

# GOVERNANCE

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## Contesting Accountability and Legitimacy in Non-State Regulatory Regimes

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### Introduction

It has been said that governments can 'puzzle as well as power'.<sup>1</sup> Shamelessly misappropriating this comment, it could be said that academic papers can do the same. Some puzzle their way through an issue, raising more questions than they answer; others 'power' on through, setting out the path that others must follow to find a solution to whatever problem is being addressed.

This paper is of the former type. The issue that it ponders is that of the accountability and legitimacy of decentred regulatory regimes. Decentred regulatory regimes are those in which the state is not the sole locus of authority, or indeed in which it plays no role at all. They are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated, and their boundaries are marked by the issues or problems which they are concerned with, rather than necessarily by a common solution. Such regimes pose a number of challenges which writers across a range of disciplines - law, political science, international relations, development studies - are all engaged in delineating and addressing. Indeed the issues to which the 'governance turn' is giving rise are drawing commentators like moths round a light.

These challenges include the functional, the systemic, the democratic and the normative. **Functional challenges** revolve around the problem of coordination; networks of organisations within a regulatory regime may be characterised by complex interdependencies and may lack a central locus of authority. There may not be a body whose role it is to act as the lead 'interpreter' of the regimes' rules or principles, for example, or to otherwise steer or coordinate the activities of the multiple participants in such a way that the regime moves towards the resolution of the problem which it both defines and is defined by. **Systemic challenges** revolve around issues of fragmentation of social systems, and the challenges that decentred regulation can pose to particular social systems. For lawyers this is particularly the challenge posed to the identification and identify of law by the

presence of numerous normative orders, an issue debated in international law in terms of the nature of 'soft law' and in legal theory journals in terms of the challenges of legal pluralism. **Democratic challenges** arise from issues of representation: who should be involved in the decision making structures of the various components of the network; to whom should such bodies be accountable and how. **Normative challenges** stem from normative concerns as to the goals and operation of the regulatory regime: what conception of 'the good' is and should be pursued. Of these, the functional, democratic and normative challenges in particular are often articulated in terms of the accountability and legitimacy of the regimes as a whole and the different actors within them.

For many engaged in that debate, the solution is to find functional equivalents to the structures of accountability which are to be found in constitutional settlements, at least of liberal democratic states. Checks and balances, dispute resolution processes, democratisation - all are common features of the 'powering' solutions being advocated by commentators in a range of disciplines.

This paper takes a different perspective. The usual quartet of accountability questions: how, with respect to what, to whom and when, are not addressed, at least not directly. The paper asks not what mechanisms are necessary to make actors in decentred regulatory regimes accountable or even legitimate, nor even in accordance with what values, or with respect to whom should they be made accountable in the regulatory process. Rather it takes the perspective of those on whom the demands are being made, and asks how they respond. What happens when these different accountability and legitimacy demands are made, and indeed what role to the objects of the accountability and legitimacy demands play in shaping those demands? This is of interest in its own right; however it is also the logically prior question that has to be asked before any 'powering' proposals can be made.

The 'puzzling' proceeds in four main stages, and has two key consequences, from which a number of further implications flow. First, it looks at the relationship between accountability and legitimacy, and suggests that both are relational concepts which are socially and

<sup>1</sup> Hecló, H. (1974), *Modern Social Politics in Britain and Sweden*, New Haven: Yale University Press.

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discursively constituted. Secondly, it suggests in turn that actors within and outside the regulatory regime have different perceptions as to the relevance and validity of different legitimacy claims with respect to different regulatory actors, in other words that there are different legitimacy communities. Thirdly, that different legitimacy claims, and associated discourses, are not always compatible but may compete. Fourthly, that although organisations can often participate in a number of different legitimacy discourses simultaneously, and thus satisfy a range of different legitimacy communities, this can not only have a deleterious affect on the organisation (which may suffer 'multiple accountability disorder') the differences between communities may be such that organisations can face a legitimacy dilemma: that actions that they need to take to render them legitimate for one legitimacy community are in direct opposition from those they need to adopt to satisfy another.

So far, so familiar, perhaps. However, the paper then seeks to explore two main consequences of these propositions for regulatory accountability and legitimacy. These are: first, that different accountability or legitimacy mechanisms are not necessarily substitutable, as some may suggest, as not all will satisfy every legitimacy community. Secondly, and more importantly for this paper, that how organisations respond to these competing legitimacy demands is structured by the particular institutional context in which the regulatory regime, and the individual organisation, operates. Regulators are not ciphers – the insights of the 'ungovernability' of actors apply as much to them as those they seek to regulate. They can be active participants in the debate on their own accountability and legitimacy, not just a passive recipient. They may exhibit the same strategies of avoidance, defiance, manipulation, compromise or acquiescence in response to pressures for their accountability and legitimacy as any organisation does in response to any norms which others seek to impose on them.<sup>2</sup> This much is familiar from institutional theory, but its insights are often separated from the more normative or 'powering' prescriptions for accountability.

The paper takes a further theoretical step and, pursuing the interplay of institutionalism with discourse theory, suggests that in acquiescing in, or at least reaching a compromise with, some legitimacy communities, the organisation indicates that it is prepared to recognise those, whilst refusing to recognise others. This has implications for those who are seeking to get the organisation to respond to their accountability and legitimacy demands. Absent other key resources, the paper suggests that those legitimacy communities whose demands have not been recognised will have to translate them into the discourses of those that have been recognised if they are to build the relationships of accountability with the organisation that they seek.

Finally, the paper draws on the preceding analysis to offer a challenging empirical research agenda into the accountability and legitimacy of decentred regulatory regimes.

## The broad parameters of the accountability and legitimacy debates

Before embarking on the puzzle, it is worth reminding ourselves of the significance and wide ranging nature of the contemporary debate over the accountability and legitimacy of organisations, including but not limited to non-state regulators. The accountability and legitimacy of organisations, ranging from firms to national, international and supranational governmental bodies, from charities to international non-governmental organisations (INGOs), from standard setting bodies to investment arbitrators, is the subject of an intense debate. The 'governance turn' revealed a plethora of non-governmental actors who were performing what had been traditionally seen as core 'governmental' functions: welfare provision and regulation, or who in much broader terms are seen as exercising significant amounts of power over those both inside and outside them. The demands for corporate social accountability, the calls for improving the 'representativeness' or 'transparency' of international regulatory and standard setting bodies, or for enhancing the 'legitimacy' of INGOs all have at their base the same central concern: that power is being exercised in a way which is insufficiently accountable to others. As a result, organisations are, to use Power's evocative phrase, being turned 'inside out'.<sup>3</sup> The details of their internal decision making structures and processes, including their incentive structures, audit and risk management processes, are seen as critically relevant to those outside them.

These multiple demands for enhanced legitimacy and accountability can lead to a coalescence of norms which have varying geographic and sectoral applicability. Firms, particularly multi-nationals, are the subject of a number of codes relating to corporate social responsibility and human rights, for example the UN Global Compact, the draft United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Firms are not alone. There have been increasing calls on INGOs to improve their legitimacy and accountability. Partly in response INGOs have developed their own codes of practice. Some of these are functional statements of best practice, but they include provisions, albeit often in very general terms, which relate to accountability and transparency. For example, the One World Trust Global Accountability Project identifies four

<sup>2</sup> See further below.

<sup>3</sup> M. Power, *The Risk Management of Everything* (Demos, 2005).

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dimensions of accountability: transparency, participation, evaluation, and complaints and response, detailing operational guidelines on how these can be translated into practice.<sup>4</sup> Other codes are far narrower. Specific codes exist for INGOs giving disaster relief, or responding to HIV/Aids,<sup>5</sup> or in specific countries or regions.<sup>6</sup> The above are examples of self-imposed and self-managed codes. NGOs can also be subject of codes formulated by governments, for example the EC Code of Conduct on Non Profit Organisations, which focuses on the potential use of non-profit organisations as vehicles of terrorist finance or money laundering, although the range of its recommendations belies this relatively narrow rationale: the registration, enhanced financial transparency, accountability and oversight of all non-profit organisations.<sup>7</sup>

Amongst this plethora of actors, non-state regulators occupy a curious position. They may be campaigning NGOs, and as such occupy a dual role as lobbyist and regulator, or they may focus primarily on a broad 'regulatory' function, at least in the sense that they set written norms for others to follow. They may have a clear organisational structure, such as Transparency International, the Forest Stewardship Council, the standard setting bodies such as the International Standards Organisation (ISO) or the transnational financial regulatory organisations: IOSCO or BCBS, for example.<sup>8</sup> Such structures may be federated, such as Responsible Care, which has a central organisation but then allows regional bodies to develop which shape the Code in ways which make it relevant for their own regions.

In these cases there is at least an organisation which 'owns' the norms or codes that are produced. However, it may be that there is no central organisational structure, rather there is a body of written norms which firms themselves have decided to apply, but there is no central locus of authority to which they can turn to discuss the proper interpretation or application of the principles. The

<sup>4</sup> M. Blagescu, L. de la Casas and R. Lloyd, *Pathways to Accountability: the GAP Framework* (London: 2005), available from [www.oneworldtrust.org](http://www.oneworldtrust.org).

<sup>5</sup> Code of Conduct for the International Red Cross, the Red Crescent and NGOs in Disaster Relief; Code of Good Practice for Responding to HIV / Aids.

<sup>6</sup> For example the BOND Statement of Principles (BOND is the British Overseas NGOs for Development – a network of over 300 UK based organisations working in international development).

<sup>7</sup> Recommendation for Member States and a Framework for a Code of Conduct for Non-Profit Organisations to Enhance Transparency and Accountability in the Non Profit Sector to Prevent Terrorist Financing and other types of Financial Abuse, 2005; contained as an Annex in The Prevention and Fight Against Terrorist Financing through enhanced national level coordination and greater transparency of the non-profit sector, COM(2005) 620 final.

<sup>8</sup> IOSCO is the International Organisation of Securities Commissions; BCBS is the Basle Committee on Banking Standards, part of the Bank of International Settlements.

Equator Principles provide a good example. These are a set of principles for sustainable development which many banks require the borrowers to comply with when issuing loans for infrastructure development, mainly in the energy sector (dams, pipelines etc). There is no one organisation which is responsible for issuing the Principles, interpreting or revising them, however. The 'regulators' are the banks, regulating both themselves and others to ensure compliance with the principles, at least in the initial loan documentation. Non-state regulatory regimes in this case have the organisational form of co-ordinated systems of corporate social responsibility, rather than taking the form of a single agency regulator which parallels a governmental body. Although the 'crisis' of accountability of non-state regulators tends to tar all with the same broad brush, different types of non-state regulatory regimes can rather pose different challenges; in particular the absence of any single locus of authority within a regulatory regime enhances the challenges of functionality and of accountability and legitimacy, discussed further below.

## Relationship between accountability and legitimacy

Nonetheless, as many have pointed out, relying on the traditional forms of accountability either of state based regulators, or indeed of corporations, are simply inadequate for such systems of regulation.<sup>9</sup> In these debates, as indeed so far in this paper, the terms accountability and legitimacy tend to be conflated. It is worth spending a brief time exploring their relationship more fully, however, before moving on to examine the different forms that demands for each can take.

Definitions of accountability abound, and there are almost as many definitions as there are articles on the subject. As Mulgan has commented, it is a word which 'now crops up everywhere, performing all sorts of analytical and rhetorical tasks, and carrying most of the burden of democratic governance'.<sup>10</sup> Or as Bovens puts it: 'As an icon, the concept has become less useful for analytical purposes, and today resembles a garbage can filled with good intentions, loosely defined concepts, and vague images of good governance.'<sup>11</sup>

As Mulgan demonstrates, from its 'core' meaning of being called to account for one's actions through a social exchange by an external body or group which has authority over one, it has expanded to include 'internal' accountability, to one's own conscience or to norms of professional ethics; 'responsiveness' by governments to

<sup>9</sup> Eg C. Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Jnl Law and Society* 38.

<sup>10</sup> R. Mulgan, 'Accountability: An Ever Expanding Concept?' (2000) 78(3) *Public Administration* 555 at 555.

<sup>11</sup> M. Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework* (2006) European Governance Paper No C-06-01, p.5.

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demands made on them by citizens; 'control' over institutions through the checks and balances of political systems, and 'dialogue': public discussion between citizens.<sup>12</sup> There is dispute over each dimension: whether accountability is internal or purely external;<sup>13</sup> whether it involves interpersonal, social exchange or whether accountability can be to the impersonalised operations of the market; whether it has to involve hierarchical relationships of authority, and whether accountability means control, as Scott argues for example,<sup>14</sup> or whether something less, such as responsiveness or the ability to impose consequences on the object of accountability suffices.<sup>15</sup>

Whilst it is not proposed to engage here in the debate on the 'true' meaning of accountability, some notion of accountability has to be adopted, at least for the purposes of this analysis. It is suggested that contrary to being seen as a form of control, accountability should not be equated with control. Debates about whether a person is 'internally' accountable to their own moral sense, for example, are conflating 'accountability' with the constraints on action that are posed by institutional norms. Similarly notions of being 'accountable' to the market refer rather to the organisation's responsiveness to the actions of market actors; not that it explains itself to the market, or engages in any dialogic process at all.

Rather, a far narrower notion of accountability is suggested: to be accountable is to agree to subject oneself to relationships of external scrutiny which can have consequences.<sup>16</sup> Although his definition is arguably too prescriptive of the actual processes that should be adopted, Boven's definition expresses the kernel of accountability: 'a relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.' The emphasis on the forum is arguably too restrictive, and stems perhaps from Bovens' focus on public institutions; it does however highlight what it is suggested is one of the central aspects of accountability: a relational responsiveness to others.<sup>17</sup>

Accountability is usually in turn linked to another iconic word: legitimacy. Like accountability, legitimacy is a 'mother and apple pie' concept which no one can argue against. Also like accountability, there is a significant debate as to its meaning, but in this case one which occupies legal and political theorists more than it does those interested in public management. Again, a short cut through the debate is proposed. It is suggested that by legitimacy is meant whether or not an institution or organisation is perceived as having a 'right to govern' both by those it seeks to govern and those on behalf it purports to govern.<sup>18</sup> Legitimacy may be an objective fact, but it is socially constructed.<sup>19</sup> It rests on the acceptability and credibility of the organisation to those it seeks to govern. Organisations may claim legitimacy, and may perform actions and enter into relationships in order to gain it. But legitimacy is rooted in the acceptance of that organisation by others.

Legitimacy is linked with authority. Here again a short cut is taken through a thicket of political and legal theory. Relying on Raz, as developed by Coleman, by authority is meant whether or not what an actor says or requires makes a 'practical difference' to the way that others act or behave, and whether it does so simply by virtue of the actor saying it. In other words, does the mere fact that a particular actor stipulates that a particular course of conduct should be followed mean that others (though by no means all) will alter their conduct not as a result of a rationalistic pursuit of preferences but principally out of a sense of obligation, or because that actor is respected or esteemed within the community for whatever reason.<sup>20</sup> This does not imply that those subject to the legitimate authority of someone issuing directives have an obligation to obey; but that the authority is perceived as justified in issuing directives to them.<sup>21</sup>

Accountability is usually seen as a central element of legitimacy in the sense that to be legitimate, an actor has to be accountable. However, this is too general a characterisation of their relationship to be satisfactory. As discussed, legitimacy is a perceived right to govern: how and why that perception is forged is another, highly complex issue addressed in part below, but the reasons are grounded in social acceptance. Accountability, for its part, is a particular type of relationship between different actors: in which one gives account and another has the authority to impose consequences as a result. In other

<sup>12</sup> Ibid.

<sup>13</sup> M. Dubnick, 'Clarifying Accountability: An Ethical Framework' in C. Sampford and N. Preston, *Public Sector Ethics* (Routledge, 1998); A. Sinclair, 'The Chameleon of Accountability' (1995) 20 *Accounting Organizations and Society* 219.

<sup>14</sup> C. Scott, *op.cit.*

<sup>15</sup> Eg Bovens, *op.cit.*

<sup>16</sup> See also R. Keohane, 'Global Governance and Democratic Accountability' in D. Held and M. Koenig-Archibugi (eds), *Taming Globalization* (Oxford: Polity Press, 2003).

<sup>17</sup> Eg Keohane, above. The notion has also entered the CSR debate, see for example M. Painter Morland, 'Redefining Accountability as Relational Responsiveness' (2006) 66 *Journal of Business Ethics* 89.

<sup>18</sup> See discussions in R. Barker, *Political Legitimacy and the State* (Oxford: OUP, 1990).

<sup>19</sup> W.R. Scott, *Institutions and Organisations* (2<sup>nd</sup> ed; Sage, 2001)

<sup>20</sup> The concept thus draws on the concept of authority developed in jurisprudence by Raz as elaborated by Coleman: J. Raz, *The Authority of Law* (Oxford: OUP, 1979); J. Coleman, 'Incorporationism, Conventionality and the Practical Difference Thesis' *The Practical Difference Thesis* (1998) 4 *Legal Theory* 381.

<sup>21</sup> See discussion in eg W. Sadursky, 'Law's Legitimacy and "Democracy Plus"' (2006) 26(2) *OJLS* 377.

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words, that the response of the person to whom account is made will make a 'practical difference' to the conduct of the one who gives account, either retrospectively, prospectively or both. A more specific description of the relationship of the two concepts, at least as they are defined above, is therefore that *perceptions of the right to govern (legitimacy) may depend (in whole or in part) on whether the actor is accepted as having an appropriate accountability relationships with others, often including, but not necessarily confined to, the person whose perception is in question.*

## Constructing accountability and legitimacy

The debate on the accountability and legitimacy of non-governmental regulators, especially at the transnational level, often depicts organisational actors which are somehow disconnected: autonomous bodies which are not grounded in any particular sector of society or even in any one state. However, as institutional theory emphasises, all actors are embedded in social institutions, from which in turn they derive their legitimacy. The conceptions of legitimacy and accountability outlined above have a strong affinity with institutional theory, or at least some branches of it.

A minimalist definition of institutions is that institutions comprise cognitive and moral structures, rules, norms, conventions or operating procedures which are regarded as socially or legally binding but which are not self-enforcing.<sup>22</sup> For political scientists institutions also comprise the key political structures: legislature, executive, voting system, legal system, and bureaucracy. For economists, they also comprise markets, firms and other institutions which facilitate and constrain economic interactions. Institutions have four key dimensions, which receive differing degrees of emphasis in the various strands of institutionalism: a behavioural or regulative dimension (providing the norms of action which are externally enforced), a cognitive dimension (beliefs and understandings of cause and effect relations), a normative dimension (providing norms of appropriateness and legitimacy), and, some would add, a resource dimension (distributing resources and regulating access and agendas of decision making).<sup>23</sup>

<sup>22</sup>Ikenberry, G. (1988), 'Conclusion: An Institutional Approach to Foreign Economic Policy' in G. Ikenberry, D.A. Lake and M. Mastanduno (eds), *The State and American Foreign Economic Policy*, Ithaca: Cornell University Press; Jepperson, R.L. (1991), 'Institutions, Institutional Effects and Institutionalism' in W.W. Powell and P.J. DiMaggio, *The New Institutionalism in Organizational Analysis*, Chicago: University of Chicago Press; W. R. Scott op.cit; DiMaggio, P.J., and W.W. Powell (1991), 'Introduction' in W.W. Powell and P.J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis*, Chicago: Chicago University Press.

<sup>23</sup> March, J. and J. Olsen, (1984), 'The New Institutionalism: Organisational Factors in Political Life', *American Political Science Review*, 78: 734-749; Hall, P. and D. Soskice (2001b),

The core notion is that 'institutions matter' to individual and social action and interaction because they provide the structure in which the action and interaction occurs. They provide shared conceptions of reality, meaning systems and collective understandings that guide decision making and which individuals take for granted. Actors articulate and define their policy problems and solutions by using institutionalised scripts, cues and routines that constitute their cognitive frameworks and empower them to act, but on which they do not necessarily reflect.<sup>24</sup> Decisions are made to pursue goals, but often the reaffirmation of processes and rituals and the communication of symbols and legitimacy is equally if not more important.<sup>25</sup> Finally, institutions have both stabilising and facilitating effects, for example they explain how collective action problems are overcome; the stability of political decision making; and why, in a situation of multiple Pareto-optimal equilibria, one policy option is chosen over another.

In institutional theory, legitimacy is central to an organisation's survival and development. Legitimacy means social credibility and acceptability: 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'<sup>26</sup> This understanding of legitimacy has a clear link with that set out above: that legitimacy is a perceived right to govern.

The notion of accountability posited above, as relational, can also be developed from an institutionalist base. The argument presented here is that accountability is not an abstract, technical process. This conception of accountability runs counter to the 'invisible hand' of cybernetics and collibration, or other mechanistic portrayals of accountability. Accountability is rather relational, and dialogic. Here again it is important to emphasise its distinctiveness from control or other institutions or events which affect behaviour. Firms may respond to consumer demand by developing ethical products, but changes in their production processes or sourcing policies to respond to consumer demand does not necessarily mean they are 'accountable' to consumers; rather they are

'An Introduction to Varieties of Capitalism' in P. Hall and D. Soskice (eds) (2001a), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford: Oxford University Press; W.R. Scott, op.cit.

<sup>24</sup> DiMaggio and Powell, op.cit; W.R. Scott, op.cit; Meyer, J.W., J. Boli and G.M. Thomas (1994), *Ontology and Rationalization in the Western Cultural Account*; in W.R. Scott, J.W. Meyer, and Associates, *Institutional Environments and Organizations: Structural Complexity and Individualism*, Thousand Oaks, Calif., Sage.

<sup>25</sup> Meyer, J.W. and B. Rowan (1977), 'Institutionalized Organizations: Formal Structure as Myth and Ceremony', *American Journal of Sociology*, 83, 340-363.

<sup>26</sup> W.R. Scott, op. cit.

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influenced by them. Being 'accountable' would mean that firms create structures through which they can communicate with consumers, or more realistically groups of consumers or those purporting to act on their behalf, and through which consumers can respond in such a way that will have consequences for the firm's behaviour.

Institutionalism lacks a strong communicative dimension, however. Here, discourse theory can be used to complement institutionalist analysis in a number of ways; institutionalism in turn provides analytical structures which explain how discourse can affect action more satisfactorily than discourse theory can itself.<sup>27</sup> A discourse theory of regulation argues that discourse constitutes regulation in that it builds understandings and definitions of problems (eg 'market failure', 'risk', 'accountability gap') and acceptable and appropriate solutions ('meta-regulation', 'precautionary principle', 'audit', 'participation'), it builds operational categories (eg 'compliance', 'transparency'), and produces the identities of and relations between those involved in the process. It is functional in that it is designed to achieve certain ends (eg the strategic use of rule design; the deployment of skills of argumentation and rhetoric by all involved at every stage). It is co-ordinating in that it produces shared meanings as to regulatory norms and social practices which then form the basis for action (eg the formation of regulatory interpretive communities, or of accountability relationships).

Discourse theory therefore suggests that different legitimacy claims, and associated accountability relationships will be grounded and expressed in different discourses; that these discourses will build different understandings and definitions of the 'accountability' problem and appropriate solutions, such as audit, performance evaluation, participation, and operational categories, such as compliance, so as to produce different forms of accountability relationship. Most importantly for this discussion, discourse theory emphasises the role of power in regulation: discursive practices, events and texts arise out of and are shaped by power and ideology and struggles over them, suggesting that which legitimacy claims an organization will respond to will be a reflection of the constellation of power relationships in which it is situated.

## Competing claims of accountability and legitimacy

Thus far it has been argued that legitimacy is socially constructed through institutions, that accountability is a communicative relationship entailing responsiveness, and that different legitimacy claims are expressed in different legitimacy discourses. This analysis is to an extent consistent with the 'principal-agent' conception of accountability relationships familiar from some political

science,<sup>28</sup> in that relationships of authority are argued to underly accountability relationships, although it prefers the less dichotomous model of organisation and environment.

But where does this leave the familiar debates on the 'types', 'forms' or 'sources' of accountability and legitimacy? Categorisations of accountability are as numerous as its definitions. The familiar ones include: legal, financial, managerial, ethical, technical, democratic and procedural. Legitimacy criteria are just as well numerated and have been argued to include: legal mandate, due process, efficiency, effectiveness and expertise,<sup>29</sup> to which may be added representativeness and / or democratic mandate, and conceptions of justice.

Categorisation exercises can be helpful; they can facilitate analysis and thus aid understanding. However what the analysis above suggests is that categorisation in itself does not answer the question: is this body accountable or legitimate, because those questions are inherently relational. They cannot be answered in the abstract. They have to be met with response: accountable or legitimate to whom? Discussions on categorisation which link types of accountability with different values go further in this respect, as do those which recognise that different forms of accountability conflict. But again the essentially constructed nature of accountability, and indeed legitimacy, is glossed over.

Nonetheless, these different typologies do draw attention to the differentiated, and indeed contested, nature of both accountability and legitimacy. Organisational environments are not homogenous, and what is considered to be 'desirable, proper or appropriate' varies considerably across them. The implication of this analysis is that what constitutes legitimacy for one part of an organisation's environment, or what I characterize here as different legitimacy communities, will differ from that which constitutes legitimacy for another. Moreover, different legitimacy communities may well be seeking different accountability relationships, directly or indirectly, with the relevant organization.

It is suggested that there are four broad types of legitimacy claims<sup>30</sup> and associated accountability relationships: legality / regulative, justice, performance and representation.<sup>31</sup> Legitimacy based on **legality** refers here very broadly to conformance with written norms

<sup>28</sup> Eg R. Keohane and J. Nye, *Power and Interdependence* (3rd ed, New York: Addison-Wesley Longman, 2001).

<sup>29</sup> For discussion see R. Baldwin and J.C. McCrudden, *Regulation and Public Law* (London: Weidenfeld and Nicholson, 1987); and R. Baldwin and M. Cave, *Understanding Regulation* (Oxford: OUP, 1999).

<sup>30</sup> Legitimacy claims refer to claims made by the organization for legitimacy and the bases of credibility or acceptability that an organization has in different parts of its environment.

<sup>31</sup> See Dubnick for a similar breakdown.

<sup>27</sup> See J. Black, 'Regulatory Conversations' (2002) *Jnl Law and Society* for elaboration.

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(thus embracing so-called 'soft law' or non-legal, generalised written norms), and actions in conformity with a procedural form of the 'rule of law', including legal values of procedural justice. Its application beyond law is signalled by the alternative term 'regulative'. Legitimacy claims rooted in **justice** refer to the normative values which the organization is pursuing, including the conception of justice (republican, Rawlsian, utilitarian, for example, or the various religious conceptions of 'truth' or 'right'). **Performance** refers to the manner of functioning of the organization: its conformity to ethical, managerial, financial, technical norms. **Representation** refers to the conformance of the organization to different governance models: representative democracy, deliberative democracy and so on. Each of these broadly corresponds to the challenges outlined above: systemic, functional, normative and democratic.

All of these merit considerable elaboration in themselves; however, the point that I want to make here is that these legitimacy claims are both contested and contestable, not only between the different groups, but within them. Indeed, there may be more interlinkages between the different groups than there are within them: between procedural justice as understood by law and the pursuit of conceptions of substantive justice, for example, or between deliberative democracy and particular conceptions of justice; or between legality and different forms of performance (eg ethical performance in legal organizations). In contrast, the differences between managerial and ethical claims to legitimacy, and associated accountability relationships, can compete to a considerable degree – indeed exploring the tension between them is a fertile ground of research in public administration, and there have been many studies on the impact of managerial modes of accountability on ethical performance in professional organizations, notably in the fields of health and education.

Moreover, different legitimacy discourses will build, and be reinforced by, different types of accountability relationships. Those of legality require, for example, conformance to written norms, an impartial forum where disputes over the application of those norms is determined, and rules to be clear, stable and prospective and to be applied impartially and in accordance with norms of fair procedure. There are in turn differences over just what conception of fair procedure, or what constitutes impartiality and so on. Accountability relationships which stem from discourses of functionality include, for example, those of audit, cost-benefit analysis, performance evaluation. Legitimacy claims related to representativeness require accountability relationships based on different conceptions of representative, participative or deliberate democracy, for example. Accountability relationships associated with legitimacy claims related to justice are built around competing conceptions of rights or 'the good'. Each of these broad groups of legitimacy claims has internal fractures and divisions, resulting in ever

more complex demands for different types of accountability relationships.<sup>32</sup>

## Organisational responses to competing claims

It is not necessary for legitimacy claims to be interlinked or mutually supporting for it to be possible for them to be met by an organization simultaneously. They simply have to be compatible. It may be, for example, that for a firm the 'win-win' solution of sustainable development and profitability can be attained, for example; or that a regulatory organization can operate in accordance with accepted modes of procedural justice whilst also operating in a financially responsible manner. The development of management models such as balanced scorecards, used by a number of UK government bodies, are just such attempts to structure, or at least provide a reporting framework, for the organisation's responsiveness to different aspects of its environment.

However, the demands of legitimacy communities may well be directly opposed, such as to satisfy one will necessarily lead to dissatisfaction of the other. Representativeness is a good example. Non-state regulators face this problem to a significant degree. Frequently, in order to satisfy the legitimacy claims of those they are regulating, their main decision making bodies need to be comprised solely or mainly of representatives of those regulatees; however to be legitimate to a wider section of civil society, those decision making bodies need to be solely or mainly composed of representatives from other sections of civil society. The same debate occurs in the context of risk regulation: to be legitimate to scientists, regulators have to be composed of scientific experts or at least be governed by them in their decisions; however to be legitimate to other sectors of society, regulators have to include a wider proportion of society in their decisions – the familiar debate on lay versus expert models of decision maker. There are other conflicts: between those demanding procedural justice and those demanding maximum speed and efficiency in decision making. Even within models of administrative justice there are conflicts, as Mashaw's familiar typology of bureaucratic, moralistic and professional models of administrative justice demonstrates.<sup>33</sup>

Organisations then face a legitimacy dilemma: what they need to do to be accepted by one part of their environment is contrary to how they need to respond to another

<sup>32</sup> In terms of how this maps on to the four types of control mechanism outlined by Hood et al: hierarchy, mutuality, competition and random selection – accountability relationships stemming out of any of the legitimacy claims can take these forms. These four types of control mechanism can be seen as cutting across the different accountability relationships and legitimacy claims. See C. Hood et al, *Regulation Inside Government* (OUP).

<sup>33</sup> J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability* (New Haven, 1983).

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part. Forming one set of accountability relationships can preclude forming others; it simply is not possible to have complete legitimacy from all aspects of its environment.

Even if the conflict between legitimacy communities does not lead to a dilemma, it can have a deleterious effect on the organization as it seeks to respond to the multiple legitimacy and accountability demands being made on it: in Koppell's evocative phrase, the organization may suffer 'multiple accountability disorder'.<sup>34</sup> In other words, its attempts to respond to the multiple demands may diminish its chances of survival.

## Implications for the accountability and legitimacy of non-state regulators

What are the implications of this analysis for our understanding of the accountability and legitimacy of non-state regulators? It is suggested that two main implications flow which have not yet received the research attention that they merit.

The first implication relates to the debate on the design of accountability mechanisms. These debates assume that accountability is a technical issue; that what is necessary is to improve the design, enhance the mechanisms, structure the springs, in such a way that accountability will necessarily follow. But accountability is not a technical exercise; it is a relational one.<sup>35</sup> Different accountability mechanisms are different accountability relationships. Those relationships are not necessarily substitutable one for the other such that if one fails another can take its place. Substitutability assumes homogeneity in legitimacy claims within the organisation's environment. But as discussed above, those claims are heterogenous, and moreover that incompatibilities can be greater within the broad forms of legitimacy claims than between them.

Far more could be said on that issue. However it is the second set of implications on which I want mainly to focus. That is what the above analysis implies for the organisation which is the subject of the accountability and legitimacy claims. How does it respond to these competing claims? Here there is very little empirical research done on non-state regulators. There is more in the field of CSR, and to an extent in regulation, where there is a considerable body of research investigating questions such as why do firms develop environmental policies which extend beyond regulatory requirements,<sup>36</sup> why do they comply with non-legal codes of conduct relating to corporate governance, and so on. There has

also been research on the narrower question of the impact of one type of accountability, new public management reforms, on parts of the civil service and public service organisations in health and education. There is some work which focuses on INGOs, though for the most part this has been of the 'powering' type – offering blueprints for accountability and legitimacy, blueprints which themselves are usually rooted in particular legitimacy claims (managerial performance, participative democracy). However there has been very little sustained research on how non-state regulators respond to these competing accountability and legitimacy claims, be they of the 'agency' type, or be they organisations which are seeking to apply common norms but without a central organisational structure to the regime (as in the case of the Equator Principles noted above).<sup>37</sup>

Here it is suggested that Oliver's typology of organisational responses could be a useful starting point for such an empirical inquiry. In a synthesis of resource theory of organisations and institutional theory,<sup>38</sup> Oliver identifies five types of strategic response by organisations to institutional processes.<sup>39</sup>

<sup>34</sup> J. Koppell, 'Pathologies of Accountability': ICANN and the Challenge of 'Multiple Accountability Disorder' (2005) 65(1) *Public Administration Review* 94.

<sup>35</sup> See also S. Lister, 'NGO Legitimacy: Technical Issue or Social Construct?' (2003) 23(2) *Critique of Anthropology* 175.

<sup>36</sup> On the latter see R. Kagan, N. Gunningham and D. Thornton, 'Explaining Corporate Environmental Performance: How Does Regulation Matter?' (2003) 37 *Law and Society Review* 51.

<sup>37</sup> It should be noted that there is also little research on how organisations respond to competing regulatory norms, both legal and non-legal; for an exception see Haines and ?. Most research is done on a domain-specific basis: 'how did Organisation X respond to set of regulatory norms Y?' where 'Y' is environmental rules, competition requirements and so on. This is also true for studies with transnational regulation, both treaty-based and 'soft law' provisions, see eg D. Shelton (ed), *Commitment and Compliance* (OUP, 2000).

<sup>38</sup> And assuming a particular model of action: Giddens' structuration (in which an organisation or individual has agency but that agency is structured by their institutional environment).

<sup>39</sup> C. Oliver, 'Strategic Responses to Institutional Processes' (1991) 16(1) *Academy of Management Review* 145.

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Table 1: Strategic Responses<sup>40</sup>

Strategies	Tactics	Examples
	Habit	Following inevitable, taken for granted norms
Acquiescence	Imitate	Mimicking institutional models
	Comply	Obeying rules and accepting norms
	Balance	Balancing the expectations of multiple constituents
Compromise	Pacify	Placating and accommodating institutional elements
	Bargain	Negotiating with institutional stakeholders
	Conceal	Disguising nonconformity
Avoid	Buffer	Loosening institutional attachments
	Escape	Changing goals, activities or domains
	Dismiss	Ignoring explicit norms and values
Defy	Challenge	Contesting rules and requirements
	Attack	Assaulting the sources of institutional pressure
	Co-opt	Importing influential constituents
Manipulate	Influence	Shaping values and criteria
	Control	Dominating institutional constituents and processes

*Acquiescence* is accession to institutional pressures. Such acquiescence may be 'blind' in the sense that it is an unconscious adherence to taken for granted rules; or it may be more strategic – compliance with regulatory norms, for example, in order to gain credibility and thus reduce negative assessments of its conduct, product or services. *Compromise* is an attempt to balance, pacify or bargain with external constituents, where demands are competing, and / or where the organisation considers unqualified conformity unpalatable or unworkable. *Avoidance* is the attempt to preclude the need to conform, by concealing non-conformity, buffering itself from institutional rules or pressures by decoupling its technical activities from external contact, or escaping from the domain in which pressure is being exerted: 'exit' in Hirschmann's terms. *Defiance* is a more active form of resistance to institutional pressures, and can consist of dismissing or ignoring institutional rules or values; challenging them; or more directly attacking them. Finally, organisations may *manipulate* the environment by actively changing, or seeking to change or exert power over the content of the expectations themselves or the sources that seek to express or enforce them.<sup>41</sup> This may be through co-opting the source of the pressure, attempts to manipulate the terms of debate,<sup>42</sup> or using controlling tactics: specific attempts to exert power or dominance over the external constituents that are applying pressure.

What determines which approach an organisation will adopt is they key research question. Response will be a

function of both capacity and willingness to conform to the institutional environment, or at rather different parts of it. Oliver suggests that the scope of an organisation's willingness to respond is bounded by organisational scepticism, political self-interest and organizational control. The scope of an organisation's capacity to respond is bounded by organisational capacity, internal conflict and awareness. She suggests that organisational responses to institutional pressures to conformity will depend on five sets of categories, each with two dimensions:

- the nature of the pressures exerted / what the organisation gains from acquiescence (cause)
  - social fitness
  - economic gain;
- who is exerting them (constituents)
  - the multiplicity of claimants and
  - the organisation's dependence on them;
- how consistent are those demands with the organisation's own goals (content)
  - whether they are congruent with the organisation's goals and
  - whether they constrain the organisation's discretion or not;
- the means by which they are imposed (control)
  - by legal or non-legal means; and
  - whether the norms, values and practices are diffused or not throughout the environment
- the nature of the environmental context in which they occur (context)
  - whether it is characterised by uncertainty, and
  - the degree of interconnectedness or degree of inter-organisational relations within the organisational field.<sup>43</sup>

<sup>40</sup> Ibid, p. 152.

<sup>41</sup> Oliver, op.cit. pp 152-159.

<sup>42</sup> Oliver does not note this, but discourse theory would suggest that this could be through deploying rhetorical tactics or otherwise seeking to change the discursive framing of an issue.

<sup>43</sup> Ibid, p.159.

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She then draws on sociological institutional theory, supplemented by organisational resource theory, to develop hypotheses on choice of strategy based on variation in the ten dimensions of these five categories.

Table 2: Oliver's Predictions of Organisational Responses

<b>Strategic Response / Predictive Factor</b>	<b>Acquiesce</b>	<b>Compromise</b>	<b>Avoid</b>	<b>Defy</b>	<b>Manipulate</b>
<b>Cause</b>					
Legitimacy	High	Low	Low	Low	Low
Efficiency	High	Low	Low	Low	Low
<b>Constituents</b>					
Multiplicity	Low	High	High	High	High
Dependence	High	High	Moderate	Low	Low
<b>Content</b>					
Consistency	High	Moderate	Moderate	Low	Low
Constraint	Low	Moderate	High	High	High
<b>Control</b>					
Coercion	High	Moderate	Moderate	Low	Low
Diffusion	High	High	Moderate	Low	Low
<b>Context</b>					
Uncertainty	High	High	High	Low	Low
Interconnectedness	High	High	Moderate	Low	Low

The key sets of hypotheses for our purposes is how will an organisation respond in a situation of uncertainty, in which uncertainty is increased by multiple, mutually incompatible or inconsistent demands,<sup>44</sup> for that is the situation faced by many organisations, not least non-state regulators. Here the hypothesis suggests that responses will range from compromise to manipulation, depending on the degree of dependence, consistency, constraint, coercion, diffusion, uncertainty or interconnectedness in the organisation's environment. However, there is no set of hypothesis for the situation where legitimacy gains are perceived to be high in such a situation, presumably because overall legitimacy gains cannot be high in a situation of multiple and competing

demands. However, it may still be the case that legitimacy gains may potentially be made to a number of different legitimacy communities (ie is it always 'high'); but as it stands Oliver's hypotheses do not extend to situations where although legitimacy gains might be high with respect to particular legitimacy communities, the organisation does not acquiesce. Arguably the hypothesis here would be that in a situation of multiple legitimacy claims, an organisation will not acquiesce even if legitimacy gains are high in situations where there is a low dependency of the organisation on that legitimacy community; the normative content of the claims are congruent only to a moderate or low degree; the constraints on discretion would be moderate or high; coercion is low; diffusion is low; uncertainty is high and interconnectedness is low.

<sup>44</sup> Incompatible here means the demands are by nature incompatible; inconsistent means that they are potentially compatible but are differently demanded over time.

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Clearly therefore there is scope for elaboration and refinement of Oliver's model, but it is suggested that it could found the basis of fruitful empirical research into how non-state regulators in fact respond to demands for legitimacy and accountability.

Still lacking from this analysis is any real conceptualisation of the role of power in accountability and legitimacy relationships – something which is often underplayed in sociological institutionalism.<sup>45</sup> However, it is suggested that the introduction of discourse theory into the analysis redresses this omission, and in turn has implications for those who are seeking to make the organisation respond to their legitimacy claim. It suggests that absent any other resource, the legitimacy community (or its constituent) will have to rely on discourse; in other words it will have to translate its demands into a discourse that the organisation already recognises in order to build relationships of accountability with the organisation that it seeks.<sup>46</sup>

## Summary

This paper did not set out to provide an answer directly to the extraordinarily difficult questions: how to make actors in decentred regulatory regimes, in particular, non-state regulators, accountable. It seeks to clear a path to answering it, however, by proposing that we understand better how such organisations themselves respond to the various legitimacy demands which are made upon them. Not only is such understanding of intrinsic interest, it should form the basis for forging answers to that initial, challenging question.

In order to begin to create that path, some conceptual groundwork had to be done. The paper therefore examined the relationship between accountability and legitimacy, and suggested that both are relational concepts which are socially and discursively constituted. This in turn provides the basis for the second proposition, which is that there are different legitimacy communities, comprised of actors within and outside the regulatory regime who have different perceptions as to the relevance and validity of different legitimacy claims with respect to different regulatory actors. This in turn led to a third proposition, which is that different legitimacy claims, and associated discourses, are not always compatible but may compete. Fourthly, that although organisations can often participate in a number of different legitimacy discourses simultaneously, and thus satisfy a range of different legitimacy communities, this can not only have a deleterious affect on the organisation (which may suffer 'multiple accountability disorder') the differences between communities may be such that organisations can face a

legitimacy dilemma: that actions that they need to take to render them legitimate for one legitimacy community are in direct opposition from those they need to adopt to satisfy another.

These propositions already find support in much of the current debate. However, the paper then sought to explore two main consequences of these propositions for the debate on regulatory accountability and legitimacy. Firstly, that different accountability or legitimacy mechanisms (or rather relationships) are not necessarily substitutable, as not all will satisfy every legitimacy community. It is not therefore always possible maintain legitimacy by replacing one with another when the first one fails, unless the replacement is recognised by that legitimacy community. Secondly, that how organisations respond to competing legitimacy demands is structured by the particular institutional context in which the regulatory regime, and the individual organisation, operates. Regulators are not ciphers. They can be active participants in the debate on their own accountability and legitimacy, not just passive recipients. They may exhibit the same strategies of avoidance, defiance, manipulation, compromise or acquiescence in response to pressures for their accountability and legitimacy as any organisation does in response to any norms which others seek to impose on them. 'How to' proposals for accountability which ignore these different organisational response strategies are as weak as any proposal for a regulatory strategy which ignores how its prescriptions will be received.

Finally, the paper proposes a further theoretical step and, pursuing the interplay of institutionalism with discourse theory, suggests that in acquiescing in, or at least reaching a compromise with, some legitimacy communities, the organisation indicates that it is prepared to recognise those, whilst refusing to recognise others. This has implications for those who are seeking to get the organisation to respond to their accountability and legitimacy demands. Absent other key resources, the paper suggests that those legitimacy communities whose demands have not been recognised will have to translate them into the discourses of those that have been recognised if they are to build the relationships of accountability with the organisation that they seek. Together, it is suggested that these propositions could form the basis of detailed empirical research into how non-state regulators respond to competing demands for legitimacy and accountability, particularly in situations of uncertainty.

<sup>45</sup> For emphasis elsewhere see Keohane and Nye, op. cit.

<sup>46</sup> Eg M. Hajer, *The Politics of Environmental Discourse* (1995); B. Morgan, *Social Citizenship in the Shadow of Competition* (Ashgate, 2003).