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Mark Findlay

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Preface and Acknowledgements

This work commences with an interest in the way globalisation has moved from its recent securitisation/terror focus to now being concerned with much more endangering crises. As the prioritisation of crisis diversifies, the governance project of global ordering also transforms. Regulation, once so state-focused or industry-centred, is increasingly identified through global governance as responding to (and even pre-empting) crisis, while lending legitimacy to any crisis-driven world governance reactions.

At this point in thinking, the North world regulatory discourse and the determination of global crisis against the interests of modernisation needed rationalisation. In my thinking it became imperative to look at crisis and regulatory ordering outside the frame of consolidated states, regulatory hierarchies and materialist political economies.

Minus the definitive shadow of the state, and often against multinational commercial self-interest, the critical analysis of crisis to ordering takes on a more collaborative dimension. To initiate and sustain collaborative regulation in national and regional contexts devoid of conventional regulatory mechanics, communitarian mutuality emerged as the front runner in a sociable regulatory agenda. How such regulatory communities could come together and renegotiate self-interest to mutuality is why the discussion of regulatory sociability is so vital.

In his work on migration and community building Eric Uslaner has identified segregation and isolation when put against cohesion and diversity as the contexts for trust/mistrust propensities. Risk to trust is the process by which the following analysis charts the progress of regulatory sociability and the communities of shared risk/fate that practise its possibilities.

The experience of migrant communities when facing the challenge of trust is not surprisingly similar to that of regulatory sociability in its more general communitarian context. Diverse social networks operating in integrated communities tend to develop trust. It might appear counter-intuitive but there is an interaction between diversity and trust. Regulatory sociability doesn't (and indeed cannot) just work for homogeneous collaborations in which trust is already present or interests are easily mutual. The test of regulatory sociability is to bring diverse interests into commonality and to craft regulatory cohesion out of networks of shared risk where diversity of motivation is integrated towards realising shared fate.

There remains some circumspection about the genuineness of collaborative regulation in contexts where normative differences may be sharp. There is always a difficulty for regulation relying on overarching consensus where morals, for instance, are divided, or where motivation divides over profit

or sustainability first. In this respect sociability is a more realistic option in that it moves from broad (even reluctant) understandings of shared risk to establishing at least some common interests concerning fate. These shared interests may have very different motivations and will recognise initiating diversity. The *risk to fate* transition essential for regulatory sociability enables regulation while accepting and working with a diversity of interest, rather than seeking artificial objectivity or strained consensus. Like the selectivity of risk and the many regulatory responses that move to fate, collective regulation can progress from many interests on to sustainable mutuality.

When considering regulatory sociability there is always the chance that collaboration will occur for the wrong reasons, and that communities will not so much appreciate shared risk but rather fall victim to the domination of 'risky' authority, where power imbalance is a feature of communitarian engagement. In fact the initial motivations for sociability may be stimulated in an atmosphere of power imbalance, which will be modified as communitarian interests solidify. Problems like these are not uncommon in collaborative regulation, and feature when accountability is required of the various relationships which make up pluralist and polycentric regulatory forms. They are problems particularly when in disaggregated states or distorted commercial markets there is no strong and supportive regulatory shadow or productive and powerful initiating force to kick off the initiation of collaboration.

Recognising such possible impediments to a balanced, mutual and sustainable sociability, I retain a commitment to its unique utility, particularly in regulating crisis to ordering. This confidence rests on two assumptions:

1) In the wake of a global crisis, risk is likely to be less ambiguous and more uniformly appreciated and felt. That is not to say there may not be forces at work to confuse or conceal the true nature and extent of risk, or to substitute politically prioritised risk over risk of harm, which is posed to all irrespective of politics. Even with the ubiquity of risk in particularly contested contexts, fundamental and prevailing global crises will eventually demonstrate risk profiles which can be the motivation for common communitarian coalescence. These processes will be revealed in the consideration of specific transitions from crisis to ordering, as in Chapters 5–8.
2) In the necessity to move from crisis to ordering, communities will come together with less freedom to dominate and less time to equivocate over positions in relationships of power and domination. The whole thinking behind the anticipated transition from self- to mutual interest, which is the essence of taking communities of shared risk to shared fate, is premised on the belief that while harmony is not essential to mutuality,

crisis will aid compatibility and make diversity bond in different ways to achieve fate.

Regulatory sociability should not be dismissed because of its reliance on relationships of trust and comity. On the way to crisis, trust relationships may not be as they seem. These collaborations can be founded on fear, on reluctant tolerance and acquiescence and even on deceit. Comity may mask resentment and desires for revenge. That said, the onset of crisis pulls away the pretence of trust and comity in an atmosphere of survival and communion. Otherwise the appearance of trust and comity crumbles in crisis and sociability is not forthcoming organically through the individual internalisation of shared risk. In these circumstances, reliance on external stimulus from a consolidated state, a clear-sited component of civil society or a forward-thinking commercial interest may be necessary to cajole community out of fracture and distrust. External intervention cannot sustain regulatory sociability and that is where increased and impending risk in blossoming crisis is paradoxically necessary to bring about the social conditions to engender true and workable communities of shared fate grown from reacting together to risk.

The move from risk to fate is sociability's regulatory mission. The nature of the regulatory techniques and strategies will differ depending on the nature of the prevailing crisis and the ordering which is sought. What remains common are the conditions of political economy and normative commitment which identify and sustain sociability.

This book has benefited immensely from exposure to several critical classes of undergraduate and postgraduate students in my teaching programmes at Singapore Management University and the University of Sydney. Regulatory sociability was pitted against a progressive scenario in which students were required to construct regulatory solutions to contemporary and impending global crises. These solutions would have made global policy makers proud. For me it was an exciting environment in which to open the book's more controversial ideas to the applied intellects of eager young minds for whom the task of making regulatory sociability a reality will be reality.

Another happy coincidence in the teaching exposure was to run these classes in very different state and cultural settings. This relativity gave much more life to the aspirations regarding theorising 'East-meets-West' policy.

I was also fortunate during the life of the project to have the creative assistance of some very talented and dedicated research assistants. Initially Lee Jia En put the detailed research referencing behind the course design from which the structure of the book evolved, and tested the compatibility and balance with the book's wider aims. Wong Shi Qi worked with me to put together and flesh out a reference review template and refined this through extensive summaries into a sophisticated referencing tool. In addition, she expanded and settled the reference bibliography. Chia Ming Yee added to the

reference resource and focused an extensive research and drafting effort in the areas of new media and communications. Finally, the intricate editorial engagement of Lim Si Wei and her critical supervision of all phases of text revisions made the project in its current form possible. I have never before worked with such a competent and dedicated research team, and I express my deepest gratitude to them.

Various phases of the research project and the development of working papers were generously assisted by the research office and institutes of the Singapore Management University.

Acronyms

AIDS	Acquired Immunodeficiency Syndrome
CIOMS	Council for International Organisations of Medical Sciences
CSR	Corporate Social Responsibility
GFC	Global Financial Collapse
H1N1	H stands for Hemagglutinin, and N stands for Neuraminidase
HIV	Human Immunodeficiency Virus
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Criminal Justice
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IHR	International Health Regulations
IM	Instant Messaging
INPO	Institute of Nuclear Power Operations
IP	Intellectual Property
JVC	Joint Venture Company
MNCs	Multinational Corporations
NGOs	Non-governmental Organisations
NRC	National Regulatory Commission
OECD	Organisation for Economic Cooperation and Development
PIGs	Public Interest Groups
PPPs	Public/Private Partnerships
RCPs	Responsible Care Programmes
SRAs	Self-regulation Associations
UK	United Kingdom
UN	United Nations
USA	United States of America
WEF	World Economic Forum
WHO	World Health Organization
WWII	World War II

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Hierarchy and Governance: Of Shadows or Equivalence?

> Bad regulation . . . can do terrible damage to people. Good regulation can control problems that might otherwise lead to bankruptcy and war, and can emancipate the lives of ordinary people. Mediocre, unimaginative regulation that occupies the space between good and bad regulation leads to results that are correspondingly between the extremes of good and bad. Regulation matters, and therefore the development and empirical testing of theories about regulation also matter.[1]

Introduction

The regulation of global crises sounds like a contradiction in terms. If ever there was an era of crisis worldwide, man-made and natural, it is now. At the same time, as global warming, epidemic poverty and disease, international financial meltdown, populations on the move and the erosion of self-determination and privacy reveal, regulatory strategies are failing the challenge. Then why attempt to address crisis with regulation at anything more than an aspirational level?

The reasons for regulation's perceived and recurrent failure are both simple and profound. Over a decade ago, I argued in *The Globalisation of Crime*[2] that the myopic focus of the West on globalisation as its problem and the unique opportunity it offered to monopolise socio-economic development denied the pressing significance of impacts on cultures in transition. A driving motivation behind this book is to expand on a realisation[3] that

> . . . consolidated statehood is the exception rather than the rule in the contemporary international system . . . outside the world of developed and highly industrialised democratic states most countries contain what we call 'areas of limited statehood'. While areas of limited statehood still belong to internationally recognised states . . . it is their domestic sovereignty which is severely circumscribed.[4]

The regulation literature (policy included) is vastly overconcerned with the Western, Westphalian socio-economic contexts. For instance, the debate about non-state-centred regulation (discussed later in Chapter 9) evolves from the assumption of a functioning, strong Weberian[5] state framework. However, modes of governance, domestically and particularly internationally, today do not exist in any such sophisticated counter-regulatory shadow.[6] As such, the top-down or bottom-up hierarchies of regulation[7] which rely on eventual state-institutionalised enforcement capacity are relevant only to a select hegemony of states and economies. It is this Western-centric evaluation of crisis priorities and appropriate regulatory responses from elitist state or corporate frames that the analytical context of this book is set to challenge.

The language of hierarchy, hegemony and empire has become the analytical prism through which scholars explain the emerging politics of globalisation.[8] This emphasis in the analytical literature has probably arisen from the conviction that preferred governance modes (state, international organisations, NGOs, MNCs and PPPs) reside in capitalist, neo-liberal socio-politics. As such, contemporary considerations of international political economy

> . . . such as neo-liberalism or neo-realism are too state-centred in their assumptions to fully appreciate the growing importance of non-state actors and various transitional networks.[9]

An argument to justify the disciplinary deficit, when it comes to imagining non-Western, non-capitalist regulatory frameworks from which to view crisis challenges for global governance (except in terms of the manner in which the poor and underdeveloped exacerbate crisis), might consist of stating the obvious: these are the dominant political and economic models and as such they should drive the global regulatory mission. This dogmatic differentiation could be a convincing argument were it not for the realisation that the:

- conditions of global crisis are created by both the developed and developing world,
- negative consequences of global crisis are felt much more profoundly in the developing world,
- failure of regulation is not limited to areas of weak or limited statehood,
- regulatory failure is not always corrected under the shadow or within the hierarchies of strong states, and
- modes of social coordination and embedded social markets essential for good governance in non-consolidated state terrain are at the heart of regulating global crisis, whatever the context.

The task of achieving a more inclusive analysis of incentives for confronting global crisis is to disentangle and reveal the contextual relationships between these modes of social coordination so that regulating global crisis can be given a flatter and wider sweep. This will take our thinking away from hierarchies and more towards *relationships* in which the incentives to minimise and avoid crisis are stimulated. In these relationships, the role of *functional equivalents* for a state-based shadow of hierarchy is to

> enable effective and sustainable non-hierarchical modes of governance involving non-state actors in areas of limited state-hood,[10]

and this leads to a more organic and harmonious shift from crisis to ordering.

Beyond rehabilitating configurations of limited statehood (and more broadly the place of transitional cultures in contemporary globalisation) within contemporary governance scholarship, it is the purpose of this book to understand and maximise incentives for cooperation in the prevention and management of global crisis. In advancing collaborative regulation as a preferred model for global crisis resolution, this book does not take a naïve normative stance. Collaboration is not a compromise for the failure of more vigorous intervention strategies. Nor is it a compromised concession to the self-regulation lobby, many of whom could be held responsible for the crisis in the first place. By selecting, in later chapters, to look at case studies of global crisis and resolution in volatile contexts where collaborative regulatory partners, particularly in third-world economies, are compromised in crisis creation, this book endeavours to reveal how turning self-interest into common good is viable and not altruistic when the realities of global crisis are exposed to communities of shared risk. In any case, state intervention in these circumstances, again especially in developing economies, is too often motivated by the collaborative self-interest of stakeholders requiring regulation.[11]

Like it or not, state-focused or otherwise, we are obliged to reflect on styles and situations of governance which are multi-layered beyond consolidated state hierarchies and not largely dependent on sanction-based enforcement. Braithwaite recognises this with his regulatory pyramids, and where the analysis to follow extends from such paradigms is the manner in which collaborative regulatory regimes have relevance and potency in governance contexts where the shadow of regulatory enforcement is faint or has failed. Aligned with this perspective is the inescapable need to reflect on the state beyond Western constellations or muffled by cosmopolitan dreaming.

Realistic reflections on the global state

For the purposes of the analysis to follow, I am greatly assisted in conceptualising the state (local and global) as a constellation of power and authority

placed somewhere on a continuum between deep consolidation and weak fragmentation. As we progress along that continuum, it is fair to assume that the influence of sanction-based, state-sponsored or complex corporate-compliant governance hierarchies diminishes and the enforcement shadow of the state (or the sophisticated corporate constellations with industry-sanctioning mechanisms within the state) fades or diminishes far off.[12] So too as we move from state consolidation to fragmentation, governance relocates from within to beyond the state. This shift should not be confused as governance without government.[13] Rather it means that the analyst needs to stop struggling to find the institutions of the strong state as evidence of good governance and governability and instead should delve more deeply into what Börzel and Risse (2010) refer to as 'functional equivalents' of the state's imminence.

While there are many configurations of limited statehood (not confined to failed states or to a failure to control territory), the modern liberal democratic notions[14] of the state exhibit a consistent and almost universal emphasis on:

- the ability to enforce collectively binding decisions;
- ultimately possessing a monopoly over the means of legitimate violence;[15]
- operating through hierarchies of authority with sanctioning at the apex;
- demonstrating an institutionalised authority structure and a bureaucracy for its execution; and
- authoritatively making, implementing and enduring central decisions for a collectivity.

Universals characterising limited statehood are more difficult to identify as even some consolidated states may contain areas of limited influence. Identifiers may include the following:

- weak domestic sovereignty;
- loss of monopoly over the use of force;
- partial enforcement powers;
- non-hierarchical authority structures;
- reduced administrative capacity;
- loss of control over territorial or functional space; and
- evidence of traditional or new non-hierarchical modes of governance.

A function of the consolidated state is law-making. Law diminishes in governance significance as it moves to the supranational,[16] or it fails to endorse private rights and public obligation when the enforcement shadow of the state is a faint or is fragmented.[17]

Is law beyond, not without, the state?[18]

The role of law as a regulator in a world, where the reach of domestic jurisdiction is becoming more and more constrained and where supranational law is not yet achieved, features in the discussion of law's relevance in general later in this text. In systems' theory terms, autopoetic considerations of private law systems in particular offer a new vision for what some think of as the false dichotomy between law within and beyond the state.[19] Take contracts for instance, where the contract, it is argued, can create its own legal order through its own internal hierarchies of obligations and rights, combining primary norms (contractual rights and obligations) with secondary norms, giving these primary norms their validity. In this way, a legal system in microcosm, including objective law and possible adjudication, emerges out of and applies to the contract. Such a contract may well explain how commercial arrangements can be regulated through contracts prevailing even in limited or fragmented state settings where legal hierarchies are impotent and where the political and economic enforcement administrations of the state cast little or no deterrent shadow over contracting parties.

Perez suggests[20] that it is not simply inevitable but in fact to be preferred that public interests will be absorbed into the otherwise sacrosanct interests of contractual private parties. It is particularly where communities are directly influenced by large-scale construction, the argument goes, that community interests have a place within private contractual negotiations, intersecting public and private goods.

Michaels argues against state parallels when trying to imagine the future of supranational legal regulation – an important speculation for later chapters in this book.

> Authors endorsing the anational or non national character of lex mercatoria, I argue are barking up the wrong tree. In perpetuating the state/non state dichotomy, the lex mercatoria without state remains within a state focused legal paradigm.[21]

But for Michaels, as with Ulrich Brand, whom I consult in more detail in later chapters, the state referent for supranational legal regulation is not inevitable or perpetual. In the sense that the legal system creates itself in separation – but not away – from the influences of the institutions of politics, law can be seen as without the state. At the global level, however, the internal differentiation of legal systems applying supranationally is not so easily or ideally divorced from politics or economy. At the global level, law as regulation still represents a segmentary differentiation, linked hard or soft to the functioning of state interest. That is the immediate barrier to Brand's *new politics* or Teubner's *global law*.

In later writing on non-state governance,[22] Michaels provocatively suggests that for law and governance as state indicia, it is not about

state/non-state divides, but that the analyst must 'put the state in perspective in order to overcome it'.[23]

Here is where the challenge emerges for considerations of governance to detach from hierarchies within the state, characterised by its sanctioning capacity towards the apex. More of this will be described later, when the discussion turns to *flat regulation*.

Governance from afar

Governance can be considered, from the perspective of regulation, as various institutionalised modes of social coordination that produce and implement binding rules collectively or provide collective 'goods'.[24] Governance is a dynamic and evolutionary phenomenon, particularly at the global level,[25] involving process and structure, and sometimes calling on the creation of new political manifestations and languages.

It will become clearer later in this book that I do not see conventional discourse on sovereignty as helpful in understanding the nature of modern governance, particularly at the global level. A reason for this resides in the incapacity of some regulatory paradigms such as public international law to break free from the referent of the liberal democratic state in the conceptualisation of sovereign authority, power and obligations. In replacing a discourse of sovereignty when looking at the manner in which regulation determines governance (and vice versa), an examination of frames and actions of particular governance styles is rewarding. Take for instance, the determination of governance by examining the actors which advance it. Therefore, in liberal democratic states, governance is governments resting on personalities and alliances, not on compatibilities, while in multinational global networks governance assumes life through negotiation and competition (between firms, consumers, shareholders, managers etc.). As a process, governance is determined by different modes of social coordination. Another strong theme to emerge in the later analysis is how *sociability* for the purpose of a common good can act as a powerful motivation for regulatory collaboration, even where enforcement shadows diminish and alternative self-interest prevails.

Coordination and collaboration, as will be much more richly developed in the later chapters,

> . . . include(s) the involvement of non-governmental actors (companies, civil society) in the provision of collective goods through non-hierarchical coordination. This coordination range (sic) from consultation and cooperation, delegation and/or co-regulation/co-production to private self regulation inside and outside the control of governments. Non-hierarchical coordination can involve governmental actors so long as they refrain from using their coercive powers.[26]

Sociability is this book's approach to regulating global crisis, a concept which can deflect the analytical focus of governance away from distinctions based on hierarchical coordination. As a dominant mode of coordination, I will argue, sociability offers a way of adjusting regulatory strategies to confront global crisis in either case when the governance model relies on a coordinated (or suffers a fragmented) state. This said, sociability neither replaces nor diminishes the regulatory significance of hierarchical coordination. It just does not depend on hierarchies or even on their strong and impending shadow.

The problem facing any consideration of regulation lacking a long hierarchical shadow is sufficient alternative sanctioning capacity to deter and deal with opportunistic self-interest and free-riding. As the discussion of collaborative motivation summarises below (and is a developing theme of the analysis evolving), the transformation of self-interest into common good is a crucial pre-condition to any diminishing reliance on hierarchical sanctioning capacity. It might be no more than the recognition of a common positioning in a community of shared risk and the impending anarchy that agreement and compliance violation on a large scale would precipitate, and this helps achieve a transition without sacrificing the interest fundamentals of a liberal capitalist democracy.

A central plank in the reasoning of collaborative (flat) regulation is the diminished reliance on sanction or threat in a climate where, minus efficient impending sanction machinery, friendship and trust, rather than deterrence and fear, become actualised market relationship essentials and are not confined to normative best practice.

Even in consolidated states, and certainly in those where their authority and reach are limited or fragmented, governance is multi-level and multi-layered. As Börzel and Risse conclude, the diversity of state constellations is not a sign of the withering of the state. Michaels sees state governance to be as mythical as non-state governance, but both views would accept that

> At stake then is the transformation of the state rather than its disappearance.[27]

In collaborative (flat) regulation, the consolidated state can facilitate dialogue, but its role even at this level is on a par with any other alternative functional equivalent (further discussed in more detail in Chapter 4).

Shadow of hierarchy

The shadow of hierarchy provides an important incentive structure for cooperation, particularly between non-state actors. Whether the state is weak or strong, it appears that for differing reasons such as compromised

autonomy/capture and a reluctance to share governance authority, states are not keen to coordinate with non-state actors unless:

- The regulatory terrain is specialised beyond the knowledge and capacity of the state.
- The regulatory terrain has large supranational reach.
- There are operating successful and pre-existing non-state regulatory networks.
- Pressure groups are urging such collaboration.
- The state is otherwise reluctant to manage the regulatory challenge for political or economic reasons.
- The crisis to be managed is either largely caused by state action/inaction or it is beyond the state's capacity to resolve.

Where state-centred foundations for the shadow of enforcement hierarchies are weak or absent, alternative frameworks of regulation may emerge explained by what March and Olsen (1998) distinguish as the logic of consequences or the logic of appropriateness.[28] As an essential part of the logic of consequences, actors and agencies, whose self-interested behaviour is otherwise essentialist and defines their mission and whose prime purpose is the attainment of private rather than public good, become constrained into taking up governance concerns.

In contexts of global crisis, the need to invest in the common good in situations of economic and political dysfunction and instability (Braithwaite's regulatory 'window' and boom/bust regulatory cycles[29]) and where legal and property rights are shaky, the inducement for collaborative regulation is strong and immediate. This is so even where the shadow of hierarchy is weak and distant either for the period of the crisis or prevailing as a consequence of the limited and fragmented existence of the state or other important equivalent regulatory frames.

Incentive structures

Most of my examination of regulating global crisis will be concerned with creating conditions and incentivising relationships which ensure that non-state actors and agencies engage in effective and sustainable regulatory governance in areas of limited statehood. To achieve this the focus will be directed to four massive fields of global crisis which in turn will be addressed from the more balanced perspective of fragmented state influence and engagement which is, I argue, the dominant governance terrain in which crises are formed and in which they will largely be met in the medium term. This does not exclude the role of strong states and hegemonies in crisis regulation. On the contrary, the under-utilisation of effective hierarchical governance, particularly when it comes to environmental regulation,

is a significant reason for how the world became crisis-ridden. The argument goes that while the failure of state-centred regulation is a failure of will and not of capacity, the disengagement or avoidance of a massive reserve of regulatory potential (and crisis-generating reasoning) in non-state sanctioned hierarchical regulatory modes needs critical reflection and policy empowerment.

The logic of consequences suggests that motivations for contributing to regulatory governance can be stimulated by repositioning self-interest as part of the common good. One path to such repositioning is the fear which emerges from a realisation of positioning within communities of shared risk (see Chapter 10). Through the lens of sociability, this book argues that another forceful and under-recognised incentive towards participatory regulatory governance (without the strong shadow of hierarchical enforcement) emerges when key self-interested actors become embedded in normative structures that induce them to do *the right thing*. While it might be hoped for the sake of good governance and the proliferation of corporate social responsibility (CSR) that altruism brings this conviction about, it could be equally (or more realistically) argued that the investment in, say community health, is meant to ensure a productive workforce and not merely to seek the betterment of mankind. Whatever the case may be, the regulatory outcome may well be the same and the benefit as individually valuable. The regulatory ethos will be more effectively ensured through a mix of self-interest and commitment to the common good as it would be in situations where the hegemonic enforcer is standing by. If commercial interests, in particular, wish to do business in the vast world of limited or fragmented state influence, it is not a question of preferring enforcement-based hierarchical shadows but of adapting to the reality of a faint or far-off external intervention.

For instance, where multinational corporations intersect with large NGOs and PPPs in contexts where states are limited and fragmented in their authority and reach, traditional norms can be employed (even where they may be conservative and reactionary) towards the creation of 'socially embedded markets'.[30] In socially embedded markets, we see in evidence a consolidation of both 'logics' for collaboration, where the consequential and the appropriate meet for mutual stakeholder benefit. In this respect, the state is not the sponsor of social responsibility. In fact it is often essential that it should not be so for reasons of conflict of interest or cultures of corrupt administration.[31] Here, socially embedded markets can provide a functional equivalent for the shadow of hierarchy and, as will be argued later, the collaborative nature of socially embedded markets flattens the need for or attractiveness of hierarchical regulation once state sanctions are bypassed.

The book, however, relies on a confidence in regulatory cooperation, however attained, not only to address global crisis in a more responsible and responsive fashion but also to do so where the shadow of regulatory

hierarchy is faintest or most distant. While regulatory competition can precede cooperation, unlike with the regulatory co-opetition literature,[32] the discussion of regulatory cooperation to follow will not tie itself to concerns for inter-, intra- or extra-governmentality.[33] Doing so necessitates some linear order of regulatory status again with state government at the top (or at least positioned recurrently in situations of key influence).

Regulatory reformers in the United States have called for decentralisation in the name of 'federalism'. In Europe, a similar sentiment advances under the banner of 'subsidiarity'. One of the underlying and critical theoretical premises of these two movements is the suggestion that 'regulatory competition' among horizontally arrayed governments will generate pressures for improved governmental efficiency in the regulatory realm. Critics have suggested that, rather than welfare-enhancing competitive pressures, divergent regulatory standards may instead trigger a welfare-reducing 'race toward the bottom'. Esty and Geradin (2000) argue[34] that both race-toward-the-bottom and regulatory competition theories are overstated from a descriptive point of view and unsatisfactory from a normative perspective. Regulatory theory (they argue) must reflect the diversity and complexity of the world. This book takes this argument a step further by strenuously locating the regulatory mission in crisis contexts which seek a solution in limited and fragmented state shadows. In these contexts, much more than for consolidated states, I assert, optimal governance requires a flexible mix of competition and cooperation between government actors as well as between governmental and non-governmental actors, along both horizontal and vertical dimensions. That said, as the state hierarchical shadow diminishes, the regulatory order flattens and cooperation is not only more essential but also more attractive, even if fragile, to establish and maintain through trust and friendship bonds. Esty and Geradin plump for an enriched model of 'regulatory co-opetition'[35], recognising that sometimes regulatory competition will prove to be advantageous but, in other cases, a greater form of collaboration will produce superior results. In a world that is pluralistic, not simplistic, a combination of regulatory competition and cooperation will almost always be optimal. Again, where this book moves on from co-opetition models is by leaving the bond of consolidated state hierarchies in favour of social citizenship and socially embedded regulatory environments.[36]

Social citizenship – Pathway to flatter regulation

Social citizenship, whether in the form that this text develops sociability, or in more conventional discussions of CSR, is a perspective on regulation which helps us understand the limited choices available in any regulatory mix:

> . . . the degree of control that regulators have in the design and enforcement of a particular regulatory regime varies. Regulators' capacity to shape an effective regime may be extremely limited if concerns about political legitimacy dominate decisions about what legislative or regulatory tools are made available . . . . A focus on human agency is timely and intrinsic to the concept of a regulator as a 'sociological citizen' reflecting and acting creatively to bring about beneficial outcomes. According to proponents, sociological citizens are creative and self-directed, they draw on a broad canvass to achieve regulatory goals . . . [37]

According to Silbey et al., 'sociological citizens' view:

> . . . their work and themselves as links in a complex web of interactions and processes rather than as an office of delimited responsibilities and interests.[38]

Later in this text, sociability, which is the mark of the social (or 'sociological') citizen regulator, does not emerge from or is not sustained in some purely normative abstract. It is deeply contextual. The more we move that context away from the shadow of the consolidated state, the more sociability is actualised through lateral relationships which do not depend on but rather avoid the need for a state-topped regulatory hierarchy.

Sociability is a process through which potential mutual regulators gain a level of perspective which is influenced deeply by their experience of crisis and their role within it which enables them to exercise a deeper understanding of regulatory responsibility and its implications. This deeper understanding allows the mutual regulator to see both crisis and ordering as they are rather than as they should be, prompting them to engage in regulation in a more responsive and responsible fashion. As C. Wright Mills may have it, such understandings translate into a *sociological imagination* that prompts the mutual regulator to improve rather than subvert the larger system of common good through norm experimentation.[39] They do not wait on state compulsion or on state agency for better regulatory outcomes.

Michaels, in his denial of the essentialist state hierarchy when imagining new governance forms, suggests a novel trajectory of thinking.[40] Much of the recent discussion concerning governance where the state is essentially at a hierarchical peak has been influenced by Michel Foucault. But as Jan Selby points out[41] the limitations of Foucault as a theorist of world politics is explained by his disinterest in supranational and international realms. Even so, for both the state and the supranational contexts, knowledge is power (as Foucault confirmed). The control of knowledge explains the dynamics of hierarchy: the capacity to ensure social differentiation through who regulates knowledge.

Michaels further projects:

> A more important step concerns the very hierarchy of levels. If it is correct that we are observing a move in the world from a political segmentary differentiation along state borders to a functional differentiation along different societal groups then this suggests that the methodologically central position of the state is wavering too. Note in a world that shifts from territoriality to functionality, the state does not automatically lose its role on functional grounds. A trajectory of theoretical accounts of governance should enable us to overcome this focus on the state ... a more specific analysis of modes and structures of hybridity, or of the particular mix of public and private governance. This makes it possible, at least, to deny the state its central position in the analysis and to develop, on a fourth level, a governance theory beyond the state. On that level, the state's institutions exist on an equal level, analytically, with non-state institutions.... A governance concept that transcends the distinction between state and non-state laws, by contrast, should enable us truly to imagine governance not only outside the state, but outside even the dichotomy of state/non-state, outside the state framework altogether.[42]

Such an analytical progression, when directed to the regulation component of governance, offers the possibility of laterally (rather than hierarchically) viewing collaborative regulation in limited or fragmented state contexts, I argue more fully in Chapters 4 and 10.

Having moved very far away from the shadow of state hierarchy in regulation, it is appropriate to return to the reality of modern regulatory trends, whether they are seen in the context of consolidated states and global capitalism or, as this book would prefer, in a world where regulation relies on alternative functional equivalents which explain the potential of regulatory collaboration in the face of global crisis.

The ubiquity of regulation

Along with socio-economic development comes the regulation of most aspects of daily life. This age of regulation is both driven by and transcends modern market economics, in the same way that it transcends a mono-cultural, mono-political or mono-economic conception of the state. Whether it is through the advance of supranational mega-corporatism, economic globalisation or conversely market failure, regulation imbues developed Western legal traditions, cultures, governance and much that gives contemporary society its form and vitality. Why is this so? Why is it also the case that a stereotypical orientalist or myopic regulatory discourse which exists in the shadow of consolidated states has for too long ignored the consequences and appropriateness of other regulatory agendas where

the state shadow is a faint or distant? Perhaps the answer lies in a century and a half of triumphant market capitalism and an age of globalisation where materialist economic development and modernisation are part of the dominant global frame.[43]

Even the market failure welfarists see the common sense of extensive state regulation:

> Markets fail, a Pigouvian (1938)[44] would say, because of externalities, asymmetric information, and lack of competition, and governments need to regulate them to counter these failures. Regulation is ubiquitous because market failures are.[45]

The case for regulatory capitalism explains epidemic regulation, particularly at the global level, as the essential economic and political context in which mega-corporatism thrives. In this, we can identify the symbiotic relationship between regulation, new capitalism and the growth of state regulatory capacity:

> . . . regulation, particularly anti-trust and securitisation of national debt, enabled the growth of both provider and regulatory states. Regulation did this through pushing the spread of large corporations . . . the corporatisation of the world increased the efficacy of tax enforcement, funding the provider and regulatory state growth. The corporatisation of the world drove a globalisation . . . this was a very different capitalism and a very different world of governance than existed in the early twentieth century capitalism of family firms.[46]

This would seem to run contrary to the law and economics tradition which suggests that the relentless drive of competition and the strategic intervention of contract arrangements and tort actions addressing market failure, leave little space for regulation.[47] If this is so, and it is looked at against the empirical evidence of the recent exponential regulatory growth explosion,[48] is it fair to suggest that the ubiquity and efficiency of regulation may not go hand in hand?

Smart regulation,[49] *meta-regulation,*[50] *responsive regulation,*[51] *really responsive regulation,*[52] *problem-solving regulation*[53] and *regulatory competition*[54] (discussed in more detail in Chapter 3) are recent approaches to the regulatory agenda which indicate a compatible explosion in the scholarship and critique of contemporary regulatory thinking. Despite this regulatory renaissance, the person in the street could be left wondering at the incredulity of those responsible for managing global crisis, when crises take hold.[55]

This text asks why we live in a world of such intrusive and expanding public and private regulation, outside the limits of the law. This approach is adopted in explaining regulatory ubiquity for several reasons. Not least

of which is that it is recognised that as social, commercial and political relations move beyond the nation state, the jurisdictional character and confines of domestic law and its essential place in command/control regulation and enforcement need to be re-envisioned. It is argued that with regulation operating decentred from the state,[56] and more and more in networks of private interest, the inextricability of law (expressive or facilitative) and regulation cannot be taken for granted. In the regulation of global crisis in particular, the empirical concerns in Chapters 5–8, law and lawyers, local and international, have a job arguing their relevance in meaningful regulatory responses beyond an expressive or supportive role. The critical analysis of crisis regulation will put the place of law into a sharp regulatory perspective. The test of whether crisis can be transformed into orderliness is asserted as a more convincing measure of regulatory efficiency than market success or failure.[57]

Sociability – New non-state relations

The book considers *regulatory sociability* as both the characteristic and consequence of engaged and reflective regulation, countering the criticism of modern regulatory intervention as representing little more than politicised popular responses to economic crisis. In the richest, most representative and benign governance structures regulation abounds, charged as it is with producing and retaining the quality of life for citizens and civil society. Thus it can be said that this book interrogates beyond self-interest in the direction of forces that achieve mutuality, revealing what makes regulation efficient in achieving any such political and social aspiration.

Legal conflict resolution tools such as contracts and damages claims are themselves heavily regulated. Well-functioning courts manage and enforce legal remedies and resolve disputes, but when litigation is expensive, unpredictable or biased, regulatory capacity and efficiency are at risk. In addition, market failure and information asymmetries are not always essential triggers for regulation. Regulatory intervention often precedes market failure and goes well beyond market need. In these respects the book considers whether regulation is driven more by political imperatives than by efficiency or outcome-based motivations. Recognising the reality that regulatory regimes are vulnerable to capture by the commercial, political and social interests which they are set to regulate,[58] the book seeks to reveal those foundational social bonds which are strained in crisis and restored in orderliness. These form the framework of *regulatory sociability*.

The outcome of *regulatory sociability* should reflect culturally sensitive and contextually efficient institutional and process adaptations of governance to a complex and globalised world. The measure of this at the sharp edge, this book argues, is the way in which conciliatory and collaborative (not just responsive or reflexive) regulation moves chaos and

crisis to orderliness. An essential pre-condition for sociability, and for the effectiveness of collaborative regulation, is trust.

Cooperative compliance as a cause and consequence of regulatory sociability entails the creation of regulatory relationships based on trust. Only where externalised incentives to cooperate trump the need for trust, and these could include legal compulsion, will these trust relationships recede and sociability diminish in any organic form. But as the conclusion of this book drives home, mechanical and imposed regulatory regimes of re-ordering crisis are unsustainable due to a variety of critical reasons. For crisis, particularly global, to be convincingly converted into orderliness that lasts, regulation, wherein:

- players can be taken at their word and dialogue is honest between them;
- where interests are mutualised and agreed rules are fair and applicable; and
- there is a resultant preference for cooperative regularity,

is required if sociability is to emerge.

However, the aspirations for regulatory sociability expressed in this text are neither naïve nor altruistic. Much is said later about the externalisation of risk to communities who do not share in the private (and legally endorsed) interests and protections of regulated commercial environments. The need to break into that legalised, privatised domain in order to advance through pluralist regulation, with strong and shared notions of public (general) good, is well recognised.[59] The inducement to collaborate, not from the acceptance of mutual interest as opposed to self-interest at least in the short term, is explored in communities of shared risk. The fragility of cooperative compliance, if it depends on best practice or good corporate citizenship, is critically anticipated. A hard look is cast at the possibility of realigning global preferencing, from economic wealth and material profit to sustainability in all its life forms. Finally, risk aversion and crisis reduction are not causally assumed, and orderliness not naturally expected as a consequence of sociability without a very critical appreciation of the vulnerable conditions which create and continue any collaborative regulatory frame.

Regulation's reality

Regulation can take many forms. Within broad regulatory frames there can exist and operate a variety of styles ranging from

- conversations and dialogue,
- behavioural incentives,

- inducements,
- persuasion,
- precautions,
- inspections,
- rules – agreed or imposed,
- licences to act or associate,
- boundaries within which enterprise can be achieved,
- best practice,
- compliance,
- to sanction, and
- to command and control.

What often determines the choice and mix of these styles or the manner in which they may be graduated or escalated is whether the purpose of the regulator is for intentional change or rather for expressive governance. These intentions need not be exclusive, and the selection of regulatory strategy to follow need not always be integrated, balanced or inclusive. Regulation, all too often, is a struggle between, rather than a reconciliation of, competing interests. That is where this book's commitment to sociability comes in: to influence purpose, to assist in the selection of strategy, to construct modes of operation and to calibrate outcomes and measures of efficiency. Regarding the latter, efficiency as we see it is impacted upon by institutional choices and not dependent on the maintenance of a public/private distinction.[60]

Regulation is neither just a *thing* nor a *result*. This book examines institutions and technologies of regulation. This is preceded by the critical consideration of regulation as theory. Then we look particularly at regulatory authorship and regulatory space. This review analysis is followed by contextual considerations of regulations as change agents. Next, the legitimacy of regulation for various locations of governance is particularly reflected against accountability and finally, we consider the preferred regulatory regime and regulation outcome of sociability. All this endeavour is for the larger purpose of appreciating the big picture transition of global crisis to orderliness in specific places and ages of political economy.

In an age of globalisation moving out of a terror/risk fixation into considerations of risk and securitisation with a broader world focus, the need for collaborative internationalist engagement is no longer an aspiration. Transnational and international regulatory conversations and strategies have taken the context of regulation beyond the interests and boundaries of the nation state. No longer is collaborative regulation limited to compliance in narrow corporate settings. The operation of risk and securitisation within global governance is producing collaboration as a result of bio-political normalisation and not simply through normative accession.[61]

As Cooley observes, too much recent analytical focus on globalisation, particularly from the perspective of political economy, is constrained in a way:

> . . . that globalisation should be viewed as a hierarchical set of structures, institutions and processes. Of course there are various strands of the 'globalisation as hierarchy' approach . . . . Even those who make the case that this new global system is not comparable to previous political economic orders find it difficult to discard altogether the hierarchy and imperialism analogies . . . even if we reject state-centred accounts of international political economy in favour of more globalist or hierarchical understandings of economic governance, rationalist formulations still offer invaluable insights into the political dynamics of the contemporary international system.[62]

Rationalist engagement with the manner in which the state is or is not essential in confronting global crisis precipitates a richer discussion of functional equivalents that are alternatives to the shadow of state hierarchy as a regulatory enforcer. As with law and its problematic relationship with consolidated states and from there its questionable relevance in regulating global crisis, the measure of a capacity to move crisis to ordering without the shadow of the state depends not on an institutional analysis of governance but rather on a functional understanding of what motivates embracing the common good.

Regulation is an essential purpose and a critical challenge for law in the modern age. Notions of regulation are embedded within the traditional disciplines of substantive law. That said, new approaches to regulation are constantly emerging outside the limitations of single and standard disciplines. A more holistic approach is required for the study of law and regulation. This book addresses the role of law in local and global regulatory regimes and examines law's place in the development of pluralistic and contemporary regulatory policy. Readers are introduced to the foundations of regulatory theory and how these can be adapted to problem-solving requiring law's authority and impact. The book charts the interaction between law, political economy, social theory, international relations and policy in both public and private sector regulatory regimes. The *real-life* or applied scope of this book centres on identified regulatory demands and crises that anticipate a legal dimension in their resolution. The social, commercial and political contexts of the text envisage change as the central theme. Readers are exposed to cutting-edge regulatory thinking and confront the demands of regional and international regulatory practice.

Analysing regulation

The substantive progress of the analysis grows from a foundation of governance and regulation theorising to a specific consideration of the place of law in both and then settles on a progression of major global challenges to

order and human security. This book will answer these challenges with an argument for pluralist regulation in a grounded form.

For some plausible and less plausible reasons, the administrative/regulation literature is relatively less comparative than it might be. This book sets out a layered comparative mission: across disciplines with law as referent, across jurisdictions and governance frames and across regulatory modalities.

Its comparative methodology is designed not simply to indicate similarities or differences. It is neither dichotomous nor does it focus on individual regulatory contexts or variants. The method employs previously developed 'comparative contextual analysis',[63] which builds on a deep contextual understanding of the referents intended for comparison prior to any more thematic consideration of broad themes (contextually dependent or universal across contexts).

The comparative endeavour works specifically towards the theme that regulatory pluralism is essential for domestic and global governance in an age of massive and complex global challenges to political economy, when post-Fordist economics and politics require but all too often ignore creative and revolutionary scholarship in meeting these challenges.

In contemporary scholarship on regulation, governance, social development, new economics, international relations and international law, there is a strong research, policy and teaching interest in cross-disciplinary engagement. An interdisciplinary, multi-disciplined approach to the identification of research priorities and the augmentation of more vibrant and integrated policy strategies will enliven the literature on regulation and governance. That integrated and collaborative scholarship is this book's commitment. Out of such disciplinary interaction will grow creative theorising and methodologies for exploring the critical social location of global risks to governance and regulation.

Binding themes

This book is centrally concerned with global crisis and collaborative regulatory responses. The analytical purpose is clearly directed to understanding the mechanical and organic constituents of crisis to orderliness and the reasons why regulatory sociability provides an answer to catastrophe. But it is more than a book on crisis management. It also aspires to introduce the reader to the rich scholarship around regulatory practice and theory. The chapters are topic-centred but cohesive through engagement with recurrent research and policy themes. These will include the following:

- collaborative regulatory possibilities to answer the economic and social fall-out of the recent (and impending) global financial collapse;

- regulating the burgeoning commercial environments and relationships across virtual web-based markets;
- the relevance of law in particular for the regulation of illegitimate market enterprise;
- regulating global health pandemics;
- the relationship between international justice delivery, peace-making and global governance;
- pluralist and integrated strategies for regulating climate change and its consequences for social development models and political economy.

This book reviews some of the available literature around these themes in order to identify from each their contribution to theorising and applying regulatory sociability as a policy force.

Understanding the dynamics of sociability

In the argument and analysis to follow, there will be both a reliance on and advocacy for regulatory sociability. The sense in which it is employed in this text indicates that sociability is neither a theory of regulation nor a regulatory strategy or device. Rather, sociability is the following:

- a way of describing relationships, which come together with either a regulatory purpose in mind or a need to augment and determine regulation away from purposes which are not supportive of mutual interests;
- an explanation of what motivates actors and agencies to come together to regulate and be regulated;
- a gradual meeting of minds, which grows from the appreciation of placement within a community of shared risk and the need to actively create communities of shared fate;
- an understanding of why collaborative regulation is appropriate and possible; and most of all
- a living and dynamic engagement with regulation stretching from passive conversation to active behavioural change. In its dynamic sense, sociability changes and is changed by the regulatory project.

The reliance on regulatory sociability might be criticised as little more than *collaborative regulation* by another name. That would again misunderstand the analytical purpose of sociability analysis. Using sociability as I do, the intention is to learn what is behind decisions to collaborate or otherwise. Collaborate towards what? Are there sub-texts within and beyond the collaborative appearance? What promotes or retards collaboration and how does collaboration morph in the process of regulatory change?

Collaborative regulation could be seen as born out of the failures and limitations of self-regulation. It recognises the need for cognitive pathways

between regulatory networks and systems. It relies on and promotes dialogue. Collaboration suggests some effort and supportive mechanisms to achieve and advance shared interest or at least to minimise destructive partiality and self-interest.

What collaborative regulation and its analysis fail to do is sufficiently distinguish between the organic and mechanical forces which bring collaboration about. It is a mutuality of interest, which cements sociability and the process of sociability in the negotiation and sustaining of mutualities. Sociability can be charted through mechanical and organic forms, but I argue that the essential characteristic of sociability and a reason why it is effective in translating crisis into ordering (particularly where conventional governance frames are weak) is the organic dimension of *coming together*, rather than the structural configuration of collaborative alliances. To know more of the organic bonding through regulatory sociability is to better understand the diverse regulatory combinations which struggle for shared benefit beyond the shadow of the state.

Holes in the argument

Sociability is not communitarianism in some form of moral regeneration or essential and universal ethical commitment. It does not anticipate a conversion from self-interest to common interest as a change in the core ethic, although such a transposition is compatible with a deeper level of sociability. Rather, sociability, as a platform for collaborative regulation, expects that due to the recognition of shared risk and shared fate, self-interest and common interest will converge. Even with this more limited and rationalist incarnation, there are several problems associated with the regulatory scope and security which need recognition.

The convergence of one form of interest with another will require a medium-term time frame. In the case of some crises, that time frame is shorter than others or might even already be exhausted.

In market contexts of vigorous innovation, commerce and industry have been very eager to buy up competing knowledge which might otherwise move their practices towards a more common interest so that the organic stimulus for change has been subverted. Even so, it is anticipated that there will be a realisation in such competitive markets that the energy of innovation necessary to fuel commercial self-interest will bubble to the top despite this monopolistic trend and that self-interest will be open to innovation if the market message is sustainability and preservation and not just raw profit at all costs.

Here too arises a concern about the nature of dialogue to be employed in collaborative regulatory conversations. Where competition is predatory, the trust necessary for collaboration to grow (discussed in detail in Chapter 11) will be absent, endangering the productivity of regulatory conversations.

A way to address this problem is to promote through other forms of market regulation the tolerance of competition in ways which are more than normative or sectarian. A challenge here exists for the commercial and industrial behaviours of consolidated states and MNCs to present competitive models from which fragmented states can benefit rather than be exploited in many current relationships of domination. In addition, competition can be fostered in market environments which value medium-term sustainability as a higher market condition.

The commercial and industrial rationality of multinational moneymaking is not consistent across the globe. While it might be realistic to imagine a shift in thinking in the air-conditioned boardrooms of the developed world where wider visions are entertained, most of the exploitation of natural resources occurs at the dusty edges of socio-economic development. In that context, middle-term reason is captive to the profit rush of the present and none of the subtler social and political nuances that might influence corporate decision-making in the customer-sensitive West are at work.

In addition, the shift from the short-term to medium-term fields of vision may be industry-specific. Some commercial enterprises are already there. Others lag behind because the sense of crisis is still not sharp or because the resistance to regulation in any form is too entrenched.

That realisation leads to another. Each crisis is different in its impact on those who are instrumental in its delivery and perpetuation. Therefore, with environmental sustainability for instance there is finally a consciousness that the clock is ticking, but when it comes to data integrity and privacy there is no consistency in appreciating the crisis, let alone the solution. With health pandemics, the approach to specific crises and solutions is still so class-driven that there is no global uniformity as to how responses should be spread and managed, particularly amongst the under-valued lives of the poor.

The argument that sociability is a better regulatory response to crisis than mechanical intervention depends on appreciating and not resisting communities of shared risk and shared fate. What are these communities and how can they be understood as singular to any particular crisis? Surely those stakeholders in crisis will exist across a range of risks and fate? In addition, risk and fate as stimuli for shifts from crisis to ordering are issues of sensitivity and perception which are themselves dependent on capacities for appreciation, evaluation and adjustment.

There are in *risk* and *fate* different forces at work. On the one hand, risk is an actuarial concept, context-specific, but generally appreciable if the conditions of crisis are right. Fate on the other hand has an ephemeral connotation. There may be a common appreciation of risk (and that is problematic in itself), but as for fate, visions may radically diverge and depend as much on individual and shared perceptions as they do on the realistic dimensions of any crisis.

What of conversations among entities which have spent their previous existence engaged in activities which fight or devalue collaboration? Free market capitalism is about dog-eat-dog. How then is a new age of communitarian dialogue to emerge?

What about those stakeholders, particularly elected politicians, whose tenure on power does not allow them to embrace medium-term visions? If these players have an important role in crisis management then to what extent will they effect the potential achievement of sociability beyond some political front?

Further, it has been argued – and that is what this analysis will concede – that regulatory energy is elitist, or a thing for the developed West. The impression is that regulatory sophistication corresponds to the development and diversification of economic, political and social superstructures. In such an appreciation of the *realm of regulation*, the rest of the globe is cut free from communitarian discourse and left to the ravages of deregulation.

Connected to this elitism and discrimination in regulatory push is the mis-appreciation of major crisis players as being holistic and consistent entities. As we know, with MNCs who jurisdiction-shop worldwide (see Chapter 8), and who deny collective responsibility as soon as one of their outliers mucks up, the hope for interest in some uniform commercial and political culture equating with consistent responsibility apportioning is idealistic.

Does this leave us with an argument which can do little more than talk about tomorrows? No. The engagement with particular crises to follow is locked in time and space. In each case study will be revealed the manner in which sociability can be seen as an eventuality and not as an aspiration. The keys to this are risk and fate. Sociability comes about to counter risk and to determine fate. Risk and fate are determined by the responses directed against them. The argument of this book remains that the most effective attack on risk, and the most influential shifter of fate, is collaborative regulatory endeavour.

Chapter structure

Before setting out the chapters to follow, let us reiterate the two main purposes of this book. They are the following:

- To emphasise a notion of sociability that translates into collaborative regulation which in turn addresses global crises to orderliness in a manner which complements a Weberian preference for organic and not mechanical organisational structures, and
- To rehabilitate regulatory thinking from an elitist fascination within and about consolidated states and rational corporations down to where the

real crisis impacts and instigators exist, where the shadow of the state and the accountable corporation is a faint.

With these intentions in mind, the argument evolves as the following.

As you will have read, Chapter 1, 'Hierarchies and Governance: Of Shadows and Equivalence?', sets out the case for this book at two levels. The first step is to explore the relationships between global regulation and contemporary global crisis. Next the chapter argues that the largely ignored context of disaggregated states needs to be drawn back into the analytical frame if we are to develop a holistic approach to returning ordering from crisis. In this way, it sets out the case for regulatory sociability, which is this book's binding theme.

Initially with a particular legal referent, Chapter 2, 'Comparative Theories of Regulation – North vs South Worlds', examines the guiding contemporary theories of interventionist and non-interventionist regulation. There is a discussion of the different disciplinary foundations and applications of these theories and their ramifications for an integrated and credible regulatory pluralism at a global level. Disciplinary deficit and silos of scholarship are within this critique. There is a summary discussion of mechanical and organic regulation. With such a wide remit, this chapter looks at theories across the continuum from vigorous state intervention to mutuality. The purpose of the elaboration is to see those theories that have purchase beyond a developed Western state frame. The chapter commences with a discussion of the place of law. Then it follows with the place of values and the place of the market. Specifically, voluntarism, preferencing, market positioning, competition, compliance, self-regulation, responsiveness to enforcement and trust are all highlighted as important regulatory theory paradigms.

Chapter 3, 'Regulatory Instruments, Strategies and Techniques – Sticks and Carrots', is designed to predicate an examination of trends towards regulation or deregulation (more than just as shift in the actors, sponsors and institutions of regulation). The chapter proceeds to explore in generalised contexts of regulatory challenge the regulatory options available to policymakers and their potentials. This discussion is conducted against the relative presence of the state, however formed and disposed, within the regulatory mix. In this exploration, the analysis follows a concept of regulation as intentional in the manner it is directed towards behavioural change. The context for both the regulatory challenge to be addressed and the change to be achieved will be identifiable and adaptive to social, economic and political relationships. Of course, as arenas for regulation and its possible outcomes, these relationships will be dependent on particular political economies. The central challenge for this book, to transform global crises in orderliness through the frame of sociability, relies on the background of this chapter, for the manner in which it sets out

the options and technologies on offer when formulating specific regulatory strategies.

Chapter 4, 'Contexts of Regulatory Challenge – Compulsion or Compliance?', introduces the crisis contexts of chapters to follow. It also joins up with thematic considerations in the final chapters, which look at state accountability and new forms of global governance. The discussion of regulation beyond the state incorporates our earlier consideration of regulatory theory and specifically locates regulatory policy within and beyond domestic contextual frames. Black's critique of decentring is put against Braithwaite's conviction that sanction-apexed regulatory hierarchies will always depend on the shadow of the state. The nature of international regulatory networking is detailed and regulatory capitalism is critiqued from the third-world perspective. Governed interdependence and trans-nationalism is a context in which supranational regulation is made possible. This leads to a discussion of global community. What role does law then have at the supranational as well as the national levels? Can law regulate cyberspace? If so, what does this mean for the re-conceptualisation of security, solidarity and sovereignty? At this point the chapter looks forward to the development of these issues (in Chapter 9) in the context of globalisation. The chapter concludes by asking how we will move towards a regulated globe.

Chapter 5, 'Regulating Communication – New Media, Old Challenges', examines globalisation as the collapsing of time and space which has created an instant communication environment hardly dreamt of prior to the development of the World Wide Web. One of the most hotly contested and culturally divisive issues in contemporary regulation is controlling new media. Social networking has become an alternative democratic governance platform and like it or not the conventional institutions of government are almost powerless to regulate it. As said, the spectre of cybercrime, child pornography and identity fraud has sharpened the security focus over instantaneous information transfer. What is the place of regulating the motivation for globalisation? The crisis surrounding data protection and communication privacy vs national security has deepened the complexity of the debate about regulating a 'free' new media. This chapter offers a three-part approach to regulatory challenge and crisis. The first thinks about the regulation of information transfer and message delivery via various broadcast media. The second considers issues of access to and protections for communication transfer in the age of new media. Finally, the chapter concerns itself with contexts for regulating communication communities; public–private interests; dependency theory; regulatory capture; and national, trans-national and international networking. This is presented with the intention of appreciating the connections between communication governance and regulation in a modern world.

Chapter 6, 'Rationalising Human Integrity – Who Owns Your Body?', progresses across three associated fields of crisis. The first talks of the tension

between human integrity and intervention in regulating the body. The second looks at the commodification of bio-medical research and its connection with *the worth of life*. In particular, this discussion critically interrogates the convergence between medical technology and morality. Conflicts of interest between public and private good, between state intervention and independent science and between professional self-regulation and public confidence feature here. The need for an international approach to regulation is explored. The final section concerns itself with the collaborative imperative in regulating health pandemics. The role of cooperation in health care as a part of governance and in specifically responding to health pandemics beyond the nation state presents interesting instances of regulatory sociability. A binding theme in this chapter is the identification and endorsing of individual integrity and human dignity. These issues can be read from the perspective of how they may be compromised by the regulatory purpose which seeks to securitise human life but differs in how life might be conceived in different socially located bodies or populations. Individual preferencing and its qualification through regulation in an effort to promote common good lead to the consideration of sustainability in the chapter to follow.

In the aftermath of the recent global financial meltdown, the vigorous 'free-market' attack on international financial regulation has been dulled but not silenced. Braithwaite's 'window of opportunity' for regulation of crisis is particularly apposite for Chapter 7, 'Regulating Finance and Economies – Profit and Beyond'. To what extent has economic re-regulation taken root in the thinking of crisis responses? Or is the discussion of regulation a mask for the failure of the contemporary model at the heart of global political economy? Even so, with so many economists dodging responsibility for crisis prediction, to what extent has financial crisis opened up discussion of the re-emergence of socially responsible economics despite the death of welfarism? The demon of deregulation is discussed against other interesting transitions such as corporate greed vs corporate citizenship and responsibility. What will be the global ethic after the demise of material profit? And how will questions of sustainability over profit lead to a fundamental reconsideration of resource distribution? Or, has financial crisis simply ushered in new dragons to guard the gulf between the 'two worlds'?

The chapter is essentially concerned with a paradox of regulation: the extent to which market failure is a consequence of regulation or weak regulation, put against the dangers inherent in propping up failed markets when regulatory failure is inevitable. To explore this paradox, the chapter reaches back to considerations of socially embedded markets and current considerations of economic repositioning.

Chapter 8, 'Environmental Regulation – Liability or Responsibility?', is essentially interested in regulation for sustainability, worldwide. It commences with the role of the public rather than the nation state as a regulatory

actor. In this sense, it talks of social capital and collective action. The demise of criminal sanction models is discussed within the intractability of state regulatory prevarication and commercial compromise. This leads to a discussion of problems with penality and the failure of the law when limited by territoriality. Sustainability returns as a theme when looking at common interest and the way in which even profit-driven corporate interests can be mutualised from communities of shared risk. Responsibility frameworks and victimisation are explored and public–private linkages examined. Voluntary initiatives are discussed and the case for regulatory pluralism are developed. Global warming and security as viewed from both worlds are explored as a way of linking environmental crisis with governance and ordering. The chapter concludes by thinking through communitarian governance and the shift from state interest or protection.

Chapter 9, 'Regulating Regulation – Who Guards the Guardian?', brings an essential emphasis to the regulatory governance keystone introduced in Chapter 2 and expanded upon in Chapter 3 – accountability. Despite the decentring debate which emerges in Chapter 4 and which anticipates, at least in the medium term, the diminution of the nation state despite an age of re-emergent nationalism, the need for state-endorsed accountability mechanisms cannot be avoided even where states are weak and disaggregated. If the shadow of the nation state is faint and the influence of multinational corporate jurisdiction is potent, how can accountability be sharpened beyond the nation state?

Collaborations, partnerships, webs, networks and other regulatory alliances, which emphasise plurality in governance methods, eventually require bonds of trust and boundaries of social responsibility. In this appreciation can be seen as the distinction between accountability and responsibility which are both critical components of regulatory sociability. Accountability can be ensured through regulatory frameworks which may not equally generate a sense of social responsibility. To produce social responsibility, regulation needs to go beyond accountability to ask:

> Whether and how much you (business) care about your duties? An ethic of responsibility calls for reflection and understanding, not mechanical or bare conformity. It looks at ideas as well as obligations, values as well as rules.... Responsibility internalises standards by building them into the self-conceptions, motivations and habits of individuals and into the organisation's premises and routines.[64]

Particular accountability frameworks are critiqued and then reflected against the regulatory choice foreshadowed in Chapter 3. The importance of civil society to habituate regulation is implicit throughout the accountability discussion, in that accountability can be said to give a framework of social responsibility to sociability. To what extent do unhealthy alliances between

the state and capitalist (Fordist) economics work against accountability, particularly for disaggregated states? The chapter concludes with a discussion of the challenges for supranational accountability in new networks of global regulation where the values of liberal democracy are retained.

Chapter 10, 'Regulation and Governance – Beyond Terror/Risk/Security', introduces a new epoch of globalisation where risk is measured not in terms of terror, but rather as crises which engulf rich and poor and those within and without the benefits of global security. It sees global governance at present directed on the basis of a sectarian and exclusive notion of world ordering. The crisis contexts explored earlier have torn away the mask of hegemonic harm priorities which has in recent decades been constructed only to reflect the narrow interests of a preferred political economy. The place of hierarchy in global governance is critiqued and this links back to our consideration of disaggregated states in the regulatory environment earlier in this chapter in relation to the *essentials of governance*. The place of international law in regulating global governance is singled out for particular evaluation. Capitalism and the strains in political economy are, as the chapters reveal, our crisis context, and are under real strain as global governance wrestles with ordering from chaos. How does voluntarism precede a new global politics and regulatory pluralism? How are we left governing the ungovernable?

Our final thoughts in Chapter 11, 'Conclusion: Regulatory Sociability and Regulatory Futures', are about the choice between holism or heterogeneity. Contesting considerations of individuality, autonomy, unilateralism and deregulation are posed against the inexorable regulatory tend towards collaboration and the creation of a sociable regulatory space. A regulatory anthropology of collaboration is proposed. The motivation for this development is, through the exploration of alternative regulatory theory, to realise the eventual prevalence of a *general good*. This will come about, it is argued, through a re-interpretation of mutuality as self-interest. Global sociability will emerge from the survivalist efforts of communities of shared risk. Crisis, therefore, becomes the mechanism for the creation of a new regulatory space and a reconstituted motivation and morality behind the regulatory mission.

2
Comparative Theories of Regulation – North vs South Worlds

Introduction – Why theorise regulation?

Initially, with a particular legal referent, this chapter summarises the guiding contemporary theories of interventionist and non-interventionist regulation. From this exercise emerges a discussion of the different disciplinary foundations and applications of these theories and their ramifications for an integrated and credible regulatory pluralism at a global level.[1] The purpose of the theory review is not to mount a detailed critique or to propose a complex framework for the synthesis and development. Those are other more ambitious projects. For the purpose of a generalist text, theory is interrogated to inform the selection and integration of regulatory strategies proposed in this chapter.

I devise the analysis of a continuum from *sharp to flat* regulation so that this review of theory can be ordered and organised. This will be further developed in the chapter dealing with strategies and techniques (Chapter 3). I give credit to the regulatory pyramid[2] but prefer a schematic which does not rely on the pinnacle of state sanction. A driving purpose for this book is to explore the future for regulating global crisis in governance contexts where the shadow of state hierarchy is faint and where the state and its agents may in fact be a key part of the regulatory challenge. Such a recognition of any constructive if compromised regulatory role for fragmented states cannot be grounded in a framework of theory which is state-centred or at least ultimately state-dependent. That said, there are few if any modern regulatory frames in the public sphere at least which are not touched by some state imprint. Therefore, the scheme that is developed below does not have as one polar opposite a stateless regulatory theory but rather states in shadows.

Sharp regulation has many of the features of the pyramid.[3] It can be hierarchical, layered, interrelated, consequential and integrated through progressive relationships and outcomes. It operates on a tension between

public and private forces. It recognises the incentives for those against whom regulation is pitched, out of self-interest to attempt to capture regulatory initiatives or to resist their reach and impact. Law features significantly in sharp regulation as does the sponsorship and authority of the state and its agencies.

Flat regulation is as it sounds, less reliant on hierarchies, less complicated, more consensual, less sanction-reliant and thus less benefitted by actionability. It is likely to have a much less interventionist perspective. Law and legal rights and obligations are not an important feature of its framework. In fact, the common regulatory characteristics and institutions of sharp regulation are not essential in these regulatory styles. Flat regulation rests on self-motivation, agreement and the endorsement of civil society rather than the triumph of powerful self-interest. That is not to say that in flatter regulatory modes interest is always common and communitarian. Were that so, then regulation may not in large part be required. For flat regulation, the motivation for compliance is likely to be shared interest or some combination of lesser and less enforceable interest allocations. Therefore, sharp regulation is likely to be employed when the interests of the regulator and the regulatee are not aligned, while flat regulation is most useful when such interests draw closer to each other, approaching mutuality.

Sharp to flat regulation has several measures, some more state-oriented than others. Interventionist (sharp) to non-interventionist (flat) measures obviously have some gradated reference to state governance. Other measures of sharp/flat relate to the:

- presence of the law;
- reliance on penality;
- significance of actionability;
- importance of conciliation and conversation;
- merging or measuring of competing interests;
- organic or mechanical origins of regulation (influencing the externality of intervention or the internality of collaboration);
- essence of communitarianism (where regulatory forces emerge organically through risk and fate, rather than being imposed by external interests and authority);
- centrality of dispute prevention over resolution;
- eventuality of regulating away the need for regulation.

On this final point, sharp regulation, on the one hand, will perpetuate itself as long as its shadow of hierarchy is strong. Flatter regulation, on the other hand, should eventually diminish the need for regulation as mutuality and collaboration take hold and hierarchy fades.

Perhaps due to the different disciplinary traditions from which regulatory theory has emerged, the discussion to follow takes on a fairly eclectic form.

Even so, a loose structural classification of theoretical development retains around the progression from intervention and sanction on to empowerment and collaboration. Dialectics and dichotomies appear in the analysis as simple comparative tools. However, I admit that such binary juxtaposition does tend to conceal the regulatory reality of trends and continuums from one extreme to another. For instance, no regulatory theory relies entirely on intervention and sanction, nor does self-regulation exist in its own vacuum.

With such a wide remit, this chapter looks at theories across the continuum of vigorous state intervention to *mutuality*.[4] Mutuality is expressed both in terms of common interests and collaborative pathways for identifying and achieving such interests. For the extremes of intervention or mutuality the measure of *interests* is important as a distinguisher of the source and form of regulatory strategy to follow. But wherever a theory may sit along this progression, as Chapters 3 and 9 reiterate, the importance of accountability and evaluative responsibility maintains.

I argue that a reason for the eruption of global crises requiring more reactive and responsive regulation has been a trend in regulatory engagement for principal actors to put self-interest above a more well-developed notion of responsible social theorising. Even where self-interest, when combined, reveals significant areas of mutuality, there has been all too often among the economic sectors of society, in particular, a tendency to deny this in favour of irresponsible commitments to the short-term maximisation of material profit. This chapter suggests why this might be the case and how disconnected or overly normative theory building has exacerbated the trend away from constructive theoretical engagement producing the possibility of orderly pluralist theorising translating into effective pluralist regulatory development.

There is a summary discussion of mechanical and organic regulation later in this chapter. The purpose of that elaboration is to reveal and better appreciate those theories and their combination, which have purchase beyond a consolidated Western state frame. After looking at the reason to theorise and how regulatory and social theory should complement each other, the chapter commences with a discussion of the place of law. What follows is a consideration of the place of values and the place of the market in constructing and meeting regulation need and outcomes. Specifically, voluntarism, preferencing, market positioning, competition, compliance, self-regulation, responsiveness to enforcement and trust are all highlighted as important regulatory theory paradigms.

Finally, the chapter will return again to other *unhelpful* dichotomies which feature across regulatory theories between:

- common and self-interest;
- state and decentred;

- interventionist and self-regulation;
- public and private interest.

The discussion in this chapter will either endeavour to harmonise these opposites or at least show essential overlaps and their utility in devising the preferred pluralist regulatory approach that recurs through the chapters to follow. This is the spirit of the 'sharp to flat' theoretical continuum.

To theory or not to theory?

What is theory? Morgan and Yeung (2007) suggest in the context of regulation that theory (or more accurately, theories) can be seen as propositions or hypotheses about *why regulation emerges* and *which actors contribute to that emergence*, and of the nature of *typical patterns of interaction between regulatory actors*. The problematic question provoked by such an applied approach to regulatory theory is *what precedes regulation in action?*

Regulatory theorising is largely dependent, for good or ill, on a clear distinction between public and private actors. However, as regulatory strategies break free of state control, the distinction on both the levels of interest and the source and style of participation is far from clear. In any case, I argue that the public/private division is not essential when regulatory theory is particularly directed to focus on economically defined goals, factors and influences.

Even when regulatory theory focuses on broadly defined political goals, the public/private divide need not be a means of segregation. A case in point is with the determining of public and private interests as they are determined and ensured by the state. A naïve interpretation is that the state is concerned with public interests, and the private sphere even in regulatory management terms is best left to the private sector to negotiate. In actual practice, the state has interests in common with public and private stakeholders. As the custodian of the legislative process and the administration of the law, the state through public authority offers essential protections and dispute resolution platforms for all forms of private interest. In this respect, it is important to consider the facilitative role of law in theories of regulation, *law as umpire*.

Defining regulation as a theoretical project

Julia Black proposes the following as her constituent definition of regulation.

> Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard setting, information gathering and behaviour modification.[5]

Theoretical underpinnings of such a definition determine regulation as:

1) pluralistic and inclusive;
2) facilitative to alter behaviour;
3) evaluative in terms of effectiveness of techniques and methods;
4) cognitive in terms of intention.

Thus, any theory which aligns with and supports a like definition will be:

Empirical **–** able to analyse and measure altered behaviour against defined standards or purposes
Causal **–** by producing broadly identified outcomes
Instrumental **–** involving mechanics, standards, information and modification.

Purpose of theories

Particularly it is the case with regulatory theorising, but it could be said of the utility of theory to policy formulation generally, the purposes of theory cover:

Potentials to create and maintain domains of exclusion and inclusion – it would be misleading to see this as a hard-edged divide between those theories which offer the benefits of access, inclusivity and integration in the regulatory project for key actors and stakeholders from those that don't. The theoretical translation from exclusion to inclusion might be viewed as a *spectrum of alienation* across which the law in particular determines certain benefits of interest (e.g. *Tenancy agreements*).

Wealth creation – some regulatory theorising only permits regulation of any sort if it has a consequence of stimulating (never retarding) wealth creation. The obvious flaw in this theorising is that wealth creation is rarely universal. As such, regulation may favour the wealth advancement of some against others, and in so doing could foment social unrest which itself provokes a related regulatory challenge. A way around this problem is to see wealth creation not purely in terms of individualist, merit-based modes. Rather, the conditions of wealth creation may be so as to require resource and wealth redistribution so long as this did not hold back or reverse the overall wealth creation project (e.g. *Share registries*).

Boundaries of permission – regulation is constantly directed against discretionary power which above all else is the operational feature of modern-day executive management (both public and private). No discretion delegation is without its constraints, even if these remain in terms of the most general principles. Boundaries are created by regulation within which permission is granted to exercise discretion and

to garner its benefits provided the boundaries are not breached. The nature and rigidity of these boundaries is an issue of regulatory strategising. Boundaries of permission also pre-determine the substance and actionability of commercial rights (e.g. *Licensing*).

Rights protection – aligned with boundary setting, regulatory agencies have a critical role to play in enunciating and protecting human rights at various levels of governance. A rights-based theory of regulation puts rights ahead of all other aspirations for social control. Underpinning this theory must be a conceptualisation of rights in both their individual and communitarian manifestations. Further, the theory needs to determine a view on rights which is peremptory or which tolerates situational conditionality and the terms under which this would operate. It is a theory of rights which is concerned with expressive and facilitative functions (e.g. *Constitutions*).

Control – control theories of regulation usually are inextricably connected to the state and to law. The context of legality for state control-centred regulation adds legitimacy to the protection of private property rights and sanctions for the violation of these rights as well as for failing to comply with public obligations and duties. Control, associated with command strategies, relies on state institutional enforcement and authority capacities. State institutions and processes of social ordering heavily rely on control regulatory theory. Private sector and self-regulatory agencies, associations and processes may also rely on the shadow of control as the ultimate enforcement guarantee in other incremental regulatory hierarchies (e.g. *Immigration*).

Sanction – control theory relies on the threat of sanction and its activation. Deterrence then is the power behind the shadow of sanction. While the state has a monopoly over criminal sanctions, the use of sanctions to protect private property rights provides in law a range of authorities and styles for sanction. Legitimacy is an important consideration in sanction-based theories of regulation and legitimacy may rely on conditions of certainty, proportionality and review. Sanctions, as with control theories, also have a close connection to regulation and procedural fairness/due process guarantees (e.g. *Sentencing and punishment*).

Empowerment – empowerment regulatory theory has regulation as a force in creating conditions for self-regulation and compliance. This does not mean that empowerment theories reject the significance of regulatory agency, far from it. In fact, empowerment may be magnified through processes of individual certification and licensing. The management of knowledge as power also features in empowerment theorising. Knowledge ownership becomes a condition of empowerment if knowledge can be turned into a product and an outcome which is the exclusive domain of the object of regulation and of the regulator (e.g. *Professional registration*).

Ordering – regulatory frameworks and networks rely on ordering and on orderliness (see Chapter 11 for a fuller discussion of this). The regulatory theorising here requires of regulation that it stimulates order and controls and contains disorder. Order is a subjective determinant and is deeply contextually relative. It is also a perspective which relies on other theories, such as the relationship between ordering, resource distribution and wealth maximisation (e.g. *Taxation*).

Responsibilisation – one of the most interesting and fertile areas of regulatory theorising is responsibilisation. Responsive and reflexive regulation (see Chapter 3) requires the identification, adoption and activation of core principles by regulatory agencies and by the objects of regulation, against which responsibilisation is ensured. The emphasis here on responsibility rather than liability shifts the focus away from sanction and control to compliance and mediated settlement. This is the theory in which regulatory sociability and its techniques of collaborative regulation are best located (e.g. *Testamentary disposition*).

Content of theories

The manner in which regulatory theories are presented in the literature is as a mixture of explanatory and prescriptive elements. Preceding any discussion of the nature, scope and purpose of each different theory usually appears some explanation of why regulation emerges, in terms of need, challenge, preferred perspective and preparing the groundwork for the regulatory strategies best accommodated to each theory.

The content of regulatory theory is purpose-driven. As part of the theoretical justification, it is a process of identifying the goals regulation should pursue.

Many theories are rigid and proscriptive. Other theories base their approach on the potential fluidity of boundaries – between critical fields such as public and private interests and explanatory and prescriptive motivations – which are exhibited in the institutionalist approaches to regulation. Unfortunately, for a more dynamic analytical potential, many theories construct and work from dichotomies such as the public and the private, which in practice overlap to such an extent as to make the theories on which they rely more model than they are operational or experiential.

Because legality and legal norms are at the heart of much regulatory theorising, theories of regulation which are legalist in nature presume and build on particular theories concerning the nature and purpose of law (i.e. relevance of command and obedience).

Finally, because regulation is a social construct, theories of regulation in content rely on theories of society (such as social contract), theories of governance, theories of economy and theories of order and ordering. This connection means that many theories of regulation growing out of a

particular social view will have the nature and progress of their analytical potential inextricably bound up with confirming their underlying construct of society. As I conclude in this chapter, if understood, the social location of regulatory theorising is a critical impetus for the effective development of preferred sociability theories.

The place of law in regulatory theorising[6]

There are many theoretical intersections between regulation and law. For the purpose of explaining this intersection, we will employ a *systems approach* to law, legal institutions and regulatory initiatives.

The theory of *autopoiesis*, essential for understanding the systems approach, is complex and beyond effective summary in the confines of this section. However, it is enough to appreciate autopoiesis as the fragmentation of society into differentiated functional systems and sub-systems: law, politics, religion, economy and then to explore the internal nature of these systems and their interrelationship.

Systems are autopoietic, meaning they are self-generating and self-referring, producing and reproducing their own elements through the interaction of those elements. Each has its own rationality and is dependent on its environment.

It is said in the systems approach that systems such as law are 'normatively closed, but cognitively open'. *Cognitively open* implies that they can observe other systems and their environment, and be indirectly affected by them. *Normatively closed* on the other hand, designates that they recognise no norms other than those which they produce as being valid. From law's point of view, the validity of legal norms is thus based solely on legal norms; it is not dependent on the external norms of politics, morality, science or religion.

If it is to operate as a theory on its own, law or legal regulation have to recognise the normative closure of autopoietic systems and make use of their cognitive openness. In this respect, the battle over behavioural change should not be waged at the level of values and norms in a removed sense but in terms of how these value and laws through recognition and integration can have influence over the manner in which different systems interpret meaning and consequent action. In this way, law *has to orientate its own development to that of the particular system in question, analyse how it operates and intervene strategically.*

Law can adopt a range of indirect regulatory strategies. For instance, it can establish a referential framework against which self-regulation can operate in a principled, reviewable and responsible fashion. This is what reflexive regulation anticipates (see Chapter 3). One of the roles of reflexive law is to ensure that organisations perform this integrative function, achieved through *procedural regulation*.

Reflexive law through procedural regulation aims to provide for the *regulated autonomy* of different sub-systems. This is not a paradox for regulatory theory but rather an accommodation which appreciates different modes of governance from which and to which regulation engages.

Competition and the public/private interest divide

In the current age of globalisation, a strong international focus for regulation is in the maintenance of competition and the control of anti-competitive commerce. Free trade is the motivation for much international relations discourse. Interestingly, even though the universal economic benefits of free trade and open competition are said to be obvious, it has required a concerted regulatory project to advance and maintain this commitment.

International and regional conventions and agreements, free trade deals and groupings have all been employed in a regulatory pincer movement. On the one hand, conventions extol the obligations for competitive trading, and the free trade pacts exclude those outside the alliance from the particular benefit of the preferential shared trade grouping. National legislation in command and control mode has prosecuted anti-competitive behaviour, cartels and price fixing, while global conventions have sought consensus and voluntary compliance.

The theorising behind regulating for competition is a mix of legal and consensual theories. Sanctions[7] are the shadow over violations of competition legislation. Conventions and pacts are determined to generate a competitive trading consciousness.

Competition is an interesting area of regulatory activity where the need and purpose for regulation is inextricably connected to national, regional and global economic theory. Free market capitalism is the model, and it may be this doctrinaire link between economic theory and regulatory theory (and its deregulatory consequences) which meant that regulators recently from national to international crisis were less able to see the imminent collapse of the economic model and the need to adjust the regulatory project accordingly.

In anti-competition, regulation also exhibits the paucity of any division between private and public interest. Competitiveness is a critical aim for the private sector in largely deregulated markets, and the state has an interest in facilitating competition and maintaining market-friendly conditions. On the other hand, corrupt state officials are also essential in maintaining market preferencing on which the dominance of illegitimate enterprise is a feature of frail economic and market conditions.[8]

As was discussed in Chapter 1, competition has been collapsed in some modern theoretical writing as *co-opetition*. Padula and Dagnino (2007) untangle the rise in this hybrid form with the explanation that inter-firm cooperation has been commonly affected by a collaborative bias implicitly

assuming that firms interact among each other on the basis of fully converging interests and goals. Empirically, it is well established that competition intrudes into collaborative environments, moving firms away from convergent or mutual interests. Cooperation between firms might better be seen as a competitive game influenced by and proving only a partially convergent interest structure.[9] The challenge for regulatory sociability is to influence environment-related and firm-related factors to diminish the divisive impact of competition over mutualising interests through cooperation.

Place of values[10]

Responsive and reflexive regulatory theories, those theories from which smart regulation grows, the theoretical foundations of self-regulation and even command and control-centred theories utilise core values as a mechanism to contain the potential excesses in the promotion of self-interest over public good. Compliance requires a clear statement of even broad and flexible value systems as a referent.

Core values may take the form of legal rules and norms. In a self-regulatory frame, core values can be taken from an external system such as law, or can be created in codes of conduct and best practice principles.

Regulatory values are hierarchical. At the base of any regulatory progression, the values can be little more than the most general conditions of civilised engagement. As the regulatory obligation and consequences of violation are accelerated, procedural fairness demands that principles which can become the measure of responsibility then liability must also be enunciated more specifically.

Theories, in general, cannot be dissociated from a normative dimension. In the regulation context, universal normative concerns across various theoretical perspectives include the following:

- differences in public and private value systems;
- the extent to which values are enforceable through other systemic means;
- how amenable are particular regulatory theories to particular value systems, and associated with this;
- what is the degree of connection between the regulatory value system and other value systems operating outside the regulatory project?

Value systems in a principled regulatory theory are also important in providing both measures of legitimacy and a language of audit and accountability. In this function can be seen a tension between regulation and market imperatives. Values are both empowering and constraining. They are meant to have precedence over individual interest and even though they may be designed to complement or even enhance individual interest, values, unlike

market imperatives, ascribe to some higher normative consciousness than profit or wealth maximisation.

Place of the market[11]

The relationship between markets and regulation is a recurrent interest of this book. In theorising, certain theories of the market and the best conditions for market health are critically connected to regulatory theory. Here I want to touch on the relationship between theories of regulation and theories of the market as they complement each other in the achievement of wider goals of good governance (for a further development of this, see Chapter 10).

Social ordering through market regulation

The crises discussed from Chapter 5 onwards explain the battle between short-term considerations at the expense of global transformation and general interest outcomes. Political choices to regulate reflect a deliberative process designed to shape and then reflect values, even if these choices when made by states and their agencies are made with one eye on economic advancement through market conditions. To what extent does regulatory theory prioritise social ordering over marketability, and are there ways in which regulatory theory can service both to achieve their complementary aims, bearing in mind that economic markets and social arrangements are better sustained in climates of orderliness? As with the preceding discussion of the place of values in regulatory theory, the creation of positive market conditions and social order through regulation may rely on higher order concerns as well as sharp regulatory theory. Many regulatory theories see this issue as reflecting the need in regulation to advance shared values. Sociability views shared values, while not essential to collaboration, as at least very conducive to creating atmospheres of regulation which support organic regulation against the need for mechanical intervention.

The argument that regulation embodies collective values is weaker in three categories of regulatory decision-making:

- If a particular regulatory option, perhaps as regulatory choice which may be externally foreclosed, possesses some special character to a certain sector of the regulated population (such as limits on tobacco smoking in public places), it is appropriate to consider competing rights as a background to regulation. Even so majority-held values may have no moral authority in the eyes of those whose choice has been foreclosed. In this sense the regulatory strategy sacrifices the task of attaining collective values in preference for a social order concern of public health.

- Collective desires might be objectionable or undesirable. This presents a genuine challenge to any regulatory theory which relies on the acceptance of major stakeholders for both effectiveness and legitimacy. What if the collective view is that civil unrest is healthy for democracy but the state represses such unrest in times of political foment for the sake of short-term social order? In such situations, command and control regulation may defeat a short-term threat but at the risk of firming up collective values into a new and more demanding regulatory challenge.
- Some collective desires might reflect a special weakness on the part of the majority, as is the case when financial market deregulation is pushed by greedy investors driven by risky wealth creation opportunities flowing on from reckless deregulation (see Chapter 7). As the state interventions following the financial collapse globally in 2009 revealed, legal remedies might remove desirable incentive for private self-control and prove unconvincing in any case, in light of the existence of alternative remedies.

In any of these cases, the situation for protective desires is much less powerful, but the need for regulation may be heightened. Regulation then becomes justified not through collective values but by the need to maintain social order and/or the incentive to ensure conditions of market sustainability.

Public interest – Private preferencing[12]

Despite the circumspection in which I hold hard distinctions between public and private interest in regulatory theory, it will be examined briefly here in order to highlight the challenge for regulatory sociability in achieving mutuality of interest as a basis for crisis re-ordering (see Chapter 11). The following thoughts are presented as a short overview of conventional thinking concerning the public/private interest divide.

Public interest

As demonstrated in a welfarest economics approach, public intervention into the private sphere rests on the problematic of *market failure* and the socio-economic assumptions on which it is based. In this thinking, social good and market benefit are viewed if not at odds then not as naturally complementary. The regulatory responsibility of state agencies, therefore, is to prioritise through regulation, social goods above market preferencing, insofar as the former is not endangered by too heavily controlling the latter.

Competition gives us a specific case in point where public interest social good preferencing in market settings tends to exacerbate tensions

between public and private interests. Free-marketeers champion competition as benefitting the individual in the market setting, and thereby all will benefit. However, the problem of a misallocation of resources may require a reconsideration of law's role in income redistribution.

In a highly politicised world, regulatory theorists with a concern for managing competing interests cannot avoid consideration of the social and political value of influential externalities (i.e. transaction costs). An essential political externality is the electorate and with that in mind realistic regulatory theorising will not be divorced from the wider world in which regulatory objectives are situated.

The public sector when facing the prospect of regulating private interests will always be hampered by information deficits and bounded rationality. How possible or realistic is it for an external public regulator to evaluate and best determine resources moving to more valued uses in a market context, in order to advance social good? To offer this regulatory decision at all to an external agency assumes that decision makers have adequate information on available alternatives including the consequences of different choices and that they are capable of processing that information and rationally behaving to maximise utility (both social and market).

These regulatory options see regulation largely as instrumental and that public authority should manage instrumentation for social good. Are these not normative pre-conditions rather than regulatory considerations for the theorist? From the outset, regulation by public agencies for the purposes of income and resource redistribution is an attempt to prefer resources to certain groups for economic, political or social purposes. The fall-out effects of such an approach are complex and often unintended.

It is critical for public interest regulatory theorists to remember that regulatory choices are not simply an aggregation of political desires. Political behaviour itself, manifest in regulatory choices, is governed by influences that are distinctly politically contextual. Four impacts should be considered in the choice process:

1) the individual and collective aspirations of citizens in political rather than consumer contexts;
2) altruism rather than market-driven self interest;
3) vindicating meta and second order preferences; and
4) permitting regulation in order to promote general rather than individual interest.

As has been recently shown with the use of social media in the creation of new modes of governance (see Chapter 7), the collective character of politics permits collective regulatory action. If this action can be directed at common goods rather than political self-interest or *de facto* selective private interest then the use of public-sponsored regulation to promote mutualities

of interest, crucial for the advancement of sociability, should not be taken for granted.

Private interest

The private interest regulatory distinction is premised on an assumption that regulation emerges from the actions of individuals and groups motivated to maximise their self-interest, and the coalescence with the common good is a coincidence if private interest advancement regulation promotes public interest as well.

Critics of private interest regulatory directions (as well as those who would like to refine and ensure private regulatory 'ownership') tend to stress the ease of regulatory failure or regulatory capture, in a similar tone to the way public interest theories stress market failure.

Proponents of private regulatory ownership distinguish politically infected from economically grounded private interest theories. In a more sophisticated view, private ownership of regulation can still tolerate public interest contribution in some form of interest group pluralism, but the structure and purpose of regulation must complement private interest.

A further criticism of regulation outside private interest is the likelihood of different groups, institutions and agencies pursuing their own version of the public interest without a genuine umpire imposing constraints on contesting interests. Whatever the preference for public or private interest regulatory sponsorship, it is a fair observation that both should be tested in terms of their emphases on the power of procedural fairness.

The possibility of a closer merger between public and private interest-sponsored regulation can emerge from a reassertion of the primacy of substantive goals over interest goals. In an effort to achieve this, some theorists are for turning regulatory sponsorship over to an institutional or agency framework supposedly designed to minimise particularised interest influence.

Institutionalist theories

This category of theorising is meant to capture any theory where rule-based spheres, or the relationship between them, explain how regulation emerges. This is not to suggest that rule-based approaches do not emerge in theories favouring public or private interest or their sponsorship. Rather, the observation indicates that for institutionalist theories the rules rather than the interests dominate as the means and the objectives for regulation. Such rule-based spheres essentially influence formal organisations, and they manifest in embedded norms and routines, leading to systems (mechanical or organic) which implement and legitimate the rules concerned.

Theories focusing on the institutional and agency nature of regulation see the progressive importance of the role of organisations, institutions and systems in regulatory dynamics. Institutional dynamics have a life of their

own in regulatory regimes. For instance, we do not see law as the context or language of regulation so much as seeing – *law as regulation.*

It soon becomes apparent when exploring the theories under this head that they consciously or otherwise tend to blur differences between public and private actors, public and private interests, ultimately asking – *Are such distinctions useful?*

Place of process[13]

There is a school of regulatory theorising which measures legitimacy against procedural fairness. Particularly, criminal justice as regulation in principle at least considers itself principled if due process is recognised. All regulatory theory in differing degrees accepts that regulatory process cannot be separated from original regulatory motivation or from the reception of regulatory outcomes by key stakeholders.

The place of process in regulatory theorising focuses on key sites for regulatory decision-making:

- procedural elements – quality of decision-making and quality of treatment;
- process-based judgements – procedural fairness and motive-based trust;
- supportive values (legitimacy);
- general cooperation – compliance, cooperation and empowerment;
- immediate decision acceptance;
- long-term decision acceptance;
- the ability of a legal system to encourage general compliance with the law and with immediate and long-term decisions of legal authorities.

The place of process and its significance, therefore, depend on subjective judgements about the procedural fairness of systems and decisions.

Regulating rights

The final contextual focus for regulatory theorising in a post-Second World War multilateral world is the intersection between regulation and rights. This theme will receive detailed particularisation in the crisis context chapters which follow. For now, it is enough to observe that regulation influences rights and rights influence regulation.

The extent to which rights can have more than an expressive function in regulation depends on a variety of international law considerations such as specificity, whether it is a prerogative right, whether it is universally accepted as binding, whether it tolerates exceptions and whether it is accompanied by mechanisms for auctioning its obligations and benefits.

Regulatory frameworks such as law do much more than make rights actionable. Law can provide the meat on the bones of international rights conventions and through the requirements of domestic enactment, nation-state law is a crucial regulatory mechanism if rights are to move from their expressive to their facilitative potential.

The sharp to flat regulatory continuum

In Chapter 3, we will see much more discussion of how a particular regulatory theory becomes applied to accommodating regulatory strategies. This will provide an opportunity to detail the constituents of each theory in the process of revealing how these translate through the selection of regulatory strategies into promised outcomes.

Here, I will do no more than take up the challenge posed in the preceding chapter to set out a regulatory continuum from sharp to flat regulation in theoretical terms. The operational substantiation of the continuum will be more clearly established in the strategic choices discussed in Chapter 3.

Too much can be made of the distinction between *hard and soft law*, but it does have relevance for the discussion of this proposed regulatory continuum.[14] Aligned with mechanical, interventionist, state/MNC-sponsored regulation will be legal sanctions, written norms, constitutional authority and the institutions of legality. These will diminish as the continuum moves to the vaguest normative positions or the most voluntary regulatory alliances.

As with any continuum, moving along the trajectory will involve diminishing certain regulatory features while expanding others. For instance, the shift from mechanical to organic regulatory theories, on the one hand, will see a drift away from state authority and the dominion it has over the nature and strength of regulatory relationships. On the other hand, the trajectory will see an increase in the significance of comity, friendship and trust as the essential underpinnings of these relationships. Trust, in particular, will either grow as state authority recedes, or if it does not then regulatory relationships will weaken. This does not mean that trust is absent when state authority is high. In fact, trust in the state is a vital factor in the legitimacy of its authority. What I am saying about trust in a climate of strong mechanical regulatory authority is that it is not essential for the achievement of regulatory objectives, whether the mechanisms for achievement are perceived as legitimate or not.

In terms of subjective evaluations of regulatory efficiency, these cannot be empirically verified as increasing or decreasing with movement across the continuum. For instance, those who hold the belief that strong trust relationships lead to better regulation will never be convinced that strong state intervention in the absence of trust also has a capacity in the short term at least to ensure positive regulatory results. Even so, there are some more

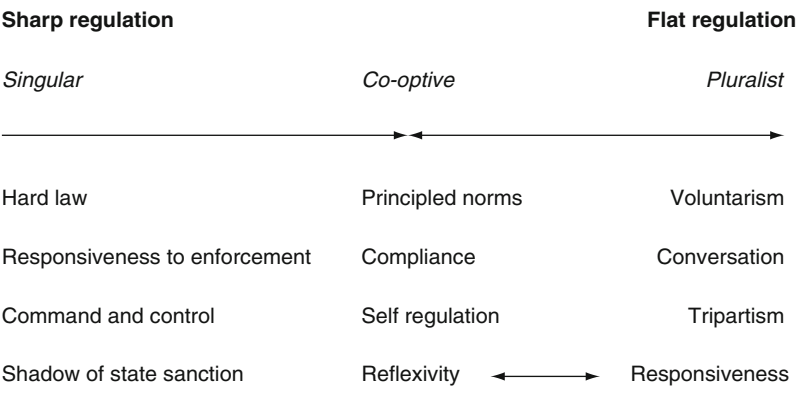
generalised positions on regulatory impact which may attend progression in one way or the other.

> Contemporary regulatory theorists posit that the most productive way to achieve genuine acceptance of, and adherence to regulations is not by an exclusive reliance on legal coercion but rather through the use of strategies that tend to bring the best out of relevant agencies, that can be coercive if necessary, but always trying to nurture virtue or the capacity for good.[15]

The consistent position in this observation is that any move away from a singular regulatory position to a more pluralist approach will increase acceptance and better regulation. Pluralism, however, calls into question the methodological utility of a continuum model. It is like this. If the continuum does no more than position different theories along a scale from sharp to flat (state to non-state, mechanical to organic, interventionist to cooperative), how can this account for a shift from single strategy to a pluralist approach? Would this not necessitate more complex multidimensional modelling? The answer is that it may, but fortunately for the attractive simplicity of the continuum which is being proposed here, those theories and their strategic products which are mechanical, interventionist, state-sponsored, law-reliant and therefore sharp are less likely to concede pluralism rather than the strength of their singular approach.

Not being satisfied by the coincidence I have just observed, the continuum will be constructed in groupings of theories which are singular, semi-pluralist and pluralist, sharp to flat.

No interrogation of this model, at the time of this text being available, will satisfactorily test its analytical utility. Hopefully in the more detailed discussion in Chapter 3, shifting theory to policy, the possibilities of this progression from sharp to flat will be opened up. For now, I will take the



single perspective, mechanical, interventionist sharp regulatory theories as a referent and briefly elaborate on a theoretical perspective which I see as co-optive (using principled values and state agency or certification under a fainter shadow of state sanction) and one which has moved on further towards a pluralist incorporation, an organic generation and inclusion of principles, replacing civil society instead of state reliance, and favouring conversation and adaptability over agency.

Self-regulation

Self-regulated does not mean *unregulated*. Self-regulation is a myriad of regulatory arrangements where self-regulation associations (SRAs) employ state agency and externalised principled norms to discipline self-interest.

Self-regulation accepts the benefits of state co-option and pluralism where other regulatory forms are second to the authority of SRAs. This can lead to the allegation that self-regulation is little more than a limited pluralism colonising state instrumentalities, in order to introduce deregulation through the back door. The accusation misses the influence of externalised principles and norms which are required through reflexive theorising to be accepted, articulated and implemented by all actors and stakeholders in the self-regulatory mix.

The dynamic regulatory interface offered through self-regulation represents an 'active engagement in a self-directive process that is cognitive as well as volitional, hence . . . public as well as private, political as well as personal'.[16]

What of self-regulation and external regulatory authority, beyond state agency? Self-regulatory associations argue that they are mini-legal systems, which should be allowed to formulate and apply their own rules; the courts should recognise the plurality of such systems and not 'cast the net of legal logic' over them. However, SRAs are not beyond the law and return to it particularly when seeking the protection and enforcement of private property rights.[17]

Reflexive regulation[18]

In the transition from co-optive to pluralist regulative theorising, a brief mention of reflexivity might be helpful to appreciate the motivations along the continuum.

Reflexive theorising holds that the need for regulation arises not from arguments about power or political autonomy but from the nature of autopoietic systems. Their regulation is necessary to ensure system integration. A greater recognition of the cognitive openness of surrounding sub-systems provides the opportunity to engage with other regulatory forms

and to move away from an overreliance on the authority of externalities such as the state.

This does not mean that the regulatory products of the state, such as law, do not, in a reflexive context, have the capacity to assist cognitive engagement across systems. Autopoietic theory has several implications for law, in that the function of law is to ensure social integration, not to control or legitimise power or protect private from the public sphere. A reflexive interpretation of the regulatory place of law sees law's autonomy as an inescapable social fact, not as an optional characteristic which may be more or less politically desirable and varied by legislative or judicial intervention. Normative autonomy in the face of a need to engage across systems effects the strategies that law can adopt to regulate other systems. Therefore, the role of law as umpire may not always be appropriate as regulation moves away from the state and civil society replaces state authority.

Tripartism

This theoretical position that self-regulation requires interest dilution and accountability blends public and private interests, by bridging *actor-centred* and *victim-focused* regulation, and highlighting institutional dynamics. Through the injection of third-party interests, tripartism reveals how costs/benefits accrue to actors in any regulatory game, depending on the negotiation of self-interest.

Tripartism can, under certain circumstances, produce public interest outcomes compatible with deliberation, dialogue and trust building empowerment, where ungoverned self-regulation could not. Third party oversight can offer out a deliberative processes, wherein cost/benefit are compatible with recognising for shared regulatory outcomes, where cooperation 'pays'.

Through the evolution of cooperation and collaboration grows the risk of corruption and capture – does defection pay better? The introduction of public interest review is in recognition of these risks without a return to state sanction or a denial of the effectiveness of organically emerging norms and principles to encourage and endorse mutuality.

By fostering involvement of public interest groups through tripartism, the regulatory legitimacy and efficacy of more self-regulatory and voluntarist methods are enhanced. In addition, through the development of comity and friendship bonds which the public interest bridge should offer other actors and stakeholders,[19] access to information from the regulator should come as a natural consequence of the shared regulatory endeavour. Tripartism makes way for more seats at the regulatory table around which the collaborative ethic which is regulatory sociability will emerge.

Conclusion – Need for regulatory and social theory to engage; regulation as agent of change

This brief exploration of the nature, direction and development of theory in regulation was intended to provide a simple framework with which to understand the preference this book proposes for regulatory sociability. The capacity through sociability for regulatory theories and social theories to engage, I argue, is proof at the level of theorising that the constituents of sociability and their social location will enable a more effective regulatory project across a range of related socio-regulatory challenges.

Regulatory theory must reflect the diversity and complexity of the modern world. Optimal governance requires a flexible mix of competition and cooperation between public regulators and private actors which is fit to maximise the benefits of pluralist and not simplistic theoretical convergences. But what of the place of law in any or all of this? The features of regulation for change, in which law claims a place in the progression from sharp to flat, involve the following:

- Law as a regulator becoming a tool used by state bodies and non-state associations to achieve their ends through the design of institutions.
- Emphasising law's facilitative role, while pointing to the potential limitation of economic concepts of regulation divorced from their location in social theorising. In this respect, law blends with economics to explicitly incorporate values other than achieving allocative efficiency.
- Using law to ensure that political versions of public interest are more inclusive, where socially located values also critically inform regulation. The intrinsic value of participation confirmed and afforded by principles enunciated in law (beyond the interests of law's protection of private property) will be achieved through process of legally constructed dialogue. In this context, regulation is justified when it establishes institutions, associations and processes that can foster collective learning through a process of participatory political dialogue, tempered by legal principle. This is regulatory sociability.

Every theory has its tensions in application. For instance, the preference for flatter regulation is founded on the collaborative endeavour and the manner in which it can avoid confrontational regulatory space exemplified by wasted energies in one field of interest trying to capture the other to neutralise the impact of mechanical regulation. However, informal voluntarism is the key feature of flat regulation which is problematic because its informal nature leaves open an *exit door* for resistant regulatees to escape their obligations and commitments when it serves their interests to do so. Yet the true difficulty here may not lie in a theory/application disconnect but rather with

a blinkered view about essential constituents of theory such as incentives to voluntarism. For instance, the foregoing problematic assumes that informality and voluntariness also mean an absence of influential incentives because formality and sanction are sacrificed. Not necessarily so. Climbing out from underneath a collaborative regulatory relationship may bring with it adverse reputational costs. In addition, the informal, flatter regulatory style does not sacrifice robust regulatory arrangements if the inducements to collaborate grow from a mutuality of interest which amalgamates the sustainability of crucial self-interests in the medium term (e.g. see Chapter 8). The following chapter will explore a fresh collaborative context enabling many forms of regulatory strategy, from sharp to flat.

3
Regulatory Instruments, Strategies and Techniques – Sticks and Carrots

Introduction

Essentially, the discussion of regulatory instruments, strategies and techniques is about the contextual application of theory to specific regulatory challenges. The success of regulatory policy will be a pressing measure of selection and implementation.

The conditions for successful/unsuccessful regulation can be seen in terms of

- need,
- response,
- content,
- technique,
- purpose,
- interrelationships.

These contextual variables are elaborated below. Successful regulatory policy, in the view of this text, depends on more than causal questions of control and containment. And, it is argued, successful regulation will play an important role in setting out a framework for *sociability*, and vice versa.

Sociability is getting along with each other. *Regulatory sociability*[1] can be perceived in at least two ways. Eisenberg, Fabes and Murphy (1995) explore how low sociability (or a non-fearful preference to be alone) relates to regulatory receptiveness. In particular, they found that 'loners had a higher than normal inhibition to control, and not surprisingly were less likely to seek social support as a means of coping with their problems'.[2] Progressing on from this is the corollary that sociability:

- is a condition of being receptive to regulation and
- (if constructed around organic and positive stimulants) will provide a successful regulatory strategy for coping with social crisis.

Chapters 4–8 identify specific global crises and test these assumptions about regulatory sociability. As the first chapter suggests, regulatory sociability is the preferred paradigm for managing crisis to ordering because it does not rely on the hierarchical shadow of the state in a world where state authority is in question and most disaggregated states pose a regulatory challenge, rather than its solution. This chapter endeavours to ground these specific crises/control challenges in a range of regulatory options which in turn, it is claimed, are enhanced and empowered through regulatory sociability. Locating regulatory strategies within specific political economies in crisis, this book will test the utility of each of these strategies and speculate on the influences of regulatory sociability. Moving in turn through regulatory sociability, from crisis to orderliness within specific political economies, it marginalises a *single event focus* when speculating on regulatory efficiency. As this book's conclusion reminds us, sociability is not a natural consequence of protecting the libertarian entitlements (or excesses) of a rights-based regulatory environment (individualist or communitarian). Rather it is collaborative relationships which, out of a variety of motivations, can lead to positive, pluralist regulatory directions set out in the substance of this chapter.

The discussion to follow progresses on from theorising to policy-making. In doing so, it will hopefully be more apparent that conceptualising and organising theory from the mechanical to the organic empowers policy choices based on a better appreciation of what we think regulation should be for and what we want it to produce. In addition, our analysis of the theorising continuum enables us to locate the practical benefits of sociability when compared with other theoretical frameworks, and evaluate relative benefits within different contexts of state capacity and conscription.

This chapter is designed to predicate an examination of trends towards regulation or deregulation (more than just as shift in the actors, sponsors and institutions of regulation). It explores, in generalised contexts of regulatory challenge, the regulatory options available to policy makers, and their potentials. This discussion is conducted against the relative presence of the state, however formed and disposed, within the regulatory mix. In this exploration the analysis follows a concept of regulation as being intentional in the manner it works for behavioural change. The context in which both the regulatory challenge is to be addressed and the change is to be achieved will be identifiable and adaptive to wider prevailing social, economic and political relationships. Of course, as arenas for regulation and its possible outcomes, these relationships will be dependent on particular political economies.

The central challenge of this book, to transform global crises to orderliness through the frame of sociability, requires the foundation laid by this chapter because of the manner in which it sets out the options and technologies on offer when formulating specific regulatory strategies. As summaries like this

tend to do, there will be a false sense of distinction between the selected regulatory strategies. Some grow from each other, many rely on each other and most function in common regulatory arenas. The strategies will be described in terms of some formative writing and research and the limitations and benefits of each approach are canvassed.

Context is an important consideration when deciding to regulate: what to regulate, how much to regulate and which preferred regulatory style to choose. In this chapter, the state and the degree to which it is involved in the regulatory challenge, and should or could be involved in the regulatory solution, is a major context. So are communitarian capacity,[3] social capital and civil society. In order to reflect our commitment to pluralism as supportive of sociability, no regulatory context can be seen in practice as discrete or self-contained or containable. As such, contextual interaction is also considered an important analytical focus when determining the best regulatory strategy to employ.

Continuing the theme of a theoretical continuum in regulation from sharp to flat, this chapter will also position regulatory strategies from interventionist to participatory, and from heavily state-reliant to options in which the state's influence is faint or when it is on the receiving end of regulatory effort.

Regulation is in the eye of the beholder

Systems theorists point out how social sub-systems (such as economy, law, politics, etc.) are wedded to their own self-referential ways of understanding the world. In this regard, moving to a more pluralist and inclusive regulatory frame, which is the conclusion of this chapter, faces challenges of marrying professional languages and experience, or at least making disciplines less resistant to other ways of seeing and thinking. Separate mediums and disciplines of regulation fail to communicate non-problematically. The fear is, for instance, that the views business managers take of regulatory responsibilities differ in kind from the visions of regulators to such a degree that rules out effective dialogue, and will always result in adversarial regulatory positioning. Regulatory sociability refuses that conclusion.

Oppositional positioning rather than mutual engagement when facing regulatory demands can construct adversarial language and ways of seeing the risks and benefits of regulatory engagement. Again, in the mind of the business manager, non-compliance may involve losses, but regulatory sanctions may only represent a small aspect of associated losses. Significant as a deterrent consequence of adverse regulatory engagement are reputational effects, operational disturbances, human resource implications, influences on markets or competitive positions or relations with regulators, investors, consumers, business partners or suppliers. Managers may see regulatory liabilities as risks to be managed, not as ethically reinforced prescriptions.

All this is the prevailing concern behind regulatory selection, and the efficiency component in compliance terms, of regulation in any form. A wider success measure may be whether the adversarial context is diffused in the medium-term.

The subjectivity of attitudes to regulatory engagement is not only the result of adversarial positioning; the fact that regulation is a political question tends to mean that the side of the political divide one takes will distinctly determine attitudes to regulatory projects. But what does it mean to say that regulation is a political question? The chapter addresses this in terms of the values exhibited by different regulatory approaches and the investment in their acceptance and implementation.

There are at least two frameworks wherein debate about proper institutional arrangements for regulation can be carried out. The first involves seeing possibilities as instruments, and the central concern in this position is about the most efficient means for achieving regulatory objectives. The second requires seeing regulation as an *essentially political act* (adapting choices of institutional alternatives to take account of valued features of any existing political world). The choice of institutional alternatives actively shapes that political world and determines the appropriateness of any selected institutional form for carrying out regulation within a political paradigm, with all the considerations that may entail.

In determining an appropriate regulatory strategy to meet a particular regulatory challenge, policy makers should move from some preferred theoretical foundation (or a combination of these) in order to then select the applications best suited to their intended regulatory outcomes. Beyond developed consolidated states or complex commercial networks, the choices may be limited while the aspirations remain broad.

Making policy choices

At the conclusion of chapter 8, I set out a scenario which presents specific regulatory challenges in the setting of a state experiencing varied crises and structural limitations. The reader is invited to develop a regulatory response to each challenge and to justify it with reflection on regulatory theory and the realities of political economy. In order to do this the make-believe policy maker should consider the following:

Need? Perceived (or not) by the state as an expression of sovereign interest, governed by prevailing social, political and economic interest. What is it that requires regulation and why?

Response? Should the regulatory intervention produce a controlled market or an enabled market? This is the carrot-and-stick conundrum. The chosen response might sit somewhere along the continuum of state regulation to deregulation to community or commercial regulation.

Context? Will the regulatory response operate where governance is otherwise through autonomy supported by a compliant (or at least non-resistant) civil society? If not, what are the contextual factors ranged against any regulatory response which will, of necessity, require its adaptation?

Technique? The initial consideration in consolidated states is the place of law in any regulatory mix. Will law provide an essential but subsidiary control role, or where the challenge emerges in states of lawlessness, will the regulatory option require law's boundaries?

Purpose? Principally in whose interest is the regulatory response offered for and governed by? Is it intended to control state/economic interests or to better ensure and regulate free civil society? Will the response to some extent deny choice through compliance or exclusion?

Relationships? The regulatory challenge produces tension so it is fair to assume that the regulatory response will be directed towards, at least in part, resolving such tension. The challenge, particularly with legal or law enforcement options and the employment of sanction responses, is to avoid, through a prohibitive and interventionist state regulatory incursion, exacerbating social and structural divides.

Thus, the policy maker soon realises that regulatory responses are designed to realign and reconstitute essential social, economic, political and cultural relationships in contexts where the relationships are strained. The regulatory relationship agenda will include the following:

- *Regulation as a field of social enquiry* – regulation as a socio-political phenomenon within which relationships of control and collaboration are struck and tested;
- *Regulation as a political ideology* – regulation as a framework of power and authority, dominion and dependency determining the style governance of civil society – for example, Welfarism;
- *Regulation as economy* – even deregulation and competition, regulation and market protection;
- *Regulation as state institutionalisation* – wherein state minimisation is a concern so as to free up the evolution of organic regulatory arrangements, or in some hybrid form with some degree of state or commercial sponsorship;
- *Regulation as a control function* – paradoxically the regulatory response fosters and delimits essential relationships;
- *Standard-setting* – regulation as information gathering and towards behaviour modification.

These relationships confirm Julia Black's preferred mission for regulation, which she sees as:[4]

> . . . the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes *with the intention* of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard setting, information gathering and behaviour modification.

This definition identifies at its core promoting a more pluralistic and inclusive account:

- the essence of which is to influence or alter behaviour;
- with an emphasis on the effectiveness of techniques and methods; and
- it must be *intentionally exerted.*

In this context then what could be said to be the *spirit of regulation* which the policy maker should reflect? Even in a climate of deregulation, complex social processes remain in need of regulation. So, in what spirit does regulation progress? When is self-regulation appropriate and successful? If commercial relationships are at the heart of the regulatory exercise, is everything in the contract non-contractual? What else besides law can and will create a sense of obligation and willingness to comply? Therefore, what is the moral foundation (influencing the regulator and the regulated) for compliance with laws, rules and mutual obligations? Is there a need for constant dialogue between regulators and the regulated? Such dialogue can take the form of *responsive regulation*, which is regulation in the shadows of the law preferring persuasion as the broad-based foundation of the regulatory pyramid (see discussion of tripatism). Ultimately, the spirit of regulation which a policy strategy should reflect grows from what I later expand on as a *community of shared fate*, where the prevailing realisation is that poor regulatory performance will be damaging to all, and will exacerbate communities of shared risk from which such fate evolves.

What procedures bring about the choice of a preferred regulatory technique?

As Robert Merton observed about choosing crime (or not), it all depends on opportunities and the constraints on opportunities, followed by the consequential decisions concerning strategies and techniques to be employed in order to achieve the original choice. The choices which this chapter advocates focus on:

- preferring complementary instrumental mixes to single-instrument approaches while avoiding *smorgasbordism*;
- exploring the virtues of parsimony, while less interventionist measures should be preferred;

- critically approaching the assumed benefits of escalating a response up an instrumental pyramid, as intending to build regulatory responsiveness;
- empowering third parties to act as surrogate regulators, freeing up scarce, centralised regulatory resources;
- maximising opportunities for *win–win* outcomes through expanding regulatory boundaries and encouraging engagement 'beyond compliance'.

This chapter will now proceed to explore the regulatory options available to policy makers and their potentials in generalised contexts of regulatory challenge. In this exploration the analysis will intend to follow a concept of regulation as intentional in the manner it is directed towards behavioural change. The context for both the regulatory challenge to be addressed and the change to be achieved will be identifiable through and adaptive to social, economic and political relationships. Of course, as forces for regulation and its possible outcomes, these relationships will be dependent on particular political economies.

The first regulatory context naturally will be the state.

Place of the state as a context for regulatory challenge and within which regulatory responses are selected

If the state is the primary locus for articulating the goals of the community, then it becomes the natural location for regulatory intervention. The state as the authority behind regulatory intervention can claim legitimacy through its democratic community mandate (if it has one) or at least from its monopoly over legal enforceability. However, as later chapters will detail, there are growing regulatory opportunities where civil society rather than the state enunciates community interest.

The introduction to this text highlighted the hierarchical nature of the state's role in governance and regulation, as well as the manner in which disaggregated states exhibit hierarchical influence in a much diminished form from that which we expect in the modern, consolidated developed states. Therefore, when proposing the state as the site for both regulatory challenge and its appropriate resolution, we need to be specific as to the type of state context and influence we are imagining, particularly in terms of political economy. At the very least, we need to appreciate the state as representing multiple levels and sites of governance.

The centrality of laws and rules sponsored by the state as *command frameworks* presents a primary mode for shaping behaviour for regulatory decision-making. This said, one needs to be mindful (as I will discuss in more detail later) of the limitations of the law as the state's essential regulatory language and technology. These limitations will consequently, for a policy maker, increase the significance of alternative policy implementation techniques, beyond law, and the state's sponsorship of laws and rules.

What are the critical consequences for state-centric and rule-centric (law-centric) notions of regulation when there is a move in policy-making towards a *decentred regulation* strategy? (for more details on this, see Chapter 4). The larger question then becomes to what extent is the state necessary for regulatory sociability to evolve?

The regulatory state

More will be said on this topic as this book progresses. I touch on it here in the sense that the state has conventionally been seen as a source and home for regulatory projects. In addition, the state is often a key player in the selection of regulatory strategies, as well as in the provision of regulatory product and of its quality control.

The debate surrounding the regulatory state originates in whether it is a new creation and to what extent it can be seen as an essential and universal theme in the regulatory mix. If the regulatory state is new then why is it, as this book strongly argues, context-specific for particular political economies? There can be little argument that, for consolidated states, their regulatory incarnation is hierarchical. However, more recently, the role of the regulatory state in wider projects of regulation reveals a shift from government by command to systems of self-steering.

The contemporary crisis of the regulatory state has not been revealed alone in terms of pressures to deregulate, but rather a deeper crisis of command and control. Unlike immediate post-Second World War state welfarism and the nationalisation characterised by control through direct public ownership in the reconstruction economies, the contemporary challenge for the regulatory state is what to do following the collapse of many much vaunted self-regulation experiments. Is the answer a return to command and control even though heavier state intervention in the Washington Consensus was seen as the problem and not the solution?

In a post-Washington Consensus rethink of regulation, the US regulatory state approach is more of a compromise than command and control. Controlling business is significantly achieved through law-backed specialist agencies rather than through public ownership. In the agency model, the contingent nature of the regulatory process for distribution of power resources among social groups is apparent in the strategic pursuit of individual and shared interests by rational actors. Of this it could be asked: does deregulation have any controllable purpose?

The evolution and development of the regulatory state since the end of the Second World War has witnessed a shift from economic to social regulation, on to deregulation of economic relationships and away from social regulation, then back to social regulation particularly through crime control, and returning to economic regulation in trade liberalisation and responding

to global economic meltdown. The post-Second World War welfare state represented a crisis of legalism, as it did in other forms when the regulatory state retreated from welfarism. At the close of the last century the regulatory state was caught up in and promoted a rights revolution, notably in the workplace and for consumers.

However, in an epoch of *free-market* capitalism and the collapse of centralist economies, the regulatory state manages essential tensions in liberal democracy around the principles which should guide regulation, its forms, reach and objectives, such as:

- the recent trend to transcend legal formalism by trading in broad definitions rather than exact rules;
- representing regulation as not so much a choice between formality and compliance, intrusiveness or collaboration, but rather with the spirit of individual self-interest which defeats regulation;
- promoting the key to regulatory success as manipulating motivations for collaboration: exploiting self interest in shared fate.

The state uses law as its essential regulatory mechanism. With a shift away from state-sponsored regulation it is not surprising to see a dissipation of law's regulatory presence. As the next section suggests, this is as much to do with law's limitation as a regulatory strategy as it is with law's state sponsorship.

The place of law – Law's failing?

The 'Renew Deal' scholars[5] present an evaluation of modern law through three paradigms:

1) Law as a system that merely facilitates private ordering (in regulatory terms law is a thin regulatory frame encasing a freedom to contract and to transact and ensure property rights around a minimum set of rules).
2) Law as a regulatory model (law works on the assumption that social subsystems are incapable of regulating themselves and therefore it is critical to intervene with goal-oriented legal policies).
3) Law as a progression from a regulatory model towards a governance approach (based on reconstitutive legal strategies that aim to 'restructure sub-systems rather than simply prescribe substantive orders'[6]).

In facilitating private ordering, law can fail the regulatory needs of all those individuals and communities outside, but effected by, the contractual relationship. Law as a model always relies on enforcement rather than engagement. The most likely area in which law will facilitate pluralist regulation is its essential facilitation of governance. Even so, law is not at its

best as a tool for reconstitution but rather as a framework against which reconstitution can be reflected and ensured.

A problem for the development of law as a useful or even essential component of pluralist regulatory strategies is to challenge whether it always needs to be a state-centred concept of law – c*an there be any other?* International law has come to realise that its deference to nation-state legal enactment of conventions is a limitation which only perpetuates the pervasive force of domestic over international interests.[7] International criminal law, for instance, is struggling to create a new role for legality which is supranational by incorporating and conflating the difference and uniqueness of domestic legal traditions.

There is no doubt that law remains the central control technology and regulatory language of the state. But maybe this is only so for consolidated states, where constitutional legality is robust and less compromised. In fragmented states, where law has less regulatory presence, or is even part of the regulatory problem, can be found governance contexts where the truly negative influence of law in regulation are often exposed. For instance, if the legal system of a disaggregated state is not independent of political influence and is corrupted by commercial interests, it not only fails in its duty as the regulatory umpire but can actively contribute to the dysfunctional social and market conditions which are ripe for regulation.

How the law gives expression to particular values is a critical question in responsive and reflexive regulatory fields. In order to appreciate the place of law in regulation do we need claims about the nature of law? To answer this last question, law needs an interpretation and an operational frame which is more than *stylised concepts that summarise patterns of empirical variation*.

Perhaps the real issue of failure in law as a regulatory paradigm has been its inability to settle on a determined role and stick with it. Below, we look at the expressive/declaratory function of the law where the norms and principles that law expounds can situate it as *motivation* behind the obedience required for other regulatory strategies to work. Law as threat is the other, less constructive side of the motivation purpose. Morgan and Yeung (2008) offer the purpose of law as *umpire*; the honest broker if you like, settling contested interests in the regulatory mix.

This book prefers, outside settling law's motivation and the consequent role it might play within pluralist regulation (see Chapter 10), seeing law as a device (framework) to enable transactions to take place in a market for knowledge, power and delineated boundaries. It is both an internal system for achieving this and a system that intersects and influences other internally constructed regulatory fields. Law interacts through control or freedom with politics and morality. To reduce the complexity of these observations it is enough to understand that the relevance of law in regulation is problematic and that within a sociability frame this is taken for granted. Law can plot

the frame within which sociability operates but it cannot claim the same scope of outreach that stakeholder collaboration, properly managed, can achieve.

In regulatory decision-making, law, then, is set up for what can be conceived of as a *paradox of intrusion and absence*. The decision for regulatory policy makers becomes whether it is a heavy or light hand[8] they want from law, and this decision is determined by the knowledge of law and its potentials possessed by the objects of regulation and the respect (or fear) in which they hold law over their otherwise respective unregulated worlds.

Legal theory places great emphasis on law's rule-making and rule-broadcasting functions. Law is the language of rules and the medium for their actionability. In this sense, rule-centred regulation without some law is difficult to conceive. Ascription to law shows that the regulatory strategy is taking seriously the connection between regulation and rules – rules as the product of interpretive communities, if we also see law as either such a product or at least tolerating such a process. The idea of law as a linguistic device is also richly embedded in Western legal theory.[9] Law can play even an absent role in self-regulation as *conversation within* communities (see Chapter 8).

However, as the law and morals debate reiterates, law is only one source and form of rules available to regulators. As is suggested below, command law cannot regulate complex social relationships and a single approach to rules as endorsed by law, if too rigid and mechanical, can spell regulatory failure where it is imposed on more organic and evolutionary regulatory projects.

It is said that law produces internal models of an external world against which it orients its operations through information gathered internally. Even where it can be applied to dysfunction, law has the capacity to be self-reproducing and to expand and often over-complicate the regulatory terrain. This phenomenon might be a natural consequence of the legislative monopoly (and limited appreciation of other regulatory frames) possessed by politicians and governments. Therefore, the overuse of law is not law's failing but an unhappy consequence of state sponsorship.

Returning to the concept of law as umpire, Chapter 9 will spend a little time examining law overseeing audit, trust and risk. For the analysis of *communities of shared risk* progressing to *communities of shared fate*, law can play an important role in making accountable the bonds of trust and the manner in which they confront and adapt risk. Law becomes a resilience tool in its audit function.

In a pluralist regulatory atmosphere, law can enhance sociability by providing a shading between legal forms and relationships on the one hand, and norms from other social fields on the other. Law will assist in placing any norm from any source along the spectrum of legality, which gives norms some legitimacy and agency.

Legality as a regulatory legitimator is a powerful justification for its presence in any regulatory mix. Legitimacy in legality can be measured at its source (through devices such as expertise, tradition and professional discourse), through its procedures (governmental and non-governmental participation, accountability and transparency), and its substance (effectiveness, equity).

The rehabilitation of law as a dominant regulatory paradigm will depend on the necessity of innovative and practical approaches through law that relate the regulatees more closely with their essential social values.[10] Judicial review is one mechanism to hold to account the internalisation and implementation of such values.

Introducing judicial review

Returning to law's audit function and its purpose as umpire, the process-based and procedural-rights-focused mechanism of judicial review deserves mention as a way in which law can at least regulate its own regulatory potential.

All exercises of collective regulatory power should be subject to review, irrespective of the interest of the state, and in determining the nature of any SRA the focus should be on function not on form. As SRAs exercise a regulatory or governmental function, all SRAs, whatever their association with the state, should be subject to a common body of principles of natural justice, rationality and legality applicable in both public and private law.

An independent judiciary can give form to the 'self-regulatory' function of the law as it reviews the manner in which the state or other regulatory agencies and associations meet common standards enshrined in legal norms. It is not enough, for instance, to ask civil society to have faith in an efficient and benevolent executive without offering a mechanism, such as law-as-umpire, which allows citizens to participate through self-initiated review, in the process of ensuring procedural fairness. If the executive reveals reluctance to enable or recognise such a review function, due to technical and pragmatic concerns, it will have a decisive impact on regulatory legitimacy.

Judicial review is a device wherein power, autonomy, community values and conceptual strain can all be measured against common values of procedural fairness applying to public and private interests and to institutional regulatory operations. Judicial review, however, is not one-size-fits-all. In this respect, the nature and power of judicial rule across legal traditions differs.

Judicial review can mediate a clash between private and *political* economy, in a way which executive state intervention may be deemed too partial to effectively achieve. In this *separation of powers* model, the state too is open to review from the independent arm of its authority.

There is some debate about whether judicial review represents legal dominion or legal pluralism. The nature of the debate at source is critically

affected by how the judiciary is viewed in different cultures and political economies. In certain state settings, because of the nature of judicial appointment and tenure, as well as the inconsistency of a separation of powers model in constitutional legality, judicial review may translate into little more than finding *governmental interest*. After all, judicial review is directed in bulk against the reality of executive power, even where private interests are also contested, and as such depends on the independence of the judiciary to balance the executive in any clash over authority.

Another challenge to the utility of judicial review as an essential regulator is the possibility, in what remains an essentially legal language, for there to arise a judicial misreading of the use that non-legal systems are making of legal norms. Aligned with this problem can be a failure in the legal adjudication context to understand the nature of diverse and largely autonomous regulatory bodies and their regulatory function, leading the courts to make inappropriate assumptions about the role other parts of the legal system should play in their supervision.

Recognising all this, there can be little doubt that the growth of judicial review over recent years in major common law jurisdictions reflects the inherent need, as regulatory options diversify, to retain the oversight of legality, at least in consolidated state environments where state regulatory incursions can present a significant challenge for review. In addition, the legitimacy of regulation fields in general depends to some degree on the separation of powers, and judicial review offers such a mechanism.

Specific regulatory techniques – Flat to sharp

This section necessarily outlines strategies, instruments and techniques of regulation which vary along the continuum we have established earlier: sharp to flat. However, the distinguisher here is not essentially state intervention, formality, mechanicality or sanction-reliance. All of these are implicit in the distinction sharp to flat, but it is *compatibility with sociability* which is much more important when looking at the ordering and progression of this listing of options; flat to sharp.

Consensus

I will say little about this regulatory form here and reserve a fuller discussion until we look more carefully at the constituents of regulatory sociability. In any case it might be said that a state of consensus does not need regulation as it is both the aspiration for regulation and an important outcome. The place of consensus within regulation is a little more complicated than this because consensus is a dynamic state which requires achievement and maintenance. It can be fragile and transient and thereby may require the support of empowering and protective regulatory contexts to confirm its sustainability in any case.

Consensus can be voluntary or imposed, organic or mechanical. It may arise as a reluctant compromise in the face of other regulatory alternatives.

And what is consensus besides an agreement about the nature and conclusion of decision-making? It leaves the analyst with the deeper question of consensus about what.

Consensus is the original self-regulatory position before persuasion. Consensus may have been obtained by persuasion and maintained through higher levels in the regulatory pyramid, but as a regulatory option it retains the same characteristics no matter what the power relations are behind its achievement and perpetuation.

Voluntarism

This area of regulatory strategy can be all things to all men. As an example of the nature and development of voluntarism as a regulatory style it is useful to look at non-state, non-market settings. Voluntarism manifested in transnational social action is becoming a particularly potent regulatory force, filling the global civil society void left as governance mediators and commentators alike struggle to determine the nature and purpose of the amorphous 'global community'.[11]

It could be said that non-governmental organisations (NGOs) are the organised face of voluntarism worldwide. When Ahlquist and Prakash (2006) ask what are NGOs, they critically conclude:

> In addition to carrying normative baggage, the term NGO suffers from descriptive inaccuracies. After all, firms are also NGOs. Although several activist organisations are termed 'non-governmental' many of them rely on governments (instead of members or private donors) for much of their funding . . . The terminological confusion is accentuated because several literatures study the advocacy and public good provision functions of organisations that are often subsumed under the term 'NGO' . . . in the ultimate analysis these NGO or NPO (non-political organisations) or social movements are interest group organisations.[12]

Civic participation (see Chapter 8), and what has come to be known as democratic ownership, is having an influence on regulatory policy.[13] It is suggested that institutional design (be it sponsored by the state or private sector interests) can enhance civic participation and, ultimately, thereby increase a citizen's sense of democratic ownership of governmental processes. If civic participation and consequent democratic ownership are given at least equal weight in the eventual evaluation of regulatory outcomes, against economic competitiveness and wealth generation, then a more multi-layered institutional polity will feature in regulatory governance as participation tends to pervade more and more regulatory layers of

governance. The impact on the legitimacy of governance, institutional and otherwise will also grow more positive.

Conversation and dialogue

The discussion of regulatory conversation underpins many, if not most, of the regulatory strategies summarised in this section. Julia Black (2002) proposes regulatory conversations and associated discourse analysis as new analytical and theoretical approaches. She determines regulatory conversations as:

> The communicative interactions that occur between all involved in the 'regulatory space'.[14]

Through discourse analysis Black contends that regulatory conversations are what constitute the regulatory process through relationships of meaning delivery and through interaction demonstrated by the communication through language.

Specifically, language in the form of conversation is said to provide perform crucial regulatory functions: it forms the basis of coordinated action, establishing important sites for conflict and contestation and it is a means for resolution. Associated with these functions are four key contentions of discourse analysis offered by Black, which she says shed light on the nature and impact of regulatory conversations:

- the meaning of language and its role in coordinated social practices;
- the construction of identities through the communicative interactions of language and conversation;
- the relationships of language, thought and knowledge; and finally
- meaning, thought, knowledge and power are open, through conversation, to contestation and change.

Critical as it is for the development of regulatory sociability, Black emphasises the manner in which conversations require as well as create, adapt and sustain interpretative communities which are essential if the trust relationships on which collaborative strategies are to grow and be dialogued. If we are to interrogate these communities beyond normative aspirations or structural framing, it is essential to seek out the correlation between language and power. In order to achieve this, an interest in regulatory conversations should not be reductionist.

Conversations do not occur in a vacuum. It is the contextualisation of conversations and the manner in which they are employed to enunciate power relations which gives a more underlying appreciation of the impact of language, not revealed through a singular fascination with discourse as an abstract rather than a socially constructed process.

Self-regulation

The rise and fall of self-regulation in many respects is a story of the struggle for private entities to free themselves from the state while at the same time seeking to retain the security of state sanctions in the shadows when property rights are contested or when a coalescence of multiple self-interests breaks down.

> Private governance also may not be self-enforcing and may require the coercive apparatus of public law. The upshot then is that deregulation and reregulation go hand in hand.[15]

Several types of self-regulation are being identified (based on the relationship of collective self-regulation and government):

- mandated self-regulation;
- sanctioned self-regulation;
- coerced self-regulation;
- voluntary self-regulation;
- verified self-regulation;
- accredit self-regulation.

Other manifestations of self-regulation involve some combination of collective self-regulation, intra-firm regulation and interactions of individuals and firms making legal contracts.

Black proposes three typologies of self-regulation:

1) Regulation as the promulgation of rules accompanied by mechanisms for monitoring and enforcement.
2) The government as regulator. The regulation techniques here include direct state intervention in the economy.
3) Regulation includes all mechanisms of social control or influence affecting behaviour from whatever source, intentional or not.

Collective self-regulation and intra-firm regulation are part of decentring regulation from the state, as they indicate that regulation occurs (partly) separate from the government. Both are manifestations of the multiple locations of regulation and therefore illustrate a decentring regulatory system. Self-regulation through the interactions of individuals and firms making legal contracts is not necessarily a manifestation of decentring regulation as the contract has to be legalised by the government or by state-sponsored laws.

In order to be able to analyse decentring regulation and the role of self-regulation, it is necessary to explore the concepts of regulation, decentring regulation and self-regulation in depth.

In a decentred system, there is regulation in many rooms. Self-regulation is part of this process of decentring regulation as a non-governmental source of regulation. However, self-regulation may also, of necessity, engage with state-centred regulatory systems. Non-governmental actors or collectives have to internalise the regulation given by the government and therefore need a form of guided self-regulation.

Julia Black's work is seminal for the critical understanding of self-regulation. [16] Black identifies self-regulation as a growth industry, while at the same time noting that more original and organic regulation takes this form. In defining the broad remit of self-regulation, Black concedes that confusion arises over the idea of 'self' and what is 'regulation' in this situation. She sees self-regulation as describing:

> ... the disciplining of one's own conduct by oneself, regulation tailored to the circumstances of particular firms, and regulation by a collective group of the conduct of its members or others. The definition of regulation varies from the 'command and control' model of regulation, to regulation by the market, to voluntary decisions of each individual to control their own behavior. Finally, the term can be used to imply no relationship with the state at all, or to describe a particular corporatist arrangement.[17]

As with networking, self-regulation can gain bite through collaboration. SRAs combine the governmental function of regulation with the institutional and often legal structure and interests of a private body. These associations also act as intermediaries linking different parts of society, such as through developing and furthering public policy through collective pressure. In this lies one of the challenges for regulating SRAs against their powerful political and economic influence. This private interest *government* directed against public policy objectives can make the achievement of interest mutualities, essential in sociability, paradoxically less difficult and more possible to achieve, depending on how strong is the governance of SRAs over its members and the ethic of SRA policy formulation and direction on their behalf. Ultimately, the potential for SRAs to contribute to interest mutuality depends on the nature of their intermediation, the collective view of their purpose and terms of agency, and ultimately on a particular conception of the responsibility of society (to their members alone or to a wider public good).

The criticisms of self-regulation are obvious and relate primarily to the perpetuation of ungoverned self-interest particularly with the added muscle of SRAs. To counter the anarchy of individualised interest exacerbated here, while not undercutting the autonomy desired in self-regulation, Black proposes a responsibility device; constitutionalised autonomy. The central element of the principle of constutionalised autonomy is that:

> It combines an emphasis on articulated values with a focus on regulatory technique and a recognition of regulatory limitations . . . in incorporating a more complex concept of 'public' it emphasises the nature of SRAs as mini-systems of collective government. In requiring flexibility it demands a targeted and tailored approach, judicial responses being directed at the particular decision in question. In separating technique from values, it cautions the prescription of one without the other, of regulatory reforms without an articulated value-base and vice versa. In demanding the articulation of values it recognises that these may vary with different political theories. In short, it stresses that constitutionalising self regulation is necessary; the constitutions developed should be as varied as the acts and decisions of SRAs to which they relate.[18]

In the last sentence, I suggest, Black concedes the limitation of her proposal. Constitutional legality as both a legitimator and a genuine accountability framework demands some institutional consistency and some common core of language and authority. It cannot be infinitely flexible. This tension between reflexive subjectivity and uniform constitutionality is not, I suggest, relieved by a general return to value-governed reform, when the source and nature of such values is neither expressed nor typified. On the other hand, the recognition of the need to develop an understanding of the role of law in the context of functionally differentiated society so as to ensure better integration of regulation, and of the political and economic and social spheres on which it relies, is moving the discussion in the right direction.

This book emphasises the changing nature and structure of the state. Regulatory bodies which were not traditionally part of the institutions of the state do need to be understood in their own participatory terms and the self-regulatory literature engages this aim. The role of the law and its judicial agents in controlling self-regulation should be premised on such an understanding of the diversity of the regulatory form. I argue, however, that the role of the law and of judges must not be beholden to regulatory diversity and subjectivity, but rather they should temper their authority against a contextual understanding of regulatory diversity.

Compliance

Compliance regulation works out of the experience that law cannot ensure obedience because it is either under- or over-effective and thereby it distorts core social values.[19] Essentially, law fails compliance due to insufficient deterrent effect due to difficulties in detection and proportional punishment. When law loses its deterrent effect it then fails in its regulatory objective in conditions where command and control sanctioning is anticipated.

It is a little misleading to refer to compliance as a regulatory strategy. In fact it is better understood as an enforcement outcome, or as an attitude to regulation. The confusion has arisen in recent business parlance where compliance (and compliance institutionalisation) actually refers to the manner in which the firm can measure and maximise constructive obedience to any chosen regulatory strategy.

The challenge of nurturing regulatory compliance is seen by some writers as essentially tied up with the appreciation of procedural justice and the legitimacy of the regulatory authority which this imbues.[20] It is suggested in this way of thinking that also crucial for the legitimacy of the enforcement agencies is the perceived legitimacy of the rules and norms they enforce in affecting the compliance behaviour of objects of regulation. Studies have shown[21] that one's perception of the legitimacy of the law is moderated by the effect of procedural justice on compliance behaviours; procedural justice is more important for shaping compliance behaviour when people question the legitimacy of laws than when they accept them as being legitimate. When, through challenging the legitimacy of laws, people increasingly distance themselves from the regulator, the procedural justice behaviour of the regulator takes on more relevance for them than it would if they complied with the laws without question and thereby did not connect compliance with enforcement treatment.

These observations relate to the individual to be regulated and their perception but they could as well apply to the behaviour of firms where the firm's *attitude to law's legitimacy* is personally constructed by those who have decision-making power, and can be influenced by regulation in that decision-making. These are important findings for regulatory policy because while agencies may have little or no control over the laws they enforce, they can influence compliance particularly where law is criticised, by ensuring the highest levels of procedural fairness.

Breach of corporate compliance is often viewed too narrowly through the legal lens. In a more reflexive context internal compliance systems can be empowered to give organisation sub-systems more incentives to activate core principles and to police their agents against a principled framework. A legal liability model involving payment of damages for agent misconduct and fundamentally altering business practice may be far more costly and retarding to business than mitigation founded on principle-based internal compliance structures. In addition, static legal regulation may encourage recalcitrant business to set minimum standards that meet their needs and yet avoid real accountability for substantive breaches.[22]

Exhortation

When writing on the expressive function of the law, Cass Sunstein (1996)[23] explains the social meaning which is expressed through 'making statements' as opposed to controlling behaviour directly. This is more than a reference to

the ethical foundations of a regulatory framework such as law. In fact, ethical foundations will not of themselves generate regulatory compliance without a prevailing belief among those to be regulated that what ethics convey is intrinsically valuable. In this understanding exists the explanation of why in particular circumstances laws, such as those concerning private morality, may have little or no effect on social norms.

Exhortation as regulation is not dependent on its effect on norms, and the consequent behaviour which norms desire to change. In this respect it may run counter to Black's definition. Instead, exhortation may be the grounding of statements towards which regulation is connected with the individual's interest in the integrity of the statement and of those making it. The expressive grounds for action, then, should be distinguished from action undertaken solely because it is believed to be right, which is what the influence of ethics would anticipate.

Another way in which exhortation can have a regulatory consequence is where the statement complements the self-perception of the object to be regulated. It can therefore be expected that exhortation is more likely to influence behaviour where it is driven in a large part by reputational effects.

It should be remembered, however, that the reception of any exhortation relies on the information possessed by the regulator as well as the object of regulation. Information allows for a valuation of compliance with the statement, or otherwise.

Some exhortations are concerned with managing norms, and consequent behavioural changes. Others can settle for the significance of the statement itself, irrespective of its consequences. Take, for example, the criticism of emissions trading as an environmental regulation strategy. It is said that emissions trading has a damaging effect on social norms by making environmental amenities seem like any other commodity: a good that has a price to be set through market mechanisms, and thereby not in need of special claims to public protection. Put this against the empirical realisation that public attitudes to the environment do not depend much on whether government has a command and control system or instead relies on economic incentives. Here, the 'statement' made for emissions trading is that it may lead to lower costs, more jobs, cleaner air, while at the same time prevailing norms remain constant. Both the statement of law and the statement of criticism are tending towards the same outcome but are based on markedly different reasoning.

Exhortation as a regulatory strategy is all about legitimacy. It is necessary to ensure, through all levels of accountability to civil society (see Chapter 9), that those who engage in norm management by exhortation are trusted by the people whose norms are at issue.

Finally, exhortation relies on effective communication. Promoting risky behaviour for profit, and the advocating of social inequality through

regulation, in contexts of paternalism or illiberality, will impede the integrity and acceptability of regulatory conversations

Codes of conduct, social responsibility programmes and best practice

Best practice regulatory models have been around for decades and have morphed into industry-specific programmes such as corporate social responsibility (CSR). CSR has its detractors who doubt the genuine capacity to strike the appropriate balance in motivation for corporate executives between contributing to the general social welfare of society, and the wealth and profit returns delivered to shareholders.[24] In an effort to evaluate *what's in it* for companies and shareholders, as well as for civil society beneficiaries, CSR research has compared corporate social performance (CSP) measures against standard financial performance indicators.[25]

In terms of CSR, corporations have a variety of options to advance their socially responsible goals ranging from simple charitable investments to more broad multifaceted responsibilities. It has been argued that philanthropy without embedded and interactive community engagement will not enable CSR to stimulate changes in corporate culture towards more socially responsible corporate ethics.[26] To further ensure that a 'giving back' culture is more than a public relations eventuality, CSR has often been developed along with clear codes of culture, which then translate into more specific manuals for corporate and industrial best practice. The criticism of these developments has been about the extent to which credible accountability frameworks, necessary to ensure legitimacy, will infringe the independent initiative, ownership and vitality of code of practice preferences ahead of actionable rules and regulations.

Tripartism

Tripartism grows from the failings of self-regulation. It depends on structures which graduate regulatory response in the face of regulatory resistance. For instance, Braithwaite's regulatory pyramid (2006)[27] is founded on critically approaching the assumed benefits of escalating a response up an instrumental pyramid, as intending to build regulatory responsiveness of state, business and citizens, to increase the dependability of outcomes through instrumental sequencing. At each stage of such a regulatory escalation warnings of failure are reiterated and incrementally intrusive regulatory responses are triggered.

Particularly in the self-regulation context it has become apparent that a constructive way to avoid regulatory capture and to restrain self-interest is to inject a third party into the regulatory mix, with different interests to protect than necessarily those of the object of regulation and even of the regulator.

These third-party injections often assume the form of public interest groups (PIGs). Their role is to keep the regulatory process honest by:

- injecting a new dimension of interest which should better reflect public good;
- providing an opportunity for such interests to influence contractual relationships where otherwise private law might exclude its standing; and
- avoiding the relationship between the regulator and the regulatee (or the SRA and its members and agencies) from becoming too cosy and even captured in a web of compromised shared interests.

Smart regulation

In short, smart regulation means areas where the need for external intervention is minimised. Smart regulation is more about smart regulators who reduce the areas of conflict and dispute, preferring to exercise common terrain wherein controls are agreed and compulsion diverted.

The European Commission in a Stakeholder Consultation on Smart Regulation in 2010 defined smart regulation as follows:

> Smart regulation is not about more or less legislation, it is about delivering results in the least burdensome way.

And it has three main characteristics:

1) It concerns the whole policy cycle – from the design of a piece of legislation to implementation, enforcement, evaluation and revision.
2) It must be a shared responsibility of the European institutions and of member states.
3) The views of those most affected by regulation have a key role to play in smart regulation.

For nation states or self-regulatory environments known for their rules and regulations and strong enforcement capability, *smart* regulation offers a change in the mindset of regulatory agencies: from that of a regulator and controller to that of a facilitator. The key forces at work to attract a smart regulation approach in favour of command and control are globalisation, technological advancements, and a more informed and educated citizenry.

Globalisation has brought about more intense competition, including competition for investments. Whether a regulatory regime is friendly to businesses and investments is a key competitive factor. This is especially so for jurisdictions with limited or expensive natural advantages, how efficient they are and how well their rules and regulations serve the interests of the

businesses and the community are important economic governance as well as regulatory considerations.

Changing the agency mindset from that of a regulator or controller to that of a facilitator is the essence of smart regulation. This means adopting less of a *regulator-centric* approach and shifting to one that is more *customer-* or *citizen-centric*. In a regulator-centric approach, the tendency will be to draw up rules that are convenient to the regulator, with little regard for the regulatory costs and administrative burden to be borne by the regulated. But if one adopts a customer- or citizen-centric perspective, the agency will be a lot more mindful of the implications for the recipients of rules. The mindset will be one of trying to help and facilitate rather than acting in the regulator's own narrow interests.

Globalisation and technology have also resulted in regulators having to grapple with far more complexity than before. There are many more new products and services, new companies and industries, and new ways of doing business. The electronic medium has revolutionised how certain transactions are carried out. All these present new issues that regulators are struggling to keep up with. Regulators have little choice but to consult experts from the industry and the community.

In the past, state regulatory agencies seemed to be very much suspicious of the private sector's involvement in regulation, a fear of having a fox in the henhouse. When agencies formulated their regulation, they did not want the regulated to know what they were doing because they assumed the regulated would always be trying to outwit them and get around their rules and systems. In simpler days, regulators thought they knew better and saw less need to consult.

Smart regulation is a transition that almost every government in developed economies has gone through. There is a more informed and educated population, and industries also demand to be consulted and heard. A more consultative approach also reflects a greater sense of confidence on the part of the government in the possibility of achieving public good and not just private adversariality resulting out of collaborative regulation. As a consequence, regulators are required to gain confidence that their regulations will be effective even when the industry is consulted. In reality, regulations will be more effective if they have taken into account inputs from the stakeholders.

However, smart regulation is not an invitation simply to roll over to producer or consumer interests. Gunningham, Grabosky and Sinclair (1998)[28] in the context of environmental protection suggest:

> Indeed, it is arguable that the window of opportunity for averting major ecological disaster is a rapidly shrinking one, and that, in some cases, it may already be too late to prevent ongoing environmental degradation.

> For policymakers, a variety of strategies are available that might, subject to political and economic constraints, enable serious environmental damage to be slowed down, halted, or ideally reversed. There is a need for much more flexible, imaginative and innovative forms of social control which seek to harness not just governments but also business and third parties. For example, we are concerned with self regulation and co-regulation, with utilising both commercial interests and Non-Government Organisations, and with finding surrogates for direct government regulation, as well as with improving the effectiveness and efficiency of more conventional forms of direct government regulation.
>
> Regulation – even broadly defined – is not the only means of addressing environmental problems but will, in the very large majority of cases, undoubtedly be a crucial one. However, most existing approaches to regulation are seriously sub-optimal. By this we mean that they are not effective in delivering their purported policy goals, or efficient, in doing so at least cost, nor do they perform well in terms of other criteria such as equity or political acceptability.

Responsive and reflexive regulation

Responsive regulation covers broad substantive values and concentrates on the ways to activate and to maintain these values within the practices of a variety of self-regulating or semi-autonomous groups. Central to responsive regulation is the commitment that any external intervention into self-regulation should depend on the extent to which the regulatee has already internalised the underlying regulatory aims. Implementation strategies, therefore, are the province of objects for regulation reflecting their individual cultural contexts. As Ayres and Braithwaite (1992) contend,[29] regulators could intervene if it is found that objects of regulation have failed to design legitimate or effective self-regulation. Responsive regulation, therefore, stimulates and facilitates the reflexive process by promoting and requiring the observation and operation of particular core values in the conduct of regulatees.

Black (1996) sees reflexivity as having been turned to the regulatory sphere as a result of the failure of regulatory programmes to achieve their desired ends, whether this is due to ineffective implementation, mismatch between regulatory strategies and issues, a failure of law to become policy-oriented and respond to social, political and economic consequences of its operation, or because regulation imposes unjustifiable social and economic costs and prevents the optimal allocation of resources through the market. Teubner (1983) conceives of regulatory failure in more radical terms; as an incompatibility of the internal logics of different sub-systems, the remedy being to recognise the impossibility, which is analytical as opposed to merely

practical, of regulating directly and to change regulatory strategy to regulate indirectly, to induce actions rather than to command them.[30] Law thus has to recognise the normative closure of sub-systems and to make use of their cognitive openness. Integration of indirect regulatory options is essential here and reflexivity is aimed at ensuring that integration can be maximised. Reflexivity also essentially reviews the control frames of sub-systems in the aim of democratising self-regulatory initiatives.

Baldwin and Black (2008) discuss ways to make law and regulation 'really responsive' other than by focusing on object compliance, directing attention in turn to:

- the operational and cognitive framework of the regulatees;
- the broader context of the regulatory regime;
- the different precepts of regulatory strategies;
- the state's own performance; and
- changes in each of these elements.

Overarching these considerations is the understanding that responsive regulation embraces the substantive public-interest-oriented goals backed by widely accepted social values and is either related to the values of the regulatees or can be associated with their values. The reflexive goals boil down to promoting broad substantive values through regulation and insisting on the incorporation of these goals into the regulatory strategies of different actors. Such goals should, as the authors insist, pervade all the different tasks of regulatory enforcement activity; detecting undesirable non-compliant activity, developing tools and strategies for responding to that behaviour, enforcing those tools and strategies, assessing their success or failure, and modifying them accordingly.[31]

Reflexive regulation has its flaws. Its aim to place its values at the heart of the implementation strategies of different objects of regulation and the regulatory project at large may be unrealistic. How can regulators be expected to know and to monitor all their objects of regulation and their propensity, or otherwise to embrace general norms which may not be organic to themselves and may be subject to the pressures of change facing the regulatees and their enterprises? And, as Teubner suggests, how can law be required to set substantive duties when its capacity for enforcement of such duties is as limited as its specific definitional capacity?

Responsive law and regulation consists of substantive and procedural values derived from a plurality of regulation originating in the state, while indirectly insisting that participants incorporate these values in their regulatory approaches. Reflexive law and regulation involves a process though which its substantive values are applied to the behaviour of participants who agree on them, revising the process along the way as values impact on changing behaviour.

Networking

Braithwaite (2008) identifies global regulatory networking as one of the reasons for and the most effective manifestations of the recent resurgence in regulatory capitalism. Lie (1997) suggests that regulatory networking is a consequence of market embeddedness. In this theoretical configuration of markets, human economy is embedded and enmeshed in economic and non-economic institutions:[32]

> The bedrock assumption of the embeddedness approach is that social networks – built on kinship or friendship, trust or goodwill – sustain economic relations and institutions. The basic idea is as old as sociology itself . . . network analysis is essential to the embeddedness approach . . . social relations are fundamental to market processes . . . it seeks to strike a correct balance in analysing markets and other institutions. In so doing it registers the existence of disparate economic phenomena and institutions . . . it emphasises power and control struggles as a crucial constituent of markets. The embeddedness approach, in other words, avoids market essentialism and incorporates power.[33]

For such an explanation of contemporary regulatory networking to have bite it needs also to take into account the structured inequalities underlying the normative equality and freedom in the market. Markets are not free and networking cannot grow around that assumption. Social networks inevitably exist within a larger historical and structural context (see the social media examples in Chapter 5). The embeddedness approach, if it is to explain the evolution of regulatory networking, must be embedded in larger historically social structures – not only state institutions, but, in the contemporary globe, also in shifting transnational and supranational relations and structures.[34]

Collaboration

There has developed a recent interest in researching collaborative regulation particularly in the non-state sector and between multinational corporations (MNCs) and NGOs.[35] MNC and NGO collaboration ranges in motivation from shared goals and purposes, through NGO pressure on MNCs (discussed in more detail in Chapter 8), to a more sophisticated appreciation of the shared benefits of collaboration and mutuality.

> According to Rondinelli and London (2003),[36] cross-sector alliances – collaborative relationships among NGOs and MNCs – may offer opportunities for MNCs to achieve legitimacy and develop the capabilities needed to respond to increasing pressure from stakeholders to address environmental and other social Issues.[37]

The recognised difficulty facing these collaborations is in the practical alliance of organisations with fundamental differences in structures and values. In emerging markets, particularly where the shadow of the state is faint, these relationships are more likely characterised by hostility and mistrust. In the past, learning, knowledge and experience deficits between profit and non-profit structures were a further impediment to collaboration. However, today, as NGOs grow to mirror the structure of major MNCs and the profit/non-profit divide is more apparent than real, effective operational alliances, particularly in the context of shared resource sustainability, are less foreign to one another.

The factors which influence the opportunity for and success of non-state collaboration between industry, commerce and social capital include the following:

- country determinants and market characteristics;
- industry characteristics and their intersection with civil society;
- company frameworks and their changing ethical cultures;
- NGO characteristics, resources and strategic fit with corporations and industrial networks;
- managerial factors and experience with NGOs and social networks; and
- community engagement, receptiveness and education.

A more advanced field, in recent times, of cross-sectoral engagement has been in the explosive development of public/private partnerships (PPPs). I will not explore these in detail here largely because of the recognition of perverse motivation for their development concealed behind 'Washington Consensus' style thinking on small government: *government is the problem not the solution*. The double standards behind proliferating PPPs make useful commentary on their relevance for a case that favours regulatory sociability, difficult to summarise.

Market pressure and competition

The place of markets, market pressure and competition in the regulatory mix is a huge topic. Markets can be seen as regulators and as arenas for regulation. Markets can resist regulation in the name of profit maximisation and the natural economic determinants of freer competitive conditions. Markets can also collapse and with their fall comes another regulatory challenge out of regulatory failure.

Recent global regulatory activity has focused on repositioning nation state interests in favour of world trade benefits.[38] The push to break down anti-competitive practices in global trade has advanced both on a specific case-by-case basis and through major strands of cooperation which feature informal consultation, general policy development, sharing of competition policy information, and the facilitation of procedural and substantive

convergence in regulatory direction (through entities such as the International Competition Network (ICN) and the International Competition Policy Advisory Committee (IPAC)). Despite these frameworks of collaboration and the high hopes invested in them, 'nothing done yet shows promise of bringing substantive policy convergence'.[39] This disappointment is ascribed to the nature of the network and the potential to truly advocate for change.

Market-oriented reform with a regulatory mission is credited with changing the fundamental relations between MNCs and governments.[40] In the 1970s and the 1980s, economists largely turned their backs on state intervention in preference to the 'Washington Consensus'[41] as the standard policy proscription for multilateral financing and market development. The Consensus emphasised the role of market forces through privatisation, trade and investment liberalisation, and deregulation as a recipe for promoting economic growth. Multilateral lending rather than state largesse became the suggested route for developing countries out of poverty and economic stagnation. However, the decades that followed showed that the opening up to MNCs leads to exploitation more than emancipation (see Chapter 8). The global financial collapse (GFC) in 2009 revealed the tragedy of an over-reliance on free market banking devoid of ethics and foresight (see Chapter 7). Privatisation of commerce, industry *and* regulation was demanded as the way forward for efficient socio-economic development. The market would restrict or remove what the state could only retard, or so the dogma went. But

> From the vantage point of more than a decade of (market) reforms, it appears that the reforms have failed to effect the transformations in governance of MNC-host relations in infrastructures... Instead, the introduction of private ownership in the infrastructure sectors appears to have merely extended the preceding pattern of MNC-host relations into these sectors. The irony here is that history seems to be repeating itself, for MNC-host conflict in these sectors was intense following the end of WWII and which culminated in the widespread nationalisation of utilities.[42]

As the recent 'Occupy Wall Street' movement demonstrates, it is the activism of civil society rather than the tenuous and often compromised interventions of the state (shutting the door after the horse has bolted) that has challenged irresponsible market reforms. The question is whether with a radical rethink of institutional failure in recent market collapses, the market can still be relied upon as a viable regulator in a world where common interests grow to surpass wealth-generating priorities?

It is important in any analysis of the nexus between the market and regulation not to ignore themes of moral economy.[43] The moral critique of

the market has a long pedigree. This history of thought is the explanation in part as to why there are no self-sustaining markets without some forms of rules and regulation – the Hobbesian problem of order remains a perennial predicament.[44] The moral critique of markets and, more specifically, the argument for market deregulation always emerges more strongly after market collapse, hence the rediscovery of socially responsible economics at the time of the 2009 global financial meltdown.

Ogus (1995)[45] discusses competitive self-regulation in unconstrained market terms, in which a firm adopts standards of product quality in response to consumer demand and which may incorporate industry-wide practice. In other contexts, another derivation of this regulatory form, independent-agency-assisted competition, relies on an agency-accredited product quality certification to enable those awarded such status to be more competitive. Competition may also develop between accrediting regimes.

Globalisation has brought about a change in the nature of competition and competitiveness as a regulatory environment. Risk and innovation enable competitiveness. The question then arises as to how regulation, like marketisation discourse, can be directed to enhance the positive deterministic institutional change environments that globalisation can foster. Institutional competitiveness, rather than an overly rigid, static and dualist approach to modern capitalist economies, can provide institutional entrepreneurship and institutional hybrids which are much more at ease with pluralist and flexible regulation.

Legality

Flowing on from our discussion above of non-market and market regulatory contexts, this analysis of regulatory strategies focuses on legality as a framework for protecting the property rights essential to maintaining market distinction. It is true that legality has a wider frame and can be seen from the perspectives of rights protection and accountability. That said, certainly in market regulatory frames legality is about property interests:

> Market-based economies function effectively if property rights are clearly delineated, monitored, and enforced at low cost. Typically governments (executive, legislature and judiciary) are the main agencies that perform these functions. At a broader level, because governments set most, if not all the rules within which market actors function and private contracts are negotiated, firms have incentives to influence policy processes.[46]

The corollary of this observation is that where property rights are unclear, contested or compromised and, as a consequence, market economies are weak and ineffective, then, part of the problem may lie in a failing of legality to create and enforce a sound and satisfactory rule structure in order to

ensure market viability. This then can be seen as much as a failing of the state and the law as of the market.

In non-market environments, where legality may offer a subsidiary presence, Ahlquist and Prakash (2006) offer four ways in which globalisation is changing the place and presence of multinational enterprises, as a regulatory challenge:

- Cross-border consolidations are leading to deregulation *and* re-regulation.
- Governments have incentives to influence non-market environments in favour of home-based MNCs.
- Citizen activism to regulate MNCs (and fill the void of failed legality) is gaining cross-border competencies to match those of MNCs. Their collective opposition is significantly assisted by the Internet and by social media, neither of which experience much of the regulatory influence of legality (see Chapter 6).
- A globalised media ensures that local non-market regulatory challenges soon acquire supranational dimensions.

Whether we explore legality and its influence in market or non-market regulatory contexts, the continuum of *hard* to *soft* law[47] (particularly for international law) provides a way of understanding sanctioned norms in either rationalist or constructivist paradigms of international relations. This is achieved by applying the overarching evaluative criteria of effectiveness and legitimacy. In the regulatory literature law can lay claim to both such outcomes.

Another issue in the regulatory role of legality is the extent to which law should or can interfere with private preferences. Sunstein (1986) asks that if private preferences are to be treated as the appropriate basis for social choice, and in private law, interferences with decisions freely arrived at by contracting parties are the exception rather than the rule, then the shaping or rejection of particular practices by law might be either misguided or tyrannical.[48] The obvious condition on this is the law's obligation to restrict private preferences that cause harm to others. This recognition immediately raises the questions what is harm and harm to whom? Sunstein argues that even outside protection from harm, the legal system should not take private preferences as exogenous variables. What conditions then should trigger legal regulation of private preferences?

- The government should reflect majority preferencing; preferences about preferences.
- Legal rules allocating entitlement to wealth and resource distribution may exist for greater concerns for social ordering.

- Individual preferences which depend on a variety of motivational distortions such as addiction and other forms of myopic behaviour require intervention.
- Some preferences are based on limited information or cognitive distortion.

As a result, legal intervention against individual preference can range from motivating voluntary foreclosure, through adaptation, endowment, re-education on to compulsory prohibition.

Command and control

Sanctioning if regulatory requirements are ignored or violated is the premise on which state regulatory authority ultimately relies, and it is the teeth in command and control regulatory styles. State-promulgated command and control regulation has diminished as self-regulation has assumed prominence particularly in the business and commercial sectors. Legal pluralism is now much preferred as a context in which state sanctions assume the position of last resort in hierarchies broadly based on compliance and persuasion. The decentralisation of legal power in the process of shrinking the state has seen civil regulation and the market coexist in a range of interdependent regulatory configurations diminishing state command and control. The pluralism of public actors requires more subtle and complicated regulatory mixes where in the past command and control would have been the medicine on offer for all. This is the inherent attraction of regulatory pluralism where the regulatory objectives are not all risked on one often blunt-edged and interventionist approach such as state-sponsored command and control. For instance, the recent fusion between responsive and reflexive regulation takes into account the needs and challenges of both regulators and objects of regulation to produce sequential influences and outcomes.

Sanction and penality

Punishment and sanction are the state's monopoly in legal regulator paradigms. However, law has come to recognise that the 'motivation standards and even monitoring and enforcement systems for responsibility rather than liability (see Chapter 9) come from places other than law'.[49] As a result, more and more individual enterprises are coming forth to design their own compliance management systems according to their specific contextual circumstances, without reliance or reflection on state punishment in the wings. An example of this is where corporate *banishment* from industrial associations is used where codes of conduct and best practice are flouted by some to the detriment of the reputation of the whole business genus. In this fashion regulation is directed towards assuming successful outcomes rather than preparing for violation or non-compliance. That said, still most pluralist regulatory inculcations anticipate the ultimate sanction

of state punishment as the point of their regulatory hierarchies. In these situations the question then shifts to certainty and universality of sanction, and proportionality of punishment.

Conclusion

In their view of pluralist regulatory design Gunningham and Sinclair (1999) propose that policy makers should take advantage of a number of largely unrecognised opportunities, strategies and techniques for achieving efficient and effective regulation policy. In addition they stress:

> the importance of *instrument combinations* and discuss how such combinations might be inherently complementary, inherently counterproductive, or essentially context-specific in nature. In recent years, policymakers have begun to explore a much wider range of environmental policy instruments. However, there has been little systematic enquiry into how conceptually different instruments might interact with each other. Overall, there remains a tendency to treat the various policy instruments as alternatives to one another rather than as potentially complementary mechanisms. As a result, policy analysts have tended to embrace one or other of these regulatory approaches without regard to the virtue of others.[50]

In the spirit of systematic enquiry, the challenges for any successful regulatory regime which recognises the utility of a pluralist approach are:

- to achieve a prudential environment in which risk is minimised and fate tends towards acceptable outcomes;
- to secure legitimacy for and through the regulatory project;
- to confirm the effectiveness of the regulatory project by demonstrating its best fit with the regulatory purpose;
- to reveal its fit with other critical conditions of civil society, and its sustainability;
- to endorse the cosmopolitan dimension of the regulatory project which identifies its universal values while respecting local difference.

It is not possible, in managing the crises in the chapters which follow, to advance a regulatory project in terms of law alone. The reason for this view is that law and, in particular, discriminative legalities such as contractual obligations and protections may have facilitated rather than reduced the *risk society* in which global social crises currently proliferate. What are some considerations pertaining to the risk society which a pluralist regulatory project needs to address?

- Modern industrialised society has created historical novel set of risks.
- Individuals cannot separately secure protection from the unknowable.
- Risk society necessarily produces regulatory society.
- New world risk brings demands for 'remanagerialisation' in the form of *shared risk to shared fate* (see Chapter 11).
- What are the forces that make the regulation of newly privatised centres of power (such as global financial markets and capitalisation) irresistible?
- Effective and legitimate risk requires the development of more convincing and localised frames of regulatory accountability.
- Ultimately the purpose of regulating risk societies is the reshaping catastrophic collective risk.

Looking realistically at the regulatory challenge posed by modern risk societies, we could find that the possibility of the *regulatory state* as discussed above existing in a globalised world is deeply problematic. If the global regulatory state is indeed a fiction, do we really need to worry about it if non-state pluralistic forms are available and effective?

This book argues that it is not enough to market a global regulatory state (as many of the agencies of international organisations prefer to do) simply because to do so makes us feel good that there is some institutional presence out there to protect us from risk and to control catastrophe. Regulatory states exist at the domestic and regional levels but their character is contingent on particular political economies and national interests. To argue for a global regulatory state being responsible for the management of global crisis would require proposing a new global governance paradigm (see Chapter 10). In a globalised regulatory sense, this at best would take the form of steering networks and relationships (cultures of control) rather than commanding a single interventionist and sanctioning vessel called the global state. In the context of sociability, the steering comes naturally as a consequence of mutuality, rather than the imposed discipline of an external disciplinary frame.

What of the place of law in pluralist global regulation beyond a globalised state? Law's relationship with global governance is tense and contestable but irreducible:

> The development of norms is one of the key tools in global governance but the types of norms that are generated have very different characteristics.[51]

If norms in the form of legal regulating emerge organically then their potential to complement sociability is much more attainable. As Roger Cotterrell observes of law at large and its purposes:

> we ought . . . to stop thinking of legal regulation primarily as something imposed on the rest of social life; and to think of it equally as something

> that might grow spontaneously out of every day conditions of social interaction, and might provide a part of the cement that gives moral meaning to social existence.[52]

Cotterrell's injunction suggests that communitarian contexts for organic and collaborative regulation have the potential not only to be supported through sociability but also to provide opportunities for moral cohesion. If governance, global or local, is to be *morally responsible* in the manner in which it addresses crisis contexts for regulation then sociability cannot simply arise and be maintained as a fatalistic response to risk perception. Jonathan Doh, when writing about the challenge to achieving global governance through the collaboration of NGOs and socially responsible corporations, says this about the power of collaboration to create new and diverse regulatory strategies:

> Innovation emerges from the combination of existing practices and processes in new and novel ways. 'Combinative capabilities' refers to the ability of firms to acquire and synthesise resources and build new applications from those resources, especially in changing environments . . . collaborative social initiatives have the potential to generate both economic and social value by leveraging the complementary resources and capabilities of each participant.[53]

More of this will be described in the crisis context chapters to follow.

4

Contexts of Global Regulatory Challenge – Compulsion or Compliance?

> States can be thought of as providing, distributing and regulating. They can bake cakes, slice them and proffer pieces as inducements to steer events. Regulation is seen as a large sub-set of governance that is about steering the flow of events, as opposed to providing or distributing . . . non-state regulation has grown even more rapidly (than the explosion of the regulatory state) . . . it is the era of *regulatory capitalism*.
>
> (Braithwaite, 2008: 1).

Introduction

Regulatory capitalism (Braithwaite, 2008), as with many other *political economies* of regulation, 'decentres' the state. This dislocation stands contrary to more conventional interpretations of regulation, wherein the state is both the authority behind and the force for regulatory institutionalisation and process. This chapter's central concern is how to reconcile the containment of global catastrophe utilising a regulatory frame above and beyond the state and thereby moving the regulatory focus from the shadow of compulsion to networks of compliance.

What does decentring the state do for claims that law retains or even grows an important global regulatory potential when law's traditional author, the nation-state, takes a lesser role in bilateral, multinational and supranational regulation? Can law above and beyond the state effectively regulate with standing and legitimacy, when cut free of state sponsorship and domestic jurisdiction?

The answer to these concerns lies partly in the way we have theorised regulation in the chapters up to this. Now it remains to consider regulatory challenge in contexts where the state is but one interest in the mix, one authority vying for recognition, one technology, and while a significant component, one element of the global community. In these senses, the consideration of 'above and beyond the state' is not a reflection of the rich literature which analyses the imminent demise of the nation-state.[1] For

now at least, state agencies and processes weigh heavily in any construction of global governance. That said, supranational or international governing and multinational mega-corporate economy are developing at an explosive pace, bringing with them a radically different understanding at least of the position which law plays in domestic and global regulation.[2]

This chapter will necessarily skim over deep disciplines of knowledge which understand regulation and governance outside the nation-state. The mention of international law, for instance, can be nothing more than specifically located on the influence of law for obedience.[3] Also, consideration of international relations as they investigate global political ordering only arises in the context of rights and obligations.[4] Supplementing these important fields, the chapter examines the nature and form of regulatory interaction that can be seen as facilitating social ordering above and beyond the state. In this respect, the chapter looks forward to our concluding discussion of regulatory sociability (Chapter 11) and the future of pluralist international regulatory forms.

The analysis below also performs another pivotal linking function. Each of the four chapters to follow explores a contemporary and crucial context for global catastrophe: communications; health and medical science; environmental sustainability; and economic and financial transition. As I agreed in the Introduction, this book could be criticised for seeming to prioritise these above other global challenges, but I reiterate that they are settled on as illustrative rather than exclusive or pre-eminent global regulatory challenges. Some equally important issues such as global risk and security have been elaborated on in our earlier work (Findlay, 2008). Other issues such as human trafficking and populations on the move are inextricably connected with those crisis contexts which are explained in Chapters 5–8.

Consistent with the binding regulatory context throughout this book, this chapter charts the *more-than-state* regulatory engagement in particular contexts of imminent and impending global crisis. The theoretical resolution of these contexts and challenges, in the form of regulatory sociability, as I see it (explained in Chapter 11 in more detail), will build on the consideration of governed interdependence[5] which is this chapter's main regulatory message.

In approaching the structure and progress of this chapter from decentred states, through the nature and maintenance of global community and on to re-envisioned global regulatory legality, the reader needs to appreciate 'beyond the state' as meaning when:

- regulation is de-centred;
- it grows from private or hybrid institutions or processes (as well as to meet their needs); and when
- the regulatory jurisdiction moves to confront regional or international challenges.

The new readings touched on in this chapter should be considered by first reflecting on the insights contained in Brand (2005), Moran (2002)[6] and several other 'summarists' whom we met in the earlier parts of the text. To talk of 'above and beyond the state' implies an understanding of the state/regulation nexus which is particularly apparent in Chapters 2 and 3.

In thinking through the meta-issues raised in this chapter, readers may be helped by reflecting on the following questions:

- What is the relationship between regulation and global governance?
- How can regulation be uncoupled from the state?
- What regulatory role does law play beyond domestic jurisdictions?
- Beyond the state how are risk societies regulated? Where does regulation sit in a supranational context where crisis is global?

What is above and beyond the state?

In the world of the late modern period, wherein Garland (2001)[7] and Simon (2007)[8] and other critical theorists impress that the nation state plays the central role in control and governance, how can a credible argument be raised for a regulatory perspective without the state? Black (2002) achieves it convincingly without losing the baby with the bath water. The state decentres, not destructs. Braithwaite (2008) expects that efficient states empower their regulatory specialisation by moving from centre stage to networking with other potent regulatory frames. The reconciliation of regulatory decentring while recentring regulatory relevance and particularity is one analytical intention for what follows and at its subtlest deserves more attention than we can here afford. Even so it is not the 'get out clause' of this overview to limit consideration of more-than-state regulatory potential to supranational regulation, corporate regulatory networking or decentred state regulatory contexts. I advance a separate consideration of recentred regulation where the shadow of the state is cast long and wide, but as the state recedes in the realm of global communities in crisis, regulation is not diminished at its passing.

As mentioned above, I see a vision of regulation above and beyond the state as reflecting a number of distinct regulatory contexts and resultant challenges. The binding theme is that the state does not lay claim to or achieve centrality in regulatory selection and attainment. These contexts include the following:

- regulation wherein the state does not have a central authority and presence, and the public and private realm are not distinctly divided;
- regulatory enforcement not dependent on an eventual state-sponsored sanction mechanism;

- regulation which looks at non-state processes and institutions as the centre of the regulatory frame – move away from penal enforcement or from legal legitimacy;
- regulation in the supranational context – wherein the law takes on a new role outside state sovereignty;
- regulation where the 'social ends' are directed towards a global community[9] and do not depend on the authority of democratically legitimated institutions and processes;
- Regulation for global governance – not the regulatory state.

In order to give some foundation for considering the last point above, a short walk through Julia Black's thinking about decentred state regulation is helpful.

Decentred or recentred regulation?

In keeping with her motive-centred and change-based definition of regulation (identified in Chapters 2 and 3), Black understands regulation broken free of a central state reliance. Whatever its authority, regulation influences and adjusts the behaviour of individuals and organisations, is intentional but not essentially self-reflective, and has the capacity to solve problems consistent with its interaction with rational actors.

> Increasingly, regulation is being seen as 'de-centred' from the state, and even from the well recognised forums of self regulation. A de-centred analysis has several strands . . . but . . . also raises [some] fundamental questions of the nature and understanding of regulation, the consequent role of the state, and our understanding of law. It means we can no longer escape the need to address the question of just what it is that is being 'de-centred', of what is it that we want the concept of 'regulation' to do, and what some of the implications of that decision might be.[10]

The five central notions of state decentred regulation are as follows:

Complexity

This recognises the diversity of factors present in the regulatory mix. The decision-making processes which form regulation are dynamic interactions between actors and/or systems. These systems (and their sub-systems), while normatively closed, have capacity in a cognitive frame to observe and influence the operations of other adjacent and 'touched' systems.

Fragmentation

Fragmentation refers to knowledge, power and control within and impressing on the regulatory frame. Knowledge, in particular, if

fragmented, restricts regulatory dialogue the management of which is often an essential role for state facilitation. Autopoetic considerations of operating systems assume fragmentation at least to the extent of self-containment and normative integrity. Systems theory models of regulatory interaction are not state-dependent and have no primary interest in system interaction in terms of power and authority. That approach gives further ground to decentred regulation where state power monopolies or state control over the autonomy of actors are not inevitable.

Interdependencies

The interdependence of actors, organisations and systems within the regulatory frame is a particular feature of supranational regulatory efficiencies and capabilities. As could be argued more likely within the domestic bounds of the nation state, but not with the same substantive outcome, the common interdependency relies on the authority agencies (like the state) responding to and managing societal needs, through the exercise of their power over governance capacities. In a simpler sense, non-state-centred regulatory interdependencies have stakeholders mutually linked through problems and solutions. In addition, authority and power is not as centralised as it may be with state-sponsored regulation, rather it is dispersed through dynamic relationships between key stakeholders.

Ungovernability

This characteristic is not to suggest the inevitable positioning of the state in governability. Nor is it implying that decentred regulation is disinterested in governance outcomes. Rather, it loosely reflects regulatory conditions and arrangements where actors and systems can be by default self-governing. In such a position, the state can add governance boundaries and might even arbitrate contested governance terrain, but self-governing contexts are to differing degrees insusceptible to external regulation. This reflects Teubner's notion (1997) of 'normatively closed but cognitively open' system co-existence and provides the essence as well as the nub for criticising systems theory explaining decentred regulatory practice: ungovernable and yet at heart a process seeking governability and ordering.

Rejection of a clear divide between public and private

The presence of the state as a regulatory referent is crucial in establishing and maintaining the public/private divide. Theories of regulation thrive on the division between public and private interests and the supposed distinction between the nature of interest motivation and thereby the significance of economic perspectives.[11] Removing the state from the regulatory centre piece also removes something of the need for this divide based on interests or otherwise, particularly in those social,

cultural or commercial contexts where communal ownership and obligation is more prescient. With a sharp conceptual division between public and private institutions and interests challenged and diminished, the evolution of regulatory hybrids is natural. In such hybrids (or coalescences) formal authority is more ambiguous, and power relations more likely to be negotiated. The later discussion of the future of collaborative regulation (crisis to ordering as will be reviewed in Chapter 11) develops this observation further.

In summary, the reasons for decentred regulation include that it:

Promotes expertise-based regulatory legitimacy beyond state monopoly;
Facilitates knowledge sharing and provides applied learning opportunities beyond state sponsorship or quarantine;
Improves responsiveness to external environmental changes when not sieved through state bureaucracy; and
Facilitates regulatory dialogue particularly when such conversations are no longer mediated or licensed through official public hierarchies of administration (more of this will be described in the next chapter).

Against the removal of a state centre from the regulatory web is the concern that this shift will result in a diminution of specific regulatory goals when there is no central legislative authority to identify and articulate the regulatory challenge. This criticism may seem self-serving when applied to a global setting where at present there is no such democratically legitimated legislative focus beyond the United Nations' (UN) not insignificant convention-construction capacity. Another concern is the shifting of the state's accountability obligations out from the regulatory centre, then regulation in whatever guise becomes less accountable and responsive to any community which would otherwise contribute to a representative or democratic state governance mandate. It is also feared that with the removal of the state will follow a reduction in regulatory effectiveness due to an ambiguity in goals and their enunciation and enforceability. This reservation reflects the early positivists' critique of international law as not meriting the classification of law because it cannot benefit in its non-domestic iteration at least in the complex enforceability frameworks afforded through the *policing* state.[12]

Such criticisms could be reconsidered in so far as they do not argue exclusively for state-centring but rather for regulation models with a central focus that declares authority, legitimacy, accountability and clout. Employing the decentred matrix as elaborated on above in contexts beyond the state, it is important now to consider what follows on from or replaces the decentred state. I do not suggest, nor does Black, that marginalising the state in the regulatory frame irrevocably and inevitably leads either to a power vacuum or a

scattering of regulatory focus, although both are possible. A short consideration of what I term *recentring* envisages state repositioning or reformulation without sacrificing analytical differentiation of interrelated fields of regulatory interest. To assist this consideration, reflection on Weiss' notion of *governed interdependence*[13] (discussed more below) is helpful.

Recentred regulation – Governed interdependence

> What constrains the ability to dominate does not necessarily weaken governance: the state's capacity to govern is actually extended by capabilities to enlist through negotiation the governance capabilities of other actors.[14]

The recentring approach to regulation looks to take on the possibilities provided by the repositioning or reformulating of the state as the focus of the regulatory frame. As a consequence of state decentring, for instance, fragmentation of regulatory interest and positioning may occur in the short term. Any such fracturing of regulatory connection *state-to-regulator-to-regulated* can be mended through complementary non-state-reliant networking so that a less power-based inter-connectivity is the structural and functional regulatory operation, promoting common interest without compromising self-interest to the point of fragmentation (more of this later). Features of this repositioning and reformulation and its challenges include the below-mentioned points.

Interconnectivity

Capture is always the risk when webs of regulation find the regulator and the regulated closely interconnected. Prosser (1992)[15] nicely describes the adaptation involved in networking regulatory capacity and interest. In talking of interests he reminds us of the tensions and vulnerability inherent in the regulatory negotiation away from simple self-interest.

> The approach I have adopted, by contrast, sees the regulator as in the middle of a web of relations, none of which can be assumed to have particular priority and which may well be in fundamental conflict.[16] Therefore capture cannot be predicted as a matter of a priori principle. Where regulation is of a multi-enterprise sector it is unlikely that it will be possible to speak of a single industry interest, let alone adequately consider the roles of the workforce or consumers, who may themselves have conflicting interests, for example between domestic and business consumers. This broadening can have both optimistic and pessimistic implications. The optimistic assumption is that of traditional pluralism in that if there are a number of interests involved, and they all have access to regulatory procedures, the interests may balance out and so the more

general public interest in the end prevails.[17] The pessimistic implication is that capture may take place by other interests apart from the firm or the industry. On the evidence I gave earlier it is certainly possible to suggest that the early stages of the regulatory process were subject to governmental capture rather than capture by the firm, not in the sense that the regulators were pressurised by ministers but that major decisions, in particular the all-important initial price formulae, were determined directly by government to achieve the political objective of successful privatisation. This is not to say, of course, that industry capture cannot happen; the relationship between producers and the Ministry of Agriculture illustrates powerfully that it can (Cannon, 1987).[18] Instead, I am suggesting that to assume that industry capture is the only, or ex hypothesis the most likely form of regulatory evolution, is a drastic oversimplification.[19]

Networking

Networks are the natural product of interconnectivity, and they bring it about. Networks, particularly within mega-corporate enterprises and across governance systems, confront the fragmentation of modern society into differentially functioning regulatory sub-systems. Networking is in fact a conscious attempt to defeat atmospheres of unregulated or at least unnegotiated self-interest which tend to be economically degenerative of an industry or a commercial market in the medium term. In recent times, multi-enterprise markets such as those featuring in telecommunications have networked around generalised rather than particularised regulatory norms reflecting a drift in major economies away from more self-centred and carnivorous materialism.[20]

Collaboration

Much more of this will be said later in the text. Sufficient for the present discussion is the observation that regulatory recentring in the form of mutual interest networks is well-serviced by collaborative regulatory relationships.[21] The motivation for such collaboration can be complex and context-specific, particularly in terms of political economy. For instance, I argue that in the face of imminent global crisis, *communities of shared* risk are drawn into collaboration where in other less confronting environment self-interest could stand in the way of collaborative regulatory enterprise. Another way of looking at the emerging collaborative phenomenon in regulatory capitalism is the dematerialist recognition of medium-term market sustainability as opposed to short-term market exploitation. While wealth generation remains as the single most significant motivation for resisting or reformulating regulation through networks of mega-corporate interest, profit and market sustainability are now featuring in supranational regulatory dialogue.[22]

Collaboration in a recentred regulatory frame looks at interests rather than agency as the focus of the enterprise.[23] If the trend to dematerialism or at least wealth protection above maximisation continues beyond the regulatory window between bust and boom cycles, collaborative interest modification will support collaborative regulatory networking.

Common good

This collectivised interest is the focus of our collaborative envisaging of recentred regulation. Structurally, in a recentred supranational governance context, the regulatory frame necessarily consists of complementary networks or looser connectivities converging around a negotiated interest which range across a motivational continuum spanning reluctant compliance through to concerted mutuality. Even at its more negative edges, however, 'common good' in a recentred and collaborative regulatory frame should not be equated with creative compliance. Network participants subscribe to differing degrees to a collectivised regulatory interest, appreciating that global networking requires some shedding of autonomy and self-interest, preferencing more medium-term market sustainability.

It is often difficult, beyond some normative aspiration, to argue for a general regulatory ascription to a common good within state-centred frames. This is because the sharper public/private interest divide tends to alienate at least the business sector (sometimes archetypically) from priorities of welfare, social justice and sustainability. In addition, state interests lay claim to a natural synergy with the common good which global networks do not need to question or recognise. International law talks of the transition of rights-based common good conventions into national state regulatory settings, but again the multi-party negotiated form of such conventions suggests a greater interest in common good thinking than may state-sponsored legislative initiatives.

Global common good (resembling public interest in the nation-state parlance) becomes the centre or regulatory networks, wherein each stakeholder may retain self-interest but only to the extent that it neither compromises trust nor endangers the individual and collective benefits of mutuality. Global governance complemented by this notion of mediated common good should also be more open to accountable, regulatory review than would be strained alliances of compromised self-interest squeezed out of communities of shared risk.

Enhancing governability

Recentred regulation enables an understanding of governance as a wider set of control activities than government (in its state-centred manifestation). Centring beyond the state enhances collaborative governability which is inclusive of public and private participants, recognising the utility in a

regulatory frame for focus, interaction, mutuality and resultant cooperation. An example of just such recentred regulation is the way in which corporations have transformed into networks or varied integration (from conversation to co-option) for the purposes of regulatory realignment. This transition in turn has rejuvenated aspects of the state's regulatory portfolio and sharpened its resource direction, particularly those components that benefit from the injection of industry-specific expertise:

> While states are de-centred under regulatory capitalism, the wealth capitalism generates means that states have more capacity both to provide and to regulate than ever before.[24]

This observation only applies when states, rich or poor, have the inclination, capacity and commitment. As a guiding principle of this analysis, set out in Chapter 1, the recognition should emerge and prevail that forces for recentring are positive in disaggregated state contexts or where the shadow of the regulatory state hierarchy is faint. Included in this observation is where states and their institutions are rich but weak in both regulatory dedication and morality and where the obligation to regulate beyond state and individual interest has become so corrupted that recentring provides the only viable alternative.

Global – Beyond the state?

Globalisation, as a geo-political and economic reality, is changing the face of international regulatory challenges and responses. Many of the crises explored later in this book could be seen as a product of the current materialist era of globalisation.[25] Recent international regulatory responses to these crises, problematic as they may have been, might also be considered as options for the regulatory agenda only because of globalisation.[26]

As an analytical device, globalisation enables (through the paradox of one culture/many cultures) an understanding of the prevailing strength of the nation-state influencing supranational regulation and the corresponding decentred/recentred trend particularly evidenced in globalising networks even in transitional cultures in the early stages of modernisation.[27]

Globalising networks

As Braithwaite asserts, traditional social science disciplines are not well prepared to come to grips with globalising networking because of their pre-occupations only with geographically bounded national societies, or political systems, or economies, legal systems, business systems, philosophical systems, cultures and identities, macro-international relations, micro-individual action or individual niches.[28] Law too (and lawyers we suggest) is not comfortable operating within global networks of interest beyond

the nation state, because of the localised legalist predisposition to dominate the commercial and administrative mechanisms of communication and interchange essential for global networking to thrive.

> . . . the proper role of the state might be to structure deliberations among decision-making fora beyond its boundaries, rather than just to guarantee the conditions of communication necessary for effective debate and public reason within the legislature.[29]

An important way to approach the networking phenomenon in contemporary global regulation is to go back to the understanding of pressures to globalise. It has been said of the present phase of globalisation that it is centrally characterised by the collapsing of time and space.[30] In regulatory terms, transcending temporal and spatial boundaries can enable opportunities for and efficiencies in networking which had previously been constrained through jurisdictionally tied concerns fascinating nation states. Opened up in this way, networking has in turn further fuelled the progress of globalisation if viewed with the lens of economic modernisation.[31]

Understanding regulatory capitalism as an ecology of patterned niches

Beyond the nation state lies an interactive regulatory environment which has survived the anti-internationalism of the cold war and the celebration of national autonomy as a mantra for neo-conservative political hegemony.[32] Interestingly, it was not the threat of resilient and expansive regulation which galvanised the mega-corporation alliances that Braithwaite (2008) identifies as underpinning the current age of regulatory capitalism. Rather, it was the intrusive and mechanical spectre of post-welfarist, post-Fordist nation-state regulatory dominion which threatened to short circuit the naturally collaborative ecology of globalisation[33] that emerged following the fall of totalitarian communism in the West, the expansion of the Asia tiger economies, along with the advance of corporatist capitalism as the new 'free market'. Non-state-centred regulatory interchange is recurrently patterned in motivation and response to capitalist decentred regulation.

Law, again, has lagged behind this regulatory patterning. A reason for this exists in the refusal of powerful nation states and political alliances to sacrifice autonomous legality in favour of a more influential place at the international capitalist regulatory table.[34] Law in this sense has been held hostage by the interests of increasingly irrelevant and regressive state regulatory discourse and posturing. By tying the regulatory determination of domestic legal institutions and processes to command and control with penal/sanction eventuality, the state has manoeuvred law into a blind alley when challenged to exist within increasingly networked and interconnected regulatory frames. Law is even failing when called upon to address creative

compliance and *fixer mentalities* which, through the unbridled self-interest of the recent decades of deregulation, undermined the preferred regulatory influence of the less coercive levels of the regulatory pyramid.

It could be the weakening of law's expressive role when it migrates from local to global, which means law's influence over supranational social and economic norms is not anything like we see in the context of domestic state legal systems. Without a strong role in normative formation, one of the chief claims of law for regulatory influence is lessened, and the rule-boundaries important for the development of just and effective globalising networks are denied the benefit of constitutional legality particularly at the supranational level. Rights without law cannot fill the void that law and enforcement (actionability) leaves in the normative framework of globalisation, if international law has reduced regulatory influence.[35]

Braithwaite (2008) alleges that regulatory capitalism and the associated regulatory recession of nation state law are not consequences of prevailing Western political hegemony in the form of neo-liberalism or of neo-conservatism. Nor can these developments be put down to the consequences of narrowing nation-state backlash against globalisation's challenge to autonomy.[36] Globalising networking seems to have developed to take advantage of regulation as a factor in market stimulation, and not as some regressive reaction to over-regulation of any particular frame.

The regulatory presence of nation states and their domestic law portfolio retreated in the face of regulatory capitalist hybridity between the privatisation of the public and publicisation of the private.[37] In regulatory theorising, despite its resilience, the analytical and actual weaknesses of a public and private interest dichotomy are clearly exposed in the context of global governance.[38] As regulatory challenges and responses globalised and the empirical reality revealed the exponential growth in regulation along with mega-corporatism,[39] comparatively the essential connection between regulation and the nation state always was going to recede, as it has. It would not, however, be correct to assume that into the void left by a decentred state, some mirrored institution or agency of global governance naturally, organically or even effortlessly has taken its place. One of the exciting features of recentred regulation is the manner in which different 'centres' have developed as a focus of intricate webs of regulatory preference, context-dependent and motivated by more than profit economy. More of this is discussed in the chapters to follow.

Regulatory trends on the way to beyond the state

Braithwaite has charted the regulatory transition and more particularly the suspect popular wisdom surrounding the transition to regulatory capitalism (2008: Chapter 1). I summarise below the principal stages he identifies in this progress not to reflect Braithwaite's purpose (to debunk the causal

significance of what he terms the 'neo-liberal fairytale') but to confirm the wider contention that as the state withdraws from regulatory centre stage in the global setting, regulation does not diminish as a consequence. What we can draw from this is that regulation exists and thrives above and beyond the state. In addition, neither a shift in state centrality nor any attendant argument for deregulation, critically favours regulatory capitalism:

> Those who believe we are in an era of neo-liberalism – where this means a hollowing out of the state, privatisation and de-regulation – are mistaken . . . markets in fits and starts have tended to become progressively more vigorous, as has investment in the regulation of market externalities . . . even some re-nationalisation of poorly conceived privatisation has begun . . . the corporatisation of the world drove a globalisation wherein many kinds of actors became important national, regional and global regulators . . . [40]

It is worth pausing at this point to concede that with the transition to regulatory capitalism in which state decentring is featured, it should not be assumed that the nation state regulatory interest has withered at large. With the exponential expansion of global regulatory state, regulation has also been empowered. But this realisation needs comparative appreciation. The growth in state regulation within the global sphere has not been as dominant as in domestic boundaries. Non-state regulation by civil society, business enterprise and associations, professions, NGOs and international organisations, not to mention networks of these have easily outstripped state regulatory advance.

> While states are 'de-centred' under regulatory capitalism, the wealth capitalism generates means that states have more capacity both to provide and to regulate than ever before.[41]

After interrogating the myth of deregulation (challenged by the boundary needs of radical privatisation), these are the stages of transition identified in Braithwaite's analysis, and which are discussed with the nation state as the critical regulatory referent:

- police economy – constituting the compliant workforce;
- unregulatable liberal economy – states learning to regulate out of *laissez-faire* and limited resourcing and experience;
- growth of the administrative state – disciplined by the market and more disciplined by growing state capacity to govern;
- liberal economy creates the provider state – paradox of a deceleration in the provider state and acceleration of the regulatory state;

- regulation creates big business – securitisation stimulated transition from family firms to professional corporatisation and mass production;
- american model of mega-corporate capitalism – impact of anti-trust regulation, reduction of monopolies and restrictive trade, and the age of regulating for corporatised competition;
- on to the creation of regulatory capitalism – regulatory state nurtures mega-corporations which in turn foster the regulatory state.

It is a contemporary economic aphorism that the vast majority of nation-states do not have a gross national product equal to the annual sales of one mega-corporate multi-national enterprise. In such circumstances of financial imbalance prevailing in weaker capitalism, the regulated state forfeits, either willingly or inevitably, its regulatory domains to big corporations with superior technical capability and market reach. Globalising networks of such corporations easily out-regulate the capacity of non-profitable or under-resourced state governance. In such a transition, it can be said that the regulated state has replaced the regulatory state particularly where the commercial power and presence of mega-corporate capitalism vastly outweighs the capacity of disadvantaged states to bargain and promote their interpretations of domestic, autonomous public interest:

> . . . does the regulatory state exist, and if so in what does it consist? This review suggests three possible answers. (1) The regulatory state is a fiction, but why worry? In the adult lifetime of most readers of this journal social science has become increasingly professionalised, which in part means more specialised. Even within political science the sub-specialisms often now have difficulty communicating with each other. 'The regulatory state' provides a sort of intellectual brazier around which we can all gather, to warm our hands and speak to each other, in a world of increasingly fragmented academic professionalism. Who cares about the shape of the brazier or what is providing fuel for the flames, as long as it helps moderate the crisis of communication in the social sciences? On this view the increasing turn to the study of risk is just a sign that scholars are moving along the line to another more attractive brazier. (2) Regulatory states exist, but their character is contingent on national setting . . . the American regulatory state is synonymous with a huge expansion of public authority in the decades after the New Deal; the British regulatory state is emblematic of the famed contradictions of Thatcherism, simultaneously involving an attempt to dismantle and to centralise state controls. (3) The regulatory state is part of a new governing paradigm – an offspring of the 'governance school', in which governing becomes 'governance', a matter of steering networks rather than commanding a single vessel called the state.[42]

Assuming that the regulatory state prevails even when most confronted by the regulatory dominance of corporate networking, has the referent of regulatory authority and sponsorship genuinely shifted from even the weak state towards many other agencies and organisational actors operating much more regulation of each other that determines a regulatory society?

Take as that society some construct of a global community where formal governance structures remain indistinct and unformed, and regulatory processes stand largely without 'law', the relationships and networks fostering (or frustrating) regulation require a much more sophisticated appreciation than afforded by state/non-state dichotomies. In order to achieve this, regulatory science also needs more nuanced contextualisation of modern global economy:

> . . . capitalism is not a self-contained system but is structurally coupled to its environment. This serves both to keep the future of the capitalist economy open (while nonetheless making its trajectory non-arbitrary and path-dependent) and to create various interfaces between the developmental logic of capital and its class struggle, on the one hand, and, on the other hand, the instrumental and communicative rationalities of its environing institutional orders and life-world together with their distinctive forms of struggle and resistance . . . In this sense the interface(s) between the capitalist economy in its inclusive sense and its environing institutional orders and the life-world becomes a crucial site for class and class-relevant struggles. These can involve a wide range of forces (not simply class forces) and a wide range of sites and sources of resistance (not reducible to the capital-labour relations alone).[43]

Whether it is class struggle or any other significant socio-economic variant pressuring for the regulation of global economy, the ground-swell for global regulation is currently unabated, with or without states at the centre. The conclusion of this discussion suggests concerns that over-regulation through the avalanche of regulatory options and collectives at the global level may reorient market relations to such an extent that the power of regulatory networks challenge the delivery of independent and accountable regulatory strategies. Such over-regulation will inevitably facilitate non-inclusive forms of global governance.[44]

> The political economy of overregulation is similar to that of open-ended delegations of administrative authority: in both cases, legislative incentives incline (governance agents and institutions) toward broad and appealing statutes that will not in practice harm politically powerful groups. The public is the only real loser.[45]

Governed interdependence and transnationalism

If we recognise the future of global governance in its regulatory incarnation as some form of *governed interdependence* that enables functional equivalents to operate where state regulation may have dominated in consolidated states, what will be the consequence for national and transnational regulation and remaining connections to domestic regulatory frames? The following are suggested as characterising the tensions between national and transnational regulation, where interdependence is a preferred governance model:

> The growth of international regimes and institutions, the proliferation of non-state actors, and the increasing interpenetration of domestic and international systems inaugurating an era of 'transnational relations' in politics, commerce, welfare, security and even sustainability.
>
> Regular interactions across national boundaries arising when at least one actor is a non-state agent, or does not operate on behalf of a national government, or for an intergovernmental organization. In this way, transnational relations are not simply a replacement of state-to-state, with state-to-international agency mirroring state functions.
>
> Transnational legal processes and processing, wherein the theory and practice of how public and private actors including nation-states, international organisations, multinational enterprises, nongovernmental organisations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalise, and enforce rules of transnational law. Process-based theories of regulation require the existence of institutionalised governance at a transnational level more developed than current global governance represents. Somewhat loser and less constitutional governance forms are growing from transnational relations to give procedural allocation to transnational laws and rules. The enforcement capacity of these laws and rules is, as a consequence of the as yet fragile global governance frameworks, not sufficiently well-formed to replace the regulatory compulsion offered by the laws and processes of the nation-state.

Following on from the final characteristic listed above is that, for the time being at least, transnational relations and networks will look to the nation state for enforcement capabilities when these need to adopt compulsory or penal form. Even if rarely activated, the state's monopoly over penality and sanction offers a sometimes essential inducement for the small number of recalcitrant and non-cooperative regulatory players, whose energies may be directed at combing legal avoidance techniques as well as illegitimate or non-collaborative anti-regulatory practices. The question then arises for

fragmented state contexts, what effectively could operate as a functional equivalent to state sanction in order to guarantee occasional regulatory intransigence? The answer might lie in focusing on factors which minimise the likelihood of such intransigence. Regulatory sociability is a climate in which impending sanction has less and less relevance.

Richer, more plural separations within and between private and public powers in polity are witnessed operating within this environment of governed interdependence. Where transnational relations reach regulatory balance, no power is dominant. Each party or institution comprising the regulatory web, while negotiating from positions of relative parity (or contributory enterprise value), operates in a semi-autonomous regulatory tension against state or corporate power.

> Consistent with the pursuit of pluralistic regulatory policy, we argued the importance of harnessing resources outside the public sector by empowering third parties that are in the best position to act as surrogate regulators. In doing so, we recognised that the regulatory potential of many third parties is unlikely to be realised spontaneously, and it is only if the state is prepared to intervene as catalyst, activator, or facilitator that they are likely to perform successfully in a quasi-regulatory capacity.[46]

Advanced nation-state government typically consists largely in coordinating the functions of various self-regulatory bodies in different spheres of economy. For strong states in particular, their capacity to govern is enhanced and extended by enlisting, through negotiation, the governance capabilities of other actors and agencies (private or hybrid). As global regulatory regimes expand, state regulatory capacity may not necessarily contract. An example is with the domestic legal sector and its role in regulatory enforcement stages. The better-governed states increase their regulatory capacity through their creative positioning in transnational interdependencies and their potential to align with global institutions.

That said, the world is not a world of well-governed states. The regulatory challenge is in fragmented state contexts not to seek to mimic regulatory regimes requiring strong state frames, and hence open up wider ground for corruption and state dysfunction through the deviant opportunities that regulation offers up, but rather to explore the conditions for regulatory sociability which can override the negative influences of failed or absent state regulation.

Governing what? Global community?

Underpinning the discussion so far are the questions of regulating for what challenge, and within what socio-political context in particular, is any regulatory strategy to be preferred and selected over another? We talk in

glib terms when it comes to the reception of communitarian governance themes in an intensively fractured world, as if there is an uncontested and defined global community and it is neither problematic nor conditional. The issue for social scientists rather than politicians is why do we keep up this pretense, in a world where social exclusion more than inclusion is the product of global governance?[47] The reason, we suggest, lies in the communitarian logic of globalisation masking segregated commercial realities of self-interest and a global economy for the rich, not for all. This economy and its perpetuation in unsustainable environments have generated the regulatory challenge studied in the four chapters that follow.[48]

In globalisation studies and the international relations critique it spawns, it might be fair to question whether we are searching for community *where it doesn't exist.* The following themes suggest particular structural and functional impediments to translating the 'global community' from a normative artefact, to a regulatory recipient in meeting global crises.

Slippery nature of supranational community – The absence of homogeneous communities 'whose values are embodied in the content and contours of the law' (and vice versa)

It has been suggested that global community is just a natural transition of civil society from the boundaries of the nation state to supranational socio-economic contexts. However, as the impossibility of seeing global governance as a mega jurisdiction of the nation state, global civil society is meaningless without the characteristics that domestic civil society draws from the constitution of the nation state as a distinct governance entity. The global state must break free of national, statist determinants that do not complement the supranational. Global community as a new civil society cannot claim its features of 'civility' or 'society' by mirroring the dominant nation-state alliances if any true communal inclusion can be claimed internationally.[49]

> As well as changes in the state in its integral sense, three trends can be discerned in the reshaping of civil society. First, just as there is a de-nationalisation of statehood, civil society is being 'de-nationalised'. This is reflected in the growth of a post-national cosmopolitanism, 'tribalism' (i.e. the rediscovery or invention of primordial, affectual identities at the expense both of liberal individualism and of civic loyalty to an 'imagined' national community) and the growth of diverse social movements which operate across national boundaries. Second, due partly to the crisis of the Keynesian welfare national state, partly to market-driven and/or state-sponsored commodification of 'civil society', and partly to the rise of new forms of public-private governance arrangements, several changes have occurred in the principles and practices of civil society considered as a (residual) social sphere. These include: rejection of the

> Atlantic Fordist commitment to class-based egalitarianism (and its associated redistributive politics); increased concern with empowerment (in the sense of ensuring lifetime access to the benefits of different institutional orders); resulting politicisation of a wide range of institutional orders; growth in identity politics and the politics of difference (with their emphases on respect, authenticity and autonomy); and the expansion of the so-called 'third' sector (which operates beyond pure markets and the bureaucratic state). And, third, and least certainly, while national citizenship is still important in many established national states, there is an emergent (albeit still weak) emphasis on (transnational) human rights which can be invoked even where an individual is not a citizen in a given state and/or that state resists such enforcement by external agencies. The problem with this last trend, it need hardly be said, is that it is still national states which are mainly responsible for enforcing human rights and, in many cases, for infringing them.[50]

Strong political resistance to command and control as a consequence of the absence of consensus on goals

The opposition to the International Criminal Court from key players in the global political alliance is typical of such atmospheres of resistance.[51] The attack on international law at large from political lobbies advancing nation-state autonomy over-regulatory internationalism is the deep foundation for such resistance.[52] But even this grounding seems schizophrenic relative to national interests. The same states, which oppose international command and control in crime and security fields, call vigorously (and legislate feverishly) for international governance of open world trading environments, and for global consensus on financial regulation. Thus, when internationalism is in the interests of global hegemony, it is the preferred governance frame, and when not, not so. It should not be drawn from this that global conceptualisation of economy is communitarian and inclusive. That certainly does not follow in a 'free market' capitalist model developed on fissures such as the artificial division of labour and capital in the hands of the few.

Problems associated with achieving consensus in narrow areas about the details of desired regulatory regimes to bolster law's facilitative function at the cost of its expressive function

Morgan and Yeung (2007) argue that in the move to the supranational, law's expressive function is diminished. At the same time, law as a facilitator for regulation beyond the nation state is possible but dependent on its alliance with and promotion of private interests, particularly those of the mega-corporations. Both assertions are debatable depending on the regulatory field in question and on the nature of law as a global regulator. What cannot be contested is that, in a globe divided between strong ideological forces, the

foundation of law's legitimacy beyond the nation-state is much more vulnerable. The enforcement role of law, while remaining one of its greatest regulatory attractions, cannot itself automatically rely on the authority of constitutional legality or even state power. Therefore, to enable its expressive or facilitative functions, law will need to take a more conciliatory position in the regulatory network. Through international conventions, international law has carved out a boundary-setting place in global order. But even in *jus cogens* manifestations, state exceptionalism means that such boundaries will be pushed by higher hegemonic interests.

Lack of an obvious transnational community together with the absence of global democratic institutions means law's role in structuring regulatory dialogue has little normative force

The obvious issue with aphorisms of global community is how in such a divided globe, by any measure, communitarianism can be aspired for? Part of the problem in any case moves towards a more communitarian realisation of global community in the absence of inclusive and democratic governance structures which endorse and ensure communitarian frameworks. The present global political hegemony talks the talk about global citizenship, but particularly with the recent rhetoric surrounding the *war on terror*, such citizenship was exclusive to proof of Western values and modernist economic interest. It is a language of exclusion not inclusion in a rich and diverse sense of community, tolerant of difference and committed to multicultural structures and values.

National and supranational context for law

I would focus this much larger consideration on the question of whether national and international regulatory tensions rest on questions of legal jurisdiction and standing. While both contextual considerations weigh heavily when invoking law as a regulatory tool in nation states, moving law outside domestic jurisdiction does much more than dislocate law from its conventional authority structures. The role of law (and legal sanctions in particular) transforms in a supranational context largely because the presumptions of international law, its sources and legislative structures are profoundly different to the domestic place and presence of law. This is not the case to interrogate such distinctions fully, but it is necessary, when considering the possible operation of law within global r*eg*ulatory frameworks, to touch on new potentials and challenges in that transition.[53]

As Tamanaha suggests (2008), the future of law in a global setting rests in its capacity for pluralist engagement within its essential forms and outside with other regulatory frames. Legal pluralism is revived as a pathway for legitimate transformation as supranational law struggles to find its relevance in the regulation of global crisis. We will take up this theme in Chapter 9.

Law loses expressive role as it moves from the national

Morgan and Yeung (2007: Chapter 6) reiterate the view that, if law translates supranationally, it sacrifices its expressive function.

> . . . law's facilitative role persists, both as a threat and as an umpire, but in a largely hidden and indirect fashion: either through national law or through public international law rendering agreements between states binding. By contrast, the law's expressive function (most clearly reflected in its imperative commands) is fairly thin for it is seldom visible at the supranational level in terms of 'law as threat'.[54]

One could be led to this conclusion if you take as immutable the understanding of public international law as conversations and obligations between nation states. Even in rigorous public international law debate today, such a bilateral view is contested. Mega-corporations and NGOs are allowed at the international law bargaining table. The other problematic pre-condition underpinning Morgan and Yeung's (2007) dispossession of expressive functions for supranational law depends on enforceability, or at least its threat. This confuses, as do the positivists in their conventional attack on international law as law, mechanical enforcement and its potential, with effective enforcement outcomes as may be argued for by deterrence theory. No one could deny that the United States, a serial sceptic when it comes to the substantive influence of international law, was at pains to recently claim that its use of torture did not contravene international law.[55] A mega-power such as the United States did not have to hide behind a supra-legality that it in other circumstances disparages and denies , unless its expressive function was at least a factor in legitimating what might alternatively be viewed as extra-legal violations of international human rights.

Law structures conversations about regulation in a national context

Much has been written in recent years about the effective influence of dialogue and conversation as a regulatory tool, particularly when it is complex science and technology that are the regulatory focus.[56] Law is accepted as a mechanism for the regulatory dialogue of traditional representative politics or of public participation. More recently, law as dialogue has adapted to and embedded itself more in networks of private actors (i.e. law's role in structuring commercial arbitration). In whatever context, there is currently much debate about how law should structure regulatory dialogue outside the nation state and beyond a limited enforcement role at the command and control end of regulator hierarchies (see Chapter 11).

When considering law free of the nation state, or domestic law influencing international regulatory frames, there needs to be a reconceptualisation of law's form and place as a mechanism for the behaviour modification

which Black (2002) sees as essential in a functioning definition of regulation. If, as HLA Hart suggests,[57] law's normative presence is deeply linguistic, then if the influence of law survives transition from nation-state authority, its role in regulatory conversation (particularly as a language of action and enforcement) should also prevail.

Contexts in which national law is powerfully shaped by supranational commitments

As where domestic law depends on international conceptions of order and good governance (as with anti-genocide legislation), national law is powerfully shaped by supranational commitments. However, where the supranational influence challenges domestic community consensus (however constructed and maintained), this can lead to a marked disconnect between national law (shaped by international commitments) and national community (bound up in local prejudice or cultural circumspection). Take, for instance, international pressure for anti-corruption governance pillars in tribal societies where filial relationships of obligation structure social order.[58] Introduced legal regulatory mechanisms which challenge domestic ordering through translation into national legislation from international convention-based obligation often dilute law's capacity to link coercive command with community consensus.

Law's changing role in regulating above and beyond the state

In any context disconnected from the state, law as a regulatory force always will be problematic. This can be seen as a simple consequence either of:

- the legislative sponsorship by the state of modern law, and
- the reliance of law on the institutional and process authorisation of the state, separation of powers or not.

As law survives the regulatory transition from state to supranational or mega-corporate, it can be criticised for being:

- retroactive;
- failing in the design of effective rules without a sound information base (the attainment of which may be an uneconomic market cost);
- subject to contested and partial interpretation, and ultimately it can become another victim of *creative compliance*.

As regards law's regulatory limitations, growing juridification can lead to Teubner's 'regulatory trilemma' in which law is either ignored by other systems, or destroys those systems' traditional and appropriate norms of

behaviour, or is itself disintegrated by the pressures imposed on it by other systems.[59]

The question then arises, how does law in a supranational context influence regulatory theory, enforcement and legitimacy?

Although the law is capable of performing a facilitative role in a supranational setting, its effectiveness can suffer due to its common reliance in its domestic state on:

- the appearance at least of a homogeneous community;
- some form of democratically legitimate, original and overarching constitutional legality in which its enforcement authority is founded;
- a permanent and recurrent legislative facility;
- a juridical profession; and
- a language which unifies the fragmentation of governance through a reified normative system.

Each of these features is absent, formative or contested globally. Therefore, the legitimacy of the law as a regulatory phenomenon and its capacity to legitimate other regulatory systems is compromised. In the context of international criminal law and justice, we have earlier argued[60] that the procedures as much as the substance of dominant Western legal traditions require transformation if they are to meet and satisfy unique global demands for legitimacy. The nation-state approach to victim interests, for instance, does not migrate effectively to the global context and thus the capacity of satisfying legitimate victim interests and eliciting community support for the authority and regulatory capacity of the law suffers consequentially (see Chapter 11).

As discussed above, the difficulty in adequately identifying and sustaining law's global community is a distinct and recurrent challenge to the effectiveness of law as a global regulator. Evidence of this is patchy and uneven global consensus on legal goals, law enforcement, and lawful governance processes, often reflecting national political agendas at the cost of regional and international harmonisation (see Chapter 10). As for the law's role in regulating either global economy or global ordering through conventional governance mechanisms, it suffers from an:

- absence of democratically legitimate coercive institutions to enable trade-offs in any transparent and community-centred fashion;
- incapacity to provide but a frail legal infrastructure to found global marketplace; and
- inability to rely on a supportive and uncontested administrative/professional fabric which in turn enables law to hold other key elements of governance, accountable to the whole.[61]

On the final point, if the law internationally is disadvantaged both from a disengagement with community foundations or from the benefit of a sophisticated and dedicated service profession, there is little hope of reproducing similar legal regulatory frames from the constitutional legality of the nation state to global governance terrain. This does not mean, however, that *law's* regulatory potential globally will inevitably suffer dislocation from nation state support infrastructure. The challenge lies in developing a leaner and more contextually resilient *legal process* internationally to service the globalising networking which we discussed earlier on.

Regulatory expertise sector specific and beyond the state

Certainly in mega-corporate regulatory environments such as the telecommunications industry, the language of enterprise is elite and the technologies and processes up for regulation, sophisticated. It is not so much that the institutions and personnel charged with regulating these systems are uniquely vulnerable to capture. Rather, the regulators and the regulated share membership of a specialist club from which the generalised regulatory operations of the state and the private sector are frequently alien and alienated. Regulation at this rarified plateau of global networking has long evolved beyond the state, preferring to:

> focus on two (regulatory) models; one based on consensual bargaining, the other involving competition between self regulatory regimes . . . when combined with some measure of external constraint each has the potential, at least in some contexts, to meet the traditional criticisms (directed at self regulation) and to generate outcomes which may be superior to those emanating from conventional public regulatory forms.[62]

This conclusion rests in both the expert knowledge base of the global network and its operation in a sphere where the state has rarely operated an alternative regulatory presence.

Beyond the jurisdictions of the local and the global is the virtual. A new challenge for regulation in which the state can only of necessity play a supporting role is e-commerce, Internet social communication and Cyberspace.

Law regulating Cyberspace?

There is little more we can do here in an overview such as this than put the reader on notice of what we see as the central challenges in suggesting the law's place in regulating virtual commercial, social and experiential reality.

In the face of a virtual regulatory terrain, what is the indelible connection between law, jurisdiction, sovereignty, standing and regulatory legitimacy?

How can an achievable and effective regulatory space be established in an environment wherein all the usual features of regulatory form – such as the capacity for the regulator to mould and manipulate the physical environment in which a targeted behaviour takes place – are either absent or at the very least formless and intentionally unreal?

What is the capacity of an individual state (no matter how influential and authoritative in the 'real' global polis, to legitimately impose regulatory power in and across cyber relations, when is ability to determine and dominate regulatory architecture at the supranational level, is limited?

Can it be said, no matter how reluctantly, that law inevitably and universally applies less to cyberspace than real space where boundaries are not delineated by right to exert control over physical territory associated with national sovereignty? Therein the capacity to assert control in cyberspace through law (or code) arises from the 'virtual' nature transcending national boundaries and distorting conventional property relations and citizenship.

In light of the preceding realisation, what elemental features of domestic and international law must transform in order to offer an attractive regulatory service to parties and relationships in cyberspace? Conversely, what must law and law enforcement shed or avoid to, escape the regulatory resistance of the adaptable and ingenious populations of cyberspace?

When Cyberspace and 'real' worlds intersect (such as with electronic funds transfers, or e-commerce) can the law lay claim on Cyberspace through law's regulatory location in local, regional and international jurisdictions? This 'cross-boundary' straddle for law is, we suggest, likely to be its most effective regulatory location where Cyberspace is concerned.

Discussing law and Cyberspace requires, even as a negative or recursive referent, considerations of sovereignty. At the supranational or global level recently, sovereignty has been inextricably connected to concerns for security.

Reconceptualising security, solidarity and sovereignty?

As developed in more detail in Chapter 9, the current era of globalisation is now transforming in its security focus, seeing the post-Bush administration subordination of state security in favour of human security and sustainability.[63] This regenerated interest in human security is accompanied

by a necessary redefinition of social solidarity, where equality in humanity challenges the rights of the individual and social solidarity is viewed against individualism as a value and a constraint.

> (The drafters of the UN constitutional documents) also understood well, long before the idea of human security gained currency, the indivisibility of security, economic development and human freedom. In the opening words of the Charter, the United Nations was created 'to reaffirm faith in fundamental human rights' and 'to promote social progress and better standards of life in larger freedom'.[64]

From the origination of the UN as a global governance forum (flawed as its institutions and fora may have proved to be), sovereignty is no longer determined in terms of integrity of member states but 'the right and capacity to participate in the UN itself and to judge and respond to threats against human security (*the right to protect*)'. Any commitment to internationalism through UN membership now requires recognising the assertion of the collective right to prevent catastrophic attack. In this approach to human security as the essential outcome of global governance (see Chapters 9 and 10), we see a shifting trend from a rights-based to a responsibility-based conception of sovereignty.

> Nations are free to choose whether or not to sign the Charter; if they do, however, they must accept the 'responsibilities of membership' flowing from their signature. According to the ICISS, 'There is no transfer or dilution of state sovereignty. But there is a necessary re-characterisation involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties.' Internally, a government has the responsibility to respect the dignity and basic rights of its citizens; externally, it has the responsibility to respect the sovereignty of other states. The high-level panel took several steps further than the ICISS. First, it makes clear that states themselves have an instrumental rather than an intrinsic value. 'The Charter of the United Nations', the panel writes, 'seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens.' Here human security trumps state security; sovereignty attaches to a state as a means of ensuring the security of its citizens. From this starting point, sovereignty misused, in the sense of failure to fulfill this responsibility, could become sovereignty denied. Second, the panel avers that a state has a duty not only to protect its own peoples, but also to 'meet its obligations to the wider international community.' In this conception, the United Nations itself, by dint of the obligations of membership, becomes a guarantor of 'international obligations' writ large. Enhancing member state compliance with these obligations will

> often be a matter of capacity building, but direct enforcement is also an option. These twin responsibilities spell nothing less than conditional sovereignty, although the panel itself did not and politically could not use that term. Sovereignty in the state of nature, e.g., outside the UN system, may still mean some Westphalian ideal of absolute autonomy. But for the 191 member states, membership is no longer simply validation and protection of their sovereign status. The Charter itself becomes a change agent, providing a collective instrument for holding all members to their word.[65]

This said, the perennial criticism of UN-centred governance is its absence of a true enforcement dimension, not dependent on the patronage or sponsorship of the dominant global political alliance. In this dependency lies the associated criticism of a discriminatory global citizenship where obedience is required and retained not as a result of legality, but rather political logistics and geo-political value.

Obeying powerless rules?

With the marked decline in national sovereignty featuring in contemporary international relations, and the recent and rapid proliferation of international regimes, institutions and non-state actors, governance beyond the nation state has witnessed a collapse of sharp public/private distinctions in all sorts of regulatory frameworks. Debate has arisen over the question whether this development spawned or was spawned by a proliferation internationally of customary and treaty-based rules, aligned with an increasing interdependence of domestic and international systems. Does this suggest the final and genuine emergence of *international society?* If so, then why has the associated development of a robust international legal system been anything but universal, uncontested and uncontestable? International law, if tested by the criteria of enforceability and obedience, is fairly criticised as not attaining the governance presence of domestic law in the constitutional essence of the nation state. We see pragmatic realities when obedience is put to the test:

- International laws are followed when international law serves state interest.
- International law is easy to obey when not really considered as law with sanctions and penality for disobedience.
- International law is guided by a sense of moral and ethical obligation driven by a sense of natural law and justice, and as such relies on consensus rather than command and control.
- Incentive to obey international law emerges from the encouragement and prodding of other states whom it engages in discursive legal process.

- International law promotes the collaborative and supportive interaction between public and private producing a political conscience of observance and obedience, translating claims for legal authority into national behaviour.

Questions of obedience to law through transnational legal process

Exploring obedience to the law as a regulatory device transnationally incurs questions of the role of lawyers in ensuring international legality, and from this the important synergy between lawful governance and rights protection.[66] The debate about legality and its capacity to protect universal rights in the face of challenges against securitisation at both local and global levels has become deeply problematic, and legality itself has been used as a tool for the politicisation of ordering.[67]

Within national governments and intergovernmental organisations, what role do lawyers and legal advisers play in ensuring that the government's policies conform to international legal standards and in prompting governmental agencies to take proactive stances towards human rights abuses? If the goal of global regulatory interaction is to produce interpretations of human rights norms, what fora are available for norm-enunciation and elaboration, both within and without existing human rights regimes?

The answers to these questions take us back to the manner in which law can be redirected as a regulatory agent supranationally from considerations of national and global security to ensuring human security for a truly communitarian global community.

> Once we put human security alongside or even before state security, the metric by which we assess the magnitude and priority of threats changes dramatically. Disease and disaster kill many more people every month than armed conflict or terrorists do in a year, a decade, or even a century. As the Worldwatch Institute writes, 'All of the wars of the twentieth century are estimated to have resulted in the deaths of an average of 1.1 million combatants and civilians per year. But at present, communicable diseases are killing fourteen times that number of people annually.' If human security is our aim, why on earth should we privilege the saving of lives from violence over the saving of lives from disease? Both are equally preventable; indeed, given human nature, preventing disease is likely to be the easier challenge. But why should human security be a matter of collective security? When a state fears attack by another state, it naturally importunes still other states for help. An alliance seeks to match the heft and capabilities of would-be attackers with pledged defenders; a collective security system seeks to prevent attack through collective obligations and a collective deterrent. But why do states need the help of their fellow states to ensure the security of their own citizens?[68]

What are the best strategies for the internalisation of international human rights norms? The answer depends on law attaining social internalisation (when a norm acquires so much public legitimacy that there is widespread general obedience to it), through what we will later explain as regulatory sociability.

> To move from a rights-based conception of sovereignty to a responsibility-based conception, from a perception of UN membership as validation of sovereign status to viewing signature of the Charter as acceptance of conditional sovereignty, and from an organisation based on and dedicated to state security to one that locates the value of states in their ability to guarantee human security is bold indeed. It cannot succeed on the envisioned scale without real reform of key UN institutions, which is precisely why Security Council expansion, of some kind, is actually essential to the reform process.[69]

Conclusion – Towards the regulatory globe

> In the last quarter of the twentieth century something transformed government across the advanced capitalist world, and a large amount of comparative political enquiry is now concerned with pinning a convincing label on that transformation. Of the many candidates the (regulatory state) has proved especially popular . . . a regulatory state is now commonly said to exist in a wide range of geographical and institutional settings: writers speak of a regulatory state in the United States and in Britain; of the European regulatory state; and even of refinements like 'a regulatory state inside the state'.[70]

For the purposes of this chapter, we have looked beyond the advanced capitalist state towards regulation wherein the processes and institutions of global governance facilitate international regulatory networks for the benefit of regulating capitalism. We have done so against a sharp awareness of the elitism of such an analysis. As De Soto (2000) identifies *in The Mystery of Capital*, contemporary discussions about the success of capitalism, or about making it work, are distinctly Western-centric. Such understandings ignore other capitalist paradigms which do not feature advanced or mega-corporate networking. The regulation of lesser capitalism is likely to involve the state (even if dysfunctional, transitional or corrupt) to a much greater degree. This is accepted by the global financial regulatory approaches by international financial agencies when imposing on (and demanding of) developing states, greater accountability and prudential rigour over their financial and commercial arrangements and market environments.

The other pre-condition of our 'beyond the state' considerations of supranational regulation is that at one time the nation state took regulatory centre stage in a largely concentric and radial regulatory frame. Such a model of

regulation lends itself well to a more simplified critique of state centrality and suggestions for the decentring of the state to follow. Despite our favouring a *recentring approach* to global and networked corporatised regulation, we accept that regulation need not only be viewed in a centrist and concentric operation. Regulation across and connecting different systems of control may not rely on a central power or authority to achieve and audit effective regulation wherever located.

And what of the state in the regulation of lesser capitalism in fragmented and unregulated states? Is decentring such a useful analytical device in domestic and regional contexts starved of a rich choice in regulatory options. In his writing on *Capitalism and its Future*, Jessop (1997) in similar vein but for different reasons to Braithwaite (2008) predicts that capitalism has no final telos; the future face of capitalist economy is dependent on the type of structural changes and social struggles we detail in the four case-study chapters to follow. In a grand theory sense, Jessop projects some key changes to the nature and advance of capitalist economy which have particular ramifications for regulation, and which rely on a more dynamic global regulatory mix. These include the following:

- the de-nationalisation of statehood;
- a partial *de-statisation* of politics;
- the internationalisation of policy regimes.

Against this Jessop concedes counter-trends such as the survival of the nation state as an instance of meta-governance. In both these analyses, and the critique of the application of state-sponsored regulation to issues of global economy agued by Soros (2009), it is the nature of the nation states as a central player in global regulation, rather than the role of a transformed 'new' state entity which is seen as the problem. Therefore, if global governance is to evolve a statehood away from domestic form and national interest, then 'beyond the state' will connote 'towards new *global regulatory statehood*' creating and maintaining a newly conceptualised and collectivist common good: *regulatory sociability*.

> Behind the dominant Global Governance discourse is the understanding that the issue at stake is one of the general interest of (world) society. That this general interest is always a societal construction as the result of social conflicts and the formation of compromises, will hardly be disputed.[71]

5
Regulating Communication – New Media, Old Challenges

Introduction

A fascinating feature of globalised communication is the manner in which it has reshaped communities. Communities are communication and vice versa. Up until the advent of the postal service and the telephone, mass communication was bound to time and space. Today we are experiencing a communication era which ignores temporal and spatial connection. But is this so new? Does it present unique challenges for the regulation of a safe and satisfying communication environment?

Communities of regulation are a central theme of this text. However, we have yet to flesh out a theory of community that gives collective substance to regulatory sociability which, as we suggested in Chapter 7, requires community embeddedness.[1] Through exploring communities of communication in this chapter, there is the opportunity to investigate the glue of communitarian regulation from both the perspective of access (inclusion) and that of legitimate aspirations for orderliness out of crisis.

Certainly the communication platforms which enable and support modern social networking are new and getting newer with each major technological development. The mobile phone has long gone from only being a portable device facilitating voice exchange. And the revolution of this hardware is said to widen the division between virtual and real worlds, posing unique problems for how we regulate or whether we regulate at all.

In this chapter, I am not willing to take this virtual/real distinction as a given, even proven duality. To do so not only divides the regulatory challenge into two assumed competing consciousness, but perhaps poses two distinct and competing contexts for crises in the global regulation of communication for a modern age.

The chapter sees crises in modern communication in two parts:

- The extent to which modern communication eschews any regulatory controls restricting access to and development of 'free' communication and, more elliptically,

- How much any concept of 'free' communication essentially relies on collaborative regulation in order that the community bonds of trust and comity can rely on responsible boundaries for the carriage of communication that ensure the integrity and legitimacy of community cohesion in all its forms?

With these themes brought clearly to the fore, the chapter divides into:

1) the good news about new media;
2) protecting the integrity of broadcasting messages;
3) ensuring data protection and privacy; and
4) social media and the new politics.

The analytical method employed in this chapter will be exposing and balancing conflicts of interests in the regulatory project, where each conflict of interest stimulates the crisis for regulation. Once crises have been identified and segregated into contexts of relevance, the associated issue is to tailor-make regulation to the conditions of the crisis. In this instantaneous communication environment hardly dreamt of prior to the development of the World Wide Web, controlling new media has become one of the most widely embraced and at the same time most hotly contested and culturally divisive issues in contemporary regulation.[2] Social networking, recently, dramatically and globally established an alternative popular democratic governance platform and like it or not the conventional institutions of government are almost powerless to regulate it. That said, the spectre of cybercrime, child pornography and identity fraud have sharpened the security focus over instantaneous information transfer.

Yet it would be misguided to assume a common regulatory ethic, motivation or commitment surrounding the control of media and communication abuses which might also lead to restrictions over access and content. Accessibility to the media and its benefits may be seen by a majority of users as a much more valuable concern than higher motive regulation, which has the consequence of limiting certain forms and fields of regulation.[3] Are we therefore facing regulatory trade-off, in a world of differential access and benefit? Are the downsides of new media and communications an accepted price to pay? If so, how will community attitudes beyond special interest groups confine the need for regulation as well as its form in a world where the attitude to crisis is ambiguous at best and resigned at worst.

Again, the chapter has a segmented approach to regulatory challenge and crisis. The first approach considers the regulation of broadcast media and the way in which the dissemination of news and knowledge requires verification and authentication. The second explores issues of access to and protections from communication transfer and its modern and mobile technologies. Finally, the chapter concerns itself with contexts for regulation and their

particular challenges relative to the situational specificity of crisis and associated different positioning of the state; public/private interests; dependency theory; regulatory capture; national, transnational and international networking.

Part 1 – Good news about new media?

As new media facilitates new concepts of 'community' through a radical transformation of communication possibilities and broadcast outlets, either previously never envisioned or only vested in the control of the rich and powerful, regulation should responsibly maintain this new *liberty* from the constraints of government and big businesses, or the taints of biased and distorting usage.

Institutional foundations of new media – Freedom vs responsibility

At the outset of discussing the foundations of new media and the challenges they present for developing and maintaining a delicate balance of free but responsible usage, it is necessary to explore the relationship between the relevant technology and platforms and the communities they create. What role does new media play in giving these communities their entity, and what responsibility does new media have to these communities and vice versa?

New communication technology[4] has created new communities not contextually determined by time and space. One of the defining characteristics of the new media is its lack of inhibition when it comes to immediacy and recurrence of communication forms. We are living in a generation in which, as a consequence of social media such as Twitter and Facebook, people share intimate information with an almost limitless audience, largely all for free. With new media social networking and the virtual reality of online living (gaming, shopping, gambling, relationship-building), it is not possible to separate the virtual world from the real world and their communities.

Despite the liberating freedom of the new media, do individual *citizens* linked into communities of communication through social networks remain bound by the responsibilities demanded of them through conventional civil society – or as *netizens* are the rules of social engagement profoundly different? If we are analysing the regulation of different communication *worlds*, it is critical to interrogate the interplay between contrasting notions of freedom and responsibility within the communities created by or arising from the new media.

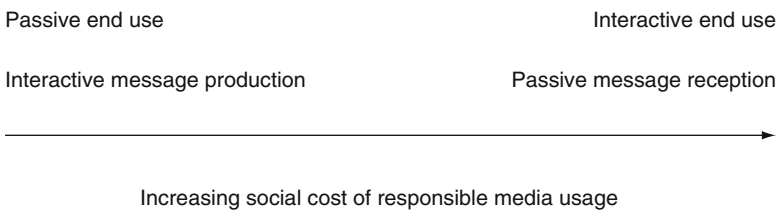
Communication is about cost and benefit: the *social cost*[5] of using any media platform and the benefits which flow from such investment, conventional or otherwise, are dependent on:

- the extent to which the platform allows user access;
- the degree of user control within the platform;

- the immediacy of the platform and its coverage; and
- any regulatory conditions which precipitate usage.

An understanding of how these variables operate against the social cost of responsible usage is revealed through a simple comparison of passive or interactive platforms. Viewing a passive media platform such as the television does not impose on the user a high social cost, whereas posting video footage on YouTube as a means of message delivery raises that social cost considerably.

Another observation which will be developed more fully later is that as passivity moves to interactivity, increasing the social cost of responsible usage, the reverse trajectory will be the case for producers of media messages. The end user might not bear a social cost in television-viewing but the producers of television messages have a much higher social cost in communicating with a passive and therefore vulnerable audience.



Regulation could harshly enforce responsible usage through the cost of freedom of use and access. In addition, the determination of what is *responsible* use or *freedom* of access is susceptible to interest and capture due to its contextual dependence. Sociability addresses this through mutuality of interests and collaborative decision-making so that fair and universal definitions can be established, and balances can be struck in the spirit of mutuality.

The interplay between freedom and responsibility further determines the nature of communication communities and the position of various participants within them. This is a critical interaction to be evaluated when determining the nature and extent of the regulatory challenge and the regulatory strategy most likely to meet that challenge. In this respect, regulation is charged with ensuring responsible use and protecting freedom to use at several levels of key stakeholder relationships.[6]

Communication communities are not a novel byproduct of new media. Most established newspapers now have an online presence which has created a community of netizens who comment on articles and recent news. While this community exists online, it is grounded in the traditional platform of newspapers. Hence, the community experiences the freedom of using the

new media to express themselves, but they are at the same time constrained by the boundaries established by the newspapers in real life. These communities are largely moderated to ensure that boundaries established by the traditional media are kept to.

Layers of wider press regulation include the following:

- maintenance of press freedom through professional journalist codes of conduct such as the confidentiality of sourcing and privilege;
- agency or self-regulation of newspaper producers;
- regulation of newspaper content through consumer choice and community advocates;
- control of opinion in newspapers through laws on libel and slander;
- controls over reader involvement through letters and written comments;
- control over the nature and content of reader blogging through online administration by newspaper personnel;
- regulation of blogging content through consumer choice and community advocates.

On the other hand, some new communication communities are entirely independent of the traditional media platforms. Even so, it could be argued that a similar responsibility/freedom regulatory balance applies in these new social networks, even if the regulatory strategy for its maintenance may be much more challenging and problematic, demanding a much greater reliance on sociability. The boundaries in the traditional media do not apply directly to these communities, except where legal conditions on usage and reception have been adapted to the new conditions. While internal moderation as regulation of social media is less intrusive than external censorship, for these platforms to remain popular and pre-eminent, users need confidence in the broad social responsibility conditions which prevail in the production and reception of messages. With greater freedom comes the need for more self-regulation as the line between acceptable and unacceptable conduct may be less clear where there is no external authority to turn to for directions. Further, sanctions by the moderators apply equally, albeit reliant as they are on the vigilance of other community users with a sense of appropriate community standards.[7]

New media gives civil society organisations and interest groups much more freedom to carry out a wide range of activities. Social media platforms originally established with social networking in mind may be adapted for commercial purposes, bringing about new responsibility considerations. For instance, companies and celebrities marketing or endorsing products through Facebook or Twitter[8] will generate obligations to warranty their goods or services, or their recommendations. The difficulty with the analogy between new and conventional media advertising responsibilities is that some new media platforms may exist within a more user-friendly and

parsimonious atmosphere, lulling the recipient of commercially directed messages into the false sense of security absent in television or newspaper advertising. It is the ubiquity of the message, therefore, which requires regulation for responsible use in certain contexts. Here public pressure from message recipients for information clarity could perform a function similar to that of consumer pressure discussed in Chapter 8.[9]

Public participation in information technology regulation – *Communities of communication*

When looking at making regulation more user-accountable, regulators will need to ask – to what extent should public participation act like a tripartite control on contests of self-interest and the negative consequences of this? How realistic is public participation in communication regulation where interests are diverse and sometimes directly contesting – such as over the issue of content and access censorship – and what can we expect of it? Finally, how can public interest be incorporated into a more collaborative sociability model, moving tripartism away from its more conventional conception of the *honest broker* in agency-based regulation?

Ayres and Braithwaite note that the very conditions that encourage cooperation may also encourage the evolution of capture and corruption.[10] They argue that tripartism can solve this problem, while at the same time opening up a raft of concerns about the nature and authority of stakeholder participation across the cooperative style.[11]

When involved in complex communities that grow from sophisticated social networking communication frames, *public interest* may only be an amalgam of differentiated priorities which are at best mutual only at a high level of generality, and collaborative participation may be unlikely due to the absence of temporal and spatial identity. Therefore, the public interest group (PIG) model relied upon by Ayres and Braithwaite will need to morph and adapt to the conditions of new communication communities if tripartism is to continue as a viable regulatory style for these communities.

The enforcement of external rules regulating the new media is currently heavily technology-based.[12] However, the widespread technical knowledge of the new media throughout civil society of all modernised cultures means that continuing to use command-and-control techniques will result in an 'arms race of innovation'[13] between governments and individuals, where each tries to outsmart the other in a regulatory tension. Globalisation allows individuals across the world to pool resources, giving the citizen users an edge in the race. As such, the shift from command-and-control techniques to *connect and collaborate* approaches is especially crucial to ensure effective regulation of new media.

It soon will be apparent to the user community how and where external authorities employ related regulatory *command-and-control* mechanisms

to limit communication avenues and monitor content. Censorship (by the state or the provider) damages the legitimacy and integrity of regulatory projects and exposes them to subversion. For instance, the recent US legislation to control online piracy has the capability to significantly restrict Internet access and substance. Similarly, the growth in state-sponsored Internet filtering, in the legitimate interests of child protection or national security, is used in totalitarian and interventionist jurisdictions to heavily censor and control Internet communication traffic.

Tripartism envisions creating contestable markets for guardianship such that PIGs compete for the privilege of acting as the third player in the regulatory negotiation. In communication communities, it is anticipated that there will be many contesting interests over how free communication should be and what are the conditions of responsibility. This atmosphere of contested interest in the formulation of a mutual position within the regulatory frame prevents PIGs from being captured. However, even the simplest model of tripartism will increase the economic and social costs of external regulation-making as these PIGs require resources (such as funding, manpower, etc.) to function. Ineffective competition between PIGs may result in a more complicated game, higher social and economic costs, wastage of resources and no improvement in regulatory decisions.

Further, it might be argued that in determining lasting measures of free access and responsible use, public participation is too volatile to act as a reliable tripartite control in the regulatory game. The commitment of *the public* to participation may waver depending on various circumstances such as the predominant political concern of the moment. Additionally, public opinion on some issues may be so varied that it is impossible to reach a consensus of what the regulatory decision should be. Some opinions may be motivated by personal biases or prejudice, and it is difficult to ferret this out for exclusion from the regulatory negotiations. PIGs are formed to propagate a certain interest and PIGs may thus become the instrument for allowing personal biases or prejudice into the regulatory game.

The discussion so far presumes active public participation in some form of external agency-based regulation or in some style of self-regulation requiring more oversight. Yet the nature of modern communication communities create more problems with participation as envisaged in conventional tripartism, even if information technology makes it easier for citizens to access the information base behind policy-making. Research has shown that public involvement in policy-making does not necessarily increase simply because technology has made it easier for citizens to participate in such policy-making.[14] This supports the position that democratic participation online in many respects reflects the practice of democratic politics in more liberal venues.

From public to private to *communication communities*

Communication and broadcasting has recently shifted radically from state control in the public interest to market-driven private ownership and onto the organisational power of communication communities which stimulates and manages the regulatory agenda for new media. When exploring the need for and nature of regulatory developments in new media communication from earlier state-sponsored models, it is important to reflect on the benefits of this progression in regulatory location and responsibility, and the regulatory challenges posed by this shift. How can a conflict of interests be avoided through regulation which seeks to maintain the benefits and interests on a more mutualised footing?

How communication and broadcasting has shifted from state control in public interest to market-driven private ownership

Given the high 'amenity potential'[15] of owning media outlets and that ownership bestows control over critical news and information,[16] control of media outlets is lucrative business and comes with considerable political power and social influence.

In the earliest days of radio broadcasting, three main regulatory models were developed: the commercial model, the State model and public service broadcasting.[17] On the one hand, the commercial model sprang from trust in the ability of market mechanisms to respond to consumer tastes and an equally strong reluctance to let the State dominate a mass medium believed to have great potential for information and influence. On the other hand, the State model arose in response to an interventionist concept of the role of broadcasting, entrusted by the community to direct government regulatory responsibility; the belief that the state was justified in using the media for its own purposes which could be assumed to correspond with the public good. The public service model oversees broadcasting by an organisation or agencies that would act in the public interest and enjoy sufficient independence to prevent political or bureaucratic interference, based on the idea that neither the market nor the state could adequately meet the public service objectives of broadcasting and acting in the public interest. These three models carried over into the television era.

For television, in the major broadcasting democracies the State model has been losing ground since the 1990s, with the commercial model becoming dominant (the United States is a prime example). The public service model has prevailed in some broadcasting democracies (such as the United Kingdom) and in most centralised state administrations, whilst faced with the financial reality of an increasingly commercial environment. The public service model remains widespread and is preferred by those concerned about the limits of commercial broadcasting as well as undue state interference.[18] This paradox presents a somewhat schizophrenic picture of state influence

in broadcast regulation, either protective or empowering. There is no such ambiguity in the commercial interest model where profit prevails and oligarchy is on sale to political interests that complement the normative and economic commitments of the media moguls.

Benefits of this shift

When the largest media firms are owned by governments or private families, this supports the public choice theory, according to which government or oligarchic ownership undermines political and economic freedom by distorting and manipulating information to entrench incumbent political and commercial counterparts, precluding voters and consumers from making informed decisions and ultimately weakening both democracy and market competitiveness.[19] News authenticity and objectivity is the first victim within this regulatory frame if regulation is in the hands of compromised state and commercial interests masquerading as public benefit. Diversified private ownership can claim that genuine competition in the ownership and activities of media outlets supplies alternative views to the public, enabling individuals to choose among political candidates, goods and securities with less fear of abuse by unscrupulous politicians, producers and promoters.[20] This assumes that public interest has been captured by compromised interests and that competition will reduce this potential. The role of such private and competitive media has become important in the checks and balances system of modern democracy so that they are in governance terms conceived of as the fourth estate, alongside the Executive, the Legislature and the Judiciary.[21] But can they become the problem in terms of who guards the guardians?

It has been dissatisfaction with the State and commercial regulatory models which has seen the development of a hybrid from the public service model, one also more compatible with the expanding of access and dissemination offered for message broadcasting through the new media. This regulatory dimension employs user 'direct action' to control the viability of message broadcasting through processes of community legitimacy on the one hand and user banishment on the other.

Regulatory challenges of this shift and how to avoid conflict of interest through regulation which maintains the benefits for all

While privatisation and liberalisation of conventional broadcasting carried the promise of more outlets and access, this has not always resulted in a broader and more pluralistic media.[22] The breakdown of state monopolies over broadcasting has had a positive impact in some countries, but in many others the state monopolies have merely been replaced by private ones with equally suspect aims. Oligarchic or monopolistic ownership becomes the impediment to competition and free market consumer influence.

Private ownership may also become a tool of abuse when the same owners control various media outlets, giving them full control over all forms of information. Research has shown that, almost universally, the largest conventional media firms are owned by the government or by private families.[23] Thus, the achievement of the goal of pluralistic media may be only illusory.

While it is difficult to prescribe an ideal system for media regulation because of the differences in political cultures and cultural expectations in various media locations, there are useful means to ensure that broadcasting is accountable for its actions without being bound to the strict interests of any state or commercial regulator. Here, the regulatory goal is to make the relationship between public broadcasting and government as transparent as possible and to discourage any attempt by government to interfere with legitimate press freedom and liberal content.[24] Many countries have a body responsible for regulating and supervising broadcasting activities, which can serve as a buffer between the government and the broadcaster. However, one regulatory intervention can lead to the need for another. For example, regulation that restricts entry into the broadcast industry may lead to the need for regulation on the level of advertising or regulation to promote pluralism.[25] Regulation restricting certain events for free-to-air television may be necessary, but it distorts competition against the development of pay television. Also, state subsidies, which are common in most countries, can distort competition among broadcasters.

Part 2 – Protecting the integrity of broadcasting

When looking at the protection of the integrity of news (or its perversion for sectarian interests), the connection between the regulation of broadcasting and the constitutional right to free speech needs some consideration. Growing out of that issue is the problematic relationship of any state regulating broadcasting for the broader public good or for the political preference of that state and thus constraining opposition. This tension and ambiguity in the role of the state and its sponsors when protecting 'truth' for broadcasting consumption precipitated the recent flight from state-protected media and broadcasting to news acquired from social networking. Why has this occurred?

Whose interests to regulate?

If one uses the public service regulatory model to strike a balance between community good and commercial profit, what can be done to prevent the regulator from being captured either by the industry or the government?

Historically, because of the mix of public interest and private entities in the conventional broadcasting sector, there has always been tension between the interests of the actors in the arena. A crucial tension revolves around the purpose of broadcasting and evidences the role of the broadcast companies

as profit-maximising commercial organisations and the need for them to fairly service an informed citizenry.[26] The broadcast industry is thus unique in the sense that it is crucial to the functioning of democratic society in a way that few other industries are.[27] With the growth in privatised media and a narrowing of accountability to shareholders rather than the public interest, profit-maximising may diverge from the public benefit and as a consequence endanger democratic representation and responsibility.

Striking the balance and avoiding capture of regulators

Regulators face continuing difficulties in adapting to innovation and new technologies within the broadcasting industry.[28] The pace and direction of change may be too fast and unpredictable for consistent or coherent regulation. Rapid technological changes place enormous pressures on regulatory administrators to change their policies and even their philosophies. Further, even if regulators have the technological know-how, they may not have the practical experience for industry-relevant regulation.

In a free market economy, there are limits to the ability of public authorities to compel powerful economic groups to act against their own interests. Thus, the regulation of broadcasting must necessarily consist of accommodation between the goals of private enterprise and regulatory bodies. Also, when a regulator appears to be failing to protect the public interest, it may be simply that the definition of public interest is kept vague to ensure flexibility, and the regulator does not consider such an act to be against *its* definition of public interest. This shows the lack of legislative or political guidance, but not capture.

Shift away from conventional media to where the consumer/user is more hands-on

In the modern information society, the consumer/user takes a much more hands-on approach to communication in all forms and is no longer as dependent on broadcasters for news and entertainment as before. Once groundbreaking, broadcast is now the poor cousin to modern news sources such as online newspapers, blogs and social media. Ironically, the truly up-to-date news is now on social media websites rather than broadcasted through conventional media such as television or radio, which are themselves often reliant on Internet sources for their news. However, as people become increasingly technology-savvy, they know that not all news on social networking sites may be credible, so in this way the state-protected media still has an important referential function. If news frameworks have diversified and become more communitarian then it is fair to assume that such a trend will influence the configuration of regulatory engagement.

This section, in light of what has been said on the topic above, will be brief – concentrating on how the community may be realistically integrated

into the regulation of broadcasting, and the accountability and legitimacy of such inclusion.

Western democracies are witnessing a changing regulatory regime from command-and-control governance to discursive, multi-stakeholder governance.[29] The issue now is whether the public as commercial 'consumers' are taking over the role of the public as 'citizen rights-holders' in the governance framework. This question is important because the 'consumer' and 'citizen' have different interests and focuses, thus different impacts on the regulatory framework and its efficacy. For instance, the 'consumer' has an economic focus whereas the 'citizen' has a broader cultural focus. While the 'consumer' is concerned about networks and services, the 'citizen' is concerned with broadcast content.

Capture of the regulator

The risk of capture of the regulator by partisan interests is high. Capture occurs when the positions and actions of a regulator are overly influenced by the vested interests of the industry it regulates to the detriment of the public interest it is intended to serve.[30] Capture is particularly problematic in the broadcast sector as broadcast regulators take decisions that have far-reaching economic implications for private media entities such as the granting or withdrawing licenses and imposing and policing conditions of broadcast. These can greatly influence the growth potential, income and profitability of media enterprises, which means that it is inevitable that media companies will try to exert influence over regulatory decisions and policies to obtain decisions favourable to themselves. Media interests are particularly well placed to influence public opinion and hence the actions of publicly elected officials and members of government.

Besides media enterprises, any independent regulator may also be captured by government. Many regulators may succumb to government pressures which may be informal and concealed from public view. In formulating policies, public officials will consider the costs and benefits of forming and maintaining coalitions necessary to keep them in office or to enhance their wealth and power.[31] The broadcasters and the regulator have sustained and varied contact (both formal and informal) with politicians, and the considerable economic power of media has led to what many describe as a 'soft' approach to regulating commercial broadcasters in some regions.

Interest groups can capture the regulator by fostering close personal relationships with regulators, controlling information, and hiring ex-regulators to induce current regulators to form expectations of future rewards.[32] The influence exerted by an interest group depends very heavily on the resources it commands and the economic and political power it possesses.

PIGs are also susceptible to capture by institutions such as media enterprises and governments. Media enterprises can do this through providing funding or making it difficult for the group to continue existing or carry out

its activities. Similarly, governments may exert pressure on PIGs to curb their activities or limit their participation in political life.

Research has shown that instances of strong capture (when special interest influence is so powerful that it renders the regulator's decisions harmful to the public interest) are relatively rare.[33] Weak capture (in which special interest influence undercuts but does not completely subvert regulator's efforts to advance the public interest) is more common. It is harder to recognise a more covert form of capture known as *cultural capture* in which regulators adopt the worldview of the firms they are supposed to control without even realising it.

Part 3 – Mass/mobile communication – Ensuring responsible message protection and privacy

With the democratisation of communication through new media, are conventional notions of privacy and data protection becoming less relevant when contested against the benefits of freedom of information and access to communication? Have the concomitant benefits/dangers presented through the instantaneous and mass sharing of information about ourselves made considerations of a *right of privacy* unrealistic and non-actionable?

New media and privacy

A benefit of new media is the open availability of information messages to all. In governance terms, open access levels the political playing field in all areas and gives rise to more opportunities for participatory democracy. However, accompanying this benefit is the threat posed to proprietary rights over information, both as a concept and as a commodity in commercial reality.

A crucial danger posed by the mass sharing of information about ourselves, our relationships and the manner in which they are authorised and ordered through the new media, is that we run a much greater risk of our information being known and/or misused by others about whom we know little, with whom we have no other relationships, over whom we have no control, and for whom the information may have an entirely different commodification than we ever intended for it.

Communication privacy protocols commonly exist at two levels:

1) protection of content from being disseminated to unauthorised or unintended others and
2) protection of content from being misused by others, including through other forms of new media.

The former is straightforward and involves legally actionable protection such as where copyright declarations propose a balance between the authors'

rights over the content they created and the public interest in accessing and utilising such content.

Those who campaign for freedom of speech as a way in which all forms of prejudice or extremism can either be conveyed or confronted have argued an alternative *crisis* about privacy. Their view alleges that privacy protections or even the fear of their activation are what hampers a much freer access to and utility of web-based messages. In these terms, the law is not to be commended for protecting privacy but resisted for reducing free speech.

Even the notion of privacy as a universal right is problematic. Celebrities are a case in point: more than ever, celebrities are famous in part by being made familiar to ordinary people through the mass media, existing as a heightened or exaggerated or special form of the ordinary.[34] As they are public figures, these people have exchanged their right to privacy in return for fame and/or power, and their consent to exposure cannot be limited to living behind a *one-way mirror*[35] in which the public may see them but not vice versa. The public nature of high-profile occupations may be construed as inferring some conditional waiver to rights of privacy or that the constant exposure and their expectation of it will make these people more *psychologically tolerant* of exposure or that the press has a right to inform the public about matters of public interest.[36] While these rationales are contestable, they act as a reminder of the limitations of a right to privacy. Other forms of notoriety, such as criminal or deviant behaviour, similarly present justifications for metering privacy or where poverty and a lack of access to private space and regulatory protection expose populations to public view with little regard for their integrity.

Privacy has proven to be a tricky area for regulatory control. Traditional command-and-control regulation is viewed by the state and by many users as required in this area through legal sanctions, but the form it should take is not so easily settled. Detailed rules may be under-inclusive, lack agility to adapt to changing circumstances and may thus frustrate regulatory ends. Further, rules that are communicated in a top-down fashion may have detrimental effects in media and broadcast organisations by disempowering those within organisations who are charged with carrying out information policies, alienating them from the goals behind the rules and promoting a focus on formalism. The past two decades have seen widespread experimentation with privacy regulatory requirements framed in terms of broad principles instead of tight legal sanctioning. Writing legal mandates broadly leaves space for discretion in implementation, draws on decision makers' superior knowledge about risks and firm behaviour, and accords regulators continuing flexibility in diverse and heterogeneous contexts and quickly shifting landscapes. Yet, what could be interpreted as the reliance on ambiguity has been criticised as rendering privacy regulation hollow, freeing firms from compliance and having the complexity of the task derail regulators' efforts to give meaning to the broad mandate.

While privacy may be considered a universal right, the behavioural mechanisms used to regulate desired levels of privacy differ relative to the value placed on the privacy to be protected, often differentiated among cultures, inviting culturally relative regulatory mechanisms.[37] Research has found that a country's regulatory approach to the corporate management of information privacy is affected by its cultural values and individuals' information privacy concerns.[38] This includes the society's perception of the roles of the government and firms, its values and assumptions about privacy and its expectation of what regulation may achieve. Thus, the exact mix of regulatory mechanisms cannot be universally prescribed, but must be tailored to the desired level of privacy and the cultural characteristics of the society in question. For instance, the United States has adopted a self-regulatory stance to privacy, letting the private sector lead the way. However, the European Union (EU) has adopted a more direct approach through its European Union Directive on Data Protection.

Privacy law has been attacked for being weak, incomplete, confusing and failing to empower individuals to control the sharing of their personal information. While this may be a largely accurate description of the law *on the books*, the debate has ignored privacy *on the ground*. Studies revealed that a constellation of regulatory phenomena has fostered legal and market connections between privacy, trust and corporate brand. This has led to a dramatic rise in corporate resources and attention accorded to privacy management and the development of privacy frameworks to guide decision-making in new contexts. These help to construct a new discourse regarding privacy protection – one in which the collaboration of stakeholders, rather than the heavy hand of state laws is to the fore – and has the potential to make privacy regulation a much more adaptive and effective behavioural influence, depending on essential contextual variables beyond the simple commercial value of the privacy object or the intractable operation of privacy laws.[39]

It has been argued that while widespread efforts to expand consent mechanisms to empower individuals to control their personal information may offer some promise in a more interactive regulatory form, privacy rights campaigners would prefer that such efforts not proceed in a way that eclipses robust substantive definitions of privacy and the processes and protections they are beginning to produce, or one which constrains the regulatory flexibility that permits their evolution. In addition, consent to handover protections in favour of message access only in the medium term relies on a fair levelling of the power and influence that exists between message producers and message receivers.

Privacy, by nature, is largely informed by social expectations. Neglecting to remember this would destroy important tools for limiting corporate overreaching, curbing consumer manipulation and protecting shared expectations of the personal sphere on the Internet and in the marketplace. Often,

the foremost concern on people's minds when they are using the new media for their messaging activities is freedom of access, and any form of sieving even for the purposes of privacy protection might be seen as an impediment to access and dissemination. Website privacy protections are notoriously ineffective as an alternative regulatory barrier. A recent study showed that an average person would expend 81–293 hours per year were they to skim the privacy policy at each website visited and 181–304 hours if they actually read them, which is usually not the case.[40] Thus, in operational terms, even such a procedural right to privacy is often an empty and formalist one.

With the increasing pervasiveness of communication technology, it is almost impossible to keep one's information secret from unintended access, innocent or otherwise. Within communities cemented together through new media communication networks, it may make more sense now to conceive of privacy not as a right to have one's information kept isolated from unintended users, but rather, as a right to prevent one's information from being misused by others.

New media and security

In the contemporary age of risk/security globalisation,[41] data security and its compromise has taken on new dimensions. On the one hand, in the name of national security, there has been feverish regulatory activity to prevent unauthorised access to sensitive material. On the other hand, the personal data about citizens at all levels of intimacy has been laid bare without the common constitutional protections available in other circumstances.

The introduction of national security protection takes the privacy issue further beyond concepts of universal rights and their protection. Even if security intrusion and privacy rights clash, the contest is all one-way if stakeholders are the young and the powerless, without means for actioning rights protection capabilities such as legal regulation. When the state is the common protagonist in claiming security data access above privacy concerns, whose responsibility is it to protect our data if not the state, from the state?

What are we protecting and why, when it comes to data integrity versus security concerns? In addressing these issues, regulatory sociability has a unique place through its capacity for clubbing together effected stakeholders and their interests who would have no individual purchase against the power of the state. Sociability can create a regulatory frame not only for protecting what is our essential identity, but also for protecting our new media empowerment.

Violations of privacy impact security on two levels (the individual and the national):

1) Individual security is affected when information that should not be known to others becomes known to them and thus brings about the potential for misuse and

2) National and global security is affected when important confidential information belonging to the state regarding defence or other sensitive areas are made known to the public or when networks reliant on technology are disrupted.

New media also represents a wider security challenge by allowing individuals to threaten society's security on a much larger scale than was previously possible. As the new media has the potential to reach out to a practically global audience, it is easy for hackers to use new media such as the Internet to invade data, incite violence and hate towards certain groups of people and to organise mass violence and subversion.

When confidential information belonging to the state is obtained by the public, the issue becomes more complicated. This is exemplified in the WikiLeaks phenomenon. The leaks highlighted the important connection between new media and security: how new media may be used to provide freedom of information or to jeopardise national and even global security by exposing confidential information to uninitiated communities at large. The WikiLeaks drama also illustrates the interrelated elements of mediation, communication and power, especially within the organisational structure of the *anti-establishment* communication networks.[42] It exposed to the world the problematic interpretations about security by those who are charged with its protection, and the manner in which these interpretations without accountability can justify perhaps unjustifiable intrusions into citizen integrity and the real security of civil society.

Given the heavy reliance on technologies such as the Internet in our everyday lives and the information interdependence which globalisation has brought about, any disruption in networked technology will have widespread social and economic costs. The security of the entire network is susceptible not only to technical failures but also to deliberate attempts to sabotage countries by terrorists or other individuals. Whose responsibility is it to protect the data and its subject, particularly when the usual sponsors of regulation may be the biggest enemy to data integrity? The possible contenders include the state, the individual who owns the data, or the person or organisation who collects the data (possibly service providers). While the simple answer is that all these agencies have the responsibility to protect, the degree of responsibility of each varies, as does their willingness or capacity to assume their responsibility. The state has the responsibility to ensure that laws and sanctions are in place both to encourage responsible handling of data and to show the state's commitment. The owner of the data has the responsibility to ensure that it is only released and used in appropriate settings. Lastly, the organisation to which the data is handed out has the responsibility to ensure that it is only used for that purpose for which it was done. However, the degree to which each carries out its responsibility is general but without definition. While the owner of the data should have the greatest interest in ensuring that the data does not fall

into wrong hands and is not misused, the owner is relatively uninvolved and often unable to understand, to initiate or to afford complex regulatory actionability.

Access

This discussion is not just about access to the new media, but access to accountable media and access to actionability where communication platforms provoke even wider challenges to personal data integrity. Should commercial access not come with sufficient information about the dangers of third-party access as well as enhanced capacities to make our identity safe? The related issues of identity and integrity are useful analytical tools which expose the scope, potency and even failings of viewing the protection of personal data as a matter of individual rights.

The Digital Divide

Despite rapid worldwide diffusion of the Internet, a disproportionate number of users are concentrated in more developed countries which are flooded with information from various sources.[43] At the same time, citizens in less-developed countries have little or no access to the new media because of social, economic and political factors.[44] This gap between societies that have ready access to the tools of information and communication technologies, and the knowledge that they provide, and those without such access or skills, has become known as the *digital divide*.[45] The same divide exists to varying degrees *within* countries, where gender, life stage and geographic location significantly affect people's access to and use of the new media.[46]

The digital divide has a profound impact on the continuation of social inequality by reinforcing existing class and social relations both within and across countries.[47] People, social groups and nations on the wrong side of the digital divide may be increasingly excluded from knowledge-based societies and economies.[48] This puts commercial and civil society in these countries at a competitive disadvantage wherein access to knowledge and innovation is crucial.

Various organisations across the world have argued that, in our present information age, unfettered access to new media should be recognised as a human right.[49] A recent United Nations report declared that Internet access is a human right endorsing this position, stating that 'the Internet has become a key means by which individuals can exercise their right to freedom and expression'[50] and that it is 'an indispensable tool for realising a range of human rights, combating inequality, and accelerating development and human progress.'[51] Providing Internet access should be a priority for states even if they do not have the resources to provide it immediately.

Access to accountable media

While it is difficult to deny that Internet access to the media should be widespread, Internet access cannot be an unqualified right as its potential for abuse is significant, and the consequences of such abuse are instantaneous, widespread and potentially severe. At one end of the spectrum, over-regulation of the new media stifles citizens' freedom of expression and leads to discontentment and resentment. Some governments – including China, North Korea, Myanmar and Saudi Arabia[52] – have placed direct restrictions on Internet access for clearly political reasons. Even democracies such as the United Kingdom, Germany and France use such methods, as well as laws of defamation and contempt, to inhibit the free flow of information. State-sponsored methods of regulation such as these are seen by communities of users as having little legitimacy and accountability.[53]

Access to actionability

Rights without accessible means of enforcement, particularly available to the most vulnerable, are empty. In principle, anyone has the standing to bring legal action if their rights are violated or are about to be violated, depending on the constitutional legality prescribed by each particular jurisdiction. However, practically, this option is open to only those with both knowledge and resources to use the law, and as such is an unrealistic regulatory tool for most users. The new media, by its very nature, can improve actionability as a medium for broadcasting violations because it disseminates information to a wide audience, thus publicising rights infringement and demanding that appropriate action be taken.

Further, the new media may connect those whose rights have been violated but who lack resources to take action, with those who have the resources to help them. By publicising the situation in the new media, others who have the resources have the opportunity to step forward to help. In this way, the actionability of rights is improved.

Surveillance

This section examines the other side of the coin, where privacy is concerned. Surveillance is a form of systematic information-gathering which carries with it negative connotations of domination and coercion.[54] Advances in communication and technology have exposed us to more surveillance than ever before, in ways that the distinction between public and private life in modern civil society is no longer clear.

How the new communication technologies open us up to snooping and why?

New communication technologies have created a whole new way of *talking* to other people, and new media enables a staggering scope of visual

interaction. Besides e-mails, there is now Blackberry Instant Messaging, Skype, Whatsapp and countless other ways of simultaneous and mutual viewing and speaking to our community, wherever one is in the world and all at little or no cost. Most of these functions may be used on mobile smartphones, making them accessible and convenient, and as such ever more widely used. However, these endless possibilities generate a large digital footprint, which makes it easy for others to pry into our personal affairs.

A burgeoning source through which intimate personal information can be easily surveilled is social networking sites such as Facebook. Although privacy settings built into Facebook suggest that users have a semblance of control over who has access to their personal information such as the events they are attending, photographs and comments from friends, this control over access is illusory against a determined snooper with minimum effort or technical knowledge. The creation of *invisible audiences*[55] in social networking enables widespread unauthorised surveillance, where users do not know who is accessing their personal information. This *leaky container*[56] is used by individuals and institutions alike, having moved from the ground up to become a legitimate way for institutions to gain information.[57]

Further, Facebook carries out surveillance by monitoring the activities of users and gathering personal information.[58] Facebook thus uses mass surveillance because it stores, compares, assesses and sells the personal data and usage behaviour of its users to advertisers. This form of unauthorised surveillance is harmful and problematic for many reasons. First, the complexity of the terms of use and privacy policies employed in this network means that few users bother to read the rules and understand them.[59] Next, the digital inequality between Facebook and users means that users may not know how to activate or use privacy mechanisms, allowing Facebook to collect and sell their data as a commodity on the advertising market without their express approval. Finally, online surveillance is a complex process and it is almost impossible for users to know what data is being collected and who has access to this data.

What rights have we given up for the benefits of open media?

Users in new communication communities have traded some rights for the convenience of such technologies without realising the nature and extent of the trade. When we make a call on our mobile telephones, numerous parties, from our service provider to the satellite owners, receive important information about us such as our location, who we are keeping in contact with and the frequency of contact.

A related *right* that has been sacrificed is the knowledge about and control over what our information is used for. It is costly and extremely difficult to take organisations to task to protect our information, and most users

resign themselves to this as a vicissitude of using modern technology for the convenience of access and inclusivity.

The modern-day panopticon is the Internet, where everyone is visible, and nothing can be hidden from even those outside select communication communities.[60] What was once considered a prison of surveillance is now more appreciated as a playground of chat.[61] In this age of the great exhibitionism, it appears that society has more than willingly traded its once valuable rights for the use of the new media.

To what extent has the need for security been distorted by recent global events so that fundamental considerations of personal integrity are hostage to national interest?

Citizens worldwide are now being subjected to constant and ever-increasing surveillance. Their physical movement is monitored by closed-circuit television cameras placed all over cities, their usage of the Internet is tracked to ensure that they do not visit terror websites and their belongings and bodies are exposed to enforcement officers in airports across the world.[62] Such measures would be criminal if they were not used by the authorities, with the implied consent of travellers.[63]

It has been argued that the opacity of the issues at stake in the rights/security trade-off confounds traditional arguments about balance and common good. Any rationalist rights response to rabid securitisation is confounded by irrational and increasing perceptions of insecurity at all levels of civil society. This commodification of securitisation distorts the need for security, with great negative consequences for civilisation in general.

Current security measures effectively punish entire societies in the hope of preventing a catastrophe and, by implying that 'everybody is a suspect',[64] perpetuate a never-ending cycle of insecurity. By approaching potential threats this way, the scope for using other forms of control is removed. Surveillance aims to build a society where perfect surveillance is possible, in the belief that this achieves full security. This neglects other forms of control which may be more effective in curbing deviant behaviour, such as social bonds, which have been found to be an important mediator of deviance in societies.[65]

Cyber security?

The Internet has transformed the way criminal activities may be carried out and has created new opportunities for crime.[66] The use of digital technologies in the commission or facilitation of crime is known as cybercrime.[67] These fields of crime include existing offences and misconduct which are targeted at the technology itself.[68] It appears that cyber security is primarily concerned with what is commercially valuable, not with harm to the

person. This raises questions about why we regulate and who benefits from regulation of cyberspace.

For example, *identity-related crimes*[69] are an area of cybercrime that has been transformed by the Internet and is receiving considerable control attention from governments across the world. The reason for regulation may be more commercial than personal. Clearly, taking over another person's identity without his consent is a both moral and commercial wrong because of the violation of the victim's personal integrity. In daily life, we are extremely exposed to authorised interference with our data, yet no one is uncomfortable with this exposure. This double standard is morally confusing and shows that cybercrimes may be criminalised because of other interests rather than moral rightness.

Double standards mean that the definition of *crime* in cyberspace is different from that in real life. This is confusing to ordinary citizens and potentially misleading in a regulatory framework which is not clear and strong. There are other reasons to eradicate such double standards.[70] The need for protection does not relate to any objective value in the information itself, but in the ability to control the access to that information, irrespective of its content.[71] What is protected is the right of the owner to access and to determine who else may have access to the information.[72] This applies equally to commercially valuable information or to mundane information.

Rights and responsibilities

Balancing rights and responsibilities

As with all other areas of regulating the public domain, the telecommunications sector requires the balancing of citizens' rights and their responsibilities. Regulation of the telecommunications sector concerns both citizens' rights such as their right to access information and their right to communicate with one another, and their responsibilities exemplified by laws such as the law of defamation and the laws regarding information property. Although the two competing sets of rights and responsibilities are considered separately in this part, it must be noted that these two sets are interlinked and, in a regulatory sense, interdependent. Given the diffusion of online services and their growing importance to the participation in democratic life and consequently freedom of expression, the right to freedom of speech and expression includes the freedom to access information.[73]

Freedom of speech

Modern information technology platforms have changed the social conditions of speech, leading to new conflicts over the ownership and control of informational and knowledge capital.[74] A major benefit of information technology is that it allows practically everyone to express himself/herself to a large audience with little difficulty. Citizens can thus fully exercise their

right to freedom of speech, expanding the possibilities for the realisation of a democratic culture. However, given the global audience and the interconnectedness of the modern world, and the immediacy and coverage of message delivery, regulation of this right is more pressing.

In general, the right to free speech is constrained by laws of defamation, which is a crime in most civil law countries and a tort in common law countries. Defamation or libel is designed to prevent people from publishing statements of others, which they know to be untrue, that create a negative impression of that person. This legal arbitration of meaning balances citizens' right to freedom of speech with their responsibility not to maliciously destroy another's reputation.

In more recent times, securitisation has become another reason for limiting the right to free speech. With the proliferation of the new media, extremist groups have used the new media to circulate their ideas and convert others to their cause. This activity, which can be designed to attack governance and cultural integrity as much as it can be revolutionary, crosses the boundaries of free speech if it is expressly intended to harm individuals or threaten legitimate governance and the other rights which governance may ensure.[75]

It has been argued that the right of anonymous access to reading materials should be part of the right to freedom of speech because of the close interdependence between receipt and expression of information.[76] If one accepts that an assumption in the freedom of speech is that individuals are free to form and express their thoughts and opinions free from intrusive oversight by governmental and private entities, then the information age forces us to reconsider the extent to which this right exists in cyberspace. Even so, responsibility is the break on dangerous speech and illicit knowledge access. The same technologies that have made vast amounts of information accessible have also made it possible for information providers to amass a wealth of data about readers (including information which readers may prefer not to share) through *copyright management* techniques.[77]

Right to information – Universal service

It has been argued that the right to access information is a fundamental human right for three reasons:

1) Humans are creatures with a capacity and a desire for knowledge.
2) Knowledge is pragmatically essential if people are to adequately meet their needs or carry out goals in life.
3) Access to information is required for people to effectively exercise and protect their other rights.

If access to and use of the Internet is recognised as a human right, then the ancillary right of universal service must be considered as such as well.

If universal service is accepted as a fundamental right, the subsequent question is then whether and how the new media environment has transformed this right.

How to balance conflicting rights?

Given the multitude of actors in cyberspace, governments are not the only entities with a responsibility to make and uphold commitments to free expression, information and privacy.[78] Private organisations such as those running Internet platforms or telecommunication services have equally serious obligations to uphold these fundamental rights, especially when governments fail to recognise these rights.[79] Governments that disregard these fundamental rights require the cooperation of companies to carry out its plans. Standing up to pressure from governments will not be easy for platform providers, as evidenced by the fact that the Global Network Initiative – a multi-stakeholder effort by companies, socially responsible investors, human rights groups and academics to help companies make and uphold such commitments – has only three participants, namely, Google, Microsoft and Yahoo.

Part 4 – Social networking a new politics? Regulating freedom of speech

Through new media, user access and participation is much more direct, and as such the potential for regulation through sociability does not first have to break down state or commercial sponsorship, beyond the indirect controls imposed by the mega search engines on the web. User and disseminator diversification is the crucial consequence of this development. This dissemination has also opened up immediate and vast opportunities for the rehabilitation of civil society inclusion outside the conventional exclusivity of professional politics.

Dependency theory – International institutions and structural power

Traditional governance forms typically use a regulatee's dependence on the regulator to encourage compliance. This is exemplified in command-and-control mechanisms through which the regulator (the state) uses the regulatees' (citizens) dependence on the state to induce citizens to comply with regulation dictated by the state. On the other hand, the dependency cuts both ways as the state is also dependent on citizens' compliance to function effectively. It is impossible for the state to govern effectively if there is no minimum level of compliance or 'regulability' among the citizenry. Through the mechanism of communication communities, what is the effect of citizen access to the formation of regulation, on the bonds of dependency essential for traditional governance forms?

Giving citizens more power in the process of regulation formation does not break the essential bonds of regulatory dependency. Rather, such participatory inclusion adds another level of dependency into regulatory relationships, because the regulator now depends on the community (and vice versa) not only for compliance but also for feedback or participation in the regulation-making process. The community now relies on the regulator not just for an orderly society but also to take its feedback into account in implementing regulation and also to provide an avenue for individuals to participate in the regulation-making process.

Unfortunately, just as how political processes have been argued to reflect the wishes of the rich and powerful in society, the regulatory process may also be affected in the same way. It is the rich and powerful who have the resources to participate in the regulatory process. This creates an interdependence which is essentially a self-benefiting relationship between the regulator and a small group of the regulatees, at the expense of the rest of the regulatees. This may be avoided through careful structuring of the regulatory process to minimise the resources needed to participate in the process.

Similar to the domestic setting, the international regulatory framework might function best if the regulated were encouraged to participate in the regulation-making process. While the avenue and choice of participation is technically open to all countries, the general regulatory framework is dominated by the player who holds the most structural power, power which may be exercised in international relations through different areas, characterised by Strange to be production, security, finance and knowledge.[80] Conventionally, the party who holds the structural power directly affects the regulatory framework in place because it has the most bargaining power and is able to convince other players to choose a regulatory framework that lets its interest take precedence. The disparity in power distribution between players is unique to the international level, and it is what causes uneven interdependence. The overdependence of some countries on others for capital, technology and access to information perpetuates patterns of inequality.[81]

If a country wants to be a part of the international community, then the domestic relations of individual countries must be subordinated to the requirement that each country restructures its domestic economy to meet the needs of those who run the international economy.[82] As such, individual countries may have very little actual effect on the regulatory process even if they are allowed to air their views and have apparent influence on the process. The unbalanced structural power may be turned into unbalanced relational power when the positions of the different countries become fixed through international institutions.

In the telecommunications industry, national companies have become international companies rapidly over the decades. The development of the media and the digital revolution are driven by political-economic forces

including the activities of these telecommunication companies, media companies and the policies of dominant nations. As such, international institutions are sometimes structured to allow these companies greater voices against nation states, undermining nation states' autonomy to regulate their domestic telecommunications industry. This enables the dominant power in the world market to be a larger version of their domestic market, regardless of the implications for the domestic markets of other nations. This makes dependency theory much more relevant to the telecommunications sector today, in the globalised, connected world than it has ever been.

Resurgence in new politics – Benefits and dangers in Twitter/Facebook governance

Social media provides a place without geographic boundaries where ideas, discourses and feelings can flow freely and accumulate momentum before ultimately manifesting in local demonstrations.[83] Social media's connectivity operates outside the close circuit of institutional power structures and can supersede and dominate discourses with a more representative message. This makes it difficult to regulate social media through conventional forms of governance.

A distinction should be drawn between using social media to further a political cause which may involve violence (as in the Arab Spring and the Occupy movement) and using it solely to incite violence (as in the 'crash mobs'[84]). The latter case is more straightforward as inciting others to commit violent crimes is never justifiable. However, the former case is more problematic because of the role that the new media plays in driving such political movement.

Two snapshots from the Arab Spring are sufficient to show the important role that social media played in furthering political causes. First, during Tunisia's 'Jasmine Revolution', dissident blogger and protest organiser Slim Amamou used the mobile social app Foursquare to alert his friends of his arrest on 6 January 2011. By *checking in* to Foursquare's virtual depiction of the jail where he was held, Amamou revealed his location to a global web of supporters and sparked further uprisings. Longtime president Zine El Aidine Ben Ali was soon ousted.[85]

A few weeks later, on 25 January 2011, the streets of Cairo erupted in protest against then-President Hosni Mubarak's repressive regime. Over the next three days, the government shut down the country's Internet service and mobile phone system to squelch the rebellion, but the rich ecosystem of Facebook conversations, Twitter outbursts and chatroom plans had already unified millions of Cairo's people, who continued the relentless uprising. Communications were restored to keep the country's economy alive, but the masses kept up the pressure until Mubarak resigned 14 days later.

Both snapshots illustrate the vital role that social media and the Internet may play in unifying citizens and organising them in massive protests, thus

harnessing the might of a country's citizens to crush an oppressive regime. Although the mobs appeared unruly, their actions resulted from digital coordination of human activity on an unprecedented scale, summoned by text messages, tweets and posts on Facebook walls.

Many view social media as the main driver of such political movements across the world because of the ease of organising such activities through social media and the speed with which ideas may be shared online. However, connectivity and communication have always been central to popular demands for political change.[86] All social media does is to provide the platform for coordination. Its function here is essentially no different from the communication tools used before the advent of the Internet such as letter-writing. The protests would have occurred even without social media. Undeniably, the protests would be different and possibly less effective in bringing about regime change,[87] but it is inaccurate to view social media as the *driver* of political movements. It is likely that it was the social and political background of these countries that was the factor that brought about and caused the revolution to succeed, not the communication tool used by the protestors.[88]

How should regulation adapt to the growing importance of social networks?

Contrary to popular belief, decisions to regulate or restrict social media during civil unrests result in higher levels of violence.[89] Further, research reveals that protests were less violent in countries where the use of information technology was more widespread.[90] This supports the argument that blockage of social media sites or the Internet is not an adequate response to its use as a coordination tool.

There are other reasons not to regulate social media too heavily using traditional governance forms. Social media is after all just a tool. A preferred regulatory tool to media black out and access rights reversal is to keep social media alive and allow it to continue transforming the way government and constituents interact.[91]

For the sake of distinguishing constructive civil disorder from riot, some form of regulation of social media is necessary. The imperative question is what type of regulation would be most effective and is most likely to be accepted by the public to ensure legitimacy as well as effectiveness. Further, it is essential that regulation does not get captured by reactionary political interests resistant to social change.

Conclusion

The essence of this chapter has been the manner in which regulation can both grow from the shared risk of communication communities and how, with the appropriate focus, it can enhance their shared

fate – communication for improved governance rather than communication as a crisis response.

If we accept that a useful, even defining, characteristic of the current phase of globalisation is the collapsing of time and space,[92] then mass communication is essential for this phenomenon. Besides the burgeoning of affordable computer technology and the expansion of the World Wide Web to almost every aspect of data storage and information technology, communication portability has been the feature of the recent decades of globalisation. You can travel to a remote hilltop village in Papua New Guinea where a cash economy is the human and community experience only of the last generation, and you will find a yellow face-painted warrior in a feathered skirt using his cell phone. Some might say that the pernicious advance of communication technology into Stone Age cultures is the most striking paradox of globalisation.

This chapter has not interrogated the moral or modernist ramifications of any harsh cultural interface between *pre-web* and Internet cultures, or their real and virtual communication landscapes. Instead, it takes the sociocultural resilience of new communication technologies as the backdrop for a discussion of several wide-ranging crises that the largely ungoverned communication spread has precipitated. An important question for the analysis was whether there are universal conditions and aspirations within the crises of modern communication such as privacy and data protection, or whether even these are now the province of only the rich and empowered.[93]

The analysis addressed the challenges for regulating responsible and free communication in a balanced and collaborative fashion, and these were identified because of the following contextual realities:

- They exist in the Internet age.
- They arise out of a tension within a general desire for free and accessible media and communication modes, pitted against the consequences of differentially regulated communication.
- They represent the quandary of how we value data integrity and privacy.
- They highlight the contest between the state managing public interest and the private sector 'marketing' communication for commercial purposes.
- They detail the explosion in social media and its recent influence in creating a new domestic, regional and global politics.
- They return to a fundamental consideration of what freedom of speech is.

In a wider sense, mass and modernised communication questions concerning the place of regulating the motivation for globalisation. For instance, the crisis surrounding data protection and communication privacy vs national security has deepened the complexity of the debate about regulating a *free*

new media. This in turn has spread to the security of conventional political alliances institutions, processes and thinking, in the face of governance through social media and all its consequences.

Developing the theme of communities for regulation (taken further in Chapter 9), the analysis has looked at the benefits of new media and broadcasting which should be facilitated through constructive regulation and wherein sociability, it is argued, is best able to empower positive developments in community-centred communication. Regulation from within the *communication community* is concerned to protect what identifies this new community in an age of globalisation where media and broadcast technologies are more about sociability than elite messaging.

The most appropriate way of balancing access against responsibility in media access goes beyond voluntarism. Given the problems of regulating the new media[94] that

- wider and more anonymous access,
- narrower external agency intervention,
- immediacy of communication,
- scope of networking, and
- ubiquity of messages represent,[95]

voluntary cooperation is only the device through which communities of shared fate can develop mutual interests over message delivery and reception, and thereby create an effective dialogue where regulation can be rationalised against the *rights* of free speech and universal access to information and knowledge.

Globalisation combined with the information technology revolution has shifted power to effect the change and control societies' communication and message broadcasting from governments or large corporations to individuals and their communities.[96] Further, globalisation has led to a proliferation of spheres of authorities which means that global governance will emerge from the interaction of overlapping spheres of these spheres and the regulation they exert. Regulation will be achieved not through centralised authority but through the spread of norms, informal rules and regimes within a more communitarian communication network, freer from the institutional and governance constraints of political economy.[97] This means that regulatory styles need to shift from command-and-control techniques to 'connect and collaborate' techniques.[98]

This symbiosis between new media and globalisation has further minimised the relevance of the nation state as a regulatory big player. In addition, communities of communication facilitated by the globalisation of new media present cultural and social challenges for the evolution of collaborative regulation. That said, the common benefits of new media to communities of communication across cultures mean that shared risk can be

converted, through regulatory sociability, into shared fate when the mutual interest is accessibility.

As the object of regulation is radically different than may be from conventional forms of message delivery, communication and broadcasting, so too is it necessary to rethink pluralist regulatory structures. Agency-based tripartism may need to give way to more collaborative and community-centred strategies. As I identified in looking at the limitations of self-regulation (Chapter 3), the answer will not lie in a total divesting of regulatory responsibilities to communication communities without some critical conditions in place. If regulatory sociability is to assert itself as a preferred means of regulatory conversation in communication communities, then the conditions of sociability for connect and combine include the following:

- communication communities seeing themselves of communities of shared risk (external invasion of communication freedom) and shared fate (responsible use of new communication opportunities);
- commitment to mutualising individual interests in the medium term around broadly determined principles such as would be the case in a responsive regulation model;
- application of a collaborative decision-making process which is consistent with and supportive of the conditions necessary for interest mutuality;
- acceptance of the primary objective for regulation as being sustainability;
- recognition of the significance of trust and comity for the sustainability of the essential community relationships on which sociability rests and regulatory collaboration progresses; and
- appreciation that sociability is circuitous – that through collaborative regulation it produces the conditions which are essential for the existence of sociability.

The discussion of regulating for and through communication communities is also an examination of the nexus between regulation and governance. Social media has facilitated new forms of political and social inclusion and activism. Collaborative regulation through communication communities can balance this process of crisis to ordering against the dangers for participants and the pressures on established nation states and supranational governance entities, to respect the new ways of governance while protecting their traditional custodianship of public/political interest.

6
Regulating Human Integrity – Who Owns Your Body?

Introduction

This chapter progresses across three associated fields of crisis. These fields are grounded in an issue which has been of interest in other parts of this book – the value of individual (bodily) integrity and human dignity. Differentially valuing life within the global community has not only skewed our appreciation of the nature and location of global crisis, but it has also discriminated the allocation of regulatory resources far from objective considerations of relative harm and most pressing need. Moving on from contention about individual integrity as (or not as the case may be) a sound measure of regulatory need, this chapter considers the relationship between health research and wealth gap. Is the response to health crisis mediated by commercial rather than humanitarian markets? The focus then moves on to considerations of regulating global health pandemics wherein recently has been evidenced a collaborative capacity beyond nation state or wealth interests. Is it in the challenge to global health that we see emerged the connection between communities of shared risk transforming them into communities of shared fate?

More particularly, the first field of crisis talks of the tension between human integrity and intervention into regulating the body. From the perspective of citizens in developed economies, where the rights directed to individual integrity, at least in a normative sense, value integrity and privacy, regulation of the body becomes an actionable terrain in which the law has developed sophisticated rules of engagement and regulatory outcomes.[1] In these circumstances, the literature critically interrogates the convergence between medical technology and morality. These issues can also be studied from the perspective of how they seek to securitise human life but differ in how life might be conceived in an individual or collective sense (bodies or populations).[2] Moral tensions emerge out of each perspective, such as the state as the representative of individual and community interests versus professional interests, concerned with the individual and collective benefits of

advancing science. While the issue of the securitisation of populations and the value of life within this context also has a powerful resonance within states and communities in the economically under-developed world, the luxury of human integrity and privacy is far from actionable. Law takes a backseat where, due to the vulnerabilities of poverty or the compromises inherent in collective rights environments, the power imbalance between professional and scientific lobbies and the universalised human conditions of hunger, disease and exploitation deny anything but the most selective or class-oriented access to actionability.

The value of life as a relative unit of production can be specifically mitigated in different social and institutional contexts, and is dependent on personal characteristics such as age and gender. The reality of wage labour in domestic arrangements contextualised through marriage is a case in point. In a specific legal regulatory situation, it is interesting to comment on contextual differentiation over the value of life and health as it is translated into damages for workplace injury.

The value of life is also related to considerations of opportunities for self-determination and preferences. Is the debate about liberty to exercise personal preferences, even where their consequences may be harmful, a luxury in which only the privileged can enjoy?

This consideration of individual integrity relative to the value of life and to the preferencing of contextual liberty moves on to the second field of crisis, which explores the complexities of regulating the explosion in biomedical research and the crisis this poses for regulation itself. Conflicts of interest between public and private good, state intervention and independent science, and professional self-regulation and public confidence feature here. Again, the regulatory imbalance is revealed through the focus on substandard generic drug markets human experimentation,and the *top-end* focus of such research, when the pressing global need for stimulating such research science is epidemic illnesses enslaving populations without the means to pay for research investment and drug profit. The need for an international approach to regulation is explored.

The final field covers the role of cooperation in healthcare as governance, specifically responding to health pandemics. Here, in recent times, we have seen a much more encouraging story of regulatory sociability. The actions of the World Health Organisation (WHO) in coordinating the responses of rich and poor states worldwide to pandemic prevention and control is evidence of the power of collaboration when communities of shared risk are well identified and where individual and common interests converge. This regulatory response is also a useful example of where strict legal intervention comes second to international networks of regulatory containment.

Part 1 – Life's cheap

Devaluation of life – Classifying integrity – Whose interests?

In a world where for the majority of poor and underprivileged life is cheap, how realistic is it to anticipate the regulation of individual integrity and human dignity so that every citizen has some choice in how their life is lived? The answer to this question belies an inevitable if unhealthy correlation between the value of life as a commodity and the extent to which the state is willing to endorse, protect and invest in that value.

International law sees human integrity as a fundamental human right. The *International Convention on Civil and Political Rights*, the cornerstone of international humanitarian law, in its preamble, recognises:

> the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, (and) that these rights derive from the inherent dignity of the human person.

Article 6 of the covenant determines the universal inherent right to life. Article 9 recognises the universal right to liberty and security of person. Essential for the present argument, Article 26 prohibits discrimination:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Despite the universal appearance of human dignity and individual integrity, the rights-protection framework is essentially and unavoidably dependent on the interests at work in determining the nature and contextual relativity of each individual claim. Why is this so?

In determining the value of life in terms of the manner in which human integrity can be claimed and the contextual determinants of any such claim, it is useful to consider more than the ownership of the body or of the rights and capacities to interfere with it. Even the issues of *ownership* and *use* are inextricably social notions.[3] If it is believed that a way of ensuring individual integrity is through the generation and enforcement of legal relationships beyond use and ownership, and more in terms of responsibility and obligation, to what extent do *status stages* (such as the age of consent and the consciousness of right or wrong) impact on personal integrity and the legal

determinants of its actionability? The answers to these questions will qualify the universal application of the right to integrity and dignity in terms of particular social location.

As with the value of protection of rights, actionability is critical, and when it comes to human integrity, the status of the individual is critical if legal recourse is the key to actionability. If the law can be viewed as an active regulator of human integrity, advancing universal rights protection against social and contextual discrimination, should it be the state's responsibility to mediate personal integrity for the common good? If the answer is yes, then whose good will the law value and ensure where competing interests calibrate the value of life on factors which may in fact devalue a commitment to the universal rights protection?

There is a view that *harm* should act as a trigger for external intervention over personal choice, and I will explore this in more detail later. At this point, it is enough to identify moral and community harm as important considerations in the decision for the state to intervene against preferencing based on individual human integrity, or even the absence of capacity in this regard due to social status disadvantage.

Jeremy Waldron (2011)[4] discusses the capacity of the individual to engage in the *self-application* of norms in terms of dignity, that is, applying officially promulgated norms to their own conduct rather than waiting for coercive intervention from the state. Therefore, through self-control, self-monitoring and the modulation of their behaviour, the agency of ordinary human behaviour becomes a means of short-circuiting, through law or any other regulatory externality, the social and contextual influences which would mechanically commodify and scale-value dignity. In this sense, law might, through its action-guiding function, be less compatible with individual dignity than might be regulatory protections, which are more the province of individuals themselves.

Through the frame of procedural fairness and the safer boundaries of the rules pertaining to legal argument, proponents of law as a protector of human dignity argue that law's institutions, processes and languages, prefaced with equality of justice, have a great potential to endorse dignity and integrity for all. Pragmatists, on the other hand, point to the discriminatory practice of the law and its preference for rank over equality (even if only in terms of positioning within private rights) as reasons enough to distrust law's role in the individual integrity struggle. In many contexts of application, law represents *dignified coercion*, rather than being used to coerce the acceptance and appreciation of universal individual integrity.

If there is to be intervention into individual preferencing as a demonstration of integrity and dignity, based on prioritising a wider common good, this should not necessarily be viewed as further endangering individual integrity as a universal right. Further, a law-and-community approach to the endorsement of common good can give specificity in determining the

limits of individual integrity, provided, as Roger Cotterrell (2008) warns, we do not employ a notion of community which is left vague or suffused with nostalgia.[5] As with my use of regulatory sociability, Cotterrell proffers a conceptualisation of community as a matter of social relations based on mutual interpersonal trust. Different types of relations of community have different regulatory problems, requirements and possibilities. Law then can be seen as the regulatory aspect of networks of community – networks existing inside but also across and beyond the boundaries of nation states.

It is Cotterrell's recognition that different contexts of community can put law in different roles in the regulation of instrumental social relations. If a particular social relationship is supportive of human integrity and the universal value of life, then law will engage with this in a very different manner to relations designed to discriminate between, and selectively devalue one life against the other based on externalities such as race, class or wealth.

If individual integrity is actualised within the context of community relationships, then it is logical that somewhere in the determination of the right will be balanced morality, even to override individual choice in circumstances where the community sees that choice as challenging the rights of many. One contemporary context wherein community *good* mediates individual preferencing for the integrity of the collective is where science claims priority in compromising personal integrity for a medium-term benefit and a generalised social benefit.[6] The conflict of interest at work in this mediation should not be underestimated and will be interrogated more fully later in the chapter.

The value of life, particularly in the realm of insurance and compensation, is historically located within the social context.[7] Take for an example the valuation of a woman's function in relation to the family and the labour market.[8] This issue is not just a problem of quantifying compensation with reference to the value of domestic labour. Applying the notion of an individual's pursuit of utility directly to specific evaluations of the housewife's role, the valuation of the woman's domestic labour and her value thereby in a commercial sense is, some might say, unfairly determined through economic relationships between classes in society as a whole (e.g. the married woman against the contracted domestic helper). If one turns the issue of comparative value into a matter of rights and individual integrity should these be consistent with legally reinforced contractual and property relations existing in a market economy and in no way mediated by the social state of marriage? And despite positive changes in the manner in which married women can claim more universal rights, these are often dependent on outmoded notions of the family influencing the mind of discretionary decision makers such as judges and arbitrators.

In determining the value of life, regulators will be confronted with the fairness or otherwise of measuring distributive impacts, without looking at equity. For instance, when placing monetary value on the risks to life, is

the value of statistical life determined by ageing in modernised society, in contrast to its value in poorer economies, as turning on whether a person is in or out of productivity?[9]

What is the significance of statistical values for life? Economic science is not morally neutral. In any case, will an improvement in the actual valuation process regarding the worth of life for the purposes of compensation affect regulatory decisions when there is no clear indication of how policy is prioritised in terms of benefits exceeding costs? The monetary valuing of life in the actuarial world of developed and modernised insurance relations is a challenging example where moral and spiritual values, and the dignity of life are traded against economic eventualities which prevail in societies where the loss of life is a monetary cost. Not so in the remaining world where life is cheap.

In the light of the wealth gap and its impact on the value of life, a balancing approach to putting the right price on life for the purpose of regulation may be achieved by utilising 'voluntary collective action' through non-profit agencies designed to identify and increase the value of life for the poor and narrowing the gap in 'value' between rich and poor.[10] The challenge is to extrapolate the wealth gap effect on life's value to a wider critique on *valuing* and *life*. In this regard, the more appropriate value reference is defined in terms of individual human integrity and the rights which are actionable for its protection, against collectives and populations where individual integrity is discounted because of a failure of actionability, and a preferencing of value based on class status and not on essential humanity.

Respecting choice – The differential placement of individual rights and actionability

The possibility of individual preferencing is a significant determinant in recognising and regulating personal integrity and individual liberty. In addition, individual preferencing raises regulatory questions when the impact of the preference is valued in terms of both the person making choices and their community.[11] Not all the world's citizens have this choice capacity, this liberty or any consequential regulatory value.

In social contexts, where the choice and the chooser are accorded value, the regulator needs to assess if private preferences are the appropriate foundation of social choice. In the context of such an evaluation the regulator then needs to determine how regulation should shape preferences or reject *inappropriate* preferencing to mould choice.

If the state is to adopt a role in the regulation of private preferencing, this raises the justification for such interference. If regulatory state initiatives are to operate beyond paternalism, their motivation could be welfarist or for the promotion of liberty in a broad, balanced social sense, but even so, it needs to be settled whether the state is to be the mover in these concerns. And if

the state is, what is the role of the law in constraining choice and when is it appropriate for legal intervention?

Back to the consideration of harm as the trigger for regulating individual preferencing, a general principle of law in many traditions is that if actions that gratify private preferences cause harm to others, governmental intervention is appropriate. Sunstein argues that outside the context of harm to others, law should not treat private preferences as exogenous variables open to essential regulation.

Human life is not only accorded value in terms of individuality. Human society determines many of the features of human life to be valued and devalued. In a globalised world, both individual and social integrity have a specific influence on human mobility and its regulation. Global human migration, if only seen in security terms, is currently exercising massive regulatory energies. While there is little space here to do justice to regulatory migration as a theme of global crisis, in securitisation terms, it is useful to touch on integrity, migration and the differential value of the *right to travel*.

Securitising human life – Populations on the move

In August 2009 US Senator Kerry said before the Senate Foreign Relations Committee that global warming would cause human displacement on a staggering scale. The image of climate change refugees on the march was, for the Senator, enough to shift climate change from a concern for the environment to a threat against national security.[12]

Zygmunt Bauman[13] talks about the new *fullness of the world* and epidemic poverty as stimuli for generations on the move. To this he adds what in his view is one of the most sinister consequences of globalisation, the deregulation of war and the manner in which refugees are fleeing from lawless space. This produces a double bind where refugees are forced into exodus from one home and are then refused entry into potential others. Migration regulation, therefore, blocks what could be viewed as global solutions to local and regional problems through the selective valuation of rights to move for populations with little or no rights to locate. States exercise their penal powers over sovereignty to discriminate movement largely in terms of a population's economic viability. Poverty, more than passports, is the determinant of individual and communal integrity when movement is negotiated. Bauman quotes Seebrook in noting:

> Global poverty is in flight: not because it is chased away by wealth but because it has been evicted from an exhausted, transformed hinterland . . . [14]

In concluding his thoughts, Bauman returns to the idea of regulating a bursting globe:

> The planet, however, is now full; that means among other things, that typical modern processes like the building of order and economic progress take place everywhere-and so also is 'human waste' everywhere . . . the process first anticipated by Rosa Luxemburg a century ago (though described by her in mainly economic, rather than explicitly social terms) has reached its ultimate limit.[15]

The devaluation of life as waste and as disposable rather than in terms of charity or refuge, to be resisted through migration regulation and securitisation, will have profound future effects on the imagination of human dignity and integrity.

Part 2 – Possibility of becoming someone else

The regulation of health provision is mediated by considerations of life's worth and by personal integrity. Biomedical research, which can be viewed as driving the cutting edge of health service provision, is an industry where the profitability of the consumer market influences higher-order determinations of health need in the selection, development and delivery of research outputs.[16] However, the identification of the research regulation agendas too often seems to focus on issues of human integrity and social ethics which may seem like luxuries for that world where modern health provision is out of reach.

In this section, to some degree, the critical literature forces a consideration of themes such as the conflict of interest in terms of empowered, or at least engaged, stakeholders. For instance, if we look at the controversy associated with the use of research subjects (particularly humans), there seems to be much more discussion in the developed world about the propriety of testing on animals, than the tragic exploitation of the poor as human subjects in developing jurisdictions.

Convergence between medical research, technology and morality

As mentioned above, regulatory agendas in the health field are identified through ethical convergence. As a consequence of prevailing and intrusive ethical agendas which contextualise biomedical research priorities, medical research and its technologies are rarely enabled a free choice to direct their own developmental horizons.

The challenge, therefore, in regulating biomedical research is to balance sometimes competing ethical dilemmas, with the need to advance medical science through cutting-edge research. The common regulatory model represents differing degrees of incorporating distinctions of morality and sanction. This requires the establishment of consensual crossover or overlapping normative consensus (no matter how limited), where even the most general areas of common ground form a responsive core of values.

To achieve any level of agreement on the ethical parameters, the regulatory project may have to establish scientifically questionable dualities which comfort opposing ethical interests. For instance, with cloning we find the some-would-say suspect distinction between therapeutic and reproductive motivations.

Biomedical research, despite its scientific sophistication and perhaps professional elitism, is largely operated depending on the shadow of the state. This regulatory influence, or even patronage, arises out of the state-perceived need to arbitrate moral values as against scientific benefit. In certain jurisdictions, such as the USA, where the political influence of Christian fundamentalist groups is disproportionate, public policy can be held hostage in the rush to satisfy the prejudices which range across a large sphere of *life-centred* research initiatives. Interestingly, in these situations, the critical debate is not about improving access to the benefits of scientific research. On the contrary, there seems to be much more pressure from religious conservatives to see the potential benefits of reproductive research in particular to be further restricted.

Biomedical research: Private ownership – Public fears

As Braithwaite's interrogation of the pharmaceutical industry[17] clearly shows, big-end biomedical research is about finance and not philanthropy. With millions invested and multi-millions in profit at risk relative to regulatory exclusion, the law has a prominent sanctioning and private-rights role in the aggressive policing of patents and intellectual property. This has led to the development of 'two worlds' when it comes to the proliferation and product of biomedical research, which are not separated by private property rights alone. In the economies which are home to the large multinational pharmaceutical firms, the private exploitation of research goes hand in hand with state licensing and protectionism. In the developing world, the state has weakened its regulatory grip (if ever there was one!) to enable the growth of a shadow industry of domestic generic products. A reason for this shadow economy is the unaffordability of corporate pharmaceuticals, even with state subsidies. While the generic product might be a welcome response to elitist pricing, it can come at a cost: price with purity. In addition, the developed economies also provide a ready market for cheap research alternatives without the ethical safeguards demanded by modernised states and ethics lobbies.

The relationship between private sector biomedical research sponsors and state regulators is, as with many other areas of intellectual property protection, ambiguous and idiosyncratic. The private firms are happy with licensing but not with taxation. They endorse consumer subsidies but resist price fixing. They want tough sanctions on intellectual property violation but react negatively to the control of anti-competitive behaviour.

An area where private and public regulation intersects, with the public sphere predominating, is product safety. Developed economies, in particular, practise strict pharmaceutical certification. It is argued that cautious product roll-out is in the public interest. Paradoxically, it might also be in the interest of private profit if delayed market access through strict testing and certification operates with restrictions which in turn limit competition and increase market share.

Conflicts of interest – Does it all come down to price over humanity?

Conflicts of interest in the sphere of biomedical research have been an unavoidable consequence of the growth of academic/governmental/industry collaboration. This intersection has produced strains in the previously *siloed* moralities of research accountability[18] and governance separation of *powers*.[19] In this field of scientific endeavour there is no longer any clear distinction between the public and private interests if such was ever possible.

The danger inherent in collaboration and technology transfer between universities and private commercial interests can manifest in a compromise of research integrity through sponsorship and an associated challenge to professional judgement. Aligned with this is an uneasy balance between fiduciary duties to various constituents such as human test subjects. *Special relationships* in both scientific and commercial senses pose the likelihood of regulatory capture where the regulatory agency or strategy and the scientist have found themselves isolated from a confused and sometimes hostile general public.

Once the conflict of interest potential becomes embedded in the relationship between the regulator and the scientists (and their sponsors), it is not a long journey before we see breaches of duty on both sides arising out of the pressures behind failure to disclose such conflicts of interest.[20] In any case, there exist erroneous assumptions in the conflict of interest setting where the assumption is, for regulatory probity, that disclosure is enough.

Central to the conflict of interest consideration right up to the regulation of health pandemics is the critical necessity to break down barriers of self-interest which form the demarcation between institutions and healthcare professionals. Aside from an effective response to infectious disease outbreaks, the prevailing healthcare interest for the greater good may be sacrificed when institutional priorities which err towards the interest of profit and servicing the rich, are favoured.[21]

State intervention in biomedical research – What about where states are weak or compromised?

As discussed above, it is assumed that state regulation is essentially the representative of general/public interest. However, whether it is a modernised state having close connections with multinational research sponsors or a disaggregated state partially victimised by generic producers and predatory

human subject testers, this assumption of state independence and vigilance is misguided.

The ambiguity of the state's regulatory potency is particularly apparent where the state has a weak regulatory shadow or is structured to prefer the narrow interest of an industrial/commercial minority. This can be so even when the state demonstrates the appearance of a rigorous licensing and classification regime.

Braithwaite's examination of the pharmaceutical industry argues that regulation needs to decentre criminal enforcement from the state. His analysis argues instead that multiple forms of regulation – consumer organisations, professional regulation and self-regulation – as well as state, regional and international regulation are needed. While Braithwaite did not deal directly with weak or disaggregated states, he considered the capture of state regulatory initiatives. He also suggested that corruption relationships proliferate between state agencies and the big drug companies, which, as is drawn up in Chapter 7, are more prolific and unbalanced when states are weak and compromised.[22]

Relationships of state/provider dependency often arise in the most vulnerable consumer contexts. Where state is afflicted with particular public health challenges and is incapable of meeting these challenges with local know-how or under-resourced medical service delivery, the state and its communities may suffer unhealthy dependencies on multinational pharmaceutical firms. These dependent relationships are of substantial power imbalances. The afflicted state may heavily rely on biomedical commercial interests, and their treatment of byproducts, in return for fundamental regulatory trade-offs such as patient/consumer/subject safety that would not be on offer or even contemplated in states where the power balance is more commercially and scientifically in parity.

Comparative national regulation

In terms of governing biomedical research and its product, the regulatory context of each nation state is deeply linked to the creation of regulatory policy.[23] Thus, for emerging or underdeveloped economies, there may be domestic health priorities and commercial imperatives which critically influence the choice to regulate or not to regulate. Take the case of India, for instance. While China is becoming the world's *shop floor*, India is taking over as the world's pharmacy, particularly for that world unable to access or afford patent medicine. In recent decades, India has emerged as the largest provider of low-cost, life-saving medicines to poor countries across the globe. To do this, India has had to take a very ambiguous approach to the interpretation of pharmaceutical patents, and as a consequence has earned the wrath of the big drug companies and the Western governments whose support they curry.

Most of India's drug production takes the form of generic copies of brand-name medicines protected by patents in Europe and the USA. In answer to this, a large Swiss drug company is currently pursuing the Indian government through its courts in an effort (which the company denies) to destroy what some see as an essential supply chain linking top-end pharmaceutical research with those markets in most need in the impoverished globe.

The case involving the reproduction of a cancer-suppressing drug is before the Indian Supreme Court, and can be seen pitting the big drug companies, defenders of private intellectual property rights, and generic drug companies and health NGOs against each other. The IP lobby (such as the US Pharmaceutical Research and Manufacturers of America) says that generic drug duplication stifles innovation by the big drug MNCs through the endangerment of financial reward for research investment. The other side of the case says that the pricing of drugs by these companies is well above the cost of research and development and is in fact a version of price fixing to unfairly maximise profit margins under the anti-competitive protection which patent law enables. The Indian law now enables patent protection but only under strict conditions of time designed to prevent *ever-greening*. More than this, the Indian drug companies and their supporters cite the possible destruction of a critical supply of inexpensive medicine to vast populations in need and not catered to by the patent medicine industry.

The case has morphed into an international relations pressure game with the USA as the diplomatic sponsor of IP protection, and the patent medicine companies add their weight against the Indian government practice to facilitate generic drug production through a conditional interpretation of their patent obligations. The Indian government had denied the Swiss company a patent for the drug, as it has for many Western drugs under the provision in the Indian patent law allowing for patent denial on grounds other than IP,[24] which has triggered the present lawsuit. The US government wants countries negotiating a new Pacific Rim trade agreement (the Trans-Pacific Partnership) to agree to grant patents in situations similar to that of the Indian case.[25]

But this legal action is about much more than patent law and its integrity. The big pharmaceutical companies want to shut down India as a place that can make early versions of generic medicines so as to compete with the original drug in poorer markets. If the interest in restricting access to medical research technology through the manufacture of generic drugs is more for the sake of market foreclosure than it is for the clarity of patent law as a regulator then there will be a genuine threat to the Indian regulatory intention of balancing the need and reward for innovation against public health concerns worldwide.

The above case study concerning regulatory challenge around essential market access inequality reveals how social and political factors explain critical regulatory differences. It is therefore important, in order to understand

the development of both domestic and global regulatory policy, to engage in comparative analysis employing wide cultural and economic frames.

Effective international regulation

King[26] argues that existing health and biomedical research regulation are largely confined within national jurisdictions, but that most countries lack domestic regulation of controversial research fields such as human experimentation.[27] This situation, he suggests, manifests a problem with inconsistent regulatory coverage at a national level and inadequate resources for regulatory enforcement.

International regulatory projects, therefore, which rely on state action such as certification for market access, are even more fragmented and unlikely to ensure minimum standards. On the level of international health and research conventions, they too have limited purchase in not being designed to serve as definitive legal or regulatory instruments.

The absence of coordinated and effective international regulation of biomedical research forces some of the most sensitive research into non-accountable private spheres where the welfare and rights of human subjects could be marginalised in the commercial production process. This is worryingly so in weak and fragmented states where human rights are less actionable and the value of life is cheap. This situation of research transmigration in a regulatory void creates a feedback loop and consequent information deficits:

> Public fears of biotechnology → increased but ineffective government regulation → fragmented international regulatory approach creating a regulatory void → privatisation of biotechnological research →information deficit through commercial secrecy →exacerbates public fears

The globalisation of major health research corporations makes it more difficult to police biomedical research; for instance, a blanket ban in one state will not stop a company from shifting its operations elsewhere. Over-regulation, on the other hand, can stifle genuine debate about the legitimate nature and purpose of research and prevent stakeholders from reaching compromises and pragmatic solutions.

It would be incorrect to assume from this that there is no international law regulatory frame addressing biomedical research. The Nuremberg Code,[28] the Declaration of Helsinki[29] and the CIOMS International Ethical Guidelines for Biomedical Research Involving Human Subjects[30]are evidence of instrumental activity which, however, was never intended as a definitive legal or regulatory code. At best the international convention framework casts the law as umpire, offering procedural safeguards reflecting a process-based model of regulation. The style of global convention-based regulation is protocols (some with professional and criminal sanctions, giving them

more *bite*). The purpose of protocols is declaratory and expressive; to state clearly the roles and procedure for reviewing and enforcing the determined or negotiated values and standards of the society in which the research is to be conducted.

Because the framework for regulatory intervention into international biomedical science is committed to reflect contested social standards, tensions inevitably arise in its activation. In particular, where regulation is not clearly enunciated for all issues, governability, responsibilisation and empowerment are battled over in the regulatory void.

Essentially, this can all be put down to conflicts of interest which range from domestic to global biomedical research arenas focusing on the:

- potential to compromise patient safety;[31]
- collaboration in research and technology between scholarly and commercial research–tied sponsorship;
- sponsorship leading to a greater potential for financial and other conflicts of interest;
- growth in collaboration creating situations in which financial or in-kind support from corporations may compromise, or appear to compromise, an investigator's or institution's independent professional judgement.

These competing interests endanger the investigator's or institution's ability to balance the fiduciary duties owed to its various constituents; specifically, its human test subjects. Attempts to address this regulatory challenge at the domestic level, when interests become adversarial rather than mutual, can lead to jurisdiction shopping in order to carry out research at the lowest cost and with the minimum regulatory oversight[32]

Contextual variables in regulatory choice

In order to conclude this part and its reflection in the regulation of biomedical research against the background of vested and contested interests, and differential community value and market access, I will skim the variables which determine regulatory choice. This precedes a more detailed examination of what makes regulatory sociability attractive and inevitable in the face of containing global health pandemics. In this part, regulation has been seen more in terms of a reluctant and ineffective reliance on externalities such as law or agency intervention. The resulting containment of the regulatory menu is a factor, as I see it, of the barriers to sociability be they around ethical dilemmas or distorted commercial self-interest. The failure to reach mutual goals and conditions for biomedical research, and the struggle to cash in on rather than universalise the benefit of such research, is a reason why regulation has perpetuated commercial inequities, humanitarian dislocation and unwinnable battles over moral terrain. With these considerations in mind, the limited range of regulatory strategies which are directed towards biomedical research seem to depend on:

- the actor networks within the policy sector;[33]
- the *game* of political parties within specific governments;
- the style of legality in the regulatory mix;
- the role of administrative agencies in unitary versus federal states;
- the extent to which community is compliant with regulator-administration pressure groups;
- the reaction towards international pressure;[34] and
- the political sequencing of bioethical issues other than the particular regulatory frame.

When looking for an explanation of regulatory choice within a variation in social, political or economic contexts, the impact on choice can be divided in terms of actors involved and institutions employed:

- Actors – what are the regulatory target groups (physicians, researchers and the final beneficiaries of these 'bio-policies', i.e. patients and political parties), how do they behave in different ways and how does the nature and interaction of their behaviours lead to different policy content in regulation?
- Institutions – what are the features of the prevailing political systems in which regulation is cast? What is the influence of 'contextual' variables on the internal decision-making process of the regulatory project (such as the difference in attitudes towards international – and especially European – pressure)? Does regulation emerge from a consensus-style of democracy based on decision-making processes that vary sharply from majoritarian systems? Finally, in situations where the state prefers to exercise 'non-decisions', relying more on professional self-regulation, does this result in policy variations which are more likely to be liberal as opposed to interventionist?

In the final part of this chapter, we move to a consideration of global health pandemics as a context in which some of these impediments to sociability fall away when regulatory choice is located in the perceived immediacy and levelling equality of humanitarian catastrophe which does not respect disparities in wealth or ethical divides.

Part 3 – Pandemics and sociability – All depend on communities of shared risk

Healthcare and new governance

Global health pandemics have recently sharpened the international effort to stem the unpredicted spread of disease, knowing no borders. It might be the speed at which the pandemic is upon us which explains the atmosphere of cooperation between nation states in the retaliation against infection.

As criticised in the later discussion of environmental and climate crisis, mutualities emerge in pandemic regulation largely beyond the retarding individual interests of territoriality.

The WHO's International Health Regulations (IHR) (2005)[35] are designed to bind the 194 State Parties to subscribe to rules for the enhancement of national, regional and global *health security.*[36] Key implementation milestones for these countries are said to include the assessment of their surveillance and response capacities and the development and implementation of plans of action to ensure that these core capacities are functioning by 2012. This is an ambitious regulatory agenda promoted by the fears of a global community of shared risk.

A close look at the IHR reveals a manifesto of obligations and responsibilities which states must discharge. The WHO takes a guidance and coordination role. Interestingly there is an absence of mention in the IHR of enforcement mechanisms or penalties for non-compliance. The IHR is regulation by guidelines and moral responsibility where the fates of states are shared.

Problematising harm

If one looks at the early days of health debate concerning the spread of HIV/AIDS, what is now an epidemic was allowed freer rein due to ambiguities in problematising harm. Strong lobbies represented HIV as almost a judgement on homosexual sex and intravenous drug use. There was little connection with the infection of innocent children at birth or unsuspecting heterosexual partners, despite the discriminatory phobia of the discourse in its intent.

Problematising harm has not been the impediment to appreciating global pandemics and planning regional and international resistance. The reasons for this are revealed, perhaps in reverse, when identifying factors which make problematising harm difficult in more domestic contexts. A principal factor in determination and prioritisation of harm for the domestic health agenda is the paternalistic role of the state. Nation states have taken a disproportionate role in the regulation and delivery of health policy and services, often for the best of social reasons. The downside of state sponsorship is that sometimes state conceptualisations of harm and its priorities are based on similar cognitive distortions which shape public wisdom. Obviously state policy relates to the inevitable preference-shaping effect of its own legal rules and those that allocate private entitlement and wealth in wider society. Fundamentally, state harm preferencing is a reflection of political ideology and the interests which shape it, which derive from the deepest relations of power and authority.[37]

The gratification of private preferencing in harm evaluation has been touched on above. Conventionally these preferences can be understood as variable, exogenous to state legal rules, and even where the harm preference

is autonomous, the state may intervene in awarding or denying legitimacy.[38] This too is the case with state controls over medical science where the determination is harmful but permissible (or not).

Science defining the agenda?

Another interesting feature of regulating health pandemics is how community hysteria trumps science in setting the regulatory priority and pace. This shift might be seen as a retrograde step in that the following may seem more rationally planned for and governed with the influence of the scientific community than by popular panic:

- issues of risk (to health and to the quality of life);
- questions of choice (for, say, patients as consumers);
- matters of property and private rights (who owns what?);
- confidentiality (against employers, insurers, fellow citizens); and
- questions of ethics.

Another reason why pandemic regulation might stand outside the normal considerations of health regulation has to do with definitional clarity. In the case of pandemics there seems little of the common controversy surrounding the definition of the health problem and consequently the proposed solutions are more likely to get universal buy-in than is usually the case with health regulation divided across conflicts of interest. It is here that communities of shared risk are revealed in global reach.

Regulation's role

In the situation of health pandemics globally the regulatory project cannot be divided between control and facilitation. In the first instance, regulatory networks of national and regional health services are employed (as with sociability) to connect the interests, arguments and apprehensions of participants, facilitating the integration of the widest range of views as to the appropriate course that technology and its regulation should take.

There are obvious problems represented by health regulation as integration. The extent to which different languages of science, commerce, ethics, ecology, law and nationhood are foreign to each other prevails as a terrain of division. In this sense, the urgent mutuality of communities of shared risk in the grip of a global pandemic means that problems over how communication is proffered, what is being said and why it is moderated, as part of any move to establishing communities of shared fate, must be anticipated and deferred in favour of the general good.

Julia Black refers to *dialogues of the deaf*,[39] where the provision of structures for communication does not necessarily lead to negotiated agreement. Fear along with trust are critical variables in moving self-interest to mutuality and

creating conditions for urgent and real dialogue. In this setting Black's invocation for regulation, rather than enforcing a common or official language, to find a role in interpreting and translating the regulatory message becomes imperative. If sociability is to succeed as the frame for regulating global health pandemics, the views of critical stakeholders need to be rapidly converted into a language which others can understand in order that negotiated integration can proceed. For instance, the language of the health provider is translated into a language of human security and it manifests into a political as well as a health regulatory commitment.

Fear and trust also tend to neutralise the tensions which proliferate in health regulation in less urgent situations. Health pandemics consolidate communities of shared risk and, in so doing, exert pressure on ameliorating tensions which deplete regulatory effectiveness and immediacy. Communities of shared risk reduce the likely emergence of tensions between the regulator and the regulated. There does not exist in the regulatory discussion the same concern about whether or not regulation is accurately targeted towards the right risks. This is so because there is no dispute about whether risk is the right organising principle for regulatory strategising.

Communities of shared risk, and governance

A central consideration when understanding communities of shared risk as a vital context for regulating crisis to ordering is the issue of inclusion. In regulatory situations where risk is ambiguous and community bonding weak, the concerns of *outsiders* are often much broader and more fundamental than can be marshalled around considerations of immediate risk. Inclusion and exclusion, where risk/fate considerations are not the motivation for community building, can be determined by hard or soft barriers which regulation must encounter rather than unquestioningly endorse. An example is with ethical divides. In debates about genetic engineering, the wider implications of the research and science related to grounds for ethical objection may be so intractable as to exclude parties and their views from the regulatory fora. In such situations, tensions emerge around defining the problem to be addressed both by health intervention and by its regulation, in terms of access to the regulatory debate and the rights to exploit any debated position, confidentiality and transparency.

Inclusivity is a benefit of regulatory sociability. The glue which binds communities will be specific to the nature of the regulatory challenge. In the case of global health pandemics it is clearly the bonds of shared risk and fate which are the foundations of communities in which governance in the face of disaster is organised. It could be said that in sociability where health pandemics are the risk, communitarian governance takes a more primitive form. National divisions have less meaning. The wealth gap is bridged through a shared risk of disease knowing no boundaries and the

fate of illness striking all. The rush to vaccinate is not necessarily down a hierarchy of power and privilege.

The governance of global health pandemics can be seen in sharp contrast to international regulatory approaches to human subject research touched on above. These involve the following:

- Existing legal regimes governing human experimentation which rely predominantly on national regulatory efforts and, at the international level, enforcement mechanisms created by human rights and humanitarian instruments therein.
- Most countries lack domestic regulatory regimes governing human experimentation, and those with legislation in place lack the resources to properly enforce the applicable provisions.

The result at the international level is that there is a fragmented, patchwork structure that lacks clear, minimum standards of treatment that human subjects are entitled to.[40] No such criticism can be raised against global pandemic regulation.[41] The reasons for this difference lie, I suggest, in the operation of communities of shared fate. Not even in the case of animal testing within the sensitivities of modernised Western communities do you find the unanimity of spirit that you find worldwide against the threat of pandemics and the mutuality of control enterprise.[42] These are relativities of governance taking on forms which are relative to the problem at hand and to the manner in which communities and polities prioritise issues of sustainability and social benefit.

However, the connection between global health and global governance has many dimensions beyond the management of pandemics. For instance, in her essay on trade and health, Koivusalo recognises the intersection between health and trade as a governance consideration:

> The recognition of conflict of interests between trade and health policies is not a call for unrestricted protectionism, but for better global governance of health and trade, recognition of systemic implications, conflicting interests, country-specific concerns, and most importantly, a willingness to act on the challenge at all areas of governance.[43]

In a governance sense, it appears that health policy priorities are subject to the interests of trade and trading partners and not vice versa, even though trade policies regionally and globally increasingly effect health policies. These realisations weigh heavily towards the imbalance which economic priorities (outside the 'regulatory window' of pandemics) direct against other vital considerations such as health, in the ordering of global governance.

If one considers health governance as a consequence of global pandemics, and then the contribution of health policy in states of pandemic as compared with health policy diminution to the interests of trade when the fear of pandemics is distant, the pragmatist approach to global health concerns in the arena of governance is all too apparent.[44] In the pandemic wave, health regulation is responsive and the impact it has on global governance is to emphasise mutual social consequences. Lifting the risk of pandemics and returning the economic priority of trade and health concerns to mutualised priorities in an equitable social context unfortunately more commonly and universally retreats in the modernisation global governance mix.

In the context of regulating health pandemics, responsive regulation goes well beyond rule functioning and onto the immediacy of survivalist social consequences. These will even outweigh considerations of social benefit in the rush to manage life itself.

Communities of shared fate – Regulation as facilitation[45]

Perhaps an explanation as to why communities of shared fate emerge in the regulation of global health risks in the form of pandemics is useful here. Communities of shared risk achieve, where most other health regulatory responses cannot, the diminution of duality, through the containment of divergent views concerning the need, purpose and direction of regulation. This is not to say that the facilitation of global health regulation is ever simple, far from it. But as much of Julia Black's strategy for negotiating the genetic revolution is premised on maximising facilitation against barriers of opposition,[46] facilitating global pandemic regulation is largely a process of maximising good will through the understanding of shared risk. Once that understanding is reached and internalised then facilitation tends to be more organic than mechanical.

Where sociability takes hold in the regulation of global pandemics, the structural, cognitive and communicative frames of regulation, which Black sees as requiring responsive engagement, are more likely to evolve through the organic generation of communities of shared risk, and to be maintained for the benefit of regulatory efficiency through the life of communities of shared fate.[47]

Access to the regulatory project, as a consequence of the freeing up of integrative and cognitive pathways through genuine communitarian discourse, will be enhanced. The insider/outsider duality which Black suggests,[48] and which is prevalent as an impediment in the regulation of biomedical research, will be minimised as the community of shared fate expands as a consequence of the scope of risk. Facilitation and negotiation become the mechanical manifestations of comity and later of trust relationships.

The final insight in Black's analysis, which is inverted through communities of shared fate, is the difficulty with settling and appreciating

the definition of the problem and of the solution. If the risk is immediate and the fate appears inevitable then so do the problem and the solution.

Communities of shared risk and shared fate

Up until now, I have employed these two analytical communities (of shared risk and shared fate) in a rather fluid manner. Because of their prominence in explaining the difference between regulating health crisis where life value is differentiated and where the threat to life is shared across that differentiation, it is helpful to set out a little more sharply how these communities are formed and transformed.

Sociability is a process of coming together. In certain situations that coalescence will produce communities of mutual interest. A motivation for bonding is the appreciation of risk, but not just any risk. The further the risk is removed from the individual, the less likely it will form a motivation for bonding. Also, if the individual can take steps on their own to reduce the risk then the bonding is less likely or less long-term.

Sociability is not about purposeless coming together. Once the risk is appreciated, then for sociability to ground, it will also be essential that the response can only be achieved through staying together. That is where communities of shared fate come in.

In the health context we have seen how this works with the control of pandemics. The risk is rapid and infection random. The individual alone is powerless to avoid infection without employing the most extreme strategies. The spread of disease, or at least the fear of disease, is immediate and indiscriminate. The value of life does not create hierarchies of either risk or response. It is incumbent on the rich to invest in the poor so that fate is shared. This goes for nations as well as individuals.

The same is not the case with HIV/AIDS. While the risk is epidemic, it is only so for the poor, the ignorant and the careless.[49] A community of shared risk could emerge depending on the context of the perceived threat but it will not necessarily hold together. Fate is in the hands of those with knowledge and resources to individually counter the risk and as such it does not depend on remaining in a community of shared risk. Tragically this assessment entrenches the differential value of life and means that the regulation of global health crisis, if these contextual conditions remain, will not produce a governance form which respects universal rights and responsibilities. In addition, it is an approach to regulation which will only sporadically bring crisis to ordering.

Conclusion – Communal integrity

> A map of the world that does not include Utopia is not even worth glancing at, for it leaves out the one country at which Humanity is always

> landing. And when Humanity lands there, it looks out, and seeing a better country it sets sail. Progress is the realization of Utopias.[50]

Health regulation or health as regulation should be part of the utopia toolkit. Yet, as this chapter suggests, whether it is health research or harm prioritisation, the equity which pervades utopia is missing even in an essentialist consideration such as the value of life. On the other hand, as with pandemics, when the lives of the valuable are at risk along with the valueless, communities of shared fate emerge across boundaries of risk that in other situations of risk would be insurmountable, even when the survival of a third of the world is in the balance.[51]

This chapter has been able to clearly connect conceptualisations of human integrity with the inequity of health research priorities. In some respects this has contributed to rather than corrected global health crises and associated crises in heath governance. Devaluing life relative to wealth and privilege spills over into global considerations of why investments in securitisation vastly outstrip resourcing programmes to defeat other humanitarian health challenges such as malnutrition.

The situation in governance terms is reversed in the critical context of global health pandemics. Communities of shared risk working together on regulatory platforms towards communities of shared fate are the reason. But can this paradox simply be viewed as one which is turned through self-interest driving the achievement of mutuality, where ethics or concern for universal rights was not able to achieve the same result?

The appreciation of this paradox is more complex than issues of competing interests and what drives them. Above these is the relationship between governance and regulation (which is explored in more detail in Chapter 10). Regulating health crises involves the governance of health and health as governance. Adding to the intricacy of this analysis are the layers of governance – local, regional and global – which proliferate in contemporary health crisis management.

Outside the regulation of pandemics, health governance and governance through health both demonstrate:

- democratic deficit – where no system from research to treatment ensures widespread input
- normative deficit – regulatory stakeholders cannot agree on the normative parameters
- information deficit – regulatory stakeholders lack adequate information about problems and possible solutions
- implementation deficit – regulatory stakeholders are unable to effectively achieve universal compliance.

In the grip of immediate pandemic crisis these deficits fall away. The establishment of communities of shared risk and fate see to that. In addition, the regulatory strategies engaged become far more pluralist.[52] As the WHO IHR demonstrate, this pluralism adds up to more than a proliferation of specialist agencies. It exhibits much more of a communitarian generation of sources of regulatory ordering.[53] This communitarian approach, moderated by a principled framework of obligations and responsibilities, takes on a responsive dimension and thereby overcomes the tendency of ground-up regulatory projects to be uncoordinated and duplicative.

Participation is also enhanced through communitarian collaboration. This process is seen in the participation of different professional players, and an expansion of the role of stakeholders of all kinds. Enhanced participation has the added benefits of increased contribution to regulatory knowledge, advances in effective communication, correction of power imbalances through transparency and mutuality and the capacity to address specific and broad regulatory challenges.

Communitarian regulatory engagement similar to the pandemic response is also benefitted by increased accountability. The emphasis on knowledge transfer as both an obligation and a responsibility of States Parties in the WHO IHR frame is an example of this commitment.

Finally, regulatory capacity is enhanced through the pluralistic landscape inhabited by communities of shared risk and fate. Pluralism offers a better mix of capabilities (cognitive, organisational, operational, political, civil, etc.). Pluralism indirectly increases a competitiveness within the communitarian bond, which advances innovation and experiential learning,[54] which is retarded in more exclusionist regulatory structures such as those which are artificially constrained by the need to concede to oppositional interests when, for example, contentious research rather than consensual survival is the focus of regulatory dialogue.[55]

7
Regulating Finance and Economies – Profit and Beyond

Introduction

In the aftermath of the recent global financial meltdown (2009), the vigorous *free-market* attack on international financial regulation has been dulled but not silenced. Braithwaite's *window of opportunity* for regulation out of crisis[1] is particularly apposite to this chapter.[2] Following on from the devastating political and social impacts of the global financial crisis, it is necessary to ask – to what extent has economic re-regulation taken root in the thinking about crisis responses? Or is the discussion of regulation a smokescreen for the failure of the contemporary market model at the heart of global political economy? Even if this concession proves correct, with so many economists dodging responsibility for crisis prediction, to what extent has the financial crisis opened up discussion of the re-emergence of socially responsible economics despite the death of welfarism? Ultimately the discussion to follow explores the real nature and purpose of collaborative regulation in the global financial industry and questions the extent to which it mimics or masks the potential of regulatory sociability.

This chapter divides a broad interest in global economic crisis into two parts. The first looks at the perennial tension between free market financial arrangements and regulation. In this consideration of crisis to ordering, the focus will not only be on the failure of half-hearted external regulatory intervention, but the implication of self-regulation in the generation (rather than regulation) of global economic crisis through the dominance of rampant self-interest over any genuine commitment to more equitable global economic health. Central to this analysis will be the paradox that the rising economic cost of global financial market failure is disproportionately borne by the tax-paying general public. Yet the public lacks the capacity to participate meaningfully in the process of regulating market misconduct, within increasingly complex and interconnected global financial markets. The hurt caused by financial mismanagement has been global, even affecting disaggregated states which have derived little benefit from modern financial

marketeering. However, the limited independent and accountable regulatory influence over financial market practice, which should be inclusive of all stakeholder interests, remains timid and constrained. Why is this so when the recent global financial collapse exposed 'pervasive market misconduct, regulatory incompetence, and conflict of interest in the . . . financial sector'[3]?

The second area of interest will be exploring the imbalance between concerns for failing Western developed economies (due to vanishing liquidity) and the potential collapse of emerging market economies as a consequence of diminishing consumer demand beyond their shores. Such a degenerating relationship seems to have confounded the modernist development mantra of inevitable economic benefit for all through the deregulation of financial markets and the aggressive regulation of anti-competitive trading behaviour. This push-me pull-you regulatory mix has led to what now seems the inevitable failure of capitalist market relations, as well as the impotence of bilateral regulatory strategies (between the industry and the regulators).

The demon of deregulation is discussed against other interesting regulatory transitions such as corporate greed versus corporate citizenship and responsibility. What will be the global ethic after the demise of material profit as the measure of modernisation and almost imperial global economic development? And how will questions of sustainability over profit lead to a fundamental reconsideration of resource distribution, or has financial crisis simply ushered in new dragons to guard the gulf between the 'two worlds' of resource benefit?

To regulate or not to regulate, that is the question?

> Despite their dismal track record as guardians of public interest, bankers and bureaucrats effectively remain in charge of protecting the public from the next financial meltdown.[4]

In a recent article in the *International Herald Tribune*,[5] the observation was made concerning the conventional financial regulatory struggle:

> . . . between bankers trying to preserve their most ludicrous business practices, and regulators trying to defuse a system that, many believe, nearly blew up the world economy . . . one lesson that emerges (from the public pressure for financial industry pushback) is that the capacity of the financial industry to lobby for its short term interests is far-reaching.

Following the fall of the Lehman Brothers bank in 2008, the US housing crisis financial meltdown of 2009 and the Euro-zone sovereign debt crisis of

2011, the debate concerning financial sector regulation has taken a turn. The characteristics of a new regulatory discourse include the following:

- less confidence in the justification that banks are too big to fail;
- less unquestioning compliance that bank losses should be bailed out with taxpayers' resources;
- growing public anger about the maintenance of banker bonuses in bailed out banks;
- growing pressure for central bank and state legislative regulatory intervention;
- weakening confidence in the capacity and genuineness of bank self-regulation;
- weakening faith in deregulation as the foolproof stimulus for economic market growth;
- strengthening of concerns about socially responsible economics and weighing the social cost of profligate market trading; and
- strengthening of determination to inject public interest into financial regulation.

On this last point, Omarova doubts that tripartism alone is enough to overcome the failings of financial self-regulation. While not suggesting that any tripartite intervention outside the industry or state regulators should have executive or legislative power, Omarova believes it essential that the independent public interest element should possess:

- broad statutory authority to collect information from government agencies and private industry participants;
- power to publicise its findings; and
- a capacity to advise legislators and external regulators to take action on issues of public concern.

With these features, it is suggested that the third regulatory arm would counteract capture and defuse the financial industry's power to control the regulatory agenda by putting both bankers and bureaucrats under constant and intense public scrutiny. Even so, this 'more effective and public-minded model of risk regulation' faces significant implementation and operational challenges, not the least of which involves revisiting the basic tenets of financial regulatory philosophy. The more a regulatory strategy is adversarial in design and pitted in between aggressive industry interest and the compromised external regulatory involvement, the greater the likely reliance on an escalating hierarchy of regulatory enforcement. As I have indicated earlier in this text, such a regulatory framework limits its application to the context of well-functioning state systems in which the

enforceability of public obligations and private rights and privileges is consolidated. Most of the world does not operate in such a context, politically or commercially. So where does that leave the regulation of market malpractice affecting fragmented states and their economies and commercial markets?

Trickledown of other crises to the financial sector

Financial industry strain has crippling effects on many components of market economies. In turn, crises in other economic sectors will destabilise the financial sector and a cycle of boom and bust will roll on. An example of this potential cycle can be anticipated in the booming market economy in China. Economic stimulus is a consequence of a more than healthy export balance to consumer markets in the West. The boost that this has given to the domestic Chinese economy has skyrocketed real-estate prices and rapidly stimulated consequent construction industry expansion. The real-estate bubble has primed the construction industry, and this in turn has fuelled demand for credit and a drain on capital. If history tells us anything about real-estate inflation, the bubble will eventually burst. A significant downturn in consumer demand from Western economies as a result of global financial market strain will hurt the Chinese economy. Some analysts suspect that the aberrant nature of the Chinese banking system and its domestic secrecy will exacerbate the consequent pressure on the Chinese financial industry, which in turn could have unpredictable consequences for global financial markets.[6]

One reason why global financial markets are so vulnerable to crises in major national economies is their interconnectedness. Sticking with the example of China, the US has been critical of the negative fallout within its economy from the Chinese failing to let their currency reach its true market value, and through the secrecy and 'ungovernability' of the Chinese banking structure. While denying the former, senior Chinese government officials have recently been wrestling with the regulation of their banking sector.[7]

Another reason for financial sector vulnerability to crises in other components of the economy is the resilience of global banks, in particular, to guard against truly competitive trading environments. With the consolidation of the international banking industry over the past decade (and its acceleration following bank collapses after 2009), world banking is oligopolistic, and cartel practices are common. Contemporary financial regulation is said to ensure competition so the markets find natural balance and correct control challenges without external interference. However, the regulation of the banking industry, in the shadow of epidemic deregulation at the close of the last century, has not created a competitive international banking environment.

This protected trading context has enabled a fundamental transition in the nature of banking from a largely domestic service utility predisposition fostering other commercial endeavours into a powerful market player trading even more risky financial products generating staggering shareholder profits. This banking transformation has not been mirrored by a sophisticated regulatory answer to the marketing of risk.

Where the regulation of anti-competitive behaviour is seen as necessary for the benefits of free market capitalism to be maximised, paradoxically, particularly with regulatory capitalism, mega-corporations such as global banks thrive in regulative regimes which tend to protect alliances for preferential market share. This realisation prompts the question to what extent is market *deregulation* for stimulating a climate of competition a *myth* in modern national and global economies? How has regulation promoted mega-corporatism? As represented in the Basel banking accords, how has private sector regulatory self-interest transformed into collaborative networks which work beyond state control and accountable political economy?

Cyclical regulation – Boom and bust

As mentioned above, crises in global finance represent themselves in cycles of economic boom and bust. Why is this so?

Tensions between wealth creation and regulation securing wealth retention create ambiguity in the nature and reach of effective and responsive financial regulation, and the attitude of the investor as to its appropriateness. Economic crashes tend to destabilise interest group equilibrium and their opposition against the regulatory control of wealth creation. Bust disempowers resistance to regulation, and as the recent global financial crisis amply demonstrated, in bad times it becomes easier to enlist business self-interest for regulation to restore investor confidence. Even so, the 'grace' period for regulatory stimulation only seems to last as long as investor confidence is shaken. Where popular wisdom turns against the rich and entrepreneurial when they fail to generate wealth for a wider investor population, those hurt in times of bust coincidentally blame regulatory ineffectiveness and seek more intervention. The same population in times of boom join the chorus against regulatory interference with financial market freedom.

This temporally limited issue-attention cycle gives reformers a brief window of opportunity to re-regulate before any market reform agenda is sidelined if and when the boom returns. Despite his gloomy predictions on market sustainability, major market players like George Soros are not won over to the regulatory camp if it involves anything but the most international of approaches:

> . . . regulations must be international in scope. Without it, financial markets cannot remain global; they would be destroyed by regulatory

> arbitrage. Businesses would move to where the regulatory climate is most benign and this would expose other countries to risks they cannot afford to run. Globalisation was so successful because it forced all countries to remove regulations, but this process doesn't work in reverse.[8]

In Soros' view, it is market structures and operations as well as their regulation which are the problems generating financial crisis. While not advocating a wholesale move away from market models for global economies, he identifies two 'cardinal principles' of market theorising which need to be factored into financial market management:

1) Market prices always distort the fundamentals. The degree of distortion may range from negligible to significant. This is in direct contradiction to the efficient market hypothesis, which maintains market prices accurately reflect all the available information.
2) Instead of playing a purely passive role in reflecting an underlying reality, financial markets also have an active role: they can affect the so-called fundamentals they are supposed to reflect (look at the effect of the mispricing of financial assets on the fundamentals).[9]

John Lie (1997) attempts to take market analysis outside specific historical and institutional contexts to theorise markets in transition. He suggests that too much emphasis might be invested in the market as the only means for understanding the diversity of economic exchange:

> The assumption of market essentialism forecloses considerations of alternative forms of exchange relationships and structures. Given the historical and comparative diversity of market relations and institutions, there is at least a prima facie reason to consider alternative arrangements . . . In order to advance theoretical works on markets, the assumption of market essentialism should be jettisoned in favour of describing and analysing the empirical diversity of actually existing markets. In addition, power and macro-sociological foundations need to be better theorised.[10]

Taking up Lie's exhortation in respect of global financial markets since the push for deregulation in the 1980s, it is impossible not to consider the recurrent regulation of market failure. However, it should not be overlooked that what first appears as market failure might actually be how the prevailing market conditions have developed and operated over time. If the measure of market success or health is competition, then the international financial market may be characterised by banking oligopolies and cartel relationships which are both features of the development of that market as it consolidates and evidence of its failure in competitive terms.

Regulating market failure

Regarding the *lopsided regulatory policy* described in the last section, governed by and responding to boom and bust cycles, and challenged in recent times by ever-diminishing credit and liquidity cycles, regulatory options are also constrained by the dual need to manage often unpredictable credit expansion with the same tools as credit contraction. In this sense financial market regulation is unable to break free of a qualifying *risk management paradigm* in which, as Lie reiterates, market essentialism prohibits consideration and auctioning of other collaborative forms of exchange management.

Global financial markets are failing with greater and more catastrophic regularity as market capitalism comes under the strain of finite resource supply chains and a seemingly infinite resource demand. Since the economics of Adam Smith, market and financial regulators look to tinker with fiscal policy to control the constituents of supply and demand, assuming that markets are essentially efficient, and the resources that fuel them are replicable. As the issue of sustainable environments is critically confronted in the next chapter, market activity since the industrial revolution and the birth of capitalism would eventually come up hard against the finite nature of market resourcing. The efficiency of the market as a regulatory assumption then is more faith than fact.

To essentially challenge the efficiency of market relationships through the lens of finite resources leads on to suspicion of principal/agent regulatory methodologies, relying as these do on private law bonds between the regulator and the regulated.[11] From here the traditional dichotomy between pricing and cost reimbursement rules tends to be blown out of any balance if market failure is forever imminent due to resource unpredictability or finality.

This book has already challenged the idea of state restructuring as a constructive context in which to rejuvenate regulatory focus and to manage political economy, even in a profit-oriented rather than socially just agenda. Mark Purcell (2002) identifies the problematic of state–citizen legitimacy as a central factor in the critique of state reconstruction being a foundation for global restructuring (say of financial markets), and thereby the reassertion of functional global political economy.[12]

Posner (1974) uses economic regulation theories to challenge essentialist assumptions regarding *market stability*.[13] Where markets are for nonproductive and expensive disposables (markets for *bling*), in financial markets it might be for derivatives such as futures; the supply-and-demand balance is challenged because shifts in asset prices may not be logically or automatically reflected in contractions of demand. Contrary to conventional market theory, and particularly in boom periods, demand does not stimulate supply; rather lack of supply does the stimulating. As resources dry up, this demand–supply relationship could prove very destructive in the wider

economy. In such circumstances, and as Posner suggests, the mutualising of interests (he calls public interest theorising), which is also one essential function of sociability, needs richer investigation as a foundation for economic regulation in political economies where, due to resource rationing and self-interested demand motivation, supply chains and demand forces become radically out of balance.

Financial instability questions efficient market theory. In the case of financial markets and their regulation, high-risk lending strategies have been exposed as in direct conflict with a money market commitment to safe returns for investors. Even so, rabid risk-taking in the name of wealth creation has sidelined conventional credit prudence, leading to a generation in which my dog could be issued with a credit card!

Where does this lead the challenge of financial market regulation with crisis around every corner? How does the collaborative dimension of regulation reveal itself when self-interest is the hallmark of the market to be regulated?

Is industry collaboration the same as sociability?

As the Basel III rules could be interpreted, the core issue for industry collaboration may be the protection of self-interest, and the self-governance of self-interest, rather than any genuine devolution of regulatory power to a broader base of cooperative and mutualised stakeholder interests. At issue for the Basel consortium of major banking agencies (Basel Committee on Banking Standards) was who should set standards concerning the retention of capital, that being the money that banks accumulate through issuing stock and holding onto profits, money they are eventually not required to repay. Through legislative activity particularly in the US and the UK and central bank direction,[14] state regulators have wanted the banks to finance their operations with more capital and less borrowed money. Operating this way means that banks will appear to be less profitable, thereby affecting bankers' productivity bonuses (a bone of public contention in the whole bank bailout saga).

The way in which the Basel Committee (referred to as 'the secretive panel which establishes banking standards'[15]) has managed this issue suggests the flaw in viewing this form of industry collaboration as any genuine experiment in regulatory sociability. While agreeing on capital retention measures that force banks to reduce risk, the Committee imposed a long phase-in period for these requirements to bite, a period in which the banking industry lobby worldwide could use to water down the impact of the rules.

Flaws in the earlier Basel II rules are said to have allowed the global financial crisis to gather in the first place. Perhaps worse than no regulation at all, these rules gave the appearance that the major banks were sufficiently cushioned against risk when in fact those banks had seriously underestimated the malignant potential of their loan holdings as the US housing market fell

away and the domino effect on bank liquidity took hold. Derivatives tied to the US housing market, with top credit ratings, suddenly became near impossible to sell and were effectively worthless, radically endangering the apparent capitalisation of over-exposed banks.

Faulty regulation also worsened the European sovereign debt crisis by assigning government bonds almost zero risk when many European governments teetered on insolvency. This encouraged banks to extend billions of dollars in credit to profligate states with no clear capacity to honour these obligations. This set up a dangerous relationship between the solvency of countries and the health of the world's largest multinational banks.

The old-fashioned regulatory aim, not yet adopted by the Basel committee, is to set a minimum level of capital to be held against gross assets, regardless of estimated risk on investments, in order to restrain the banks' strong incentive to make optimistic assessments and to supercharge leverage. Banks consider this leverage tool as a blunt regulatory instrument, almost an insult to their sophisticated efforts over the past decade to create complex and competing internal risk management systems, as well as a threat to profits and payouts for top banking executives.

The Basel rules in any case are only benchmarks and it is up to individual nation states to translate them into domestic laws. Even so, lobby groups such as the Institute of International Finance have published studies that maintaining the Basel rules will force banks to substantially curtail lending and to undercut economic growth, representing the former at least (which was an aim of the rules where risky lending was involved) as retrograde rather than prudent. In any case such studies ignore the huge social costs of financial crises for communities with no representation through the banks to the Basel *regulatory regime*.

Will the Basel rules make the world a safer place? Even if Basel were to be complied with fully, banks will still be able to borrow $32 for every dollar they hold as capital.[16] It is interesting now that due to adverse public opinion towards bank bailouts and bankers' bonuses, legislatures have more courage than bank self-regulation mechanisms and their lobbyists, but the time for this is dependent on any return to the boom days of wealth creation. Assisted by the regular revelations of rogue banking practices, it is harder for the banks to argue they have learnt their lesson and should continue to be trusted with the reins of self-regulation.

New economics – Debate of financial regulation reform

As suggested above, the *laissez-faire school* of economic theory – where supply and demand equilibrium will be obtained in the right market conditions, and those conditions support free markets naturally achieving supply/demand balance – is the unrealistic foundation for a conclusion

that regulatory interference with market forces disrupts rather than sustains that balance. In this thinking, only external market shocks (such as in the financial context, exchange rate controls) push markets away from natural optimal state.

In a world of finite and fast diminishing resources, this style of market theorising, influencing the nature and direction of market regulation, is more than unrealistic; it could be catastrophic. Reiterating Lie's invocation to always consider the contextual diversity of actual existing markets, why should any theory about the market for goods be the same as theories about markets for labour, land and capital inputs? Associated with this, is it not necessary to consider the normative conditions in which markets operate as critical variables in predicting regulatory requirements and outcomes? For instance, the impact of deregulation strategies on the global financial industry since the 1980s was essentially constructed by and productive of what Braithwaite (2008) refers to as *fiscal termites*. In the neo-liberal economic period of the late twentieth century, the ethic of wealth at any cost predominated, justifying tax havens and money-laundering, minimisation schemes and arbitrage, derivatives to minimise tax, all of which evidenced and exacerbated a commercial moral bankruptcy which not only justified risk and excess but, in terms of market expectation, rewarded it until the consequences caught up. Braithwaite (2008) indicates that in combination with increased regulatory backbone there is a critical need to re-moralise markets to counter the contagion of tax cheating; a contagion requiring reversal – markets in vice to markets in virtue.

Braithwaite identifies the following (external and internal) market conditions for the move from vice to virtue when looking particularly at the case study of extra-legal tax minimisation schemes:

- heavy promoter penalties;
- restorative justice options at early stages of discovery and resolution;
- targeting clients of A-list promoters of avoidance/minimisation schemes and selective prosecution;
- banning professional fees contingent on the magnitude of legal liabilities avoided in subscribing customers to avoidance schemes;
- strict liability offence structures where motive is not important;
- sheltering disclosure on book-tax disclosure for corporations;
- integrating public and private markets for tax advice;
- educating investors as to the risk of flouting the regulations;
- corporate certification of continuous improvement in tax integrity[17]

These policy responses could be seen as reflecting Polanyi's *double movement* away from the normative and socially operational dimensions of self-interest and self-regulation, towards a regulated re-moralism.

Following the recent global financial collapses and facing the imminence of further economic crises in the world of the future, new life is breathed into the debate surrounding financial sector reform. The aspects of reform which have become increasingly less problematic include:

- improving the governance of financial regulation;
- ensuring the independence of critical regulatory elements and agencies;
- broadening the regulator's intellectual perspective;
- developing a more pluralistic and inclusive regulatory mix;
- being ever vigilant against regulatory capture;
- introducing extra-financial considerations such as social responsibility into the intended regulatory outcomes;
- avoiding an overreliance on the extremes of ungoverned self-regulation, or overbearing state intervention

At a functional level, the impact of regulatory reform requires effective monitoring (see Chapter 9). As the later discussion of regulatory accountability reiterates, this is best achieved within a framework of mutuality and *regulatory community*. Representation of key interests is not denied where sociability is preferred, and the accountability framework compatible with collaborative regulation may include proxy advocates, technical experts, agency monitors, designated consumer representatives and even ombudsmen.

Institutional competitiveness

One of the reasons why financial markets have been prone to collapse in cycles is the paucity of genuine institutional competitiveness between financial institutions. As the age of financial deregulation dawned in the 1980s, one of the arguments in its favour, opening up financial markets to competitive efficiencies, was swiftly snuffed out as banks in particular consolidated and globalised. Financial industries moved rapidly beyond their national origins and obligations and at a time when fiscal policy was burgeoning as the referred economic technology of developed nations, the mechanisms through which that policy was to be exercised were increasingly beyond state control.

Banking consolidation was accompanied by the colonisation by banks of a vast range of financial products and services previously not considered the province of banking. This further undermined competition in the financial services market, narrowing supply diversity and demand choice.

As a feature of the post-1980s consolidation of global financial arrangements emerged the cult of the entrepreneur; the risk-taker and the innovator. These personalities, however, were not also a stimulus to a freer competitive market. In fact entrepreneurial motivation and enterprise in the

financial markets of the world were deeply enmeshed and incestuous. The *merry-go-round* of executive banking personnel (and regulatory insider-knowledge) proliferated a self-interest management ethic. Further, knowledge capital and executive expertise concentrated on, rather than innovated through, competition, and loyalty to the institution or to the client-base dissipated as an ethical self-regulatory check.

As Bernard and Boucher (2007)[18] demonstrate, through globalisation, institutional competitiveness is not necessarily assured. Such competitiveness is dependent on institutional design and strategic institutional entrepreneurship. Some design and entrepreneurial initiatives which at first instance might seem costly and thus anti-competitive can produce much in the way of ancillary benefit which sharpens medium-term competitive edge. In particular, the so-called 'social investments' can enhance productivity through workforce satisfaction and customer conscience and, as a consequence, can pay for themselves. When, however, as with the contemporary finance industry, social investments are minimised in preference to maximising the self-interest of the entrepreneur then productivity is measured against skewed standards which do not adequately take into account risk generation or its management. Institutional competitiveness is not, in such circumstances, promoted for the benefit of the industry but may be retarded through oligopolistic market conditions in the pursuit of non-productive self-interest, which in turn is risky to the industry and requires more rather than less regulatory investment.

In terms of the global financial market the regulatory options for freeing up competition include:

- international conventions;
- judicial adjudication;
- regulatory injunction;
- license conditions;
- private-interest enforcement;
- litigation as an anti-competitive strategy.

However, in the light of the supranational structure of global banks, most of these devices have little practical purchase. Even when confronting a combination of public and private enforcement, anti-competitive banking cartels around product pricing and fees for service have been distinctly resilient.

The negative consequences of anti-competitive financial industry practices require a broader and more pluralistic regulatory approach. Regulation strategies need to be directed against modern banking culture and, at the same time, market tolerance of high and ungoverned risk levels. Two of the more effective options in this regard include the following:

NGOs as private prosecutors (where laws against anti-competitive behaviour are potent)

In this context a major public interest organisation can adopt a *class-action* approach to the negative fallout of anti-competitive behaviour. The downside of this approach is not all instances of disadvantage arising from anti-competitive behaviour can fall under a class umbrella, and some may have very individual and specific ramifications. In addition, where we are dealing with massively resourced and politically influential global banks, this sort of social action through the courts will only be viable where legal resources are made available through the state, and the judicial process is deaf to commercial interest and influence.

Tripartite restorative and responsive justice (where communities are in tune with social agency and action)

The simple challenge in any tripartite regulatory frame is not avoiding capture or ensuring a truly independent and representative *honest broker* as the third arm from the industry and the external regulator, but the capacity to ensure parity of power and influence when relating the three arms of the regulatory project. In addition, the other two arms may be used for a cosy and concealed regulatory relationship and in turn align their mutual interests against those of the third arm. Resistance to this will depend at least on the degree to which the interests represented in the third arm are mutual and consistent with wider civil society interests.

The failure of competition in the financial sector indicates a fundamental failing in the oft-presumed natural conditions of capitalism. However, with contemporary capitalism, capital could be said to be the most essential component of Western economic advance, yet it has been much neglected in recent critical economic and social analysis. In recent neo-liberal economic theory, capital is taken as an essential market component to be maximised and not regulated.

The example of micro-financing presents an opportunity to examine the role of capital management, even that of human capital, in the regulation of recurrent financial crisis.

Contestation in microfinance – Failure of capitalism?

In his work on capitalism De Soto (2000) identifies *Five Mysteries* of capitalism[19]:

1) Missing information – the dead capital savings of the poor.
2) Capital – what is it, how is it produced and how does it relate to money?
3) Political awareness – ignoring the industrial and commercial revolution of poverty urbanisation.
4) Missing lessons of history – how does capitalism transform as well as produce poverty?
5) Legal failure – why property law does not work outside the West?

In opening his analysis, De Soto quotes Braudel in *The Wheels of Commerce*:[20]

> The key problem is to find out why that sector of society of the past, which I would not hesitate to call capitalist, should have lived as if in a bell jar, cut off from the rest; why was it not able to expand and conquer the whole of society? . . . [Why was it that] a significant rate of capital formation was possible only in certain sectors and not in the whole market economy of the time?

In this regard the capitalist world is contained by variables which may not be explained purely in economic terms alone. This realisation has a central relevance for the construction of communitarian regulatory strategies outside the fragile frame of the finance industry and its fractured market focus (see Chapter 10). Certain of these variables, sociability might suggest, oppose the individualist and meritocratic motivations for social engagement which are central to capitalist economics and which proliferate in the discourse around the boardrooms of the global financial institutions. Capital accumulation, distribution and management do not, however, need to be seen or to be regulated only in these terms.

Particularly in relation to the final two mysteries, De Soto sees that the mechanisms of capitalism, such as global financial institutions and processes, do not well service undercapitalised states or those states with disaggregated political or commercial frameworks. This disjunct in turn means that the negative impact of global financial crises on such states and communities may be greater due to capital drain, or at least from not being able to be counterbalanced against the years of wealth creation and their benefits which preceded collapse in capitalist Western economies. Under-capitalised economies as well are not given a seat at the table when it comes to globally determining the regulatory responses from crisis to ordering, which is a central concern of this book. Capital starvation, in this sense, leads to regulatory disempowerment and the further disadvantage which may flow from regional undervaluing in geopolitical regulatory prioritisation.

Even in the case of emergent economies the benefit of capitalism may be short-lived. Back to the example of China, with so many persistent

retail risks and global uncertainties as the fallout of global financial collapse, excess capacity and recent industrial surges may come crashing down along with dips in external consumer demand and consequent muted capital spending and investment. The social costs attendant upon rising economic inequality and the prospect of labour retrenchment from prolonged periods of full employment cannot be ignored. The capacity of richer-income households and capital-income earners to absorb rising living costs cannot soften the negative impact on poorer labour income earners. The resultant inequality will lead to popular protests, eventual political instability and crackdowns to shore up failing authority. This instability poses further strains on economic performance.

This only sees the problem for emergent economies in economic terms. What of the vast populations already lost to the benefits of economic expansion? What of those banished to rural or trapped in rural subsistence and poverty as a consequence of either employment downturn or the restrictions on urban access? Who will feed the poor and starving when the economic buffer risked on the rewards of capitalist expansion is no longer available to supplement capital flight?

It should be remembered for the emergent economies that, as a result of the globalisation of the investment industry, even healthy economies can fall into recession. As Keynes observed regarding an unhealthy reliance on economic theory to get us out of economic failure:

> We have involved ourselves into a colossal muddle, having blundered in the control of a delicate machine, the working of which we still do not understand.[21]

External to China and to other emergent economies, the current account imbalances which were the fuel for their selective capitalist development now pose equal risks to their economic future because of their dependence on failing external consumer demand. Policy makers are running out of regulatory options, at least in the form of conventional fiscal policy. Take currency devaluation for instance. Not all countries can devalue their currency and at the same time improve net exports if the markets to which they conventionally trade are in radical decline. Monetary policy has little effect in economies which are insolvent. This policy was originally designed to regulate inflation in situations of liquidity, not a feature of even advanced economies today.[22]

Weak governments are finding it increasingly difficult to implement international regulatory policy coordination to steady financial markets as the worldviews, goals and interests of advanced economies and emerging markets come into conflict. In 1989, Kapstein projected the international coordination of banking regulation as a way of resolving the regulator's dilemma with financial market control.[23] He focused on the role of market

forces, consensual knowledge and state power as critical in bringing banking accord to fruition. This was before 2009 or the sovereign debt crisis in the Euro-zone, which brought the banking sector to its knees. Even so, this was not the fault of coordinated regulation. Rather it was an absence in the genuineness and mutuality of that coordination that might take blame for regulation's role in these crises. Kapstein easily identified crisis and the risk of further crises as catalysing the interest in regulating international financial markets. The challenge was to turn that interest into a regulatory strategy which would not be attacked or subverted by a self-interested regulatee or regulated sector used to little or no regulation in the immediate past. Braithwaite (2008) might suggest that it was both the absence of regulatory accountability and the incapacity of self-regulation which precipitated the demise of financial markets along with risky and indulgent market behaviour.

The reason for complexity in banking regulation is in part a factor of the globalisation of the banking industry and also due to the diversity of regulatory capacity within the places in which banks trade. Kapstein poses certain principles for handling banking crisis and they are the following:

1) Banks that encounter liquidity difficulties within national borders will be supported by the central bank concerned.
2) Banks that have difficulties due to fraud will not necessarily be bailed out but their deposits will be protected.
3) If a foreign bank or an overseas subsidiary of a bank sustains losses, the parent bank will be held accountable for the losses, and if necessary will be supported by the central bank concerned.
4) If a consortium bank has difficulties it will be supported on a pro rata basis by the parent banks and, if necessary, the central bank concerned.[24]

In 1989, no one envisaged the scope of losses in global banking which would occur in a decade and which would make this neat division of responsibility seem both superficial and naïve.

Sovereign risk and foreign exchange risk are both products of globalised financial markets, and when they become reality not risk, then all states suffer well beyond the home jurisdictions of the banks concerned or their regulatory agencies. Kapstein's version of collaboration to minimise the fallout of these global risks does not take into account the massive negative influence that global banking crisis can have even on the capital flow necessary for states and economies that manage through micro-financing and localised financial markets. This said, a collaborative strategy which only imagines participation by the mega financial institutions will not accommodate the interests of smaller, disaggregated economies even if, due to crisis, the playing field of international finance is tipped more in favour of non-bank

financial institutions. The major difficulty Kapstein suggests in *bankers' club* collaboration is the variability in the enforcement experience of each member in the regulatory environment with which they are most familiar. I would go much further in saying that this form of collaborative regulation has the potential to capture itself in its own diverse and member-centred self-interest because it fails to recognise and incorporate the massive victim interests of the small fish who collectively carry great loss from these crises but individually mean little in influencing the client base of a mega bank.

As with such *club-based* regulation masquerading as sociability, capitalism can be seen, as De Soto suggests, as having lost its way:

> It is out of touch with those who should be its largest constituency, and instead of being a cause that promises opportunity for all, capitalism appears increasingly as the leitmotif of a self-serving guild of businessmen and their technocracies.[25]

Secrecy and self-interest

In his review of Paul Krugman's scarily prophetic book *The Return of Depression Economics and the Crisis of 2008*, William Leith in the Guardian Newspaper observed:

> The entire edifice of capitalism is based on capital – which is really just another word for confidence. Wealth is created because people who have capital, or confidence, expose it to risk. If people believe your confidence to be authentic, the risk you take is likely to be small. But as soon as people think you are bluffing they panic – and panic destroys wealth faster than confidence can ever increase it.[26]

If this is so then regulatory intervention into the financial market following a collapse in capital (confidence) should not be directed at merely shoring up wealth creation as a result of restoring confidence. Regulation might require a repositioning of our appreciation of capital and relationships with it, so that risk to capital is spread through more fundamental and long-lasting redistributions.

De Soto accepts that in the present capitalist age, prosperity follows capitalist economic systems, but these systems have only thrived in the West. He puts the problem down to an inability globally to produce capital. De Soto then locates this problem squarely in the court of regulation. The fault as he sees it does not lie with the self-interest of the rich but the incapacity of the poor to access the protection of private property rights.

> Formal property is more than a system for titling, recording and mapping assets – it is an instrument of thought, representing assets in such a way that people's minds can work on them to produce surplus value. That

> is why formal property must be universally accessible: to bring everyone into one social contract where they can cooperate to raise society's productivity.[27]

The impediments to achieving this outcome are not simply in the narrow consciousness of the poor. Any limited appreciation of property, property rights and the potential of property surplus is a consequence of the secrecy imposed by the wealthy economies about the nature of property and a fundamental denial of universal access to the regulatory protections which make property negotiable and valuable. This is a cult of secrecy and self-interest which is designed to thwart cooperation over the ever-growing global wealth gap.

It was also a cult of secrecy and self-interest which led to the recent global financial *daisy chain* of lost control – allowing wild and lucrative risk-taking further and further away from commercial responsibility or capital ownership. In this regard, the risk-taking for wealth creation became more and more distant from the responsibilising influence of capital creation and management. Playing with other people's money was the foundation of wealth creation particularly in modern corporate banking practice. For the bankers and traders, all gain with no pain, but not for long.

The financial industry developed not as some exclusive alliance of capital owners or managers but of *wealth managers*, traders, product marketeers and financial advisors who were not as bound or burdened by the need to create capital or to directly account for its rise and fall. In this market, confidence became unhinged from capital, and risks were as such made much more risky. Regulators lost limited control over market intermediaries (auditors, analysts), intermediaries over managers, and managers over more aggressive employees. The decision makers in the financial industry were, through distance from responsibility and realistic evaluations of capital risk, largely able to avoid public and private regulation of tax, accounting standards, investment restrictions and even government subsidies.

If wealth management in the financial industry drifted away from an essential link to capital production, then what was marketed through the industry has also fundamentally changed. The industry turned to the marketing of risk for itself. Derivatives became used as counter-regulatory instruments, enabling their purveyors through hedge funds (much the same as bankers did with trusts just prior to the Wall Street crash in 1907) to steer around national and international rules, rating agencies, self-regulation by boards, regulation by market conditions or by the audit of traders.

Rediscovering social responsibility

More than offering an opportunity for changing the consciousness of bankers from vice to virtue, following a post-market crash, financial market regulation needs to enhance its medium-term influence by addressing the

role of this market in helping to grow the global wealth gap. This was the responsibility of bankers and traders, as far as disgruntled investors were concerned and, like it or not it, added a personal greed and professional confidence dimension to the regulator's agenda, individualising as well as institutionalising the regulatory purpose. At the World Economic Forum in Davos in 2011, the chief executive of JP Morgan Chase lashed out at what he viewed as being unfair criticism of the world's financial wizards:

> I just think this constant refrain 'bankers, bankers, bankers' – is a really unproductive and unfair way of treating people . . . people should just stop doing that.[28]

Even as a result of financial crisis, the word 'banker' has become an epithet for the undeserving rich, and inequality, once accepted as just a part of economic growth, is increasingly challenged in an economic world where social responsibility is rediscovered. More than a rallying cry for social activists, the global gap between the haves and the have-nots is openly debated in arenas of *laissez-faire* capitalism where previous talk of social inequality would have been taken for class warfare. If civil society, and not just protest movements, perceive of themselves as among the 99% paying for the sins of the 1% then financial executives have more than a public relations challenge in their hands and regulators have more than passing shot at bankers on the run. With Bill Gates bringing cassava to Davos in 2012 to highlight the need for a focus on global agriculture to feed the starving, the focus of major financial regulators such as the World Bank cannot be limited to conditions of global economic crisis. Socially responsible economic regulation demands synergies between poverty eradication and financial market well-being.

Although I do not agree with Margaret Thatcher's advocating of De Soto's *Mystery of Capital*, that the failure of third world and centralist economies is a lack of rule of law that upholds property rights and provides a framework for enterprise,[29] I do see sense in De Soto's prescription to political and economic leaders in such contexts to:

> Do at least three specific things: take the perspective of the poor, co-opt the elite, and deal with the legal and technical bureaucracies that are the bell jar's current custodians.[30]

The theme of this invocation is engagement and responsibility. The rebirth of socially responsible economics as part of the rehabilitation of market theory could have only occurred in a post-neo-liberal age, in the wake of economy-shaking crisis. The path to ordering based on more socially responsible engagement, even in the cradles of free market capitalism such as the US and the UK, is apparent in the recent proliferation of community benefit companies. [31] Michael Porter's work on shared value, philanthropy and

corporate social responsibility is the scholarship behind a fundamental transition in corporate form which sees responsibility not as a gloss but a core structural and functional requirement of modern business entities.[32]

Webs of control or tainted economies

One of the greatest impediments to the achievement of better benefit to the many from accessing the capital of the few, in developing economies, is corrupt public and private sector relationships. Behind this realisation rests a deeply complex picture of the cultural relativity of poverty, corruption and control.

An enterprise theory of crime and control[33] refers to motivations (for crime and control) as economic profit-based. Crime here is seen as commercial relationships that foster profit in markets which are criminal[34] or partially legitimate.[35] Crime control may form just one but an important market regulator which enables particular commercial/profit relationships (legitimate or illegitimate) to adapt and flourish.

Corruption is one of the relationships that enhance the profit outcomes of criminal enterprise. In fact, the nature, organisation and influence on the enterprise may be reliant on the networks of dependence and advantage created and maintained by corruption. Also, certain commercial aspirations (particularly where these are ambiguous or polyglot) and incentives for market advantage may act as opportunities for corruption.

In some market contexts, particularly where legitimate markets for similar goods and services are either weak or over-regulated, corruption may make good business sense. In other situations, such as where the enterprise and the market are made up of tight-knit communities where legitimate market advantage is hard to engineer, corruption becomes part of the commercial or business culture. This is more likely than not where the enterprise comes in contact with market regulators. Prevailing social connections in any of these commercial contexts may in fact view corruption as a normal or at least tolerable feature of doing profitable business.[36]

Efforts at identifying, investigating and controlling corruption would do well to recognise the business advantage promoted by certain corruption relationships and in particular market contexts. With this understanding it is more likely that control strategies will not simply become another form of market relationship which selectively favours certain corrupt market outcomes while limiting others.[37]

Appreciating corruption as a component of business and as an important indicator of criminal enterprise (with public-sector collusion) has the potential also to explain the relationship between corruption and modernisation. For transitional cultures in phases of rapid socio-economic development the pressure is to move from customary commercial constructions to those which promote cash economies. The indigenous networks of dependence

and advantage are supposed to support the aspirations of free-market capitalism but to do so in contexts where the market is either unable to facilitate strong competition or where it is regulated in an imbalanced fashion by layers of overarching economic dependence.[38]

Within customary societies rapidly transforming into cash cultures, other motivations may predominate over economic profit.[39] Where the profit motive has taken hold, it may in turn be applied to the advancement of other more important social aims. For instance, in the South Pacific, the culture of the 'big man' as leader and power broker might explain why newly elected politicians employ their parliamentary allowances directly and openly to curry favour with their clan or village power base.[40] To the outside observer this might appear corrupt but within its cultural context it is an expected behaviour and is good political *business*. To attempt to control the practice by a crude or moralist control strategy which does not understand the indigenous network of dependence and advantage, or the manner in which the exposure to cash for office facilitates these, would do little to generate an anti-corruption consciousness in the community. In fact, it might present an opportunity to dismiss corruption control initiatives generally as foreign and culturally inappropriate.[41]

In the light of tainted economies through corruption and the exacerbation of certain control perspectives, the following conclusions can be drawn regarding the intersection between the forces for modernisation and transitional cultures and emerging economies:

- The identification of certain commercial relationships as corrupt is culturally relative.
- Political power, where it is inextricably dependent on complex networks of filial support and custom obligation, will challenge international notions of good governance and financial probity.
- Politics and commerce are inextricably linked in states where modernisation is rapid and sporadic.
- In transitional cultures, crucial relationships within politics and commerce are influenced and shaped by pre-existing custom obligations.
- Custom obligations may create opportunities for corrupt relationships to flourish, while in the local context being redefined (and not always in a positive reaction to corruption regulation initiatives).
- The bonds of custom obligation which underpin political and commercial relationships in these transitional cultures may also stand in the way of regulating and controlling corruption.
- Besides (and regardless of) custom obligation, the public, politicians and the commercial community are sensitised to the dangers of corruption through its potential to undermine national credibility, which is essential to economic development.

- Even so, where global concerns for good governance and commercial probity intersect with custom obligation and feudal loyalties in transitional cultures, the process of criminalisation and crime control is problematised.
- Economic development within unchallenged contexts of custom obligation can simultaneously stimulate corrupt and commercially viable relationships.[42]

In order to construct a more effective corruption control strategy for transitional cultures regulation needs to be contextually reliant and community sensitive, in addition to communitarian and collaborative:

1) A culturally relative and developmentally interactive[43] process for identifying and labelling corrupt relationship.
2) The recognition of the role that international and national corruption regulation agencies may have in promoting corruption within transitional enterprises and markets experiencing the strain of rapid modernisation.
3) A reliance on commercial viability in preference to public morality as a measure of the consequences of corruption.
4) The need to globalise the context of corruption in transitional cultures and to recognise the role that rapid modernisation, against strong indigenous frameworks of obligation, can play in creating further opportunities for corruption to flourish.[44]

This strategy cannot rest with donor governments and international financial agencies that have been exposed as partial and proliferating the dependencies that generate opportunities for corruption. The major corporate players in the transitional or emerging cultures and economies who have used these dependencies to their advantage now need to accept the challenge of good corporate citizenship beyond the jurisdiction of their shareholders and on to the markets which have for too long offered easy pickings (see Chapter 8). Corporate social responsibility starts in such situations of economic vulnerability by identifying relationships of dependency and avoiding their exploitation where corruption is seen as good business. The sustainability of commercial relationships needs to rise in priority against the diminishing viability of profit exploitation in fragile fabrics of economic dependency.

Profit to sustainability

As the foregoing brief analysis of financial market collapse and regulatory inhibition reveals, the risky pursuit of short-term profit for individualised gain has endangered not only wider networks of global financial viability

but also the fabric of *laissez-faire* capitalism a global economic model. Some commentators take a simple view of the regulatory failure/market failure analysis. Shleifer (2010), for instance, declares that the regulation of economic activity globally is ubiquitous, yet standard theories of economics and of regulation continue to be wary of the influence of regulation over healthy economic growth. Shleifer argues[45] that the ubiquity of regulation can be explained not so much by market failure or by asymmetric information about market behaviour but by a failure of the courts to settle disputes over private legal interests cheaply, predictably and impartially. This largely legalist argument, however, begs the question what about the failure of law as a regulator. This could be better addressed by approaching the following challenges to legalist regulation:

- capture by clients with significant private interests at stake;
- the partiality of private property relations;
- the myth of privity and of parsimony;
- the impossibility of parity;
- the limitations of jurisdiction;
- the fragility of authority based on state sovereignty; and more recently;
- the preference of the commercial sector when selecting modes of dispute resolution to go anywhere than to law.

Shleifer's confidence in legal regulation as a saving frame for vulnerable market relations chimes well with De Soto's celebration of private property relations in broadening access to capital and the benefits of capitalism. However, both these views preceded the most sensational financial market collapses ushering in the new millennium. It would be fair to say that the debate about transforming global financial arrangements and relationships is not confined to refining one regulatory mode such as law and its protection of property rights. The pursuit of profit and the generation of economic wealth are now being questioned internationally both as adequate measures of regulatory motivation and as sustainable social outcomes.

Conclusion – Sociability by any other name

This chapter could be viewed as exposing regulation not as it seems. Collaborative regulatory exercises such those touched on here do not constitute sociability if their primary purpose is to colonise the regulatory agenda for their own interests. This outcome is revealed above through capture even of genuine tripartite approaches to regulation, or through constructing a self-regulating consortium of self-interest to deflect and diffuse other mechanical regulatory intrusions. While these collaborations can be viewed as emerging organically from within the system to be regulated, they do not satisfy

at least one other critical test of sociability, the mutualisation of interests towards a common good.

Besides transforming self to mutual interest in a market climate where all power and knowledge has until now largely vested in the critical consortia of regulatees, this chapter has suggested that regulation for the market may indeed be too late and it may be the market itself which is acting beyond regulation. In his prophetic work *The Great Transformation*, Karl Polanyi argued that the development of the modern state went hand in hand with the developing modern market economies and that these two changes were historically, inexorably linked. Modern state development and the power of its authority, he considered, demanded changes in social structure that allowed for a competitive capitalist economy, and that a capitalist economy required a strong state to mitigate its harsher effects. For Polanyi, these changes implied the destruction of the prevailing pre-capitalist social order. It was the great transformation of this social order and the destruction of communitarian constituents which it required that would be the eventual challenge to capitalism.

On the market and methods for its regulation Polanyi speculated that the construction of a *self-regulating* market necessitated the separation of society into economic and political realms. Despite selectively producing *unheard of material wealth*, Polanyi viewed the market as no longer about land, labour and money but rather *fictitious commodities* which do not claim an independent rationality in any truly *marketable* sense and as such *the market in fictitious commodification* 'subordinate[s] the substance of society itself to the laws of the market.'[46]

How does one regulate a fictitious market in fictitious commodities? Polanyi considered that the necessary consequential massive social dislocation and spontaneous responses by society to protect itself will come about once the free market attempts to separate itself from the fabric of society, as clearly has been the activity of the global financial trade. Socially responsible economics will emerge in this reflexive movement obviously as economics is not a subject closed off from other fields of enquiry.

The answer to market dislocation is social embeddedness. Mark Granovetter castigates the overwhelming analysis of economic action for failing to see this feature:

> Under and over-socialised accounts are paradoxically similar in their neglect of ongoing structures of social relations, and a sophisticated account of economic action must consider its embeddedness in such structures.[47]

The resultant risk for regulation in engaging with fictitious commodities in fictitious markets is that it too will dislocate from the social and political core realities of civil society. Sociability requires that regulation be essentially

embedded as a community construct. For this to be achieved and maintained there would be no room for regulation to assist in the artificialisation of commodities or markets. Regulatory sociability could provide a bridge for bringing markets and society closer together and through this process socially responsible economics becomes the framework for a more essential market rehabilitation and reform.

In an appreciation of the regulatory crisis and its market context in contemporary terms of a *Great Transformation*,[48] Polanyi has proved his predictions that 'after a century of blind "improvement", man is restoring his "habitation?" '[49] Are we facing the reality of market failure or failure of the market as a central regulatory challenge, not so much for regulation to assist market sustainability but rather to facilitate economic transition in a social world?

In his book *The Communitarian Persuasion* (2002), Selznick, after listing the dangerous temptations attendant on short-term economic gain, says this about market failure:

> Society needs new ways of doing what was previously done by (conventional mechanisms of profit regulation). We need to do by public policy and institutional design what earlier was done less consciously by family pride, or the psychic rewards of a modestly successful business based on a vocation or craft. (After a preference for an expansion of non-profit organisations for critical service delivery he continues.) In this work, moral idealism is combined with economic realism. Resources must be mobilised, investments monitored, costs controlled. These activities are not untouched by market forces. But the so called 'non-profits' the market indifference to culture and morality. If social policy encourages these associations and activities, it will acknowledge the worth and redeem the promise of civil society.[50]

Regulation has its place in transformation as much as it does in resuscitation. If Selznick's aspiration for civil society engagement over profit as a measure of market viability is to be tested then the task for regulation is to take a form in which civil society has a place and for which investment becomes the 'people's business' rather than the plaything of risky business.

8
Environmental Regulation – Liability or Responsibility?

Introduction – Regulating sustainability

Al Gore's *inconvenient truth* made global warming an inescapable political and social conundrum from the mouth of someone who might otherwise had been viewed as a hegemonically compromised politician. What brought him to the point of committing his political presence to the anti-global warming science and movement? *Melting ice*!

The sustainability of the planet facing the avaricious resource consumption of the North and South worlds and the prevarication of self-interested nation states, are what Gore identifies as creating a global crisis demanding much more creative and holistic regulatory invention and commitment. As a crisis of such imminent, inescapable and invasive proportions, it also represents a test for this book's arguments regarding the potential of regulatory sociability for collaboratively addressing communities of shared risk and shared fate. The challenge is sharpened by the following realities:

- Up until recently, those who might be said to have precipitated the crisis have been actively opposed to its regulators.
- Regulatory initiatives by nation states directed at the crisis have been distinctly unsuccessful.
- Regulatory commitment as to how success might be improved has been divided or is absent.
- Competing knowledge bases regarding the nature and extent of the problem have made a unified conception of public interest problematic.
- Public scrutiny and community activism have been sectarian, sometimes violent, and further divisive.
- Economic self-interest has merged between commercial polluters and sensitive or corrupted political policy makers to produce a destructive environment of regulatory capture.

Therefore, if regulatory sociability is to advance order from crisis around environmental sustainability, it must:

- work from a more consolidated understanding of common good;
- either neutralise or compromise commercial self-interest through repositioning the gaze of polluters and regulators from short-term economic profit to medium-term market and resource sustainability;
- incorporate the polluters and the regulators and the wider public interest into communities of shared risk and shared fate; and thereby
- invigorate collaborative regulation options away from failed state sanction, which recognises the differential capacity of large corporations and fragmented states to negotiate common interests.

This chapter is essentially interested in regulation for sustainability worldwide. It commences with the role of the public rather than the nation state as a regulatory actor (in the form of consumers and activists).[1] In this sense, it talks of social capital and collective action. The demise of criminal sanction models is discussed within the intractability of state regulatory prevarication and commercial compromise. This leads on to a discussion of problems with penality and the failure of the law when limited by territoriality. Sustainability returns as a theme when looking at common interest and the way in which even profit-driven corporate interests can be mutualised from communities of shared risk. Responsibility frameworks and victimisation are explored and public–private linkages examined. Voluntary initiatives and the case for regulatory pluralism is developed. Global warming and security as viewed from both worlds are explored as a way of linking environmental crisis with governance and ordering. The chapter concludes by thinking through communitarian governance and the shift from state interest/protection.

Environmental worldview – Ecological context of human welfare?

Why should it be mutually exclusive that

> All too often, pressures to increase human wellbeing as measured in per capita income overwhelm pressures to increase human wellbeing as measured in the quality of the living environment.[2]

An apt description of the contemporary global environmental worldview would be *institutional blindness*. It is another book to chart the emergence of this political and economic condition. One central factor in its perpetuation has been the almost dogmatic political and economic separation[3] between the built and the natural environments.[4] So long as the two exist in a

non-communicative state, the possibility for ecological coexistence remains remote or at the very least limited to commercial considerations of necessary environmental impact commodification. The pity is that without a conscious policy, to find terms for environmental coexistence in any sustainable sense of human engagement with nature, the polluter will continue to be demonised by some and the environmentalist dismissed by others as economically irrational. Any attempts at regulatory conversation between these two representations are doomed by such initial and divisive interpretations of self-interest.[5]

Perhaps a manageable place to start efforts at reconciliation between these representations and their 'voices' is with the capitalist view of nature as a resource rather than a delicate and diminished responsibility – neither limitless nor expendable. As will be suggested in the discussion of corporate responsibility below, a fundamental shift in self-interested opinion cannot be produced in moral terms alone. The transition will need talking through in economic language and by moving the commercial depth of field from short-term profit to medium-term market sustainability. Only then can private preferences for *environmental goods*[6] be adapted to existing environmental options through explaining social demand for environmental regulation and impeaching purely economic preferences that are otherwise input into environmental regulatory policy.[7]

> Unfortunately, most existing approaches to regulation (broadly defined) are seriously sub-optimal. By this we mean they are not effective in achieving their purported policy goals,[8] not efficient in doing so at least cost,[9] nor do they perform well in terms of other criteria such as equity or public accountability.[10,11]

To go some way towards a new and more collaborative environmental worldview[12] requires potential regulators to work on the disparity between private consumption choices and collective judgements as expressed in political decision-making. It is expanded when looking at consumer pressure as a regulatory tool, product and service preferences are not a-contextual and, as such, are susceptible to implication into a pluralist regulation strategy.[13] In addition, consumer choice can work on fundamental commercial motivation by hitting profit bottom lines and by forcing commercial polluters to measure their anti-environmental practices as commercial choices with exponential consumer costs.[14]

Along with attacking alternative interpretations of environments and natural resources in the commercial vein, *institutional blindness*, at least politically, depends on wider cultures of ecological indifference. These cultures are widespread and again may require tactical engagement if a new and responsive environmental worldview is to foster and be fostered by regulatory sociability. What role can law play in this transformation? It might be

fair to say that the private commercial relationships which keep the built and the natural environment separate and self-contained require greater intersection.[15] Law needs to create the possibility for parties to 'contract-out' of environmental destruction. This may mean incorporating within, for example, contractual relationships, parties with little immediate commercial interest, but medium- and long-term environmental stakes. In that respect, commercial arrangements become semi-political mechanisms rather than private tools.

Particularly in developing countries where small-scale industrial pollution is high and the economic vulnerability of this sector is also high, there is a need for pluralist and cheap regulatory alliances (such as democratic representation, courts, NGOs and a vigilant international community) so that fragmented and dominated states are not excluded from the determination and enjoyment of a new environmental worldview.[16] This will be a central and concluding theme plotting crisis to order in this chapter.

Role of the public as a regulatory actor

Conventional regulatory literature sees the role of the public as a regulatory actor in terms of their inclusion in the state's general regulatory planning.[17] In this model, the state remains central but government is encouraged to use a pluralistic mix of regulatory options (the public being one of them). This direction in state regulatory predisposition would involve some degree of decentralisation which would lend community legitimacy to government regulatory policy (discussed further in Chapter 4).

Another purpose of public inclusion in state-sponsored regulatory policy is to bridge the divide between public and private interests,[18] and thereby reducing hostility to legislative intervention and creating, through an informed public *imbued with the ambitions of government*, public pressure on private businesses to comply with state regulatory regimes. Equally, however, polluting industry and their supporters invest heavily in misinformation in an effort to diffuse the potential influence of an active and informed community lobby.

There is widely perceived to be an 'elaborate "environmentally friendly" façade erected by (multi-national) companies' green lobbyists and spin doctors'[19] that restricts consumers from understanding the true impacts that multinational corporations (MNCs) are having on the environment. MNCs are keen to maintain this smokescreen, a combination of climate change scepticism, belief in the rescue of new science and half truths about the full extent of and responsibility for global pollution. More than global image repair, it is argued by environmentalists as a critical, commercial necessity against the reputation transaction losses should consumers and critical electorates in the developed world begin to understand the extent to which global capitalism damages the environment in the developing world.[20]

Consumer influence over environmental sustainability is not just dependant on the public's co-option by the state. A central role for public activism in shifting the corporate and regulatory focus on commercialising sustainability from short-term to medium-term market concern is through their role as consumers. However, to see the role of civil society only in these terms compounds an elitist conception of environmental responsibility and protection. As the later discussion of *social capital* suggests, if all mankind has an interest in environmental sustainability, then those cut out of materialist consumptions more than most require empowering in order to protect their share of these interests.

That said, consumer pressure is immediate in hitting the hip-pocket nerve of corporate polluters and their collaborators. Consumer pressure comes in two distinct forms: protesting and product choice.[21] With globalisation making the world an increasingly singular society, it is possible for the destructive business exploits of MNCs in developing nations to be broadcast internationally within seconds. Immediate social networking through universal and instantaneous telecommunication (see Chapter 5) can 'radicalise' consumers outside formal protest groups and around specific issues of preference in order to pressurise companies into more environmentally sound standards. A recent survey involving a number of the largest firms in Canada found that they believe consumer pressure is the second most significant factor, after government regulation, for establishing sound environmental policy.[22] Consumers, non-governmental organisations and pressure groups are able to target this pressure on firms to alter their specific commercial and social practices.[23] A 1995 study identified that companies were motivated to improve their environmental performance following aggressive publicity campaigns which highlighted the company's failure to operate in an environmentally sound way.[24]

Aligned with consumer purchasing pressure is the transactability and profit quantification for MNCs of reputation and brand integrity. With consumers becoming increasingly aware of the environment's fragility and resource depletion, companies can be forced to reconsider their commercial practices in developing states and regions which could damage their global brand. In particular, if it became known that otherwise reputable global firms were preying on fragmented states, they could be deterred by direct and indirect consumer pressure from suspect environmental practices such as *jurisdiction shopping*.

Consumers can connect with and manipulate increased media interest in the environment and how it is protected. Companies, when publically exposed to reputation erosion, will recognise the economic risks that they might have to face if the expected environmental standards are not met.

This intensification of community interest in the environment, particularly amongst the young people in the developed world who have

massive consumption power, has resulted in substantial pressure from non-governmental organisations and consumers towards businesses and their environmental policies.[25] It is not only direct pressure but also pressure placed on other global actors that can force MNCs to change their practices, like protests at international economic fora.[26] The high-profile nature of these protests means that companies are less likely to risk the negative, and possibly destructive, publicity that may result from failing to meet the consumers' expected environmental standards. As a result, MNCs can be forced to reject possible opportunities for environmental jurisdiction shopping, in preference for and to implement stronger environmental safeguards, not exploiting regulatory vacuum.[27]

The effectiveness of the consumer voice to improve environmental standards is maximised through their purchasing choices. Consumers are becoming increasingly willing to judge companies on the basis of their global environmental standards and not just the standards they set in the locality of the consumer.[28] Consumers are able, and increasingly willing, to demonstrate their views on environmental issues by paying a 'premium for "green products" and increasingly shunning products from companies associated with major environmental problems'.[29]

Boycotting, or *buycotting*, is becoming one of the fastest growing forms of consumer participation.[30] A recent poll of over 25,000 citizens spanning 23 countries reported that more than 20% of the participants had punished companies based on their social performance and a further 20% had considered doing so.[31] Another study showed that 23% of people in Britain had boycotted a firm's product as a result of such consideration.[32] While these instances of boycotting relate to social performance as a whole, rather than just environmental performance, there is evidence to suggest that environmental considerations are a strong factor in consumer's social thinking. In a study of citizens across 25 different countries, 'protecting the environment' received one of the strongest responses when respondents were asked in what areas companies should be held socially accountable.[33] Furthermore, it is widely believed that this already forceful pressure on companies will increase significantly as people become more aware of the effects companies are having.[34]

Consumers can achieve similar results by actively supporting companies which act in an environmentally sound way. Recent research on the issue found that 43% of respondents would be willing to 'pay much higher prices' in order to guarantee that the company was protecting the environment. This attitude was compared to only 24% who were unwilling to pay the much higher prices.[35]

A good example of this consumer reward phenomenon is the Fairtrade Foundation, a company started in the 1980s to prevent exploitation of Mexican coffee growers[36] and that has now developed into a multi-billion pound business, which, even during recession, is continuing to grow.[37] The

Fairtrade's message of removing injustices and the exploitation of trade[38] is one that consumers have supported while indirectly showing their antipathy of MNCs which exploit regulatory loopholes in developing countries.

It is economic trends in consumer purchasing such as these that have led numerous MNCs such as large food retail chains to support and to even co-opt into their own brands the model of Fairtrade in order to achieve its mark of approval.[39] Companies are recognising the success that Fairtrade is having and the support it and its policies have garnered among consumers and are, therefore, attempting to respond to consumer demands by becoming fairer in trade and not rewarding through trade other firms who exploit lax regulations. This is particularly important in the agriculture and food-distribution industries of the developing world. In the United Kingdom, for example, the retail of the world's food product largely from the developing world is tied up by four retail giants, and what they say about trade rules. This oligopoly of trade power and influence is useful for consumer activists, on the other hand, because their preferencing can be a lot more focused, and its outreach wide-spread and influential.

Consumer pressure and spending patterns can only be based on the information that consumers are able to obtain.[40] This information dissemination is not a major issue when examining the environmental practices of a domestically based firm. However, for MNCs and their subsidiaries working offshore, information access and quality is much more problematic. Often, information about the subsidiaries based in developing nations is difficult to obtain or is incomplete.[41] 'In the absence of transparency, firms may use public relations strategies rather than self-regulation strategies to address customer concerns, because customers cannot verify the firms' claims about their environmental conduct.'[42] Companies may represent themselves as being environmentally conscientious in order to appeal to consumers, but this may be little more than a marketing strategy.

Whiteley describes the situation as one where 'affluence promotes consumer participation, while inequality inhibits it'.[43] Given that the public views environmental standards as an important aspect in their consumer decisions, companies are being increasingly forced to disclose information regarding these practices. A recent study highlighted that companies now believe that they are forced into communication with consumers regarding their environmental practices so those consumers can make informed decisions about their purchasing to prevent possible boycotts.

Ultimately, public participation in environmental regulation, with or without state involvement, is only as useful as it is effective, beyond making people feel that they have had their say. In the case of community/state collaboration in the regulatory mission, it is crucial to determine the impact of public influence if only so that the state is on notice to keep its own efforts sharp and focused. How then can it be determined that the public has been successfully conscripted to support important regulatory goals?

Indicators that the public/state collaboration is constructive include the following: the increasing role of the public in environmental issues as it is becoming increasingly relevant to market interests; the engagement of public interest groups (PIGs) with private businesses to influence behaviour to accord with social and ethical standards on environmental responsibility; publically initiated environmental litigation with its potential to motivate both government and private businesses to take action regarding environmental issues and growth in corporate responsibility as the potential threat of public interest litigation can influence business behaviour and decisions.

Social capital and collective action[44] – Ecological dilemmas as political dilemmas

As was discussed in the preceding section, insights from social capital thinking and the collective action it spawns can inform the nature of the adaptive capacities of society and can also help to generate state-sponsored and corporate norms which shape the policies of adaptation.

For the purposes of influencing more collaborative regulation, social capital can be seen as including the following: relations of trust, reciprocity and exchange; the evolution of common rules; the role of networks – roles given to civil society and collective action for both instrumental and democratic reasons; and explanations for differential spatial patterns of societal interaction.

There are both public and quasi-private elements within social capital thus conceived. The manner in which they are bonded and networked depends in part on the legal and institutional structures that facilitate community association and networking. In terms of regulatory sociability, associating major forms of social capital is more likely possible through organic collaborations rather than mechanically crafted and imposed mechanisms. This is perhaps more the case with the sustainability rather than the initiation of social capital associations.

For consolidated states at least, synergies develop between the state and civil society in generating and developing social capital. These are

particularly important for managing risk, and also for resource-dependent communities in the developing world that require dense social capital to manage resources efficiently. In such contexts the role of the state as facilitator and enforcer will naturally diminish in favour of more community-reliant *functional equivalents* (see Chapter 1).

government structures and institutions important for the promotion of social capital where in consolidated and not fragmented state governance settings the state favours its sponsorship of public participation as a consciously employed legitimator to reduce barriers to adaptive policies and increase their wider regulatory legitimacy.

In considering the management of social capital by consolidated states to stimulate regulatory adaptivity, it is important to focus on sustaining the preconditions for the emergence and promotion of social capital. As in its non-state-dependent form, social capital can act as an alternative to government where unknown environment risks are posed. In fragmented state governance settings, social capital may fill the gap where governments may not always have the resources or frameworks to provide security to environmentally marginalised resources and communities.

Adaptivity to regulatory options in many forms which incorporate social capital is an essential organic requirement when regulating environmental crisis in and across fragmented state territoriality. Collective action to bring about adaptivity and adaptation is clearly a vital consideration when determining the outcomes of regulatory sociability applied to environmental crisis in such situations of governance.

What do we mean by adaptation? How can we use policy planning to enhance adaptivity through the employment of social capital?

There is a need to learn from past and present adaptation strategies to understand both the processes by which adaptation takes place and the limitations of the various agents of change (states, markets and civil society) on these processes.

Adaptation processes involve the interdependence of agents through their relationships with each other, with the institutions within which they reside and with the resource base on which they depend. Hence, the ability of societies to adapt is determined by the ability to act collectively.

Since decisions on adaptation are made by these agents, the effectiveness of strategies for adapting to climate change will depend on: the social acceptability of options for adaptation; the place of adaptation in the wider landscape of economic development and social evolution and economic globalisation.

The employment of social capital to advance regulatory sociability requires a shift from seeing the regulatory challenge in *essence* to one of relationships. For instance, when considering environmental sustainability through sociability, it is necessary to reconsider how the economy impacts sustainability. This can be advanced by focusing on the way humans and non-humans commingle and interact. How do the natural and the built environments sustain each other, and how is their current interaction endangering the sustainability of both? These questions initially can be viewed with an economic lens but with the intention of transforming presently dangerous and endangering interaction between critical elements of social capital.

In terms of adaptation and the role of social capital in advancing a new commercial and industrial ethic around the common good of mid-term resource and market sustainability, there is a further need to transform the regulatory conversation from *essence to association*,[45] thereby reformulating

the resolution path of the regulatory challenge – from ethical to political. This can be achieved in terms of sustainability if the challenge is seen as one of bringing commercial and community interests closer together while still retaining the political reality of economic motivation but re-envisioning it away from immediate considerations of profitability at all costs. Such an association will not be without its moral context, but that morality need not be presented as a competing consideration which endangers any collaborative regulatory association with adapted economic aspirations.

The process of adapting social capital towards environmental sustainability will recognise that ecology is not exclusively about nature. As was argued earlier in the proposal to bring the natural and the built environments closer together to attain common interests, political ecology will be encountered as a new way of handling objects of human and non-human collective life. In this way, social capital in political ecology conceptualises ecology as a political endeavour, which has the capacity to negotiate rights and resource inequality towards the common interest of sustainability.

What are the practical, institutional structures which will stimulate adaptation and promote the utilisation of social capital? The answer to the question is inextricably dependent, for the present at least, on the shadow of state hierarchies – its reach and its depth in order to confirm the sustainability of environment and of economy as a central regulatory *essence*, converting crisis to orderliness (see Chapter 11).

An example of the adaptivity of social capital through a dynamic regulatory strategy is social activism.

Protest movements can be conceived of as a process for revealing *institutionalised bad conscience*. In this role, social capital in protest reminds the powerful of the losers and losses of globalisation.

Protest movements, as Brand (2005) details, highlight the economic unevenness and social crises which are recurrent in post-Fordist capitalist development.

The direct action of protest movements struggle for the *re-regulation of capitalism* to deal with rising dysfunction. In our discussion of financial collapse as a global crisis (Chapter 7), both institutional greed and process risk has endangered the foundations of capitalist economy and liberal democratic governance. Protest movements are attacking these meta-issues as well as more microconcerns such as personal wealth and employment security.

Firstly, social capital employed in protest activism is also healthy for the resilience of democratic governance through its capacity to demark, detect, defend and exploit space for political action.

Secondly, social capital employed in protest as the representatives of wider communities of social action takes responsibility for the formulation of a *national-popular collective will*.

> Finally, social capital employed in activism is constantly attacking the deregulation and related destruction of social rights – the re-commodification of social relationships – and thereby, challenging dominant developments in justice, democratisation and diversity.

Social capital and civil society-based regulatory contexts can be facilitated by legal frameworks but do not depend on them. The role of law in respect of consensual social action is either to retard or to accommodate organic evolutionary regulation which is difficult for law to discharge (in a civil or administrative sense). After all, modern legal regulatory form is a long way from natural law and organic orderliness. This is, so sociability would see it, a reason for the recurrent failure of law as a regulatory frame.

The demise of criminal sanction models – Soft vs hard regulation

Legality as the regulatory frame, because of the shadow of the sanction cast over law, and of state sponsorship, can be said to produce hard regulation.[46] Hard in the sense that:

- due to its formality and the mechanical overlay of legal proceedings;
- which if are themselves not complied with;
- can produce negative outcomes before regulatory intentions are met; and thereby
- the nature of the compliance which law demands, is non-forgiving.

Law is supposed to enable the balancing of competing interests. However, in reality, private law prefers one set of interests over another and public law punishes the loser. This adversarial context, in which law divides, is a reason why in recent years arbitration has thrived on the failings of law's rigidity.

One of the difficulties with an overreliance on a criminal sanction model of regulation is its policy dilemma – does hard law favour the uncertainty of sustainability compromises at the risk of endangering its usual focus which is the protection of private economic interests? For the *deep ecology movement*, the answer to this question is straightforward. Environmentalism for them is compelling as a new form of political and social ethic – nature has a social role beyond a *means for human well-being* – and the domination of nature in favour of exploiting private self-interest is the main malady of modern society. Following this argument, sustainability rather than short-term private economic gain becomes the only normative framework within which sanctions can be measured and culpability applied. Herd law is used, therefore, to advance what might be viewed from the perspective of law's conventional commercial beneficiaries as 'soft interests'. Rather than perpetuating the nature/society opposition, law in this context is instrumental in its resolution.

The counterargument advanced by the conventional beneficiaries of private law sanctions is that bio-egalitarianism cannot be achieved without leading to social paralysis. This assertion is put largely in terms of the economic consequences of investing in hard law and environmental conscience. If law is instrumental in dissolving the boundaries between nature and society, how should the various components of this conflation be understood? Does it demand eventual strict social asceticism? Can sustainability tolerate economy? The understandings essential for disentangling these challenges require a more robust debate about the role of law, above and beyond crude 'hard/soft' distinctions.

At the outset, legislators, commercial interests and civil society must come together to determine whether the future of law and legal sanctions in the regulation of competing environmental interests is governed by the supervening commitment for law as serving medium-term, rather than short-term, market interests (resource and market sustainability, against immediate and diminishing profit agendas).

Law as a primary regulator in its private law manifestations confronts the following issues when seeking to expand its regulatory force beyond narrow private interests confined in time and space:

- Who should take responsibility for environmental impact assessment? Contracting parties, the regulatory establishment or the host community? What will be its impact on them? How is it to be measured so as to take into account the widest considerations of general interest in sustainability?
- What can be done through private legal relationships to address the need for *collaboration* particularly in developing countries where regulatory capacity is limited?
- What should be the extent to which mandatory rules of law or issues of public policy can interfere with the 'law of the contract', as it is currently constructed?
- This question leads onto the realisation that we are not talking about an intrusion of public law into private order but of private law into public policy ordering. What will be the ramifications of this for the development of contract-secured interests in the context of environmental resources for sale?
- Can law come to view the instrument of the contract as a semi-political mechanism rather than a strictly private tool mitigating environmental insensitivity?[47]

In his paper 'The Challenge of an International Environmental Criminal Law',[48] Frederic Megret details that despite strenuous calls for vigorous approaches to sanctions and punishment backing up environmental regulation, these have 'largely remained a dead letter' at the international level.

Megret identifies the legal, political, social and economic factors which inhibit the development of a 'fully fledged international criminal law of the environment', despite his view that both horizontal and top-down regulatory advocates are not greatly divided on the ultimate need for penal sanctions against pollution. He sees the following restrictions:

- limitations due to the nature of the context: international law;
- limitations due to the nature of the protected interest: the environment;
- limitations linked to the nature of the project: criminal law.

Even in the face of these Megret argues in favour of the criminal law, criminalisation, internationalisation and punishment as effective prohibitory regimes.

Victor Tadros is equally well disposed to the criminal law as an effective environmental regulator. His explanation for why a public law approach to international environmental regulation has been stalled[49] extols the declaratory impact of the criminal sanction. But this may not be enough to enliven criminalisation as a regulator without creative crossover between criminal and civil law regulatory outcomes. A deeper examination of compensation[50] within the context of criminal sanctioning is advanced as a useful development.

International environmental regulation policy – Interest-based regulation

As a global problem, law cannot address environmental sustainability through domestic tools such as legislation and judicial decision-making alone. Law's role in regulation needs to confront and adapt contractual relationships of commercial interest. For instance, law in its private manifestation must develop a capacity, as essential environmental variables alter with challenges to sustainability, to recognise changing historical conditions from when contractual relationships were formed.[51] Legal regulation needs to be sensitive to the institutional nature and structure of organisations which control production and thereby endanger sustainability. Legal regulation must counteract exclusion and dominance of capitalist production – the resource base of capitalism is finite and requires rationing – how? For whom?

Regarding what they determine to be interest-based regulation, Sprinz and Vaahtoranta observe[52]:

> Despite growing international environmental interdependence, the international system lacks a central authority to foster environmental protection. As a consequence, countries have adopted different policies to reduce international environmental problems. More specifically, costly

> regulations are not universally supported. In order to explain the success and failure of international environmental regulation, it is necessary to systematically focus on the factors that shape the environmental foreign policy of sovereign states. Since such an approach is missing from the literature, we develop an interest-based explanation of support for international environmental regulation and postulate what impact it should have on state preferences for international environmental regulation.[53]

These authors advocate the prospect for environmental sustainability of international environmental interdependence. To stimulate this position, they explore an interest-based approach to international environmental regulation as a partial but parsimonious view of how a country's preferences for international environmental regulation are shaped:

> The interest-based explanation of the international politics of environmental management focuses on those domestic factors that shape a country's position in international environmental negotiations. In other words, the interest-based explanation is a unit-level explanation of international relations. Unit-level explanations refer to elements located at the national or sub-national levels, whereas systemic explanations suggest that differences at the unit level produce less variation in outcomes than one would expect in the absence of systemic constraints. While unit-level explanations emphasise the varying characteristics of countries, systemic theories suggest that countries with different internal characteristics tend to behave in the same way if they are similarly positioned in the international system.[54]

Approaching questions of internationalisation from the domestic focus might present an analytical constraint in itself. That noted, the authors see a pragmatic and interest-based correlation between environmental vulnerability and abatement costs:

> In addition to these mass political pressures on national governments, a differentiated industry pressure model could be developed. By explicitly linking abatement costs and international trade in environmental technologies, on the one hand, to the interests of major polluting industries and the abatement technology sector, on the other hand, a differentiated model of industry support for international environmental regulation can be developed.[55]

Strategies towards sociable regulation

What must be done therefore to transform parsimonious interest into an atmosphere[56] of collaborative international interdependence?

The absence of a central governance authority to foster environmental protection at the global level means that interdependency cannot rely on the mechanical coordination that state agencies offer at the nation-state level – diverse and unconnected national approaches add to the difficulty of connecting and networking.

The factors that shape the environmental foreign policy of sovereign states need adaptation so as to recognise the importance of transforming self-interest into *mutualities of interest*[57] at a variety of networked levels.

Such transformation is achieved through the reconstitution of what is difference against what is a mutual approach to recognising diverse sources of interest. It also suggests that the emphasis in a clash of interests can and should shift away from what divides to what is in common. *In a governance sense we are not just talking about difference at state and sub-state levels but more constructively about similarity in the behaviour of different characteristics when the positioning of interests is similar at international level.* An example of this might be the recognition of shared interests in sustainability but a difference in emphasis, on the one hand being market focus at the national level and on the other hand resource focus at the global.

Interdependence is not to be confused with dependency. Interdependence implies moving from positions of legitimate self-interest, beyond negotiation theory where parties are fundamentally different in the power they bring to the table – internationally this may require political and economic compensation for weaker players based on (1) a country's ecological vulnerability to pollution and (2) the economic costs of pollution abatement.

Is the assumption that states are self-interested and rationally weigh sustainability in terms of domestic measures of cost/benefit intractable, and in what circumstances? *Can it be said that parsimony rules?*

A route to converting parsimony into mutuality is to interrogate *global supply chains*[58] and expose the key medium-term considerations for resource and market sustainability and the way in which these depend on productive international interdependency. To this end, the following features are important:

- pressure for responsibility from non-governmental actors[59];
- concerns about the ability of states to regulate these firms' environmental conduct in the global economy;
- NGOs extending their reach into global supply chains;
- international voluntary environmental initiatives as a realistic approach to self-regulation where there is a regulatory voice at state and supranational levels;
- enhancement of firms capacity to address environmental issues and their strategic importance to the firm and to its community;

- manifestation of real regulatory commitment rather than just the pre-emption of higher regulatory threat.

With these considerations in mind what are the prospects for 'trading' in favour of environmental sustainability within international networks of dependency? Productive trading will be effected by:

- the background of bitter social disputes driven by conflicting interests, values and discourses;
- the re-engineering of social values above profit – *industrial health and safety as an example*;
- *expanding the reflexivity of the contractual package – flexible participation procedures*[60] for the extra-contractual community;
- *overcoming the technocratic orientation of eco-management* – to recognise the external community as parties to business 'deal' due to their carriage of environmental risk;
- promoting commensurability between environmental quality and the things against which this good must be traded off – can the value of environmental and other goods be assessed on the same metric?

Ultimately, productive interdependency moving towards mutualising self-interest depends on significant changes in value preferences:

The vigorous promotion of post-materialist values wherein domestic interest representations of mass political attitudes are orchestrated as a medium-term sustainability commitment.

Redirecting industrial lobbying away from profit and towards sustainability – resource rationing becomes justified in terms of the protection of medium-term market trade. This transformation is not necessarily state-dependent and can be promoted through a *differentiated industry pressure model,* linking abatement costs and international trade in environmental technology to major polluters and the abatement technology sector.

BUT – how do any of these initiatives counter *status quo bias*? How can they be represented as being beyond welfare economics and its recent negative connotations in neo-liberal democracies? (Or the electoral self-interest of legislation? Or unenforceability?) The answer to these reservations lies in a conscious qualification on the rational actor model, a qualification which exposes the negative imperatives arising from choice restrictions as a consequence of rampant self-interest. In this respect, market and resource preferences are endogenous to existing legal policy if it focuses only on sustaining the limited private rights of commercial parties outside the general interests of civil society at large.

Having set the scene for the growth of mutualising interdependencies beyond the nation state, the next consideration is locating responsibilities for these interdependencies back within crisis-centres such as polluting commercial and industrial concerns. What mechanisms can be employed to heighten responsibility within the interests of key adversaries of the sustainability frame?

Corporate social responsibility – Turning self-interest into common good

Before engaging in a brief review of corporate social responsibility (CSR) (and associated self-regulatory associations and mutualities), it is best to make clear how these initiatives differ from regulatory sociability. While the corporate and industry emergent self-regulatory initiatives can claim to be more organic than mechanical and as such more likely to foster (internally at least) collaborative approaches, they are what Teubner refers to as autopeotic (closed) systems.[61] Sociability, on the other hand, depends on an integration of interests across systems and sources. While commercial/industrial organic regulatory initiatives can be inclusive, more often than not they are forged out of a continued desire to distance other regulatory forces from the self-interest that compliance might conceal. For them, integration and regulatory cross-fertilisation is a positive but not essential or intended consequence of mutuality within a system.

CSR has numerous definitions, depending on its context, but broadly, it is the practice of a company operating in a manner that 'meets or exceeds the ethical, legal, commercial, and public expectations that society has of business'. Ultimately, a company's CSR code combines legal regulations, industrial codes that the company supports, and consumer pressure is often the reason companies implement a code.

CSR needs to be considered against the view that as an economy grows it will experience negative economic conditions – Kuznet's theory. In this context, large commercial interests will construct with the compromised leaders of fragmented state relationships of power and dependency which become an essential and unfortunate backdrop for the development of CSR programmes. Kuznet's theory[62] predicts that at the start of the development cycle, the country will experience environmental degradation. However, as development and wealth increases, the environment will become of greater importance and steps will then be made to reduce the damage caused through unbridled modernisation and resource development.[63] That said, with the explosion of MNCs investing in developing economies, the speed at which the environmental damage is occurring has accelerated, and by the time environmental control becomes important within a nation, the damage may be irreversible.[64]

A failing in the reality of CSR has been the commercial habit of major MNCs to jurisdiction shop so as to avoid the bite of domestic regulatory force and to maximise their capacity to pressure weak nation states for favourable commercial terms against their capacity to pollute and to exploit natural resources. This alliance is exacerbated by corrupt relationships between MNCs and political leaders in the developing world, which not only conceals from the general population the extent of the depletion of their natural environment but also keeps to the few the commercial benefits of such exploitation. On top of this, shows of CSR can be critically evaluated for the cynical tradeoffs that they offer to further mask the destructive outcomes of corporate greed and political self-interest.

The response to greater globalised networks of responsibility, which Christmann and Taylor (2002) identify as turning the tide away from third world resource exploitation towards responsible sustainability, remains patchy in some areas of greatest economic dependency and strongest profit motivation (such as oil exploration and repatriation). Despite continued evidence that some MNCs are damaging the environment (utilising jurisdiction shopping to do so), there is a lack of concerted global action to correct and stop the damage.[65] CSR programmes only seem to emerge in such circumstances where the heat on the company is too strong to avoid.

Despite the broadcast positives, CSR has attracted a great deal of criticism with many arguing that in the developing world markets and environmental contexts, it is simply a case of 'greenwashing' – setting minimal standards to prevent costly backlash from consumers.[66] Furthermore, some argue that CSR is simply a method which companies utilise routinely and inexpensively to prevent the implementation of international regulation.[67]

CSR is increasingly promoted as an instrument for global governance to address the regulatory vacuum surrounding transnational business activities, while encouraging business to contribute to sustainable development at the national level. It is important to remember, however, that CSR no longer remains the province of business alone. In recent times, a variety of governmental and multilateral institutions have developed CSR perspectives for their own activities. Because the socio-political model underlying CSR as a product of American business is anything but neutral, Gjølberg identifies different typologies for CSR's in distinct administrative contexts.[68] Her analysis suggests that

> Pre-existing political-economic institutions and cultural norms deeply affect the interpretation of CSR, and that this, when combined with ongoing national political processes, leads to a highly transformed concept of CSR,[69] one in which a much more collaborative and inclusive sharing of responsibility is possible.

CSR can, if effectively pursued in atmospheres of trust (see Chapter 11), create safe spaces within which public–private linkages are forged, with sustainability at their heart.

Public–private linkages to regulate environmental conflict

Much has been said about this connectability potential already, regarding collaborative efforts at sustainability across sectors and interests. Perez rejects the 'simple binary story' when it comes to interest amalgamation, which he suggests are kept apart through 'multiple dilemmas-constituted and negotiated by a myriad of institutional and discursive discourses'.[70] He proposes the following remedy by a selective collapsing of public/private legal sectioning, through a method of global legal pluralism where the assumed 'trade and environment' conflict is reconstructed and governed by multiple systems of law rather than any single system:

> A proper analysis of the trade-environment conflict must be sensitive, therefore, to the composite nature of contemporary global law. (We need to take) a closer look at one of the 'private' manifestations of this multi-faceted conflict: international construction law (the lex construction is) – an important branch of the lex mercatoria. The relevance of this field of law to environmental studies stems from the fact that construction activities – particularly those associated with large infra-structure projects – can generate significant environmental damage. Any construction activity modifies the land or habitat in which it is taking place. This damage is highly varied, and includes loss of biodiversity, reduction in the stability of land formations, and contamination of water resources. The large volume of waste generated by construction operations can cause further environmental degradation . . . My goal is not confined, however, to an articulation of institutional 'blindness'. I am interested also in developing pragmatic alternatives. To this end, I draw a distinction between the contractual heritage of the lex mercatoria and a counter-contractual vision, which depicts the construction contract as a semi-political mechanism, rather than a strictly private tool. This conceptual change seeks to break the traditional separation between the 'public' and 'private' realms – a division that characterises most of the standard contracts in the construction market. Of course, the main challenge lies in developing detailed normative/ institutional configurations that would enable the realisation of this 'political/constitutional understanding of the contract'. These configurations should have a reasonable 'fit' with the commercial constraints of the transnational construction market.[71]

As indicated earlier, Perez represents the modern built environment as a context of highly contextualised activity, currently mechanically webbed into

ecological and social location. He sees this embeddedness as highly incongruent with the image of an isolated business relationship due to what he suggests as a stylised and underproductive division between the world of private contracting parties, and the wider environmental community excluded from, but necessarily effected by, contractual rights. If it is possible to externalise the environmental cost of the impact of contractual rights onto the extra-contractual community, how can this evidence be anything but law's *blindness* to its wider function of protecting the mutual essence of human existence?

A purely *economic view of* this narrow contextual division is that law is used as an economic tool to enhance the economic value of business deals for private contracting parties. In this interpretation, law fails more than just by ignoring community impact; it encourages parties to allocate environmental risk to the external community without economic consequences.

This private/public law distinction is particularly dangerous in political contexts where the regulatory level is low and the public participation scarce. As we have seen with the predatory activities of MNCs in resource-rich and regulation-poor states, private legal relationships mask corruption and exploitation, while effected communities exist excluded from legal claim.

National/international law approaches to global problem

Environmental degradation has no respect for territoriality, sovereignty or any other legal construct which mechanically segments the world into political and economic units. With this realisation in mind, the distinction between national and international approaches to sustainability breaks down with a narrow focus on legal regulation. This realisation reverts critical regulatory policy to a reconsideration of territoriality as a context for regulatory application; beyond the territory of the nation state and onto a consideration of mutualisation of interests in the territory of a global environment.

Bosselmann (2004) suggests that:

> Domestic environmental law is increasingly shaped by cooperative approaches to trying to overcome dichotomies between law-making and law enforcement. One of its intriguing developments has been to look beyond compliance[72] and promote 'smart regulation'[73] allowing for compliance without enforcement.[74]

Considering environmental law as an integral part of its enforcement, and vice versa, may explain the limitations of domestic law as an environmental regulator, specifically if law so conceived is bound up with sovereignty and jurisdiction, of which Bosselmann critiques:

> Nowhere is the gap between legal fiction and reality more striking than with respect to the environment. What a state does, in its environment, affects not only its own territory, but the territory of other states together with the planetary environment shared by all. The 'export' of environmental interferences into the 'sovereign' territory of other states is matched by the 'import' of other state's environmental interferences into their own state's sovereignty. Such practice of invasion and retaliation may be acceptable by the international community as a matter of inevitability . . . The mutual acceptance of absolute territorial sovereignty and the environmental degradation associated with it undermines the common interest in protecting the global environment.[75]

He sees the answer as lying in a conceptualisation of environmental governance which adjusts sovereignty to global realities (more of this is explained in Chapter 10). If common interests in environmental welfare are to be legally guaranteed, then such guarantees need to go much beyond nation state sovereignty, which in turn requires limitation in order to facilitate the social conceptualisation of common interest of environmental governance.

Environmental regulation from a nation state perspective is a mix (heavy or otherwise) of domestic law-making and regional and global convention-centred obligations, given the various degrees of national legal presence. There are numerous commentators who support the implementation of international environmental laws to help control the environmental damage being caused by MNCs in developing nation states.[76] Eaton notes that the environmental degradation problems in Nigeria, for example, have led some scholars to 'call for a comprehensive international regulatory scheme, which, they argue, would level the competitive playing field'.[77] In other words, the introduction of an international environmental code would restrict the extent to which companies engage in *jurisdiction shopping* as there would be a global standard for environmental practices, thus negating the profit advantage that could be gained from jurisdiction shopping.

Despite the assumed collaborative benefits of such a set of regulations internationally devised for consistency and uniformly committed to domestic legislative form (both deeply problematic assumptions in practice), there are numerous difficulties working against consistent and universal implementation. Firstly, developing states may be unwilling to allow such regulations to infringe on their sovereignty[78] whilst MNCs will lobby against their implementation.[79] Domestic political weakness and predatory corporate pressure over such weakness ultimately mean that an international legislative framework for environmental practices will have its shaky foundation on a failure of domestic political will and of international commercial probity. [80]

While the superpowers within the global order seem reluctant to impose stringent international regulations controlling environmental damage, developing nations have been consistently calling for help in forcing MNCs to take responsibility for their actions.[81] At the same time, these developing states were taking down environmental protection barriers which they feared would deter foreign investment and disadvantage their viability to MNC trading and commerce. In the early 1990s, India, for instance, made a series of law and policy reforms that they believed would make them a more attractive investment prospect as they lowered environmental standards which businesses were required to meet. Developing nations feel constrained to act in this way as they compete for investment that they are convinced will accelerate their development. However, as there are limited, competing or compelling international standards for resource protection, these states are in reality competing with other vulnerable developing nations to minimise their environmental standards.

For developing countries, when it comes to resource exploitation and depletion, they are faced with market forces dictating that they have to lower regulations to attract investment. Where regulatory schemes are in place, the pace and scale of investment in any case can overwhelm the host nations' regulatory framework and capacity, making the regulations little more than expressive in value.[82]

International regulatory cooperation involving states, industries, communities and public interest groups will help prevent MNCs benefitting from jurisdiction shopping as the gap between individual countries' regulations will be forced, through more universal compliance, to decrease.[83] Ultimately, it is conceivable that the common interests of the home and host nations may lead to the principles of sovereignty being manoeuvred to allow much needed international regulation to move from expressive to facilitative functions.[84]

Coordinated international environmental policy is highly desirable for the global domestic and benefits it will bring.[85] Companies themselves acknowledge that government regulation is the biggest influencing factor on their environmental standards[86] and thus it should be the priority of the international community to introduce effective international standards.

The argument has progressed along the assumption that a transition from national to international, and corporate to community environmental outlook is both preferable and possible. This shift will not be enough if it does not progress from a softening of normative divides. Nor will a re-imagining of territorial entity and responsibility ensure a long-lasting commonality of interest. These realisations make a specific discussion of regulatory mechanisms which resemble sociability important insofar as they may suggest the conditions under which a wider move to this collaborative regulatory state across different forms of global crisis and in different climates of general regulation may be achieved.

Strategies for international voluntary environmental initiatives

Given the current void of compelling and coordinated international regulations to govern environmental practices and the patchwork and incoherent nature of national legislation, many industries have begun to implement their own voluntary codes of practice.[87] Consumer pressure and governmental regulation have already been described as external methods by which company practices can be curtailed and regulated. However, the use of industry codes of practice and the use of company codes are methods by which internal regulation can be achieved.

Industry codes of practice enable the collective improvement of environmental standards throughout the industry regardless of the restrictions imposed by government regulations.[88] Through these codes of practice, companies are able to join together and regulate their activities to avoid a common threat of oppressive mechanical, interventionist regulation, or to work towards a common goal of improving standards.[89] These codes provide companies with environmental objectives and methods of implementation that are additional to the standards required by government legislation[90] and encourage knowledge-sharing between companies.

The critical scholarly view of such codes of practice is that they are little more than 'a sham',[91] 'inherently feeble and ineffective'.[92] However, this view is becoming increasingly challenged[93] by supporters of industry regulation. Advocates highlight how industry self-regulation of this type offers flexibility and market-sensitive regulations that are formed by experts within the industry and can therefore lead to more effective measures of control than can government regulation.[94]

In any evaluation of their effectiveness as an alternative to state-sanctioned codes, it is important to establish the precise content of industrial environmental codes of practice, their reach, consequences and the extent to which they cross over other regulatory devices and approaches. While codes differ from industry to industry in order to meet the specific requirements of that given industry, they share universal regulatory characteristics.[95] The codes generally stipulate various environmental practices and goals for their members which would extend beyond those required by government.[96] Codes may address the main reason that jurisdiction shopping takes place where national legislative frameworks are not cohesive, consistent, control-oriented or incorporating of international regulatory standards. Codes should also declare a more responsible corporate ethic which eschews the exploitation of weak states simply because the commercial opportunity is available. The industrial codes should fill the gaps in environmental best practice which some nation states are unwilling or unable to declare and enforce.

A further advantage of the industrial codes is that they generally aspire to achieve long-term solutions, challenging companies to integrate environmentally sound thinking into all aspects of their business.[97] This medium- to long-term approach allows businesses time to adapt and change gradually to meet the demands of the codes, which in turn makes the code more acceptable to individual companies, thus increasing positive take-up. The medium-term focus is also good corporate training away from the destructive self-interest which is profit-oriented and sustainability neglectful, towards a recognition that in the environmental future, sustainability is all that will ensure market and resource access and availability.

Even where codes detail how firms can meet the requirements stipulated, it is often the case that the codes set no specific performance levels or emission limits.[98] Instead the codes are likely to focus on companies continually improving themselves and setting individually formed targets.[99] Unfortunately, this idea of unsanctioned self-regulation often results in codes 'serving the industry rather than the public interest'.[100]

In particular, there is a large body of academic opinion that has been far more circumspect about Responsible Care Programmes (RCP) and industrial codes in general. Gunningham describes RCP as demonstrably lacking teeth,[101] while Reisch suggests that consumers and investors accept these programmes as enough to avoid the otherwise apparent need for boycotts[102] as more direct pressure on companies to improve their environmental performance. In effect, the RCP can be used as a smokescreen to protect firms which do not operate in an environmentally sound manner,[103] enabling the hiding of practices such as jurisdiction shopping.

Even more damming against the efficacy of codes as a control alternative, where collaboration is anticipated to at least match the utility of state regulation, is the evidence provided by King and Lenox in their extensive study into how the RCP has influenced environmental practices. Their research establishes that there is 'no evidence the RC[P] has positively influenced the rate of improvement among its members. Indeed . . . [they] found evidence that members of the RC[P] are improving . . . more slowly than non-members.'[104] Is this then an indictment of collaborative self-regulation or, I would argue more likely, the consequence of no real commitment to regulatory goals beyond the salvaging of suspect environmental reputation. In the face of such revelations, self-regulation advocates say that industrial codes and RCPs are continually evolving and currently attempting to introduce third party verification to ensure that standards are being met.[105]

Many economists agree that without this third-party monitoring, the RCP, and industrial codes in general, will fail any control purpose, and worse still even disguise poor environmental practice.[106] There are two options for self-regulation through industrial codes. One way forward is for the RCP and industrial codes to follow the 'one striking exception'[107] of the Institute of Nuclear Power Operations (INPO) and implement, as series of stringent

codes with firm sanctions and explicit targets, that are externally verified and checked in order to remove the doubt that is currently present. This has the appearance of a hybrid sanction model. The other is to achieve a genuine collaborative control environment governed by verifiable commitments to medium-term common interests of sustainability. The framework and content of the code must, in an externally reviewable form, clearly represent such a direction.

Over two-thirds of company codes in a recent study were found to have general or frail targets, leaving the company significant room for interpretation.[108] Further research into the monitoring procedures of these codes has highlighted that over one-fifth of the companies had no monitoring procedure in place and of those that did the most were internal procedures.[109]

Allowing room for interpretation along with the internal measuring procedures means that CSR codes can have the effect of masking the activities of errant companies. While through forming the code, these actors appear to be demonstrating environmentally sound business practice, they are still able to abuse environmental regulation inequalities between states using the code as a shield against allegations.

The RCP is heading towards this position with companies being encouraged to implement external verification, with the mantra being 'don't trust us, track us'. If all industrial codes can be persuaded to implement such strategies, they can be used as a method by which jurisdiction shopping can be controlled while the nature and reach of international regulation continues to be debated. Furthermore, if industrial codes can increase their utility as regimes offering external verification then they will aid the ability of consumers to pressurise companies into acting in an environmentally sound manner. The verified information that could be provided by industrial code regimes would enable consumers to make informed purchasing decisions. Verification relies on accountable dialogue across and between actors and stages in the collaborative project. In the past, the classification of knowledge sources informing environmental regulation has not always assisted effective communication. This is particularly the case when the discussion moves into the contested terrain of climate change.

Risks of communication discourse[110]

Communication about climate change differs among science, politics and the media in terms of the way the risk of climate change is:

- perceived or socially constructed;
- communicated among the three sectors of society; and
- represented by the media in making elite discourse appreciable across all levels of civil society.

The differences between these three sectors of knowledge discourse are not random but systematic, given the specific risks (to self-interest) each of them faces in adopting and broadcasting a particular position on climate change.

In the discourse on climate change commonly expressed in consolidated states and regions:

- Scientists politicise the issue.
- Politicians reduce the scientific complexities and uncertainties to CO_2 emission reduction targets and other catchy policy 'achievables'.
- The media ignores the uncertainties of both science and politics and transforms them into a sequence of events leading to catastrophe and requiring immediate action, whether this be against polluters or against irresponsible environmentalists.

Hence, the problem in communication discourse surrounding crisis and regulation from different perspectives of knowledge and interest can be characterised as such:

Interference of discourses: There is therefore no 'one true' or 'appropriate' definition of the issue due to the specific selectivities exhibited in the discourse of different actors (both in the sense of inclusions and exclusions) occurring as the issue of climate change was communicated.

Uncertainty discourses: Although science still holds the ultimate authority for judging scientific truth or falsity, the scientific community itself may be divided over the truth of certain hypotheses, in light of scientific uncertainty. This then plays into the hands of those with interests in the other two discourses to undermine a common view on the crisis and methods for its control.

Partiality discourses: Faced with uncertainties that are potentially threatening their legitimate claim to power, politicians have to select options that, however simplistic they may be, allow them to make decisions. The media, in turn, will report what seems worth reporting, given the profession's limits of space and time, and the media audience's limited capacity to comprehend complex scientific problems.

Why do these problems arise?

The problem comes about primarily when science makes pronouncements on issues that potentially concern the safety and wellbeing of the population at large and are thus of immediate political relevance and have a high news value for the media. Such pronouncements are bound to attract public attention and lead to engaged debates over what is correct and what measures are appropriate.

There are identifiable phases in the development in these three fields of discourse.

Science sphere

- First phase: discovery of anthropogenic impacts on the climate,
- Second phase: politicisation and scientific closure,
- Third phase (1991–1995): institutionalisation and diversification of scientific advice.

Political sphere

- First phase: scepticism, vigilance,
- Second phase: catastrophism – despite the uncertainties surrounding the science, politicians had no choice but to accept the hypotheses because they had already framed the issue as one of catastrophe.

Media sphere

- First phase: low but continuous level of attention to anthropogenic causes of climate change,
- Second phase: definite increase in media attention – linked to the framing of the issue as a catastrophe in both the science and political spheres,
- Third phase: scepticism.

This development of segregated knowledge and the stories created from it in different perspectives takes us back to my initial observation on the environmental worldview. If it is not *blindness*, then it could at least be criticised as one-eyed or distinctly self-serving, leading to damaging consequences for the dialogue on the essence of regulation and the necessary associations to achieve any clear regulatory mission.

Global warming as security – Populations on the move: two worldviews

Whether at immediate crisis proportions or not, the inconvenient truth of global warming is that now there can be little doubt that it at least needs to be addressed by policy instruments purpose-designed for the problem.[111] Considerations governing the nature and choice of such instruments include the following:

Criteria for instrument choice

Efficiency: the degree to which instruments are capable of maximising net benefits

Cost-effectiveness: achieving a target at minimum aggregate cost

Prevailing domestic policy instruments

Command and control
Market-based instruments

International policy instruments

Some countries may not stand to gain from controlling climate change and some actually benefit from it. Hence, for a voluntary international agreement to be successful, it must include a mechanism for transferring gains to other countries that would not benefit from joining the agreement. Another possibility could be uniform standards laid out in an emission–reduction agreement. A preferred approach which requires a shift in sustainability focus through market-based instruments such as:

- harmonised domestic taxes (carbon taxes);
- domestic tradeable permits;
- uniform international tax;
- international tradeable permits;
- joint implementation (i.e. bilateral trading on *ad hoc* basis).

However, any and all of these regulatory instruments are premised on the shadow of the state. Taxes, for example, require enforceability and therein can lie the limitations in regions and governance and commercial contexts where enforcement mechanisms cannot match the desire to avoid regulatory cost. The discussion then returns to sociability. Implementation and enforceability within sociability conditions are nowhere near the challenge they represent in mechanical interventionist regulatory strategies. What confirms this is a return to the implantation challenges for the types of mechanical strategies listed above. Beyond locating and selecting various policy options the implementation issues arise as:

Effects of uncertainty on the choice of policy instrument

Surprisingly, uncertainty about the benefits of abatement does not affect the choice between a price and a quantity instrument
If marginal abatement cost function is known, then both instruments will be equal in achieving a target level of emission

The currency of regulation

Currency is likely to be the carbon content of fossil fuels
Practical issues (since there exists a proportional relationship between carbon content and CO_2 emissions)

Coupled with monitoring – important precursor

Market power

Two potential problems: Economic agents may influence permit price or use permits to exercise market power in the output market

Transaction costs

Arises from

- research and information;
- bargaining and decision;
- monitoring and enforcement.

Free-rising and emission leakage problems

Emphasising global warming regulation which relies mainly on an interventionist/ mechanical regulatory paradigm will necessarily (in terms of the three discourses identified above) create tension and the appearance of competing rather than common interests around the following (false as sociability would argue) dichotomies:

- regulatory systems vs market-based instruments;
- domestic tradeable permits vs domestic taxes;
- international tradeable permits vs international tax systems.

Each of these anticipated tensions employs interventionist language and technologies, commonly absent of any true sense of mutual interest, or even the desire to find some. And at the outset, to pitch the market interest as opposed to the regulatory compact is essentially to misunderstand, I argue, both the nature of the crisis and the climate for its resolution. Say, for instance, the crisis of global warming is principally perceived as the cost consequences of control, over the market benefit of limited control. In that language the dynamics of the crisis become represented and debated as:

- dominance of financial over industrial capital;
- market hastening the demise of state regulation;
- economic processes globalised beyond the regulatory impact of the nation state, while the political sphere remains captive of national framework;
- shadowy role of the state in relation to unfettered markets;
- globalisation now a far-reaching process of social transformation which is productive of *new power relations*, so as to shift regulation (and its debate) into the hands of those requiring regulation

The essential question then arises as to whether critical issues beyond materialist profit, such as resource and market sustainability, can ever be protected through better regulation of global capitalism, when global capitalism casts regulation ultimately as a state-sourced intervention which must be captured or resisted? Braithwaite (2008) answers yes, but only if the economic process is politically re-regulated *through pluralist regulatory engagement*. For Braithwaite, that cannot be achieved outside the shadow of the state, except in exceptional circumstances or in the long term. For regulatory sociability, I argue, the term is shortened and the state shadow faints if regulation is flattened into a communitarian horizon of engagement where shared risk and shared fate replace a single profit motive in new age capitalism.[112]

Integrative regulation and pluralism – Social responsibility and communitarianism

Pluralist regulation is discussed and argued for in much more detail in other parts of this book (see Chapters 10 and 11). We return to it here within a somewhat more narrow frame:

- concern to break down the self-interest barriers of nation state territorialism and sovereignty;
- in a newly determined environmental territorialism to position social responsibility as the political discourse for a new environmental world view;
- attached to this is the recognition of mutualities of interest (even within the economic paradigm) which favour medium-term sustainability of markets and resources; and
- in order to bring about and maintain this recognition of mutualities, otherwise opposing interests are located (and accept their location) in *communities of shared risk*;
- collaborative regulation is preferred as the organic mechanism within which pluralistic regulatory strategies are developed to empower communities of shared risk into *communities of shared fate*.

In order to identify how these stages of progression might play out, let us examine the regulation of environmental pollution. Bosselmann (2004) identifies the following domains of pollution which demand an integrative and pluralist regulatory response:

- intraterritorial pollution;
- trans-boundary pollution;
- common areas pollution;
- global environmental pollution.

In looking at regulatory responses, he considers but rejects a reformist approach (expanding existing interventionist principles and frameworks), in favour of a transformational approach which relies on redefining territorial sovereignty (and consequentially diminishing the 'sovereignty' of nation state self-interest). State sovereignty, he posits, should not be determined outside the context of its international dimensions when environmental protection is the common interest at stake. This does not mean we are to hold hostage environmental interests to some ill-defined and artificial reciprocity of state interests. Global environmental protection need not be a derivative of, and thereby secondary to, a community of reciprocal state interests which, he says, is what is currently restraining the development of a truly global regulatory approach to the common good of environmental protection. If ecology is indivisible from the value of property, then, as with property, value is not determined by limited notions of sovereignty.

Essential for a pluralist approach to the common good of environmental protection then becomes the recognition of the environment as a duality: consisting of a 'right' to use territorial resources and an obligation to protect the environment in so doing. Regulation is directed at both understandings.

The shift to mutualities of interests is easier to derive in a new configuration of territoriality where the environment as a shared space (both natural and built) within which risk and fate can be determined and regulated without the assumed opposition of individual and common good and the consequent warring of one regulatory form against another.

Govind (2007) suggests that for the necessary public/private/state mix in regulatory pluralism it is necessary to increase public and private businesses' awareness of the issues associated with climate change, and exert legitimate pressure through indirect means (the public and green consumerism).

These simple precursors to appreciating positioning in communities of shared risk have been detailed above. The move then to regulating collaboratively as communities of shared fate necessitates a shift away from reliance on the state for selective interest protection in favour of a globalisation of common interests and their regulatory assurance.

Communitarian governance and the shift from state interest/protection – Globalising common interest

Some interpretations of globalisation cannot think outside the box. Globalisation is too often represented as the insidious and intractable reason why communitarian governance modes for environmental sustainability are unsustainable even if ever attainable. Usually the critics of this suggest that unhealthy alliance between globalisation and environmental destruction

highlights corporate and industrial practice appearing as reckless self-interest or, on the other hand, suggest that changes of commercial motivation through CSR are little more than another level of exploitation: the gullibility of civil society rather than the vulnerability of weak, resource-rich and governance-impoverished jurisdictions. For instance, Christmann and Taylor (2001) identify critics of globalisation and its influence on environmental protection as focusing on the detrimental corporate practice of jurisdiction shopping: locating polluting industries in countries with low environmental regulation standards.

In turn, these authors propose a contrary interpretation of globalising interest in the common good. They suggest that globalisation may have positive environmental effects because global ties and commercial networks beyond national interests and territoriality increase pressure on firms in countries with poor regulatory standards. Multinational ownership, multinational reputation transaction, export reliance to developed nations and a globalised customer base can increase the preference for responsive (and responsible) self-regulation towards better environmental performance. Thus, as I highlighted in the early part of this chapter, the destructive profits of short-term regulation avoidance can be negated by the medium-term benefits of accepting common good sustainability rather than prey on fragmented states and territorial protectivism.

Returning to Bosselmann (2004) and his environmental territoriality, he proposes a notion of environmental governance to rule the self-interest of state territoriality and sovereignty and to be guaranteed through legal common interests, these which would then ensure human welfare as a common global interest.

> The proposed argument for environmental governance goes as follows. The development of international environmental law is characterised by the recognition of common interest in protecting the environment. This recognition, visible in new principles and concepts, has effectively limited state sovereignty. It has, however, not principally limited territorial sovereignty. In order to principally limit or redefine territorial sovereignty, environmental governance has to be accommodated by exempting transnational aspects of the environment from the concept of territorial sovereignty. Territoriality, in its classical form, is outdated.[113] It is no longer the state's exclusive domain and not the defining moment for the state's identity. Borders have not only become permeable to human, material and intellectual exchanges, they have increasingly lost their function to secure territoriality. By their very nature modern weaponry, communications technology, free trade, the environment and human rights ignore these boundaries. Existing territorial sovereignty does little to protect the state's enclosure against such invasions.[114]

Despite obstacles of territoriality and sovereignty so deeply connected within the construction of legal regulation, the fact remains that integrated national and international frameworks to guarantee 'the rule of law, the transparency and accountability of government policies, as well as responsible corporate governance'[115] are crucial if long-term global prosperity is to be achieved.

Bosselmann argues that the current operating practices of some MNCs and the lack of international regulation on environmental standards is nothing more that self-extermination that is leading the economy towards failure and must be 'replaced by a different logic'. Another argument in favour of loosening the principles of sovereignty in favour of an international approach to environmental regulation is the inability of developing nations to impose such regulations by themselves. Developing nations fear the negative impact that imposing national regulations may have on economic sustainability in their country and have therefore refrained from imposing environmental controls that would benefit their long-term national interests.[116] This indicates not only the rapacious consequences of commercial self-interest but also the failure of the regulatory shadow of the state. In fragmented state contexts the state and commercial self-interest conspires to undermine social capital. Therefore, the regulatory agenda needs little argument:

- The natural and the built environment require socially responsible regulation.
- The state cannot be relied upon alone for this or necessarily in consort with economic interests.
- Commerce and industry will not self-regulate without an understanding of their place in communities of shared risk.
- Regulation must move beyond the nation state.
- Here is no sufficient supranational governance entity to replace and re-invigorate state regulatory governance.
- Therefore, the inevitability of collaborative regulatory strategies is clear.

The book will continue to argue through the remaining crisis context chapters that sociability is the most effective context in which to achieve the best outcomes for collaborative regulation.

Returning to jurisdiction shopping as an example, a regulatory need in a globalised world, a *favourable interpretation* of the relationship between globalisation and economic development would have it that globalisation also has the ability to prevent jurisdiction shopping by extending the number of stakeholders interested in a firm's environmental performance.[117] *Collaboration; mutualities of interest; communities of shared risk and shared fate* are each imperatives which increase the pressure on companies to act in

an environmentally responsible way as this is what critical stakeholders such as 'governments, regulators, customers, competitors, community and environmental interest groups, and industry associations'[118] demand. It is by examining these stakeholders' interests and the capacity to mutualise these that regulatory sociability reveals how best MNCs can be co-opted towards acting in a responsible and ethical manner and away from risky medium-term practices such as jurisdiction shopping.

Research challenge exercise

Your boss (who is the executive director of the National Regulatory Commission of Sylvania) has just come back from the most recent round of UN Climate Talks where as an observer he has now become totally disillusioned with emissions (carbon) trading as a regulatory strategy for environmental sustainability. Internationally, the government of Sylvania was criticised at the talks for being soft on the big polluters and putting the present economic interests ahead of the future of the environment. The Commission, on the other hand, is mindful that legal regulation of global pollution is largely limited in its effectiveness around issues of jurisdiction and standing. That said, the Commission still believes that the law's expressive purpose gives it a central role in any environmental protection scheme to be grown in a largely complacent and compliant society such as Sylvania. The problem for the Commission lies in the reality that Sylvania is a tiny player in the bigger scheme of environmental destruction and pollution in the region.

The Commission has asked your policy advice group to go beyond emissions trading thinking. It wants you to build on some of the thinking in the last stage's presentation in constructing an environmental regulation policy which tackles domestic and regional concerns for sustainability, exploiting at least in part the expressive and facilitative role of the law. Critique your options as you develop your strategy.

How can you resolve your differences so that law reform can be developed? Consider what theory will assist in working up a compromise.

Possible regulatory strategy

As our discussion of territoriality as an artificial terrain, in which to conduct the environmental sustainability debate, suggests, the regulatory response in this problem must at the very least move from a regional perspective. With this in mind these questions follow:

- What can make a regional regulatory regime successful?
- What framework will enhance the adoption of regulatory strategies?
- How will these strategies best be evaluated?

- Especially when Sylvania sees itself as a tiny player in a bigger scheme of environmental destruction and pollution in the region, how can the challenge be narrowed down to manageable intervention opportunities?

The focus should be on sustainability, and one threat to that and a focus for regulation is the emission of greenhouse gasses. A conventional approach to transforming regulatory priorities in order to gain acceptance of regulatory initiatives is to prioritise the regulatory outcomes of sustainability over maximising economic gains. In the spirit of sociability, a potentially more effective way of carrying otherwise opposed regulatory stakeholders along with the regulatory mission is to re-educate polluters and politicians in particular to refocus their economic outcomes on medium-term resource and market sustainability in preference to short-term commercial profit.

Along with this change in focus is the need to balance as much as possible initially different self-interests of stakeholders towards the recognition of the mutual benefit of common good. In this problem, stakeholder interests include the following:

- local business elites;
- local opposition;
- MNCs;
- states in the region;
- environmental NGOs;
- international pressure (climate change talks).

The route to an effective regulatory strategy is (as discussed in Chapter 3), first, selecting an effective strategy or grouping of strategies, then the generation of legitimacy which encourages widespread adoption, culmination in the successful exporting of that regime onto the regional agenda. Key stakeholders here are corporate players and the states. A tool for evaluating the potential success of any chosen strategy is to converge scales from total agreement to total disagreement on stakeholder axes (state and corporate interests, assuming in any legitimate regulatory context these will not be the same, or at least when it comes to adopting regulatory controls). The choices are the following:

- institutional self-regulation (some states agree/disagree; all corporations agree);
- corporate self-regulation (all states disagree; all corporations agree);
- hierachical compliance (All states agree; some corporations agree/disagree);
- market-based approach (some states agree/disagree; some corporations agree/disagree);
- CSR (All states disagree; some corporations agree/disagree)

With each of these behavioural prediction approaches to strategy acceptance and legitimacy, the problem is that they are posed as discrete options (so no pluralist networking is envisaged) and also that they rest on the assumption that the interests of the state and of corporations will largely be opposing. As the idea of taxing carbon emissions suggests, neither of these assumptions may hold in practice. In a practical sense, to enhance carbon trading strategies or at least to avoid their obvious limitations, structural and institutional arrangements for facilitating a more collaborative regulatory regime need to be advanced. These could involve initiatives such as setting up a purpose-designed research hub to refine knowledge about the crisis and effective regulation, creating private law arrangements that better integrate the widest range of stakeholder communities and establishing a joint venture company with the specific mandate to infiltrate polluter industries and to use its shareholder investment influence to turn around the environmental conscience and practices of the companies concerned. The joint venture would be between:

- environmental agencies, companies and PIGs, with the purpose of;
- buying majority shareholdings in polluter companies, in order to connect polluting companies with alternative green technology, facilitating better practice through;
- sharing technological know-how.

The joint venture company would be attractive to polluters by providing additional injections of capital. This would come at a price; influencing the company to be more environmentally conscious and, depending on the nature of the member state's economy in a regional context, they would have differential commitments for capitalising the Joint Venture Corporation (JVC) but would share the commitment and the beneficial outcomes.

9
Regulating Regulation – Who Guards the Guardian

Introduction

This chapter brings an essential emphasis to the regulatory governance keystone introduced in Chapter 2 and expanded upon in Chapter 3 – accountability.[1] Despite the decentring debate[2] which emerges in Chapter 4 and which anticipates at least in the medium term the diminution of the nation state, despite an age of re-emergent nationalism, the need for state endorsed accountability mechanisms cannot be avoided even where states are weak and disaggregated. And if the shadow of the nation state is faint, and the influence of multinational corporate jurisdiction is potent, how can accountability be sharpened beyond the nation state?

Collaborations, partnerships, webs, networks and other regulatory alliances which emphasise plurality in governance methods and cooperation in regulatory projects eventually require bonds of trust and boundaries of social responsibility if they are to coalesce and remain mutual. In this appreciation can be seen the distinction between accountability and responsibility, which are both critical components of regulatory sociability. Accountability can be ensured through regulatory frameworks which themselves may not equally generate a sense of social responsibility. It is perhaps unrealistic in pluralist or poly-centric regulatory environments (more of these later) to expect that each regulatory connection will foster responsibility to the same degree. To produce social responsibility, regulation needs to go beyond accountability to ask:

> Whether and how much you (your business) care about your duties? An ethic of responsibility calls for reflection and understanding, not mechanical or bare conformity. It looks at ideas as well as obligations, values as well as rules … Responsibility internalises standards by building them into the self-conceptions, motivations and habits of individuals and into the organisation's premises and routines.[3]

In Chapter 5, responsibility was explored as a brake on both individualised rights and increased actionability through the explosion of new media.

The tone of this chapter was one of regulatory balance between reminding responsibility and facilitating freedom. The complication of the balance was that responsibility and freedom can mean all things to all men when they are not viewed in the context of a clearly purposeful normative agenda. The chapter dealing with financial crisis (Chapter 7) demonstrated the disastrous consequences of an absence of responsible regulatory accountability and the consequent evaporation of legitimacy in the financial industry worldwide. The examination of health regulation and health as regulation (Chapter 3) exemplified how accountability can be context-specific and very much mediated by contested normative positions. Considerations of environmental sustainability in the preceding chapter demand accountability for and to parties that are risking mutuality in approaching sustainability initially from quite different perspectives and constituencies. At the end of the day, we are testing responsibility through making regulation accountable and utilising regulation to make the processes of sociability accountable and legitimate.

The analysis to follow will consciously simplify the role of accountability in habilitating regulation as a project and as a mechanism itself requiring the revision of a constant critical lens. In this respect, this chapter is about the potential of various forms of regulation to require key elements of governance to be accountable, and thereby it links into the chapter to follow. Less time will be spent on the no less significant consideration of making regulation accountable to governance.

The reader will recall from Chapter 3 the discussion of the failure of self-regulation and its modification through responsive and reflective regulation. It is considerations of regulatory purpose and techniques, against measures such as core values, that reiterate regulation's role in serving civil society and servicing democratic inclusion which is an essential underpinning of the mutuality of sociability, and the levelling of power and influence which it requires. Accountability, therefore, has an essential audit function even going as far back in regulatory considerations to whether the regulatory purpose is consistent with wider concerns of civil society (i.e. communication access, environmental sustainability, socially responsible economies, or equitable health service provision). In terms of accountability, it is not enough to test whether regulation did what it was directed to do so but also whether the regulatory outcome was consistent with good governance commitments. For the social sustainability of a regulatory regime, audit processes are now well calibrated and influential.[4]

Sociability is criticised for not sufficiently recognising the power imbalances, which mean that attempts to convert self-interest into mutuality through the inclusion in communities of shared risk and the operation of communities of shared fate will only mask the oppression and concession behind apparent collaboration (see the answer to this in the Preface). Accountability goes some way to answer that reservation. While

accountability cannot deny power imbalance and interest oppression, it can reveal the nature and conditions in which these variables operate. If essential to accountability is increased transparency then a consequence will be the exposure of domination and dependency across regulatory relationships or at least what is standing in the way of seeing these power imbalances for what they are. Revelations of power and disempowerment in the regulatory transaction, particularly when sociability is initiated, can empower other regulatory stakeholders to take account of these pressures and where possible to make their collaboration conditional on power redistribution.

On another central accountability concern for sociability, the true nature of a collaborative spirit can be tested. Is there a genuine move to bring interests at least under some shared consensual crossover, or is the appearance of collaboration a mask for medium-term capture? Because of the desire for compromise for the sake of mutuality in all collaborative regulatory forms, where power imbalances are at work, there will be the pressure for capture, both of the regulatory project and of efforts to make it accountable. This tendency to capture may increase as the need for mutuality intensifies. Therefore, if sustainability is to flow from genuine mutual interests, capture at the point of their initiation and development needs to be revealed through transparency and, if necessary, external audit for that specific purpose.

Accountability is not only important to keep regulation open and honest but it also plays a critical role in understanding the processes of preferencing which lead to regulatory choice. If preferences are laid bare and their determination is better understood through the audit of decision-making, then regulation in the setting of sociability can be rationed and rational.

Particular accountability frameworks act as critiques of regulation and of accountability itself. In limited measure, the chapter will discuss accountability methods reflected against specific regulatory choices as foreshadowed in Chapter 3. The importance of accountability to habituate particular regulatory projects within civil society is implicit throughout the following discussion, as accountability can be said to give a framework of social responsibility to sociability and on to the regulation in which civil society participates and benefits. The critique of particular approaches to accountability connects back to the shift of crisis to ordering and enquires – to what extent do unhealthy alliances, between the state and capitalist (post-Fordist) economies work against accountability, particularly for disaggregated states?[5]

The discussion briefly introduces the role of discretion in regulation and accountability, at the same time recognising the contemporary fear of discretion as a factor of decision-making that can lead to both crisis and social ordering. From this consideration, the chapter moves on to particularise some organic and mechanical connections between regimes of regulation and accountability. The essential motivation for legitimacy through

enlisting accountability is exposed as one of the forces behind stakeholders signing up to accountability compacts. What role does legitimacy[6] play through accountability in giving teeth to regulatory sociability?

Regulatory paradox is never far from the attendant paradoxes in accountability, and this needs to be revealed as such paradoxes influence the adjustment of critical elements of political economy (such as legitimacy and governance) from crisis to ordering. An important paradox for consideration in this chapter relates to where the state is not a key player in either regulation or accountability, then how is the legitimacy of sociability ensured through sanction-shadowed mutuality rather than as a consequence of the undue exertion of power and influence? Sociability will, in many of its earlier forms, rely on the assistance of accountability frames, say from the state, and the actionable rights of stakeholders are important in this regard.

Another popular connection between accountability, regulation and legitimacy outside the state is conscience building, and for the purposes of example, we will return to some considerations of corporate conscience and citizenship. Responsibility is back in the mix in the form of responsible accountability endorsing conscience creation which might otherwise reluctantly arise out of shared risk and fate. The process of moving from risk to fate is critically based on trust and while trust relationships are not maintained through accountability measures, their early stages rest on its endorsement. The chapter concludes by discussion challenges for supranational accountability in new networks of global regulation where the values of liberal democracy are retained.[7]

First, we explore regulating decision-making through the accountable exercise of discretion.

Beyond the fear of discretion[8]

It can be said that accountability is the other side of discretion balancing on the fulcrum of responsibility. However, as was identified in the discussion of responsible access to new media (Chapter 5), there is definitional uncertainty surrounding responsibility, and this is exacerbated by the relativity of regulatory consciousness that affects accountability in different contexts and for different stakeholders.

Discretion as decisions, decision-making and as sites for decision-making is never unfettered. The critical role played by both regulation and accountability when it comes to the exercise of discretion is to create *boundaries of permission* within which decisions are constructed. These boundaries require accountability to the regulatory project which is activated within and beyond their limits.

In recent debates concerning the best-practice operation of discretion in executive government,[9] these questions have been floated:

- Is accountability better achieved through *more or less discretion*?
- Is the accountability of discretion *inversely proportional* to the openness of its exercise?
- In responsible discretionary governance, is there a need to consider the exercise of both *individual* and *institutional*[10] discretion in requiring accountability so as to engage relational and operational governance?[11]

There is the possibility to achieve some reversal in the negative exercise of discretion through the relationship between regulation and accountability. This behaviour change through regulation being made more open and transparent addresses the criticism of discretion complicating accountability. If discretion is exercised accountably then it will be seen as socially responsible and responsive. Put simply, just knowing the identity of the decision maker can empower those over whom the decision has purchase. Moving from isolation to openness through transparency; from the predominance of authority to client-centred service through accountable delivery; by ditching *garrison* mentality so prevalent in the bureaucratic exercise of executive discretion through requiring explanations for decisions as a matter of course; by embracing the complexity of the community which a regulatory strategy may serve (*democratic pluralism*); through anticipating cooperation and mutuality and thereby developing more flexibility in regulatory style; by reducing reliance on stereotyping in formulating decisions at both individual and institutional levels; by avoiding *structural imperatives towards failure* which feature so strongly in the normative dysfunction of closed communities and above all in making sure that accountability is not seen by key stakeholders as punitive but rather as increasing legitimacy through encouraging information-sharing when transparency is better achieved.

How is discretionary legitimacy better ensured through accountable regulation and regulatory accountability? Is such legitimacy dependent on the:

- public accepting decisions without coercion;
- legitimacy of administrative process being viewed in terms of the persuasive power of arguments in its favour;
- essential linkage to democracy and its institutions;
- ultimate reflection against an actionable individual rights framework;
- justification of decisions to regulate against basic political values for collective welfare and individual liberty where these can be reconciled;
- openness and accountability of regulation and accountability rather than the success in attaining some substantive outcome;
- fidelity to legal principle;

- procedural fairness and institutional consistency of process and practice; and
- sponsorship of charismatic leadership?

In order to raise the legitimacy potential of regulatory accountability, in the domestic governance context, claims to legislative mandate and the democratic authority on which they rest are critical where the state is either the sponsor of regulation or the authority behind its accountability. Accountability, if directed to command and control style state regulatory intervention, itself risks becoming another control claim[12] institutionalised within the state. This eventuality is destructive of regulatory sociability unless it is employed in the most limited sense as an incentive for coming to (or returning to) the decision-making table. Much more effective in the medium term is to market accountability within a procedural fairness mode as a state due process claim, for ensuring fairness and even-handedness in government along with the regulatory prudential that accountability is meant to confirm. Finally, in state or in non-state promoted regulatory styles, accountability can advance legitimacy through the *expertise claim* where accountability is meant to at least confirm the objectives achieved and their purpose-oriented efficiency.

A contemporary concern with the use of discretion is the manner in which it is delegated.[13] Conditions of delegated authority are often designed to broaden the regulatory impact of discretion but at the same time to cloud clear lines of accountability.

Regulatory regimes and accountability

Looking at the *cumulative impact* of each and any claim to legitimacy through accountability, a vital component in their legitimating potential will be the nature and receptiveness of the audience within which accountability is played out. It could be said that accountability is an *obligation to answer for a responsibility which has been conferred*. So conceived, both accountability and the resultant legitimacy it offers are dependent on satisfying the elements contained in this definition which impact on accountability as a central feature of regulatory efficiency and thereby regulatory legitimacy.[14] The critical parties included in this definition are as follows: those who allocate responsibility; those who accept responsibility; those who give authority to allocate responsibility; those for whom responsibility is exercised; and those against whom responsibility is exercised. These parties are the audience which measure the legitimacy of accountable regulation.

Regulatory accountability is not simply employing public power, particularly as choice between executive and legal avenues of responsibilisation. Making regulation more accountable and using regulation to enhance

the accountability of other features of governance are each best achieved (as I argue in Chapter 11 with pluralist regulation itself) through a consideration of multiple strategies of accountability involving public and private actors in horizontal and vertical decision relationships with public officials across markets, grievance mechanisms and other user or consumer consultations. Accountability can transect regulatory or governance paradigms, offering checks and balances, at critical decision-sites operating in the form and through the facility of independent interests. This lateral and multilateral accountability model recognises the decentred nature of regulation and builds accountability on diverse regulatory decision-sites.

In such a pluralist regulatory framework as has been advocated throughout this text as meeting the needs of complex regulatory challenges, questions concerning for whom regulation and accountability is mounted become more diversified. This consequence is consistent with a more expansive intention for the outcomes of regulation and accountability, these being interpreted as economic; social/procedural; continuity/security values and employed by and for government agencies, executive service providers, corporate decision makers, civil society activators, or citizen users and consumers.

It is unrealistic to expect that accountability agents will be truly independent of regulatory processes or missions. Effective accountability, particularly to service regulatory sociability, anticipates healthy interdependence which does not degenerate into capture. Cooperation in legitimating regulation does not have to eventuate into compromise. This intention for (non-compromised) independent interdependence can be achieved through:

- separation of policy from operation;
- creation of 'free-standing' regulatory institutions;
- reduction in discretion in favour of formalism;
- formal parliamentary, executive (administrative) and judicial accountability supplemented by extended accountability arrangements (to other independent interest parties or beyond agencies of the regulatory state) – public and private;
- redundancy – operation of corresponding agencies with similar, independent but interrelated mandates.

In her article 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', Julia Black[15] proposes an institutional, relational and discursive conception of legitimacy and accountability, and suggests that such a conception enables both an understanding of the dynamics and accountability of legitimacy and the construction of normative propositions as to how they can be created and enhanced. She argues that the key to understanding the legitimacy and accountability

relationships in regulation lies in recognising three elements which are essential to their 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.

Black employs de-centering analysis in her arguments on legitimacy and accountability within three dimensions:

1) Organisational: It focuses on a multitude of actors which constitute a regulatory regime in a particular domain.
2) Conceptual: there is a particular understanding both of the nature of the regulatory problem and the nature of state–society and intra-state and intra-society relationships.
3) Strategic: the hallmarks of the regulatory strategies that characterise decentred/polycentric regimes are that they are hybrid, multifaceted and indirect.

Each of these dimensions presupposes dynamic relationships of accountability and of accountability and regulation. 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.

It is a fallacy to think of the model accountability relationship as flowing in one direction: from accountee to accountor. Accountability relationships are never linear, but at least dialectical. Those engaged in social relations, including governance, regulatory and accountability relations, are at once autonomous from and dependent on the other. As to the function of accountability, rendering regulation to account and regulation requiring this of governance, it is important to ask what does giving the explanation imply for the person giving it, what is necessary for any party to give an account of and what effects do the construction and articulation of that account have on the accountee? The answers to any of these concerns have impact on the potential for accountability, and of regulation as an accountability theme to vest legitimacy.

Contesting legitimacy[16] – Polycentric regulatory regimes

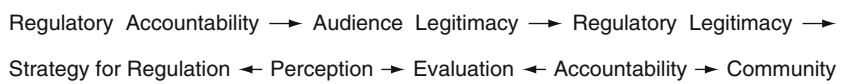
Black (2008) sees significant challenges in terms of accountability and legitimacy when determined in polycentric regulatory regimes:

1) Functional challenges: presenting problems of coordination – networks of organisations within a regulatory regime may be characterised by complex interdependencies and may lack a central locus of authority.[17]
2) Systemic challenges: these relate to the fragmentation of social systems – identification and identity of the law by the presence of numerous normative orders.[18]
3) Democratic challenges: these are arising from issues of representation.
4) Normative challenges: these are stemming from concerns as to the goals and operation of the regulatory regime.

These factors invite the question – how can dialectical relationships, which characterise the many bonds of obligations and responsibility in polycentric styles, complemented by the interdependency between accountability relationships, be reconciled with the idea of having a central locus of authority? If particularly for state-sponsored regulation, authority for it and over its accountability may critically originate from the central authority of the state. However, in collaborative regulatory styles, dialectical relationships are compatible with and foster shared authority and indeed, authority and legitimacy arise out of the appropriate working of dialectical relationships, be they of regulation or of accountability.

Black's analysis of legitimacy and its construction locates claims to legitimacy within *legitimacy communities*. I interpret this concept as representing the audience for accountability which is critical for regulatory sociability to develop from the initial imperatives that invite collaboration.

In sociological terms, legitimacy may be an objective fact, but it is socially constructed.[19] Legitimacy means social credibility and acceptability. 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. Once this level of legitimacy is established for the regulatory technique and its parties, its regulatory impact can contribute to the legitimacy of the communitarian audience for which it works. In this respect, the legitimacy process runs:



The figure is designed to suggest the interactive process engaged in by accountability mechanisms and regulatory projects in the mutual influence of legitimacy. The above representation does not demonstrate an institutional analysis of organisational legitimacy which Black argues as having three sets of reasons for social acceptance:

- Legitimacy may be pragmatically based: the person or social group perceives that the organisation will pursue their interests directly or indirectly.
- It can be morally based: the person or social group perceives the goals and/or procedures of the organisation to be morally appropriate.
- Finally, legitimacy can be cognitively based: the organisation is accepted as necessary or inevitable.

As has been suggested earlier, and certainly consistent with this book's broad understanding of the regulation–accountability–legitimacy dynamic, legitimacy is not necessarily a question of legal validity. Legitimacy 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.

Black determines that the normative assessments of when a regulator should be regarded as legitimate broadly fall into four main groups or 'claims': constitutional claims; justice claims; functional or performance claims; and democratic claims.[20] However, it should be remembered, the extent to which regulators are perceived as legitimate is based not only on cognitive and normative assessments, but also on pragmatic assessments. Pragmatic legitimacy is often excluded from legal and political science accounts of legitimacy, but pragmatic legitimacy can be significant in practice in the creation of legitimacy for regulatory organisations, state or non-state, even though it may be normatively undesirable. An example of this paradox is where an organisation seeks external accountability in order to advertise its pragmatic legitimacy of 'nothing to hide', but when it tries to conceal from the audit or is forced to open up organisational features which are damaging, its legitimacy is in fact challenged.

In the graphic representation above, regulators provide a role in the legitimacy process, within the accountability of regulation and later in achieving the regulatory accountability of other nominated governance forms. Regulators, like states or indeed any organisation, can play a role in constructing their own legitimacy claims though, absent hegemony, these claims will not necessarily be accepted by every audience.

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), for example, public consultation, decision-making and reporting. Regulators can also seek to develop moral and cognitive legitimacy through, for example, linking themselves to other organisations which are perceived to be legitimate by those whose legitimacy claims they want to meet. 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.

Regulatory organisations and agencies 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 legitimation strategy takes will vary with the type of legitimacy that is in issue. With respect to polycentric regimes, a regulatory organisation's legitimacy communities may include any other participants in the regulatory regime on which the organisation relies, or which it would like to enroll in its regulatory processes, as well as those outside it.

The endeavour for a regulatory project to engage legitimacy can produce negative outcomes which might even be paradoxical, in terms of either regulatory objectives or accountability outcomes. For instance, preferential relationships between regulators and external parties who may have an interest which requires regulating may skew a regulatory outcome away from the common good and in so doing may require concealment of the preferential relationship.

Understanding the paradoxes

Much has been said already in terms of the identified global crises discussed earlier in this book, about regulatory paradox.[21] As is obvious with regulatory dilemmas such as accountability shortfalls in terms of regulatory capture,[22] accountability is not immune from generating paradox in the regulatory project or in being paradoxical in its role as an auditor and a potential legitimator. In order to avoid capture and paradox, which may result from it through the process of accountability and the search for liability, it is necessary that regulatory purpose is clear and consistently enunciated.

With more pluralist, collaborative and polycentric trends in regulation emerging, the traditional ways of achieving regulatory goals (through prescriptive regulation) have given way to experimentation with a variety of innovations (system-based and performance-based regulations), although these traditional approaches to purpose still remain. The central feature of the newer approaches is a shift in key regulatory responsibilities from governmental regulators to non-governmental actors. This shift, in turn, raises fundamental issues concerning regulatory accountability.

> The transformation of enforcement roles stresses the role of professional accountability in the newer regulatory regimes. Systems-based and performance-based regulatory regimes give regulated entities primary responsibility for regulatory functions and to show adequate compliance. Traditional, prescriptive regulation emphasises accountability through bureaucratic controls that seek compliance with prescribed actions. System-based and performance-based regulatory regimes

> relax these controls in favor of greater reliance on professional accountability.[23]

May (2007) concludes that each regulatory regime has potentials for accountability shortfalls at one or more levels, although they differ in their specifics and in what they suggest about consequences for regulatory outcomes. For example, regulatory capture, while prevalent in prescriptive regulatory regimes, is more subtle in newer regulatory regimes, and therefore more difficult to identify, make transparent and accountable.

Problems with capture and its identification relative to the nature and complexity of regulatory roles have important implications for the design of regulatory regimes, when their legitimacy is a central concern. These can be summarised as follows:

- *Key accountability considerations for the system-based and performance-based regimes*: professional judgement, the exercise of professional responsibility;
- *Challenges*: lack of expertise, potential for subtle forms of regulatory capture, potential shortfalls in different aspects of accountability (each may end up reverting to the traditional prescriptive form of regulation);
- *Dilemma*: how can regulators increase regulatory flexibility, given the accountability shortfalls in both the old and new regulatory regimes?

Another potential area of paradox is with the dissonance between the actual nature and the manipulated representation of accountability relationships designed to maximise legitimacy and yet defeat transparency. Accountability relationships can be, in this sense, simply strategic devices used by regulatory organisations to manipulate perceptions of their activities and performance. Following on from this revelation arises the question, if manipulated representation can be a tool used by the regulator to 'manage'/'build up' its legitimacy, then why would the regulator bother with building accountability and legitimacy controls into the system? The answer rests in the realisation that fake accountability in polycentric regulatory webs will eventually be shown through dialectic discourse at some dialectical level to have produced fake legitimacy. The scope for strategic action to either promote or conceal accountability in the name of legitimacy is bounded by the institutional context, and if that context is networked then at least one accountability relationship will reveal itself for what it is to a critical audience. The audience in such situations can be the regulator, but not stopping there. The accountability audience also sees the regulator as a player in the legitimacy contest and will measure its performance against standards not necessarily managed by the regulator. The narratives that organisations construct will have to make sense to themselves as well as to the audiences

they are designed to influence. The regulatory organisation may therefore alter the accountability narrative or, if it cannot achieve this without effecting legitimacy, may seek to decouple the activities of the organisation from the maintenance of formal legitimacy structures. It is also possible that to the extent that the accountability narrative is distinct from the regulatory purpose, the narrative may in fact alter the direction and eventual purpose of the regulatory organisation. This transformation may itself become a process of self-delusion where the regulatory organisation alters to bring itself closer into accord with the story it tells of itself, and indeed which it may be required to tell. Without an externality such as state oversight to keep the regulation 'honest', internal accountability is vulnerable to story 'fixing'.

Can non-state governance be legitimate?[24]

A useful way of envisaging non-state accountability is to examine accountability relationships. Accountability relationships are a critical element in the construction and contestation of legitimacy claims by both regulators and legitimacy communities, as they form 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 trying to understand different foundations for legitimacy, as they influence the development of accountability relationships, the following classifications are indicative: pragmatic and moral legitimacy entail some form of active evaluation of an organisation and its regulatory purpose, whereas cognitive legitimacy relates to far more deep-rooted assumptions that are rarely articulated, let alone actively assessed.[25] Accountability is thus a route through which pragmatic and moral/normative legitimacy claims, in particular, are validated.

Although accountability relationships can be critical for legitimacy, legitimacy is not necessarily always dependent on accountability relationships. This might be explained in the observation that accountability and legitimacy are usually conflated in debates on regulation or governance, but analytically they are distinct.

Due to the fact that non-state regulation is either unable or only has a limited capacity (say through delegation) to claim the legitimacy of state authority, it becomes more critical for accountability, when directed towards non-state regulation (or when accountability is demanded by non-state regulation), to examine the motivations for legitimacy as more specifically linked to regulatory form. This suggested analysis is enabled through a consideration of the legitimate expectation of accountability communities. The demands of legitimacy communities may well be conflicting and, therefore, to satisfy one will necessarily lead to dissatisfaction of the other. Closeness to the regulatee may be a factor in evaluating the different structural

components of the accountability agency or organisation which may be deemed best for the sake of legitimacy:

- In order to satisfy the legitimacy claims of those they are seeking to regulate, regulators' main decision-making bodies need to be comprised mainly of representatives of those regulatees or those with considerable technical expertise (or both). The danger here is that legitimacy may be false through the bias of capture.
- 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 organisation may be relying on, such as pressure groups, NGOs, or national governments, rather than those decision-making bodies need to be mainly composed of a wider range of representatives.[26]

Forming one set of accountability relationships can preclude forming others; it simply is not possible for regulatory projects or organisations to have complete legitimacy from all aspects of the accountability environment, including all other organisations in the regulatory regime. Even if the conflict between legitimacy communities does not lead to a dilemma, it can have a deleterious effect on the regulatory organisation as it seeks to respond to the multiple legitimacy and accountability demands being made on it. In contrast, even though it is faced with multiple and perhaps incompatible legitimacy claims, the organisation may not perceive there to be a dilemma at all. Instead, it simply does not respond to a particular claim. But regulatory, and indeed other, organisations cannot ignore all legitimacy claims and survive, even if they can ignore some – or perceive that they can.

This tension between regulatory organisations and legitimacy claims suggests that there can be significant implications for an organisation, therefore, in acquiescing in certain legitimacy claims and developing certain accountability relationships rather than others. The question is, to what extent will regulatory projects or organisations respond to or refrain from forming accountability relationships with certain groups that have a capacity to prosecute legitimacy claims?

Legitimacy and responsibility

Legitimacy is the silent purpose of accountability.[27] Legitimacy in terms of accountability can be seen from a normative and a descriptive point of view. In this respect, the evaluative dimension of accountability sets both the proficiency and probity of a regulatory strategy. Either and both of these measures can establish legitimacy depending on whether the facilitative or expressive potentials of regulation are deemed the better measures of legitimacy.

In its audit function, accountability offers legitimacy to regulation as the auditor and of appropriately audited regulation. The importance of the notion of audit is for checking up on layers of accountability which regulation provides or endorses. For the sake of audit as a legitimator, it is essential to determine the extent to which regulatory strategies *require* external review for their legitimacy. In addition, the question needs to be asked to what extent can regulatory strategies *incorporate and provide* external review there-by offering legitimacy to other dimensions of governance?

External review offers measure of accuracy, compliance, efficiency and potential legitimacy.[28] With these in mind, it is useful to identify three dimensions of regulatory accountability:

1) processes for making regulation accountable to principle stakeholders and regulatory communities;
2) regulation as a mechanism for ensuring the accountability of governance mechanisms (public and private); and
3) the potential for accountability to legitimate both particular forms of regulation and resultant frameworks of governance.

Accountability, therefore, is influenced in form, frame and function by the prevailing theory of regulation and governance which the regulatory project in question exhibits, as well as by the instruments, techniques and strategies which address specific regulatory challenges in the wider project of governance. Responsible accountability can be determined by how it goes on to make regulation and governance more accountable, and this could be argued in reverse.

An important variable in determining the relationship between responsibility and accountability is the manner in which accountability communicates its requirements and in turn offers legitimacy potential. To give account is to construct and present a narrative of past events or actions. It may be that the narrative has no effect on the organisation; the narrative is constructed by it, but the narrative itself is not constitutive of organisational norms or practices.

As mentioned critically above, to give account requires the construction of a narrative; it also involves engaging in a particular discourse of accountability. Recognising that both accountability and resultant legitimacy is communicative is a significant understanding of the accountability/regulation synthesis, 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. This realisation is necessary if we want accountability to require that regulation favours subjective, if universal benefits such as human rights.

Accountability and human rights

It is a constant theme throughout this book that human rights (individual or collective) must be recognised and made actionable through the regulatory project.[29] But as was clearly evident in the enforcement of patent law or the protection of biomedical innovation, one regulatory purpose for the property rights of the few can endanger the individual integrity rights of the many. This tension between regulation and rights is exacerbated, as with the paradox between communication access and the sacrifice of privacy; are rights anything but absolute, requiring balance to at least achieve some of the benefits of both ends of the tension?

Human rights protection is located through international law squarely on the nation state.[30] This may explain why human rights are not consistently or excellently guaranteed through regulation or accountability which relies on state authority, when the state can be the challenge either to human rights or to their universality. This consequence will obviously depend on the commitments and priorities of the regulatory state.[31]

Another reason why regulation as a human rights mechanism may be difficult to call to account is that as a consequence of the diffused and diverse nature of human rights and the ubiquity of actionability, it becomes difficult in practice to achieve a complementary regulatory focus and an accountability locus. Black sees this as the *problem of 'many hands'*[32] wherein 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.

Much of the recent discussion concerning corporate responsibility in fostering rights and the human rights environment of business recognises the failed responsibility of states in this regard.[33] Beyond the role of the megacorporates (and often mirroring them in organisation and operation), the role of NGOs is now critical in the maintenance of human rights through both regulation and accountability. Yet, beyond the capacity of NGOs to make states and enterprises accountable for their rights consequences, there is a growing critical international voice requiring that NGOs as rights regulators should be more accountable in the exercise of their mandate.[34]

Accountability and corporate conscience

Christine Parker (2007) argues[35] that for meta regulation to work at holding businesses accountable for their social responsibility the following are necessary:

1) Meta regulation must be aimed at clear values or policy goals for which business can take responsibility as distinct from allowing business to merely comply with output rules.

2) It must aim to ensure that these values are embedded into the practices and structures of businesses.
3) Meta regulation needs to recognise that business must still be able to pursue its main goals and it should be given space to work out for itself how best to meet those goals within the responsibility framework.[36]

I am at odds on the last point at least. If a change in short-term commercial aims and behaviour is not part of the corporate regulatory project, then the extent of responsibility achieved is unnecessarily limited. This is a good example of where regulatory perspectives bound by self-regulation commitments cannot be as transformational as collaborative perspectives if a move to mutual interests is implicit and anticipated. Bronwyn Morgan (2003) echoes this transformative position by asserting that meta regulation has the ability to manage the tension between the *social* and the *economic* goals of regulatory politics.[37]

Haines and Gurney (2003) suggest, further, that a meta regulatory approach is consistent with market principles as they influence changing market practice, by emphasising greater efficiency and flexibility. In addition, meta regulation in day-to-day business practice can influence the needs of problem-solving and thereby create a more responsible relationship between problem-solving and crisis.[38]

It is often an artificial and some say doomed exercise to expect that corporate responsibility will somehow magically disconnect the corporate entity from shareholder profit in favour of some non-profit common good. This reservation is very real outside the context of sociability. Regulatory sociability is premised on the assumption of change in the way all stakeholders do business. In the case of the corporate personality, sociability does not demand only a shift in consciousness, it rewards the shift in currency which is not entirely unknown in the common corporate purpose. For instance, as we discussed in Chapter 8, resource sustainability through a more respectful and collaborative approach to the intersection between the natural and the built environments will lead to market sustainability as well as environmental protection. The former is a corporate responsibility and as it links to the later, corporate conscious can change to embrace environmental concerns for market reasons along with considerations of the quality of life.

Challenges for supranational accountability[39] in new networks of global regulation[40]

The broad parameters of the accountability debate in transnational regulatory contexts are unique. In the case of making accountable non-state transnational regulators with no central organisational structure and no central locus of authority to turn to, in order to discuss the proper interpretation

of regulatory norms that are applicable to them, one must ask, who enforces and monitors compliance with these principles?[41]

As is noted in the chapter to follow, transnational and global governance are complicated through an absence of democratic institutions and processes.[42] Non-state transnational regulators can be criticised for their lack of transparency,[43] with only (if any) very attenuated consultation processes. Those affected by their decisions are excluded from the decision-making process and have no way of calling them to account politically or legally. However, even with non-state transnational regulators, there are links to conventional governance environments for the purposes of their legitimacy which offer some opportunity for accountability relationships,[44] such as through:

- the relationships they have with national governments;
- the level of rule-making they are engaged in; and
- the extent to which those affected by their standards or on whom the organisation wishes to impose them can participate in their formation.

The absence of jurisdiction is another problem when traditional accountability forms are used to measure the operation of transnational and supranational regulatory projects.[45]Non-state transnational regulators do not fit neatly within existing legal and territorial jurisdictional boundaries. Hence, their mandates are uncertain, and it is not clear on whose behalf they purport to act and to whom accountability should be owed.[46] This distance from authority also affects who has the right to call to account such regulatory styles.

Another consideration in better understanding regulatory accountability and accountability through regulation when translated into the supranational context is the tension between regulatory pluralism, and harmony through accountability. In specific terms, take the case of law as a regulatory frame. In a global regulatory challenge or accountability requirement, to be effective law needs to be part of a pluralist regulatory mix, but at the same time law's distinction is its integrity in harmonising the accountability of different regulatory techniques and purposes. Therefore, in its global form to regulate and to make accountable, is law more an arbiter than a commander or controller?

- law's role as an expressive umpire and not the moderator of difference – to what extent can law retain its legitimacy and tolerate difference?
- law creating a facilitative framework enabling expert input to buffer and intersect difference;
- fashioning space for the exercise of discretion;
- law's expressive role in identifying and broadcasting uniform values which then tend to legitimate both democracy and difference;
- political contestation.

Crisis of regulatory legitimacy – Towards a new common sense[47]

In his article 'Governing the Ungovernable: The challenge of a global disaggregation of authority', Rosenau (2007) discusses the concept of spheres of authority, the factors that encourage their proliferation and the prospects for global governance in a world of disaggregated authority. The analysis suggests that governance will emerge from the interaction of overlapping spheres of authority and that regulation will be achieved through the spread of norms, informal rules and regimes rather than any global reversion to centralised authority. If Rosenau's representation of a global authority frame at the heart of global governance is correct, then the task for regulation and accountability in legitimating this governance web is significant and challenging.

The critical variables in considering the role that regulation plays in authorising global governance, and how accountability (of and through regulation) produces legitimacy for global governance, are not dissimilar to what would be expected of core principles in responsive regulatory modes in any governance context:

- *Rationality* – in a bureaucratic context, conditions for decision-making such as accuracy, efficiency, capacity for implementation, hierarchical certainty, knowledge transfer and information delivery;
- *Professionalism* – service consciousness, client satisfaction, interpersonality, clinical application of specialist knowledge, through responsible delegation the dispossession of responsibility;
- *Morality* – fairness, conflict resolution, independence, contextual interpretation and cultural sensitivity.

These indicators are consistent with a just as well as a legitimate regulatory and accountability outcome. Even accepting that global authority networks can be broken free from the nation state, to what extent does legitimacy remain bound to processes of authentication, regulation being one of these? This question takes us back to considerations of the purpose of regulation as confirmed in legitimacy through accountability. At the global level, and when thinking of the regulatory or accountability audience being the global community, a driving purpose is the maximisation of aggregate welfare, as benefit for all (mutuality). On this measure both accountability and legitimacy could be directed towards:

- satisfaction of procedural requirements for representation and participation;
- non-majoritarian principles and inclusion;
- separating efficiency from redistributive concerns;
- role of expertise and partisan politics.

When returning to the connection between accountability and global governance for the purpose of seeing how regulation produces legitimacy, agency independency and public accountability need to be considered as mutually re-enforcing rather than antipathetic. In this way, the transparency required of regulatory agencies for the sake of public good must in regulatory outcome evaluation produce fairness for losers as much as for winners. Critical consideration of justice and fairness as accountability frames for regulation, and of how regulation can shape governance are more acute when the accountability lens is turned onto the interdependency of global governance processes and institutions.[48]

Returning to the book's consideration of regulating crisis to ordering, this transition is as much about regulatory legitimacy as it is about better governance outcomes. Where there is a crisis in legitimacy, there will, eventually as an inevitable if unwanted consequence, be a crisis in governance. When thinking of the adjustments global governance will need to make when caught up in legitimacy crises, it is worthwhile to reflect on how any such crisis plays out in the nation state with its:

- mix of public and private arrangements in regulation and the dangers they pose for accountability, for example, as demonstrated in the state contracted private policing;
- difficulty in dislodging public power and the intractability of agencies within public and private governance, for example, control by the state over marital relations;
- capture of public choice regulation by private interest, for example, tension in servicing compulsory schooling;
- conflict between neutrality and participation, for example, consumption taxation and income taxation.

Crises in legitimacy will not necessarily be factored away by refinements in accountability against a sharpening of regulatory purpose. As this chapter sets out, accountability relationships are positive for regulation (and vice versa) when the risks in crisis are met through moving to mutualities of shared fate. Accountability has the potential to confirm these mutualities as in the common good and thereby having the potential to help shift crisis to ordering.

Ultimately accountability is the government of risk.[49] For accountability to flourish as a legitimator of regulation (as an accountability tool and of accountable regulation) the sociability model needs to enjoy the mutual collaboration of state and non-state accountability frames, with the capacity to check each other and to be open to internal and external review.[50] Collaboration of this nature is not achieved through the

subjugation of one legitimate accountability frame over another.[51] State and non-state accountability interaction is best achieved through dynamic relationships of interest mediation. These then become the continuing revolution of accountability and the perpetual renewal of regulatory legitimacy.

10
Regulation and Governance – Beyond Terror/Risk/Security

Introduction

The discussion of accountability in global regulation leads inevitably to considerations of responsive governance. This chapter positions the regulation of *crisis to ordering* in the context of global governance no longer dominated by terror-centred risk/security priorities or the human rights compromises that these have produced. The analysis of global governance commences with a consideration of the consequences of risk/security globalisation wherein regulation has required rights compromise. From here, it is argued that as the risk/security focus shifts from narrow interests in terrorism to more universal crises, regulation has the prospect of endorsing rather than sacrificing human rights concerns through strategies of collaborative sociability where previously the emphasis was on command and control intervention.

The last decade of risk/security globalisation[1] has witnessed the reassertion of militarist power over fundamental human rights protection under the guise of self-defence doctrines and the responsibility to protect, accompanied by a profound attack on one of the most universally confirmed human rights protections. Whether it was in the discourse of the war on terror or on regime change, this attack has not been baldly asserted as *might is right*, but in terms of some version of constitutional legality, and the consequent necessities of protecting civilisation. The challenge is all the more insidious in that otherwise *rule of law* states employ international legality to assert the supremacy of ensuring global ordering above the inviolability of human integrity at its most basic level. Some would even suggest that to do otherwise is to neglect the most basic obligations of the nation state to protect its citizens. Add to this the post-9/11 invocation of the global hegemony to fight on behalf of *civilisation* and the heat behind the torture/not torture debate is far from surprising.

Reflecting on a decade of terror-centred risk/security globalisation and its consequences for a rights-based global governance or some new form of

international politics[2] draws attention to the manner in which *harm* has been subjectified and contextualised both to confirm and constrain a new *realistic appreciation* of security before self-determination and its coverage and meaning in the sense of negotiated harm to humanity in the selective manner detailed below.

This chapter introduces a new epoch of globalisation where risk is measured not in terms of terror but rather crises which engulf the rich and poor, and those within and without the benefits of global security. It sees global governance, at present, directed to a sectarian and exclusive notion of world ordering. The crisis contexts explored earlier have torn away the mask of hegemonic harm priorities which has in recent decades been constructed only to reflect narrow interests of a preferred political economy. The place of hierarchy in global governance is critiqued and this links back to our consideration of disaggregated states in the regulatory environment. The place of international law in regulating global governance is singled out for particular evaluation. Capitalism and strains in political economy are, as our crisis context chapters revealed, under real strain as global governance wrestles with ordering from chaos. How does voluntarism precede a new global politics and regulatory pluralism? How are we left governing the ungovernable?

The analysis of global governance in transition to a reliance on regulatory sociability as a credible regulatory platform, from which to address the crisis to ordering contexts so far identified, requires a brief reflection of what is global governance, followed by a discussion of governance and regulation, and then onto a review of globalisation as the context within which both crisis and ordering are prioritised and expectations for regulation are determined. The torture case study of rights erosion through regulatory strategies governed by terror-centred risk/security globalisation will be used to suggest how command and control undermines the possibility for sociability and the rights protections it complements. This chapter will conclude with the speculation of the power of sociability to regulate crisis to ordering at no cost to rights individual and collective. The thesis is that more than regulation and rights being compatible, regulation relies on rights and vice versa in the advancement of sociability.

Global governance

For a simple reading in this book, governance is equated with governability.[3] Traditionally, governance is founded in the authority of sovereignty within nation states. The transition from the state to the global and the dilution of the link between authority and sovereignty which this entails question the identity of authority on which global governance and its institutions and processes rest.[4] Interrogating the nature of the authority underlying global governance leads to an understanding of why fledgling institutions such as

international courts have a disproportionate significance as an institution of global governance.[5]

State governance is manifested through its political institutions and their processes. The democratic institutions of governance at a global level are sparse and underdeveloped.[6] The international courts are an identifiable governance entity in a governance terrain where authority is negotiated through shadowy hegemonic alliances and loose networks of power and domination.[7] Global governance is, in the current stage of globalisation, a hegemonic project determined by alliance with and protection within the economic, political and military elite.[8] It is not communitarian. It is not democratic. It is exclusive and culturally and normatively sectarian. It reserves the benefits of rights protection (and the innocence on which this is based) for global citizens who are not excluded through their associations (presumed or otherwise) with those beyond the law. [9]

Global governance can be conceived of as a search for global ordering in a world in crisis. Regulation for global governance is a political, economic and social (not simply legal) language in which this search is carried out. The search is a process of emerging some new form of post-Fordist politics and its substantiation. Arising from the cycles of global crisis in which global crime is one significant focus, this book argues that communities of shared risk and shared fate are struggling for ways of generating and grounding a 'general interest' of world society (see Chapter 11), in which justice is a central expectation. Global governance is thereby articulated with the dominant transformations of the political, social and economic *worlds*, which play a role in requiring regulatory accountability particularly of legal institutions and frameworks in post-conflict resolution and peace-making. Building on my earlier considerations of the intersection between cultures in transition, crime, control and globalisation (Findlay, 1999), this book employs globalisation and its criminogenic potentials as the contemporary context in which processes such as international criminal justice (ICJ) explore its governance capacity.

International regulation and global governance

Unpacking the meaning of the term *international* within international regulation is crucial to gaining satisfactory insights into prime definitional and operational questions regarding global governance and in positioning the uniqueness of particular regulatory strategies that manage the global governance project. International (or multilateral) regulation is more complicated than simply considering a shift from domestic to global regulatory space or regulatory challenges. This book holds that for global governance to have form and the global community to have manifestation, regulation is an even more critical indicia than it might be in appreciating domestic authority frameworks or community constructs. This is because, at the very

least, the institutional and process components of governance at the global level are sparse, not democratically grounded and not endorsed through the authority of sovereign political economies. Therefore, regulation (as project or process) provides some quantifiable presence for governance globally and some outcomes by which it can be measured (crisis to ordering).

The *international* location and constitution of regulation implies a universal legitimacy that, in contrast to the constitutionally conferred authority of the most domestic regulatory mechanisms, is very much contested. The institutions of global regulation exercise jurisdiction beyond the state or the region, and claim to deal with mass challenges through new laws, merged procedural traditions and economic networking.

In its simplest sense, international means *more than national*. That said, most regulatory projects never truly break free from the nation state jurisdiction because the institutions, networks and processes of international regulation recognise the parity and symbiosis between national and international jurisdiction and the systems these maintain.

International also means *between nations*, and incorporates *transnational* and *supranational* applications, neither of which are equivalent with universal jurisdiction. Thus, it is not a single law, forum or type of stakeholder involvement that makes regulation *international*. It is defined by the challenge to which it responds as well as the inclusive aspects of its response and outreach, both of which hold relevance and implications beyond a single nation state jurisdiction.

Another issue which emerges when testing the essential connection between international regulation and global governance is the barriers to universal participation in regulation against which internationalism aspires. In many iconic regulatory regimes, the biggest players in the global political and economic hegemony remain distant from the aims and operations of the regulatory project. With the regulation of global crime through ICJ, for instance, states such as the United States refuse to become International Criminal Court (ICC) member states (and thereby to accept the court's jurisdiction) for fear that their citizens and, particularly, military personnel will be exposed to external prosecution. This refusal can be read as an effort to bolster nation state autonomy in the face of an encroaching ICJ jurisdiction. As a matter of national interest, the United States' rejection of internationalism expressed via membership of the ICC, contrasts with the United States' energetic embrace of internationalism directed towards achieving global free trade. This contradictory approach can be explained in terms of national self-interest, tempered by the reality that states such as the United States are more exposed to the ICC prosecution as a consequence of their prominent roles in policing global security.

Another paradox is that these reservationist states do not show the same reserve when advancing other mechanisms and frameworks of regulatory control, particularly in the economic and security arenas. The United States

is prominent in transnational and global initiatives against drugs and terror. China aggressively pursues the objective of free global trade while also denying the jurisdiction of many global judicial institutions on the basis of sovereign autonomy. In these situations where autonomy is still compromised for a higher common good, the reservationist states see it as a price worth paying to protect other pressing national interests through the exercise of ICJ.

Security, sovereignty autonomy – Globalisation and paradox

Globalisation is 'paradoxical in the way it unifies and delineates, internationalises and localises …'.[10] The tensions inherent in recognising local and global governance issues have, to some extent, through the past decade been painted over by a general ascription to the risk/security focus of ordering (local to global). In the process, universal human rights protections have been trumped by a risk/security paranoia. This control/rights tradeoff is much more than a legal distinction or a moral contradiction. It is, I later suggest, a natural consequence of contemporary globalisation where risk/security trumps rights and uniform legality.[11] A governance atmosphere placing security above rights is supported by the segmented disaggregation of universal rights where the protection of the *legitimate* global citizen is valorised and the award of anything like rights to the terrorist or to their resistant communities is not even argued for.[12]

Global regulation as global security takes on its hegemonic reality in the form of the decisions and control reactions favouring only some actors (suffering harm from resistance) while marginalising cultures and communities on the receiving end of harm as a mechanism for deterrence. The following observation by Nowak (quoted by Bauman) encapsulates this sectarian argument in the wider discriminatory and paradoxical frame of contemporary globalisation, as against the prevailing governance background national self-interest:

> …rather than homogenising the human condition, the technological annulment of temporal/spatial distances tends to polarise it. It emancipates certain humans from territorial constraints and renders certain community generating meanings extra-territorial – while denuding the territory, to which other people go on being confined, of its meaning and its identity-endowing capacity. For some people it augurs an unprecedented freedom from physical obstacles and unheard-of ability to move and act from a distance. For others it portends the impossibility of appropriating and domesticating the locality from which they have little chance of cutting themselves free in order to move elsewhere. With 'distances no longer meaning anything', localities, separated by distances also lose their meanings. This however augurs freedom of

> meaning-creation for some but portends ascription to meaninglessness for others.[13]

Globalisation has resulted in a further paradox wherein normative governance and resultant policy considerations become more global and at the same time key control actors and agencies in the global arena adopt a more localised view of risk and security. Foucault saw this domestic governance focus (despite his disinterest in international governability) as a natural, even inevitable consequence of hierarchical governance with the state and its capacity to securitise all facets of *governmentalisation* at the apex. For Foucault, this necessitated the state as central for an *internationalised world*.[14] Recent critics such as Selby argue that this is a much too limited interpretation of recent forces for globalisation. That said, there can be no denying, prominent in the recently revitalised torture debate, the pre-eminence of autonomy when measuring global ordering from the situation of dominant state security.

As I argue later, attempts at global ordering unduly influenced by nation state or regional risk/security interests have resulted in a realistic appreciation of harm (such as torture) in terms of a fundamental rights invasion, being marginalised for the sake of sectarian security interests. Globalisation is the backdrop against which the issues of global governance, individual actors and agency interests, and global ordering are set in this governance trend for securitisation dominance over universal rights protections and uniform harm evaluation.

Take as a case in point the global *war on terror* as a political discourse rather than an empirical evaluation of global harm. This discourse can be exposed for distorting actual priorities of global harm as it ultimately represents the natural securitisation paradigm as working from a domestic control response to terrorism (utilising the localised Janus-face of globalisation and defending domestic citizen safety through torture) in the 'name of international liberal democratic values'.[15] At the global level, the dominant political alliance view of terrorism has enabled the promotion of an exacerbated if unrealistic risk/security approach to globalisation[16] and global ordering which takes state security as a foundation, scaling up to the needs of an at-risk global community which complements selective state interest regarding domestic ordering concerns. This distorting discourse has also provided a justification for the use of violent, para-justice control agendas to combat threats to local and global citizenship.[17]

When reviewed in risk/security governance terms, an ultimate result of globalisation is that as the world setting is compressed, there is an intensification of *consciousness* towards global interests such as selective *ordering* running parallel with the strongly influential autonomous security interests of the nation state and regional concerns. Consequent regulatory control outcomes are constructed against the sharp individualised influence of key

actors and agencies.[18] However, as risk and security disproportionately motivate globalisation, dominant nation state interests (which are at the heart of what operationalises global hegemony) become paradoxically the prevailing measure of global ordering. Attitudes to *harm* converge around these sectarian interests from the local to the global.

Globalisation 'divides as much as it unites'.[19] It should not be surprising that those who are left behind[20] in the globalising rush seek to retaliate as they see the dominant alliance disproportionately prosper from globalisation while they suffer.[21] This suffering is made worse by the marginalisation of harm in efforts to achieve global ordering because those who are left behind remain on the periphery of global order when at the same time the dominant alliance repositions global governance to exclusively favour *legitimated* global citizens and *valid* victims. In effect, this creates a global politics wherein the privileged are securitised to govern and those deemed to be their enemies are withheld from the protections of global community.[22]

Harm *legitimately* visited upon *the enemy* (determined in war on terror discourse) through securitisation is reinterpreted in light of the protection; it is said to afford those with the rights of inclusion within the global community and its governance realm. As the realistic appreciation of harm is marginalised by these sectarian and exclusionist approaches to global ordering, it is easy to become 'pessimistic about the prospects for global governance and the probabilities of continuing disarray in world affairs'.[23]

Globalisation is not as straightforward as the creation of a single, harmonious, global arena for universal peace and good order,[24] especially when it comes to crime and crime control. Globalisation has the ability 'not only to reintegrate and unify but also to marginalise and divide'.[25] The potential for forces of globalisation to unify is demonstrated through the formation of international organisations such as the UN which, at least with the normative if not practical coalescence of global hegemony, endeavour to guarantee international peace and security.[26] However, even the strongest normative constructions of global, communitarian morality are held hostage to the sectarian ordering of elite interests for the benefit of their legitimated citizens and victims. This distinction undermines any democratic but crucial global governance underpinning that if the rights-protection policies of international organisations such as the UN were even generally actioned then there would be a common and more accountable appreciation of harm within the global community, universal and inclusive, to be protected by supervening and consistent rights frameworks. Harm would be defined in a manner that applies to all actors within the global governance frame and would not be defined by sectarian and hegemonic efforts at global ordering.

As asserted consistently throughout this text, the current closing phase of globalisation has as its centre of attention a risk and security approach which to global ordering at the cost of universal human rights protection, for those arguably most in need of it because of their marginalisation in or exclusion

from hegemonic global community. With this in mind, globalisation has created a number of paradoxes for achieving a lasting and comprehensive global ordering, where nature and reach of global regulation and resultant governance are dictated by the dominant political hegemony, and rights become secularised not universal. Those who seek to contest the views of the hegemonic interests behind this ordering design, such as terrorists, are placed outside the global order and its normative international protections, in being subjected to the one-sided appreciation of harm constructed by the hegemony[27] in its attempts to secure and maintain an exclusive and exclusionist global ordering. As a consequence:

> the values of freedom, equality, communitarian harmony and personal integrity which the prosecution of crimes against humanity are said to advance need not be sacrificed in a 'new world order' obsessed with partial security and secularised risk.[28]

The place of hierarchy in global governance – Sharp not flat regulation

> Governance is the sum of the many ways individuals and institutions, public and private, manage their affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.[29]

Global governance has multiple shades. It varies in:

- nature – (e.g. market-enabling versus regulatory disciplines);
- coverage – (e.g. scope of nation state regulatory participation and its qualifications);
- degree of formality (mechanical versus organic regulation);
- asymmetric effects on countries, industries and social groups (depending on location in consolidated or fragmented state regulatory regimes).[30]

When critically considering recent transformations in global governance, it is elemental to examine the ideological shifts from superpower polarity during the cold war, through to the reluctant and crisis-driven multilateralism of the current age. Another obvious feature of regulatory transformation in a globalised world, where modernisation is the driver for socio-economic development,[31] is the global management of trade and competition.[32] As suggested before, the push to break down trade barriers and state economic autonomy stands in marked contrast to the attitude

of some major UN Security Council permanent members to the internationalisation of criminal justice and military accountability.[33] The rise in the influence of regulatory networking, beyond alliances of nation states and the resurgent development of non-governmental organisations (NGO) and multinationals' self-governance has featured clearly in the evolution of global governance away from a mirror of nation state authority and institutional frameworks.[34] Therefore, in an examination of the nature of global governance and the global regulatory institutions and processes that give it form, it seems logical to suggest that with a move from the national to the supranational, regulatory hierarchies, if they are present, will be much less gradated up to a reliance on overarching mechanical authority and sanction power. Unfortunately, the regulatory reality, for the sake of sociability, is not so simple.

Networking is a feature of global regulation. This suggests a flatter regulatory construct in which authority is more mutual, and legitimacy depends on processes of more organic mutual decision-making than an ascription to rules and externally created and maintained laws. However, the propensity for regulatory networking does not emerge in an organic crisis-to-ordering environment. There are two major contextual *authorities* which require that regulatory networking operates mindful of imposed and interventionist hierarchies:

1) As is well represented in the global regulation of anti-competitive trading, prevailing hegemonic interests sponsor international regulatory agencies to manage and manipulate complex frameworks of regional and international laws and regulations to create and sustain regulatory networks which promote hegemonic economic interests.
2) The Basel banking accords (mentioned in more detail in Chapter 7) represent for the regulation of global financial relationships, not so much an organic coalescence of equitable economic interests, but instead they act as a dominating *club* determining the form of financial institutions and operations for a much wider network of economic instrumentalities and processes outside the Basel block.

These brief examples suggest that as the national gives way to the supranational in regulation and governance terms, a flattening of regulatory hierarchies is not inevitable. Instead, while the state may not be the sanctioning pinnacle of global regulatory networks, multinational and hegemonic interests overlord the freer regulatory evolution which non-state networking holds out. In any case, if one accepts the suggestion that globalisation is never far from the enunciation of powerful state interests, even the suggestion that supranational regulatory networks replace hierarchical state authority, depending on the regulatory economic prize in particular, may be illusory.

In any case, the national/supranational dialectic is much more complex than some crude warring between domestic democratic self-interest and a less-defined cosmopolitan common good. Space here does not allow for a more nuanced interrogation of the interest sources which promote state or supranational ordering, but neither context is realistically a reflection of the common mind of its constituency. National interests, emerging from consolidated or fragmented states, are nothing of the sort. They are often little more than the determinations of politically powerful families, party cliques, industrial blocks, commercial cabals and religious power brokers. Even more so at the international level, hegemonic power and the interests it promotes are in the hands of the privileged and unrepresentative few.

Testament to the prevalence of state interests in reformulated global regulatory hierarchies is the authority framework of international law. Until very recently at least, international law has created legal relationships between nation states. Despite the debate which might be had regarding the relevance and influence of international law in global regulation and governance, there are myriad examples of where international conventions and treaties given force of national and regional law are more likely the consequence of negotiated state interest and represent the economic priorities of consolidated states and political economies, rather than advancing internationalism.

The place of international law – Protecting rights or security?

> This globalisation process which points to the extension of global cultural interrelatedness can also be understood as leading to a global ecumene, defined as a region of persistent culture interaction and exchange.[35]

That said, a critical concern for the regulatory relevance of international law is how the *ecumene* of *jus cogens* protections such as the universal prohibition on torture have been qualified by strong and competing nation state and alliance interests that place risk/security cultures against fundamental supranational rights commitments.

One answer to this lies in the regressive duality of globalisation itself. As duality it is:

> . . . illusory and potentially distracting at this stage of the globalisation process only to concentrate on the 'collapsing' of time and space without recognising the diversity of human consequence which remains . . . globalisation as a concept refers both to the compression of the world and the intensification of consciousness of the world as a whole . . .[36]

Within that intensification of consciousness is a struggle over the meaning of torture which has a potential to shake the foundations of international humanitarian legality in the same way that the agreement on the conventions discussed to follow opened up the vision of a new age of human dignity for all. Hegemonic interests that would determine either the incomprehensibility or utility of torture may hold the key for a critique of the recent segmented development of the human rights dimension of global governance.

This hegemonic analysis, despite its Western-centric tone, realistically recognises that as currently interpreted, globalisation advances consolidated state risk/security interests, against a plethora of contesting ideologies, interests and rights perceptions beyond the nation state. The sectarian and hegemonic differentiation of combative power constellations which constitute current global hegemony exhibit this phenomenon in the prevailing *war on terror*.[37]

As my earlier work has endeavoured to establish for transitional cultures,[38] the process of globalisation affects key actors and stakeholders differentially depending on their inclusion or exclusion within and beyond the global community.[39] Some actors dominate while others are marginalised by the process of globalisation.[40] Dominant actors currently locate in the Western alliance of liberal democratic politics and capitalist market economics, and they determine the new politics of global governance.[41]

Normatively at least, when significant and universal rights issues such as personal integrity are endangered through phenomenon like torture, international humanitarian law is assumed to safeguard the rights and privileges of all global citizens. Historically, torture has been determined through the relative prisms of cruelty, horror, tyranny and shame, even where exercised in the processes of 'justice' or harsh morality.[42]

> Torture has always been bound up with military conquest, regal punishment, dictatorial terror, forced confessions, and the repression of dissident belief. [43]

The *Janus-face*[44] of globalisation accommodates the possibility in hegemonic governance terms, for example, as with the non-derogable injunction against torture, to be applied with dual meaning in either local or global governance contexts. Contemporary global governance, operationalised as it now is within an underdeveloped form of 'new politics',[45] recognises torture as being appropriately prevented through the instruments of international law and international human rights conventions, while at the same time entertaining hegemonic justifications for torture's necessity against the globalised risk/security backdrop. It is the local/global duality in determining risk/security and the tension between the domestic and the global nation state which fuels this divergence by asserting the essential priority

of nation state securitisation and seeking to extend this to the protection of the legitimate global community.

If the focus of globalisation is shifted onto its localising aspects and interests (such as nationalism, autonomy, cultural separatism, xenophobia), then rights abuses such as torture are condoned, justified and even promoted through a security/risk approach to world order[46] as viewed from the standing of domestic interest, and torture becomes a control option rather than a controlled state practice. Thereby, the paradox of preventing torture and at the same time promoting it stems from the duality of interests at work towards global ordering, when risk/security considerations move from the global to the local, and when domestic interests set security above rights.

Human rights abuses such as torture as an answer to global terror are problematic if the global hegemony trades off international law for exceptional responses to exceptional threats, while at the local level nation states import and export torture almost as a duty to protect citizen safety. While one *face* of globalisation[47] promotes the single community and an international obligation to prohibit torture as a universal right of the global citizen, its other *face* concurrently demands the security/risk approach towards the paramount protection of the national citizen, whereby domestic actors seek to maintain their preferred and often secular place within the world order. It is this tension and contradiction between the protections of global citizenship and the priorities of national citizenship that essentially creates the political paradox between the promotion and prohibition of policies on torture. In addition, citizenship national or global is not in actuality universal and as such the paradoxical approach to prevention/promotion of torture for citizen interest is complicated as it is applied either locally or globally across hegemonic determinations and divides.[48]

The choice for key actors and agencies from nation states, regions and internationally, charged with maintaining world order, is whether to respect international law and work towards a single global community commitment against essential rights violations, such as torture, or whether they should first and foremost protect their individual risk/security interests. As mentioned before, with the *global community* divided across hegemonic interests and the autonomy of powerful nation states in the ascendency when securitisation is the measure of citizenship, universal rights protections, even so deeply embedded as the torture prohibition, remain vulnerable. Ultimately, it is the dominant political hegemony and its amalgam of autonomous interests that dictate how international governance is enacted,[49] be this through international law or through the acts of individual key actors and agencies.

Another level at which hegemonic interests prevail over more general or universal 'goods', and where global regulation becomes engaged to maintain

sectarian preferencing, is where economic inclusion and benefit does not follow or even require a fair distribution of resources. The 'right' not to be impoverished at the expense of other people's unjust enrichment, while alluded to in international rights instruments, will never gain genuine regulatory priority in global governance while capitalism continues to dominate as the model of successful political economy.

Capitalism and strains in political economy

In *Regulatory Capitalism*, Braithwaite (2008) identifies the synergies between global regulation and multinational global capitalism. The observation should not be surprising, even to those who believe that deregulated markets foster profit. Regulation protects oligopolistic market relations as much as it is required to defeat anti-competitive behaviour. The paradox of globalisation when it comes to the reliance of global political economy on world trade is how, on the one hand, protectionist barriers are attacked while, at the same time, international trading laws are required to protect exclusive intellectual property interest and trademark exclusivity. The free market is not free either for a choice of trading preference or for open access to the knowledge base for innovation.

Regulating economic and resource inequality is an essential challenge for the application of equitable regulatory strategies, ensuring more universal economic (and environmental) sustainability (see Chapter 8). Perhaps the answer to this conundrum resides in an appreciation that most regulatory theory is not premised on economic or resource equality (Chapter 2). Even those theories which work out of a commitment to a redistribution of wealth and access to wealth come hard up against competing regulatory commitments to complement meritocracy and economic entrepreneurship. These tensions emerge from a more fundamental regulatory question when applied to the perpetuation of successful political economy. Socially just economics can exist compatibly with the protection of human rights. The reason for this is not to be found in an essential endorsement of resource redistribution or equitable access to capital and wealth creation. So long as the human rights paradigm advanced globally continues to celebrate the individual, then merit will prevail over equity even where regulatory frameworks (such as testamentary disposition) perpetuate social and economic conditions that fundamentally distort any level playing field from which merit might be evaluated and favoured.

An unintended but essential context for healthy political economy is social order. Crisis can lead to a beneficial repositioning of conditions important for political economy but long-term crisis will not allow economy to flourish. This is so whether the economic model which regulation supports is organic and inclusive or mechanical and exclusionist.

Order regulation – Hegemony and international politics

The globe is divided, and humanity and the rights it enjoys are reserved to those for whom securitisation poses no risk. Rights become relative and global governance is for a fluid community of *legitimate* citizen/victims facing 'modern life and its fears'.[50]

Bauman would have it that the management of fear is a great challenge for institutions and processes of global governance where the world is 'out of touch together'. Incrementally, the justification and execution of torture in a world where *might is right* has a long and recurrent history. The difference in the current closing age of *globalisation as security* is that through the conventions of international law, the interests of those who set the world ordering agenda are projected and protected against a universal rights perspective, despite the economic and political marginalisation of those *on the receiving end* of globalisation whose rights are conditional.

Even in *a contracting globe* where pluralist, cultural, economic and religious values are tolerated only insofar as they do not challenge the norms of a prevailing political alliance, world order has come to rely on a risky mix of domination and violent resistance.[51]

> From a global governance perspective, the risk/security paradigm itself is risky. With risk prediction and security evaluation, more reliant on political and cultural context than comprehensive and comparative harm measures, community safety gives way to community imperative as a primary governance obligation. It might be said that this is not unusual for governance frameworks which run to service political agendas. However, the difference for global governance is its declared commitment to the safety of humanity. Further, with globalisation promoting preferred regulatory strategies to address risk/security concerns, governance against terror will become more polarised and essentially less tolerant of cultural diversity as it is deemed threatening.[52]

The promotion of this security/risk approach to world order has its foundations in the terrorist attacks of 9/11. These attacks represented a significant turning point in global governance through securitisation, 'the crunch point; the apocalypse now'.[53] It turned international crime, in the form of terrorism, into an attack on national citizenship and on *civilisation* and Western values,[54] on civilisation itself, thereby challenging the dominant political ordering of world power and securitisation. Consequently, interpretations by the dominant political alliance regarding global terrorism changed from nation state or regional responses into a galvanising battle cry determining a 'conceptualisation and promotion of the new globalisation (risk/security hegemony)'.[55] This risk/security approach to world ordering has featured global terrorism as justification for the use of para-justice control regimes.[56]

The dominant global political alliance has reacted to the harm caused by terrorists by, in effect, treating terrorists and terror suspects as outside international law and universal human rights protection and, therefore, can be subjected to torture.[57] As outlaws, terrorists (and their communities) forfeit universal human rights protections, it is argued, because they reject the international laws and governance regimes on which these rights rely. One cannot impugn a Western rights framework through violence and expect to receive its benefits if securitisation envelops terrorists and their communities.

Even so, legal principles and processes of *justice* are exeptionalised and challenged in order to claim legality for the consequences of *outlawry*. Terrorists have been highlighted by those dominant in the global hegemony as a potential threat to global ordering and security and as such are denied 'traditional criminal justice protections and even international human rights'.[58] Along with the alienation of outlawry, a realistic appreciation of harm has been marginalised in efforts at global ordering.

The currently closing security/risk phase of globalisation and the resultant approach to world ordering summarised so far has had far-reaching effects on the constituency and reach of international human rights protections which have accompanied the development of the modern phase of ICJ.[59] Torture, for instance, may be prohibited unequivocally by international and human rights law, yet the supervening security/risk approach to world order has seen its use argued as *legal* in the shadow of 9/11. The hegemonic nature of global governance, up until the recent financial meltdown in 2009 at least, aligned with military dominion, allows for this paradox to appear reconciled on the road to global ordering but not from the perspective of resistant and excluded communities.[60]

For the majority of world states and populations excluded from this hegemony, and wherein violent resistance to the dominion of hegemonic values is generated, the neutering of jus cogens rights where they are most needed will have a profound effect on the inclusive legitimacy of notions such as the global community. The dependency of developing nations on the dominant political alliance has had a fundamental effect on the marginalisation of a realistic appreciation of harm. This dominant alliance has, as has been shown by the post-9/11 war on terror discourse, used global terrorism as reasoning to localise its priorities and promote the use of para-justice control ideals such as torture.

The rejuvenation of a rights consciousness will only be possible in the waning risk/security governance paradigm when sociability replaces the nation state and supranational hegemonic interest mix. How will this come about? The answer as suggested in the crisis context chapters may come as a consequence of a new regulatory project which takes crisis to ordering. The project, no doubt, due to the pressing exigencies of sustainability and the incompatibility of state institutions and processes

as they translate into global governance will involve voluntarism and communitarian engagement, accepting all the challenges that this transition will present.

Regulation and voluntarism – Governance in the making

Voluntarism is both a feature of sociability and of the communitarian regulatory environments of shared risk and shared fate in which it will thrive. In applying voluntarism (and for that matter communitarianism) to the possibility of sociability in better regulating crisis to ordering, it is necessary to go beyond trends in contemporary consolidated states where voluntarism and communitarianism are fashions rather the source of essential regulatory survival. Often discussions of legal pluralism in the West, for instance, replicate the colonial origins of law by focusing on the relationship between consolidated Western state law and foreign, non-Western, community-originated regulatory forms.[61] This orientalist analysis becomes more distracting when modelling communitarian regulation, wherein the non-Western communities are transnational rather than contained in fragmented states. In fact, the shape of communitarianism in transnational contexts is determined by new concepts of community not determined temporally or spatially.

The parallel between law as regulation and community should not necessarily lead away from the centrality of the state and law, no matter what state structure we address. How community moves from law may be assisted or necessitated by state dysfunction, but as is more clearly seen with global law, the community offers, through voluntary rather than compulsory relationships of obligation, more organic and engaged regulatory frames than law in any source can impose.

I have already mentioned the compatibility between individualised concepts of human rights and regulatory strategies which promote meritocracy. There is no essential contradiction in such an intersection that rights should be endangered through economic elitism unless the conditions under which economic meritocracy operate are so exclusive as to significantly disadvantage the majority. Yet, more communitarian and inclusive regulation should have the consequence of at least reflecting communitarian rights which have a more broad-based benefit structure at heart. Particularly with transnational communities bonded through social networking (see Chapter 6), their communicative cohesion rather than cultural homogeneity gives form to both the communitarian rights to be regulated and a communitarian obligation to engage in the regulation process.

Fisher (2008) argues that if anything characterises the contemporary epoch of globalisation, it is the reduced importance of community.[62] Interactions occur and regulations are struck among diverse and dispersed agents

across vast space (or no space) with very little commonality. Law, particularly in the global commercial arena, makes close community ties dispensable. Does this make the communitarian future of global regulation questionable? I think not.

The preferred interpretation of globalisation's influence over communitarian regulation, argued for here, is that the nexus between globalisation and homogeneous culture is paradoxical: at the same time globalisation produces diversity and individuality, it enforces (particularly for economic benefit) a common consumer community. Put aside this phenomenon, the realisation that transnationalism can create new communities not conventionally connected through time and space, but which are communities nonetheless. The reality of global communitarianism is that it survives and even thrives on the collapsing of time and space. Removing spatial and temporal dependency, and the cultural qualifiers of territoriality and domain, globalisation requires a rethinking of community and what it is to be communitarian. In this enterprise, the possibility for wider communitarian engagement without boundaries in fact makes globalisation community-friendly.

This realisation has important ramifications for global governance (as it did for global regulatory accountability discussed in the preceding chapter). The nature of the *global community*, widely imagined as the constituency of global governance, is as much defined by movement and transitional bonding as in the past it may have been by spatial and temporal permanence.[63]

New global politics and pluralism

Globalisation has meant not only changes in global politics but also changing sites of legal pluralism.[64] As argued above, changing notions of community now see people across a new range of multiple groups being influenced by multiple norms, of which law is one style. The rise of global legal pluralism can be seen as a break away from the state-to-state constellation of international law. Global legal pluralism refuses to privilege the legitimacy or authority of state lawmaking over other normative communities:

> . . . all collective behaviour entailing systematic understandings of our commitments to future worlds (can lay) equal claim to the word 'law'.[65]

Cover identified jurisdictional politics as an important locus for the clash of normative visions. He saw law as a bridge across normative space connecting the world-that-is to the world-that-might-be. In this context, communities can claim the authority to use the language of the law based on a right or entitlement that is separate from the particular sovereignties of the present

moment. This enables a new conception of law based on a recognition that the state does not always hold a monopoly on the articulation and exercise of legal norms. Law becomes more a terrain of engagement where various communities debate different visions of alternative futures.

In particular, beyond the nation state, the authority to create and broadcast laws is disaggregated and delegated to a range of international organisations and constellations. The diversification of global regulation and the prizing away of its accountability from governmental actors is the evidence of not only a pluralist regulatory engagement for law but also a pluralism in the way regulation formulates global governance.

Against the actuality of contemporary global governance, an egalitarian 'world order is a chimera.'[66] 'Globalisation is a process of paradoxes.'[67] In that context, globalisation (in reflecting local securitisation and supranational ordering interests) is a significant and explanatory discriminator of the paradox between ordering and harm. In trying to understand how domestic interests placing security above rights can co-exist with a global commitment to rights as a condition of ordering, it should be remembered that globalisation both 'internationalises and localises'.[68]

The subtlety of this duality is revealed through the world's reliance on the UN as guaranteeing peace and security only with the assistance and concurrence of the world's major powers, that concurrence being limited as it is to where hegemonic interests correspond rather than compete with UN peace and security agendas. UN peace propositions align through the protection of domestic interests and the reassurance of exclusive and unique hegemonic global ordering priorities. To add to this governance irony is the diligence with which hegemonic military force has sought the legitimacy of the UN Security Council mandated to rubber stamp selective war-making. Thus, problematic relationship between hegemonic power and global democracy in the development of global governance has not only secularised world ordering but also 'the governance imperatives of a dominant world order have tended to compromise the delivery and legitimacy of international criminal justice.'[69]

The rise of securitisation interests in global terrorism, particularly around the events of 9/11,[70] has resulted in a localised control focus, especially within the United States, then broadcast as a compatible global ordering imperative. As the superpowers enforce the risk/security model into global ordering, global institutions are forced to 'perpetuate the globalised hegemony of the dominant western alliance'.[71] This compulsion to politicise ICJ[72], in particular, so as to help achieve a sectarian ordering, results in the realistic appreciation of harm being marginalised as global institutions and 'smaller' nations are the recipients of harm inflicted by the superpowers and their agents to protect their localised interests. I draw on these ideas in describing the dominant hegemony's approach to international policy and global ordering;

> If internationalism is seen as complementing that notion of Westernised world order, then it too is embraced by the current hegemony. In such a setting hegemony tolerates and works with other political forces within global institutions which may peacefully oppose Western values. If hegemonic order is contested then the return to the alliance-based security is apparent.[73]

In the process of joining the world together through a web of global regulatory networks, these linkages operate more in favour of some actors, especially the self-appointed decision makers (global elite), and at the same time marginalising those at the receiving end of globalisation. Bauman describes this setting:

> ... rather than homogenising the human condition, the technological annulment of temporal/spatial distances tends to polarise it. It emancipates certain humans from territorial constraints and renders certain community generating meanings extra-territorial – while denuding the territory, to which other people go on being confined, of its meaning and its identity-endowing capacity. For some people it augurs an unprecedented freedom from physical obstacles and unheard-of ability to move and act from a distance. For others it portends the impossibility of appropriating and domesticating the locality from which they have little chance of cutting themselves free in order to move elsewhere. With 'distances no longer meaning anything', localities, separated by distances also lose their meanings. This however augurs freedom of meaning-creation for some but portends ascription to meaninglessness for others.[74]

While the global elite sets the agenda for world ordering in the way that maximises and fosters their particular interests, the marginalised actors are consigned to a continuum from exclusion beyond the benefits of global community to outlawry. A realistic appreciation of harm also risks marginalisation as hegemonic global ordering is achieved, at least in terms of a sacrificed discourse of rights protection and the constraint of its outreach to the citizens and victims of a hegemonic global community.

Under these conditions, a realistic appreciation of harm cannot be achieved because of the contextually dependent aspiration and interpretation of global ordering, and the lop-sided power/rights differential ensuring its achievement and maintenance:

> From a global governance perspective the risk/security paradigm itself is risky. With risk prediction and security evaluation, more reliant on political and cultural context than comprehensive and comparative harm measures, community safety gives way to community imperative as a primary governance obligation. It might be said that this is not unusual

> for governance frameworks which run to service political agendas. However, the difference for global governance is its declared commitment to the safety of humanity. That safety may be less likely to be achieved and even more likely to be endangered when terrorism and violent control responses exemplify the risk/security commitment for global governance. Further, with globalisation promoting preferred regulatory strategies to address risk/security concerns, governance against terror will become more polarised and essentially less tolerant of cultural diversity as it is deemed threatening.[75]

The harmful effects of the process of globalisation on those at the margins of global ordering receive only self-serving treatment at the hands of the global elite. Rarely will hegemonic interest be qualified or compromised in the achievement of order unless in doing so greater interests are ensured.

Crime control (local and global) provides an example of how sectarian interests percolate from national to global governance in the endeavour of socio-political ordering. Sanction-based state regulation, such as crime control, as a primary state influence over community safety and securitisation at the domestic level, is currently shaped by risk-reduction techniques that compromise rights protection, as the torture case reveals. Criminal justice priorities from a state perspective have fallen into line with neo-liberal retributive justice paradigms wherein the autonomy and responsibility of the citizen is confirmed (as offender and victim) and state or private justice intervention is designed to prevent and contain the harm which unregulated disorder presents.[76]

Where will law sit in all of this? At least it is clear that as pluralism and law intersect, the more narrow state sponsorship of law and the divisiveness this entails will of necessity diminish as an essential context composite of legal ordering and of its foundational authority. In looking at these challenges, Michaels addresses the parallels between legal globalisation and legal pluralism, and the manner in which these can be reduced down to the plurality of legal orders, the co-existence of domestic state laws with other orders, and the absence of hierarchically superior positions transcending the differences.[77]

The engagement of legal pluralism with legal globalisation and vice versa means more than wholesale borrowing. As suggested in the preceding discussion of globalisation, securitisation and rights, and as commended by Michaels, legal globalisation has transformed some traditional themes of legal pluralism such as the definition of law, the role of the state in law, and of the community, and of the connections between law, sovereignty and territory. In this way, the development to a *global law* as a foundation for global governance will be more than pluralist; it will be pluralised through the pressures and interests of globalisation. In so saying, the reflexivity and responsiveness of global law as it interacts with other mechanisms of global regulation will inevitably lead to ordering trough a pluralist path even more

so than through the essential sponsorship of regulation (and of law) by the nation state:

> Quite likely, law is always uniform and plural at the same time. In this regard, interlegality may provide a somewhat helpful concept to understand globalised law – not interlegality linked to pluralism but interlegality in describing law more generally. However, the reality is that law is perceived as far more orderly than (pluralism) suggests and operates as though it were far more coherent . . . it is necessary to acknowledge this propensity toward order as an element of law.

It then becomes important to speculate on the role of sociability to ensure order for those who would otherwise see themselves as outside the law, whether it is globalised or not.

Governing the ungovernable – Disaggregated authority

> The politics of many international negotiations can usefully be conceived as a two-level game. At the national level, domestic groups pursue their interests by pressuring governments to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximise their own ability to satisfy domestic pressures, while minimising the adverse consequences of foreign developments.[78]

If such an observation holds, what does it say about the regulatory challenges in moving from national to global governance? One way of examining that transition is to reflect against those actors or agents who are notoriously difficult to govern at both the local and the global level; conglomerate MNCs.

As Levy and Newell (2006) observe:

> From regional trade agreements to international environmental treaties, we are witnessing the emergence of multi-lateral institutions and sources of authority that effect the operations of multi-national corporations (MNCs). Even in the absence of supra-national authority with the coercive power of a state, negotiations among governments, firms and non-governmental organisations (NGOs) are leading to the establishment of structures of governance-rules, norms, codes of conduct and standards-that constrain, facilitate and shape MNCs market behaviour . . . MNCs do not just interact with governance structures, rather they constitute an integral part of the fabric of global governance.[79]

The authors make this observation after interrogating the diverse ways MNCs respond and contribute to the architecture of global governance in their roles as investors, innovators, manufacturers, lobbyists and employers, each role posing its own regulatory challenge. Beyond engagement with external regulatory institutions, the day-to-day production, research and marketing activities of large MNCs are decisive in shaping wider crisis regulation priorities such as environmental impacts, trade patterns, labour market practices, consumer pricing and consumer identity.

Despite seeing the primary fields of engagement for MNCs with the market as requiring regulation, political economies are becoming more aware that large firms can also serve as powerful engines of change, in financial, technological, knowledge generating and resource oraganisational terms. For MNCs as well as their regulators, market activities constitute an important aspect of governance, and the linkages between these activities and more overtly political engagement with public policy reveal of MNCs their regulatory capacity as well as their potential to capture the regulatory agenda and thereby become competing governance dimensions. In this, the governing capacity and the governability of MNCs become critical variables in a more expansive notion of global governance:

> The use of the term 'global governance' itself constitutes a reorientation of perspective regarding the political economy of MNCs; instead of the traditional focus on relations between business and host/home governments… global governance presumes that it is meaningful to conceptualise governance at the multilateral, if not global or supranational levels… international governance structures are now emerging around more regulatory or distributive regimes which constrain MNC behaviour… global governance refers to the multiple channels through which economic activity and its impacts are ordered and regulated… also implying a soft infrastructure of norms and expectations in processes that engage the participation of a broad range of stakeholders. This conception of governance displaces government from its traditional, sovereign role in establishing and securing order. Instead, governance is viewed as a more diffuse form of authority and control operating through a network of actors, at multiple levels… [80]

In the broader system of order envisaged in global governance, key players such as MNCs can, properly monitored, appear both as central actors in a regulatory network, and for other concerns and interests, the object of regulation in a variety of forms. This Janus-faced existence of MNCs within the global governance regulatory project responds more flexibly and effectively in a suitably accountable collaborative context such as regulatory sociability (as I argue in the final chapter), rather than some schizophrenic sanction-based interventionism (masked as self-regulation) requiring MNCs

to misdirect useful and mutual regulatory energy to the quest for capture to protect their self-interest.

The rise of multinational governance away from conventional models of governing multinational enterprise and its excesses could be said to mirror recent multipolar moves in global politics.

> Compared with past multipolar systems, the global nature of the coming world will afford the great powers more space to manoeuvre without steeping on each other's toes making it relatively easy for them to carve out mutually exclusive spheres of influence. Colliding territorial interests will be a less frequent and intense problem than it was under old-style multipolarity . . . unlike past great powers (the new members of the great power club) will not need more territory or population to compete with each other; there will be no imperial temptations to resist. Rather, the key to realising their potential power will be internal growth and consolidation-processes best facilitated by a quiescent international setting.[81]

The jury is still out on whether this transition to a new global multipolarity in political presence will be permeated by insecurity and rivalry, particularly in the form of fierce competition for scarce resources. The optimists suggest that multipolarity implies multilateralism, finding ways to build and manage a new global governance architecture. For this to be achieved, and for more essential features of liberal order to replace the discriminating hegemony of the present, principles and practices of restraint, accommodation, reciprocity and cooperation will need to work in concert to establish mutually acknowledged roles and responsibilities to commonage an evolving but stable international order that benefits all of the great powers. Only regulatory sociability can ensure this against what Schweller envisages for world ordering as:

> . . . a perpetual state of purgatory – a chaotic realm of unknowable complexity and increasing disorder . . . an age of entropy (capturing both) the flattening and chaotic nature of the world as well as the rise of bounded power, similar to useless energy.[82]

If Schweller is correct in the prediction of a world succumbing to the unstemmable tide of increasing entropy, then it will be through collaborative regulation and the mutualisation of interests that will confront and contain a world politics otherwise subsumed by the forces of randomness and enervation, wearing away its order, variety and dynamism. Sociability is a realistic regulatory antidote to such a poisonous future.

11
Conclusion: Regulatory Sociability and Regulatory Futures

Introduction

This chapter does not provide the conventional service offered by conclusions for texts such as this which we now draw to its close. The discussion of sociability and of futures is not constructed in the following analysis as a summary of the themes which have prevailed throughout this book. With an introductory overview such as that you have just read, a further summary would inadequately reflect the purpose of what has gone before. In essence this book as a whole is a summary of the scope and challenge posed for the regulation of global crisis.

The conclusion gives an opportunity to rehearse and develop a prevailing theme and thesis running throughout the text: that regulating crisis to orderliness is better achieved through a form of collaboration which we now develop as *regulatory sociability*. This concept, the chapter argues, is both an inevitable outcome of morphing enforced self-regulation in an age of regulatory capitalism as well as the future for non-interventionist regulatory regimes.

Overview

The chapter is interested in *regulatory sociability*. As developed here, sociability is not a natural consequence of protecting the libertarian entitlements (or excesses) of a rights-based regulatory environment (individualist or communitarian).[1] Rather sociability is collaborative relationships which, from a variety of motivations, can lead to positive, pluralist regulatory directions.[2] The central theme of this brief analysis of the conditions of regulatory sociability is to explore regulatory theories entertaining organic cooperation as opposed to mechanical intervention, when progressing crisis to orderliness.[3]

Collaborative regulation goes further than *interest group* or *capture* theories.[4] The argument to follow progresses the idea that for whatever reason in the context of reactions to crisis modified through the particularities

of political economy,[5] collaborative regulation is more than a product of public calls for market correction, or the particular demands of pressure groups struggling to reconcile the diverse preferences of their members.[6] Organic collaboration should be viewed as a regulatory resolution emerging as a conscious choice away from mechanical intervention, both available as possible policy strategies to resolve larger political and ideological conflicts.[7]

In the wake of the recent global financial meltdown[8] and the apparent failure of the Copenhagen and Cancun climate change talks, questions are being asked of conventional global regulatory strategies, particularly those wedded to law, regarding even their capacity to appreciate the essential conditions of global crisis.[9] The aim of this concluding analysis is to position an intersection between crisis theories and political economy in order to explain an emergent predisposition among crisis stakeholders towards collaborative regulation, and thereby the conditions of regulatory sociability. For the present purpose, crisis flash points in recent political economies will be taken as given and their common features enunciated. From there the chapter speculates on the nexus between crisis and political economy as it motivates cooperative regulatory strategies.

Collaboration is employed beyond ideas of *best practice*[10] and compliance (creative or otherwise),[11] although both these established regulatory contexts will rely to differing degrees on cooperation, convergence and mutualities of interest. Collaboration is central to theories of responsive regulation[12] but differs, as I see it, in the essential characteristic of emerging common interest (crisis to ordering) within *communities of shared risk and shared fate* (crisis disordering).

For the sake of expedience, and so as to confine the analytical focus to non-compulsory regulatory forms, cooperation in this analysis will assume a background in prevailing domestic and international polarities of political and economic interest.[13] Despite earlier chapters' (Chapters 2, 3, 9 and 10) consideration of the active nexus between the features of political economy and crisis theories[14] in real time, we will not at this stage move from theoretical modelling to empirical testing. That is a larger, later project.

This chapter works its way through the features and theorising of regulatory sociability from collaboration rather than intervention, whatever the interest-based motivation within crisis and towards orderliness. It concludes with a discussion of disciplinary deficit, in terms of the way that compulsory regulatory preference remains low on the orderliness continuum. I argue that as compulsory discipline increases, it may produce compliance but at costs for regulatory sociability. The alternative regulatory paradigm is one which moves to resolve the antimony between desire and reason in a manner which relies on and endorses the constituents of collaboration.

Collaborative regulation, I suggest, can arise out of crisis and be justified through desires for orderliness without compulsion. But for collaborative

regulation to be sustainable, it must complement certain positive 'orderly' aspects within political economy.[15] The analysis determines some observations concerning the shape and shaping of collaborative regulation in an atmosphere of more pluralist knowledge-based (disciplinary) engagement.

Sociability – More than responsive regulation[16] and interest management

For the purposes of an analysis which looks at regulation in the context of *sociability*, context is crucial if we are to trace the progress from crisis to ordering. By locating regulatory strategies within specific political economies, it is possible to provide some predictive potential regarding such a trend, with a variety of crucial socio-political and economic variables held constant.

This section explores some of the constant contextual conditions which promote sociability in situations of crisis. More significant for this analysis, however, is the realisation that sociability holds out the potential to manage and transform the interest frames with which regulation either competes or complements. Game theory addresses interest formulation and transformation and as such is relevant for understanding how collaboration more than intervention may well manage interest shift.

Moving from crisis to orderliness within specific political economy, contextualisation marginalises a *single event* focus when evaluating regulatory efficiency and encourages consideration of the manner in which multiple variants influence and are influenced by a chosen regulatory strategy. Game theory presents a way of managing the interaction of multi-variant analysis when looking at: (a) the constituent features of crisis and order contexts and (b) the interaction of variants leading towards or away from crisis or order. Two traditional approaches to utilising game theory for interactive analysis have been:

1) non-cooperative game-play, that is the strategic choices of individuals and
2) cooperative deal-making, with options available to the groups of participants (i.e. how are coalitions formed and how the available payoff is divided).

Non-cooperative theory is intimately concerned with processes and rules defining the game. Cooperative theory[17] operates away from such rules and looks only at more general descriptions that specify what each coalition can obtain. As such, cooperative game theory is not intimately concerned with processes and rules. Rather it specifies what each regulatory coalition might achieve, as opposed to how they will achieve beyond cooperation.[18] Rules as legitimating compulsory (and often external) intervention are eschewed in a collaborative regulatory model. Rules which enable the foundation and

perpetuation of game conditions for collaboration, on the other hand, are desired.

The discourse of regulation within a game theory frame is a significant variable when advancing collaboration instead of compulsion:

> The constitution of discourse represents a process which is struggled over, and at the same time it forms 'spaces' and 'rules of the game', in and according to which conflicts are settled. Discourses have effects on power when they become institutionalized, are linked to action and become carriers of valid knowledge (Link, 1983: 60). Discourses are hegemonic when they become the 'historical-organic ideology' (Antonio Gramsci) of ruling actors, who in this way gain consent in society for their particular interests (usually by making concessions and compromises). Of course, this cannot just be manufactured by elites but must have a material basis in society. This process is part of complex struggles and their institutionalization over societal regulation . . . [19]

The discourse essential in a collaborative regulatory environment is conversation more than dialogue, conversation providing a crucial language on which to found *sociability*. Sociability implies trust, respect, conditions of comity and cooperative relationships of friendship. These relationships are responsive to, and foster, orderliness from chaos at domestic, regional and international levels of political economy. Regulatory strategies compatible with effective friendship relationships, the paper argues, are likely to be pluralist rather than dependent on state-centred solidarism.

From the pluralist perspective, sustaining order in a diverse international system lacking solidarity requires emphasising the importance of international rules and norms in reason-guided action. Even so, the more rules are removed from the constitutional legality of particular political economy, the more it relies on goodwill for compliance. But pluralism may underestimate the scope of reasons available for international cooperation even as it may correctly point to the risks to international legal norms that those expanded reasons for cooperation (even amongst friends) may create.

Friendship and interest management are inextricable. The solidarism implied by international friendship is parsimonious. Friendship bonds and their interest foundations do not necessarily extend to the whole of international society and hence may be viewed with suspicion by those who hope to bring together the international community of states into a greater solidarity in pursuit of global orderliness. The discourse of friendship has more to do with the treatment of those who are friends than with those outside that circle. Unlike the normative thrust of solidarism (or cosmopolitanism), the reasoning associated with international friendship has less to say about bolstering justifications for interventions into unjust regimes. In contrast to

realism, pluralism, solidarism and cosmopolitanism, friendship itself provides a set of reasons that can have standing in decision-making. These reasons do not necessarily trump reasons of narrow self-interest, human rights, international solidarity or international law, but they are reasons that go some way to explaining regulatory preference for collaboration rather than solidarist prescription.

Ayres and Braithwaite (1992) refer to Meidinger (1987) in arguing that there is no useful separation between public and private interests in theorising regulation.

> Social life seems 'almost always to involve a combination of pecuniary interest-pursuit and citizenship'. In practical terms, citizen concerns about themselves motivate their identification of public concerns: 'reason is most likely to be applied by passion – in the form of interests'. This is not to support the 'crude deals' thesis that one sometimes sees in law and economics writing. Regulation is largely contested in a public-regarding discourse; it is a shallow analysis to view interest groups as unashamedly using the state regulatory apparatus as no more than a vehicle for advancing their private interests .... Achieving regulatory effectiveness through a balance of control is not about simply striking a compromise of interests. It is about understanding each other's needs and then sharing ideas in the pursuit of risk management strategies that deliver acceptable protection at an acceptable cost.[20]

Interest management is a feature of game theory when it comes to explaining the forces at work for and against collaboration as well as the eventual place of collaboration in replacing the need for rules and other mechanical frameworks of ordering.

Order and regulation[21] – Playing the game[22]

Putting regulation somewhere in a transition towards ordering (and the outcome of orderliness) intends to break down the dialectic order/disorder. Having said this, the orderliness imperative of regulation depends on understanding and tackling what constitutes disorder. Misunderstanding the incremental nature of orderliness in favour of a simple dichotomous approach is central to why many compulsory (command and control) regulatory expressions fail or under-perform. It is unhelpful to work in the shadow of this order dialectic if theorising is to concern itself with the forms and sources of regulatory choice towards states of orderliness. Rather than order/disorder it is more helpful to view regulatory options as progressing on a continuum from crisis (chaos) to orderliness.

This section develops some of the features of game theory considering participation (collectively or through agency) as a productive regulatory choice.

What is it in the nature of political economy which influences choice, participation and their regulatory dimensions?

The need to regulate order out of chaos is a perennial consideration in global regulatory convergence and co-existence. However, the contextual contingency of regulatory strategies both directed at chaos and order has lead to the rich theorising on *the game* as a regulatory choice frame. The game can be the metaphor for contextual contingency and at the same time common rules of the game can enable some universal analytical considerations which are not constantly derailed in contextual relativity.

When studying regulation in a transitional process to orderliness, with the intention of predictive potential concerning the factors best suited to turn chaos to order, game theory as a dynamic model offers the identification of major and sub-game priorities, what moves towards interest equilibrium, how to measure the significance of agency and the impacts on stakeholder (or player) reputation.[23]

Game theory anticipates capacities for choice in contexts that if not orderly are not perpetually destabilised by crisis and chaos. Political and bureaucratic frames may commonly evolve the rules of the game which are expected to reproduce orderliness. Within these rules, control is the name of the game, where the regulation options are enabled through game rules. Implementation of the rules becomes problematic when external or imposed regulation structures attempt to determine the legitimate or effective parameters for the game and game choices, beyond the game itself.

For our purposes, the field for regulation is particular epochs of global crisis and the regulatory choices are driven by regulatory intentions towards social ordering. The game, therefore, is to control crisis utilising players within the crisis, who demonstrate both self and mutual interests in the transition to ordering. For instance, external political interests can endeavour to dominate bureaucratic outputs within the game, and thereby the control of policy outcomes is complicated by tradeoffs between externally controllable versus internally effective (but less predictable) implementation strategies. With this realisation of the game framework, a collaborative regulatory strategy shared between key stakeholders (particularly those likely to be otherwise regulated) may increase compliance and avoid measures of enforcement effectiveness in the narrow administrative game relying on the interference and 'control' from external political interests.

Collaboration, I argue, diminishes

- principal agent control problems and
- collective action problems associated with any implementation strategy,

which can lead regulatory policy beneficiaries to oppose other effective but intrusive implementation strategies in the broader socio-political games.

Issues of political economy may construct the preferred choices of principal and collective game players so that they act out of self-interest and thereby sometimes against the effectiveness of collaborative regulation and implementation policies. The interactions between regulatory effectiveness and interest group politics (external from and internal to the game) in this and other implementation situations require that both be analysed simultaneously, and the game theory framework provides a systematic approach to regulatory outcome prediction.

As with our contextual location of sociability, game theory transposed into regulatory policy choices essentially requires political economy location. Brand suggests these in a contemporary sense as different phases of bourgeois–capitalist socialisation. He sees any of these phases in a heuristic way to indicate from a regulationist perspective the contradictory, and on a more concrete level, the diverse transformation of capitalism towards a new phase of political economy.[24] Regulatory discourse, therefore, becomes a language 'for sorting complex societal relations, makes them plausible and serves as a point of orientation for political action'.[25] The 'game' of bourgeois–capitalist economy (Fordist politics) Brand suggests is now subject to the political reregulation of economic globalisation, seen wherein certain developments and reasons for them are unavoidable and legitimate, and other concepts of societal development are pushed aside or rendered implausible in view of the dominant patterns of sociability. The emergent trend towards collaborative regulation in the global banking sector, for instance, in response to impending increased state regulation following the recent global financial meltdown (or any boom and bust cycle for that matter) is evidence of new rules in a previously deregulated game. As Brand concedes, such regulatory transition may not adequately be viewed through discourse analysis alone. It is more than all talk.

> Even if it is plausible that there is no meaningful reality for actors outside of discourses, relatively 'independent' structures exist which are reproduced through actions and, at the same time, are very difficult to change for the actors. Structures are a theoretical construction, but – without grasping reality in full – they point to 'corridors' for action in the sense of restrictions and opportunities which are beyond non-theoretical discursive practices. The opportunities of certain forms of action to establish themselves are clearly less at certain times, or even non-existent . . . According to this (historical materialist) concept, in bourgeois-capitalist societies structural principles such as the separation of the political and the economic, wage labour and the private ownership of the means of production take effect which are more deeply anchored than explicit norms. From a historical-materialist point of view it is therefore a question of more than simply inter-subjectivity and

> communicative action because communication about the fundamental structures of bourgeois-capitalist socialization usually does not take place.[26]

Participatory regulatory governance serves as a framework to deal with crises in political economy and to make their management more effective. Brand reflects that even post-Fordist politics is based on relationships of compulsion and coercion. The procedures of representative democracy are rescinded at the global level. The global system is directed and regulated by oligarchical power structures which tend to merge into ever more efficient and better integrated networks which circumvent nation state governments.[27] Global governance discourse on problem-solving and order-creating political regulation seems detached from the prevailing deregulated/semi-regulated economic discourses around competition. Successful economic politics breaks down regulatory barriers in order to improve the conditions for the utilisation of capital. Global order, in contrast, is seen as the product of interventionist regulatory securitisation. Herein lies a central contradiction of the global regulatory game.

Teleologies of regulation and crisis – Evolutionary mechanisms

Brand argues that the dynamic transformation of international politics (with crisis to ordering as a central governance concern) can be understood very well through regulatory theory. In doing so he exercises the notion of contradiction. Chaos theorising, where crisis is a critical transformation point, employs contradiction which, I suggest, ranges between regulatory order and deregulated disorder.

Crisis not only fuels choices for re-establishing order but can also give meaning to the regulatory methodology preferred for ordering. Crisis can be viewed as cathartic; as occurring for a purpose and giving purpose to its response. The purposes behind crisis-led regulation ultimately precipitate resolution through the progress to ordering. In this way, crisis states are temporal, contradictory and self-defeating, but essential to the rejuvenation of ordering.

Crisis as the antimony of ordering is determined against the conditions of chaos theory. Chaos theory takes its root in the study of non-linear dynamic systems.[28] The interests of economists and physical scientists in such dynamics have been mainly stimulated by these systems' capabilities in representing what were previously perceived as noise and randomness.[29] Much of the work done of this type focuses on regularity, equilibrium, stability and predictability, rather than the apparent unexplainable, the complex, the *stable–unstable*. Therefore, the study of chaos is as much a theory of

ordering and its realisation out of chaos. Chaos conversely is studied to reveal potentials for ordering rather than the uncertainty of disorder.

Here follows a short deconstruction of chaos modelled not simply in some linear causal progression or as a fragmented, even static phenomenon. Chaos is about interaction between variables which may themselves have as much influence over ordering as they have over disorder. Therefore, what comprises or results in chaos may depend on the time at which in the evolution of these interactive relationships certain outcomes are triggered and certain regulatory interventions required as a result.

A non-linear dynamic system is a system where relationships between time-dependent variables are non-linear or simply causal. Such a system has three types of possible equilibriums: stable, periodic and chaotic. The passage from stable equilibrium to periodic behaviour to chaos takes place when an increasing number of change variables with different frequencies are coupled between each other. As the number of variables with different periodicity increases, a resulting more complicated behaviour is observed. Consequentially, the simultaneous presence of a minimum number of counteracting forces creates an *apparent* randomness or chaos similar to phenomena observed in nature. Factors driving to orderliness rather than maintaining disorder are revealed within this randomness and change.

From tomorrow's weather, water turbulence, jet engine gas propulsion, demographic drift, economic cycles and stock market evolution, non-linear dynamic systems seem to be governed by relationships which dynamically interact with one another and are prone to chaotic behaviour. The multiple interactions between these relationships turn the simplest connection, we can imagine, into a highly complex network in which future behaviour may be impossible to anticipate. This realisation does not prevent, however, theorising and manipulating the factors within chaos which drive to orderliness. Effective regulation achieves this if it is directed towards the *sociability* rather than *segregation* of critical interactive variables essential for the production of chaos or of order.

Especially in the case of dissipative systems – those which squander their energy – chaotic change can organise around structures found at different scales of orderliness. A new form of order is found out of chaos wherein apparently random behaviour becomes attracted to a given space and remains within its limits. As such the *attractor* creates an implicit order within chaos. Inside the *attractor space*, the systemised behaviour may be highly complex and unstable. However, deconstructing this complexity with an eye to eventual ordering, it also seems organised rather than random or disorderly.

In theory, any system has to eventually return to its initial state. However, due to the perfect synchronism in time and space between the different variables that this requires, it is unlikely that the same conditions will be found again in the reasonable future. Thus, predicting cycles of boom and

bust is possible but not certain as the general cyclical influences are common to each cycle but the contextual determinants vary with time and adjustments in political economy. Consequently, the probability of seeing a system *reverse* exactly and completely to its initial state is extremely low. Once in a state of chaos, the system will probably not find itself again in the same situation in the foreseeable future. The question then becomes, how can chaotic systems and processes not so much revert to their original state but be transformed to new contexts of orderliness? The next question is, how can sociability arise out of chaos unless bonds of friendship and trust replace the suspicion and destructive self-interest which leads to crisis and disorder?

Trust and friendship as conditions of orderliness away from chaos

The progress of chaos to orderliness, particularly in an economic context, needs motivation from either general or specific interest (*self* or *mutual*). The causal nexus between crisis and ordering, facilitated by cooperation rather than managed by intervention, is nicely understood within the relative as opposed to absolute gains debate. This is a debate which also interrogates (and some might say invigorates) the friendship bonds which might otherwise be suspect in regulatory environments where crisis at least grew from competitive distortion, excess and operational suspicion. Friendship paradigms are particularly apposite for non-state centred regulatory domains. Friendship internationally, particularly between multinational organisations and NGO's presents significant global ordering possibilities, and is the foundation on which regulatory networking supranationally is proliferating.

In a global relations context, the reasons associated with international friendship suggest that the stronger the friendship, the less cause states have to be concerned with the relative gains of their friends. In other words, the vision of international cooperation implied by the idea of friendship stands in sharp contrast to that vision suggested by realist theorists for whom the only reason that can (and for some realists should) count in a state's foreign policy is whether the resulting actions will further secure or advance its narrowly understood self-interest. Hence, for realists, friendships between states must always be friendships of utility, and relative gains must always be a central (although not the sole) concern. In contrast, in realms of regulatory collaboration and sociability, international friendships can be supported by reasons that are not different in kind from the reasons supporting narrow self-interest. What changes is not the motivation of self-interest but the regulatory context and priority for its achievement.

In later sections, the idea of *communities of shared risk* is proposed as a foundational context wherein common interest replaces self-interest,

and absolute rather than relative gains prevail. For instance, the recent shift to medium-term sustainability and away from short-term profit is the explanation for a growth in *de-materialist* corporate decision-making when mega-corporations realise the expendability of say fossil fuels in the wider context of environmental degradation. This trend is evidence of sociability against previous competitive market positioning and immediate self-interest.

The aim of a regulatory strategy such as collaborative sociability designed upon the dynamic mechanisms of trust engenders greater compliance through the development of confidence and obligation in preferring conditions of sociability. Such a strategy evolves from a consequentialist theory preferring goal maximisation as a trust-based strategy where the goal becomes maximum adherence to regulatory standards.

Rather than constraining the regulatory game, as is the habit of external coercive strategies, a trust-based approach enables regulatory models to be designed around more dynamic and innovative frameworks where networks of regulatory conversation predominate in a global setting. The trust infused regulatory preference can shift between praise and punishment, regulation and self-regulation, citizenship and self-interest where virtue is nurtured, and its failure is met with a closure of cooperative pathways.[30]

Trust-based regulation can be wrongly regarded as utopian. If dispositions of trust are proposed and analysed outside particular political economies then trust falls back into the realm of normative aspiration and the collaborative outcomes of trust atmospheres are lost as mechanisms of regulatory force. Trust-based regulatory strategies in practice and action provide scope for realising the rewards of collaborative regulation, chaos to orderliness, in a far more sustainable fashion than through external compulsory intervention.

Trust as a regulatory context need not be utopian or purely aspirational. Conditions fostering trust are measurable and operational. These conditions are not only relative to political economy, but are also extractable in more universalised expressive and facilitative forms. Evaluating conditions for maximising or diminishing trust, even so, need to be understood within particular temporal and spatial situations of political economy.

Obviously, total trust environments remove the need for regulation. However, trust is a dynamic social state. Trust maintenance and collaborative sociability may require re-enforcement through regulation, preferably internal to that relationship and hence co-opted to the restoration of trust. Cooperative rather than interventionist and prescriptive regulation is more naturally aligned with and fostered within organic rather than mechanical conditions of trust. In the following section, the chapter explores both expressive and facilitative relationships from trust to pluralist regulation.

Cooperation or contingent necessity?

Whether cooperative regulation emerges organically from the smoke of crisis or is accepted reluctantly as the preferred alternative to mechanical regulation, the cooperative partners will to differing degrees dabble in trust.

The threat and use of the legal apparatus within the regulatory environment can be counterproductive for generating sustainable atmospheres of trust. The most productive way to achieve genuine acceptance of, and adherence to, regulations is not by an exclusive reliance upon legal coercion but rather through the use of strategies that attempt to bring out best practice and creative compliance responses from dependent agencies by nurturing virtue or the capacity for good.

Rather than regarding regulation as a zero-sum game with compliance only being motivated through rewards or punishments, regulatory encounters are more sustainably and less confrontationally conceptualised as dynamic relationships demanding flexible strategies that recognise the existence of a range of motivational diversity in adhering to regulatory demands. Generating the responsibilities of citizenship to sociability, rather than exclusion through sanction, fosters the internalisation of regulatory objectives and increases voluntary compliance.

Collaborative regulatory theory appreciates and confirms the productive capacity and dynamic nature of basing regulatory encounters upon trust relationships, an approach that secures compliance by eschewing threat, and training dependant agencies to value, maximise and exploit trustworthy capacities. The regulated and the regulators co-exist within an interdependent milieu but can often demand opposing regulatory outcomes. Therefore, interdependent mechanisms by which mutually cooperative interventions can be injected into the regulatory environment can within atmospheres of trust replace the choice of sanction-focused interventions for ordering away from chaos. Preceding atmospheres of trust which support collaborative regulation, it becomes essential for theory to explain the dynamics of trust relationships in particular environments.

Sociability depends on trust forming a constituent part of social, economic and political relationships which allow for regularity, predictability and continuity in orderly, not chaotic, relationships. Paradoxically risk is an essential feature of trust relationships. In bestowing trust, the choice to trust is a discretion based upon subjective assessments and presumptions that another dependent agent will act in a particular way in the future that is not at least contrary to the initiator's own interest. It is expected that the trustee will act in the interest of the trustor, without direct coercion to act in the desired way. However, trust relationships have symmetrical and asymmetrical constituents, the former being trust as confidence, relating to internalised human expectations that arise from intellectual and emotional understandings or beliefs that the natural, social or moral order will persist,

be stable and predictable. This conception of trust is based upon notions of positive intent, goodwill, and sociability towards civil society. Asymmetrical trust relationships are due to power differentials based upon knowledge and expertise, with the expectation that the expertise and knowledge will be used in a technically competent manner. These are the sorts of professional ethics which can be termed trust as obligation, relating to the undertaking of fidelity whereby one regards others in a relationship as having ideal obligations and responsibilities to demonstrate and place the interest of the weaker party (the trustor) above their own (the trustee).

Luhmann (1979)[31] argues that the delegation of trust is particularly functional in modem societies, because due to their complexity it is impossible to develop actions or plans that take into account all possible contingent futures. He states:

> Without trust only the very simple forms of human co-operation which can be transacted on the spot are possible, and even individual action is much too sensitive to disruption to be capable of being planned, without trust, beyond the immediately assured moment.

Sanction-based and compulsory regulation cannot replace any degree of trust because total enforcement is unachievable. A complete absence of trust would not even allow for the formulation of distrust in a direction on which action can be based, for this would force one to presuppose trust in another direction. Trust is functional in the sense that by investing in it we can motivate others to do likewise and create the conditions under which greater productive relationships can be achieved. Essential for the resilience of these conditions is the collaborative modification and compromise of specific interests towards the general interest of sociability. This is the capacity for interest management to produce a common good in communities of shared risk, which sociability is said to possess.

General interest of global sociability

Brand sees the issue at stake in global governance and regulation as *general interest*.

> That this general interest is always a societal construction as the result of social conflicts and the formation of compromises, will hardly be disputed. At the same time in most of the contributions on Global Governance this fact that this is constructed is not scrutinized further.

In an effort to advance this scrutiny, Brand offers an analysis of conditions for general interest which may both promote and consolidate collaborative regulation globally.

> There are three ways in which this (general interest) is related to dominant perspectives: the state can in this way become the embodiment of precisely this general interest, which provides the reason for the necessity of the ability of the state to exercise control. The question as to the concrete processes and the subject-matter of state politics can safely be put aside because as the expression of the general interest it *a priori* does not need a reason. Secondly, societal conflicts can be represented here as basically reconcilable or – politically more pointed – certain political self-images and strategies can be delegitimized. And finally, a general interest of 'world society' is formulated largely from the perspective of the 'OECD world', which not only knows where the problems lie but also has available the means to deal with them.
>
> (Explicitly the Group of Lisbon, 1997: 27)

Brand goes on to suggest that the sponsorship of general interest by state regulatory capacity can lead to tension or crisis:

> A remarkable tension arises here: 'world society's' general interest in political cooperation is not at all seen as being in conflict with 'national interests', which are in part quite different from the former. In national societies it has become the general interest to be competitive as a location *vis-à-vis* other societies.

But the competitive nation state advocating a general regulatory interest in economic deregulation may not complement the general interest of global communities which seek solutions to world problems through a collaborative rather than a competitive approach to political and economic relations.

> From my perspective this paradox between cooperation and competition is solved in the following way: the above described essentializing and inviolability of the economic will make it possible to regard political cooperation as the 'solution to world problems' as *not* being in open contradiction to the competition among locations, capital and labour, and the safeguarding of them by the competition state and by global.

Therefore, the imperative for individual political economy may be competitive while the approach to global problems is cooperative without challenge to either regulatory milieu provided the later has the appearance of normative or ideological neutrality.

> A general interest in cooperative solutions to obvious problems with which everybody is faced to the same extent is formulated in which capitalist competition is no longer seen as a problem but exists as something

> more or less natural. Precisely due to this ignoring of various aspects is it possible to organize certain consensuses in post-Fordism. This is not at all new: the various forces in society always struggle for the generalization of their specific interests. What has changed, however, is the concrete historical forms in which this takes place. The actors themselves are more or less aware – usually much more strongly than the social sciences which reflect upon them – that they cannot establish their interests completely but must be prepared to make compromises.

At this point, Brand proposes the essential underpinning of general interest as it is seen in the context of global governance: compromise. The same can be said of global regulation in a collaborative vein. What remains is to chart the achievement of collaboration through compromise in particular transitions from crisis to orderliness in specific political economies.

> . . . some 'truths' seem to be unquestionable: that globalization is untouchable in its (economic) core which means the fundamental shift of power relations, a concept of politics which refers to cooperation and *realpolitik*. With this, world problems which seem to affect all people can be resolved. The discourse is so attractive because it contributes to the generalization of dominant interests.[32]

Common interest pushing and enjoying regulatory collaboration, mechanically arising out of compromise, crafted organically from dominant interest: as the reality of global governance. The organic emergence of common good though the regulatory mutualities of cooperation is a more powerful process to legitimate governance than could be expected of mechanical and imposed regulatory forces, even the authority of law.

The organic reality – Heterogeneous mix of regulatory approaches

A foundation of organic regulation crisis to order, wherein cooperation is a dominant discourse and process, requires the development of *goodwill* relationships. In commercial regulatory theory, this has been seen to mirror social bonds of friendship cooperation. Irrespective of whether friendship in commerce grows from compromised self-interest, the eventual regulatory shift to general interest better ensures sociability in political economy.

Friendship is a positive and collaborative regulatory relationship. The language of friendships provides powerful reasons for states and their political economies to engage in *other-regarding conduct*. The same reasons that justify a state's self-regard (self-interest) also justify its regard for others. These reasons rest on whether the basic institutions of a state – one's own or another's – are minimally collaborative and empathetic. States and their

political economies have reason to enter into different levels of friendship. These differential friendship relationships in turn generate different expectations regarding consultation and collaboration as well as respect for autonomy and self-interest.

Friendships between agencies and institutions are based either on considerations of advantage or on the character of parties to the relationship. Friendships based on character carry independent and substantial weight, which in turn tends to legitimise the bearer. Such friendships also generate a series of questions regarding the kinds of reasons that could draw particular elites together and whether those reasons could motivate actions that push beyond the concerns of narrow dominant self-interest.

The parity of reasons for self-concern and the reasons for concern for one's friends may be based on qualities of character a pre-eminent special concern for one's own interests in that all people possessing valued characters compose a pool of impersonal friends, and that this view of friendship leaves more or less open how one should act towards those outside the circle of friends.

This analysis requires a presumptive understanding of conditions of self-interest from which friendship relationships are selected and preferred. Paramount among these conditions is the mutuality and maintenance of respect. The bonds essential for the perpetuation of community and the collaboration on which it relies are respect for the essentials of civil society. If respect breaks down, crises in political economy emerge from the community upwards. If we transfer the consideration of community (and communitarian collaboration) to a global frame then the conditions of trust, respect, friendship and mutuality of interest on which sociability relies are much more difficult to cultivate and maintain organically or sanction and impose through mechanical intervention.

Political economy and global community – Necessary simplicities

Economic and political realities in nominated political contexts mediate both the reasons for the crisis and the imperatives for regulation. They also incubate dominant interest and negotiate protective and beneficial compromise as a pre-condition for cooperation.

Whether organic or mechanical in origin and operation, regulatory alternatives work best in an atmosphere approaching equality of arms (or minimum justice). By this, I am not suggesting that the fundamental contractual myth of parity in standing is necessary among and between parties facing the need to regulate crisis to order. However, comity is a key contextual feature for regulation serviced by trust, imbuing friendship and giving legitimacy to game choice and differential value.

Choice and capacities to choose are dependent on conditions of comity (as suggested above) which promote rather than distract from sociability. 'Comity' is more than simply being nice to one another. It requires a certain degree of manners within conventional compliance. Manners are conventions, and conventional compliance requires respect for 'laws and usages' in an exchange of reciprocity within conventions. Against the civility of conventions are rules for achieving and regulating comity.

However, comity as a reason for regulatory collaboration may be as misconstrued as the simple causal assumption that private sector interests cooperate to self-regulate in order to stave off impending interventionist and compulsory state regulation. Collaboration, masquerading comity rather than compromise reflecting dominant self-interest, can also benefit from the legitimacy of organic rather than mechanical origination. In addition, the allusion of comity gains credibility from its natural alignment with regulatory socialisation.

Brand suggests (in similar terms for global governance) that it is hegemony rather than harmony at the heart of collaborative alliances:

> Finally, one important question remains, namely whether Global Governance opens up opportunities for a new, higher evaluation of societal processes (cf. e.g. Ruppert, 2000: 56). This cannot be decided abstractly. As a counterpoint to US unilateralism it is certainly possible and currently urgently necessary. And at the fringes, too, more critical positions can emerge, as the feminist debate for example has shown. How far Global Governance will become a hegemonic discourse depends not only on the struggles over interpretation but is also a question of international and inner-societal conflicts over institutional developments, material concessions, etc.[33]

Collaborative regulation represents a governance force suited to confronting and resolving the international and inner societal conflicts which fuel crisis and chaos. The issue to resolve is whether the motivation for collaboration is satisfying hegemonic interest or more inclusive and universal common good. To determine the complexity of regulatory collaboration in practice is a challenge for regulatory scholarship and not just the craft of partial policy-making.

Conclusion: A regulatory anthropology of cooperation – Reshaping catastrophic collective risk?

Regulatory scholarship too is sometimes myopic around disciplinary and theoretical exclusivity and as such limited as it translates to policy solutions.[34] Add to this the difficulties for critical scholarship in accessing privileged knowledge in the hands of the regulator or the regulated, and

the task of theory testing is exacerbated. As Braithwaite and Ayres argue[35] in modern regulatory thinking there is a need to transcend debates about regulation/deregulation, and about the limits of command.

> High levels of regulation are necessary both on grounds of economic efficiency and risk management. Effective regulation in conditions of great complexity depends on fostering norms among the regulated such that they will voluntarily comply, and depends on the creation of a constant dialogue between regulators and the regulated: hence 'responsive regulation', the coinage for which Braithwaite is best known.[36]

So the *smart regulation* literature answers the question when can we abandon command by looking towards a 'community of shared fate' – where poor performance on the part of one damages the prospects of all.[37]

Is this reflected in the recent trend in global regulation to transcend legal formalism by trading in broad definitions rather than sharp rules? Where it is 'creative opportunism' such as tax avoidance that is the focus of regulation, legal formalism is undermined regularly by the creativity of strategic actors searching for the advantage towards self-interest. Yet an alternative self-regulatory approach to controlling creative, individualist advantage is itself undermined when:

> . . . tensions in legal ideology, conflicts with legislative and regulatory approaches, disagreements over how to best achieve efficient control and at what price, vested interests, powerful lobbies against the broad approach all voiced in the discourse of formalism, have provided the first nail in the coffin of anti-formalist control.[38]

The tension here is not between legal rules and creative avoidance but within the foment of competing self-interest, ungoverned by law. The foundation of the regulatory conundrum is not so much the choice between formality and compliance, intrusiveness or collaboration, but rather within the spirit of individual self-interest. The rational choice of the individual creative opportunist outside the general interest will undermine any and all regulatory strategies. The failure to recognise minimum utility in regulation even for self-interest removes the critique from preferred regulatory styles to further strategies of avoidance. It is the recognition of multiple interests playing out for each regulatory stakeholder which invites consideration of mutuality. Therefore, the key to regulatory success is the manipulation of the motivation for collaboration: exploiting the community of shared fate. Inducing cooperation in adverse individualist contexts of self-interest will produce at best creative compliance which ignores the general interest spirit of collaborative regulation in preference for comparative advantage.

> Creative compliance is stimulated by strong motivations for resisting control. These motivations do not disappear with the first threat of a different form of control. On the contrary, they become motivations for resisting and undermining anti-formalism.[39]

In the context of the *regulatory society* where risk is the driving force for regulation, a transition from self-interest to general interest may be motivated out of the peculiar social entities which are post-meltdown, no-turning-back global warming political economies:

> The basis of their solidarity and sense of collective identity have been eroded and at the same time the substantially realistic expectations of their citizens as to security, well-being and improvement in their circumstances are constantly increased by the application of science and technology.[40]

As that faith in science and technology is wasted within crises of uncontrollable proportions, the triumph of self-interest over general interest in a growing and desperate community of shared fate will no doubt be short-lived. The emerging age of corporate social responsibility (CSR) from a world of *fortress corporation* at the close of the last century is evidence. This transition in interest motivation will provide an impetus for collaborative regulation not known in recent post-industrial ages of political economy and globalisation.

The suggested *science* of crisis to ordering through regulatory collaboration is more suited to a political climate that sees the need for regulation as conflict resolution or even crisis management within a reactive and diminishing state which is limited to providing a framework within which citizens can pursue their chosen goals towards the general interest of cooperative sustainability rather than individualised advantage. This organic regulatory atmosphere is contrary and often alien to more recently conceptualised state-driven mechanical ordering more suited to interventionist and imposed policy within an activist state dedicated to the 'material and moral betterment of its citizens'.[41]

Cotterrell in *Law's Community* sees the move to a more inclusive conception of regulation as requiring a new way of thinking, wherein regulation becomes a central cohesive force behind motivations for sociability.

> we ought . . . to stop thinking of legal regulation primarily as something imposed on the rest of social life; and to think of it equally as something that might grow spontaneously out of every day conditions of social interaction, and might provide a part of the cement that gives moral meaning to social existence.[42]

The pressure towards collaborative regulation in a more generalised interest in order to ensure the sustainability of communities of shared risk cannot be separated from an impending sense of millenarianism. As Hood suggests, individual choice will be regulated and constrained through group choice, 'by binding the individual into a collective body'.[43]

Hood sees this as generating a simple but powerful typology of styles of public management: fatalist, hierarchist, individualist and egalitarian. Despite the inevitability of collaboration in communities of shared risk and shared fate, this does not tell us, beyond a greater mutuality of interest, what will be the styles, techniques, instruments and languages of regulation, which will emerge. Interrogating sociability rather than vague notions of communities united in the face of catastrophe and crisis may assist in understanding the features of regulatory transitions to modern global ordering.

Notes

1 Hierarchy and Governance: Of Shadows or Equivalence?

1. Braithwaite, J., Coglianese, G. & Levi-Faur, D. (2007) 'Can Regulation and Governance Make a Difference: Editor's Introduction', *Regulation & Governance* 1/1: 1–7, at p. 4.
2. Findlay, M. (1999) *The Globalisation of Crime: Understanding Transitional Relationships in Context*. Cambridge: Cambridge University Press.
3. As well summarised in Börzel, T. & Risse, T. (2010) 'Governance without a State: Can It Work?', *Regulation & Governance* 4/2: 113–134.
4. Ibid., at p. 118.
5. Gerth, H. & Wright Mills, C. (1946) *From Max Weber: Essays in Sociology* (ed./trans./intro.). Oxford: Oxford University Press; Lassman, P. & Speirs, R. (1994) *Weber: Political Writings* (ed./trans.). Cambridge: Cambridge University Press.
6. For a discussion of this in terms of global governance and new politics, see Teubner, G. (1997) 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.) *Global Law without a State*. Brookfield: Dartmouth Publishing, pp. 3–28.
7. See Braithwaite, J. (2008) *Regulatory Capitalism: How It Works, Ideas for Making It Work Better*. Cheltenham: Edward Elgar Publishing.
8. Cooley, A. (2003) 'Thinking Rationally about Hierarchy and Global Governance', *Review of International Political Economy* 10/4: 672–684, at p. 673.
9. Ibid., at p. 673; also see Strange, S. (1996) *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge: Cambridge University Press.
10. Börzel & Risse (2010), p. 120.
11. Bernstein, S. & Cashore, B. (2007) 'Can Non-State Global Governance Be Legitimate? An Analytical Framework', *Regulation & Governance* 1/4: 347–371.
12. I include commercial constellations in my consideration of the modernised state as they exhibit comparable and parallel authority and power potentials which have recognised and formal regulation significance and may contribute significantly to the sanctioning alternatives within state governance. An exploration of this dimension of regulation within modernised states appears in Murphy, K., Tyler, T. & Curtis, A. (2009) 'Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?', *Regulation & Governance* 3/1: 1–26.
13. For a discussion of this notion, see Bernstein and Cashore (2007).
14. These are tellingly critiqued in Brand, U. (2006) 'The World Wide Web of Anti-Neoliberalism. Emerging Forms of Post-Fordist Protest and the Impossibility of Global Keynesianism', in D. Plehwe et al. (eds.) *Neoliberal Hegemony: A Global Critique*. London: Routledge, pp. 236–251.
15. This has been diminishing in recent times of global conflict, in particular where the state outsources the means and delivery of violence and as such can only claim to authorise this process of agency.

16. For a general discussion of this at both expressive and facilitative levels see Morgan, B. & Yeung, K. (2007) *An Introduction to Law and Regulation: Text and Materials*. Cambridge: Cambridge University Press, Chapter 6.
17. See Bernstein and Cashore (2007).
18. This is a question asked by Ralph Michaels in his critique of considering Lex Mercatoria as law beyond the state. See Michaels, R. (2007) 'The True Lex Mercatoria: Law beyond the State', *Indiana Journal of Global Legal Studies* 14/2: 447–468.
19. For a richer discussion of this, see Teubner (1997).
20. Perez, O. (2002) 'Using Private–Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts', *Journal of Law and Society* 29/1: 77–110.
21. Michaels (2007), p. 452.
22. Michaels, R. (2010) 'The Mirage of Non-State Governance', *Utah Law Review* 1: 31–45.
23. Ibid., at p. 44.
24. Börzel and Risse (2010), p. 114.
25. Brand, U. (2005) 'Order and Regulation: Global Governance as a Hegemonic Discourse of International Politics?', *Review of International Political Economy* 12/1: 155–176.
26. Börzel and Risse (2010), p. 115.
27. Börzel and Risse (2010), p. 128.
28. March, J. & Olsen, J. (1998) 'The Institutional Dynamics of International Political Orders', *International Organisation* 52/4: 943–969.
29. Braithwaite (2008), Chapter 2.
30. This term infers a process where even the most self-interested firms are turned toward the common good not through altruism but pragmatism which reveals the commercially consolidating potential of CSR and community investment.
31. See Findlay, M. (2007) 'Misunderstanding Corruption and Community: Comparative Cultural Politics in Corruption Prevention in the Pacific', *Asian Journal of Criminology* 2/1: 47–56.
32. Börzel and Risse (2010), pp. 123–126.
33. Jordana, J. & Levi-Faur, D. (1994) 'The Politics of Regulation in the Age of Governance', in J. Jordana & D. Levi-Faur (eds.) *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*. Cheltenham: Edward Elgar Publishing, pp. 1–28.
34. Esty, D. & Geradin, D. (2000) 'Regulatory Co-opetition', *Journal of International Economic Law* 3/2: 235–255.
35. Defined by Esty and Geradin as an optimal business strategy requiring a mix of competitive and cooperative actions. Also see, Brandenburger, A. & Nalebuff, B. (1996) *Co-opetition*. New York: Currency Doubleday.
36. Taylor-Gooby, P. (2008) *Reframing Social Citizenship*. Oxford: Oxford University Press.
37. Haines, F. (2011) 'Addressing the Risk, Reading the Landscape: The Role of Agency in Regulation', *Regulation & Governance* 5/1: 118–144, at p. 119.
38. Silbey, S., Huising, R. & Coslovsky, S. (2009) 'The Sociological Citizen: Relational Interdependence in Law and Organizations', *L'Annee Sociologique* 59/1: 201–229, at p. 203.
39. Wright Mills, C. (1959) *The Sociological Imagination*. New York: Oxford University Press.
40. Michaels (2010), pp. 44–45.

41. Selby, J. (2007) 'Engaging Foucault: Discourse, Liberal Governance and the Limits of Foucauldian IR', *International Relations* 21/3: 324–345, at p. 324.
42. Michaels (2010), pp. 44–45.
43. Findlay (1999).
44. Pigouvian market analysis saw market failure not as a failure of markets but of market conditions. For a development of these views, see Carlton, D. & Loury, G. (1980) 'The Limitations of Pigouvian Taxes as a Long-Run Remedy for Externalities', *The Quarterly Journal of Economics* 95/3: 559–566.
45. Shleifer, A. (2010) 'Efficient Regulation', in D. Kessler (ed.) *Regulation versus Litigation: Perspectives from Economics and Law*. Chicago: University of Chicago Press, pp. 27–43.
46. Braithwaite (2008), pp. 28–29.
47. Coase, R. (1960) 'The Problem of Social Cost', *Journal of Law and Economics* 3: 1–44.
48. Levi-Faur, D. & Jordana, J. (eds.) (2005) *The Rise of Regulatory Capitalism: The Global Diffusion of a New Order (The ANNALS of the American Academy of Political and Social Science Series)*. London: Sage Publications, Inc.; also see Jordana, J., Levi-Faur, D. & Fernández i Marín, X. (2011) 'The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion', *Comparative Political Studies* 44/10: 1343–1369.
49. Gunningham, N., Grabosky, P. & Sinclair, D. (1998) *Smart Regulation: Designing Environmental Policy*. Oxford: Clarendon Press.
50. Parker, C. (2002) *The Open Corporation: Effective Self-Regulation and Democracy*. Cambridge: Cambridge University Press.
51. Ayres, I. & Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*. Oxford: Oxford University Press.
52. Baldwin, R. & Black, J. (2008) 'Really Responsive Regulation', *The Modern Law Review* 71/1: 59–94.
53. Sparrow, M. (2000) *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*. Washington, DC: Brookings Institution Press.
54. Jordana and Levi-Faur (1994).
55. An example of this is the common response of economic analysts that they did not foresee the financial meltdown of 2009 continuing.
56. Black, J. (2002a) 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World', *Current Legal Problems* 54/1: 103–146.
57. In proposing this alternative, we would be foolish to ignore the economic (and more particularly, market) objectives for regulation. Market meltdown will feature as one of the crisis scenarios with which the book engages. The assertion is intended, however, to allow for situations where a regulatory fixation on market failure may itself lead to related and non-related global crisis regulatory challenges.
58. Stigler, G. (1971) 'The Theory of Economic Regulation', *The Bell Journal of Economics and Management Science* 2/1: 3–21.
59. For a discussion of this in the context of promoting general interests in construction contracts where agreements for advancing the built environment endanger the quality of life for non-contracting communities, see, Perez (2002).
60. While maintaining such distinction throughout their analysis Morgan and Yeung engage in a hybridization of theory and practice such as Braithwaite's Tripartism

which undermines in action the public and private regulatory domains. Morgan and Yeung (2007), Introduction.

61. Findlay, M. (2008a) *Governing through Globalised Crime: Futures for International Criminal Justice*. Devon: Willan Publishing.
62. Cooley (2003), pp. 672–674.
63. Findlay (1999); Findlay (2008a).
64. Selznick, P. (2002) *The Communitarian Persuasion*. Baltimore: Woodrow Wilson Centre Press, p. 210.

2 Comparative Theories of Regulation – North vs South Worlds

1. Disciplinary deficit and silos of scholarship are within this critique.
2. See Ayres, I. & Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*. Oxford: Oxford University Press.
3. The critical characteristic of sharp regulation is mechanical interventionism, structured on hierarchy culminating in sanction, whatever might be its external authority. This can take the form of state sponsored or private interest sanctioning.
4. Mutuality is discussed in a particular applied sense in Chapters 6 and 8.
5. Black, J. (2002b) 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy* 27: 1–35, at p. 26.
6. Sunstein, C. (1996) 'The Expressive Function of the Law', *University of Pennsylvania Law Review* 144/5: 2021–2053.
7. In this context, sanctions for anti-competitive behaviour usually take the form of economic penalties rather than being penal. Economic sanctions employed by the state or by supra-national organisations offer another example of the link between economic and regulatory theories.
8. Findlay, M. & Hanif, N. (forthcoming) 'Disturbing the Rice Pot: Market Modelling Criminal Enterprise'.
9. Padula, G. & Dagnino, G. (2007) 'Untangling the Rise of Coopetition: The Intrusion of Competition in a Cooperative Game Structure', *International Studies of Management and Organisation* 37/2: 32–52.
10. There is no time here to explore the very interesting relationship between values and culture; a critical determinant in the selection of regulatory strategies. See Jing, R. & Graham, J. (2008) 'Values Versus Regulations: How Culture Plays Its Role', *Journal of Business Ethics* 80/4: 791–806.
11. See Lie, J. (1997) 'Sociology of Markets', *Annual Review of Sociology* 23: 341–360.
12. Sunstein, C. (1986) 'Legal Interference with Private Preferences', *University of Chicago Law Review* 53/4: 1129–1174.
13. Murphy, K., Tyler, T. & Curtis, A. (2009) 'Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?', *Regulation & Governance* 3/1: 1–26.
14. For a discussion of hard and soft laws and the context of the legitimacy and effectiveness of norms emanating from different forms of law, see Karlsson-Vinkhuyzen, S. & Vihma, A. (2009) 'Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework', *Regulation & Governance* 3/4: 400–420.
15. Cherney, A. (1997) 'Trust as Regulatory Strategy: A Theoretical Review', *Current Issues in Criminal Justice* 9/1: 71–84, at p. 71.

16. Black, J. (1996) 'Constitutionalising Self-regulation', *The Modern Law Review* 59/1: 24–55, at p. 30.
17. This shows that SRAs and the law have a symbiotic relationship in that SRAs, on the one hand, require the endorsement of law to ground their central norms and principles, to motivate compliance, to encourage and structure mediation and ultimately to sanction destructive self-interest. Law, on the other hand, can rely on SRAs to generate and maintain regulatory relationships which would otherwise confront or capture excessively interventionist legal institutions and processes.
18. Baldwin, R & Black, J. (2008) 'Really Responsive Regulation', *Modern Law Review* 71/1: 59–94.
19. See Uslaner, E. (1991) 'Comity in Context: Confrontation in Historical Perspective', *British Journal of Political Science* 21/1: 45–77.

3 Regulatory Instruments, Strategies and Techniques – Sticks and Carrots

1. While regulatory sociability is best achieved as flat regulation wherein coercion is replaced by cooperation, the path to sociability (and mutuality of interest) may rely on a range of inducements from peer pressure to medium-term sustainability such as self-interest. Continuing with the theme of unhelpful duality, sociability is a transition away from coercion but may need incentives to achieve eventual collaboration and mutuality.
2. Eisenberg, N., Fabes, R. and Murphy, B. (1995) 'Relations of Shyness and Low Sociability to Regulation and Emotionality', *Journal of Personal and Social Psychology* 68/3: 505–517.
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4 Contexts of Global Regulatory Challenge – Compulsion or Compliance?

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65. Ibid., p. 628.
66. Findlay (2008a).
67. Findlay (2012).
68. Slaughter (2005), pp. 623–624.
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71. Brand (2005), p. 169.

5 Regulating Communication – New Media, Old Challenges

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3. See the recent debate concerning state regulation of Internet content and trade for the purpose of protecting intellectual property.
4. These include mobile telephones, Internet communication and now Internet-based mobile telephone communication (e.g. Blackberry IM, whatsapp, etc.).
5. Social cost here has several meanings, from the cost to society incurred through irresponsible usage, to the cost incurred by individuals and their privacy by opening up themselves and their 'messages' to intended and unintended audiences.
6. Platform creators and owners, platform message producers, platform message recipients and the interactive progress of one to another as messages are communicated down the line.
7. For instance, the offending comment once identified may be removed, other users may report the author for being abusive, moderators may shut down the account of the offender, or the offender and their views may become socially ostracised in the community through retaliatory comments or through a form of communication 'banishment'.
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80. Strange, S. (1983) 'Cave! Hic Dragones: A Critique of Regime Analysis', in S. Krasner (ed.) *International Regimes*. Ithaca and London: Cornell University Press, pp. 337–354.
81. Guillén and Suárez (2005).
82. Hills, J. (1994) 'Dependency Theory and Its Relevance Today: International Institutions in Telecommunications and Structural Power', *Review of International Studies* 20/2: 169–186.
83. Kula, E. (2012) 'Geographic Margins, Technological Connections and Political Protest: The Case of Airport Protests', *Western Political Science Association*, http://wpsa.research.pdx.edu/meet/2012/kula.pdf
84. Craig, R. (August 16, 2011) 'Viewpoint: The Case Against Social Media Regulation', *Randall Craig*, http://www.randallcraig.com/case-against-social-media-regulation/
85. Ratti, C. and Townsend, A. (2011) 'The Social Nexus', *Scientific American* 305: 42–48.
86. Kula (2012).
87. It would likely have taken a much longer time, more planning and coordination and would possibly have involved less people.
88. Demidov, O. (2012) 'Social Networks in International and National Security', *Security Index: A Russian Journal on International Security* 18/1: 23–36.
89. Casilli, A. and Tubaro, P. (2011) 'Why Net Censorship in Times of Political Unrest Results in More Violent Uprisings: A Social Simulation Experiment on the UK Riots', *Working Paper*, http://ssrn.com/abstract=1909467
90. Demidov (2012).
91. Leamon, R. (August 15, 2011) 'How Should Social Media Be Regulated?', *March Communications*, http://www.marchpr.com/blog/2011/08/how-should-social-media-be-regulated
92. Findlay, M. (1999) *The Globalisation of Crime: Understanding Transitional Relationships in Context*. Cambridge: Cambridge University Press.
93. This question provokes a wider consideration of the 'class base' of individualised human rights such as freedom of speech which tends to challenge hopes for universality. This is an undercurrent in the text's interest in state dualities, but I do not have the luxury of space to develop it here. More discussion around individual integrity appears in Chapter 6.
94. Including regulatory arbitrage, anonymity, scarce resources: Murray, A. and Scott, C. (2002) 'Controlling the New Media: Hybrid Responses to New Forms of Power', *The Modern Law Review* 65/4: 491–516.
95. Murray and Scott (2002).
96. Friedman, T. (December 17, 2011) 'Help Wanted', *The New York Times*, http://www.nytimes.com/2011/12/18/opinion/sunday/friedman-help-wanted.html

97. Rosenau, J. (2007) 'Governing the Ungovernable: The Challenge of a Global Disaggregation of Authority', *Regulation & Governance* 1/1: 88–97.
98. Friedman (2011).

6 Regulating Human Integrity – Who Owns Your Body?

1. See for example: Yamin, A. and Gloppen, S. (eds.) (2011) *Litigating Health Rights: Can Courts Bring More Justice to Health?* Cambridge: Harvard University Press. This text includes case studies from Costa Rica, South Africa, India, Brazil, Argentina and Colombia.
2. Foucault uses the term 'securitise' to refer to techniques that foster life and that work at the level of population, see, for example, Foucault, M. (2007) *Security, Territory, Population: Lectures at the Collège De France, 1977–1978* (trans. G. Burchell) Basingstoke: Palgrave Macmillan; Foucault, M. (2003) *'Society Must Be Defended': Lectures at the Collège De France, 1975–1976* (trans. David Macey) London: Picador.
3. The cultural embeddedness of the notion of 'ownership' and 'use' of one's own body is evident, for instance, in the growing interest in the discipline of 'animal law', particularly the challenge by some Indian scholars as to whether the rights of animals (in bodily integrity and labour in particular) should be seen as different from those of humans.
4. Waldron, J. (2011) 'How Law Protects Dignity', *New York University School of Law, Public Law Research Paper Series No. 11-83*.
5. Cotterrell, R. (2008) 'Community as a Legal Concept? Some Uses of a Law-and-Community Approach in Legal Theory', in R. Cotterrell (ed.) *Living Law: Studies in Legal and Social Theory*. Aldershot: Ashgate, pp. 17–28; *Queen Mary School of Law Legal Studies Research Paper No. 95/2011*.
6. This is very apparent in the issues raised by clinical trials, where the individual personal integrity is accorded differential value determined by factors such as nationality (as nation states provide differing levels of bodily protection in trials); see, for example, Cooper, M. (2011) 'Experimental Republic: Medical Accidents (Productive and Unproductive) in Post-socialist China', *East Asian Science, Technology and Society: An International Journal* 5/3: 313–327. It is also determined in part by gender; see Waldby, C. and Cooper, M. (2008) 'The Biopolitics of Reproduction: Post-Fordist Biotechnology and Women's Clinical Labour', *Australian Feminist Studies* 23/55: 57–73.
7. Economic valuation of life, assessed through worker's compensation, and life insurance are now generally accepted as part of economic measure of the value of life: Viscusi, W. (2003) 'The Value of Life: Estimates with Risks by Occupation and Industry', *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series, Paper No. 422*.
8. For a more detailed consideration of this matter, see Clarke, K. and Ogus, A. (1978) 'What is a Wife Worth?', *British Journal of Law and Society*, 5/1: 1–25.
9. Viscusi, W. (2009) 'The Devaluation of Life', *Regulation & Governance* 3/2: 103–127.
10. Fourcade, M. (2009) 'The Political Valuation of Life', *Regulation & Governance* 3/3: 291–297.
11. Sunstein, C. (1986) 'Legal Interference with Private Preferences', *University of Chicago Law Review* 53/4: 1129–1174.
12. Fears, M. (September 10, 2009) 'Senator Kerry Launches New Global Warming Campaign', http://www.examiner.com/environmental-news-in-national/senator-kerry-launches-new-global-warming-campaign

13. Bauman, Z. (2007) 'Humanity on the Move', *Liquid Times: Living in an Age of Uncertainty*. Cambridge: Polity Press, Chapter 2.
14. Ibid., p. 28.
15. Ibid., p. 54.
16. Clamon argues that conflicts of interests between the competing interests – such as those between commercial research interests and public university-based research – is a major factor compromising patient safety: Clamon, J. (2003) 'The Search for a Cure: Combating the Problem of Conflicts of Interest That Currently Plagues Biomedical Research', *Iowa Law Review* 89/1: 235–271.
17. Braithwaite, J. (1984) *Corporate Crime in the Pharmaceutical Industry*. London: Routledge & Kegan Paul.
18. See Trubek, Rees, Hoflund, Farquhar and Heimar for a discussion of the way in which, in a plural regulatory environment, the methods of accountability proliferate: Trubek, L., Rees, J., Hoflund, A., Farquhar, M. and Heimer, C. (2008) 'Health Care and New Governance: The Quest for Effective Regulation', *Regulation & Governance* 2/1: 1–8.
19. Clamon (2003).
20. Resnik, D. (1999) 'Privatized Biomedical Research, Public Fears, and the Hazards of Government Regulation: Lessons from Stem Cell Research', *Health Care Analysis* 7/3: 273–287.
21. University of Toronto Joint Centre for Bioethics (2005) 'Stand on Guard for Thee: Ethical Considerations in Preparedness Planning for Pandemic Influenza', A report of the University Toronto Joint Centre for Bioethics pandemic Influenza Working Group, http://www.jointcentreforbioethics.ca/people/documents/upshur_stand_guard.pdf
22. Braithwaite, J. (1993) 'Transnational Regulation of the Pharmaceutical Industry', *The ANNALS of the American Academy of Political and Social Science* 525/1: 12–30.
23. Schiffino, N. and Varone, F. (2006) 'Regulating Biomedicine in Belgium and France: Neighboring Countries, Diverging Policies', *German Policy Studies* 3/4: 648–697.
24. The section refers to the Indian position not to grant patents prior to 2005. Following The World Trade Organisation agreement on patents that year, India said that it would not apply to medicines created before 1995. The section prohibits the granting of patents to newer forms of a known medicine unless it significantly improves the medicine's efficiency and effectiveness.
25. Bajaj, V. and Kumar, H. (March 7, 2012) 'Patent Case Could Reduce the Flow of Medications', *International Herald Tribune*, pp. 1, 18.
26. King, K. (1998) 'A Proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects', *Stanford Journal of International Law* 34: 163–206.
27. Ibid.
28. *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*. Washington, DC: US Government Printing Office 2: 181–182.
29. World Medical Association Declaration of Helsinki – Ethical Principles for Medical Research Involving Human Subjects, http://www.wma.net/en/30publications/10policies/b3/index.html
30. Council for International Organizations of Medical Sciences & World Health Organisation (1993) *International Ethical Guidelines for Biomedical Research Involving Human Subjects*. Geneva: World Health Organisation, http://www.cioms.ch/publications/guidelines/guidelines_nov_2002_blurb.htm

31. Clamon (2003).
32. King (1998).
33. Schiffino and Varone (2006).
34. Schiffino and Varone's comparative analysis of two seemingly similar countries highlights how differing attitudes to international and regional pressure shape the effectiveness of a particular method of regulation: Schiffino and Varone (2006).
35. World Health Organisation (2005) *International Health Regulations*, http://www.who.int/ihr/en/
36. It is interesting to see pandemic prevention securitised in order to increase risk and sharpen fate. Katz, R. and Fischer, J. (2010) 'The Revised International Health Regulations: A Framework for Global Pandemic Response', *Global Health Governance* 3/2: 1–18.
37. Black, J. (2008) 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', *Regulation & Governance* 2/2: 137–164.
38. For instance, in 2004, the Cambodian government reversed its permission for a trial of HIV pre-exposure antiretroviral drug Tenofovir within Cambodia's sex worker population after HIV and sex worker activists brought the disparities between participation and benefits for Cambodia to public attention: Singh, J. and Mills, E. (2005) 'The Abandoned Trials of Pre-Exposure Prophylaxis for HIV: What Went Wrong?', *Public Library of Science Medicine* 2/9: 824–827.
39. Black, J. (1998) 'Regulation as Facilitation: Negotiating the Genetic Revolution', *The Modern Law Review* 61/5: 621–660.
40. King (1998).
41. In fact, the 2009 H1N1 influenza outbreak provided the first test of the IHR, and the response has been described as one of 'unprecedented efficiency in international communications and cooperation': Katz and Fischer (2010).
42. I am not suggesting that cooperation across boundaries is not limited or does not require improvement; see, for instance, the discussion in: Kumanan, W., Brownstein, J., and Fidler, D. (2010) 'Strengthening the International Health Regulations: Lessons from the H1N1 Pandemic', *Health Policy Plan* 25/6: 505–509.
43. Koivusalo, M. (2011) 'Trade and Health: The Ethics of Global Rights, Regulation and Redistribution', in S. Benatar and G. Brock (eds.) *Global Health and Global Health Ethics*. Cambridge: Cambridge University Press, pp. 143–152, at p. 152.
44. Trubek et al. (2008).
45. Black (1998).
46. Ibid.
47. Ibid.
48. Ibid.
49. See, for instance, Nelson, V. (1999) 'The Reagan Administration's Response to AIDS: Conservative Argument and Conflict', in W. Elwood (ed.) *Power in the Blood: A Handbook on AIDS, Politics and Communication*. Mahwah, NJ: Lawrence Erlbaum Associates, pp. 53–66.
50. Oscar Wilde, as quoted in Beaumont, M. (2004) 'Reinterpreting Oscar Wilde's Concept of Utopia: The Soul of Man under Socialism', *Utopian Studies* 15/1: 13–29.
51. World Hunger Education Service (2012) World Hunger and Poverty Facts and Statistics, http://www.worldhunger.org/articles/Learn/world%20hunger%20facts%202002.htm

52. Trubek (2008).
53. Ibid.
54. Brennan and Berwick argue that organisational capacity relies on innovation and the ability to learn from innovation, see Brennan, T. and Berwick, D. (1996) *New Rules: Regulation, Markets and the Quality of American Health Care*. San Francisco, CA: Jossey-Bass.
55. For an analysis of the conditions surrounding regulatory dialogue, see Black (1998).

7 Regulating Finance and Economies – Profit and Beyond

1. Braithwaite, J. (2008) *Regulatory Capitalism: How It Works, Ideas for Making It Work Better*. Cheltenham: Edward Elgar Publishing, Chapter 2.
2. Following the collapse of the Lehman Brothers merchant bank in 2008, there appeared to be a global consensus in banking regulation that things had to change. But powerful resistance from banking industry organisations such as the Washington-based Institute of International Finance (comprising the major banks) saw a prevarication in regulatory will, and the impact of the 2009 financial meltdown was largely lost to regulators.
3. Omarova, S. (2011) 'Bankers, Bureaucrats and Guardians: Towards Tripartism in Financial Services Regulation', *Journal of Corporation Law* 37/3: 621–674, p. 622.
4. Ibid., p. 622.
5. *International Herald Tribune* (December 22, 2011) 'Banker Pushes to Defuse Global Threat', p. 1.
6. Krugman, P. (December 18, 2011) 'Will China Break?', http://www.nytimes.com/2011/12/19/opinion/krugman-will-china-break.html?_r= 1
7. Todayonline (December 22, 2011) 'Wen Tells Chinese Banks to Clean Up Their Act', http://www.todayonline.com/Business/EDC111222-0000061/Wen-tells-China-banks-to-clean-up-their-act
8. Soros, G. (October 30, 2009a) 'Soros: The Way Forward', http://www.ft.com/cms/s/2/2ee0b622-bfeb-11de-aed2-00144feab49a.html
9. Soros, G. (October 30, 2009b) 'Soros: Financial Markets', http://www.ft.com/cms/s/2/2ee0b622-bfeb-11de-aed2-00144feab49a.html
10. Lie, J. (1997) 'Sociology of Markets', *Annual Review of Sociology* 23: 341–360, pp. 353–354.
11. For a discussion of these themes, see Laffont, J. (1994) 'The New Economics of Regulation Ten Years After', *Econometrica* 62/3: 507–537.
12. Purcell, M. (2002) 'The State, Regulation and Global Restructuring: Reasserting the Political in Political Economy', *Review of International Political Economy* 9/2: 298–332.
13. Posner, R. (1974) 'Theories of Economic Regulation', *Bell Journal of Economics and Management Science* 5/2: 335–358.
14. See Wyatt, E. (December 20, 2011) 'Fed Proposes New Capital Rules for Banks', http://www.nytimes.com/2011/12/21/business/fed-proposes-new-capital-rules-for-banks.html
15. *International Herald Tribune* (December 22, 2011), p. 15.
16. Berger, A. and Bowman, C. (2009) 'Bank Capital, Survival and Performance around Financial Crises', http://fic.wharton.upenn.edu/fic/papers/09/0924.pdf
17. Braithwaite (2008), Chapter 6.
18. Bernard, P. and Boucher, G. (2007) 'Institutional Competitiveness, Social Investment and Welfare Regimes', *Regulation & Governance* 1/3: 213–229.

19. De Soto, H. (2000) *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books.
20. Braudel, F. (1992) *The Wheels of Commerce*. Berkeley: University of California Press.
21. Quoted in Leith, W. (December 27, 2008) 'Still Looking for a Free Lunch', http://www.guardian.co.uk/books/2008/dec/27/return-of-depression-economics-paul-krugman
22. Krugman P. (2008) *The Return of Depression Economics and the Crisis of 2008*. London: Penguin.
23. Kapstein, E. (1989) 'Resolving the Regulator's Dilemma: International Coordination of Banking Regulations', *International Organization* 43/2: 323–347.
24. Ibid., p. 329.
25. De Soto (2000), pp. 226–227.
26. Krugman (2008), p. 329.
27. De Soto (2000), p. 218.
28. Quoted in Pfanner, E. (January 25, 2012) 'Wealth Gaps Are Growing Globally, and So Is Unease', *International Herald Tribune*, p. 1, http://www.lekiosque.fr/reader.html?issueId= 1194852&fullscreen= yes
29. Quoted in Reed, G. (2001) 'The Mystery of Capital: A ReAL Review by Gerard Reed', http://www.torenewamerica.com/hernando-de-soto-the-real-book-review
30. De Soto (2000), p. 190.
31. The Department for Business Innovation & Skills, Community Interest Companies, http://www.bis.gov.uk/cicregulator/
32. Porter, M. and Kramer, M. (January 1, 2011) 'Creating Shared Value', *Harvard Business Review*, http://hbr.org/2011/01/the-big-idea-creating-shared-value/ar/1
33. Burchfield, K. (1978) 'The Economic Organisation of Crime: A Study of the Development of Criminal Enterprise', *Criminal Law Quarterly* 20/4: 478–512.
34. In saying this, these markets may intersect with legitimate business markets often running parallel to the criminal enterprise.
35. Such as where money from other criminal enterprises is processed through the legitimate financial and business sectors.
36. Findlay, M. (1994) 'Breaking the Crime-control Nexus: Market Models of Corruption and Opportunity', in D. Chappell and P. Wilson (eds.) *The Australian Criminal Justice System: The mid 1990s*. Sydney: Butterworths, pp. 270–282.
37. For a brief examination of how this works in the case of drug law enforcement, see Findlay (1999), pp. 101–104.
38. P. Dauvergne (ed.) (1998) *Weak and Strong States in Asia-Pacific Societies* Sydney: Allen & Unwin.
39. S. Dinnen, R. May and A. Regan (eds.) (1997) *Challenging the State: The Sandline Affair in Papua New Guinea*. Canberra: National Centre for Development Studies and Department of Political and Social Change, Research School of Pacific Studies, Australian National University.
40. Findlay (1999).
41. This was the case in the example provided in Findlay (1999), pp. 85–89.
42. Findlay (1999), p. 89.
43. What I mean here is where the principal influences of dominance and obligation within programmes for socio-economic development within transitional cultures are viewed in terms of the criminogenic dynamics of interaction.
44. Findlay (1999), pp. 90–93.
45. Shleifer, A. (2010) 'Efficient Regulation', in D. Kessler (ed.) *Regulation Versus Litigation: Perspectives from Economics and Law*. Chicago: University of Chicago Press, pp. 27–43.

46. Polanyi, K. (1944) *The Great Transformation*. New York: Rinehart, p. 71 and Chapter 6.
47. Granovetter, M. (1985) 'Economic Action and Social Structure: The Problem of Embeddedness', *The American Journal of Sociology* 91/3: 481–510, at p. 481.
48. Interestingly, the meta theme of the World Economic Forum (2012) is just this notion. For a critique, see Elliott, L. (January 25, 2012) 'Davos: A Sanatorium for Those in Denial of Capitalism's Ills', http://www.guardian.co.uk/business/2012/jan/25/davos-sanatorium-capitalisms-ills?INTCMP=SRCH
49. Polanyi (1944), p. 257.
50. Selznick, P. (2002) *The Communitarian Persuasion*. Baltimore: Woodrow Wilson Centre Press, pp. 105–106.

8 Environmental Regulation – Liability or Responsibility?

1. This is meant so as not to exclude communities and civil society in developing countries where powers as consumers is low but impact as workers, producers and social activists can be strong and targeted.
2. Stuligross, D. (1999) 'The Political Economy of Environmental Regulation in India', *Pacific Affairs* 72/3: 392–406, at p. 406.
3. This separation can be demonstrated in the sharp difference between the manners in which the state regulates the built and the natural environment, suggesting the differential commercial value that the state and its contracting parties place in each. This regulatory separation can do more than commercially devalue the natural environment. It rends to unrealistically alienate those with a valid interest in both but with no contractual or state-recognised interest in the built environment.
4. Perez, O. (2002) 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts', *Journal of Law and Society* 29/1: 77–110.
5. Black, J. (2002c) 'Regulatory Conversations', *Journal of Law and Society* 29/1: 163–196.
6. This term is meant to indicate transactable environmental value beyond seeing conditions of the natural environment as expendable commercial resources. An example on non-material environmental goods would be human well-being sustained through engagement with the natural environment.
7. Gunningham, N. and Sinclair, D. (1999) 'Integrative Regulation: A Principle-based Approach to Environmental Policy', *Law & Social Inquiry* 24/4: 853–896.
8. Jacobs, M. (1991) *The Green Economy*. London: Pluto Press.
9. Opschoor, J. and Turner, R. (1994) *Economic Incentives and Environmental Policies: Principles and Practice*. Dordrecht: Kluwer Academic Publishers.
10. See Forino, D. (1996) 'Towards a New System of Environmental Regulation: The Case for an Industry Sector Approach', *Environmental Law* 26/2: 457–488.
11. Gunningham and Sinclair (1999), p. 854.
12. Here collaboration is not restricted to polluters with the state or to the state with civil society, but envisages a sharing across many interests and power bases of a more mutual vision of global environmental needs.
13. Findlay, M. and Hanif, N. (forthcoming) 'Disturbing the Rice Pot: Market Modelling Criminal Enterprise'.
14. In what follows, I do not intend to overplay the change-power of consumer interest. There is much criticism of consumer motivational influence over

environmental pollution particularly when that influence is sporadic, fragmented or partial. Even so, an empowered civil society, as is later argued in the chapter is a powerful motivation for the collaboration of initially opposed interests. See Christmann, P. (2004) 'Multinational Companies and the Natural Environment: Determinants of Global Environmental Policy Standardization', *The Academy of Management Journal* 47/5: 747–760, p. 749.

15. Perez (2002).
16. Stuligross (1999).
17. Govind, P. (2007) 'The Role of the Public as a Regulatory Actor in the Context of Climate Change Regulation', *Macquarie Journal of International and Comparative Environmental Law* 4/2: 61–76.
18. Morgan, B. and Yeung, K. (2007) *An Introduction to Law and Regulation: Text and Materials*. Cambridge: Cambridge University Press, Chapter 2.
19. Okonta, I. and Douglas, O. (2003) *Where Vultures Feast: Shell, Human Rights, and Oil*. London: Verso, p. 63.
20. Gana, J. (1999) 'US Environmental Regulations and the Mining Industry: Lessons for Chile', in A. Warhurst (ed.) *Mining and the Environment Case Studies from the Americas*. Ottawa: International Development Research Centre, pp. 49–100, at p. 66.
21. Levis, J. (2006) 'Adoption of Corporate Social Responsibility Codes by Multinational Companies', *Journal of Asian Economics* 17/1: 50–55, p. 51.
22. Delmas, M. and Toffel, M. (2004) 'Stakeholders and Environmental Management Practices: An Institutional Framework', *Business, Strategy and the Environment* 13/4: 209–222, p. 213.
23. Wheeler, D. (2001) 'Racing to the Bottom? Foreign Direct Investment and Air Pollution in Developing Countries', *The Journal of Environmental Development* 10/3: 225–245, p. 233.
24. Delmas and Toffel (2004), p. 214.
25. Christie, I. and Jarvis, L. (2001) 'How Green Are Our Values?', in A. Park, J. Curtice, K. Thomson, L. Jarvis, C. Bromley and N. Stratford (eds.) *British Social Attitudes: The 18th Report*. London: Sage Publications, Inc, p. 131.
26. Ibid.
27. This is discussed in the context of China and positive regulatory influence in Christmann, P. and Taylor, G. (2001) 'Globalization and the Environment: Determinants of Firm Self-regulation in China', *Journal of International Business Studies* 32/3: 439–458.
28. Christmann (2004), p. 750.
29. Gonzales, A. (2001) 'FDI and the Environment', in *Organisation for Economic Co-operation and Development (OECD) Global Forum on International Investment: New Horizons and Policy Challenges for Foreign Direct Investment in the 21st Century.* Mexico City: OECD, p. 244.
30. Whiteley, P. (2008) 'What Makes a Good Citizen? Citizenship across the Democratic World', in A. Park, J. Curtice, K. Thomson, M. Phillips, M. Johnson and E. Clery (eds.) *British Social Attitudes: The 24th Report* London: Sage Publications, Inc, p. 181.
31. Arthaud-Day, M. (2005) 'Transnational Corporate Social Responsibility: A Tridimensional Approach to International CSR Research', *Business Ethics Quarterly* 15/1: 1–22, p. 1.
32. Whiteley (2008), p. 181.
33. Arthaud-Day (2005), p. 12.

34. Ibid., p. 1.
35. Christie and Jarvis (2001), p. 144.
36. The Fairtrade Foundation, http://www.fairtrade.org.uk/
37. Milmo, D. (February 28, 2011) 'Fairtrade's Annual Sales Defy Recession to Pass £1bn', http://www.guardian.co.uk/business/2011/feb/28/fairtrade-sales-rise-despite-recession
38. The Fairtrade Foundation mission, http://www.fairtrade.org.uk/what_is_fairtrade/fairtrade_foundation.aspx
39. Milmo (2011).
40. Christmann (2004), p. 756.
41. Ibid., p. 756.
42. Ibid., p. 750.
43. Whiteley (2008), p. 182.
44. See, Adger, W. (2003), 'Social Capital, Collective Action, and Adaptation to Climate Change', *Economic Geography* 79/4: 387–404.
45. Here essence refers to debates about the appropriateness and utility of regulation, and association indicates the forces which combine to activate regulatory potential where the essence debate has been marginalised by the pressures on (and from) social capital through shared risk and shared fate.
46. Dialectic analysis of regulation in terms of hard/soft, state/self, interventionist/organic all have their limitations but are at least useful for the manner in which they necessitate a consideration of source as well as structure.
47. For a richer examination of each of these themes, see Perez (2002).
48. Megret, F. (2010) 'The Challenge of an International Environmental Criminal Law', http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1583610
49. Tadros, V. (2009) 'Criminalization and Regulation', *Warwick School of Law Research Paper No. 2009/08*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1521557
50. Compensation as a consequence of criminal liability and sanction in the common law remains rigid and constrained. However, if the compensation capacity envisaged in International Criminal Justice is examined, particularly in the context of responsibility (Henham, R. and Findlay, M. (2011) *Exploring the Boundaries of International Criminal Justice*. Surrey: Ashgate, Chapter 3.), there is much more capacity for its development.
51. What is envisaged here is the creation of a 'responsibility mode' in contractual relationships, where contracts are not simply used to protect the limiting conditions and benefits to parties at the time the contract is struck but to recognise changing conditions. This is the common course, for instance, with the mortgage contract and interest rates on borrowing.
52. Sprinz, D. and Vaahtoranta, T. (1994) 'The Interest-based Explanation of International Environmental Policy', *International Organization* 48/1: 77–105.
53. Ibid., p. 77.
54. Ibid., p. 78.
55. Ibid., p. 104.
56. Atmosphere here is intended to suggest the prevailing international interdependencies and commitments which suggest regulatory collaboration. Braithwaite (2008) talks of these in terms of corporate networking.
57. Mutualities are more than 'common' or 'general'. They suggest a retention of the features of self-interest without their preclusive potential. Mutualities indicate where self-interest when collaborated reveal a significant field of common ground.

58. This is the language of economic modeling transposed into environmental regulation. In the former sense, the more supply chains move from the local to the global, the more integrated they become and therefore the more mutually reliant on a common pool of finite environmental resources.
59. Obviously this idea conceals significant practical challenges when the reality of the power disparities between NGO actors, social capital, MNC actors and states at differing stages of consolidation is added to this aspiration. Power differentials are an important contextual variable in achieving regulatory collaboration and need to be factored into risk and fate rather than be seen as intractable impediments to dialogue.
60. Such flexibility is assisted by involving more entities into the contract but only if this expansion of participation comes along with an emancipation of rights, protections, privileges and obligations.
61. For a very general discussion of autopoiesis, see Morgan and Yeung (2007), Chapter 2.
62. Stern, D., Common, M. and Barbier, E. (1996) 'Economic Growth and Environmental Degradation: The Environmental Kuznets Curve and Sustainable Development', *World Development* 24/7: 1151–1160.
63. Barbier, E. (1997) 'Introduction to the Environmental Kuznets Curve Special Issue', *Environment and Development Economics* 2/4: 369–381, pp. 369–370.
64. Gonzales (2001), p. 243.
65. Christie and Jarvis (2001), p. 131.
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11 Conclusion: Regulatory Sociability and Regulatory Futures

1. This conclusion is based on writings about the deontological strain of liberalism. Individual sovereignty in the choice of personal action throws into sharp relief the more general libertarian rights which are to varying degrees dependent on institutional restraints and regulation, see Fried, C. (1983) 'Liberalism, Community and the Objectivity of Values', *Harvard Law Review* 96/4: 960–968.
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13. This can mean many things. Within the general conditions of political economy employed here, we adopt a similar appreciation of the role of the market in global crisis and its potentials for regulation as Lie, J. (1997) 'Sociology of Markets', *Annual Review of Sociology* 23: 341–360.
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