize that there are multiple sources of accountability extending beyond such traditional state bodies: n 1 above.

⁵⁰ Eg D. Cass, *Constitutionalizing the World Trade Organization* (Oxford: Oxford University Press, 2005).

⁵¹ Kingsbury, Krisch and Stewart, n 23 above.

⁵² See for example the ongoing debate in England and Wales on the definition of a public body for determining the scope of judicial review and of the Human Rights Act: *Aston Kantlow v ACC* [2004] AC 456; *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48; D. Oliver, 'Functions of a Public Nature under the HRA' (2004) *Public Law* 329.

boundaries.⁵³ Their mandates are uncertain, and it is not clear on whose behalf they purport to act and to whom accountability should be owed. In principal-agent terms, who is the principal for whom these bodies are acting? Lack of jurisdictional boundaries and the problem of identifying ‘principals’ complicates questions of who has a right to call them to account, and how the boundaries of their accountability should be drawn. If principles of democratic accountability are to be introduced, for example, who should be eligible to participate in that democratic process? If mechanisms of legal accountability, such as judicial review, are to be used, which courts have jurisdiction, and how does the jurisdiction of national courts relate to that of the dispute settlement mechanisms (where they exist) of transnational regulators?⁵⁴

Finally, polycentric regimes at any level (sub-national, national, supranational, global) pose the problem of ‘many hands’.⁵⁵ The issue is not, or rather not simply, how to call to account a single organisation, but how to call to account a constellation of regulators.⁵⁶ Is the appropriate course to identify one regulator and argue that the accountability of the others is derived from and dependent on the accountability of that regulator, as in hierarchical regimes (one for all)?⁵⁷ Or is the appropriate course to say that each regulator has to be individually accountable for the activities of the regime as a whole (all for one)? Alternatively, should each actor be held accountable just for their own role within the regime (each for itself)?

CONSTRUCTING ACCOUNTABILITY AND LEGITIMACY

The range of accountability and legitimacy issues that contemporary governance and regulatory regimes pose is such that the urge to pose a neat and workable solution is compelling. However, my contention here is that attempts to construct such a solution have to be grounded in a greater appreciation of the nature of regulatory organisations, and indeed regulatory regimes, and in a deeper understanding of what it means to be legitimate and accountable. We can then begin to understand the dynamics of legitimacy and accountability relationships, a necessary pre-requisite for any attempts to try to develop new relationships or alter existing ones.

⁵³ See e.g. Skelcher, n 30 above.

⁵⁴ Cassese identifies the question of who ensures legal protection for those affected by the decisions of transnational regulators as the ‘biggest issue of global administrative justice’; n 29 above, 692.

⁵⁵ D.F. Thompson, ‘The Moral Responsibility of Public Officials: The Problem of Many Hands’ (1980) 74 *Am Pol Sci Review* 905, cited in M. Bovens, ‘Analysing and Assessing Accountability: A Conceptual Framework’ (2007) 13(4) *En Law Jnl* 447 at 457.

⁵⁶ Where, for example, different collectivities are responsible for standard setting and enforcement – see e.g. Kerwer, n 34 above.

⁵⁷ Adapting Bovens, n 55 above.

Given the amount already written on accountability and legitimacy, do we need to spend any more time analysing them? I suggest we do. Focussing on non-state regulators, particularly at the transnational level and within polycentric regimes, brings to the fore critical issues, concerning how legitimacy is constructed both within and outside the regulatory regime, what constitutes accountability, and the complex interrelationship of legitimacy, accountability and the act of governance, which are often obscured when discussed in the context of comparatively stable constitutional settlements and legal regimes.

The key to understanding both how accountability and legitimacy are forged, it is argued, lies in recognising the institutional embeddedness of regulators, be they at the national, sub-national, supranational or global level. Institutional structures provide the resources for an organisation, (e.g. regulating access and agendas of decision making), its cognitive and normative structures, and the rules, norms, conventions or operating procedures which are regarded as socially or legally binding but which are not self-enforcing.⁵⁸ Institutions matter to individual and social action and interaction because they provide the structure in which the action and interaction occurs. They provide shared conceptions of reality, meaning systems and collective understandings that guide decision making and which individuals take for granted. Actors articulate and define their policy problems and solutions by using institutionalised scripts, cues and routines that constitute their cognitive frameworks and empower them to act, but on which they do not necessarily reflect.⁵⁹ Decisions are made to pursue goals, but often the reaffirmation of processes and rituals and the communication of symbols and legitimacy is equally if not more important.⁶⁰ Finally, institutions have both stabilising and facilitating effects, for example they explain how collective action problems are overcome; the stability of political decision making; and why, in a situation of multiple Pareto-optimal equilibria, one policy option is chosen over another.

Thus, whilst in legal terms they may escape jurisdictional reaches of legal and political systems, regulators, both national and transnational, state and non-state, are embedded in an institutional environment which influences how they behave. Recognising their institutional embeddedness has significant implications for understanding how legitimacy and accountability are constructed, and in turn how

⁵⁸ G. Ikenberry, 'Conclusion: An Institutional Approach to Foreign Economic Policy' in G. Ikenberry, D.A. Lake and M. Mastanduno (eds), *The State and American Foreign Economic Policy* (Ithaca: Cornell University Press, 1988); R.L. Jepperson, 'Institutions, Institutional Effects and Institutionalism' in W.W. Powell and P.J. DiMaggio, *The New Institutionalism in Organisational Analysis* (Chicago: University of Chicago Press, 1991); P.J. DiMaggio and W.W. Powell, 'Introduction' in *ibid*; J. March, and P. Olsen, 'The New Institutionalism: Organisational Factors in Political Life' (1984) 78 *American Political Science Review* 734; P. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism' in P. Hall and D. Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); W.R. Scott, *Institutions and Organizations* (Thousand Oaks, Calif.: Sage, 2nd ed, 2001).

⁵⁹ DiMaggio and Powell, *ibid*; W.R. Scott, *ibid*; J.W. Meyer, J. Boli and G.M. Thomas, 'Ontology and Rationalization in the Western Cultural Account', in W.R. Scott, J.W. Meyer, and Associates, *Institutional Environments and Organizations: Structural Complexity and Individualism* (Thousand Oaks, Calif.: Sage, 1994).

⁶⁰ J.W. Meyer and B. Rowan, 'Institutionalized Organizations: Formal Structure as Myth and Ceremony' (1977) 83 *American Journal of Sociology* 340.

regulators will respond to attempts to render them legitimate, particularly in situations of multiple and competing legitimacy claims. In order to understand the relevance of institutional context in the legitimacy and accountability debates, however, we need a more fine grained analysis of legitimacy, accountability and their interrelationship.

LEGITIMACY CLAIMS AND LEGITIMACY COMMUNITIES

It is often said of accountability that it is relational,⁶¹ but less so of legitimacy, particularly by legal writers. But both legitimacy and accountability, it is argued, are both fundamentally relational, and that relationship is shaped by the institutional, and I would add discursive, context in which they are situated. Take legitimacy first.

Legitimacy may be an objective fact, but it is socially constructed.⁶² Legitimacy means social credibility and acceptability: ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’⁶³ In a governance or regulatory context, a statement that a regulator is ‘legitimate’ means that it is perceived as having a right to govern both by those it seeks to govern and those on behalf it purports to govern.⁶⁴ Drawing on Weber, power (including regulatory) relations are legitimate where those engaged in them perceive or believe them to be so.⁶⁵ Legitimacy rests on the acceptability and credibility of the organisation to those it seeks to govern. Organisations (regulators) may claim legitimacy, and may perform actions and enter into relationships in order to gain it. But legitimacy is rooted in the acceptance of that organisation by others, and more particularly in the reasons for that acceptance. These reasons lie in the congruence of the regime to a person’s beliefs or expectations.⁶⁶

More particularly, and drawing on institutional theory, there are three sets of reasons for social acceptance. Legitimacy may be pragmatically based: the person or social group perceives that the organisation will pursue their interests directly or indirectly. It can be morally based: the person or social group perceives the goals and/or procedures of the organisation to be morally appropriate. Finally,

⁶¹ Eg Bovens, n 55 above; Mashaw, n 6 above.

⁶² W.R. Scott, n 58 above.

⁶³ *ibid.*

⁶⁴ See discussions in R. Barker, *Political Legitimacy and the State* (Oxford: Oxford University Press, 1990) and D. Beetham, *The Legitimation of Power* (London: Macmillan, 1991).

⁶⁵ M. Weber, ‘Bureaucracy’ in H.H. Gerth and C. Wright Mills, *Max Weber, Essays in Sociology* (London: Routledge, 1948), 213.

⁶⁶ Beetham, n 64 above, 11; Weber, n 65 above; J. Habermas, *Legitimation Crisis* (London: Polity Press, 1973), though leaving aside for the moment how these values are themselves grounded (e.g. the Habermasian position that the validity claim of norms lies in rationally motivated agreement and the counterfactual supposition that the norms could be ‘discursively redeemed’, i.e. grounded in the consensus of participants through argumentation (Habermas, *ibid* 105).

legitimacy can be cognitively based: the organisation is accepted as necessary or inevitable.⁶⁷

Legitimacy is thus not necessarily a question of legal validity. This is not to argue against the positivist position that law is accepted as legitimate because it is legally valid.⁶⁸ It is simply to say that in identifying the ‘legitimacy’ of governance regimes or organisations within them, trying to do so by identifying legal validity will often be irrelevant, or at least unproductive. Where regulatory regimes are largely non-legal and where, as in transnational regimes, infusing them with law is problematic, using only a legal concept of legitimacy will lead us to a dead end: such regimes will necessarily lack legitimacy and any potential for legitimacy, in legal terms. They may, however, still be regarded as perfectly legitimate by others. The Forest Stewardship Council or Responsible Care, for example, are seen as legitimate by a number of market actors in the forestry and chemical industries respectively, but they have no legal basis.

Legitimacy thus lies as much in the values, interests and expectations, and cognitive frames of those who are perceiving or accepting the regime as they do in the regime itself. As such legitimacy can differ significantly across time and space, and between actors, systems and contexts.⁶⁹ Although legitimacy claims may change, legitimacy can nonetheless be resilient – legitimacy communities may ‘forgive’ individual transgressions.⁷⁰ Moreover, different people’s perceptions of whether an organisation is legitimate are not necessarily based on the same types of evaluations. B may perceive an organisation or set of institutions (A) to be legitimate because it embodies a particular religious ideology, or because it is pursuing a goal which B judges to be normatively good (sustainable development; pro-life; euthanasia; animal rights; free trade). Alternatively, C may perceive A to be legitimate because it is procedurally fair in its conduct, or because it is pursuing C’s interests. Legitimacy is also associated with the roles that are being performed.⁷¹ Role-legitimacy is particularly relevant when considering the role of non-state regulators, as not all organisations will be perceived as legitimate in performing regulatory roles. An NGO, for example, may be perceived by some as legitimate in performing a role as a lobbyist but not as a regulator; just as an aid organisation may be perceived as legitimate in providing humanitarian relief for those affected by civil war but not in lobbying for regime change.⁷² Froomkin, for

⁶⁷ M. Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *Academy of Management Review* 571; L.G. Zucker, ‘Institutional Theory of Organizations’ (1987) 13 *Annual Review of Sociology* 443. A fourth form of legitimacy, charismatic legitimacy, is also noted by these writers.

⁶⁸ C. Schmitt, *Law and Legitimacy*, transl. J. Seitzer (Durham: Duke University Press, 2004).

⁶⁹ This differs slightly from Beetham, n 64 above, 10, who argues they rest solely on the characteristics of the regime, although he also states that what is significant is the resonance that those characteristics have for different actors within and outside the regime; however, he is not so concerned to delineate the differences between legitimacy communities.

⁷⁰ Although as Suchman argues, the resilience of legitimacy is linked to its basis: pragmatic legitimacy is less resilient than moral or normative legitimacy, which is in turn less resilient than cognitive legitimacy. For discussion see Suchman, n 67 above; Zucker, n 67 above.

⁷¹ Suchman, n 67 above; Zucker, n 67 above.

⁷² M. Edwards and D. Hulme (eds) *Non-governmental Organisations: Performance and Accountability* (London: Earthscan, 1995).

example, argues that ICAAN (the domain name regulator) is the legitimate body for performing tasks of technical coordination, but not broader policy making.⁷³

In short, what constitutes legitimacy for one part of an organisation's environment, or one legitimacy community,⁷⁴ will differ from that which constitutes legitimacy for another. Regulators are thus likely to be subject to multiple legitimacy claims which differ between themselves quite substantially, and which indeed may be irreconcilable, a point to which we will return below.

This is not a new observation, but debates on accountability and legitimacy in law, and often in political science, tend to focus on normative or cognitive bases of legitimacy, and on contestations arising from these. With respect to state regulators there is a set of normative, and to an extent cognitive, legitimacy criteria which is generally accepted, albeit one which is expressed differently between different writers and which vary with constitutional traditions.⁷⁵ Synthesising these, and extending them to non-state regulators, it is suggested that there are four broad types of normative and cognitive legitimacy claims which are made of (and by) regulatory bodies, each with their own logics.⁷⁶ These are constitutional claims; justice claims; functional or performance claims; and democratic claims. *Constitutional claims* emphasise conformance with written norms (thus embracing law and so-called 'soft law' or non-legal, generalised written norms), and conformity with legal values of procedural justice and other broadly based constitutional values such as consistency, proportionality and so on. *Justice claims* emphasise the values or ends which the organisation is pursuing, including the conception of justice (republican, Rawlsian, utilitarian, for example, or various religious conceptions of 'truth' or 'right'), but also more prosaically goals such as sustainable development or free trade. *Functional or performance-based legitimacy claims* focus on the outcomes and consequences of the organisation (for example efficiency, expertise or effectiveness), and the extent to which it operates in conformance with professional or scientific norms, for example. *Democratic claims* are concerned with the extent to which the organisation or regime is congruent with a particular model of democratic governance, for example representative, participatory, or deliberative. These legitimacy claims are both contestable and contested, not only between the different groups, but within them. Thus there are different models of procedural justice; competing models of democratic governance; different types of functional or performance legitimacy claims

⁷³ M. Froomkin, 'Wrong Turn in Cyberspace: Using ICAAN to Route Around the APA and the Constitution' (2000) 50 Duke LJ 17; M. Froomkin, 'Form and Substance in Cyberspace' (2002) 6 Jnl Small and Emerging Business Law 93.

⁷⁴ On the significance of regulatory communities in understanding and constituting the dynamics of regulatory regimes, see E. Meidinger, 'Regulatory Culture: A Theoretical Outline' (1987) 9(4) *Law and Policy* 355; J. Black, 'Talking About Regulation' [1998] *Public Law* 77.

⁷⁵ For discussion see e.g. R. Baldwin and J.C. McCrudden, *Regulation and Public Law* (London: Weidenfeld and Nicholson, 1987); R. Baldwin and M. Cave, *Understanding Regulation* (Oxford: Oxford University Press, 1999); B. Morgan and K. Yeung, *Introduction to Regulation* (Cambridge: Cambridge University Press, 2006).

⁷⁶ In the sense used by R. Friedland and R. Alford, 'Bringing Society Back In: Symbols, Practices and Institutional Contradictions' in Powell and DiMaggio, n 58 above.

(financial, ethical, professional, economic), and, obviously, competing conceptions of justice.

However, the extent to which regulators are perceived as legitimate is not only based on cognitive and normative assessments, but on pragmatic assessments. Pragmatic legitimacy is often excluded from legal and political science accounts of legitimacy (indeed seen as an illegitimate form of legitimacy), but it can be significant in practice in the creation of legitimacy for regulatory organisations, state or non-state, even though it may be normatively undesirable.⁷⁷ The dynamics of ‘responsible consumerism’, for example, in which consumers make purchasing decisions not just on the price and quality of goods but on peripheral attributes such as the conditions of their production (labour rights, sustainable development) or the terms of their economic transfer in the supply chain (fair trading), mean that firms both on the supply and demand side can have a significant economic interest in complying with social and economic norms that bodies such as FSC, which consumers perceive to be legitimate on normative grounds, generate, although the nature of their interests can vary depending on where they are in the supply chain.⁷⁸ The FSC’s legitimacy is thus pragmatically rooted for some (e.g. suppliers), and normatively based for others (consumers).

Legitimacy claims are thus both constructed and contested by those evaluating regulators. Thus far in this discussion, as in others, it has been implicitly assumed that regulators are passive recipients of these legitimacy evaluations. But regulators, like states,⁷⁹ or indeed any organisation,⁸⁰ can play a role in constructing their own legitimacy claims though, absent hegemony, these claims will not necessarily be accepted by all others. Suchman’s analysis of how organisations can manage their own legitimacy identifies three main strategies: conforming, manipulating and informing. Managing legitimacy encompasses building legitimacy, maintaining it, and repairing it once lost. Organisations can manage their legitimacy by attempting to conform to the legitimacy claims that are made on them; they can seek to manipulate them; or they can select from among their environments audiences (legitimacy communities) that will support them. The form that the strategy takes will vary with the type of legitimacy that is in issue: pragmatic legitimacy (based on self interested claims of legitimacy communities); moral or normative legitimacy (based on assessments that this is the ‘right thing to do’); or cognitive legitimacy (based on assumptions that things could not be any other way); and on whether the organisation is seeking to build, maintain or repair legitimacy.⁸¹

⁷⁷ See also Cashore, n 19 above; and on the role of self interest in the compliance with ISO 14001 standards, see M. Potoski and A. Prakash, ‘The Regulation Dilemma: Cooperation and Conflict in Environmental Governance’ (2004) 64(2) *Public Administration Review* 152.

⁷⁸ Cashore n 19 above.

⁷⁹ See e.g. S.M. Lipset, ‘Some Social Requisites of Democracy’ (1958) 53 *American Political Science Review* 69; R. Merelman, (1966) 60 *American Political Science Review* 548; Habermas, n 66 above.

⁸⁰ See Scott and Meyer, n 67 above; Suchman, n 67 above; Powell and DiMaggio n 58 above.

⁸¹ Suchman, n 67 above, 585-601. See Cashore for consideration in the context of the FSC: Cashore, n 19 above.

Regulators can seek to manage their legitimacy by managing the pragmatic and normative bases of their legitimacy in a number of ways (cognitive legitimacy, by its nature, is far harder to strategically manage). Many state based regulatory agencies, for example, have developed systems of public consultation, decision making and reporting which go well beyond those required by law⁸² to enhance their normative legitimacy. Non-state regulators also can also seek to manage their legitimacy, both out of self interest and because they perceive it to be the ‘right thing to do’: in March and Olsen’s terms, out of a logic of consequences and a logic of appropriateness. Cashore’s analysis of the FSC’s legitimacy illustrates how the FSC seeks to manage its pragmatic legitimacy by engaging in ‘brand-destroying’ activities against those who do not conform.⁸³ Regulators can also seek to develop moral and cognitive legitimacy through, for example, linking themselves to other organisations which are perceived to be legitimate by those whose legitimacy claims they want to meet.⁸⁴ For example, a number of the social and environmental accreditation bodies have agreed to ensure that they abide by the Code of Practice developed by ISEAL (the International Social and Economic Accreditation League) on the development, publication and review of standards by member organisations, largely to enhance their credibility.⁸⁵ The International Accounting Standards Committee has changed its constitutional structures and membership to enhance its legitimacy. Froomkin argues that ICANN has developed procedures modelled on the Internet Engineering Taskforce, which is widely accepted as legitimate by the internet community, in an attempt to gain legitimacy for itself.⁸⁶

Regulators may thus seek to build legitimacy for themselves in a number of ways: by conforming to the claims of all or a selective group of legitimacy communities, for example, or by attempting to create new legitimacy beliefs and new legitimacy communities.⁸⁷ The important point to note with respect to polycentric regimes is that an organisation’s legitimacy communities include other participants in the regulatory regime on whom the organisation relies, or that it would like to enrol in its regulatory processes, as well as those outside it. So a regulator lacking legal powers in a particular jurisdiction, for example Fair Trade, relies on pressure groups or NGOs to generate awareness amongst consumers and in turn economic pressures on market actors to conform to those norms, and so

⁸² See M. Thatcher, ‘Regulation after Delegation: Independent Regulatory Agencies in Europe’ (2002) 9(6) *Journal of European Public Policy* 954.

⁸³ Suchman, n 67 above.

⁸⁴ *ibid.* See also S. Bernstein and B. Cashore, ‘Can Non State Global Governance be Legitimate? An Analytical Framework’ (2007) 1 *Regulation and Governance* 347.

⁸⁵ ISEAL Alliance, Code of Good Practice, available at <http://www.isealalliance.org/index.cfm?fuseaction=Page.viewPage&pageId=502&parentID=500>. See also E. Meidinger, Multi-Interest Self Governance through Global Product Certification Programs’, Buffalo Legal Studies Research Paper 2006-016, available at <http://ssrn.com/abstract=917956>.

⁸⁶ Froomkin, n 3 above, 844-5.

⁸⁷ On strategies for building legitimacy see Suchman, n 67 above, 591-593; B. Ashford and B. Gibbs, ‘The Double Edge of Organizational Legitimation’ (1990) 1 *Organization Science* 177.

consequently has to generate legitimacy amongst those bodies in order to motivate them to act in its support.

REASONS FOR CONSTRUCTING LEGITIMACY

The attempts of regulators to build legitimacy brings to the fore a key issue which discussions on state-based regulators obscure: an awareness of why regulators need legitimacy and authority. All regulators, but particularly non-state regulators, need legitimacy because legitimacy is a critical element in motivating behavioural responses.⁸⁸ They require not only that others accept them, but that they will change their behaviour because of what of the organisations or standards say. Unlike state-based regulators⁸⁹ whose actions are supported by law, non-state regulators cannot necessarily rely on the authority of law to motivate people to behave, or derive their legitimacy from their position in a wider legal order and constitutional settlement.⁹⁰ They have to create the motivation for compliance or change in some other way.⁹¹ That can include trying to render themselves legitimate to states in an attempt to attract support, for example by enacting their norms into law.

Distinguishing state from non-state regulators in this context does not mean that state-based regulators are always perceived as legitimate, and compliance is necessarily forthcoming (or indeed that the state is always absent in polycentric regimes). Research into compliance with state-based regulatory requirements shows that how people respond to regulatory regimes can depend significantly on their perceptions of the legitimacy of those regimes and the particular regulator in question.⁹² But although legitimacy is central to motivating behaviour in all regulatory regimes, it is particularly critical for non-state regulators who do not necessarily have the legitimacy of the state, or supranational or international

⁸⁸ Suchman, n 67 above.

⁸⁹ By which are included legally constituted regulators in the EU.

⁹⁰ Non-state regulators may be linked to state actors in ways within a regulatory regime which mean that they can 'borrow' on the legitimacy of the state (e.g. if state actors choose to adopt their norms, and indeed turn them into law – e.g. such as the EU's adoption of IASB standards in accounting). However, such links may not exist for others, or for the same organisation in a different legal jurisdiction.

⁹¹ For discussion of cooperative strategies in the transnational context see A. Chayes and A.H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass., Harvard University Press, 1995). Non-state regulators will often enroll others to enforce their standards, expanding the number of organisations participating in the regulatory regime (for discussion in the context of financial regulation see e.g. Kerwer, above n 34; J. Black, 'Mapping the Contours of Contemporary Financial Services Regulation' (2002) 2 *Journal of Corporate Law Studies* 253; this does not avoid the need for legitimacy but enhances it, and often raises the issue of role legitimacy (is an NGO a legitimate 'enforcer' of standards, for example).

⁹² See in particular T. Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (New Haven: Yale University Press, 1990); T. Tyler, 'The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities' (1997) 1 *Personality & Social Psychology Review* 323–45; see also A. Chayes and D. Shelton, 'Commentary: MultiLateral Arms Control' in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000); V. Braithwaite and M. Reinhart, 'Taxation Threat, Motivational Postures and Responsive Regulation' (2007) 29(1) *Law and Policy* 137; V. Braithwaite, J. Braithwaite, D. Gibson, and T. Makkai, 'Regulatory Styles, Motivational Postures and Nursing Home Compliance' (1994) 16 *Law and Policy* 363.

settlement to fall back on. For them, satisfying multiple legitimacy communities (or rather a certain set of legitimacy communities) is particularly necessary if their authority is to be recognized and accepted, and thus for their continued survival as a regulatory body. State-based regulators can borrow on the authority of the state or the international legal regime to bolster their legitimacy claims but non-state regulators often need to build legitimacy from the start.

CONSTRUCTING LEGITIMACY –THE ROLE OF ACCOUNTABILITY RELATIONSHIPS

Legitimacy claims are thus made both on and by regulators, and both regulators and legitimacy communities construct and contest the legitimacy of regulators, and indeed of one another. Accountability relationships, it is suggested, are a critical element in the construction and contestation of legitimacy claims by both regulators and legitimacy communities, as they are the means by which those communities seek to ensure that their legitimacy claims are met, and that their evaluations of the legitimacy of regulators are valid. In seeking ‘accountability’, legitimacy communities are seeking to form or validate the congruence between (their understandings of) the regulators’ roles and activities and their own legitimacy claims and, where necessary, to bring regulators closer to meeting those claims.⁹³

As noted above, legitimacy can be grounded not just in moral acceptance (i.e. values) but pragmatically, in the congruence of the organisation to a person’s interests or expectations, and cognitively, in taken for granted assumptions. As organisational institutionalists observe, only pragmatic and moral legitimacy entail some form of active evaluation of an organisation; cognitive legitimacy relates to far more deep rooted assumptions that are rarely articulated, let alone actively assessed.⁹⁴ Accountability is thus the route through which pragmatic and moral/normative legitimacy claims in particular are validated.⁹⁵ This is distinct from saying that accountability relationships are based in different values.⁹⁶ Those who dispute the legitimacy claims of others will contest the associated accountability relationships: so accountability relationships that are sought by

⁹³ As suggested above, those claims will in turn be rooted, at least in the regulatory context, in constitutionalism, justice, democracy and performance/functionality.

⁹⁴ Suchman, above n 67.

⁹⁵ The exact pattern of social relationships through which accountability is performed may vary from hierarchy, competition, mutuality or intermittency (‘contrived randomness’) or any combination of the four, as Hood *et al* have elaborated (C. Hood *et al*, *Regulation Inside Government* (Oxford: Oxford University Press, 1999), all or any of which may exist with respect to non-state regulators (cf R.F. Goodin, ‘Democratic Accountability: The Distinctiveness of the Third Sector’ (2005) 4 *En Jnl Sociology* 364); but my concern is not with the relative ‘status’ of each participant vis-à-vis one another in the accountability relationship, but its communicative structures.

⁹⁶ Cf, for example, C. Harlow, “Global Administrative Law: The Quest for Principles and Values” (2006) 17 *EJIL* 187-214.

powerful market actors to ensure that a regulator acts in their interests in order to validate their pragmatic legitimacy claim, (e.g. ensure regulators allow deforestation) will be contested by those seeking to validate moral/ normative claims, for example as to the justice goals being pursued (sustainable development). Those seeking to build accountability relationships that will validate a particular form of normative claim (e.g. constitutional) will contest accountability relationships which seek to validate a conflicting normative claim (e.g. functional), or conflicting pragmatic or cognitive claim.

Although accountability relationships can be critical for legitimacy, legitimacy is not necessarily always dependent on accountability relationships. Accountability and legitimacy are usually conflated in debates on regulation or governance (as they have been thus far here), but analytically they are distinct. Organisations, institutions or regimes may be afforded legitimacy for a whole range of reasons: self-interest, charisma, ideology, religion, even though they make no attempt to be accountable and indeed may even subvert attempts to make them accountable. For a practising Catholic, the Pope is legitimate even though there is no relationship of accountability between them. However, it is suggested that a more specific description of the relationship of accountability and legitimacy in a regulatory context is that perceptions of the right to govern (legitimacy) depend (in whole or in part) on whether the actor is accepted as having an appropriate accountability relationships with others, often including, but not necessarily confined to, the person whose perception is in question.⁹⁷

THE NATURE OF ACCOUNTABILITY RELATIONSHIPS

Given the range of meanings given to the term, it is necessary to specify just what is meant by accountability here. There are almost as many definitions of accountability as there are articles on the subject, if not more.⁹⁸ As Mulgan demonstrates, from its 'core' meaning of being called to account for one's actions through a social exchange by an external body or group which has authority over one, it has expanded to include 'internal' accountability, to one's own conscience or to norms of professional ethics; 'responsiveness' by governments to demands made on them by citizens; 'control' over institutions through the checks and balances of political systems; and 'dialogue', public discussion between citizens.⁹⁹

At its core, accountability is a particular type of relationship between different actors in which one gives account and another has the power or authority to

⁹⁷ The question of trust is also clearly important; and I would suggest that trust and legitimacy are closely interrelated – however exploring the contours of that interrelationship is an issue for another time.

⁹⁸ See e.g. Bovens, n 55 above; R. Mulgan, 'Accountability: An Ever Expanding Concept?' (2000) 78(3) *Public Administration* 555; M. Dubnick, 'Clarifying Accountability: An Ethical Framework' in C. Sampford and N. Preston, *Public Sector Ethics* (London: Routledge, 1998); A. Sinclair, 'The Chameleon of Accountability' (1995) 20 *Accounting Organizations and Society* 219; R. Keohane, 'Global Governance and Democratic Accountability' in D. Held and M Koenig-Archibugi (eds), *Taming Globalization* (Oxford: Polity Press, 2003); Mashaw, n 6 above.

⁹⁹ Mulgan, n 98 above.

impose consequences as a result.¹⁰⁰ In other words, for A to be accountable to B means that A agrees to external scrutiny by or on behalf of B (gives account to B) *and that* B's response will make a 'practical difference' to the conduct of A, either retrospectively, prospectively or both. These consequences may include sanctions, but as Bovens argues, the presence or absence of sanctions, even informal ones, should not be decisive of the question of whether an accountability relationship exists; it simply distinguishes its form (in Bovens analysis, whether it is 'thin' or 'thick').¹⁰¹ Other, more expansive conceptions of accountability, for example as internal conscience,¹⁰² responsiveness¹⁰³ or control,¹⁰⁴ are thus not adopted here. Rather, as by others elsewhere, a relational notion of accountability is suggested: to be accountable is to agree to subject oneself to relationships of external scrutiny which can have consequences.¹⁰⁵

So far, so familiar. But this sketch of the nature of accountability relationships needs elaboration in three key respects if we are to understand the role of these relationships in constructing and contesting legitimacy, and their implications. First, even Bovens' comprehensive analysis of accountability arguably fails to capture the complexity of the dynamics, interdependences and institutional structures of accountability relationships outside constitutional settlements.

Secondly, power, to the extent it is envisaged at all in accountability relationships, is usually envisaged in flowing in one direction: from accountee over

¹⁰⁰ Bovens, n 55 above; Mulgan, n 98 above.

¹⁰¹ Bovens, n 55 above.

¹⁰² For some, accountability can be 'internal', to one's own conscience, for example, or internalised norms of professional standards or ethics, e.g. Sinclair, n 98 above. However, whilst this can alter a person's behaviour, it conflates 'accountability' with the external constraints on action that are posed or sought. Rather accountability involves more than self-censorship and self-examination; it is a form of relationship with others. For public lawyers, and most political scientists, that relationship has to be public for a relationship to be recognised as an accountability relationship. However, it is suggested that it is not that the relationship has to be public for an accountability relationship to *exist*, just that it has to be public for many people to consider it to be an appropriate form of accountability relationship for public (governmental) actors. The critical element in constituting accountability is the relationship; not its publicity.

¹⁰³ Accountability is also sometimes confused with responsiveness: notions of being 'accountable' to the market, for example, often which refer rather to a firm's responsiveness to the actions of market actors, such as shareholders or consumers. Responsiveness on its own is not necessarily accountability, however. Firms may respond to consumer demand by developing ethical products, for example, but changes in their production processes, labour relations or sourcing policies to respond to consumer demand does not necessarily mean they are 'accountable' to consumers; rather they are influenced by them. Being 'accountable' would mean that firms create structures through which they can communicate with consumers, or more realistically groups of consumers or those purporting to act on their behalf, and through which consumers can respond in such a way that will have consequences for the firm's behaviour.

¹⁰⁴ e.g. n 1 above; A. Lupia 'Delegation and its Perils', in: K. Strom *et al* (ed.), *Delegation and Accountability in Parliamentary Democracies* (Oxford: Oxford University Press, 2003) 33-54. However, by sheer force of definition, defining accountability as control excludes from consideration one of the main problems that accountability relationships are meant to address – how to exert control, even retrospectively, for that itself can have prospective effect (See also C. Harlow, *Accountability in the European Union* at 10 for a similar criticism). Moreover, control conceptions of accountability also omit the need for the accountee to 'render account': to explain and justify its actions, a point also made by Mulgan, n 98 above; Bovens, n 55 above; R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies*, (Basingstoke: Palgrave, 2003) 19.

¹⁰⁵ Bovens n 55 above; Mashaw, n 6 above.

accountor. This linear model of accountability is the equivalent of the ‘command and control’ fallacy in the regulatory context: that regulation is about regulators telling and others doing. But as the decentring analysis emphasises, all social relations, as Giddens points out, are dialectical.¹⁰⁶ Those engaged in social relations, including governance, regulatory and accountability relations, are at once autonomous from and dependent on the other. Accountability relationships are not linear but dialectical. The accountor is dependent on the accountee for information, for example, relying on it to render a valid account and to respond to the accountor’s assessment, and yet the accountor is autonomous. It is not a cipher, and ‘compliance’ cannot be assumed. Similarly, the accountee (e.g. regulator) is dependent on the accountor, for example to provide it with resources; to leave it alone; to comply with standards that the regulator issues, a matter to which we will return below.

Thirdly, we need a more developed understanding of what it means to ‘render account’. The question, ‘what does it mean to render account’ is usually answered in terms of the original use of accountability – literally to give ‘a count’, as expanded into the more comprehensive understanding of informing, explaining and justifying one’s actions.¹⁰⁷ But what does giving such an explanation imply for the person giving it? What is necessary for it to give an account, and what effects does the construction and articulation of that account have on the accountee? What it means to render account is a central issue, for it is significant both for understanding how organisations respond to and construct accountability relationships, and in turn for recognising what the implications are for them in doing so.

RENDERING ACCOUNT: THE COMMUNICATIVE STRUCTURES OF ACCOUNTABILITY

While pointing out that different accountability relationships may operate in tension is not new, what is less recognised are the potential implications of these tensions. In order to recognise just what ‘rendering account’ can mean for an organisation, we need to add to a relational and dialectical concept of accountability an appreciation of the communicative structures in which accountability occurs. In one sense, to give account is to construct and present a narrative of past events or actions. It may be that the narrative has no effect on the organisation; the narrative is constructed by it, but the narrative itself is not constitutive of organisational norms or practices. Indeed, on a rational actor analysis, an organisation may simply construct a narrative which is false in order to serve its own interests. To the extent that the narrative is rationally constructed in

¹⁰⁶ n 18 above.

¹⁰⁷ See Dubnick, n 98 above above; Bovens, n 55 above.

order to enhance the organisation's legitimacy, accountability relationships can thus simply be a strategic devices used by organisations to manipulate perceptions of their activities and performance. To an extent, attempts by regulators to construct their own legitimacy can be seen as illustrations of such strategies.

However, on a more sociological analysis, the scope for strategic action is bounded by the institutional context. On such an analysis, the narratives organisations construct will have to make sense to them. Meyer and Rowan, for example, argue that the narrative has to accord at least in part to the organisation's own sense of itself, its activities and role.¹⁰⁸ Their assumption is that the organisation will alter the narrative. However, it is also possible that to the extent that the narrative was distinct, the narrative alters the organisation. The organisation alters to bring itself closer into accordance with the story it tells of itself. Akin to the way that some argue that participants in the ideal speech situation cannot maintain positions that they do not ultimately believe in,¹⁰⁹ some discourse theorists argue that significant dissonance between our perception of ourselves and the story we tell others of ourselves cannot be maintained over time.¹¹⁰ Similarly, Suchman argues that responding to moral and cognitive claims can itself have transformatory effects on an organisation.¹¹¹

This insight has implications for how and whether organisations can construct multiple narratives in the context of multiple accountability relationships in an attempt to meet the divergent legitimacy claims of multiple legitimacy communities. To give account requires the construction of a narrative; it also involves engaging in a particular discourse of accountability. Audit, for example, is not simply an accountability tool which can be used to given an account of financial expenditure, or indeed increasingly performance in achieving a wide range of social objective, such as sustainable development, ethical labour practices, and so on, as the growing practices of social audit illustrate.¹¹² Judicial review is not simply the application of a set of legal norms to the behaviour of public actors. Deliberative polyarchies which engage regulators in democratic deliberation and in which regulators are called to give account are not simply the engagement of the public in reviewing actions of regulators. Rather each is an interpretive and discursive schema through which participants in the accountability relationship make sense of their own and each others' roles, which is constitutive of their relationship and which is fundamentally shaped by it.

¹⁰⁸ n 60 above.

¹⁰⁹ J. Habermas, 'Three Normative Models of Democracy' in S. Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, N.J.: Princeton University Press, 1996).

¹¹⁰ B. Davies and R. Harre, 'Positioning: The Discursive Production of Selves' (1990) 20 *J of the Theory of Social Behaviour* 43; S. Hall, 'The Work of Representation' in S. Hall (ed), *Representation: Cultural Representations and Signifying Practices* (London: SAGE, 1997); R. Collins, 'On the Microfoundations of Macrosociology' (1981) 86 *American Journal of Sociology* 984.

¹¹¹ Suchman, n 67 above, 579.

¹¹² S. Courville 'Social accountability audits: challenging or defending democratic governance?' (2003) 25(3) *Law and Policy*: 269.

What this communicative dimension of accountability provides to the analysis here is that accountability is not an abstract, technical process, and the ‘tools’ or ‘techniques’ by which it is achieved are not neutral, technical instruments that can be deployed at will. This runs counter to the ‘collibration’ or ‘invisible hand’ model of accountability, in which accountability mechanisms can be tweaked or altered and selective inhibitors applied through processes of strategic intervention to ensure that appropriate norm structures are recognised and outcomes achieved.¹¹³ Rather accountability relationships are discursive interactions which draw on and thus reproduce particular structures of meaning.

This argument accords with recent calls by some political scientists for a more ‘sociological’ conception of regulatory tools.¹¹⁴ However, those who work with these tools already, particularly lawyers and accountants, have long adopted this approach, recognising that the instruments of law, statistics, accounting, or auditing are far from being neutral or merely technical. In particular, there is a significant body of literature on accounting and audit which explores in considerable depth the role of these practices in transforming organisational reality. Accounting or auditing norms can be sites of contestation between different conceptions of the role of the organisation both within and outside it; they can build new shared understandings of organisational purposes; provide a common discourse and framework of meanings in which the organisation can make sense of itself and others make sense of it; and provide organisational members with a system of categories in which they can make sense of what has happened, anticipate the future and plan and assess action.¹¹⁵

More generally, regulatory (including accountability) tools should be understood as technologies: ways of understanding cause and effect relations and the products of those understandings.¹¹⁶ Different regulatory technologies are different discourses and have different logics.¹¹⁷ They embody, or at least place emphasis on, different understandings of the nature of behaviour or of an institutional environment, and in turn have different preconditions for effectiveness (which are that the institutional environment or behaviour conforms to those foundational understandings). Technologies of disclosure, for example, assume a model of behaviour which at the very least approximates to that of a rational actor. Legal norms are themselves a technology: they have certain inherent

¹¹³ See n 1 above.

¹¹⁴ P. Lascombes and P. Le Gales, ‘Introduction: Understanding Public Policy Through its Instruments – From the Nature of Instruments to the Sociology of Public Policy Instrumentation’ (2007) 20(1) *Governance* 1.

¹¹⁵ P. Miller and T. O’Leary, ‘Accounting and the Construction of the Governable Person’ (1987) 12 *Accounting, Organizations and Society* 235; *ids*, ‘Making Accountancy Practical (1990) 15 *Accounting, Organizations and Society* 479; A. Hopwood, ‘The Archaeology of Accounting Systems’ (1987) 12 *Accounting, Organizations and Society* 207 ; A. Loft, ‘Toward a Critical Understanding of Accounting: The Case of Cost Accounting in the UK 1914-1925 (1988) 13 *Accounting, Organizations and Society* 137; S. Burchell *et al*, ‘The Role of Accounting in Society’ (1980) 5 *Accounting, Organizations and Society* 1; M. Power, *The Audit Explosion* (Oxford: Oxford University Press, 1997).

¹¹⁶ See J. Black, ‘Decentred Regulation: Understanding the Role of Regulation and Self Regulation in a “Post-Regulatory” World’ (2001) 54 *Current Legal Problems* 103-147.

¹¹⁷ In sense used by Friedland and Alford in DiMaggio and Powell, n 58 above.

limitations; using rules of different structure assumes particular models of behaviour and can help to construct or confirm relative roles of regulators and others within a regulatory regime.¹¹⁸ The role of statistics in constituting a particular social reality and then governing the reality thus constituted has been well explored.¹¹⁹ Literature on the role of mapping and architectural design emphasizes the role of these technologies not just in representing but structuring a social reality.¹²⁰ Finally, as noted, the literature on accounting and audit probably provides the most extensive exploration of a particular type of regulatory technology.¹²¹ Accountability ‘tools’ are no different from other types of regulatory tool. They too are technologies. This is true not just of the familiar accountability tools of audit and accounting. As such they have different cognitive and normative dimensions, embodying different assumptions about the world, about social behaviour, and about what ought to be.

The analysis of accountability tools as technologies has implications for debates on the design of accountability mechanisms, particularly those that assume that accountability is a technical issue; that what is necessary is to improve the design, enhance the mechanisms, structure the springs, in such a way that accountability will necessarily follow.¹²² For to reiterate, accountability is not a technical exercise; it is a relational one.¹²³ Different accountability mechanisms are different accountability relationships with different logics. Moreover, because different accountability relationships are grounded in different legitimacy claims, those relationships are not necessarily substitutable one for the other such that if one fails another can take its place.¹²⁴ Substitutability assumes homogeneity in legitimacy claims within the organisation’s environment. But as discussed above, those claims are heterogenous. As a result, recommendations, such as Scott’s concept of ‘extended accountability’, in which different types of accountability can be substituted one for another should one of them fail, fail to recognise that such substitutions can affect the legitimacy of the organisation for different legitimacy communities. Substituting accountability to a political forum with an audit, for example, may be more effective in functional terms (e.g. in ensuring financial prudence and probity), but in terms of the organisation’s legitimacy the substitution might be acceptable to some, deeply unacceptable to others.

¹¹⁸ J. Black, *Rules and Regulators* (Oxford: Oxford University Press, 1997).

¹¹⁹ Rose, n 15 above, T. Porter, *Trust in Numbers* (Princeton, N.J.: Princeton University Press, 1995).

¹²⁰ J.C. Scott, *Seeing Like a State* (Yale: Yale University Press, 1998); D. Garland, *The Culture of Control* (Oxford: Clarendon, 2001), 162; C. Shearing and P. Stenning, ‘From the Panopticon to Disneyworld: The Development of Discipline’ in E. Doob and E. L. Greenspan (eds), *Perspectives in Criminal Law* (Aurora, Ontario: Canada Law Book, 1985).

¹²¹ See references at n 115 above.

¹²² Eg n 1 above.

¹²³ See also S. Lister, ‘NGO Legitimacy: Technical Issue or Social Construct?’ (2003) 23(2) *Critique of Anthropology* 175.

¹²⁴ This is not to say that certain technologies, such as audit, are always used to further certain types of claim (e.g. financial performance); they can be used to further claims of ethical practices, for example, as the rise of social audits demonstrates; but technologies such as audit are broadly associated with claims relating to performance. It is not the purpose here to develop a matrix of accountability ‘tool’ and legitimacy claim, however, even if one could be coherently and usefully developed.

RESPONDING TO MULTIPLE LEGITIMACY CLAIMS

DILEMMAS AND TRILEMMAS

What are the implications of this analysis of legitimacy and accountability for understanding how regulators will respond to multiple and often conflicting accountability and legitimacy claims? As noted above, organisations can face multiple legitimacy claims, many of which may conflict. How can an organisation respond? It may be able to meet all, or at least some of them, simultaneously – to please some of the people some of the time. It is not necessary for legitimacy claims to be interlinked or mutually supporting for it to be possible for this to happen. They simply have to be compatible. The development of management models such as balanced scorecards, used by a number of government bodies, represent just such attempts to structure, or at least provide a reporting framework for, the organisation's responsiveness to different aspects of its environment.¹²⁵

As noted above, regulators can play a role in constructing their own legitimacy claims though, absent hegemony, these claims will not necessarily be accepted by all others.¹²⁶ In responding to legitimacy claims of others, conforming to the demands of most or all legitimacy communities may work: the 'win-win' solution may be attainable. But the demands of legitimacy communities may well be directly opposed, so that to satisfy one will necessarily lead to dissatisfaction of the other.

Representation and membership is a good example. Regulators can attempt to incorporate potentially competing demands within their organisational structures; for example the FSC attempts to balance the voting power (and structure the potential conflict) between different members through a tripartite structure of membership chambers: social, environmental and economic.¹²⁷ However, frequently, in order to satisfy the legitimacy claims of those they are seeking to regulate, regulators' main decision making bodies need to be comprised solely or mainly of representatives of those regulatees and /or those with considerable technical expertise. In contrast, to be legitimate to a wider section of civil society, and indeed to be legitimate to other actors in the regulatory regime, such as pressure groups or NGOs that the standard setting organisation may be relying on, those decision making bodies need to be composed of a wider range of representatives. A similar debate occurs in the context of risk regulation: to be legitimate to scientists, regulators have to be composed of scientific experts, or at least be governed by them in their decisions; however to be legitimate to other

¹²⁵ The idea originated in the context of corporations with R.S. Kaplan and D. P. Norton, 'The Balanced Scorecard—Measures that Drive Performance' (1992) January-February, *Harvard Business Review* 71–79; it is increasingly used by UK governmental regulators to report on performance, e.g. the Health and Safety Executive and the Environment Agency. They are also used by state and regional healthcare providers in the US, Canada and the UK.

¹²⁶ Text accompanying n 78 *et seq* above.

¹²⁷ http://www.fsc.org/en/about/governance/membership_chambers. See Meidinger, n 19 above for discussion.

sectors of society, regulators have to include a wider representation of society in their decisions – the familiar debate on lay versus expert models of decision maker.¹²⁸ There are other conflicts: such as between those demanding procedural justice and those demanding maximum speed and efficiency in decision making. Even within models of administrative justice there are conflicts, as Mashaw’s familiar typology of bureaucratic, moralistic and professional models of administrative justice demonstrates.¹²⁹

Faced with incompatible legitimacy claims, organisations face a legitimacy dilemma: what they need to do to be accepted by one part of their environment, within and outside the regulatory regime, is contrary to how they need to respond to another part. Forming one set of accountability relationships can preclude forming others; it simply is not possible for organisations to have complete legitimacy from all aspects of its environment, including all other organisations in the regulatory regime.

Even if the conflict between legitimacy communities does not lead to a dilemma, it can have a deleterious effect on the organisation as it seeks to respond to the multiple legitimacy and accountability demands being made on it: in Koppell’s evocative phrase, the organisation may suffer ‘multiple accountability disorder’.¹³⁰ In other words, its attempts to respond to the multiple demands may diminish its chances of survival.¹³¹ Koppell argues that ICAAN has suffered in this respect. Although there is little other work done on the effects of multiple legitimacy claims on regulators, there has been some on how other organisations have responded to attempts to render them more accountable on which we can draw. Edwards, for example, has noted that the increasing demands on NGOs to develop the accountability trappings of financial audit, transparency, and so on, can result in those organisations becoming more accepted by state or international actors, but also more bureaucratized and increasingly distant from the communities they seek to engage with and represent.¹³² Research into the effects of the introduction of new public management tools of accountability and evaluation in healthcare and education, for example, is replete with complaints from those within those sectors that the demands of audit, performance targets and other accountability and managerial tools are distorting organisational

¹²⁸ Contrast, for example, S. Breyer, *Breaking the Vicious Cycle: Toward Effective Risk Regulation* (Cambridge, Mass.: Harvard University Press, 1992); J. Cohen and C. Sabel ‘Directly Deliberative Polyarchy’ (1997) 3 *European Law Journal* 313; see generally Royal Society, *Risk: Analysis, Perception, Management* (London: RSA, 1992) chapter 6.

¹²⁹ J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability* (New Haven: Yale University Press, 1983).

¹³⁰ J. Koppell, ‘Pathologies of Accountability’: ICANN and the Challenge of ‘Multiple Accountability Disorder’ (2005) 65(1) *Public Administration Review* 94.

¹³¹ See in particular Power, n 115 above.

¹³² M. Edwards, *Future Positive: International Co-operation in the 21st Century* (London: Earthscan, 1999), chapter 11; H. Slim, ‘By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations’ The International Council on Human Rights Policy International Meeting on Global Trends and Human Rights – Before and After 11 September, Geneva, January 2002 (available at <http://www.jha.ac/articles/a082.htm>). For expression of similar concerns with respect to non-profit organisations, see Goodin, n 95 above.

priorities away from what others (doctors, teachers) think should be the central role for the organisation.¹³³ Conflicting pressures on the organisation lead to internal conflicts between different parts of the organisation and to the adoption of a range of responses, from transformation and acquiescence to defiance and manipulation.¹³⁴ This suggests that there can be significant implications for an organisation, therefore, in acquiescing in certain legitimacy claims and developing certain accountability relationships rather than others.

Moreover, once gained, maintaining legitimacy may be difficult, not least because legitimacy communities can change: new actors with different legitimacy claims may become relevant to the organisation or legitimacy claims of existing actors in the regulators' environment may mutate.¹³⁵ Studies of UK nationalized industries post-privatisation illustrate the tensions that existed within organisations when new actors (shareholders and potential investors) became relevant for that organisation due to changes in the institutional environment (the advent of private shareholding), making it necessary for the organisation to substantially alter not just its activities but its frame of reference and self-understanding.¹³⁶ Regulatory bodies can be subject to similar changes. Some may be forced on them by legal requirements (for example a requirement to consult or respond to a specified consumer panel), or by other coercive or isomorphic pressures (the need to be seen have particular systems of governance, for example); others they may be able to respond to in a more strategic and autonomous manner, albeit one shaped by the institutional context.

It may be that even though it is faced with multiple and perhaps incompatible legitimacy claims that the organisation does not perceive there to be a dilemma at all. Instead, it simply does not respond to a particular claim. In other words the organisation does not (perceive a) need to meet the legitimacy claims of a particular legitimacy community in order to pursue its goals or to survive – the legitimacy claimant is not a legitimate one for the organisation. It can ignore the claims of consumers, less developed countries, human rights organisations and so

¹³³ See e.g. L. Lindkvist, 'Performance based compensation in health care—a Swedish experience' (1996) 12 *Financial Accountability and Management* 89; I. Lapsley, 'Reflections on Performance Measurement in the Public Sector', in I. Lapsley and F. Mitchell (eds), *Accounting and Performance Measurement. Issues in the Private and Public Sectors* (London: Paul Chapman Publishing, 1996); R. Laughlin, J. Broadbent, D. and Shearn, 'Recent financial and accountability changes in general practice: an unhealthy intrusion into medical autonomy?' (1992) 8 *Financial Accountability and Management* 129–148.

¹³⁴ See S. Brignall and S. Modell, 'An Institutional Perspective on Performance Measurement and Management in the New Public Service' (2000) 11 *Management Accounting Research* 281. On the distorting effects of targets see C. Hood, 'Gaming in Targetworld: The Targets Approach to Managing British Public Services' (2006) 66(4) *Public Administration Review* 515; G. Bevan and C. Hood, 'What's Measured is What Matters: Targets and Gaming in the English Public Healthcare System' (2006) 84(3) *Public Administration* 517. On internal conflicts and the transformative effects of accounting in particular on newly privatized industries in the UK, see S. Ogden, 'Transforming Frameworks of Accountability: The Case of Water Privatization' (1995) 20 (2/3) *Accounting Organizations and Society* 193; J.F. Dent, 'Accounting and Organizational Reality: A Field Study of the Emergence of a New Organizational Reality' (1991) 16(8) *Accounting Organizations and Society* 705; L. Conrad, 'A Structuration Analysis of Accounting Systems and Systems of Accountability in the Privatized Gas Industry' (2005) 15 *Critical Perspectives on Accounting* 1.

¹³⁵ For discussion see Suchman, n 67 above.

¹³⁶ Ogden, n 134 above; Dent, n 134 above; Conrad, n 134 above.

on, because it has greater (perceived) need for recognition by other legitimacy communities. The Anglican Church in England has proved almost impervious to attempts to impose hierarchical systems of financial and managerial control, for example;¹³⁷ although adopting them would enhance its legitimacy amongst some, this is not of itself a strong enough impetus to promote change, and those attempts to build these accountability relationships can be ignored.

But regulatory, and indeed other, organisations cannot ignore all legitimacy claims, even if they can, or perceive they can, ignore some. As emphasized above, regulatory organisations have a particular need for legitimacy – it is not enough that they are ‘generally accepted’, they need to be actively supported. This is true for all regulators,¹³⁸ but it is particularly true for non-state regulators who are trying to promote behavioural changes in others who may be under no legal obligation to take any notice of them at all, and moreover who often compete with other regulators to have their norms accepted.¹³⁹

There has been very little sustained research on how either governmental or non-governmental regulators respond to competing accountability and legitimacy claims, and even less on how these responses may be affected by their relationship with other regulators in polycentric regulatory regimes.¹⁴⁰ There is a considerable body of research investigating the responses of regulatees: both on the reasons for their non-compliance,¹⁴¹ and why they ‘go beyond’ compliance: why firms develop environmental policies which extend beyond regulatory requirements,¹⁴² or why they comply with non-legal codes of conduct relating to corporate governance, for

¹³⁷ A.J. Berry, ‘Accountability and Control in a Cat’s Cradle’ (2005) 18(2) *Accounting, Audit and Accountability Journal*, 225.

¹³⁸ And indeed all religions, it could be said, but the relationship is not one that will be explored here.

¹³⁹ E. Meidinger, ‘Competitive Supra-Governmental Regulation: How Could it be Democratic?’ Buffalo Legal Studies Research Paper Series 2007-007 available at <http://ssrn.com/abstract=1001770>. The phenomenon of regulatory competition between states is recognized, but the dynamics are different, not least because of the effects of legal jurisdiction in the latter case.

¹⁴⁰ There are a few exceptions, though these tend to focus more broadly on the politics or dynamics of non-state regulators more broadly; see for example W. Mattli and T. Buthe, ‘Accountability in Accounting: The Politics of Rulemaking in the Public Interest’ (2005) 18(3) *Governance* 399; Koppell, n 130 above; R. Suddaby, D. Cooper and R. Greenwood, ‘Transnational Regulation of Professional Services: Governance Dynamics of Field Level Organizational Change’ (2007) 32 *Accounting, Organizations and Society* 333. It should be noted that there is also little research on how regulated organisations respond to competing regulatory norms, both legal and non-legal; most research is done on a domain-specific basis: ‘how did organisation X respond to set of regulatory norms Y?’ where ‘Y’ is environmental rules, or competition requirements or health and safety provisions, and so on. This is also true for studies of transnational regulation, both treaty-based and ‘soft law’ provisions: see e.g. D. Shelton (ed), *Commitment and Compliance* (Oxford University Press, 2000). For a rare exception see F. Haines and D. Gurney, ‘The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict’ (2003) 25(4) *Law and Policy* 353.

¹⁴¹ See e.g. R. Kagan and J. Scholz, ‘The “Criminology of the Corporation” and Regulatory Enforcement Strategies’ in K. Hawkins and J.M. Thomas (eds) *Enforcing Regulation* (Boston, Mass: Kluwer-Nijhoff, 1984); R. Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1995); D. Winter and C. May, ‘Motivation for Compliance with Environmental Regulatory Policy’ (2001) 20(4) *Jnl Policy Analysis and Management* 675.

¹⁴² On the latter see e.g. R. Kagan, N. Gunningham and D. Thornton, ‘Explaining Corporate Environmental Performance: How Does Regulation Matter?’ (2003) 37 *Law and Society Review* 51.

example.¹⁴³ There has also been research on the narrower question of the impact of new public management reforms in some European countries, in particular in health, education and local government.¹⁴⁴ There is some work which focuses on INGOs.¹⁴⁵ There has also been research on compliance with binding and non-binding international norms.¹⁴⁶

Two elements of that work are particularly relevant. Recent work in the psychology of compliance shows the importance of motivational postures to how organisations respond to regulation and to regulators. Motivational postures are the social signals that individuals send to the regulator and to themselves to communicate the degree to which they accept both the regulatory agenda and the way in which the regulator functions and carries out its duties on a daily basis. This work identifies five types of motivational posture: commitment to or accommodation of the regulatory agenda; capitulation to the regulatory authority; resistance, game playing and disengagement.¹⁴⁷

A similar categorization of organisational responses has been developed in organisational theory. Although it has separate theoretical roots and is developed outside of the regulatory context, there are considerable similarities between the two approaches. In a synthesis of resource theory of organisations and institutional theory,¹⁴⁸ Oliver identifies five types of response by organisations to institutional processes: acquiescence, compromise, manipulation, avoidance or defiance, which broadly map onto Braithwaite et al's typology, outlined above.¹⁴⁹ In Oliver's analysis, however, each main type of response is further subdivided into three, producing a fifteen-fold typology. Oliver further suggests that organisational responses to institutional pressures to conform will depend on five categories, each with two dimensions. These are cause (the nature of the pressures exerted/ what the organisation gains from acquiescence – either in terms of social fitness or economic gain); constituents (the issue of who is exerting the pressures, examining both the multiplicity of claimants and the degree organisation's dependence on them); content (the consistency of the demands made with the goals of the organisation, and the extent to which they constrain the organisation's

¹⁴³ See e.g. C. Parker, *The Open Corporation* (Cambridge: Cambridge University Press, 2001); for a recent contribution to the wider corporate social responsibility debate, see D. McBarnet, A. Voiculescu and T. Campbell (eds) *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007).

¹⁴⁴ See e.g. references above at n 133.

¹⁴⁵ For review see H. Slim, 'By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations', The International Council on Human Rights Policy International Meeting on Global Trends and Human Rights – Before and After 11 September, Geneva, January 2002 (available at <http://www.jha.ac/articles/a082.htm>).

¹⁴⁶ Shelton, n 140 above; Chayes and Chayes, n 91 above. There is very little cross-referencing across these literatures, however: research on compliance with national regulatory requirements is quite separate from the literature on compliance with international requirements, for example, even though the questions being asked are in all important respects the same.

¹⁴⁷ Braithwaite and Reinhart, n 92 above; Braithwaite, Braithwaite, Gibson, and Makkai, n 92 above.

¹⁴⁸ And assuming a particular model of action: Giddens' structuration (in which an organisation or individual has agency but that agency is structured by their institutional environment).

¹⁴⁹ C. Oliver, 'Strategic Responses to Institutional Processes' (1991) 16(1) *Academy of Management Review* 145.

discretion or not); control (the means by which the demands are imposed, and whether the norms, values and practices are diffused throughout the environment or not); and context (the nature of the environmental context in which the demands occur, in particular whether it is characterised by uncertainty, and the degree of interconnectedness or of inter-organisational relations within the organisational field).¹⁵⁰

She then draws on sociological institutional theory, supplemented by organisational resource theory, to develop hypotheses on choice of strategy based on variation in the ten dimensions of these five categories. Of most relevance here, she predicts that organisations will always acquiesce when legitimacy gains are high.

These hypotheses provide a starting point, but need considerable refinement.¹⁵¹ In particular, there is no hypothesis for the situation where legitimacy gains are perceived to be high with respect to a legitimacy community, and yet the organisation does not acquiesce. Arguably the hypothesis here would be that in a situation of multiple legitimacy claims, an organisation will not acquiesce to the legitimacy claims of a particular legitimacy community, even if legitimacy gains with respect to that community are high, where there is a low dependency of the organisation on that legitimacy community; the normative content of the claims are congruent with the goals of the organisation only to a moderate or low degree;¹⁵² the constraints on discretion would be moderate or high; coercion is low; diffusion is low; uncertainty is high and interconnectedness is low. Thus, for example, the hypothesis would be that the Basle Committee on Banking Supervision (BCBS) refuses to expand its membership, or grant observer status, to countries such as India and China because its dependence on them is low; the demands of those countries are not particularly in line with the aims or views of the Committee; the constraints on what it is the BCBS wants to do would be high; they have little means of imposing their demands; their views or demands are not widely shared by communities the BCBS recognises as relevant; uncertainty as to whether acquiescence would bring any overall legitimacy or other gains for BCBS is high; and interconnectedness is low. Each one of these statements may or may not be empirically valid, of course – testing them is an exercise for another time.

Further, Oliver does not distinguish between types of legitimacy claim in predicting organisational response. In contrast, others have suggested that the degree to which organisations respond strategically to a legitimacy claim depends on whether that claim is pragmatic, moral or cognitive, with strategic responses being lowest with respect to cognitive claims.¹⁵³ Further, Oliver is not particularly

¹⁵⁰ *ibid* 159.

¹⁵¹ See also Brignall and Modell, n 134 above.

¹⁵² On the importance of congruence for acquiescence with international provisions (although expressed in other terms) see G.W. Downs, D.M. Rocke and P.N. Barsoom, 'Is the good news about compliance good news about cooperation?' (1996) 50(3) *International Organization* 379.

¹⁵³ Cashore, above n 19; Suchman, n 67 above.

concerned to analyse the organisational field to any great depth. The key point with respect to polycentric regulatory regimes, however, is the composition of that field. For the regulator has potentially to respond to legitimacy claims made not just by the actors whose behaviour it is attempting to regulate (e.g. firms, governments), and wider civil societies, but also other actors within the regulatory regime. These may be states, or they may be other non-state actors that the organisation interacts with in the performance of the regulatory regime – for example accreditation bodies, monitoring groups (e.g. trade unions with respect to labour conditions), or NGOs whose campaigning work is aimed at influencing consumer purchasing or government behaviour such that it conforms to the norms promulgated by the organisation.

Finally, there is little place given for the role of discourse in constructing and expressing legitimacy claims and accountability relationships, and for getting regulators to respond to them. There is a strategic dimension to this role: empirical research suggests, for example, that in order for those who lack coercive or other means to build an accountability relationship with a regulator, they have to translate their demands into a discourse that the regulator already recognises.¹⁵⁴ But there is also a broader point: recognising this dimension emphasises the implications that responding to these demands can have for the organisation in question.

It is not just that there are competing demands being made, or indeed that there are tensions within the organisations themselves as to which types of accountability relationships are most appropriate and which legitimacy claims should be heeded; though both of these observations are important and empirically supported. It is that, as discussed above, meeting different legitimacy claims involves engaging in different accountability relationships, which in turn requires organisations to construct different narratives. Both the relationship itself and the narrative can have a transformative effect. But there are only so many ways an organisation can be transformed at once. Something has to give. Multiple legitimacy claims and engaging in multiple accountability relationships can mean that attempts to make an organisation accountable end up in the accountability equivalent of the ‘regulatory trilemma’:¹⁵⁵ they are ignored, co-opted, or destroy that which it is they seek to make accountable.

CONCLUSION

Although the analysis of legitimacy and accountability above was developed in the context of non-state actors in polycentric regimes, the hypothesis on organisational response is of far wider application, and could apply to any

¹⁵⁴ Eg M. Hajer, *The Politics of Environmental Discourse* (Oxford: Clarendon Press, 1995); B. Morgan, *Social Citizenship in the Shadow of Competition* (Aldershot: Ashgate, 2003).

¹⁵⁵ n 11 above.

organisation, or state or non-state regulator at any governance level. Does this focus on the regulatory organisation render the analysis too state-centric, or at least regulator-centric, ignoring the wider regime and indeed polycentric perspective that was emphasised at the outset? Arguably not. It is not denied that in order to assess the accountability of a regulatory regime as a whole, to the extent this can be done at all, the focus has to be on holding the outcomes of regime as a whole accountable.¹⁵⁶ All regulatory regimes are polycentric, not just transnational ones, and any regulator, state or non-state, is only a part of the regime – that is the point of the decentring analysis. But holding the regime as a whole to account engages questions of the accountability, and in turn legitimacy, of its constituent elements. So the argument here, that an awareness of how those elements may respond to legitimacy and accountability claims needs to be an integral part of any attempts to advance those claims, is consonant with the decentring analysis, not contrary to it. Moreover, the issues explored here concern the construction and contestation of legitimacy and accountability *in* the regime, as well as *of* it.

Accountability tools are not neutral technical instruments but discursive technologies embodying their own logics and interpretive schemes, and which can have constitutive and transformative effects. Consequently, it was argued, although organisations can often participate in a number of different legitimacy discourses simultaneously, and thus satisfy a range of different legitimacy communities, this can not only have a deleterious affect on the organisation but the differences between communities may be such that organisations can face a legitimacy dilemma: that actions that they need to take to render them legitimate for one legitimacy community are in direct opposition from those they need to adopt to satisfy another. Moreover, attempts to render them accountable may face an ‘accountability trilemma’: they are ignored; co-opted; or destroy that which it is they seek to make accountable. There is thus a great deal at stake, both for the regulator and for those seeking to make it accountable, in understanding and anticipating how the regulator responds to those claims.

Regulators are not ciphers. Accountability relationships, like regulatory relationships, are dialectical. Legitimacy is critical for regulators, but regulators can be active participants in constructing their own legitimacy, not just passive recipients. They may seek to build legitimacy with different legitimacy communities within and outside the regulatory regime; and they may respond to pressures to increase their accountability and legitimacy by avoidance, defiance, manipulation, compromise or acquiescence in the same way that any might organisation respond to any norms which others seek to impose on them. The exact nature of that response will be shaped by a complex interaction of strategy, the institutional context which shapes their relationship with different legitimacy

¹⁵⁶ ‘Accountability and Transparency in Regulation: critiques, doctrines and instruments’ in J. Jacint and D. Levi-Faur (eds), *Politics of Regulation*, (Cheltenham: Edward Elgar, May 2004); L. Sturton and M. Lodge, ‘Transparency Mechanisms: Building Publicness into Public Services’ (2001) 28 (4) *Jnl Law and Society* 471.

communities and by the discourses of accountability that are used. Understanding these dynamics is essential if we are to make headway in debates on accountability and legitimacy of any regulator, but particularly non-state regulators in polycentric regulatory regimes. ‘How to’ proposals for building accountability and legitimacy which ignore these dynamics risk being simply pipe dreams: diverting, but in the end making little difference.