1 Regulation and regulatory governance

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> [O]ur life plans are so often impeded by rules, large and small, that the very idea of a life plan independent of rules is scarcely imaginable. (Schauer 1992: 1)

Like many other political concepts, regulation is hard to define, not least because it means different things to different people. The term is employed for a myriad of discursive, theoretical, and analytical purposes that cry out for clarification (Baldwin et al. 1998; Black 2002; Parker and Braithwaite 2003). The notion of regulation is also highly contested. For the Far Right, regulation is a dirty word representing the heavy hand of authoritarian governments and the creeping body of rules that constrain human or national liberties. For the Old Left it is part of the superstructure that serves the interests of the dominant class and frames power relations in seemingly civilized forms. For Progressive Democrats, it is a public good, a tool to control profit-hungry capitalists and to govern social and ecological risks. For some, regulation is something that is done exclusively by government, a matter of the state and legal enforcement, while for others regulation is mostly the work of social actors who monitor other actors, including governments.

State-centered conceptions of regulation define it with reference to state-made laws (Laffont 1994), while society-centered analysts and scholars of globalization tend to point to the proliferation of regulatory institutions beyond the state (e.g. civil-to-civil, civil-to-government, civil-to-business, business-to-business, and business-to-government regulation). For legal scholars, regulation is often a legal instrument, while for sociologists and criminologists it is yet another form of social control; thus they emphasize regulatory instruments such as shaming and issues of restorative justice and responsive regulation (Braithwaite 1989; Ayres and Braithwaite 1992; Braithwaite 2002). For some it is the amalgamation of all types of laws – primary, secondary, and tertiary legislation – while for others it is confined to secondary legislation. For economists it is usually a strategic tool used by private and special interests to exploit the majority (e.g. Stigler 1971; Jarrell 1978; Priest 1993). Not all economists are alike: for institutional economists regulation might be a constitutive element of the market and is often understood as the mechanism that constitutes property rights (North 1990) or even as a source of competitiveness (Porter 1991; Jänicke 2008). The French Regulation School seems to have developed a similar institutional perspective but with a more critical tone and without the normative preferences that dominate Anglo-Saxon economists (Aglietta 1979; Lipietz 1987; Boyer 1990).

While scholars of public administration seem to perceive it with direct and intimate reference to the scope of state authority, formal regulatory organizations, and the "art of government" (Bernstein 1955; Mitnick 1980; Coen and Thatcher 2005; Gilardi 2005, 2008), scholars of global governance tend to focus on standards and soft norms (Mattli and Büthe 2003; Scott 2004; Jacobsson 2004; Trubek and Trubek 2005; Dejlic and

Sahlin-Andersson 2006). While some seem to think of the rise of regulation as yet another indication of the advance of neoliberalism and the retreat of the welfare state (Majone 1994), others tend to see it as a neo-mercantilist instrument for market expansion (Levi-Faur 1998), high modernism (Moran 2003), and social engineering (Zedner 2006). In the European parlance, and for most of the 20th century, regulation was synonymous with government intervention and, indeed, with all the efforts of the state, by whatever means, to control and guide the economy and society. This rather broad meaning of the term seems to have faded, and scholars now make efforts to distinguish rule making from other tools of governance, and indeed from other types of policy instruments, such as taxation, subsidies, redistribution, and public ownership.

Regulation not only is a distinct type of policy but also entails identifiable forms and patterns of political conflict that differ from the patterns that are regularly associated with policies of distribution and redistribution (Lowi 1964; Wilson 1980; Majone 1997). In addition, while other types of policy are about relatively visible transfers and direct allocation of resources, regulation only indirectly shapes the distribution of costs in society. Government budgets include relatively visible[1] and clear estimations of the overall costs of distribution and redistribution but hardly any of the cost of regulation.[2] One of the most important features of regulation is therefore that its costs (and some suggests also its politics) are opaque. The most significant costs of regulation are compliance costs, which are borne not by the government budget but mostly by the regulated parties. The wide distribution of these costs and their embeddedness in the regulatees' budgets make their impact, effects, and net benefits less visible and therefore less transparent to the attentive public. Some efforts to assess the costs and benefits of regulation are made in some countries and over some issues via the institutionalization of regulatory impact analysis assessments (Sunstein 2002; Radaelli and De Francesco 2007). Yet the transparency of these impact assessments and their theoretical and empirical foundations are contested (Sinden et al. 2009). At the same time the scope of their application at least for the moment is narrow.

For some, regulation is a risky business that is prone to failure and costs that exceed the benefits, but for others the business of regulation is the business of risk minimization (Hood et al. 2001; Hutter 2001; Fischer 2007). Some contend that regulation comprises mostly rule making while others extend it to include rule monitoring and rule enforcement (Hood et al. 2001). For some, regulations are about the rules and functions of the administrative agency after the act of delegation; for others, as already observed, regulation includes every kind of rule, including primary legislation and even social and professional norms. Multiple definitions of regulation are evident in the Law as well. The American Administrative Procedure Act defines the term "rule" but not the term "regulation," and what it defines as rule is confined to the scope of the Act itself (Kerwin 1994).[3] Other laws may include, and indeed apply, other terms, definitions, and terminologies in a somewhat chaotic manner. This is how Ira Sharkansky described the situation in the legal system of the US:

> In dealing with laws and rules that govern the behavior of administrators, we must enter a language thicket where terminology is crucial but generally haphazard. In most places, a decision is an agency's determination of how it will act in a particular case. In the Treasury Department however a decision is a general rule. According to the US Administrative Procedures Act, an order is a judicial-type decision issued by an administrative body. Often, however, an order is a

> general regulation. A directive likewise can be a general regulation, or rule, or particular decision. (Sharkansky 1982: 323–4)

To add another layer of "comparative" complexity, the European Union's legal system "regulation" has a different meaning altogether and denotes one of five forms of law: regulation, directive, decision, recommendation, and opinion. "Regulation" means a rule that is directly applicable and obligatory in all member states. Thus Law cannot save us from the recognition that there are many ways in which regulation enters the public and academic discourse.

Instead of forcing unity, we should recognize the many meanings of regulation and devote our efforts to understanding each others' terms. This pluralist aptitude was also adopted by Julia Black, who has distinguished between functionalist, essentialist, and conventionalist definitions of regulation (Black 2002). A functionalist definition is based on the function that "regulation" performs in society, or what it does (e.g. risk minimization and economic controls). An essentialist definition asserts that "Regulation is. . ." It identifies elements that have an analytical relationship to the concept in an attempt to specify an invariant set of necessary and sufficient conditions. For example, "Regulation is a form of institutionalized norm enforcement." A conventionalist definition focuses on the way or ways that the term is used in practice; for example, "For [such and such a party] regulation means [such and such] but for [another party] regulation means [something else]." It is unproductive, Black suggests, forcing a definition on a diverse community of scholars and public policymakers with different interests in regulation. It is however important to clarify different meanings, and to point to the way that definition characterizes the practice, the conceptions, and the paradoxes that are involved in the study and practice of regulation. At the same time it is important to draw up definitions of regulation that allow us to examine and understand rule making in light of social, political, and economy theories, developments in national and global governance, and regulatory trends that are identified in this chapter, namely the consolidation of regulatory regimes, the autonomization of regulatory agencies, the emergence of new forms of civil and business-to-business regulation, and the hybrid architecture of regulatory capitalism.

One important aspect of any discussion of the different connotations and characteristics of regulation is the intimate relations between regulation and the existence of an administrative agency. Rule making and rule-making agencies are closely connected. An emphasis on the workings, characteristics, failures, and merits of regulation by administrative agencies is prevalent in the literature on regulation. Indeed, these aspects are expressed in one of the most widely cited definitions of regulation, namely as "sustained and focused control exercised by a public agency over activities that are valued by the community" (Selznick 1985: 363). Not only does this definition include an explicit reference to public agency, but it also stresses the sustained and focused nature of regulation. Regulation involves a continuous action of monitoring, assessment, and refinement of rules rather than ad hoc operation. Implicit in this definition is also the expectation that *ex ante* rules will be the dominant form of regulatory control. The definition is apt also in the sense that it recognizes that many, perhaps the most important, regulations are exercised not by "regulatory agencies" but by a wide variety of executive organs. This definition is less successful, however, in other respects. It recognizes regulation only as

public activity by "public agency" and thus excludes business-to-business regulation as well as civil regulation. It also does not clarify which kinds of focused control the public agency applies (is it rule making only or also other forms of control such as arbitrary commands?), and the definition unnecessarily limits regulation to those actions that are valued by the community.

The focus on the administrative elements in the study of regulation might be less useful for scholars who emphasize the limits of "hard law" and who are aware of the importance of social norms and other forms of "soft law" in the governance of societies and economies. A wider definition of regulation that captures regulation as soft law would suggest that regulation encompasses "all mechanisms of social control" including unintentional and non-state processes. Indeed, it extends "to mechanisms which are not the products of state activity, nor part of any institutional arrangement, such as the development of social norms and the effects of markets in modifying behavior" (Baldwin et al. 1998: 4). Thus a notion of intentionality about the development of norms has been dropped from this definition of regulation, and anything producing effects on behavior may be considered regulatory. In addition, a wide range of activities which may involve legal or quasi-legal norms, but without mechanisms for monitoring and enforcement, might also come within the definition. Thus Scott defines regulation as "any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within the acceptable limits of the regime" (Scott 2001: 283). This approach connects widely with the research agenda on governance, "the new governance" (Lobel 2004; Trubek and Trubek 2005), and the "new regulatory state" (Braithwaite 2000), where elements of steering and plural forms of regulation are emphasized in the effort to capture the plurality of interests and sources of control around issues, problems, and institutions. This rather wide definition of regulation also allows us to "de-center" regulation from the state and even from well-recognized forms of self-regulation (Black 2002). Decentered approaches to regulation emphasize complexity, fragmentation, interdependencies, and government failures, and suggest the limits of the distinctions between the public and the private and between the global and the national (Black 2001; Scott 2004; Gunningham 2009).

While recognizing pluralism and its strengths, it is also important to clarify my own preference. I define regulation as the *ex ante* bureaucratic legalization of prescriptive rules and the monitoring and enforcement of these rules by social, business, and political actors on other social, business, and political actors. These rules will be considered as regulation as long as they are *not* formulated directly by the legislature (primary law) or the courts (verdict, judgment, ruling, and adjudication). In other words, regulation is about bureaucratic and administrative rule making and not about legislative or judicial rule making. This does not mean that for other scholarly purposes they shouldn't be included. Nor does it mean that legislatures or courts are not important engines for regulatory expansion, and of course it does not mean that they cannot be critical actors in the regulatory space. The definition emphasizes the role of diverse sets of actors in this process in order to point to the importance of hybrid elements in the systems that govern our "life plans." It does not, however, suggest what the functions of regulation are; specifically, it is neutral on the question whether regulation aims to reduce social and ecological risks, to control costs, to promote competitive markets, or to promote private interests.

1.1 REGULATING AND THE REGULOCRATS: WHO, WHAT AND HOW?

To better understand regulation we need to pay close attention to the questions: Who are the regulators? What is being regulated? How is regulation carried out? Each of these issues is critical for a more thorough understanding of what regulatory governance and regulatory capitalism are all about (on regulatory capitalism see this volume, Levi-Faur, 2011). Let us start with the *who* question. Different approaches to regulation would identify different regulators. For criminologists, policemen are the regulators; for public administration scholars regulators are employees of regulatory agencies; for socio-legal scholars we are all regulators. If we adopt this broad approach to regulation, it follows that, while only a few of us are acting as professional regulators, most, if not all, of us act as regulators in some capacity. We frequently monitor our government, corporations, and NGOs. We often act, consciously or not, like gatekeepers of the social order and raise "fire alarms" in cases of corruption, violence, or other forms of deviant behavior. This of course saves on "police patrols"[4] and helps us to understand that regulatory networks are embedded in the social system and do not represent a distinct, stand-alone part of it.

Nonetheless, while we are all regulators in some capacity, it is possible to identify a distinct class of regulators. The agencification of regulatory functions and the increasing autonomy that they enjoy suggest the transformation of the bureaucracy of the modern administrative state and indeed private bureaucracy as well to a regulocracy (Gilardi et al. 2007). To live in an age where regulation is expanding means that we expect our colleagues, and even ourselves, to invest more of our resources in regulation. In other words, we are all immersed in the regulatory game. Yet the scope of this phenomenon is still an open question. Also open is the question to what extent new forms of governance offer new opportunities to the weak to deploy new strategies of regulation to their own advantage. While some suggest that this is the case (Braithwaite 2004) and that indeed even a female sex worker can regulate police brutality (Biradavolu et al. 2009), others suggest that the new networks of regulators are constrained by entrenched structures of power (Shamir 2008; Sørensen and Torfing 2008).

Regulatory games of demands for accountability and transparency, on the one hand, and political and bureaucratic responses towards blame shifting, on the other, are becoming central to our organizational, social, and political behavior (Hood 2010). Organizations such as the mass media are developing monitoring and regulatory capacities via ranking and grading techniques. Similarly social movements find that public education campaigns, demonstrations, and lobbying are not enough and therefore develop monitoring capacities. To exemplify this process, it might be useful to focus for a moment on the role of three different types of non-governmental organizations (NGOs) that may develop important regulatory capacities: MaNGO, CiNGO, and GoNGO. MaNGOs are market-oriented NGOs that are controlled (owned or otherwise dominated) by market actors and works, whether explicitly or not, to develop their own regulatory capacities (cf. Shamir 2005: 240; Barkay 2009). MaNGOs blur the distinction between civil society and the economy and do not conform to the traditional image of NGOs as independent from both business and the state. CiNGOs are NGOs that are controlled (owned or otherwise dominated) by civil society actors and works, whether

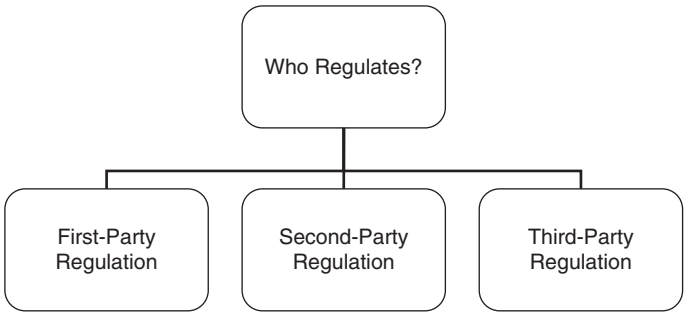


Figure 1.1 Who regulates?

consciously or not, to develop their own regulatory capacities. CiNGOs do conform with our image of the independent civil sphere, but, unlike the traditional NGOs which focus on service provisions or advocacy, CiNGOs are mainly regulatory organizations that function as alternatives and complementary to the regulatory state. Finally GoNGOs are NGOs that are controlled (owned or otherwise dominated) by state actors and work, whether explicitly or not, to develop their own regulatory capacities. This distinction between different types of NGOs which act as regulators will allow us to develop a clearer understanding of hybrid designs of regulatory institutions.

It is sometimes useful to distinguish between three major strategies of regulation: first-party regulation, second-party regulation, and third-party regulation (see Figure 1.1). These strategies deal with how to regulate, but the *how* is intimately connected to the question of *who* regulates. In first-party regulation the major form of regulatory control is self-regulation. The regulator is also the regulatee. In second-party regulation, there is a social, political, economic, and administrative division of labor between the actors, and the regulator is independent and distinct from the regulatee. While we often identify second-party regulation with state regulation of business, this is not always the case. Business regulation of business is a case in point. Here the growth of regulation is driven by the ability of some businesses (most often big businesses) to set standards for other businesses (most often smaller). One relevant example is the ability of big supermarket chains to set contractual standards of food manufacturing, processing, and marketing all over the world (Levi-Faur 2008). In third-party regulation, the relations between the regulator and the regulatee are mediated by a third party that acts as independent or semi-independent regulatory-auditor.[5] Processes and procedures of accreditation by third parties are a central enforcement strategy and "contractual relationship between firm and the party auditing the facility in place of relying solely on the regulatory agency as enforcer" (Kunreuther et al. 2002: 309).[6] One of the most popular forms of third-party regulation is "auditing." Indeed, the notion of audit is now used in a variety of contexts to refer to growing pressures for verification requirements (Power 1997). Third-party regulation is a prevalent feature of modern life and it opens the door for a more comprehensive understanding of regulation as a hybrid of the interaction between state regulation, market actor regulation (MaNGOs and other business organizations), and CiNGOs (civil society regulators). Table 1.1 presents the various options for regulatory hybridizations when three different types of third parties are enlisted by three different types of regula-

Table 1.1 Types of third-party regulatory designs

Type of third party enlisted	State actors as regulators (e.g. regulatory agencies, GoNGOs)			Market actors as regulators (e.g. MaNGOs)			Civil actors as regulators (e.g. CiNGOs)		
	S	M	C	S	M	C	S	M	C
State actors as regulatees	**SSS**	SMS	SCS	MSS	MMS	MCS	CSS	CMS	CCS
Market actors as regulatees	SSM	SMM	SCM	MSM	**MMM**	MCM	CSM	CMM	CCM
Civil actors as regulatees	SSC	SMC	SCC	MSC	MMC	MCC	CSC	CMC	**CCC**

Note: First letter means the regulator; second represents the enlisted third party; third letter means the regulatee. S=state; M=market; C=civil.

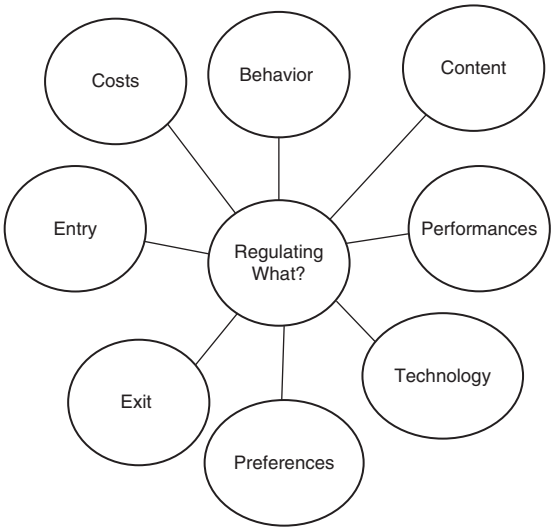


Figure 1.2 What is being regulated?

tors to regulate three types of regulatees. The intersection between the regulator (state, market, civil), the third party (state, market, civil), and the regulatees (state, market, civil) creates 27 different forms of third-party regulation. Only three forms of third-party regulation (SSS, MMM, and CCC) are pure forms of self-governance. All the others involve different types of actors and thus blur the distinctions between state, society, and markets.

Moving to the question of *what* is being regulated, we suggest that regulation can be exerted on at least eight aspects of any governance systems: entry, exit, behavior, costs, content, preferences, technology, and performances (see Figure 1.2). Entry regulation determines who is eligible to offer service, supply a product and offer advice and information. Regulation can be exerted on exit from a business, for example when

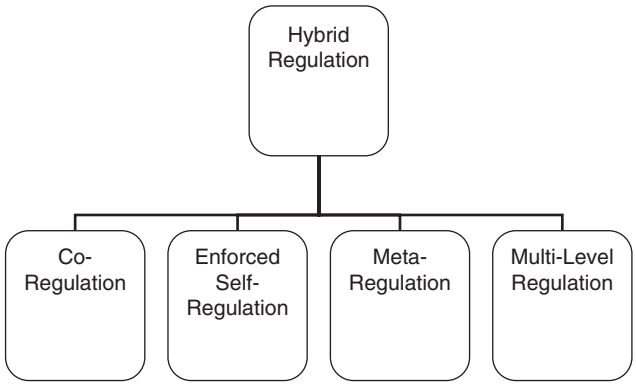


Figure 1.3 Hybrid forms of regulation

a license is revoked. Regulation on behavior is a common form of regulation that deals with issues of proper action, speech, or expression. Regulation of costs deals with the acceptable (minimum, maximum) cost of service or product. Cost regulation can come in various forms (e.g. price cap, rate of return). The regulation of content deals with the integrity of a message across various platforms of communication (e.g. books, mass broadcasting, newspapers, internet) and with issues such as the integrity of the message (e.g. advertisement rules, acceptable language, violence, sexuality). The regulation of preferences is manifested most of all via socialization, professionalization, and educational processes. Regulation of technology prescribes the application of a certain technology of production or process (and not others) as a form of control. Finally the regulation of performance is directed towards the achievement of results. Some significant efforts are carried recently in the literature in order to evaluate the costs and benefits of regulating one component of the system instead of others. For example, the literature on performance-based regulation suggests that regulations should be based on achievement of specified results, while leaving it to regulated entities to determine how best to achieve those results (Coglianese and Lazer 2003; May 2007; 2010).

Hybridism abounds and not only in connection to NGOs and third-party regulation. In addition, it is possible to identify four major forms of hybrids that involve both first- and second-, and perhaps also third-party forms of regulation that deal with the issue of *how* to regulate (see Figure 1.3). First is co-regulation**,** where responsibility for regulatory design or regulatory enforcement is shared by the regulator and the regulatees, often state and civil actors, but also between MaNGOs and CiNGOs and state and MaNGOs. The particular scope of cooperation may vary as long as the regulatory arrangements are grounded in cooperative techniques and the legitimacy of the regime rests at least partly on public–private cooperation. A second form of hybrid regulation is enforced self-regulation**,** where the regulator compels the regulatee to write a set of rules tailored to the unique set of contingencies facing that firm. The regulator, e.g. a regulatory agency, "would either approve these rules, or send them back for revision if they were insufficiently stringent" (Ayres and Braithwaite 1992: 106). Rather than having the government enforce the rules, most enforcement duties and costs would be internalized

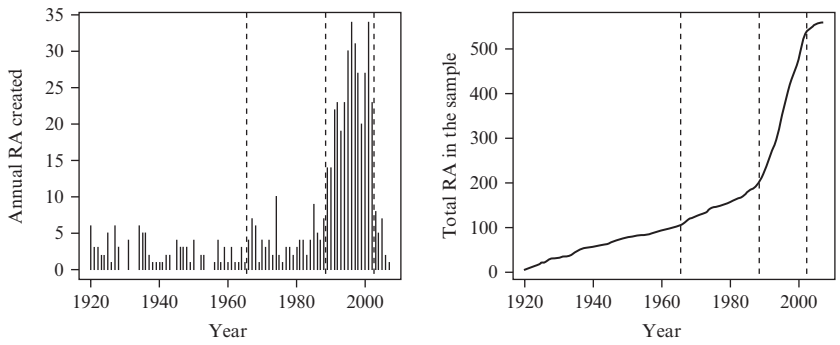
by the regulatees, who would be required to establish their own independent compliance administration.

A third form of hybrid regulation is meta-regulation. Unlike enforced self-regulation, it allows the regulatee to determine its own rules. The role of the regulator is confined to the institutionalization and monitoring of the integrity of institutional compliance. In this sense, it is about meta-monitoring (Grabosky 1995). In Christine Parker's formulation, the notion of meta-regulation has been used as a descriptive or explanatory term within the literature on the "new governance" to refer to the way in which the state's role in governance and regulation is changing (Parker 2002). "Meta-regulation" "entails any form of regulation (whether by tools of state law or other mechanisms) that regulates any other form of regulation" (Parker 2007). Thus it might include legal regulation of self-regulation (e.g. putting an oversight board above a self-regulatory professional association), non-legal methods of "regulating" internal corporate self-regulation or management (e.g. voluntary accreditation to codes of good conduct), or the regulation of national law-making by transnational bodies (such as the EU) (Parker 2007). In Bronwen Morgan's formulation, it captures a desire or tendency "to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated" (Morgan 2003: 2).

Finally, the fourth form of hybrid regulation is often known as "multi-level regulation." Here regulatory authority is allocated to different levels of territorial tiers – supranational (global and regional), national, regional (domestic), and local (Marks and Hooghe 2001). There are various forms of multi-level regulation depending on the number of tiers that are involved and the particular form of allocation. Regulatory authority can be allocated on a functional basis (whereby regulatory authority is allocated to different tiers according to their capacity to deal with the problem) or on a hierarchical basis (where supreme authority is defined in one of the regulatory tiers), or simply be a product of incremental, path-dependent processes (where the regime is the result of the amalgamation of patches, each designed to solve a particular aspect as it occurred on the regulatory agenda). While much of the discussion on multi-level governance (which is a broader term than multi-level regulation) focuses on the transfer of authority between one tier and another, one should also note that the overall impact of multi-level regulation can be that of accretion (that is, regulatory expansion). Indeed, the possibility that multi-level regulation may involve co-development of regulatory capacities in different tiers is only rarely recognized.

1.2 THE REGULATORY AGENCIES

One of the most important indicators of the growth in the scope and depth of regulatory activities in modern society is the proliferation of regulatory agencies as the administrative and intellectual core of national and global systems of regulatory governance. Regulatory agencies are not a new feature of modern systems of governance, but they have become a highly popular form of regulatory governance since the 1990s (see Figure 1.4). A regulatory agency is a non-departmental public organization mainly involved with rule making, which may also be responsible for fact finding, monitoring, adjudication, and enforcement. It is autonomous in the sense that it can shape its own preferences;



Note: The data cover the creation of agencies in 48 countries and 16 sectors over 88 years (1920–2007).

Source: Jordana et al. (2009).

Figure 1.4 (a) Annual creation of regulatory agencies in the sample. (b) Cumulative annual creation of regulatory agencies, 1920–2007

of course, the extent of the autonomy varies with its administrative capacities, its ability to shape preferences independently, and its ability to enforce its rules. The autonomy of the agency is also constituted by the act of its establishment as a separate organization and the institutionalization of a policy space where the agency's role becomes "taken for granted." Note that rule making, fact finding, monitoring, adjudication, and enforcement capacities are defining characteristics of regulatory agencies, but also that other organizations, both within and outside the state, can acquire and successfully deploy these characteristics.

As state organizations, regulatory agencies originated in various boards, ad hoc committees, and other pre-modern organizational entities that during the 20th century became the pillars of the modern administrative state. Regulatory agencies became a distinctive feature of the American administrative state in the early 20th century. What other countries often nationalized the US regulated. Indeed, the history of the American administrative state is also the history of the establishment of regulatory agencies. Yet, while the number of regulatory agencies in the US has not grown since the mid-1970s, such agencies have become popular elsewhere in the world. A recent survey of the establishment of regulatory agencies across 16 different sectors in 63 countries from the 1920s through 2007 reveals that it is possible to find an autonomous regulatory agency in about 73 percent of the possible sector–country units that were surveyed (Jordana et al. 2009). The number of regulatory agencies rose sharply in the 1990s. The rate of establishment increased dramatically: from fewer than five new autonomous agencies per year from the 1960s to the 1980s, to more than 20 agencies per year from the 1990s to 2002 (rising to almost 40 agencies per year between 1994 and 1996).

The literature usually distinguishes between two types of regulatory agencies: economic and social. The distinction is not entirely clear cut but it is useful for characterizing the historical context of the establishment of these agencies, their organizational characteristics, and the challenges that they face. In recent years, the regulatory explosion has led to the consolidation of a new type of agency, best called the "integrity agency."

Economic regulatory agencies deal with the functioning of markets and employ a variety of tools to constitute, manage, and supervise them. Issues of competition and costs of service under conditions of concentrated market power on the one hand and restricted options for voice by consumers on the other are major challenges for economic regulatory agencies. Social regulation agencies deal with issues of health, safety, and the environment, and in this sense they are often also called risk-regulation agencies and sometimes protective-regulation agencies. While the stated aim of many economic regulators is to nurture or increase competition, the stated aim of social regulators is to make our lives safer by eliminating or reducing risks or exposure to risks (Breyer 1993: 3). In addition, while economic regulation (with the notable exception of antitrust regulation) is often sector specific, social regulation is usually applied industry-wide, that is, beyond specific sectors. Some countries use social regulation (rather than subsidies) in order to advance goals such as social cohesion and equality. In these cases, the boundaries between the regulatory state and the welfare state are becoming even more blurred (Mabbett, 2011; Haber 2011). Integrity regulatory agencies (or pro-accountability regulation agencies) deal with moral issues in the public sphere and safeguard accountability and other norms of conduct in the public sphere.[7] Examples include autonomous corruption-control bodies, independent electoral institutions, auditing agencies, and human rights ombudsmen.

1.3 BEYOND AGENCIES: REGULATORY REGIMES

For certain theoretical, methodological, and empirical purposes, it might be useful to focus on the notion of a regulatory regime rather than solely on regulation as atomistic, stand-alone rule making. The notion of a regulatory regime encompasses the norms, the mechanisms of decision making, and the network of actors that are involved in regulation (Eisner 1993; Drezner 2007). It has many parallels with the notion of "regulatory space" (Hancher and Moran 1989; Scott 2001; Thatcher and Coen 2008). The notion of a regulatory regime is an increasingly popular concept in the study of regulation and regulatory reform, which probably attests to the emergence and consolidation of systemic rule making to govern different issues, arenas, and sectors. The notions of a "regulatory regime" and "international regulatory regime" build on Krasner's definition of a regime as the "principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given issue-area" (Krasner 1982: 185). Steven Vogel applied it to the study of regulation and distinguished between two major components of the regulatory regime. The first component, "regime orientation," indicates "state actors' beliefs about the proper scope, goals, and method of government intervention in the economy and about how this intervention affects economic performance." The second component, "regime organization," captures the particular "organization of those state actors concerned with industry and the relationship of these actors to the private actors" (Vogel 1996: 20–21).

Hood, Rothstein, and Baldwin made the notion of a regulatory regime a central pillar of their risk analysis. Regulatory regime "connotes the overall way risk is regulated in a particular policy domain" (Hood et al. 2001: 8). They identify three major elements of regimes that represent different aspects of the ideal control system. The first is

information gathering, to allow monitoring and to produce knowledge about current or changing states of the regime. The second is standard setting, to allow a distinction to be made between more and less preferred states of the regime. The third is behavior modification, to meet the standards, goals, or targets (Hood et al. 2001: 21). The authors make a second important distinction, between the "context" and the "content" of a regime. Regime context means the backdrop or setting in which regulation takes place; it includes the different types and levels of risk being tackled, the nature of public preferences and attitudes to risk, and the way the various actors who produce or are affected by the risk are organized. Regime content refers to three elements of its internal structure: first, the "size" of the policy, which reflects the extent of policy aggregation and the overall regulatory investment; second, the institutional structure of the regulators and especially the distribution of regulatory costs between state and other regulators, and the degree of organizational fragmentation and complexity; and, third, the regulatory style, as expressed by the regulators' attitudes, beliefs, and operating conventions.

1.4 THE GOVERNANCE OF REGULATORY REGIMES

Much of the academic and public discussion of regulation nowadays deals with the governance of regulation itself (or regulating regulation) rather than governance via regulation. The growth in the scope and number of regulations raises issues of effectiveness as well as issues of democratic control. This section of the chapter identifies two major challenges of governance: of effectiveness and of democratic legitimacy. The first challenge focuses on the effectiveness of direct regulation, and especially the alleged weakness of systems of command and control with prescriptive rules that tell regulated entities what to do and how to do it. These prescriptive rules tend to be highly particularistic in specifying required actions and the standards to be adhered to, and tend to be backed by state sanctions. At the same time they tend to have clear-cut lines of responsibility and thus accountability (May 2007: 9). Yet clarity, the ability to sanction, and direct accountability all come at a price. Strict authoritarianism, unreasonable rule, and capricious enforcement practices are associated with regulatory formalism, and it is argued that they impose needless costs and generate adversarial relations between regulators and regulatees (Bardach and Kagan 1982). Six shortcomings of regulation are emphasized in this context: (a) expensive and ineffective regulatory strategies; (b) inflexible regulatory strategies that encourage adversarial enforcement; (c) legal constraints on the subjects, procedures, and scope of regulatory discretion; (d) regulatees' resentment, which leads to non-compliance or "creative compliance" (McBarnet and Whelan 1997); (e) strict regulation that often presents an obstacle to innovation; and (f) regulation that often serves to set a lowest common denominator for regulatees to follow rather than supplying incentives for improved standards.

There are five major strategies of response to these weaknesses (Gunningham and Grabosky 1998; Croley 2008). The first, and the most controversial, is the return to "deregulation" and the efforts to ossify rule making. This might result in a race to the bottom or degradation of economic and environmental performances, unmitigated risk, and immoral economies and societies. The second is to turn to "lite" and management-based regulation and to harness economic incentives as much as possible toward

politically determined public goods (Coglianese and Lazer 2003; May 2007; Baldwin 2008). The third is to promote responsive regulation (Ayres and Braithwaite 1992; Braithwaite 2005) as well as voluntary, negotiated, and cooperative forms of regulation. The fourth is to improve the regulatory arsenal (for example, employing auctions and using benchmarking) as well as the quality and training of the regulators (Sparrow 2000) and the quality of the regulatory design (Maggetti 2007; Gilardi 2008). The fifth is to institutionalize regulatory impact analysis and cost–benefit techniques (Sunstein 2002; Radaelli and De Francesco 2007). These control measures are becoming increasingly popular, and some countries have even established regulatory agencies to regulate regulation itself (e.g. the Dutch Advisory Board on Administrative Burdens, the British Better Regulation Executive, and the Office of Information and Regulatory Affairs in the United States).

The second challenge stems from the democratic qualities (or more accurately weaknesses) of regulation. Again, more than one democratic challenge is relevant here. First, regulators are not elected and they are accountable to the people only indirectly (Kerwin 1994: 161), leading to arguments about the democratic deficit of regulatory systems (Majone 1999). Regulation, as bureaucratic legislation, impinges on one of the pillars of democratic theory, that is, the doctrine of the separation of powers. The belief that the legislator should legislate, the judiciary should adjudicate, and the executive should govern via the bureaucracy takes regulation to be, at best, a "necessary evil" (Ganz 1997). Yet this "necessary evil" is expanding and diversifying to an extent that raises important challenges for democratic theory and practice. Second, while it is a fundamental idea of law that people should be subject to fixed, known, and certain rules (Raz 1979: 214–15), the sheer numbers of rules and the frequency and the process with which they are changed create a situation where it is beyond the capacity of most if not all individuals to act without legal advice.[8] The large volume of regulations represents a challenge for democratic, judicial, parliamentary, and administrative systems of control (Hewart 1929; Majone 1994, 1997; Dotan 1996; Kerwin 2003; Taggart 2005). Third, the growth of international administrative law – both in the form of regulation by intergovernmental and supranational organization and in the form of both business and international standards – makes supposedly sovereign polities into rule takers rather than rule makers (Braithwaite and Drahos 2000: 3–4). Regionalization, internationalization, and globalization of regulation all raise issues of legitimacy and may lead to new and innovative forms of democratic control over regulatory systems. The fourth democratic challenge is the reinforcement and sometimes the emergence of "private regulatory regimes" and "private governments." These spheres of private control may weaken democratic legitimacy and may change the balance of power between corporations and states (Hall and Biersteker 2002; Haufler 2002).

To deal with these democratic challenges that emerge from the growth in the scope and number of regulations, it is possible to develop and strengthen three systems of control over bureaucratic legislation: parliamentary, judicial, and participatory. The logic of these different systems varies, and so do their aims and degrees of effectiveness. Parliamentary systems of control enforce procedures of *de facto* or *de jure* monitoring and approval mechanisms over bureaucratic legislation. A common procedure of parliamentary control is the obligation to submit bureaucratic legislation to parliamentary approval before its official publication. The scope, mechanisms,

and effectiveness of control vary across countries and are very telling as to the political development of the country. Judicial systems of control institutionalize *ex post* judicial review processes over bureaucratic legislation. The review process is triggered by litigation or appeal to either the country's courts or special administrative courts. Empirical studies that cover or sample the volume of judicial review of bureaucratic legislation are rare. Participatory systems of control institutionalize points of access and procedural obligations that require the bureaucratic legislator to publish the intention to legislate, to invite public comments, and to consult affected parties. The rule-making process as set by the American Administrative Procedure Act is one good and pioneering example of a participatory system of control (though not without its limits and flaws).

1.5 CONCLUSIONS: UNDERSTANDING REGULATORY GOVERNANCE

This chapter's exploration of the notion of regulation, and indeed the handbook chapters more generally, are based on the observation that we live in the golden age of regulation (Kagan 1995; Braithwaite and Drahos 2000; Ruhl and Salzman 2003; Levi-Faur 2005; Braithwaite 2008). The great financial crisis of 2008 and the sovereign debt crisis that followed it promise that the trend of growth in regulation will be reinforced even more strongly. It is possible to observe more "social" regulations alongside more "economic" regulations; "red tape" alongside "fair tape"; political and civil; national and international. We also observe regulations that hinder competition alongside regulation-*for*-competition, regulations that serve the public interest and regulation that mainly serves private interests. Deregulation, despite its prominence in the scholarly and public discourse, proved to be only a limited element of the reforms in governance. Where it occurred, it was followed either immediately or somewhat later by new regulatory expansion (McGarity 1992; Page 2001; Yackee and Yackee 2010). These observations were made in the so-called "era of deregulation," but they hold even more strongly following the financial crises.

Regulation and governance have become a core concept in the social sciences, and for good reasons. While redistributive, distributive, and developmental policies still abound, the expanding part of governance is regulation, that is, rule making, monitoring, and enforcement. Few projects are more central to the social sciences than the study of regulation and regulatory governance. Regulation, along with the significant issues raised or affected by it, have become central to the work of social scientists from many disciplines, including political science, economics, law, sociology, psychology, anthropology, and history. A strong interest of other professional and scholarly communities, such as physicians, nutritionists, biologists, ecologists, geologists, pharmacists, and chemists, makes regulatory issues even more central to scientists and practitioners (Braithwaite et al. 2007). The financial, ecological, legitimation, and moral crises of our time make regulatory issues even more central then ever before. Thus the demand for better, fairer, more efficient, and more participatory systems of governance promises that regulatory governance will continue to capture the imagination of scholars and dominate the agenda of policy makers. While regulatory governance is hardly a new feature of the social

sciences, the issue still attracts less systematic and theoretical attention than it deserves. Attention should focus on the plurality of aspects and forms in which rule making, rule monitoring, and rule enforcement enter into our economic, political, and social life as well as on the creation of regulatory capitalism as a global political-economy order (Levi-Faur, 2011).

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NOTES

1. Not that this is only relative. Budgets are transparent to accountants to some degree but not to the public, even the educated public. State budgets omit important elements such as the costs of tax deductions. Transparent and participatory accounting is being called for to narrow the gaps between the rhetoric of democracy and its realities.
2. With the exception of the administrative costs of regulation (costs of fact finding, monitoring, and implementation).
3. "Rule" means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy (Kerwin 1994: 3).
4. Police patrols represent direct oversight, while "fire alarms" mobilize third parties, including private actors into the regulatory space. See McCubbins and Schwartz (1984).
5. An example of a third-party regulation that is motivated by market considerations is the SGS Corporation. It does inspection, verification, testing, and certification; it has been listed on the Swiss Stock Exchange since 1985 and has more than 46 000 employees, in over 1000 sites around the world. Another is EurepGAP, a private sector body that sets voluntary standards for the certification of agricultural products around the globe. It brings together agricultural producers and retailers that want to establish certification standards and procedures for good agricultural practices (GAP). Certification covers the production process of the certified product from before the seed is planted until it leaves the farm. EurepGAP is a business-to-business label and is therefore not directly visible to consumers. A form of third-party regulation that is socially motivated is the "green" or "social" labels that are offered and promoted by non-governmental, non-profit organizations. A more coercive form of third-party regulation is criminal or civil liabilities of the "third party" in the event that it fails to perform its duties. Indeed, much of the new expansion of regulation in the field of corporate governance is about the expansion of responsibility and demand for accountability from stakeholders who are not necessarily the offending persons but still are in a position to prevent non-compliance.
6. Third-party regulators should not be confused with the notion of "gatekeepers" (Kraakman 1986). These include senior executives, independent directors, large auditing firms, outside lawyers, securities analysts, the financial media, underwriters, and debt-rating agencies (Ribstein 2005: 5–6). Gatekeeping, whether by design or not, is an important element of governance regimes.
7. I owe this point to Avishai Benish.
8. In the US, agency rules have been produced in recent years at a rate of about 4200 a year (Croley et al. forthcoming). According to Coglianese, the volume of regulations issued by specific agencies has experienced a substantial growth. From 1976 to 1996 the overall volume of regulation in the Code of Federal Regulation was almost doubled (Coglianese 2002). In the United Kingdom they are produced at a rate of 3000 or so each year, outnumbering Acts of Parliament by 40 or 50 to one (Page 2001: ix). According to the Australian Parliament the volume of regulations and other statutory instruments is increasing, at the Commonwealth level alone by an annual average of 3000. In Israel they are being produced at a rate of only 800 or so a year, outnumbering Acts of Parliament by a factor of seven to one.

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