Jerusalem Papers in Regulation & Governance

Working Paper No. 1
February 2010

Regulation &Regulatory Governance

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This paper discusses the various facets of the notions of regulation, regulatory governance, and regulatory capitalism. It aims to serve as an updated introduction for scholars and practitioners. Its starting point is the observation that while we were supposed to be living in an "era of deregulation", regulation, against the expectations and rhetoric of many is exploding (Kagan 1995; Braithwaite & Drahos 2000; Ruhl & Salzman 2003; Levi-Faur 2005; Braithwaite 2008). The great financial crises of 2008 promises that the trend of growth in regulation will be reinforced and will be continue in the coming years. We 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. It might well be that 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 & Yackee 2009). Often, perhaps too often, it takes a crisis to return to regulation. We live in the golden era of regulation and in this era, as was already been observed "our 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, p. 1). These observations were made in an "era of deregulation", but they hold even more strongly following the great financial crisis of 2008, since it is likely that the crisis will lead to stronger regimes of regulatory governance.

In order to provide a comprehensive conceptual framework for the study of regulatory governance as an interdisciplinary subject this paper combines state-centered perspective with civil or private regulation perspective in one major theme around the notion of regulatory capitalism. The notion of regulatory capitalism suggests that the study of regulatory governance should proceed beyond states, markets and societies into the identification of hybrid forms of regulation and towards the creation of autonomous regulatory spa ces that blur the distinctions between the global and the national. The paper starts with analytical discussion of the definition of regulation, and then moves on to discuss *who* regulates, *what* is being regulated and *how* they regulate. The third and fourth parts of the paper deal with the regulatory agency and the regulatory state respectively. The fifth section deals with the notion of the regulatory regime. The sixth section deals with major challenges of the governance of regulation. The seventh brings together the various parts of the regulatory literature under the notion of regulatory capitalism. The Eights part concludes.

1. *Defining regulation*

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 and mapping (Baldwin, Scott & Hood 1998; Parker & Braithwaite 2003; Black 2002). It 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 regulatory institutions beyond the state (e.g., civil-to-civil, civil-to-government, civil-to-business and business-to-business regulation). For legal scholars, regulation is often a legal instrument, while for sociologists and criminologists it is yet another form of social control, thus attention is being paid to shaming and issues of restorative justices (Braithwaite, 1989; Ayres & 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 functionalist orientation of some 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 & Thatcher, 2005; Gilardi 2005; 2008), scholars of global governance tend to focus on standards and soft norms (Mattli & Büthe 2003; Scott 2004; Jacobsson 2004; Trubek & Trubek 2005; Dejlic & 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 at as a neo-mercantilist instrument for market expansion (Levi-Faur 1998), an instrument of high modernism of the state (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 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 instrument, 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] 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 & Di Francesco 2007). Yet, the transparency of these impact assessments and their theoretical and empirical foundations are contested (Sinden at 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 (Hutter 2001; Hood, Rothstein & Baldwin 2001; Fischer 2007). Some contend that regulation comprises mostly rule making while others extend it to include rule monitoring and rule enforcement (Hood, Rothstein, & Baldwin 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, pp. 323–4).

To add another layer of complexity, in 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. This pluralism was already recognized by Julia Black for example 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 theory; developments in national and global governance and regulatory trends that are identified in this paper.[4]

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, p. 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, Scott & Hood 1998, p. 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 & 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; Parker 2003; Gunningham 2009).

All in all, while recognizing pluralism and its strength, we suggest that regulation is the promulgation of prescriptive rules as well as 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 does not mean that they can 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.

2. *Regulating and the Regulocrats: Who? What? & How ?*

To better understand regulation we need to pay close attention to the question of *Who* are the regulators? *What* is being regulated? and, *How* regulation is carried out?. Each of these issues is critical for a more thorough understanding of the emerging order that is best described here as regulatory capitalism. The argument about the explosion or regulation that is advanced here implies that there are more regulators, that what is being regulated in each regulatory space is widening and that various techniques of regulation are coming together to create complex hybrids of governance. 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 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 policy patrols[5] and helps us to understand that regulatory network is embedded in the social system, and does 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, Jordana and Levi-Faur, 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 becoming regulators. Yet, the scope of this phenomena 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 (Braithwaith, 2004) and that indeed even a female sex worker can regulate policy brutality (Biradavolu et al., 2009), others suggest that the new networks of regulators are constrained by entrenched structures of power (Sorenson & Torfing, 2008; Shamir, 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 demonstrate 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 other wise dominated) by market actors and works, whether explicitly or not, to develop its own regulatory capacities (cf. Shamir 2005, p. 240; Barkay, 2009). MaNGOs blur the distinction between civil society and the economy and do not conforms to the traditional image of NGOs as independent from both business and the state. CiNGOs are NGOs that are controlled (owned or other wise dominated) by civil society actors and works, whether explicitly or not, to develop its own regulatory capacities. CiNGos do conform with our image of 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 other wise dominated) by state actors and works, whether explicitly or not, to develop its 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 2). 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 a point. Here the growth of regulation is driven by the ability of some businesses (most often big business) 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. [6] Processes and procedures of accreditation by third parties is 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, McNulty and Kang, 2002: 309).[7] 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 an hybrid of the interaction between state regulation, market actor regulation (MaNGOs and other Business organizations) and CiNGOs (civil society regulators). Table 1 presents the various options for regulatory hybridizations when three different types of third parties are enlisted by three different types of regulators 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 twenty seven 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.

Table 1: Types of Third Party Regulatory Designs

	State Actors as Regulators (e.g. regulatory agencies; GoNGOs)			**Market Actors as Regulators (e.g. Mangos)**			**Civil Actors as Regulators (e.g., CiNGOs)**		
Type of Third Party Enlisted	**S**	**M**	**C**	**S**	**M**	**C**	**S**	**M**	**C**
State Actor as regulatees	SSS	SMS	SCS	MSS	MMS	MCS	CSS	CMS	CCS
Market Actors as Regulatees	SSM	SMM	SCM	MSM	<u>MMM</u>	MCM	CSM	CMM	CCM
Civil Actors as Regulatees	SSC	SMC	SCC	MSC	MMC	MCC	CSC	CMC	<u>CCC</u>

Triplets Key: First letter means the Regulator; Second represents the enlisted third party; Third letter the regula*tee*; S=State; M=Market; C=Civil

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). 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 a license is revoked. Regulation on behavior is a common form of regulation it 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 deal with the content of a message across various platform of communication (e.g., books, mass broadcasting, newspapers, internet) and deal 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 lately in the literature in order to evaluate the costs and benefits of regulating one component of the system instead of others. Thus 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. In addition to hybrid NGOs and in addition to third party regulation 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 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 its own independent compliance administration.

Figure 1-3 about here

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 the work of the compliance group of the regulatees. 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-trajectory 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. Indeed, the possibility that multi-level regulation may involve co-development of regulatory capacities in different tiers is only rarely recognized.

3. *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 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; 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% of the possible sector–country units that were surveyed (Jordana, Levi-Faur, & Fernandez i Marin 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 agency: 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".

Figure 4 about here

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, p. 3). Some countries use social regulation (rather than subsidies) in order to advances goals such as social cohesion and equality. In these cases, the boundaries between the Regulatory State and the Welfare States are becoming even more blurred. Integrity regulatory agencies (or pro-accountability regulation agencies) deals with moral issues at the public sphere and safe guard accountability and other norms of conduct in the public sphere.[8] Examples include autonomous corruption-control bodies, independent electoral institutions, auditing agencies, and human rights ombudsmen.

4. *The Regulatory State*

The expansion in the number of regulatory agencies and arguably also in the scope of regulation and of the policy capacities of these agencies has been manifest since the 1990s in the popularity of the notion of the regulatory state (Majone 1994; Moran 2002; Loughlin & Scott 1997; McGowan & Wallace 1996). In its most straightforward form the term "regulatory state" "suggests [that] modern states are placing more emphasis on the use of authority, rules and standard-setting, partially displacing an earlier emphasis on public ownership, public subsidies, and directly provided services" (Hood *et al*. 1999, p. 3). Three elements are especially useful in characterizing the regulatory state (cf. Levi-Faur & Gilad 2004).

First, bureaucratic functions of regulation are being separated from service delivery. With the withdrawal of the state from direct provision of services (i.e. via privatization of existing services and the nurturing of private provision of value-added services), regulatory functions are becoming increasingly salient and are the new frontiers where the state redefines itself. The visible element of this division of labor is the rise of the regulatory agency; less salient but no less important is the role of "regulatory auditors", mainly lawyers and accountants, who are dispersed in various government ministries and are involved with various forms of contracting out (Power 1997; 2007). They are responsible for (a) the formation, monitoring, and enforcement of contracts with a multitude of for-profit and voluntary organizations that provide public services; and (b) the auditing of government action itself. The estimated growth of total staffing in public sector regulatory bodies is 90% for the period between 1976 and 1995 (Hood *et al*. 1999, pp. 29–31). Hood *et al*. (1999, p. 42) estimate that, if the patterns of regulatory growth and civil service downsizing had continued at the 1975–95 rate indefinitely, late in the present decade the civil service would have more than two regulators for every "doer" and over ten regulatory organizations for every major government department. These new auditors, the *regulatory auditors*, are not as visible as their fellow regulocrats who chair and run agencies, yet their role is increasingly important in the formation and implementation of public policy.

Second, the regulatory functions of government are being separated from policymaking functions and, thus, the regulators are being placed at arm's length from their political masters; the autonomy of regulators and regulatory agencies is institutionalized and thus further extends the sphere of "apolitical" policymaking. Regulatory agencies became the citadels which fortify the autonomous and influential role of the regulocrats in the policy process. We are witnessing the strengthening of the regulators at the expense of politicians on the one hand and of the managerial elite on the other.

Third, and as a result of the first two elements, regulation and rule making emerge as a distinct stage in the policy-making process. Accordingly, regulation is emerging as a distinct profession and administrative identity. Professional affiliation to global networks of experts becomes a major source of innovations, world views, accountability, and legitimacy.

The historical conjuncture that brought together the rise of the regulatory state at the same time as the stagnation or even retreat of the welfare state has led some to suggest that the regulatory state is essentially neoliberal. Yet all regulation, even regulation that serves neoliberal purposes, extends the sphere of the political and thus allows contestation within the political process. While not all of the regulations enhance the public interest or are even intended to, all regulation enhances and extends the public sphere by making the private public and by making the implicit and the normative formal. To the extent that democratic values and forces shape the political, these neoliberal rules are prone to democratic contestation. In other words, while regulations do not necessarily lead to egalitarian results and do not necessarily constrain "market forces", they open new venues for the democratic control of capitalism. The regulatory state (as well as regulatory capitalism more generally) is therefore not necessarily a "neoliberal state". Indeed, it can even adopt "high modernist" and neo-mercantilist forms of intervention (Moran 2003; Levi-Faur 1998). The open-ended nature of regulation and governance through rule making is already reflected in the debate between opponents and proponents of private-interest and public-interest theories of regulation (for an updated comprehensive overview, see Morgan & Yeung 2007). From a private-interest perspective, regulation may legitimize public programs that serve the few at the expense of the many; it can serve as a mask for policy actors and institutions that in effect rob or marginalize the weakest sections of society. Yet at the same time, as public-interest theories assert, regulation can serve as an effective governance tool that enhances public welfare, corrects market failures, and reduces social risks. While some regulations fail to do so, and while some regulators betray the public they were supposed to serve, regulation and regulators significantly extend the public sphere. We can hardly imagine life without regulation.

5. *Beyond Agencies and the State: 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 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 "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, p. 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" (S. Vogel 1996, pp. 20–1).

Hood, Rothstein, and Baldwin made the notion of regulatory regime a central pillar of their risk analysis. Regulatory regime "connotes the overall way risk is regulated in a particular policy domain…" (Hood, Rothstein, & Baldwin 2001, p. 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, Rothstein, & Baldwin 2001, p. 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.

6. 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 tow 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, p. 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 & 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 & 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 & 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 & Lazer 2003; Baldwin 2008; May 2007). The third is to promote responsive regulation (Ayres & 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 (Gilardi 2008; Maggetti 2007). The fifth is to institutionalize regulatory impact analysis and cost–benefit techniques (Sunstein 2002; Radaelli & 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, p. 161). Hence 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, pp. 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. [9] The large volume of regulations represents a challenge for democratic, judicial, parliamentary, and administrative systems of control (Hewart 1929; Taggart 2005; Dotan 1996; Kerwin 2003; Majone 1994; 1997). *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 & Drahos 2000, pp. 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 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 (Haufler 2002; Hall & Biersteker 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).

*7. **Regulatory capitalism***

The term "regulatory capitalism" denotes (a) the growth in scope, importance, and impact of regulation at the national and global levels; (b) the growing investments of political, economic and social actors in regulation in general and regulatory strategies in particular; (c) the emergence, extension and consolidation of hybrid forms of regulation which shape diverse and more complex forms of regulatory regime. These hybrid regimes of regulation rest on varied forms of hybridism: combining different actors, different strategies and different institutions that act on different components of the governance system.

The notion of regulatory capitalism suggests that regulation and rule making are the major instruments in the expansion of global governance in doing so it takes regulation theory and regulatory analysis beyond national boundaries (hence, also beyond the notion of the regulatory state) and beyond formal state-centered rule making (therefore toward civil regulation and decentered analysis of regulatory systems). It also denotes a world where regulation is increasingly a hybrid of different systems of control; statist regulation co-evolves with civil regulation; national regulation expands with international and global regulation; private regulation co-evolves and expands with public regulation; voluntary regulations expand with coercive ones; and the market itself is used or mobilized as a regulatory mechanism.

From the point of view of regulatory capitalism, the growth of regulation is manifested not solely in the growth of the regulatory state but also in the growth in the number of civil and business actors that "invest" in regulation and accordingly also in the growth of civil and business-to-business regulatory institutions and instruments. At the same time there are indications of the transformation of the politics of interest groups and non-governmental organizations. Civil actors are often associated with advocacy (e.g. lobbying) and service provision (e.g. replacing the state in the provision of welfare), but in our areas of study they also produce, monitor, and enforce regulation. The concept of civil regulation aims to capture this evolving feature of civil politics.

But what is civil regulation? The term refers to the institutionalization of voluntary global and national forms of regulation through the creation of private (non-state) forms of regulation intended to govern markets and firms (D. Vogel 2005; 2009). Civil regulation attempts to embed international markets and firms in a normative order that prescribes responsible business conduct. "What distinguishes the legitimacy, governance and implementation of civil regulation", Vogel tells us, "is that it is not rooted in public [i.e. state] authority. Operating beside or around the state rather than through it, civil regulations are based on 'soft law' rather than legally binding standards: violators are subject often to market rather than legal penalties (Vogel 2009). A distinction between "voluntary regulation" and "civil regulation" might be useful. While the two notions retain a close affinity, civil regulation, unlike voluntary regulation, may, at least in principle, possess coercive aspects.[10] Civil regulation tend to rest on old and traditional forms of self-regulation but goes beyond it to include regulatory techniques such as third-party accreditation and certification (Gunningham & Grabosky 1998), gatekeeping strategies (Kraakman 1986) meta-regulation (Braithwaite 2003; Parker 2002; Morgan 2003), enforced self-regulation

(Ayres & Braithwaite 1992; Heritier and Lehmkuhl, 2008), self-regulation (Ogus 1995; Gunningham & Rees 1997), and leagues tables (Sauder & Espeland 2006).

If indeed regulation, as we defined it earlier, is about the triplet of rule-making, monitoring and enforcement we can now bring civil and state regulation together into one framework that may help clarify the plurality of regulatory hybrids that govern different aspects of our life. Table 2 presents some of the options that are open for the analysis (and design) of hybrid regimes of regulatory governance. It emphasize the many options (indeed it presents only some of the possible combinations) that are open for the designers and indeed the complexity of regulatory regimes in the age of regulatory capitalism.

Table 2: Some Options for State and Civil Regulatory Designs

Rule Making	Monitoring	Enforcement
S	S	S
C	C	C
C	S	S
SC	SC	SC
SC	S	S

KEY: S- State regulation; C-Civil Regulation; CS- Co-Regulation

At the same time that the notion of regulatory capitalism captures a new global architecture (see figure 4), it also recognizes the global diffusion of rules, regulatory agencies, and regulatory forms of governance. Perhaps the most visible aspect of this form of globalization is the spread of regulatory agencies in the 1990s to all regions of the world. Less visible but not necessarily less influential and effective than the regulatory agencies is the consolidation and expansion of arenas of civil regulation where non-governmental organizations increasingly employ techniques of civil regulation (Braithwaite 2008; Lehmkuhl 2008; Abbott and Snidal, 2009). In this sense the opening of the global sphere to diverse set of regulatory actors creates a regulatory architecture that allows new democratic forms of participation, accountability, and blame-shifting, and therefore of what might be best termed ”regulatory democracy”. The expansion of regulation as an instrument of governance and government is not only expressed in the plurality of arenas and actors but also in the growth in the strategies of regulation, namely the application of first-party, second party, third party and other forms of hybrid regulation: such as co-regulation, enforced self-regulation, meta-regulation and multi-level regulation. Regulatory capitalism, unlike older forms of governance and governance, rest more on decentralized and private forms of regulation rather than on procedural and Command & Control forms of regulation. The holistic portrayal of the growth and dynamics of regulation that we offer here allow us to better understand the logic and politics of components of the system.

Figure 5 about here

8. Conclusions; Understanding Regulatory Capitalism

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, Coglianese and Levi-Faur, 2007). The financial, ecological, legitimation and moral crises of our time make regulatory issues even more central then ever before. Thu, 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 then 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, creating regulatory capitalism as a global order which is yet to be better understood.

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Figure 1: What is Being Regulated ?

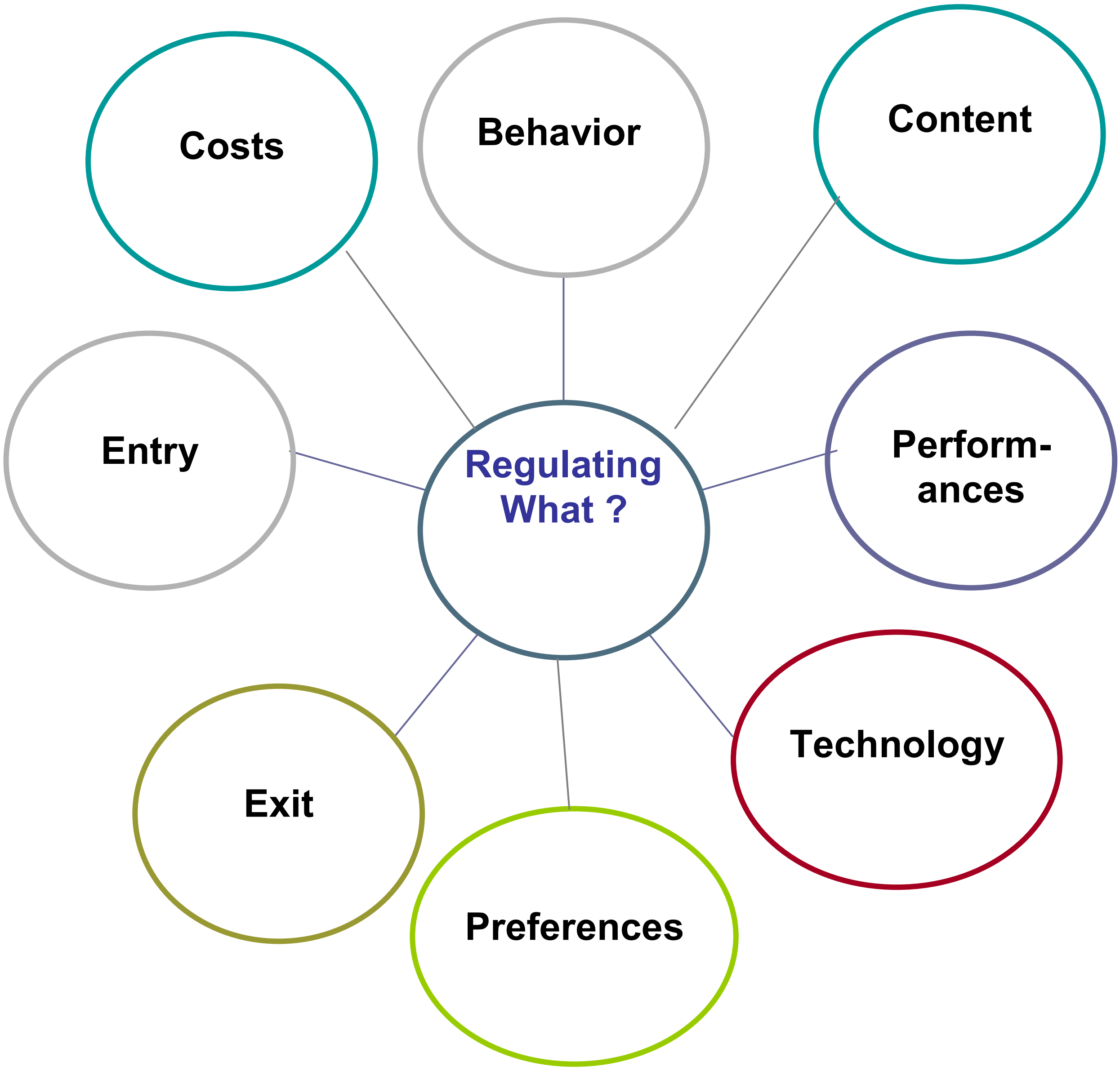


Figure 2: Who Regulates?

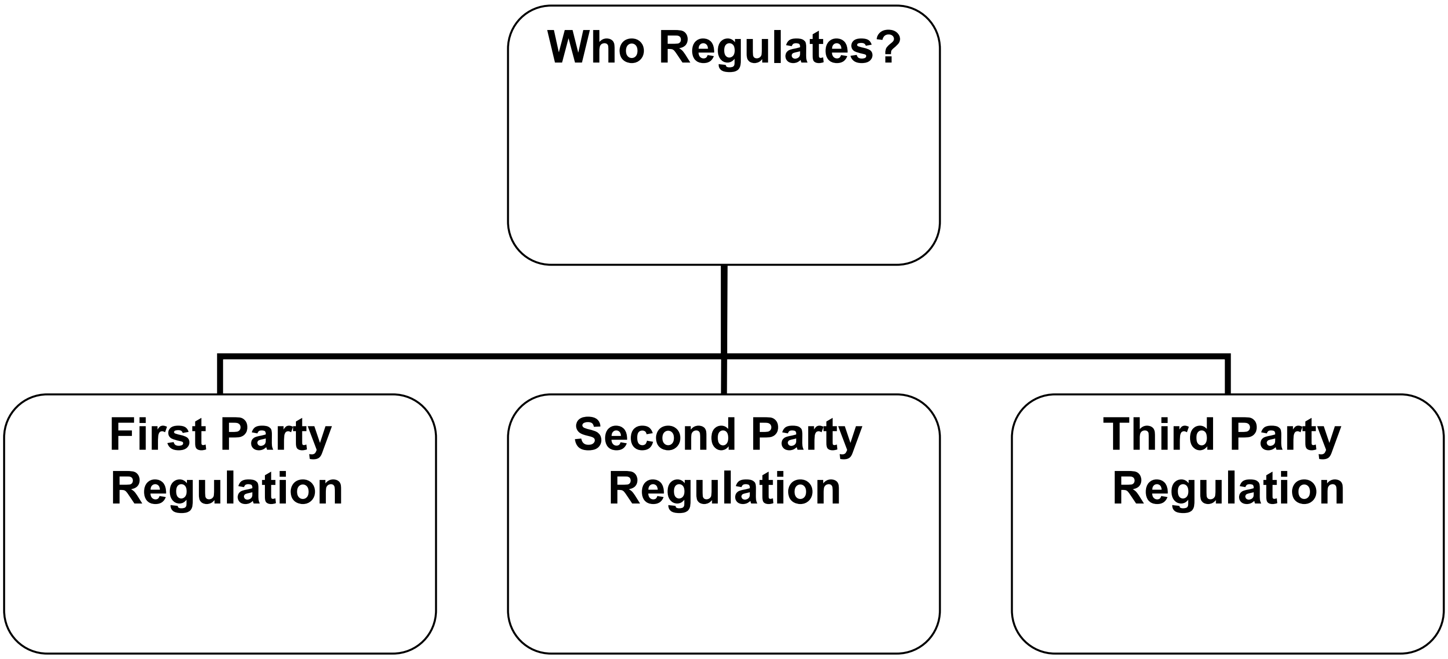
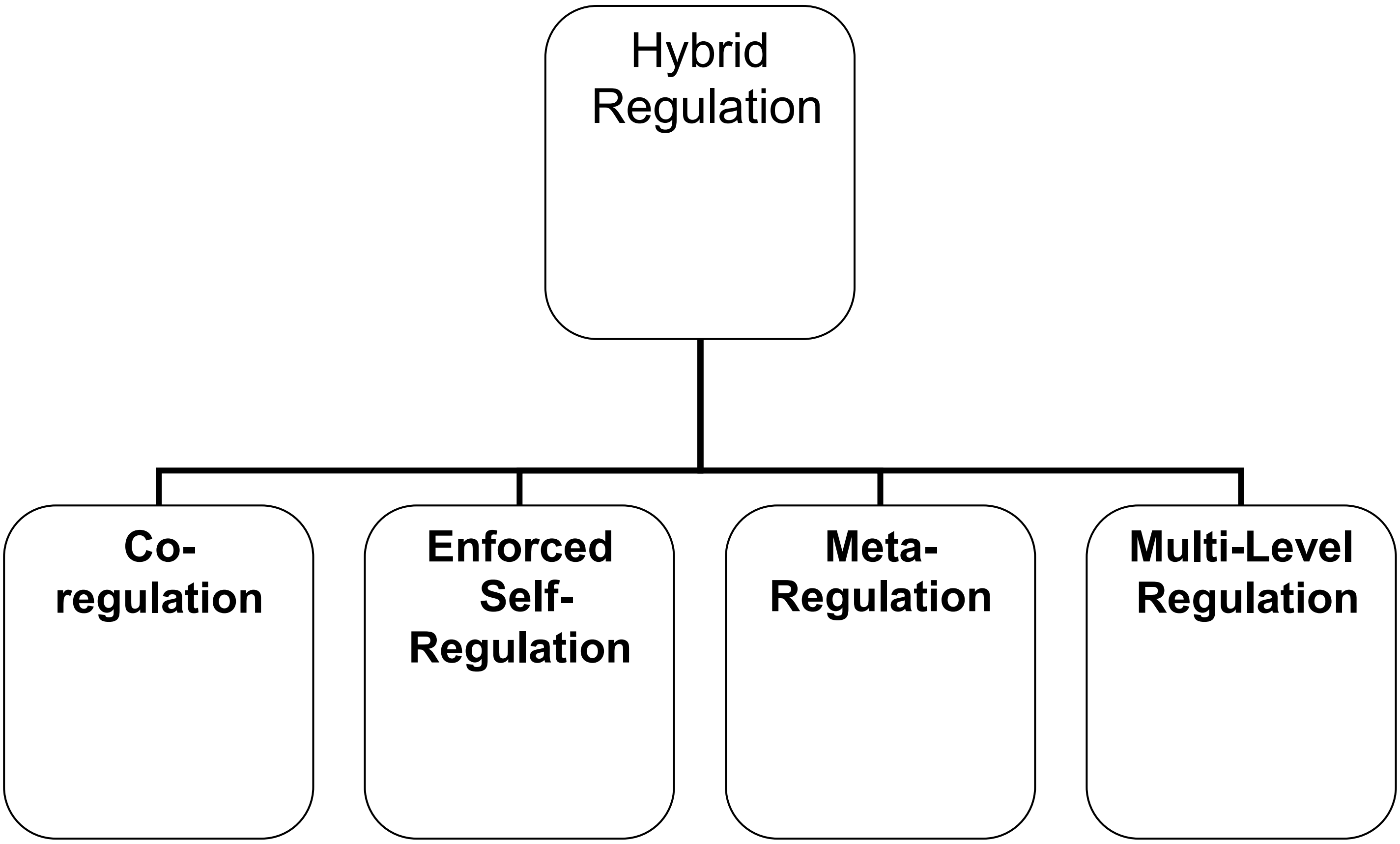


Figure 3: Hybrid Forms of Regulation



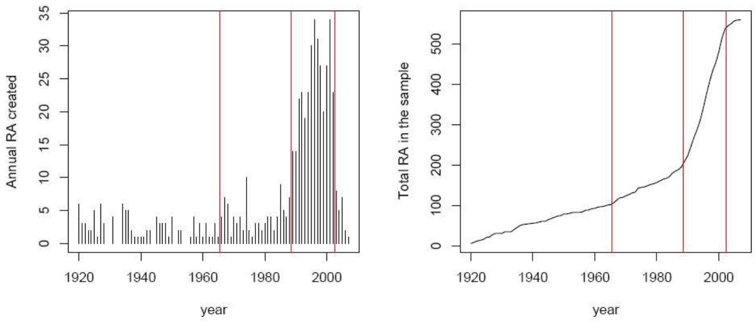


Figure 4: (a) Annual creation of regulatory agencies in the sample. (b) Cumulative annual creation of regulatory agencies 1920–2007). Source: Jordana, Levi-Faur and Fernandez (2009). The data covers the creation of agencies in 48 countries and 16 sectors over 88 years (1920–2007),

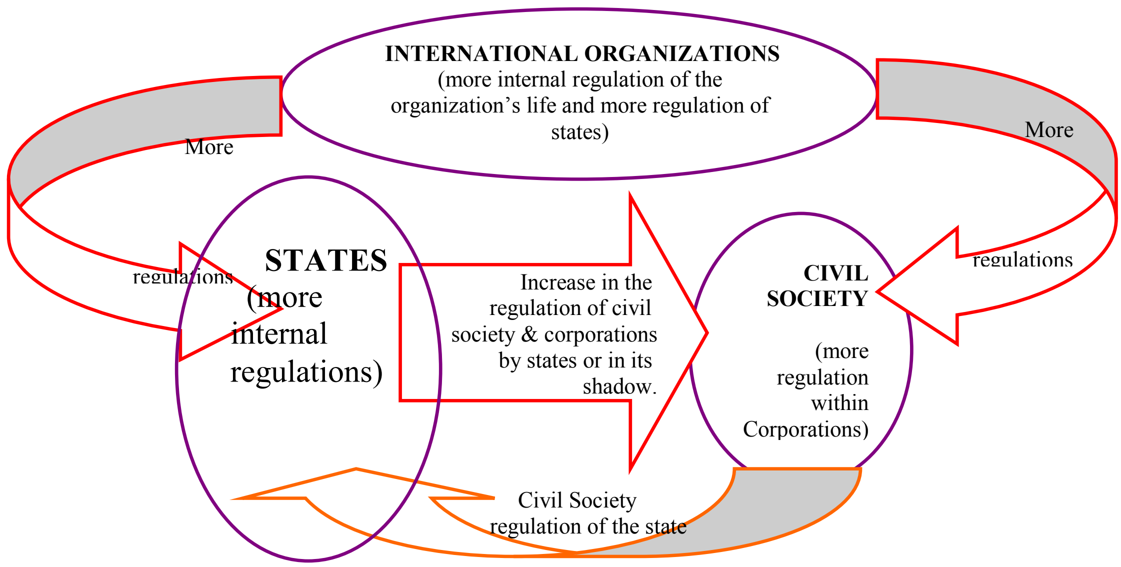


Figure 5: Regulatory Capitalism

Source: Levi-Faur , 2005

Acknowledgements

I would like to acknowledge the useful comments from Christine Parker, Avishai Beinish, Hanan Haber and Ronit Justo-Hanani. Responsibility for the content is of course mine. Some pdarts of this research were supported by research grant 2005/7 of the Israel National Institute for Health Policy and Health Services Research.

FOOTNOTES

[1] Not that this is only relative. Budgets are transparent to accountants to some degree but not to the public, even 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, p. 3).

[4] These trends include 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.

[5] Police patrols represent direct oversight, while 'fire alarms' mobilize third parties, including private actors into the regulatory space. See more McCubbins and Schwartz (1984).

[6] 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 1,000 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 (Courville, 2003). 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.

[7] Third-party regulators should not be confused by 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). Gate-keeping, whether by design or not, is important element governance regimes.

[8] I owe this point to Avishai Benish

[9] In the US agency rules have been produced in recent years at a rate of about 4,200 a year (Croley and McGill, 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 3,000 or so each year, outnumbering Acts of Parliament by 40 or 50 to one (Page 2001, p. 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 3,000. 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.

[10] The term voluntary regulation captures some of the sources of compliance that are often associated with civil regulation. Voluntary regulation includes a broad category of social and human behavior in which regulatory compliance is not imposed on the

individual or the organization but is partly or wholly based on the choice and the institutional design of the *regulatees*. The motivations for voluntary regulation may differ and so do the results; yet there is one constant feature that characterizes it, and that serves as an umbrella for a broad range of regulatory strategies. This feature is the consistent commitment, which is not required by law, to control behavior in such a way as to minimize the *regulatee's* freedom of action.