

Constructing and contesting legitimacy and accountability in polycentric regulatory regimes

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Abstract

The legitimacy and accountability of polycentric regulatory regimes, particularly at the transnational level, has been severely criticized, and the search is on to find ways in which they can be enhanced. This paper argues that before developing even more proposals, we need to pay far greater attention to the dynamics of accountability and legitimacy relationships, and to how those in regulatory regimes respond to them. The article thus first seeks to develop a closer analysis of three key elements of legitimacy and accountability relationships which it suggests are central to these dynamics: The role of the institutional environment in the construction of legitimacy, the dialectical nature of accountability relationships, and the communicative structures through which accountability occurs and legitimacy is constructed. Second, the article explores how organizations in regulatory regimes respond, or are likely to respond, to multiple legitimacy and accountability claims, and how they themselves seek to build legitimacy in complex and dynamic situations. The arguments developed here are not normative: There is no “grand solution” proposed to the normative questions of when regulators should be considered legitimate or how to make them so. Rather, the article seeks to analyse the dynamics of legitimacy and accountability relationships as they occur in an attempt to build a more realistic foundation on which grander “how to” proposals can be built. For until we understand these dynamics, the grander, normative arguments risk being simply pipe dreams – diverting, but in the end making little difference.

Keywords: accountability, legitimacy, polycentric regulation, regulation, transnational regulators.

Introduction

How to render polycentric regulatory regimes legitimate and accountable is one of the central questions preoccupying many social scientists, including lawyers. Such regulatory regimes are those in which the state is not the sole locus of authority, or indeed in which it plays no role at all. They are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated, and their boundaries are marked by the issues or problems which they are concerned with, rather than necessarily by a common solution. Such regimes pose a number of challenges which writers across a range of disciplines – law, political science,

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international relations, development studies – are all engaged in delineating and addressing. Indeed the issues to which the “governance turn” is giving rise is drawing commentators like moths round a light.

These challenges are principally functional, democratic, normative and systemic, as outlined below. Of these, the first three are often articulated as concerns about legitimacy and accountability. Solutions proposed include developing systems of extended accountability (Scott 2000), network accountability (Harlow & Rawlings 2007), enhanced democratic governance (Clapp 1998; Froomkin 2003; Cohen & Sabel 2005; Dingwerth 2005), or adopting functional equivalents to the structures of accountability which are to be found in constitutional settlements, at least of liberal democratic states, such as judicial review (Stewart 2005) or an enhanced role for parliaments or for executive oversight bodies such as auditors and ombudsmen (e.g. Harlow 2002, ch. 7; Harlow *et al.* 2007).

This article takes a different perspective. The usual set of accountability questions – who, to whom, how, for what, in accordance with what standards, and with what effects (Mashaw 2007) – are not addressed, at least not directly. Instead the paper asks what it means for regulators to be legitimate and accountable and how they respond, or are likely to respond, to demands that they should change in some way in order to meet the legitimacy and accountability claims made by others, and indeed what role the objects of the accountability and legitimacy demands play in shaping those demands. These questions are of interest in their own right; they are also the logically prior questions that have to be asked before any “how to” proposals can be made.

The arguments developed here are in principle applicable to all regulators, state and non-state, or indeed any organizations on which legitimacy and accountability demands are made, or which themselves seek to enhance their legitimacy and accountability. However, the site in which the issues are explored is that of transnational, non-state regulators in polycentric regulatory regimes.

Transnational, non-state regulators are chosen because they provide the “hard case” for legitimacy, authority, and accountability. In particular, focusing on such regulators brings to the fore critical issues which are often obscured when discussed in the context of comparatively stable constitutional settlements and legal regimes: notably, how legitimacy is constructed both within and outside the regulatory regime, what constitutes accountability, and the complex interrelationship of legitimacy, accountability and the act of governance. Take, for example, the social and environmental accreditation bodies, such as the Fair Trade Labelling Organization (FTLO) or the Forest Stewardship Council (FSC); or financial regulators such as the International Accounting Standards Committee Foundation (IASC) and International Accounting Standards Board (IASB), or the Basel Committee on Banking Supervision (BCBS). Each of these bodies has a different element of state involvement. There are no governmental actors represented in the FTLO, the FSC or the IASC or IASB, but the Basel Committee is comprised of banking supervisors from the G10 countries. However, they share the characteristic that their activities are not based on or mandated by national, supranational, or international law. Moreover, there are no clear existing structures such as courts, legislative committees, national auditors, ombudsmen, and so on, to which recourse can be made to render them accountable; they have no clear jurisdictional boundaries; and there is no easily identifiable set of potential democratic participants in their processes. Yet, as will be explored further below, the need such regulators (and others like them) have for legitimacy is particularly strong as they have to promote a motivational response from those

whose behavior it is they seek to change, but often without the infrastructure of the state to fall back on.

The article thus first seeks to develop a closer analysis of three key elements of legitimacy and accountability relationships which it suggests are central to understanding their dynamics. These are the role of the institutional environment in the construction of legitimacy; the dialectical nature of accountability relationships; and the communicative structures through which accountability occurs and legitimacy is constructed. Second, the article explores how organizations in regulatory regimes respond, or are likely to respond, to multiple and often conflicting legitimacy and accountability claims, and how they themselves seek to build legitimacy in complex and dynamic situations. For regulators may attempt to create and manipulate others' perceptions of their legitimacy. But their scope for strategic action may be bounded, and in any event structured by their institutional environment. Moreover, the communicative activity of "rendering account" may have transformatory effects on the organization, with implications for its ability to meet multiple legitimacy claims. The article thus proposes an institutional, relational and discursive conception of legitimacy and accountability and suggests that such a conception enables us both to understand the dynamics of accountability and legitimacy and to construct normative propositions as to how they can be created and enhanced. Before embarking on that analysis, however, the paper briefly sets out the broader institutional and conceptual context in which the arguments are developed.

Setting the scene: Governance and decentered regulatory regimes

Commentators on regulation and governance, like English speakers in the UK and the US, are sometimes separated by a common language. So some preliminary "definitional throat clearing" is required to avoid misunderstandings. First, the terms "state" and "non-state" are used throughout to distinguish in broad terms those regulators which have a legal mandate (including administrative bodies in the EU and international organizations founded by treaty) and those which do not – while recognizing that in practice the two are interrelated in a myriad of different types of relationship, and indeed state actors may be regulated by non-state actors (Risse-Kappen 1995; Meidinger 1997; Keck & Sikkink 1998; Cashore 2002; Scott 2002). A hierarchy of state–non-state cannot be assumed. By regulation is meant sustained and focused attempts to change the behavior of others in order to address a collective problem or attain an identified end or ends, usually through a combination of rules or norms and some means for their implementation and enforcement, which can be legal or non-legal. The regulatory functions can be exercised primarily by one actor or dispersed between a number of actors. The greater the dispersal and fragmentation of actors in the performance of regulation, including the definition of the problem/goals, the greater the polycentricity of the regime. Finally, a regulatory regime is a set of interrelated units which are engaged in joint problem solving to address a particular goal, its boundaries are defined by the definition of the problem being addressed, and it has some continuity over time (Hood *et al.* 2001).

Further, the arguments as to the nature of legitimacy and accountability which are developed in this article draw on elements of the decentering analysis of regulation (Black 2001, 2007). The decentering analysis has three levels or dimensions: organizational, conceptual and strategic. At the organizational level, the analysis draws attention away from individual regulatory bodies, be they at the national or global level, and emphasizes

instead the multitude of actors which constitute a regulatory regime in a particular domain. Decentered and polycentric regulation are synonyms, but draw attention in different directions. “Decentered regulation” draws attention away from the state – it denies that there is necessarily a central role for the state in regulation and seeks to draw attention from it; “polycentric regulation” is a term which acts more positively to draw attention to the multiple sites in which regulation occurs at sub-national, national and transnational levels.

Conceptually, the decentering analysis has a particular understanding both of the nature of the regulatory problem and the nature of state–society and intra-state and intra-society relationships, an understanding which is relevant for analysing the dynamics of both regulatory and accountability relationships, as discussed further below. At the conceptual core of a decentered analysis are five central notions: complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private (Black 2001). Critically for the debate here, it rejects a linear conception of regulation, in which regulatees are assumed to comply with regulatory requirements, and instead problematizes the response of different actors to attempts by others to regulate them, emphasizing their operational autonomy. Regulation, like any set of social relations, is dialectical: both regulator and regulatee are at once autonomous and dependent on each other (Giddens 1984).

The third dimension is strategic or functional. The hallmarks of the regulatory strategies which can both characterize decentered or polycentric regimes and which the conceptual analysis suggests are necessary, are that they are hybrid (combining governmental and non-governmental actors), multifaceted (using a number of different strategies simultaneously or sequentially), and indirect (Teubner 1986). In the context of accountability, this aspect of the decentering requires recognition of the multiple points of accountability within a regulatory regime and of the form that accountability mechanisms may have to take (Scott 2001).

Challenges of polycentric regulatory regimes

Decentered or polycentric regulatory regimes pose a number of challenges at any level, national, supranational, or transnational. Of these, four challenges in particular are central to current debates. These challenges are functional, systemic, democratic and normative. Functional challenges revolve around the problem of coordination; networks of organizations within a regulatory regime may be characterized by complex interdependencies and may lack a central locus of authority. There may not be a body whose role it is to act as the lead interpreter of the regimes’ rules or principles, for example, or to otherwise steer or coordinate the activities of the multiple participants in such a way that the regime moves toward the resolution of the problem which it both defines and is defined by (see e.g. Klijn & Koppenjan 1995, 2000; Kickert *et al.* 1997; Castells 2000). Systemic challenges revolve around issues of the fragmentation of social systems (Luhmann 1995). For lawyers, this is particularly the challenge posed to both the identification and identity of the law by the presence of numerous normative orders, an issue debated in international law in terms of the nature of “soft law”, and in legal theory journals in terms of the challenges of legal pluralism (e.g. De Sousa Santos 1995; Teubner 1997). Which norms are “law” and which are not; what are the implications of fragmentation within law by regulatory norms, or of the porosity of national and transnational legal systems, or indeed of the extensive bypassing of law in many governance

regimes – each of these questions poses a challenge for understanding law and for the law's understanding of itself (e.g. Cassese 2005). Democratic challenges arise from issues of representation: who should be involved in the decision-making structures of the various components of the network; to whom should such bodies be accountable and how (e.g. Cohen & Sabel 2005; Dingwerth 2005; Skelcher 2005). Normative challenges stem from concerns as to the goals and operation of the regulatory regime: from competing conceptions of “the good” that should be pursued (e.g. Krisch 2005; Koskiennemi 2007). These challenges, especially the latter, are not unique to polycentric regimes, but are enhanced by them. Of these, it is the functional, democratic, and normative which are often articulated in terms of the legitimacy and accountability of the regimes as a whole and different actors within them, and it is to these issues that we now turn.

The broad parameters of the accountability and legitimacy debates

The legitimacy and accountability of regulatory organizations even at the state level has long been the subject of debate. Writing in the 1930s, Landis observed that the literature on the administration “abounds with fulmination” (Landis 1938, p. 4) in particular at the “inappropriate” combination of legislative, judicial and executive functions within regulatory agencies and their lack of accountability. The adequacy of the accountability of the national and supra-national “regulatory state” has continued to be questioned, and ever-increasing controls over the activities of regulatory agencies have been sought by academics, politicians, and the public alike (e.g. Stewart 1990; Sunstein 1990; Majone 1999; Curtin 2007).

The problem of accountability is enhanced at the supranational level, again at the transnational level, and reaches its zenith in decentered or polycentric regulatory regimes at any level which are characterized by a strong, but not necessarily exclusive, presence of non-state regulators (see e.g. Clapp 1998; Dingwerth 2005; Skelcher 2005; Kerwer 2005a, b). The “governance turn” revealed a plethora of non-governmental actors at the national, supranational and global levels who are performing what had been traditionally seen as core “governmental” functions – welfare provision and regulation (e.g. Cutler *et al.* 1999; Braithwaite & Drahos 2000; Higgott *et al.* 2000; Slaughter 2001, 2002; Pattberg 2005). Accountability and legitimacy concerns are of course not confined to regulators or quasi-regulators but extend to those who in much broader terms are seen as exercising significant amounts of power over those both inside and outside organizations, including for profit corporations. As a result, organizations are, to use Power's evocative phrase, being turned “inside out” (Power 2005). The details of their internal decision-making structures and processes, including their incentive structures, audit, and risk management processes, are seen as critically relevant to those outside them.

Within this plethora of actors, non-state transnational regulators occupy a curious position. Such regulators may have a clear organizational structure, such as Transparency International (Wang & Rosenau 2001), the Forest Stewardship Council (Cashore 2002; Meidinger *et al.* 2003), or the standard setting bodies such as the International Organization for Standardization (ISO) (Furusten 2000). Such structures may be federated, such as Responsible Care, which develops and implements a code of practice for the chemical industry. It has a central organization but then allows regional bodies to develop which shape the Code in ways which make it relevant for their own regions (see, e.g. Gunningham & Grabosky 1999; Moffet *et al.* 2004). It may be that there is no

central organizational structure, rather there is a body of written norms which firms themselves have decided to apply, but there is no central locus of authority to which they can turn to discuss the proper interpretation or application of the principles. The Equator Principles provide a good example (Forster *et al.* 2005a,b; Watchman 2006). These are a set of principles for sustainable development which many banks require the borrowers to comply with when issuing loans for infrastructure development, mainly in the energy sector (dams, pipelines etc.). There is no one organization which is responsible for issuing the principles, interpreting or revising them, however. The “regulators” are the banks, regulating both themselves and others to ensure compliance with the principles, at least in the initial loan documentation. Non-state regulatory regimes in this case have the organizational form of co-ordinated systems of corporate social responsibility, rather than taking the form of a single agency regulator which parallels a governmental body.

Such regulators are subjected to a number of concerns relating both to what they do and to how they do it, though these vary between them. They (mainly the financial and trade related bodies) are criticized as being technocratic, dominated by liberal economic ideology; as insufficiently sensitive to environmental, consumer, labor and other social interests; and as ignoring or paying insufficient attention to the concerns of developing countries (e.g. Clapp 1998; Bull *et al.* 2004; Dingwerth 2005; Kerwer 2005b). They are also criticized on the grounds that, because they develop outside national constitutional settlements or at the transnational level outside the treaty system, they escape accountability through the mechanisms of consent of either domestic or international law. Moreover, they are criticized as non-transparent; as lacking, or only having very attenuated, consultation processes; as undemocratic; and as failing to have adequate, or any, systems of redress: those affected by their decisions are excluded from the decision-making process and have no way of calling them to account politically or legally (e.g. Slaughter 2002; Stewart 2005).

Not all the criticisms are always valid with respect to every regulator or regulatory regime. The extent to which they are regarded as “democratic,” for example, varies, among other things with the relationships they have with national governments (for example, whether they are comprised of members of national governments, or overseen by governments in systems of outsourced or “meta regulation”); the level of rule making they are engaged in – whether they are elaborating principles enshrined in law or developed by transnational committees of regulators or whether they are formulating their own; the degree to which they are internally democratic; and the extent to which those affected by their standards or on whom the organization wishes to impose them can participate in their formation. The individual members of transnational committees of regulators, for example, are subject to their own national systems of accountability, and are legitimate to the extent that their members are representatives of governments which are regarded as legitimate within their own nation states. However, they may fail against democratic criteria in that the extent to which they represent the international financial community varies significantly, from the broad membership of International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) to the far narrower membership of the BCBS. This narrow membership becomes particularly relevant when such bodies develop standards which they seek to apply not only to their own members but to others as well – as in the case of BCBS, the Financial Action Taskforce (FATF), and the IASB. In contrast, transactional or market based standard setters, such as the International Swaps and Derivatives Association, or the

ISO or social accreditation bodies respectively, may be regarded as less democratic on some measures in that they do not represent the state in any way, nor do they have particularly clear criteria of membership, although in practice their membership may be broader than that of some of the transnational committees of governmental regulators.

But despite their variety, transnational, non-state regulators in general pose the difficulty that the usual panoply of constitutional mechanisms of accountability which characterize liberal democratic constitutional systems is not necessarily available.² Despite the arguments on the constitutionalization of individual regulatory bodies, even those constituted within the international law framework (e.g. Cass 2005), and the identification of an emergent global administrative law (Kingsbury *et al.* 2005), these initiatives are nascent and rudimentary. Transnational regulators do not (yet) operate within a constitutional framework, and even that which applies to non-state regulators at the state level may be attenuated or uncertain.³

The issue of jurisdiction is also complicated in the transnational context; such regulators do not fit neatly within existing legal and territorial jurisdictional boundaries (see also Skelcher 2005). Their mandates are uncertain, and it is not clear on whose behalf they purport to act and to whom accountability should be owed. In principal-agent terms, who is the principal for whom these bodies are acting? Lack of jurisdictional boundaries and the problem of identifying “principals” complicate questions of who has a right to call them to account, and how the boundaries of their accountability should be drawn. If principles of democratic accountability are to be introduced, for example, who should be eligible to participate in that democratic process? If mechanisms of legal accountability, such as judicial review, are to be used, which courts have jurisdiction, and how does the jurisdiction of national courts relate to that of the dispute settlement mechanisms (where they exist) of transnational regulators (e.g. Cassese 2005). What representation, if any, should the original standard setter have in any dispute resolution process and what would be the implications of “interpretive interference” by these processes on the functioning of the regime?

Finally, polycentric regimes at any level (sub-national, national, supranational, global) pose the problem of “many hands” (Thompson 1980; Bovens 2007). The different regulatory roles and responsibilities of identifying goals, formulating standards, monitoring and enforcement are often dispersed between a number of participants, with significant implications for accountability. For example, it is hard to hold the standard setter to account for the ways in which the rules have been enforced – but potentially difficult to hold the enforcer to account for rules it did not write (see also Kerwer 2005b). Here the issue is not, or rather not simply, how to call to account a single organization, but how to call to account a constellation of regulators. Is the appropriate course to identify one regulator and argue that the accountability of the others is derived from and dependent on the accountability of that regulator, as in hierarchical regimes (one for all)? Or is the appropriate course to say that each regulator has to be individually accountable for the activities of the regime as a whole (all for one)? Alternatively, should each actor be held accountable just for its own role within the regime (each for itself) (adapting Bovens 2007)?

Indeed, the range of accountability and legitimacy issues that contemporary governance and regulatory regimes pose is such that the urge to pose a neat and workable solution is compelling. However, my contention here is that attempts to construct such a solution have to be grounded in a greater appreciation of the nature of regulatory

organizations – and indeed regulatory regimes – and in a deeper understanding of what it means to be legitimate and accountable. We can then begin to understand the dynamics of legitimacy and accountability relationships, a necessary prerequisite for any attempts to try to develop new relationships or alter existing ones.

The key to understanding both how accountability and legitimacy are forged, it is argued, lies in recognizing three key elements: (i) the institutional embeddedness of regulators, be they at the national, sub-national, supranational, or global level and the role of that institutional environment in the construction and contestation of legitimacy; (ii) the dialectical nature of accountability relationships; and (iii) the communicative structures in which legitimacy claims and accountability relationships are articulated and constituted. We turn first to the role of institutional structures in the construction and management of legitimacy before exploring the dialectical and communicative dimensions of legitimacy and accountability relationships.

Constructing legitimacy: Legitimacy claims and legitimacy communities

For many commentators in law and political science, issues of legitimacy are at heart normative questions: when should an actor or constellation of actors be regarded as legitimate. But sociological debates on legitimacy ask an empirical question: when is an actor regarded as legitimate, and why? It is these empirical questions that we need to ask before we can approach the normative. In sociological terms, legitimacy may be an objective fact, but it is socially constructed (Scott 2001). Legitimacy means social credibility and acceptability: “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” (Suchman 1995, p. 574; Scott 2001). In a governance or regulatory context, a statement that a regulator is “legitimate” means that it is perceived as having a right to govern both by those it seeks to govern and those on behalf of whom it purports to govern (Barker 1990; Beetham 1991). Drawing on Weber, power (including regulatory) relations are legitimate where those engaged in them perceive or believe them to be so (Weber 1948, p. 213). Legitimacy rests on the acceptability and credibility of the organization to those it seeks to govern. Organizations (regulators) may claim legitimacy, and may perform actions and enter into relationships in order to gain it. But legitimacy is rooted in the acceptance of that organization by others, and more particularly in the reasons for that acceptance. These reasons lie in the congruence of the regime to a person’s beliefs or expectations (Weber 1948; Habermas 1973; Beetham 1991, p. 11), or, others would add, interests (Zucker 1987; Suchman 1995).⁴

More particularly, institutional analyses of organizational legitimacy argue that there are three sets of reasons for social acceptance. Legitimacy may be pragmatically based: the person or social group perceives that the organization will pursue their interests directly or indirectly. It can be morally based: the person or social group perceives the goals and/or procedures of the organization to be morally appropriate. Finally, legitimacy can be cognitively based: the organization is accepted as necessary or inevitable (Zucker 1987; Suchman 1995). Research on what motivates compliance with legal and voluntary norms echoes this triptych (Winter & May 2001; Gunningham *et al.* 2004; May 2004).

Legitimacy is thus not necessarily a question of legal validity. This is not to argue against the positivist position that law is accepted as legitimate because it is legally valid (e.g. Schmitt 2004). It is simply to say that in identifying the “legitimacy” of governance

regimes or organizations within them, trying to do so by identifying legal validity will often be irrelevant, or at least unproductive. Where regulatory regimes are largely non-legal and where, as in transnational regimes, infusing them with law is problematic, using only a legal concept of legitimacy will lead us to a dead end: such regimes will necessarily lack legitimacy and any potential for legitimacy, in legal terms. They may, however, still be regarded as perfectly legitimate by others. The Forest Stewardship Council or Responsible Care, for example, are seen as legitimate by a number of market actors in the forestry and chemical industries respectively, but they have no legal basis for their perceived legitimacy.

Legitimacy thus lies as much in the values, interests, expectations, and cognitive frames of those who are perceiving or accepting the regime as they do in the regime itself. As such, legitimacy can differ significantly across time and space, and between actors, systems, and contexts. Although legitimacy claims may change, legitimacy can nonetheless be resilient – legitimacy communities may “forgive” individual transgressions (e.g. Gibson & Caldeira 1995), though the resilience of legitimacy may be linked to its basis: pragmatic legitimacy is less resilient than moral or normative legitimacy, which is in turn less resilient than cognitive legitimacy (Zucker 1987; Suchman 1995). Moreover, different people’s perceptions of whether an organization is legitimate are not necessarily based on the same types of evaluations. B may perceive an organization or set of institutions, A, to be legitimate because it embodies a particular religious ideology, or because it is pursuing a goal which B judges to be normatively good (sustainable development; pro-life; euthanasia; animal rights; free trade). Alternatively, C may perceive A to be legitimate because it is procedurally fair in its conduct (Tyler 1990), or because it conforms to the rule of law (Gibson & Caldeira 1995), or because it is pursuing C’s interests. Legitimacy is also associated with the roles that are being performed (Zucker 1987; Suchman 1995). Role legitimacy is particularly relevant when considering the role of non-state regulators, as not all organizations will be perceived as legitimate in performing regulatory roles. An NGO, for example, may be perceived by some as legitimate in performing a role as a lobbyist but not as a regulator; just as an aid organization may be perceived as legitimate in providing humanitarian relief for those affected by civil war but not in lobbying for regime change (Edwards & Hulme 1995). Froomkin, for example, argues that Internet Corporation for Assigned Names and Numbers (ICANN), the domain name regulator, is a legitimate body for performing tasks of technical coordination, but not broader policy making because of its closed decision making processes and limited participation (Froomkin 2000, 2002, 2003).

In particular, the normative bases of legitimacy are frequently contested. As noted above, accountability and legitimacy in law, and often in political science, tend to focus on normative or cognitive bases of legitimacy: On when an organization *should* be regarded as legitimate, rather than on whether it is regarded as legitimate. The questions are analytically distinct, but the answers to each may have a normative or cognitive base: a person may regard an organization as legitimate because it conforms to a set of normative criteria which that person thinks is relevant and important or because its legitimacy is so deep rooted it is barely questioned.

The normative assessments of when a regulator should be regarded as legitimate broadly fall into four main groups or “claims,” albeit they are expressed differently between different writers and vary with constitutional traditions (see e.g. Baldwin & McCrudden 1987; Baldwin & Cave 1999; Morgan & Yeung 2006). These are constitutional claims;

justice claims; functional or performance claims; and democratic claims. Constitutional claims emphasize conformance with written norms (thus embracing law and so-called “soft law” or non-legal, generalized written norms), and conformance with legal values of procedural justice and other broadly based constitutional values such as consistency, proportionality, and so on. Justice claims emphasize the values or ends which the organization is pursuing, including the conception of justice (republican, Rawlsian, utilitarian, for example, or various other conceptions of “truth” or “right”), but also more prosaically, goals such as sustainable development or free trade. Functional or performance-based legitimacy claims focus on the outcomes and consequences of the organization (for example efficiency, expertise or effectiveness), and the extent to which it operates in conformance with professional or scientific norms, for example. Democratic claims are concerned with the extent to which the organization or regime is congruent with a particular model of democratic governance models, for example representative, participatory, or deliberative. These legitimacy claims are both contested and contestable, not only between the different groups, but within them. Thus there are different models of procedural justice; competing models of democratic governance; different types of functional or performance legitimacy claims (financial, ethical, professional, economic), and obviously competing conceptions of justice.

However, the extent to which regulators are perceived as legitimate is not only based on cognitive and normative assessments, but on pragmatic assessments. Pragmatic legitimacy is often excluded from legal and political science accounts of legitimacy (indeed seen as an “illegitimate” form of legitimacy), but pragmatic legitimacy can be significant in practice in the creation of legitimacy for regulatory organizations, state or non-state, even though it may be normatively undesirable (e.g. Cashore 2002; Potoski & Prakash 2004). The dynamics of pragmatic legitimacy need not be detrimental to or incompatible with normative assessments of legitimacy, however. The dynamics of “responsible consumerism,” for example, in which consumers make purchasing decisions not just on the price and quality of goods but on peripheral attributes such as the conditions of their production (labor rights, sustainable development) or the terms of their economic transfer in the supply chain (fair trading), mean that firms both on the supply and demand side can have a significant economic interest in complying with social and economic norms of accreditation bodies such as FSC, which consumers perceive to be legitimate on normative grounds (Cashore 2002). The FSC’s legitimacy is thus pragmatically rooted for some (e.g. suppliers), and normatively based for others (consumers).

Constructing legitimacy: The role of regulators

Legitimacy claims are thus both constructed and contested by those evaluating regulators. Thus far in this discussion, as in others, it has been implicitly assumed that regulators are passive recipients of these legitimacy evaluations. But regulators, like states (Lipset 1958; Merelman 1966; Habermas 1977), or indeed any organization (Meyer & Rowan 1977), can play a role in constructing their own legitimacy claims though, absent hegemony, these claims will not necessarily be accepted by all others. Suchman’s analysis of how organizations can manage their own legitimacy identifies three main strategies: conforming, manipulating, and informing. Managing their legitimacy encompasses building legitimacy, maintaining it, and repairing it once lost. Organizations can manage their legitimacy by attempting to conform to legitimacy claims that are made on them; they can seek to manipulate them; or they can selectively conform to claims from among

their environments, or legitimacy communities, conforming to claims of those that will support them. The form that the strategy takes will vary with the type of legitimacy that is in issue: pragmatic legitimacy (based on self-interested claims of legitimacy communities); moral or normative legitimacy (based on assessments that this is the “right thing to do”) or cognitive legitimacy (based on assumptions that things could not be any other way), and on whether the organization is seeking to build, maintain or repair legitimacy (Suchman 1995, pp. 585–601; Cashore 2002; Bernstein & Cashore 2007).

Regulators can manage the pragmatic and normative bases of their legitimacy in a number of ways (cognitive legitimacy, by its nature, is far harder to manage strategically). Many state based regulatory agencies, for example, have developed systems of public consultation, decision-making, and reporting which go well beyond those required by law to enhance their normative legitimacy (Thatcher 2002). Non-state regulators can also seek to manage their legitimacy, both out of self-interest and because they perceive it to be the “right thing to do:” in March and Olsen’s terms, out of a logic of consequences and a logic of appropriateness (March & Olsen 1984). Cashore’s analysis of the FSC’s legitimacy illustrates how the FSC seeks to manage its pragmatic legitimacy by engaging in “brand destroying” activities against those who do not conform (Cashore 2002; see also Bernstein & Cashore 2007). Regulators can also seek to develop moral and cognitive legitimacy through, for example, linking themselves to other organizations which are perceived to be legitimate by those whose legitimacy claims they want to meet (Meyer & Rowan 1977). The bodies to whom they are linked may also derive enhanced legitimacy from those legitimacy communities that support the regulator seeking the alignment, in systems of mutual legitimacy enhancement or “legitimacy networks”. For example, a number of the social and environmental accreditation bodies have agreed to ensure that they abide by the Code of Practice developed by the International Social and Economic Accreditation League (ISEAL) on the development, publication and review of standards by member organizations, largely to enhance their credibility (ISEAL Alliance 2004; Meidinger 2006).⁵ In turn, ISEAL’s legitimacy may be enhanced through its own association with such organizations among certain legitimacy communities. But such a tactic of alignment may not of itself always be successful. Froomkin argues, for example, that ICANN’s attempts to gain legitimacy by developing procedures modelled on the Internet Engineering Taskforce, a body which is widely accepted as legitimate by the internet community, have been largely unsuccessful (Froomkin 2003).

Regulators may thus seek to build legitimacy by conforming to the claims of all or a selective group of legitimacy communities, or by attempting to create new legitimacy beliefs and new legitimacy communities (Ashford & Gibbs 1990; Suchman 1995, pp. 591–593). The important point to note with respect to polycentric regimes is that an organization’s legitimacy communities include other participants in the regulatory regime on which the organization relies, or which it would like to enrol in its regulatory processes, as well as those outside it. Social and environmental accreditation regulators, for example, such as FTLO, rely on pressure groups or NGOs to generate awareness among consumers and in turn generate economic pressures on market actors to conform to those norms, and so have to generate legitimacy among those bodies as well as firms in order to motivate them to act in their support. The FSC relies quite heavily on the Rainforest Alliance, an NGO, to raise awareness of its scheme and to campaign for its adoption. But the interdependencies that are created through enrollment and interconnectedness can come at a price, as the regulator has to adjust its structures or strategies to

meet the legitimacy claims of others in the network in ways it would not otherwise want to do. The Financial Action Taskforce, which promulgates standards on anti-money laundering, sought to enroll the World Bank and IMF to help enforce its standards, but in return it had to abandon the use of “blacklists” – countries which did not comply on the grounds that neither the World Bank nor the IMF saw these as acceptable (Hulsse & Kerwer 2007). The IASB’s International Accounting Standards and International Financial Reporting Standards derive significant support from the EU’s incorporation of the standards into its own legal regime, and increasingly from the US’s indications that it will recognize them. However, in return, the EU and US are demanding that the IASC Foundation should establish a monitoring body to reinforce the public interest oversight function of the IASC Foundation Trustees, which oversee the IASB, and to represent the interests of the wider investment community (IOSCO 2007). For these public authorities, themselves a legitimacy community for the IASC, expertise in accountancy is not a sufficient condition of legitimacy of the IASC, the IASB and the standards they produce. If they are to lend these bodies their support, they want changes to be made.

Reasons for constructing legitimacy

Recognition of regulators’ attempts to build legitimacy brings to the fore a key issue which discussion on state based regulators obscures: an awareness of why regulators need legitimacy and authority. All regulators, but particularly non-state regulators, need legitimacy because it is a critical element in motivating behavioral responses (Suchman 1995, though see Gibson & Caldeira 1995). They require not only that others accept them, but that they will change their behavior because of what of the organizations or standards say. Unlike state based regulators, whose actions are supported by law, non-state regulators cannot necessarily rely on the authority of law to motivate people to behave, or derive their legitimacy from their position in a wider legal order and constitutional settlement.⁶ They have to create the motivation for compliance or change in some other way.⁷

Moreover, in polycentric regimes, regulators enroll others in the performance regulation, not only expanding the number of organizations participating in the regulatory regime (see e.g. Kerwer 2005b; Black 2002) but expanding the number of organizations on which any one regulator is dependent or with which it is connected, and therefore whose legitimacy claims it may have to meet. Enrollment can enhance legitimacy within some legitimacy communities, as where the regulator aligns itself with another regulator who is considered legitimate, discussed above, but enrollment can also increase the regulator’s need for legitimacy from a wider range of actors within the regulatory regime with whom it interacts in the performance of regulation. Enrollment also raises the issue of the legitimacy of the actor enrolled (is an NGO or credit rating agency a legitimate producer and/or enforcer of standards, for example, and for whom?). Enrollment can potentially enhance a regulator’s legitimacy within a legitimacy community, but if the actor enrolled is not considered legitimate, it may well erode it.

Distinguishing state from non-state regulators in this context does not mean that state based regulators are always perceived as legitimate, and compliance is necessarily forthcoming (or indeed that the state is always absent in polycentric regimes). Research into compliance with state based regulatory requirements shows that how people respond to regulatory regimes can depend significantly on their perceptions of the legitimacy of those regimes and the particular regulator in question (Tyler 1990, 1997;

Braithwaite *et al.* 1994; Chayes & Shelton 2000; Braithwaite & Reinhart 2007). Although legitimacy plays a key role in motivating behavior in all regulatory regimes, it is particularly critical for non-state regulators who do not necessarily have the legitimacy or powers of the state, or a supranational or international legal settlement to fall back on. For them, satisfying multiple legitimacy communities (or rather a certain set of legitimacy communities) is particularly necessary if their authority is to be recognized and accepted, and thus for their continued survival as a regulatory body. State based regulators can borrow on the legitimacy of the state or the international legal regime (to the extent that legitimacy exists) to bolster their individual legitimacy claims but non-state regulators often need to build legitimacy from the start.

Constructing legitimacy – the role of accountability relationships

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

As noted above, legitimacy can be grounded not just in moral acceptance (i.e. values) but pragmatically, in the congruence of the organization to a person’s interests or expectations, and cognitively, in taken for granted assumptions. As organizational institutionalists observe, only pragmatic and moral legitimacy entail some form of active evaluation of an organization; cognitive legitimacy relates to far more deep rooted assumptions that are rarely articulated, let alone actively assessed (Suchman 1995). Accountability is thus a route through which pragmatic and moral/normative legitimacy claims in particular are validated.⁸ This is distinct from saying that accountability relationships are based in different values (cf. Harlow 2006). Rather it is saying that each legitimacy claim, and thus accountability relationship, will have its own logic: set of material practices, symbolic claims, and cognitive and normative structures. Those who dispute the legitimacy claims of others will contest the associated accountability relationships. So accountability relationships that are sought by powerful market actors to ensure that a regulator acts in their interests in order to validate their pragmatic legitimacy claim (e.g. ensure regulators allow a certain amount of deforestation) will be contested by those seeking to validate moral/normative claims, for example as to the justice goals being pursued (sustainable development). Those seeking to build accountability relationships that will validate a particular form of normative claim (e.g. constitutional) will contest accountability relationships which seek to validate a conflicting normative claim (e.g. functional), or a conflicting pragmatic or cognitive claim.

Although accountability relationships can be critical for legitimacy, legitimacy is not necessarily always dependent on accountability relationships. Accountability and legitimacy are usually conflated in debates on regulation or governance (as they have been thus far here), but analytically they are distinct. As we have seen, organizations, institutions or regimes may be afforded legitimacy for a whole range of reasons – self-interest,

charisma, ideology, religion – even though they make no attempt to be accountable and indeed may even subvert attempts to make them accountable. For a practising Roman Catholic, the Pope is legitimate even though there is no relationship of accountability between them. However, it is suggested that a more specific description of the relationship of accountability and legitimacy in a regulatory context is that perceptions of the right to govern (legitimacy) depend (in whole or in part) on whether or not the actor is accepted as having appropriate accountability relationships with others, often including, but not necessarily confined to, the person whose perception is in question.⁹

The nature of accountability relationships

At its core, accountability is a particular type of relationship between different actors in which one gives account and another has the power or authority to impose consequences as a result (Mulgan 2000; Bovens 2007; Mashaw 2007). In other words, for A to be accountable to B means that A agrees to external scrutiny by or on behalf of B (gives account to B) and that B's response will make a "practical difference" to the conduct of A, either retrospectively, prospectively, or both. These consequences may include sanctions, but as Bovens argues, the presence or absence of sanctions, even informal ones, should not be decisive of the question of whether an accountability relationship exists, it simply distinguishes its form (in Bovens' analysis, whether it is "thin" or "thick") (Bovens 2007).

To be accountable is to agree to subject oneself to relationships of external scrutiny which can have consequences. So far, so familiar. But this sketch of the nature of accountability relationship needs elaboration in two key respects if we are to understand the role of accountability relationships in constructing and contesting legitimacy, and their implications.

First, power, to the extent that it is envisaged at all in accountability relationships, is usually envisaged as flowing in one direction: from accountee to accountant. This linear model of accountability is the equivalent of the "command and control" fallacy in the regulatory context: that regulation is about regulators telling and others doing. As the decentering analysis emphasizes, all social relations, as Giddens points out, are dialectical (Giddens 1984). Those engaged in social relations, including governance, regulatory and accountability relations, are at once autonomous from and dependent on the other. Accountability relationships are also thus not linear but dialectical. The accountant is dependent on the accountee for information, for example, is relying on it to render a valid account and to respond to the accountant's assessment, and yet the accountant is autonomous. It is not a cipher, and "compliance" cannot be assumed. Similarly, the accountee (e.g. regulator) is dependent on the accountant, for example to provide it with resources; to leave it alone; to act on its behalf (e.g. NGOs to use their resources to stimulate compliance from others); or to comply with standards that the regulator issues. These interdependencies, which characterize polycentric regulatory regimes, disrupt the hierarchical relationships which are implicitly assumed in many conceptions of accountability, including those modelled on principal-agent relationships.

Second, we need a more developed understanding of what it means to "render account." The question, "what does it mean to render account" is usually answered in terms of the original use of accountability – literally to give "a count," as expanded into the more comprehensive understanding of informing, explaining and justifying one's actions (Dubnick 2002; Bovens 2007). But what does giving the explanation imply for the person giving it? What is necessary for it to give an account, and what effects does the

construction and articulation of that account have on the accountee? What it means to render account is a central issue, for it is significant both for understanding how organizations respond to and construct accountability relationships, and in turn for recognizing what the implications are for them in doing so.

Rendering account: The communicative structures of accountability

In order to recognize just what “rendering account” can mean for an organization, we need to add to a relational and dialectical concept of accountability an appreciation of the communicative structures in which accountability occurs. In one sense, to give account is to construct and present a narrative of past events or actions. It may be that the narrative has no effect on the organization; the narrative is constructed by it, but the narrative itself is not constitutive of organizational norms or practices. Indeed, on a rational actor analysis, an organization may simply construct a narrative which is false in order to serve its own interests. To the extent that the narrative is rationally constructed in order to enhance the organization’s legitimacy, accountability relationships can thus simply be strategic devices used by organizations to manipulate perceptions of their activities and performance. To an extent, attempts by regulators to construct their own legitimacy can be seen as illustrations of such strategies.

However, the scope for strategic action is bounded by the institutional context. The narratives that organizations construct will have to make sense to themselves (Meyer & Rowan 1977). The organization may therefore alter the narrative, or if it cannot, may seek to decouple the activities of the organization from the maintenance of formal legitimacy structures (Meyer & Rowan 1977). However, it is also possible that to the extent that the narrative was distinct, the narrative alters the organization. The organization alters to bring itself closer into accord with the story it tells of itself, and indeed which it may be required to tell. Akin to the way that some argue that participants in the ideal speech situation cannot maintain positions that they do not ultimately believe in (Habermas 1996), some discourse theorists argue that significant dissonance between our perception of ourselves and the story we tell others of ourselves cannot be maintained over time (Collins 1981; Davies & Harre 1990; Hall 1997). Similarly, albeit from a different theoretical perspective, Suchman argues that responding to moral and cognitive claims can itself have transformative effects on an organization (Suchman 1995).

The potentially transformative effects of accountability relationships are illustrated in the effects of accounting and audit practices within organizations. There is a significant body of research in critical accounting which explores the role of accounting and audit in transforming organizational reality. This research demonstrates that accounting or auditing norms can be sites of contestation between different conceptions of the role of the organization both within and outside it; organizations can build new shared understandings of organizational purposes; they can provide a common discourse and framework of meanings in which the organization can make sense of itself and others can make sense of it. They can also provide organizational members with a system of categories in which they can make sense of what has happened, anticipate the future and plan and assess action (Burchell *et al.* 1980; Hopwood 1987; Miller & O’Leary 1987, 1990; Loft 1988; Power 1995).

The insights as to the transformative effects of accountability relationships that this body of work provides have significant implications for our understanding of how and

whether organizations can construct multiple narratives in the context of multiple accountability relationships in an attempt to meet the divergent legitimacy claims of multiple legitimacy communities. To give account requires the construction of a narrative; it also involves engaging in a particular discourse of accountability. Auditing, for example, is not simply an accountability tool which can be used to give an account of financial expenditure, or indeed increasing performance in achieving a wide range of social objectives: sustainable development or ethical labor practices and so on, as the growing practices of social auditing illustrate (Courville 2003). Judicial review is not simply the application of a set of legal norms for the behavior of public actors. Deliberative polyarchies which engage regulators in democratic deliberation and in which regulators are called to give account are not simply the engagement of the public in reviewing actions of regulators. Rather, each is an interpretive and discursive schema through which participants in the accountability relationship make sense of their own and each other's roles, which is constitutive of their relationship and which is fundamentally shaped by it.

Recognizing this communicative dimension of accountability is significant as it contradicts the image of accountability as an abstract, technical process, and the "tools" or "techniques" by which it is achieved as neutral, technical instruments that can be deployed at will. As such it runs counter to the collibration or "invisible hand" model of accountability, in which accountability mechanisms can be tweaked or altered and selective inhibitors applied through processes of strategic intervention to ensure that appropriate norm structures are recognized and outcomes achieved (cf. Scott 2000).

Rather, accountability relationships are discursive interactions with their own logics which draw on and thus reproduce particular structures of meaning. Moreover, because different accountability relationships are grounded in different legitimacy claims, those relationships are not necessarily substitutable one for the other such that if one fails another can take its place.¹⁰ Substitutability assumes homogeneity or at least compatibility in legitimacy claims within the organization's environment. But as discussed above, those claims are heterogeneous and often incompatible. As a result, recommendations, such as Scott's concept of "extended accountability," in which different types of accountability can be substituted one for another should one of them fail (Scott, 2000), neglect to recognize that such substitutions may have a differential impact on the perceptions of the organization's legitimacy between different legitimacy communities. Substituting accountability to a democratic forum with an audit, for example, may satisfy functional legitimacy claims (e.g. for financial prudence and probity) but of themselves are likely to fail to satisfy legitimacy communities who are advancing legitimacy claims rooted in forms of constitutionality or democracy.

Responding to multiple legitimacy claims

Dilemmas and trilemmas

What are the implications of the institutional, dialectical and communicative conception of legitimacy and accountability outlined above for understanding how regulators will respond to multiple and often conflicting accountability and legitimacy claims? As noted above, regulators can face multiple legitimacy claims from within and outside the regulatory regime, some of which may conflict. They can also be proactive in managing their own legitimacy. So how can and will they respond to multiple legitimacy claims? They

may be able to meet all, or at least some of them, simultaneously – to please some of the people some of the time. It is not necessary for legitimacy claims to be interlinked or mutually supporting for this to be possible. They simply have to be compatible. The development of management models such as balanced scorecards (Kaplan & Norton 1992), used by a number of government bodies, is just such an attempt to structure, or at least provide a reporting framework for, the organization's responsiveness to different aspects of its environment.¹¹

But, as suggested above, the demands of legitimacy communities may well be directly opposed – to satisfy one will necessarily lead to dissatisfaction of the other. The incompatibility of democratically rooted claims relating to representation and membership with functionally rooted legitimacy claims relating to efficiency or expertise provides a good example. Frequently, in order to satisfy the legitimacy claims of those they are seeking to regulate, regulators' main decision-making bodies need to be comprised solely or mainly of representatives of those regulatees or those with considerable technical expertise (or both). In contrast, to be legitimate to a wider section of civil society, and indeed to be legitimate to other actors in the regulatory regime that the standard setting organization may be relying on, such as pressure groups, NGOs, or national governments, those decision-making bodies need to be solely or mainly composed of a wider range of representatives. Regulators can attempt to incorporate potentially competing demands within their organizational structures, for example the FSC attempts to balance the voting power (and structure the potential conflict) between different members through a tripartite structure of membership chambers: social, environmental, and economic (Meidinger 1997). But frequently membership remains contentious. Debates on the IASC's membership have continued since its inception, for example, and despite recent changes to its constitution to broaden membership and enhance consultation (IASC Foundation Constitution Committee 2004), as noted above the pressures on the IASC Foundation to change its structures remain, as they do with respect to the BCBS. The membership of ICANN has also been a constant battleground since its inception.

Conflicts between legitimacy claims based on functionality and those based on democracy are common, but there can be other conflicts between legitimacy claims: such as between those demanding procedural justice (constitutionality) and those demanding maximum speed and efficiency in decision-making (functionality). Even within groups of claims there are conflicts, such as conflicts between constitutional claims rooted in different models of administrative justice, as Mashaw's familiar typology of bureaucratic, moralistic, and professional models of administrative justice demonstrates (Mashaw 1983). Moreover, once gained, maintaining legitimacy may be difficult, not least because legitimacy communities can change; new actors with different legitimacy claims may become relevant to the organization or legitimacy claims of existing actors in the regulators' environment may mutate (see e.g. Dent 1991; Ogden 1995; Conrad 2005), as the example of the IASC illustrates.

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

effect on the organization as it seeks to respond to the multiple legitimacy and accountability demands being made on it; in Koppell's evocative phrase, the organization may suffer "multiple accountability disorder" (Koppell 2005). In other words, its attempts to respond to the multiple demands may diminish its chances of survival (Power 1995).

Koppell argues that ICANN has suffered in this respect. Its turbulent history is marked by significant shifts in membership, structures, and procedures as it attempted, in part, to respond to the different legitimacy claims made on it and attempts to forge different types of accountability relationships, with the result that it has ended up with little legitimacy from anyone (Koppell 2005). Other organizations have had similar experiences. In their attempts to meet the legitimacy claims of one community, they lose it from another. Edwards, for example, has noted that the increasing demands on NGOs to develop the accountability trappings of financial audit, transparency, and so on, can result in NGOs becoming more accepted by state or international actors, but also more bureaucratized and increasingly distant from the communities they seek to engage with and represent (Edwards 1999; Slim 2002; Goodin 2005). Research into the effects of the introduction of new public management tools of accountability and evaluation in healthcare and education in a number of European countries is replete with complaints from those within those sectors that the demands of audit, performance targets, and other accountability relationships are distorting organizational priorities away from what others (doctors, teachers) think should be the central role for the organization (e.g. Laughlin *et al.* 1992; Lindkvist 1996).

In contrast, even though it is faced with multiple and perhaps incompatible legitimacy claims, the organization may not perceive there to be a dilemma at all. Instead, it simply does not respond to a particular claim. In other words the organization does not (perceive a) need to meet the legitimacy claims of a particular legitimacy community in order to pursue its goals or to survive. It perceives that it can ignore the claims of consumers, less developed countries, human rights organizations and so on, because it has greater (perceived) need for recognition by other legitimacy communities. The Church of England has proved almost impervious to attempts to impose hierarchical systems of financial and managerial control, for example. Although their adoption would enhance its legitimacy for some, this has not yet of itself been a sufficient impetus to promote change and the perception within the Church thus far has been attempts to build these accountability relationships can be ignored (Berry 2005).

But regulatory, and indeed other, organizations cannot ignore all legitimacy claims and survive, even if they can ignore some – or perceive that they can. As emphasized above, regulatory organizations have a particular need for legitimacy – it is not enough that they are "generally accepted," they need to be actively supported. This is true for all regulators, but as noted it is particularly true for non-state regulators who are trying to promote behavioral changes in others who may be under no legal obligation to take any notice of them at all, and moreover who often compete with other regulators to have their norms accepted (Bernstein & Cashore 2007; Meidinger 2007).

This suggests that there can be significant implications for an organization, therefore, in acquiescing in certain legitimacy claims and developing certain accountability relationships rather than others. The question arises as to the claims that they are likely to respond to and those from which they will refrain, and moreover the extent to which their scope for strategic action is bounded by their institutional environment. There has been very little sustained research on how non-governmental regulators respond to

competing accountability and legitimacy claims, and even less on how these responses may be affected by their relationship with other regulators in polycentric regulatory regimes.¹² There has been research on how other organizations have responded to attempts to render them more accountable through public management techniques on which we can draw, however, as well as the more general literature on compliance. Research on how organizations respond to the accountability and performance mechanisms introduced in the “new public management” show that conflicting pressures on the organization lead to internal conflicts between different parts of the organization and to the adoption of a range of responses, from transformation and acquiescence to defiance and manipulation (Brignall & Modell 2000; Bevan & Hood 2006; Hood 2006). The variety of organizational responses to regulatory requirements has also been noted in the compliance literature (Braithwaite *et al.* 1994; Braithwaite & Reinhart 2007).

As to why responses vary, the research on organizational, or indeed national, responses to regulatory requirements tends to bifurcate as to the emphasis placed on motivation and capacity to respond (or both), and with respect to motivation, on the extent to which it assumes, implicitly or explicitly, a strategic rational actor or a more complex model of behavior (e.g. Kagan & Scholz 1984; Braithwaite *et al.* 1994; Baldwin 1995; Chayes & Chayes 1995; Downs *et al.* 1996; Shelton 2000; Parker 2001; Winter & May 2001; Downs & Jones 2002; Braithwaite & Reinhart 2007).¹³

In an attempt to synthesize the strategic and more bounded models of response, and assuming a structured model of behavior, Oliver identifies five types of response by organizations to institutional processes: acquiescence, compromise, manipulation, avoidance, and defiance (Oliver 1991). Oliver suggests that organizational responses to institutional pressures to conform will depend on five sets of categories, each with two dimensions: cause, constituents, content, control, and context. First, the response will vary with the cause; in other words, the nature of the pressures exerted and what the organization gains from acquiescence, for example social fitness or economic gain. Second, it will vary with the organization's constituents, or who is exerting the pressures – notably how multiple they are, and the degree to which the organization is dependent on them. Third, the response will vary with the content of the claim or demand; with how consistent it is with the organization's own goals, and the extent to which compliance with them will constrain the organization's discretion. Fourth, the response will vary with the means by which the claims are imposed (through coercive means or not) and with the extent to which they are diffused throughout the organization's environment. Finally, the response will vary with the context of the organization, in particular the degree of interconnectedness of inter-organizational relations within the field, and the degree of uncertainty that exists. Oliver then develops hypotheses on how organizations will respond based on variation in the 10 dimensions of these five categories.

Of most relevance here, she predicts that organizations will always acquiesce when legitimacy gains are high (Oliver 1991). However, as we have seen above, organizations may not always acquiesce in every legitimacy claim, even where that would result in more legitimacy from that particular legitimacy community. Oliver's analysis therefore provides a useful starting point, but needs considerable refinement (see also Brignall & Modell 2000). Further, Oliver does not distinguish between types of legitimacy claims in predicting organizational response. In contrast, others have suggested that the degree to which organizations respond strategically to a legitimacy claim depends on whether that claim is pragmatic, moral or cognitive, with strategic responses being

lowest with respect to cognitive claims (Suchman 1995; Cashore 2002; Bernstein & Cashore 2007). Further, Oliver is not particularly concerned with analysing the organizational field to any great depth. The key point with respect to polycentric regulatory regimes, however, is the composition of that field. For, as noted above, those within the regime potentially have to respond to legitimacy claims made not just by the actors whose behavior they are attempting to regulate (e.g. firms, governments), and wider civil societies, but by other actors within the regulatory regime with whom they are interrelated and/or on whom they may be partly dependent. Finally, more recognition has to be given to the role of discourse in constructing and expressing legitimacy claims and accountability relationships, and its role in shaping organizational responses. There is a strategic dimension to the role of discourse in this dynamic; empirical research suggests, for example, that in order for a regulator to build an accountability relationship with those who lack coercive or other means to pressure the regulator to acquiesce, they have to translate their demands into a discourse that the regulator already recognizes (Hajer 1995; Morgan 2003). This is a strategy which can enhance the congruence of their claims with the regulator's own cognitive or normative framework.

Nevertheless, we can draw on Oliver's work to hypothesize that regulators are less likely to acquiesce to legitimacy claims, even if the legitimacy gains for that regulator within that particular legitimacy community may be high, where all or some of six conditions pertain: (i) the regulator perceives itself to have a low dependency or interconnectedness on that legitimacy community for the performance of its regulatory function; (ii) where the content of the claims, and the discourse in which they are articulated, is not congruent or consistent with the regulator's, or is only so to a moderate degree; (iii) where acquiescence with the claims would pose moderate to severe constraints on the ability of the regulator to determine its own structures, goals and activities; (iv) where the legitimacy community has little means, directly or indirectly, to coerce the regulator to respond; (v) where the claims being advanced are not widely diffused among others within or outside the regulatory regime; and (vi) the consequences of acquiescing are uncertain. Thus, for example, the hypothesis would be that the Basle Committee on Banking Supervision (BCBS) refuses to expand its membership, or grant observer status, to, countries such as India and China because its dependence on them is low; the demands of those countries are not particularly in line with the aims or views of the Committee; the constraints on what it is the BCBS wants to do would be high; they have little means of imposing their demands; their views or demands are not widely shared by communities the BCBS recognizes as relevant; uncertainty as to whether acquiescence would bring any overall legitimacy or other gains for the BCBS is high; and interconnectedness is low. Conversely, a regulator or organization is more likely to acquiesce to legitimacy claims where it perceives itself to have a relatively high dependence on or interconnectedness with the legitimacy claimant; where the content of the claim and the discourse in which it is expressed is congruent with the organization; where acquiescence would not pose severe constraints on its discretion; where the claimant can directly or indirectly coerce the regulator; where the claims being advanced are widely diffused; and the consequences of acquiescing are relatively certain.

Not all of these conditions are likely to be equally relevant at all times. Moreover, it still has to be recognized that for the regulator, meeting different legitimacy claims often involves engaging in different accountability relationships, relationships which can

have transformative effects. Engaging in one set of accountability relationships may compromise the regulator's ability to engage in another set and so to meet the claims of a different legitimacy community. For there are only so many ways an organization can be transformed at once. Something has to give. Multiple legitimacy claims and engaging in multiple accountability relationships can mean that attempts to make an organization accountable end in the accountability equivalent of the "regulatory trilemma" (Teubner 1986): they are ignored, co-opted, or destroy that which it is they seek to make accountable.

Conclusion

Although the analysis of legitimacy and accountability above was developed in the context of non-state actors in polycentric regimes, does this focus on the regulatory organization render the analysis too state-centric, or at least regulator-centric, ignoring the wider regime and indeed polycentric perspective that was emphasized at the outset? Arguably not. It is not denied that in order to assess the accountability of a regulatory regime as a whole, to the extent this can be done at all, the focus has to be on holding the outcomes of a regime as a whole accountable (Stirton & Lodge 2001; Lodge 2004). All regulatory regimes are polycentric to varying degrees, not just transnational ones, and any regulator, state or non-state, is only a part of the regime – that is the point of the decentering analysis. But holding the regime as a whole to account engages questions of the accountability, and in turn legitimacy, of its constituent elements. So the argument here – that an awareness of how those elements may respond to legitimacy and accountability claims needs to be an integral part of any attempts to advance those claims – is consonant with the decentering analysis, not contrary to it. Moreover, the issues explored here concern the construction and contestation of legitimacy and accountability in the regime, as well as of it.

The institutional embeddedness of those within the regulatory regime, and of the regime itself, is critical for understanding how legitimacy is constructed, both by those making legitimacy claims and by the regulator who is responding to them, often by making legitimacy claims of their own. Accountability and legitimacy are distinct communicative, dialectical relationships which are socially and discursively constructed, and which are contested. Different legitimacy communities within and outside the regulatory regime make different legitimacy claims which they seek to validate through developing varying accountability relationships. The issue is what will be the response of those on whom the claims are made. Regulators may attempt to create and manipulate perceptions of their legitimacy. But their scope for strategic action may be bounded, and in any event structured by their institutional environment. Moreover, the communicative activity of "rendering account" may be transformative, with implications for regulators' ability to meet multiple legitimacy claims. Accountability tools are not neutral technical instruments but discursive technologies embodying their own logics and interpretive schemes, and can have constitutive and transformative effects. Consequently, it was argued, although regulators can often participate in a number of different legitimacy discourses simultaneously, and thus attempt to satisfy a range of different legitimacy communities, not only can this have a deleterious affect on the organization but the differences between communities may be such that organizations can face a legitimacy dilemma. Actions that organizations may need to take to render them legitimate for one

legitimacy community can be in direct opposition to those they need to adopt to satisfy another. Moreover, attempts to render them accountable may face an “accountability trilemma:” they are ignored, co-opted, or destroy that which it is they seek to make accountable. There is thus a great deal at stake, both for those within regulatory regimes and for those outside, in understanding and anticipating how regulators respond to their claims.

Notes

- 1 Professor of Law, London School of Economics and Political Science, and Research Associate, ESRC Centre for the Analysis of Risk and Regulation, London School of Economics and Political Science. Previous drafts of this paper were presented at the ESRC Seminar on Administrative Justice, Liverpool, December 2006, and seminars at the Australian National University and at Melbourne University in April 2007. I thank the participants at those seminars, and Rob Baldwin, Carol Harlow, Benedict Kingsbury, Nico Krisch, Martin Lodge, Rick Rawlings, Colin Scott and the anonymous referees for their observations and comments. The usual responsibilities remain my own.
- 2 And as Scott argues, even consideration of the accountability of state regulators has to recognize that there are multiple sources of accountability extending beyond such traditional state bodies: Scott (2000).
- 3 See for example the ongoing debate in England and Wales on the definition of a public body for determining the scope of judicial review and of the Human Rights Act: *Aston Kantlow v ACC* (2004) AC 456; *Poplar Housing and Regeneration Community Association v Donoghue* (2002) QB 48; D. Oliver (2004).
- 4 Though leaving aside, for the moment, how these values are themselves grounded; e.g. the Habermasian position that the validity claim of norms lies in rationally motivated agreement and the counterfactual supposition that the norms could be “discursively redeemed,” i.e. grounded in the consensus of participants through argumentation (Habermas 1977, p. 105).
- 5 ISEAL Alliance, Code of Good Practice, available at <http://www.isealalliance.org/index.cfm?fuseaction=Page.viewPage&pageId=502&parentID=500>. See also Meidinger (2006).
- 6 Non-state regulators may be linked to state actors in ways within a regulatory regime which mean that they can “borrow” on the legitimacy of the state (e.g. if state actors choose to adopt their norms, and indeed turn them into law – e.g. the EU’s adoption of IASB standards in accounting). However, such links may not exist for others, or for the same organization in a different legal jurisdiction.
- 7 For discussion of cooperative strategies in the transnational context see Chayes and Chayes (1995).
- 8 The exact pattern of social relationships through which accountability is performed may vary from hierarchy, competition, mutuality or intermittency (“contrived randomness”) or any combination of the four, as Hood *et al.* have elaborated (Hood *et al.* 1999), all or any of which may exist with respect to non-state regulators (cf Goodin (2005)), but my concern is not with the relative “status” of each participant vis-à-vis one another in the accountability relationship, but its communicative structures.
- 9 The question of trust is also clearly important. I would suggest that trust and legitimacy are closely interrelated – however, exploring the contours of that interrelationship is an issue for another time.
- 10 This is not to say that certain forms of accountability relationship, such as an audit, are always used to further certain types of claim (e.g. financial performance); they can be used to further claims of ethical practices, for example, as the rise of social audits demonstrates; but audit is broadly associated with functional legitimacy claims, ie those relating to performance. There is not space here, however, to explore further the relationship between particular forms of accountability relationships and particular forms of legitimacy claims.

- 11 Balanced scorecards are used by state and regional healthcare providers in the US, Canada and the UK to report on performance; they are also used by the UK Health and Safety Executive and the Environment Agency.
- 12 There are a few exceptions, though these tend to focus more broadly on the politics or dynamics of non-state regulators; see for example Koppell (2005); Mattli & Buthe (2005); Suddaby *et al.* (2007). It should be noted that there is also little research on how regulated organizations respond to competing regulatory norms, both legal and non-legal; Most research is done on a domain specific basis: “how did organization X respond to a set of regulatory norms Y?” where “Y” is environmental rules, or competition requirements, or health and safety provisions, and so on. For a rare exception see Haines and Gurney (2003). This is also true for studies of transnational regulation, both treaty based and “soft law” provisions, see e.g. Shelton (2000).
- 13 There is very little cross-referencing across these literatures; however, research on compliance with national regulatory requirements is quite separate from the literature on compliance with international requirements, for example, even though the questions being asked are in all important respects the same.

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