DECENTRING REGULATION: UNDERSTANDING THE ROLE OF REGULATION AND SELF-REGULATION IN A 'POST- REGULATORY' WORLD

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Introduction

This paper is not the one I had intended to write. Rather, it is the paper I found I had to write before I could start the one I had intended. The original intention was to look at trends in recent regulatory policies and academic literature and to ask whether and to what extent regulation was being 'decentred' using examples of varieties of regulation which go under the label of 'self-regulation', including the role of, for example, technical committees, epistemic communities, or 'webs of influence' in regulating. However, in trying to address that empirical issue, I needed to know what it was I was looking for, and how I would know when I had found it. In other words, I needed to answer three basic analytical questions: what is 'decentring regulation', what is 'self-regulation' and how does it fit in the decentring analysis, and what meaning is given to 'regulation' to allow it analytically to be 'decentred'—how do we know 'decentred regulation' when we see it? The answers were not apparent, and this chapter is an attempt to find them.

Decentring is a term often used to encompass a number of notions, and has both positive and normative dimensions. It is used to express the observation that governments do not, and the proposition that they should not, have a monopoly on regulation and that regulation is occurring within and between other social actors, for example large organizations, collective associations, technical committees, professions etc., all without the government's involvement or indeed formal approval: there is 'regulation

in many rooms'. Decentring is also used to describe changes occurring within government and administration: the internal fragmentation of the tasks of policy formation and implementation. Decentring is further used to express the observation (and less so the normative goal) that governments are constrained in their actions, and that they are as much acted upon as they are actors. Decentring is thus part of the globalization debate on one hand, and of the debate on the developments of mezzo-levels of government (regionalism, devolution, federalism) on the other. Decentring is also used in a positive sense to describe the consequence of a particular analysis of social systems, in which politics and administration, like law or economics, are described as being self-referentially closed sub-systems of society, incapable of observing other systems except through their own distorted lenses: decentring is thus the removal of government and administration from the conceptual centre of society. Finally, developing from these observations (and mixing metaphors), decentring can be used, positively and normatively, to express 'de-apexing': the removal of the state from the conceptual hierarchy of state-society, and the move to a heterarchical relationship in which the roles of governors and governed are both shifting and ill-defined.

The themes of 'decentring' are reflected in a changed understanding of regulation. In that changed understanding, self-regulation plays a particular role both in practical policy debates and in more conceptual discussions. The role ascribed to self-regulation, however, differs quite fundamentally in those debates. Some form of self-regulation is in some ways seen as a quintessentially decentring regulatory strategy, in it lies the solution to the problems of 'centred' regulation. However, in other analyses self-regulation is posited as the core problem that 'centred' regulation has to overcome. Indeed, one of the central parts of the decentred understanding of regulation is that self-regulation is not just as an option that policy-makers can use or not use as they see fit, but as an inescapable fact of life. Regulation of self-regulation is the new challenge. But the prescription is for governments to regulate self-regulation in a 'post-regulatory' way.[1] The decoupling of regulation from

[1] G. Teubner, 'After Legal Instrumentalism: Strategic Models of Post-Regulatory Law' in G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin, 1986).

government, and the 'post-regulatory' regulation of self-regulation: just what conception of regulation does the 'decentring of regulation' entail?

Decentred Regulation

A changing understanding of the nature of regulating is emerging in both practitioner and academic circles. This new understanding has a number of aspects, not all of which are present in all academic writings, and only a few of which filter through, in diluted form, to the practical policy debates. What I set out below under the label 'the decentred understanding of regulation', or 'decentring analysis', is in some respects a Weberian ideal type. It is a composite of many different writings, some concerning the issue of governance, some explicitly the issue of regulation. Whilst no exact match would probably be found in any one writing, enough of its strands are present in many to be able to group them in this way, even if a misleading impression of analytical coherence is perhaps thus created. As noted above, the analysis begs the question of what conception of 'regulation' is invoked, but we will return to that issue below.

The decentred understanding of regulation has an 'other' against which it is explicitly or implicitly defined. That is regulation by the state, which is often assumed to take a particular form, that is the use of legal rules backed by criminal sanctions: 'command and control' (CAC) regulation. The 'decentred' analysis of regulation is thus distinct from (or perhaps rather subsumes within it) the 'regulatory state' and to an extent the 'new regulatory state' analyses, in that, quite simply, the 'decentred' analysis is not state-centred. How the state responds to the newly conceptualized challenges of regulating is only one part of the decentring analysis, it does not exhaust it.

As many have noted, 'command and control' is more a caricature than an accurate description of the operation of any particular regulatory system, though some are closer to the caricature than others. Essentially the term is used to denote all that can be bad about regulation: poorly targeted rules, rigidity, ossification, under- or over-enforcement, unintended consequences. The extent to which CAC does or does not live up to its caricature is an empirical question which has been debated

elsewhere.[2] Relevant for our purposes, CAC regulation posits a particular role for the state against which the 'decentring' analysis is counterposed. It is 'centred' in that it assumes the state to have the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling. It is assumed to be unilateral in its approach (governments telling, others doing), based on simple cause-effect relations, and envisaging a linear progression from policy formation through to implementation. Its failings are variously identified as being, *inter alia,* that the instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify non-compliance (information failure), that implementation of the regulation is inadequate (implementation failure), and/or that those being regulated are insufficiently inclined to comply (motivation failure).

The decentred understanding of regulation is based on slightly different diagnoses of regulatory failure, diagnoses which are based on, and give rise to, a changed understanding of the nature of society, of government, and of the relationship between them.[3] The first aspect is complexity. Complexity refers both to causal complexity, and to the complexity of interactions between actors in society (or systems, if one signs up to systems theory). There is a recognition that social problems are the result of various inter-

[2] See R. Baldwin, 'Regulation: After Command and Control' in K. Hawkins (ed.), *The Human Face of Law* (Oxford, 1997); N. Gunningham and P. Grabovsky, *Smart Regulation: Designing Environmental Policy* (Oxford, 1998), 38–50.

[3] As noted above, there is no single exposition of a 'decentred understanding', but key threads can be found in, for example, the systems theory related literature: G. Teubner (ed.), *Juridification of the Social Spheres* (Berlin, 1987); G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin, 1986); G. Teubner and A. Febbrajo (eds.), *State, Law, Economy as Autopoietic Systems* (Milan, 1992); G. Teubner, L. Farmer and D. Murphy, *Environmental Law and Ecological Responsibility* (London, 1994); R. Veld *et al*., *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Dordrecht, 1991). And in the governance literature: M. Foucault, 'Governmentality' in G. Burchell, C. Gordon and P. Miller, *The Foucault Effect: Studies in Governmentality* (London, 1991); N. Rose and P. Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 173; J. Kooiman (ed.), *Modern Governance: New Government-Society Interactions* (London, 1993); R. Rhodes, *Understanding Governance* (Buckingham, 1997).

acting factors, not all of which may be known, the nature and relevance of which changes over time, and the interaction between which will be only imperfectly understood. Attention is also drawn in more conceptual writings to the dynamic interactions between actors and/or systems, and to the operations of forces which produce a constant tension between stability and change within a system (loosely defined). Those interactions are themselves complex and intricate, and actors are diverse in their goals, intentions, purposes, norms, and powers.

The second aspect is the fragmentation, and construction, of knowledge. This is sometimes referred to simply as the information asymmetry between regulator and regulated: that government cannot know as much about industry as industry does about itself. Phrased in those terms, the problem is familiar and well recognized. In the decentred understanding of regulation, however, the information problem is more complex. For unlike the traditional analysis, it does not assume that any one actor has all the information necessary to solve social problems: it is not a question of industry having, government needing. Rather, no single actor has all the knowledge required to solve complex, diverse, and dynamic problems, and no single actor has the overview necessary to employ all the instruments needed to make regulation effective. The problem can be more radically framed. That is, that not only is knowledge fragmented but that information is socially constructed: there are no such things as 'objective' social truths.[4] This conclusion is arrived at via various theoretical routes, most influential in regulatory writings has been autopoeisis. Autopoietically closed sub-systems, such as politics, administration, and law, construct their images of other sub-systems only through the distorting lens of their own perceptual apparatus, that is through experiences of their environment and in terms of their own binary oppositions. Thus the information which systems possess about other systems is simply that which they have themselves constructed in accordance with their own criteria. The conclusion is also reached through hermeneutics, or through various strands of new institutionalism, some strands of cultural theory, and some decision-making theories: that is that decision-makers, organizations, etc., construct

[4] The debate extends to scientific truths, but I leave that aside for the moment.

images of their environment in their own image, or through their own cognitive frames.[5]

The third aspect is fragmentation of the exercise of power and control. This is the recognition that government does not have a monopoly on the exercise of power and control, rather that is fragmented between social actors and between actors and the state.[6] The regulatory systems existing within social spheres are just as important to social ordering, if not more so, as the formal ordering of the state. Regulation occurs in many locations, in many fora: 'regulation in many rooms'.[7]

The fragmentation of the exercise of power and control entails the fourth aspect of the decentred understanding of regulation: a recognition of the autonomy of social actors. Autonomy is not used in the sense of freedom from interference by government, but in the sense that actors will continue to develop or act in their own way in the absence of intervention. Regulation therefore cannot take the behaviour of those being regulated as a constant. Regulation is, as Foucault said of governance, the 'conduct of conduct',[8] or as rephrased by Rose, 'to act upon action'.[9] This has several implications, most obviously that regulation will produce changes in behaviour and outcomes that are unintended (though not necessarily adverse),[10] and that its form may have to vary depending on the attitude of the regulatee towards compliance, an attitude which it can itself affect,[11] and that the autonomy of the

[5] For a general discussion of decision-making theories in the context of regulation see J. Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (1997) 19 *Law and Policy* 51.

[6] Foucault, n. 3 above.

[7] See e.g. L. Nader and C. Nader, 'A Wide Angle on Regulation: An Anthropological Perspective' in R. Noll (ed.), *Regulatory Policy and the Social Sciences* (Berkeley, Calif., 1985).

[8] See Foucault, n. 3 above). C. Gordon, 'Governmental Rationality: An Introduction' in G. Burchell, C. Gordon and P. Miller, *The Foucault Effect* (Hemel Hempstead, 1991).

[9] N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge, 1999) 4.

[10] See e.g. P. Grabovsky, 'Counterproductive Regulation' (1995) 23 *Int. J. of Sociology of Law*, 347.

[11] See e.g. R. Kagan and J. Scholz, 'Regulatory Enforcement Strategies' in K. Hawkins and J. Thomas, *Enforcing Regulation* (Boston, Mass., 1984); R. Baldwin, *Rules and Government* (Oxford, 1995); D. McBarnet and C. Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *MLR* 848.

actor will to an extent render it insusceptible to external regulation. Further, no single actor can hope to dominate the regulatory process unilaterally as all actors can be severely restricted in reaching their own objectives, not just by limitations in their own knowledge, but also by the autonomy of others.[12] Whether that is because of the actors' capacity to employ power and resources for action, [13] or because of the inherent characteristics of the system, or for some other reason, is a moot point. Again, autopoiesis has the more radical analysis of autonomy. Autopoeticists diverge on the meaning of autonomy, but broadly it refers to the self-regulation, self-production, and self-organization of systems which are normatively closed but cognitively open.[14] The consequence: no system can act directly upon another, and attempts to do so will result in Teubner's regulatory trilemma: the indifference of the 'target' system to the intervention, the destruction of the 'target' system itself, or the destruction of the intervening system.

The fifth aspect of the decentred understanding of regulation is the existence and complexity of interactions and interdependencies between social actors, and between social actors and government in the process of regulation. This is both a descriptive and a normative claim. Descriptively, the observation is that regulation is a two-way, or three- or four-way process, between all those involved in the regulatory process, and particularly between regulator and regulatee in the implementation of regulation. In Offe's terms, regulation is 'co-produced'.[15] In part this is expressed in the 'regulatory space' argument,[16] but that argument bundles together so many variables that may affect the formation and implementation of public policy and in so doing tends to obscure more than it

[12] J. Kooiman, 'Governance and Governability: Using Complexity, Dynamics and Diversity' in J. Kooiman (ed.), n. 3 above, 44–7.

[13] See e.g. Mayntz who argues that highly institutionalized and organized subsystems may resist political control, but argues that it is not their self-referential closure which makes intervention difficult but the actions of identifiable actors in resisting intervention/creating autonomy by employing the power resources and capacities for collective action characteristic of highly organized societal sectors: R. Mayntz, 'Governing Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm' in J. Kooiman (ed.), n. 3 above, 17.

[14] See G. Teubner, *Law as an Autopoietic System* (Oxford, 1993), 32–4.

[15] C. Offe, *Contradictions of the Welfare State* (London, 1984), 310; J. Black, 'Talking About Regulation, [1998] *Public Law* 77.

[16] L. Hancher and M. Moran, 'Organizing Regulatory Space' in L. Hancher and M. Moran (eds.), *Capitalism, Culture and Regulation* (Oxford, 1989).

illuminates. The dynamic of the relationship embraced in the new understanding of regulation is that interdependencies and interactions exist between government and social actors.[17] Further, it is not the case that society has needs (problems) and government has capacities (solutions). Rather each should be seen as having both problems (needs) and solutions (capacities), and as being mutually dependent on each other for their resolution and use.[18] These interactions and interdependencies should not be presumed to be contained within national territorial borders: analyses of globalization emphasize that they may extend well beyond them.

The claim that governance and regulation are the product of interactions and interdependencies leads into a sixth aspect of the decentred understanding of regulation. That is the collapse of the public/private distinction in socio-political terms, and a rethinking of the role of formal authority in governance and regulation. In the decentred understanding of regulation, regulation happens in the absence of formal legal sanction—it is the product of interactions, not of the exercise of the formal, constitutionally recognized authority of government.[19] The collapse of the public/private distinction as a useful tool for analysing governance and regulation is manifested in the identification of 'hybrid' organizations or networks that combine governmental and non-governmental actors in a variety of ways. To the governing alternatives of bureaucracies (hierarchies) and markets have been added associations—the 'private interest governments' identified by Streeck and Schmitter which comprised the new corporatism. The concept of authority still played a role, however, for these organizations shared in the state's authority to make and enforce binding decisions.[20] Added more recently are networks: the interactions of a range of actors, of which the state is only one, and which it has been argued government both does use and should use to govern.[21] As noted above, governance and regulation are seen to be the outcome of the inter-

[17] See e.g. J. Kooiman, 'Findings, Speculations and Recommendations' in J. Kooiman (ed.), n. 3 above, 253; Rhodes, n. 3 above, 50–9; Rose, n. 9 above, ch. 1.

[18] Kooiman, n. 3 above.

[19] Rhodes, n. 3 above.

[20] P. Streeck and P. Schmitter, 'Community, Market, State—and Associations? The Prospective Contribution of Interest Governance to Social Order' in P. Streeck and P. Schmitter (eds.), *Private Interest Government: Beyond Market and State* (London, 1985), 20.

[21] See e.g. Rose, n. 9 above, 16ff.

actions of networks, or alternatively 'webs of influence' which operate in the absence of formal governmental or legal sanction.[22] In the decentred understanding of regulation, therefore, formal *de lege* authority plays an ambiguous role.

So complexity, fragmentation and construction of knowledge, fragmentation of the exercise of power and control, autonomy, interactions and interdependencies, and the collapse of the public / private distinction: all are elements of the composite 'decentred understanding' of regulation. Together they suggest a diagnosis of regulatory failure which is based on the dynamics, complexity, and diversity of economic and social life, and in the inherent ungovernability of social actors, systems, and networks. They are accompanied by the final, seventh aspect of the new understanding of regulation, and that is the set of normative propositions as to the regulatory strategies that should be adopted.

The hallmarks of the regulatory strategies advocated are that they are hybrid (combining governmental and non-governmental actors), multi-faceted (using a number of different strategies simultaneously or sequentially), and indirect. The impetus for the latter prescription comes from the diagnosis of regulatory failure provided by systems theories: the functional differentiation of society into cognitively closed, normatively open self-referential systems, though analyses of the tools of regulation to be employed may by only weakly attached to this particular theoretical base. The prescription is that regulation should be indirect, focusing on interactions between the system and its environment. It should be a process of co-ordinating, steering, influencing, and balancing interactions between actors/systems, and of creating new patterns of interaction which enable social actors/systems to organize themselves, using such techniques as proceduralization, collibration, feedback loops, redundancy, and above all, countering variety with variety.[23] Such strategies have been described in a wide range of writings on regulation,[24] and have been labelled by some as the strategies of the 'new regulatory state'.[25] In a truly decentred

[22] Rhodes, n. 3 above; J. Braithwaite and P. Drahos, *Global Business Regulation* (Oxford, 2000).

[23] Teubner, n. 1 above and references cited at nn. 2 and 3.

[24] See for example the references cited *ibid*.

[25] J. Braithwaite, 'The New Regulatory State and the Transformation of Criminology' (2000) 40 *British Jnl. of Criminology* 222; C. Parker, 'Reinventing Regula-

understanding of regulation, however, such strategies would not be seen as unique to the state, but as prescriptions that all those attempting to regulate should follow. The particular normative goal that should be achieved in using such strategies varies with the writer's attachment to systems theory, in particular to Teubner's version, in which the normative goals of regulation must be to create the conditions for responsiveness, to prevent the entropy or self-destruction of systems, and to stimulate system integration.[26]

Decentred Regulation and Self-regulation

'Decentred regulation' thus involves a move away from an understanding of regulation which assumes that governments have a monopoly on the exercise of power and control, that they occupy a position from which they can oversee the actions of others, and that those actions will be altered pursuant to government's demand. 'Decentring' thus refers to changing (or differently recognized) capacities of the state and limitations on those capacities. Essentially, decentred regulation involves a shift (and recognition of such a shift) in the locus of the activity of 'regulating' from the state to other, multiple, locations, and the adoption on the part of the state of particular strategies of regulation.

The decentred understanding of regulation has filtered through in a more dilute form into practitioner debates and government literature on regulation. Policy-makers are essentially being told (by other policy-makers) that, first, there is no clear dichotomy between state regulation and non-state regulation, but a continuum between the two.[27] Secondly, that problems have multiple

tion within the Corporation: Compliance Oriented Regulatory Innovation' (2000) 35 *Administration & Society* 529; C. Parker, *The Open Corporation: Self-Regulation and Corporate Citizenship*, forthcoming.

[26] Teubner, n. 1 above; G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Soc. Rev.* 239; idem., 'Juridification: Concepts, Aspects, Limits, Solutions' in G. Teubner (ed.), *Juridification of the Social Spheres* (Berlin, 1987).

[27] See e.g. the 'better regulation' policy documents issued by the OECD, e.g. OECD, *The OECD Report on Regulatory Reform: Synthesis* (Paris, 1997), the federal governments of Australia: Productivity Commission, Office of Regulatory Review, *Guide to Regulation* 2nd edn. (Canberra, 1999), and Canada: *Regulatory Affairs Guide, Assessing Regulatory Alternatives* (Ontario, 1994), and of the UK: Better Regulation Taskforce, *Alternatives to State Regulation* (London, July 2000).

causes, many unknown, and that regulation has unintended consequences. Policy-makers therefore should not think in terms of using just one regulatory instrument to address a problem, but of using a range of instruments in a combination which will be multi-faceted and hope to minimize, or self-correct, unintended consequences: instrument mix is the new buzz phrase.[28] Thirdly, that one set of solutions will not fit all problems—regulatory design has to be contextual, it has to be responsive to the context in which it will be operating.[29] Fourthly, that governments should not row and cannot steer, at least not directly.[30] Rather they have to create the conditions in which firms, markets, etc. steer themselves, but in the direction that governments want them to go: regulation at one remove.

Where does 'self-regulation' fit into this analysis? At one level, self-regulation and more particularly various forms of 'co'-regulatory arrangements have an obvious attraction. Whatever 'self'-regulation is, it is not state regulation; it must therefore have a natural place in the new 'decentred' regulatory world. It is bound to be contextual, responsive, and does not involve governments in direct steering. Moreover, it seems to overcome the problem of regulating others—the 'others' simply regulate themselves.

Discussing the place of self- or co-regulation, however, assumes an accepted understanding of what it is they consist. Is the 'self-regulation' that of associations, individual firms, or is it the conceptually more radical 'self-regulation' of network analysis or systems theory? What is the distinction, if any, between self-regulation, co-regulation, quasi-legal regulation, and voluntarism? What do we mean by 'regulating self-regulation'? Does it mean simply threatening to move up the legislative pyramid in a manner akin to the operation of Ayres and Braithwaite's enforcement pyramid? Or does it mean a more radical reconceptualization of the task of regulating itself, manifested in the indirect techniques of regulation: proceduralization, collibration, and so on? Are those indirect techniques of regulation necessarily 'self-regulatory'

[28] Gunningham and Grabovsky, n. 2 above, ch. 6.

[29] Ibid., I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Regulation Debate* (Oxford, 1992).

[30] Modifying D. Osborne and T. Gaebler's phrase: *Reinventing Government* (Reading, Mass., 1992); 'steering' is itself subject to a range of meanings: see Mayntz in Kooiman (ed.), n. 3 above.

techniques or are they instead prescriptions for how the state should exercise its regulatory function (as in the 'new regulatory state' thesis)? If they are, and they often seem to be, then is the policy response to the diagnosis of decentring a particular type of action by the centre? The question is rendered more complicated because in some discussions self-regulation is a solution, a tool or strategy government can adopt as it chooses, although for some it is so flawed as a tool of regulatory policy that it is a problem posing as a solution. In other discussions, however, self-regulation is seen not as a tool to be used or not as government wishes, but instead as the problem that policy-makers have to address. At the same time, though, it is argued in those discussions that self-regulation provides the solution to the problem which it itself creates.

Self-regulation as a Solution

In much policy literature, emanating from both governments and academics, self-regulation is an optional strategy which governments could adopt, depending on the particular context. The Australian *Guide to Regulation*, for example, stipulates that once a problem has been identified, self-regulation is the first solution that should be considered.[31] Self-regulation usually comes with a policy health warning attached, however. The OECD, for example, warns that 'the risks of self-regulation and voluntary approaches ... need to be rigorously managed by programme design and application of competition policies'.[32] So policy designers in both government and academia have been suggesting ways in which the traditional model of self-regulation can be adapted and used to achieve governmental aims either on its own or in combination with some form of government or 'stakeholder' involvement in different 'co-regulatory' arrangements which can

[31] *Guide to Regulation*, n. 27 above, B3.

[32] OECD, n. 27 above, 28. The UK Competition Act 1998 applies to 'associations of undertakings', but bodies regulating professions may apply to the Secretary of State for their rules to be designated and thus excluded from the Chapter I prohibition: Schedule 4, para 2 and The Competition Act 1998 (Application for Designation of Professional Rules) Regulations 1999 (SI 1999 No 2546), and others may apply to the Director General of Fair Trading for exemption if they comply with the criteria set out in s.9 of the Act: see OFT, *Trade Associations, Professions and Self-Regulating Bodies* (OFT 408, March 1999).

address the weaknesses of self-regulation whilst retaining its strengths.[33]

One of the difficulties in discussing self-regulation as a policy option, however, is that self-regulation is such a normatively loaded term. For some it denotes regulation that is responsive, flexible, informed, targeted, which prompts greater compliance,[34] and which at once stimulates and draws on the internal morality of the sector or organization being regulated.[35] For others it is self-serving, self-interested, lacking in sanctions, beset with free rider problems, and simply a sham.[36] The rhetoric affects policy attitudes and decisions, and can result in poor regulatory design.[37] A government policy of relying on self-regulation is often interpreted as indicating that the government is not serious about an issue. The 'how to regulate' guides issued by governments in Australia and the UK, for example, support this interpretation, for they suggest that self-regulation should not be used for matters which are of high public interest or profile, or for regulating activities which pose particularly high risks.[38]

[33] For example in Canada see Industry Canada, *Voluntary Codes: A Guide for their Development and Use* (Ontario, 1998); Office of Consumer Affairs, *An Evaluative Framework for Voluntary Codes* (Ontario, March 2000); *Assessing Regulatory Alternatives*, n. 27 above; in Australia see *Guide to Regulation*, n. 27 above, Minister for Customs and Consumer Affairs, *Codes of Conduct: Policy Framework, Industry, Science, Tourism and Consumer Affairs* (Canberra, March 1998); Commonwealth Inter Departmental Committee on Quasi Regulation, *Grey Letter Law* (Canberra, 1997); in the UK see the Better Regulation Taskforce, *Self Regulation: Interim Report* (London, October 1999); idem., *Alternatives to State Regulation*, n. 27 above; Oftel, *Encouraging Self- and Co-Regulation in Telecoms to Benefit Consumers* (London, June 2000), National Consumers Council, *Models of Self Regulation* (London, October 2000).

[34] See generally R. Baldwin and M. Cave, *Understanding Regulation* (Oxford, 1999), ch. 10; C. Scott and J. Black, *Cranston's Consumers and the Law* (London, 2000), chs. 2 and 13; and Gunningham and Grabovsky, n. 2 above, 50–6 and references cited therein.

[35] P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, Ca., 1992); N. Gunningham and J. Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 10 *Law and Policy* 363.

[36] See e.g. J. Braithwaite and B. Fisse, 'Self Regulation and the Costs of Corporate Crime' in C. Shearing and P. Stenning, *Private Policing* (Beverly Hills, Ca., 1987); J. Braithwaite, 'Responsive Business Regulatory Institutions' in C. Cody and C. Sampford (eds.), *Business, Ethics and Law* (Sydney, 1993).

[37] The system set up under the Financial Services Act 1986 is a prime example. For discussion of the role of rhetoric in the actual design of the system see J. Black, *Rules and Regulators* (Oxford, 1997), ch. 2

[38] *A Guide to Regulation*, n. 27 above, Box D.2; and this is the implicit message in the Better Regulation Taskforce, *Alternatives to State Regulation*, n. 27 above.

A second difficulty in discussing self-regulation as a policy option is that exactly what the key variable is that makes regulation 'self-regulation' can be hard to spot. One set of definitions assumes that 'self-regulation' is some form of collective exercise on the part of non-governmental actors, but then there are many variations within that broad grouping. For many, it is that regulation is voluntarily initiated, whether on a unilateral, bilateral, or collective basis, and that the jurisdiction of any enforcer is voluntarily submitted to, which is the hallmark of 'pure' self-regulation. In contrast, the Canadian Regulatory Affairs Guide, for example, asserts 'there is nothing voluntary about self regulation', preferring to use the term 'voluntary codes' to refer to non-legal rules unilaterally or collectively adopted by business (although such codes, it notes helpfully, can be voluntary or mandatory).[39] 'Self-regulation' in the context of the Canadian debates refers to the delegation of power to the professions to regulate themselves.

The lack of any government involvement in the initiation and/or operation of the regulation is for some seen as critical to the definition of 'self-regulation' and it is on this basis that 'self'-regulation is distinguished from most definitions of 'co'-regulation.[40] Many government policy documents define self-regulation as the practice of industry taking the initiative to formulate and enforce rules and codes of conduct with no government involvement, or with such involvement taking a very limited form, for example as observer or advisor. The OECD defines self-regulation as the 'process by which an organized group regulates the behaviour of its members'.[41] The UK Better Regulation Taskforce emphasizes collectivity and mutual agreement, as does the Australian Better Regulation Guide.[42] However, in its definition of self-regulation Oftel retains the emphasis on mutuality but broadens the participants from industry to all stakeholders.[43]

Others equate 'self-regulation' with a particular type of rule: non-legal rules or 'soft law'. The Australian Better Regulation

[39] *Assessing Regulatory Alternatives*, n. 27 above, 48.
[40] See e.g. Oftel, n. 33 above.
[41] OECD, *Meeting on Alternatives to Traditional Regulation* (OECD, Paris, 1994) 7.
[42] *Alternatives to State Regulation*, n. 27 above; *Self Regulation—Interim Report*, n. 33 above; *A Guide to Regulation*, n. 27 above, E8.
[43] Oftel, n. 33 above, para 1.8.

Guide, for example, distinguishes between self-regulation, quasi-regulation, co-regulation, and explicit government regulation on the basis of the legal status of the rules that are used and on the relationship of the rule-making function of the industry body to legislative powers given to government agencies.[44] The Guide stipulates that self-regulation refers to industry formulating rules and codes of conduct and being solely responsible for their enforcement. Quasi-regulation refers to non-legal rules which have some form of government 'halo', including government-endorsed industry codes of practice, government agency guidance notes, industry-government agreements, and national accreditation schemes[45] (which in some UK classifications would be 'tertiary rules').[46] Co-regulation refers to a degree of legislative underpinning of codes or standards, e.g. legislative delegation of power to industry to regulate and enforce codes, expecting or requiring industry to have a code but having back-stop legislative power to impose one, prescribing industry codes as voluntary or mandatory in legislation, legislation setting minimum standards which industry can improve upon, or enforcing undertakings to comply with a code.[47] The equation between 'soft law' and 'self-regulation' is also made by others, for example in debates on the role of 'soft law' in the context of EU regulation.[48]

Others focus either, or in addition, on whether the rules are unilateral, bilateral, or multilateral (collective). Most discussions of self-regulation focus on regulation by a group of persons or organizations, in which case the rules are multilateral (between many).[49] However, some use self-regulation to refer also (or instead) to the unilateral adoption of standards of conduct by an individual firm[50] (sometimes alternatively referred to as 'voluntary

[44] *Guide to Regulation*, n. 27 above, E8–E12; *Codes of Conduct: Policy Framework, Industry, Science, Tourism and Consumer Affairs*, n. 33 above; *Grey Letter Law*, n. 33 above, ix.

[45] See further Productivity Commission, *Regulation and Its Review 1997–1998* (Canberra, 1998); *Grey Letter Law*, n. 33 above.

[46] Baldwin, n. 11 above.

[47] *Guide to Regulation*, n. 27 above, E8–E12.

[48] See e.g. G. Howells, ' "Soft Law" in EC Consumer Law' in P. Craig and C. Harlow (eds.), *Law Making in the European Union* (Oxford, 1998).

[49] Although it is recognized that some self-regulatory rules may in formal legal terms take the form of a bilateral contract between a member and an association, such association rules are here termed multilateral because the rules are designed to be common to all members.

[50] Which is further distinguished from intra-firm regulation, discussed below.

regulation').[51] 'Self-regulation' is also sometimes used to refer to bilateral agreements entered into between government and a particular firm or firms where these lack legal underpinning (e.g. voluntary efforts to reduce greenhouse gases in Australia).[52]

Others adopt a neo-corporatist analysis, eschewing the voluntary/mandatory, legal/nonlegal, public/private dichotomies as definitional tools and including under the label 'self-regulation' a variety of arrangements in which associations or individuals may retain the authority to make rules and to monitor and enforce them, but which involve different relationships with government. I have in the past distinguished four broad types of relationship of collective self-regulation and government. These are: *mandated* self-regulation, in which a collective group is required or designated by the government to formulate and enforce norms within a broad framework set by government; *sanctioned* self-regulation, in which the collective group formulates rules which are then approved by government; *coerced* self-regulation, in which the industry formulates and imposes regulation but only in response to the threat of statutory regulation (and government may have taken back-stop statutory powers to impose such regulation, sometimes also described as 'regulation in the shadow of the law' or 'co-regulation'); and *voluntary* self-regulation, where there is no government involvement, direct or indirect, in promoting or mandating self-regulation.

Other variables could be built into the neo-corporatist definition of collective self-regulation. These could be, for example, the

[51] See for example Gunningham and Grabovsky, n. 2 above, 56 (who also use 'voluntarism' to apply to agreements entered into between a business and government); and the government of Canada, which uses voluntary codes to refer to unilaterally adopted standards of conduct and collective codes: see references at n. 33 above.

[52] D. Sinclair, 'Self Regulation versus Command and Control? Beyond False Dichotomies' (1997) 20 *Law and Policy* 529, 541. Other examples of such bilateral regulation are the agreements entered into between the main financial institutions involved in selling derivatives and the Federal Reserve Board concerning conduct of business standards when advising on and selling complex products: see J. Black, 'Perspectives on Derivatives Regulation' in A. Hudson (ed.), *Modern Financial Techniques, Derivatives and Law* (Dordrecht, 2000). Given the variety of forms that bilateral regulation can take (licences used in utilities, broadcasting, for example, could be characterized as bilateral regulation, as well as e.g. environmental covenants in the Netherlands), bilateral regulation could be perhaps better recognized as a separate technique of regulation in its own right rather than as a variety of self-regulation.

involvement or relationship with other associations or groups in the regulatory process, such as auditors, technical committees, community groups, NGOs. This involvement may take the form of consumer or community representatives, for example, on rule-making or disciplinary panels or agreements with local communities (*'stakeholder'* self-regulation). Alternatively, or in addition, it could be *'verified'* self-regulation, in which third parties are responsible for monitoring compliance (auditors, NGOs, others);[53] or *'accredited'* self-regulation, in which rules and compliance are accredited by another non-governmental body (e.g. standards council or other technical committee).

Finally, a somewhat narrower view is sometimes taken of the function of regulating in which 'self-regulation' essentially means involvement in or control over rule-formation. It is on this basis that the standards set by technical committees are sometimes described as 'self-regulation'. In this use of the term, the standard setting body makes the final determination on the standards. Some definitions of 'self-regulation', such as that of the UK National Consumers Council (adopted by the UK Better Regulation Unit), are even thinner—their basis for designating a regulatory system as 'self-regulatory' is that industry has had an input into the formation of the rules, even if it has not had the final say on their content. This is the basis of the National Consumer Council's classification of eight forms of self-regulation: unilateral codes of conduct, customer charters, sectoral codes (agreed between members of an industry), negotiated codes (negotiated with consumers, government), trade association codes approved by the OFT, recognized codes (codes which have some form of statutory foundation or recognition), official codes and guidance promulgated by government or a regulatory agency often elaborating on statutory requirements, and 'legal codes', those sanctioned by legislation and which may have some legal status. The NCC therefore, somewhat confusingly, includes large tracts of delegated legislation as 'self-regulation' on the basis that practitioners have been consulted in its formation.[54]

The second main sense in which 'self-regulation' is used is to

[53] For example the Responsible Care programme: for discussion see Gunningham and Grabovsky, n. 2 above, 155–172.
[54] NCC, n. 33 above.

refer to the quite distinct practice of 'intra-firm' regulation: the design and operation of systems of regulation inside a single organization, which in the regulatory literature is usually a firm (although analytically it could be a school, prison, university, etc., see further below).[55] In this use of the term, the defining feature is that an individual organization is responsible for exercising a regulatory function;[56] whether that regulation is voluntary, mandatory, or within a framework set by law is of less definitional importance. It is sometimes assumed that the regulation is voluntary and separate from government regulation (e.g. the Gap Inc.'s Source Code, or Ogus's model of 'consensual self regulation'),[57] but others use the term to describe a form of intra-firm regulation that is required by government regulation—for example, Ayres and Braithwaite's 'enforced self regulation'[58] or Rees's discussion of 'mandated' and 'partially' mandated self-regulation.[59] 'Self-regulation' then does not equate to voluntarism: rather, it is simply an internal regulatory process induced by government.[60]

A third use of 'self-regulation' has been to refer to the interactions of individuals and firms in making legal contracts.[61] Collins argues that contracting is properly described as self-regulation, for contract parties are the source of the rules, monitor each other's compliance, and seek sanctions from courts. Indeed, he argues that

[55] See generally Parker, n. 25 above.

[56] Clearly, on this definition how one draws the boundary around an organization will be critical to identifying whether it is 'self-regulating' or being regulated by another. Recent studies of regulation of government illustrate how this may simply be a matter of construction by the observer: Hood *et al.*'s study of regulation inside government takes as a defining feature of regulation the fact that the regulator is organizationally separate; no self-regulation figures: C. Hood, C. Scott, O. James, G. Jones and T. Travers, *Regulation inside Government* (Oxford, 2000). Daintith and Page's recent study of the executive describes what Hood *et al.* may classify as regulation as 'internal controls', and occasionally as 'self-regulation': T. Daintith and A. Page, *The Executive in the Constitution* (Oxford, 2000).

[57] A. Ogus, 'Rethinking Self Regulation', *OJLS* 15 (1995) 97.

[58] Ayres and Braithwaite, n. 29 above.

[59] J. Rees, *Reforming the Workplace: A Study of Self Regulation in Occupational Health and Safety* (Philadelphia, Penn., 1988), 9–12.

[60] See M. Aalders and T. Wilthagen, 'Moving Beyond Command and Control: Reflexivity in the Regulation of Occupational Health and Safety in the Environment', *Law and Policy* 19 (1997) 415.

[61] H. Collins, *Regulating Contracts* (Oxford, 2000), 63 ff.

the private law of contract uniquely among regulatory systems provides a species of 'self-enforced self regulation' in that it is left to the parties themselves to decide whether or not compliance with the rules should be insisted on.[62]

This definition is at first sight a mere variant on some understandings of the collective self-regulation model, differing only in that the rules are bilateral rather than multilateral. The fact that the parties who formulate the rules are responsible for monitoring and enforcing them, far from being 'unique' to the private law of contract, is for most the central component of collective self-regulation, and moreover that collective commitment need not be underpinned by any form of contractual relationship at all for its operation.[63] Indeed, on some definitions 'self-regulation' as contract is not 'self-regulation' as it is not separate from law—the arrangement is by its nature legally enforceable and the parties do not have the final say over the interpretation of the rules.

So self-regulation is used to mean variously soft law, collective arrangements that may be non-legal, and/or entail no government involvement, bilateral arrangements between firms and the government, unilateral adoption of standards, the involvement of industry in rule-formation, neo-corporatist arrangements in which the collective shares in the state's authority to make decisions about standards of conduct, monitoring, and enforcement, but in which the relationship with government may vary, and/or in which those other than the persons being regulated may play a role (auditors, stakeholders). Self-regulation can additionally or alternatively mean intra-firm regulation; it can mean private contracting. What any one definition of 'self-regulation' does not encompass is picked up by other labels: co-regulation, quasi-regulation, quasi-law, soft law, voluntarism, the exact application of those labels varying with the model of 'self-regulation' to which it is opposed.

Where do these different conceptions of self-regulation fit into the understanding of decentred regulation? Take first the various definitions of collective self-regulation. Simply by denoting what it is they are describing as 'regulation' they all indicate that 'regulation' occurs separate from government—that there is 'regulation

[62] Ibid., 66–7.
[63] The most obvious example is the operation of the Takeover Panel.

in many rooms'. Defining self-regulation as non-legal and as being free from government involvement implies a recognition that there are systems of ordering in society which exist separately from direct government ordering (although those private systems of ordering may be constituted by, *inter alia*, laws of property or contract, for example, or they may not[64]). The definition is dependent on a clear distinction between public and private though, for as soon as there is a whiff of government or legal involvement the arrangement is not deemed to be self-regulatory. Self-regulation on this understanding cannnot therefore, by definition, be a hybrid regulatory arrangement. Neo-corporatist definitions, in contrast, by their nature recognize hybridity, and use a range of prefixes to denote the nature of that hybridity (voluntary, mandated, coerced, accredited etc.)

Self-regulation as intra-firm regulation can also find a place in a decentred analysis of regulation, though any notion of voluntariness that the word 'self' might imply is often absent. Moreover, as noted above, the 'self' is not a monolithic entity but rather an organization which may be internally fragmented, and in which the regulation itself may take a hierarchical form and consist of CAC rules backed by sanctions. But although the terminology of 'self'-regulation may not be particularly helpful in either the collective or intra-firm senses (regulation is still of 'others': other firms, other individuals within organizations), focusing on regulation within firms does accord with some aspects of the decentring analysis. Intra-firm regulation is a manifestation of the multiple locations of regulation, and its existence, even if it is not specifically designed into the regulatory system, illustrates the interdependencies between government and other social actors and co-production of regulation. As for 'self-regulation' describing private contracting, again that recognizes multiple sites of ordering, but does not suggest hybridity or interdependencies between government and other social actors and it raises the question, discussed below, of what is meant by the term 'regulation' when it is used in this context.

[64] C. D. Shearing, 'A Constitutive Conception of Regulation' in P. Grabovsky and J. Braithwaite, *Business Regulation and Australia's Future* (Australian Institute of Criminology, Canberra, 1993); Collins, n. 61 above, 212–18.

Self-regulation: A Problem Posing as a Solution?

The discussions on collective self-regulation and intra-firm regulation usually occur in a context in which they are seen as potential tools for a policy-maker to employ, and there is a standard list of advantages and disadvantages which is generally attributed to 'self-regulation' regardless of the form it takes. As many have noted, these lists are only of limited use, as how self-regulation will in fact operate depends on the form it takes and the context in which it operates.

There is a danger, however, that despite the warnings for contextual analysis and that despite the great claims made for it as an innovative policy form, collective self-regulation or intra-firm regulation may well be simply the displacement of command and control regulation to another level, be it the association or the individual firm. Regulation is likely to rely on rules backed by sanctions—as is assumed in most models of self-regulation—and so will be prey to all the weaknesses of that model.[65] The success of collective self-regulation depends, *inter alia*, on the relationship of the association to its members, and of intra firm regulation on the relationship of the compliance department to the rest of the organization. Both require knowledge, capacity, and motivation in the same way that government regulation is assumed to for its effectiveness. Analyses of self-regulation which fail to focus on these points may have accepted the rhetoric of the decentring thesis, but they have rejected its analysis. The existence of and need to recognize issues of complexity, the fragmentation and construction of knowledge, the fragmentation of the exercise of power and control, autonomy, and interactions and interdependencies do not stop at the borders of the collective or organizational 'black box' but pervade it.

Further, there is an implicit attraction to self-regulation which derives from its name. Implicit in the term 'self'-regulation is the assumption that principal and agent are collapsed into one. The core regulatory problem, how to influence others, is assumed away. It is assumed that the 'self' is autonomous in that it constructs the reasons for its actions, and that what is at issue is

[65] For illustration of this fact in the context of intra-firm regulation see Parker, forthcoming, n. 25 above.

simply the *will* to influence oneself. The *ability* to do so is often simply taken for granted. These are dangerous assumptions. Collectives are clearly not monoliths, but neither are organizations—they are complex, disaggregated, fragmented, with multiple identities and multiple sub-units, with multiple selves,[66] and one may add, multiple 'others'. For the dealer in an investment bank 'self-regulation', even if voluntarily adopted by the firm, is not something imposed by a 'self', but by the 'other' of compliance officers, risk management teams, internal auditors. Collective self-regulation and intra-firm regulation, far from avoiding the problems of a clash of rationalities, external-internal boundaries or principal-agent structures, and the incentive and monitoring problems of other forms of regulation, may simply replicate them.

Self-regulation as a Problem

As noted, the above uses of self-regulation view self-regulation from the perspective of a policy-maker, and see self-regulation as one instrument in the policy-makers' tool box that can be used and fashioned as required. This contrasts with the sense in which 'self-regulation' is employed in autopoiesis and which has in turn been appropriated and used in some discussions of networks.[67] In autopoiesis, self-regulation refers to the ability of a system spontaneously to build up and stabilize structures to produce an autonomous order (self-organization) and to alter those structures according to its own criteria.[68] It is dynamic structural change in a system, and a system is self-reflexive when that change occurs according to criteria which are determined ('regulated') by the system's self-description.[69]

Self-regulation in autopoiesis, therefore, means something quite different to the meanings described above. It does not necessarily mean non-legal: in autopoeitic analyses of law, law is self-regulating as it has its own rules for how to produce change—it makes no sense to say those rules are non-legal. It does not mean regulation through non-governmental actors *per se*, either associations, firms, or individuals. It does not mean the application to 'oneself'

[66] Ayres and Braithwaite, n. 29 above, 31.
[67] See Rhodes, n. 3 above; R. Rhodes, 'From Marketization to Diplomacy: It's the Mix that Matters', *Public Policy and Administration* (1997) 12 31.
[68] Teubner, n. 14 above, 19–20; 34. [69] Ibid., 22, 24.

(in the sense either of a collective or a single organization, e.g. a firm) of standards of behaviour or conduct or the imposition on oneself (in the sense of an individual) of criteria for action or decision, either unilaterally or by consent in an exchange relationship with another (as in contracting). In fact it does not even mean the capacity to influence its own operation (that is self-observation)[70]—rather, it means its structural change.

Self-regulation in autopoeitic analyses is not equated with autonomy, it is simply part of the system's autonomy. However, as the idea of self-regulating systems has been used and appropriated, particularly in some analyses of networks, self-regulation is sometimes used interchangeably with self-referentiality, and has also come to mean a particular kind of autonomy: autopoietic closure. That autonomy poses risks for the system itself, as systems are entropic, and for other systems, as each system will fail to be responsive to others. Some form of 'regulation' is then seen as necessary both to ensure the survival of the system and to ensure its responsiveness to its environment. However, the nature of the system, now often simply bundled up into the term 'self-regulating', poses limits on the scope for intervention. The self-regulation of the system, however, also provides the only key for intervention, for if it is to achieve its ends that intervention has somehow to alter the criteria for the dynamic for change within that system. Self-regulation is thus not simply one policy option amongst many that a government might choose. Rather, it is the inescapable 'problem', and it is the object of all the various 'solutions'. The prominence of self-regulation in the decentred understanding of regulation is thus unsurprising: it is the diagnosis of regulatory failure that lies at the heart of the decentring analysis.

Self-regulation as a solution posing as a problem

The decentred understanding of regulation, in recognizing the multiple locations of regulation, and the interdependencies and interactions of government and social actors, emphasizes that 'governments could never govern if people were not self governing'.[71] One of its central insights is that social systems are

[70] Ibid., 19.
[71] A. Dunsire, 'Modes of Governance' in Kooiman (ed.), n. 3 above, 26.

steerable from the outside or from within only if the system itself can make use of its major component systems to effect correcting action, and each component is only reliable if it can keep its variability within bounds, i.e. it is self-regulating.[72] Again, we do not need systems theory to be able to make the point: government-initiated regulation of firms relies for its effectiveness in part on firms having not only the will to comply but also the organizational capacity to do so.[73]

The normative aspect of the new understanding of regulation is that intervention in the self-regulation of social actors (not all analyses take systems theory so seriously as to replace actors with communications) has to be indirect. It has to harness that self-regulatory capacity but ensure that it is used for public policy ends, by adjusting, balancing, structuring, facilitating, enabling, negotiating, but never directly telling and never directly trying to control.

How these self-regulating capacities are in fact harnessed is now the current topic of debate. The instruments that governments have at their disposal remain the same: financial, legal, and informational (the carrot, the stick, and the sermon).[74] It is the way that they are used that is significant. So the tools of the policy-maker include the usual financial ones of subsidies, loans, grants, incentives, public procurement policies; the 'new' aspect (and one could debate the extent to which it is empirically 'new') is the explicit recognition of these devices, not as budgetary devices but as regulatory ones. Similarly with information: the 'decentred' regulatory strategies emphasize a larger and more strategic role for information and its explicit recognition as a regulatory tool.

A bigger shift is required in the use of law, for here the prescription is to move away from 'regulatory law' to reflexive, 'procedural', or 'post-regulatory' law. 'Regulatory law' set substantive standards; 'reflexive' or 'procedural' law sets procedures. These procedures should be aimed at improving the reflex-

[72] A. Dunsire, 'Modes of Governance' in Kooiman (ed.), n. 3 above, 26.

[73] See Rees, n. 59 above; Gunningham and Rees, n. 35 above; J. Black and R. Nobles, 'Personal Pension Misselling: The Causes and Lessons of Regulatory Failure', *MLR* 761 (1998) 89; Parker, n. 25.

[74] J. Bruijn and E. Heuvelhof, 'Policy Instruments for Steering Autopoietic Actors' in Veld *et al.* (eds.), n. 3 above, 161.

ivity of systems and their responsiveness to their environments, and so the co-ordination or integration of perspectives between different social actors or systems, often summed up in the term 'democratization'.[75] They could also be procedures which aid reflexivity by, for example, building feedback mechanisms, for the generation and dissemination of information and knowledge, for the risk-management of an institution.[76]

The neo-corporatist models of self-regulation have a natural home in this decentred understanding of and prescriptions for regulation, and one of the roles of reflexive law is to set the decision-making procedures within organizations in such a way that the goals of public policy are achieved. Another proposal of an indirect strategy is Dunsire's analysis of collibration. Dunsire argues that what keeps systems self-regulating is constant opposition and tension between alternative states: isostasy, the stability owed to a balancing of multiple forces. Collibration is the manipulation of these tensions. The essence is:

> to identify in any area what antagonistic forces already operate, what configuration of them provides the current stability, and what intervention would help to change that stability to an alternative one which is more in line with the policy makers' objectives, not by laying down a standard, but by giving that degree of *ad hoc* support to the side that needs it to do the trick.[77]

So policy-makers can intervene in the stabilization process by strengthening one force or weakening another in a polydynamic area so as to alter the outcome without superseding the tensions altogether.[78] This, he argues, is a more familiar technique than might first appear. It is manifested in constitutional separation of powers and checks and balances, and one could add in the existence of consumer panels or other institutionalized provision for consumer input into the regulatory process. It could be manifested in the provision of information to empower consumers or other groups, so altering the balance in their favour. Or using other

[75] For discussion see J. Black, 'Proceduralising Regulation: Part I' (2000) 20 *OJLS* 597, and 'Proceduralising Regulation: Part II', *OJLS* (2001) 21 33.

[76] Ladeur calls these 'second order' proceduralization: K.-H. Ladeur, 'Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law' in Teubner, Farmer and Murphy, n. 3 above.

[77] Dunsire, n. 71 above, 34.

[78] Ibid.

strategies, also classified as 'non-regulatory', such as taxes, to provide incentives, or subsidizing consumer advice.[79] The point of such techniques is that they cannot be routinized, they are *ad hoc*, they fine-tune the balance, and they can be discourseless: they just alter the terms of engagement.[80] Further elaborations include strategies of redundancy, in which duplication of function is deliberately designed into the regulatory system, in the hope that if one 'fails' then the other will still be effective.[81]

The literature on indirect regulatory (or post-regulatory) strategies is extensive, and whilst it offers many innovative designs for techniques of regulation, it is not the aim to review those here. For the purposes of this discussion it is sufficient to note that self-regulation, as an element of autopoietic closure, is central to the decentring analysis. It provides its principal diagnosis of regulatory failure, and is posited normatively as the key to regulatory success. The task of regulation has been redefined: it is to regulate self-regulation. However, it is to do so indirectly, in a 'post-regulatory' way. Do post-regulatory techniques therefore mark the end of regulation? Are they alternatives to regulation, or alternatives of regulation? We can only answer that question if we know what we mean by 'regulation'.

The Role of Regulation in the 'Post-regulatory' World

The decentred understanding of regulation is in many respects very stimulating. It opens up the cognitive frame of what 'regulation' is, enabling commentators to spot regulation in previously unsuspected places, and it prompts policy-thinkers to consider a wide range of different configurations of state, market, community, associations, and networks to deliver public policy goals. But it does raise a fundamental definitional question. When 'regulation' was something associated simply with governments and their administrators, and when 'self'-regulation could define itself

[79] Dunsire, n. 71 above, 32.

[80] A. Dunsire, 'Tipping the Balance: Autopoiesis and Governance' (1996) 31 *Administration and Society* 299, 322.

[81] M. Landau, 'Redundancy, Rationality and the Problem of Duplication and Overlap', *Public Administration Review* 39 (1969) 356; Rhodes, n. 3 above, and in the context of accountability, see C. Scott, 'Accountability in the Regulatory State' (2000) 27 *J of Law & Soc.* 38.

simply in opposition to the 'normal' regulation by government, matters were confused at a terminological level, certainly, but conceptually we could gloss over what the 'regulation' was that was being done, and just focus on the institutional form. But one of the consequences of accepting the 'decentring' of the state in the function of regulation is obviously that 'regulation' is uncoupled from the activities of government. Once regulation is seen as something that can be done without government, the question arises of what it is. The answer is not at all clear.

The reaction of most regulationists at this point is likely to be: 'oh no, not this again'. But this is not because they would all come out with the same answer—far from it. Indeed, definitional chaos is almost seen as an occupational hazard by those who write about regulation. Rather, regulationists would probably pull out the three broad types of definitions which have been identified in some of the main 'textbooks' on regulation.[82] In the first, regulation is the promulgation of rules accompanied by mechanisms for monitoring and enforcement. The usual assumption is that government is the rule-maker, monitor, and enforcer, usually operating through a public agency. The second definition keeps to the government as the 'regulator' but broadens the techniques that may be described as 'regulation' to include any form of direct state intervention in the economy, whatever form that intervention might take. In the third definition, regulation includes all mechanisms of social control or influence affecting behaviour from whatever source, whether intentional or not.[83]

A quick survey of some government publications on 'better regulation' shows that it is usually some version of the first two definitions of 'regulation' that are adopted. Indeed, it is often a very narrow definition in which regulation refers simply to the use of legal instruments, with no presumption as to the existence of systems of monitoring and enforcement. The OECD, for example, defines regulation as:

> the full range of legal instruments by which governing institutions, at all levels of government, impose obligations or constraints on private sector behaviour. Constitutions, parliamentary laws, subordinate legislation,

[82] R. Baldwin, C. Scott and C. Hood, *A Reader on Regulation* (Oxford, 1998); R. Baldwin and M. Cave, *Understanding Regulation* (Oxford, 1999).

[83] See Baldwin, Scott and Hood, ibid., 3; Baldwin and Cave, ibid., 2.

decrees, orders, norms, licences, plans, codes and even some forms of administrative guidance can all be considered as 'regulation'.[84]

The governments of Canada and Australia adopt a similar definition.[85] Everything that government does that is not done through legislation or delegated legislation is thus not 'regulation'. In contrast, the UK government's Better Regulation Taskforce (BRT) defines regulation as 'any government measure or intervention that seeks to change the behaviour of individuals or groups, so including taxes, subsidies and other financial measures'.[86] Government is, however, a notoriously fragmented thing. Whilst the BRT focuses only on government actions as being regulation, Oftel includes in its definition of regulation the operation of market forces.[87]

Academics are even less disciplined. They (including myself) vary as to which of the above definitions they adopt, if any of them, and the same writers may adopt different definitions in different writings. To take just some of the more recent books on regulation: Baldwin, Scott, and Hood adopt all three definitions in the Introduction to their *Reader on Regulation*;[88] Baldwin and Cave adopt the first two in their book *Understanding Regulation* with the variation that regulation is also the making, monitoring and enforcing of rules by non-governmental actors.[89] Hood *et al.* adopt only the first definition in their book, *Regulation inside Government,* with the twist that the 'regulator' has some kind of official mandate to scrutinize the behaviour of the 'regulatee' and seek to change it.[90] Hall, Hood, and Scott, however, implicitly adopt the third definition in their book on telecommunications regulation when they talk of regulators being 'regulated' by culture.[91] A version of the broader definition is also adopted by

[84] OECD, Recommendation of the Council of the OECD on Improving the Quality of Government Regulation, OECD/GD(95)95, Note 1; OECD, n. 27 above.

[85] *Assessing Regulatory Alternatives,* n. 27 above, 63; *A Guide to Regulation*, n. 27 above.

[86] Better Regulation Taskforce, *Principles of Better Regulation* (undated), 1.

[87] Oftel, n. 33 above, 2.

[88] R. Baldwin, C. Scott and C. Hood, 'Introduction', in Baldwin, Scott and Hood, n. 82 above.

[89] Hood *et al.*, n. 56 above.

[90] Ibid., 8.

[91] C. Hall, C. Scott and C. Hood, *Telecommunications Regulation: Culture, Chaos and Interdependency inside the Regulatory Process* (London, 2000), 5–7.

Braithwaite and Drahos, who equate regulation with the norms, standards, principles, and rules that govern commerce and their enforcement.[92] In their view, governments are regulated by, for example, Standard and Poor's and Moody's ratings of the bonds they issue.[93] Another variant on the third definition is provided by Gunnningham and Grabovsky who, in their book *Smart Regulation,* use 'regulation' to include the forms of social control available to harness a wide range of actors in addressing a particular problem or set of problems—in their case, those related to the environment.[94] These variations on the third definition differ, for example, as to the role played by intentionality, the problem-solving nature of regulation, and as to the vantage point from which regulation is observed. Gunningham and Grabovsky take the more usual vantage point of the regulator and ask what tools are available to it to solve particular problems. However, those who say that regulators are 'regulated' by culture adopt the perspective of the regulated—what forces are they subject to. Moreover, in this latter usage regulation is not seen as a problem-solving activity, and the role of intentionality is dropped.

Within those three definitions there is also frequently an implicit or explicit assumption that the target of regulation is an economic actor: a business or a consumer (this is so whether the regulation is seen as 'economic' or 'social', for the terms 'economic' and 'social' regulation are usually used to refer to the objectives of the regulation, not its location).[95] Thus, for Ogus 'regulation is fundamentally a politico-economic concept and, as such, can best be understood by reference to different systems of economic organization and the legal forms which maintain them.'[96] Regulation is the means by which the state 'seeks to encourage or direct behaviour which it is assumed would not

[92] Braithwaite and Drahos, n. 22 above, 10.
[93] Ibid., 27.
[94] Gunningham and Grabovsky, n. 2 above, 4.
[95] Hawkins and Hutter define 'economic' regulation as regulation of financial markets, prices and profits, and 'social' regulation as laws protecting the environment, consumers, and employees: K. Hawkins and B. Hutter, 'The Response of Business to Social Regulation in England and Wales: An Enforcement Perspective' (1993) 15 *Law and Policy* 199; B. Hutter, *Compliance: Regulation and Environment* (Oxford, 1997), 7; P. Yeager, *The Limits of the Law: The Public Regulation of Private Pollution* (Cambridge, 1991) 24.
[96] A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, 1994), 1.

occur without such intervention' and as such should be seen as distinct from the operation of the markets, even though the latter are underpinned by legal rules.[97] Baldwin and Cave see 'regulation' as including the use of any tool by government to intervene in the economy, and also to include the use of rules by non-government actors to influence the behaviour of businesses.[98] The *New Palgrave Dictionary* defines 'regulation' as 'the imposition of economic controls by government agencies on (usually) private businesses'.[99] Definitions of 'regulation' implicit in the term 'regulatory state' seem even more narrow: the counterpoint to the 'regulatory state' is in this context the 'welfare state', and 'regulatory state' is used to describe the shift in the style of governance from the direct provision of public services to their provision by others.[100] 'Regulatory' in this context thus suggests that 'regulation' covers only those functions which were previously part of the welfare state. In this, the definition seems akin to the older definition of 'regulation', that is the control of businesses providing public utilities.[101]

The assumption that 'regulation' only exists with respect to economic actors could have had the potential to serve as a cognitive constraint. However, on the contrary, it has allowed academics to spot regulation where it had otherwise not been thought to exist. Regulation of the family, health, reproduction, contracts, unemployment, government itself: everything, it seems, is subject to regulation. What had simply been seen as 'law' before is now regulation: company law is redescribed as 'regulation'; contract law is 'regulation'.

Moreover, the thing that is doing the regulating is increasingly broadened from the state and some self-regulatory associations to other actors (committees, firms, epistemic communities, contracting individuals) and to other 'factors': norms, culture, etc. The broad definition of both actors and factors serves those who pertain to be

[97] A. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, 1994), 1.
[98] Baldwin and Cave, n. 82 above, 2, 63.
[99] *New Palgrave Dictionary of Economics and the Law* vol. 3 (ed. P. Newman) (London, 1998).
[100] G. Majone, 'The Rise of the Regulatory State in Western Europe' (1994) 17 *West European Politics* 77; M. Loughlin and C. Scott, 'The Regulatory State' in P. Dunleavy *et al.* (eds.), *Developments in British Politics* (London, 1997).
[101] The definition employed in the *International Encyclopedia of the Social Sciences* vol. 13 (London, 1968).

regulation experts well for it opens up pretty much the whole of social science to their (our!) imperial domain. Indeed, whilst the broad definition given to 'regulation' in Europe, as encompassing all forms of legislation, governance, and social control, has been cited as the reason why the study of 'regulation' had not emerged outside the US by the late 1980s as an academic (sub)discipline in its own right,[102] that broad definition is now providing 'regulationists' with a seemingly endless territory ripe for colonization.

The situation is such that even identifying three definitions glosses over the multiplicity of meanings given to regulation. To illustrate the point, I have made an attempt to indicate the ever-expanding nature of 'regulation' in the following table. The table aims to indicate most of the current ways in which regulation is used (or seems to be used—as noted above, authors are not always explicit as to what they are discussing when they are discussing 'regulation') in many contemporary academic writings and in the policy documents of some governments and multinational organizations.[103] I have somewhat artificially grouped the different sets of meanings/applications into five: what it is assumed 'regulation' is—a type of legal instrument, process, an outcome, or a property; who or what is performing it; what institutional or organizational form the regulation is assumed to take with respect to what actors or areas of social life is it occurring and how regulation is conducted, through what mechanisms, instruments, techniques.

The first group of meanings concerns what the phenomenon is that the commentator on 'regulation' is concerned with. Sometimes, as noted above, regulation is seen simply as a type of legal instrument. Sometimes it is seen as an action, sometimes as an outcome, sometimes as a property. As an action, the dictionary definitions of 'regulation' are controlling, governing, directing, altering, adjusting with reference to some standard or purpose.[104] These are reflected in part of one of the more central definitions of 'regulation' used in the literature, Selznick's definition of regulation as 'sustained and focused control'[105] (which has the additional

[102] G. Majone, 'Introduction' in *Deregulation or Re-Regulation? Regulatory Reform in Europe and the United States* (London, 1990), 1.
[103] Those of the UK, US, Australia, and Canada, and of the OECD.
[104] *New Shorter Oxford English Dictionary*, 4th edn., 1993.
[105] P. Selznick, 'Focusing Organizational Research on Regulation', in Noll (ed.), n. 7 above, 363–4.

Table 1: Regulation: an ever-expanding concept

(A) What is regulation?	(B) Who or what does it?	(C) What form does it take?	(D) With respect to what actors or area of life?	(E) How is it done, via what instruments/ techniques?
A *type of legal instrument* A *process* of: • 'controlling, governing, or directing' (OED) • 'altering or controlling with reference to some standard or purpose' (OED)	State institutions (regional, national, 'extra-national')	– ministries, departments, agencies – supra-national bodies (EU) – international bodies (WTO) – courts	– economic (firms, markets) – any other (family, education, health, government, etc.)	– rules (legal, 'quasi-legal', non-legal; universal, sectoral, bilateral) – other instruments (financial, information) (+)– monitoring (+)– sanctioning
• enabling/facilitating • co-ordinating • influencing • conferring a pattern on something, ordering • rendering constant and the *process* is:	Non-state institutions/ actors	E.g. – associations – committees – firms – individuals – epistemic communities – networks	– economic – any other	– rules (legal, 'quasi-legal', non-legal; multi-lateral, bilateral, unilateral – other instruments (financial, information) (+)– monitoring (+)– sanctioning – trust

• intentional • goal-directed, problem-solving	Economic forces	Market	– economic – any other	– interaction of rational actors
An *outcome* – the result of the interaction of actors/ networks/'forces' A *property* of self-correction A *property* whereby the nature and growth of parts of an organism are interrelated so as to produce an integrated whole, enabling adaptation (biol.)	'Social forces'	E.g. – norms – institutions – language – cognitive frames – culture – systems – networks	– economic – any other	E.g. – structuring – framing – enabling – co-ordinating – ordering – translating – self-referential reproduction
	'Technologies'	Understandings of and ability to manipulate physical and human environment	– any	– products of those understandings, e.g. statistics, probabilities, engineering, IT

elaboration on the dictionary definitions in that the control is systematic rather than *ad hoc*). Any walk through the regulatory literature soon throws up meanings other than the dictionary definition, however. Regulation is used additionally to mean co-ordinating, ordering (e.g. 'regulation by the market'[106]), and facilitating.[107] Others distinguish 'regulation' from 'control'.[108] Further, whilst most writers assume that there is some intentionality involved—the intention to affect behaviour, even if there may be unintended consequences or side effects—others use the term 'regulation' to refer to those incidental side effects (outcomes) of action that had a quite separate primary intention or purpose (if any at all). 'Regulation by the market' denies that any intentionality need be involved in regulation, for example as does regulation by 'culture'.[109] As we have seen, autopoiesis adopts a very specific meaning for 'regulation', at least when used to refer to 'self-regulation', as dynamic structural change in accordance with the system's own criteria.[110] In autopoietic-inspired discussions, however, 'regulation' used on its own seems to refer to the activity of controlling, governing, or directing.[111] Finally, biology gives us yet another usage. 'Regulation' (which is in this following sense always self-regulation) is 'the property whereby the nature and growth of parts of an organism are interrelated so as to produce an integrated whole so an organism can adapt to shocks or its surroundings'.[112]

Turning from just what form of instrument, activity, outcome, or property 'regulation' is seen to be, we have questions of who or what is performing it, in what institutional or other form, in relation to what, and how. These categories are almost indefensibly broad-brush in their demarcation and identification of components, largely because what is encompassed in columns (b)–(e) of the table is pretty much the whole of social science. None the less, it is worth persevering with the mapping exercise, even if it does shamelessly blunder through the fundamental questions of social order and control and downplay the extent to

[106] E.g. Oftel, n. 3 above.
[107] Baldwin and Cave, n. 82 above, 2.
[108] E.g. R. Rhodes, 'The Governance Narrative: Key Findings and Lessons from the ESRC's Whitehall Programme' (2000) 78 *Public Administration* 345.
[109] E.g. Hall, Scott and Hood, n. 91 above.
[110] Teubner, n. 14 above, 1993, 20–2.
[111] Teubner, nn. 1 and 26 above.
[112] *The New Shorter Oxford English Dictionary*.

which definitions, boundaries, interactions are open to debate, for if nothing else it indicates just how wide the preserve of 'regulation' has become, and perhaps how blundering some of us regulationists can be.

Battling on therefore, if we look at the issue of who or what is performing this activity, then we have yet another set of assumptions which are often rolled up into the definition or use of the term 'regulation'. For most, regulation is something done by government actors, e.g. through ministries or agencies, but some have also included courts.[113] For many others it is something also done by non-government actors (organizations, associations, firms, individuals, other specialist bodies, e.g. auditors, technical committees). For some regulation can (additionally) be performed by economic forces (principally the interactions of buyers and sellers in a market, though it can also include macro-economic factors such as inflation, foreign exchange rates, money supply, etc.). For yet others, 'regulation' is the action of, or outcome of, social forces, this time the usual suspects of sociology: norms, institutions, culture, etc.

I have also included technologies, by which is meant the understanding of and ability to employ, manipulate, alter the physical/human environment and the products of that understanding. I include in this broad category both the understandings and outputs of the applied, natural, and human sciences, though analyses which focused just on technologies would probably find it illuminating to separate them. Examples are the development of techniques of number theory, and so statistics,[114] probability theory (risk analysis),[115] double-entry book-keeping (audit),[116] tables of solar declination (navigation, hence imperial expansion and colonial control),[117] engineering (steam engine, printing press, electronic engineering (hardware and software), photography (e.g.

[113] Collins, n. 61 above, ch. 4.

[114] Foucault, n. 3 above; N. Rose, 'Governing by Numbers: Figuring Out Democracy' (1991) 16(7) *Accounting, Organizations and Society* 673; B. Latour, *Science in Action* (Milton Keynes, 1987).

[115] P. L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (New York, 1996).

[116] M. Power, *The Audit Society* (Oxford, 1997).

[117] J. Law, 'On the Methods of Long-Distance Control: Vessels, Navigation and the Portuguese Route to India' in J. Law (ed.), *Power, Action, Belief: A New Sociology of Knowledge?* (London, 1986).

CCTVs), fingerprinting, understandings of the properties of the environment or biology. It also includes the design of the built environment (design and positioning of buildings—e.g. impact on policing). The role of technology in regulating is not yet part of the mainstream regulatory literature, but has been noted in diverse writings on audit,[118] risk,[119] the internet,[120] and on sociologies of control.[121] I include it here as I think it is something that needs to be explored more systematically in the study of any regulatory system. The point is that the ability to control is hampered or facilitated by technology, that is by extent to which we do or do not have technological capacity, and by the inherent characteristics of that technology. Whether these forms of control constitute 'regulation' or whether they are simply instruments that may or may not be employed in the activity of regulation, or are an input into the overall output of interactions which constitutes regulation, is of course part of the definitional dispute.

Then there is the issue of what actors, activities and/or areas of social life are being 'regulated'. The implicit assumption in much regulatory writing is that it is economic activity which is being subjected to regulation: the market, and actors in the market, usually firms. As noted, Ogus, for example, states that regulation is fundamentally 'a politico-economic concept'. But others have used the terms more widely to refer to the regulation of: the family, education, reproduction, health, unemployment, government. 'Regulation' then is seen by no means as just a politico-economic concept, rather the term is used with respect to any area of social or 'natural' life.[122]

Finally there is the increasingly complex issue of how regulation is or can be exercised; of what instruments are 'regulatory instruments. The 'how' of regulation, or more particularly 'how to do it better', is a burgeoning policy area and deserves separate

[118] Power, n. 116 above.
[119] Bernstein, n. 115 above; I. Hackling, *The Taming of Chance* (Cambridge, 1990).
[120] L. Lessig, *Code and Other Laws of Cyberspace* (New York, 1999).
[121] Law, n. 117 above; M. Callon, 'Domestication of the Scallops and the Fishermen of St Brieuc Bay: Some Elements of the Sociology of Translation' in Law (ed.), n. 117 above; J. Law and J. Hussard (eds.), *Actor-Network Theory and After* (Oxford, 1999); Rose and Miller, n. 3 above, 183–7; Rose, n. 9 above, 52–5.
[122] With the required caveat that the distinction, to the extent there is one, may not be accepted to be a 'given' but simply to be socially constructed.

consideration in its own right.[123] For our purposes it is sufficient to note that the 'how' is obviously related to who or what it is that is seen to be doing the 'regulating'. So if it is government that is seen to be the 'regulator' then regulation is used to refer to the use of rules, legal, quasi-legal, non-legal, which may have a certain character (mandatory, facilitatory, performance, technical), which may or may not be accompanied by systematic monitoring and enforcement of sanctions for their breach ('command and control' regulation) by government. Or, as the initial definitions set out above note, it may refer to any action by government: use of laws, economic instruments, information, persuasion. These legal or non-legal instruments may be used as part of a number of strategies of control including hierarchical arrangements, competitive or incentivizing arrangements, or providing frameworks for non-governmental regulation. Non-governmental actors have a similar range of instruments, excluding the legitimate use of force.[124] Governmental and non-governmental actors may act alone or in any combination. If the market is seen as 'regulating' then it is through the interactions of rational buyers and sellers. If it is the broad category of 'social forces' that is chosen then essentially the analytic tools of sociology are employed: structuring, framing, enabling, co-ordinating, ordering, etc.; if it is 'technologies' then it is the results of the development and application of understandings of the physical or human environment—the outpourings of the applied, natural, and human sciences.

Thus the table depicts in extremely rough and ready terms many (I hesitate to say all) of the different uses of regulation. Which aspects of these extremely wide-ranging usages those interested in 'regulation' want to, or should, focus on is the issue in question. Matters are further confounded by the fact that definitions vary as to whether they contain something from every column, and if not, from which columns they do take the definition. Many definitions do include something from all five columns (i.e. regulation is activity (a) performed by (b) taking form (c) with respect to area (d) using mechanism (e)). For example, one very common definition of regulation, particularly in the US, takes this

[123] See e.g. Baldwin and Cave, n. 82 above; Hood *et al.*, n. 56 above; Gunningham and Grabovsky, n. 2 above.

[124] T. Daintith, *Law as an Instrument of Economic Policy* (Berlin, 1988), 25–47.

composite form: regulation is defined as the activity of controlling (a) by government (b) through a separate agency (c) with respect to business (d) using rules (e).[125] Other definitions are more parsimonious. For example, some would argue that 'regulation' is one of the definitions in (a), e.g. a process of controlling or directing, via one particular instrument in (d), i.e. rules, but would not see anything in columns (b), (c), or (d) as definitionally relevant. Definitions also vary as to the rows they incorporate: some specifically exclude anything that affects non-economic life, for example, as noted above. For some only governments regulate. For others, regulation is an intentional activity, so only actors regulate—technologies, or 'social forces' do not. They may be tools that those regulating might use, or indeed be constrained by, but of their own volition, as it were, economic forces, social forces, or technologies do not 'regulate', they may affect the activity of regulating, be deployed in that activity, or be the outcome of the interactions that constitute regulation.

It might be asked, does this definitional free-for-all matter? Isn't preoccupation with definitions very 'modern'—in the sense of not post-modern and so hopelessly old-fashioned? Moreover, is it not better to have a broad definitional scope than a narrow one? After all, it was the very narrow definition of 'regulation' employed particularly by US writers that led to the incredibly irritating and futile 'regulation', 'deregulation', 'reregulation' debate of the 1980s.[126] But whilst narrowness can stultify thought, breadth can bring incoherence. It has been said that concepts are more important for what they do than for what they mean.[127] They provide a cognitive frame, an institutionalized set of meanings that channels thought and action in particular directions.[128] Their value lies in the way they are able to provide a purchase for critical thought upon contemporary problems.[129] I would agree. But what cognitive frame is set up, what purchase for critical thought provided, and on what problem, by the invocation of the concept 'regulation'? Further, what is the labelling of something

[125] See e.g. R. Noll, 'Government Regulatory Behaviour: A Multidisciplinary Survey and Synthesis' in Noll (ed.), n. 7 above, 3.

[126] For a review see Majone (ed.), n. 102 above.

[127] Rose, n. 9 above, 9.

[128] W. Connolly, *The Terms of Political Discourse*, 2nd edn. (Oxford, 1983), 1.

[129] Rose, n. 9 above, 9.

as 'regulation' meant to signify, and what response, if any, is it meant to invoke?

We can start by asking what relationship any of the components of the table have to the concept. Can we distinguish between those that have an analytical relationship to it, and those that have a synthetic one? That is, can we specify an invariant set of necessary and sufficient conditions for the application of the term 'regulation' without which it is logically inconsistent to assert that it is properly applied (analytic)? Which conditions are simply open to empirical investigation (synthetic)? To take an example: is the use of rules a necessary part of the definition of regulation, such that the absence of rules means there is no regulation, or is rather the use of rules in regulation a question which is open to empirical verification?

Or is application of the analytic-synthetic dichotomy misplaced? Is regulation instead a 'cluster concept'? To adopt Connolly, that is a concept which, first, is comprised of a broad range of ingredients, any large set of which grouped together in a particular act or practice is capable of characterizing the phenomenon as 'regulation', but any one of which might be missing in a particular instance where people would otherwise agree that 'regulation' properly applies,[130] and secondly, those ingredients themselves make reference to new concepts which are themselves complex, and to which, to make the concept of 'regulation' intelligible, we must display its connections.[131] So, for example, is it the case that if say three or four of the following are present, then what we are observing is 'regulation': deliberate attempts to influence behaviour; an emerging pattern of interactions; legally enforceable rules; norms; monitoring and enforcement; restraints upon behaviour; government intervention; interventions in the market?

It has to be said that the broad range of uses given to the term 'regulation' suggests that it is a cluster concept and that anything in the table is a potential ingredient for 'regulation'. Do we want any more analytical rigour, and if so why? The answer lies in what it is we want the concept to do, or perhaps rather what we want to do with it. If it is to serve as a descriptive device for an empirical

[130] Connolly, n. 128 above, 14–20.
[131] Ibid., 14, 17–20.

investigation into what structures or constrains the behaviour of individuals, organizations, systems, then clearly a wide-ranging conception of regulation is both needed and, of course, once provided is self-validating for it then itself necessitates and justifies such a search. Such a definition would probably embrace everything on the table as being part of the concept of regulation, in which case 'regulation' would be an enormously cluttered cluster concept. But, as noted above, that makes almost all questions of social and political science questions of regulation. Great for regulationists, and for others too if 'regulation' is intellectually fashionable for it provides an obliging wrapper for grant applications, conferences, publications, etc. But how would 'regulationists' defend their role should fashions move on, as fashions do? [132]

Alternatively, is the more fruitful task of the concept of 'regulation' to enable us to see control, power, and ordering in unsuspected places, and as affected by unsuspected actors (in which case we could additionally ask in what ways, if at all, it is distinct from the 'governance' debate). I suggest that it is (though will leave consideration of the relationship of governance and regulation for another time). If so, then the definition of regulation would not entail all parts of the table, but would define regulation as the intentional activity of attempting to control, order, or influence the behaviour of others. Such a definition uncouples the activity of intentionally attempting to control from the actor of government, so enabling a decentred understanding of regulation. It may still be too broad: a stronger purposive dimension may be required, in which case an appropriate definition would be that regulation is a process involving the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly defined outcome or outcomes.

Again, the point is not so much what is meant by 'regulation' as such, but to illustrate the relationship between the definition of the concept of regulation and what the concept is designed to do.

[132] Baldwin, Scott and Hood argue that three new perspectives could be employed in the study of regulation (language and rhetoric, culture and consequences), but as noted, do not offer a particular analysis of what 'regulation' is that is being studied: n. 82 above, 37. On the role of rhetoric in regulation see M. Hajer, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford, 1995).

If the task is seen to be not simply to provide a broad-ranging device for describing all the factors that influence behaviour but to be the more specific task of examining intentional attempts to control behaviour, then for many a normative response is triggered. That is that 'regulation' should be subjected to particular values, that it should be made legitimate and/or accountable in some way. Just how, or indeed what is meant by legitimacy and accountability is again a moot point. Accountability, for example, is almost as expansive a concept as regulation,[133] and one can expect the debate to be coloured further by the particular constitutional and legal traditions of different countries. For example concerns about the practice of incorporating standards set by non-governmental technical committees into law are framed in Germany and the EU in terms of the constitutional doctrine of *delagare non potest delagare*, the unconstitutional delegation of powers to such committees.[134] By contrast, in Australia the concern for accountability has more pragmatic roots: it is that such standard-setting practices may fall outside regimes of regulatory impact analysis.[135]

For many rendering regulation accountable means democratizing it: accountability as dialogue to use Mulgan's phrase.[136] Indeed one of the main techniques of 'regulation of self-regulation', a form of proceduralization, is simultaneously a technique of regulation and of accountability—democratization is the tool of regulation and the mode of accountability. What form of democratization that would take is, however, usually left open.[137] Court-based accountability (in the sense of both calling to account and control) for decentralized regulation has also been a preoccupation for some.[138] For example, I have argued elsewhere that whilst the doctrines of public law could themselves provide the

[133] See R. Mulgan, ' "Accountability": An Ever-Expanding Concept?' (2000) 78 *Public Administration* 555.

[134] C. Joerges, H. Schepel and E. Vos, 'The Law's Problem with the Involvement of Non-Governmental Actors in Europe's Legislative Processes: The Case of Standardisation under the "New Approach" ', EUI Working Papers Law No 99/9 (Florence, 1999).

[135] *Grey Letter Law*, n. 33 above, xii–xiv; *A Guide to Regulation*, n. 27 above, E13.

[136] Mulgan, n. 133 above.

[137] Black, n. 75 above.

[138] J. Black, 'Constitutionalising Self Regulation' (1996) 59 *MLR* 24.

framework for the 'regulation of self-regulation', more particularly its constitutionalization, the particular construction of the private/public dichotomy in legal doctrine currently inhibits a fully developed and coherent judicial theory of constitutionalization. There is currently a mismatch between legal doctrine, which maintains a public/private dichotomy, and socio-political analysis of decentred regulation, in which that dichotomy has broken down. The result is that the classification of 'public' in legal doctrine excludes those who are exercising the same regulatory function as government. Oliver, for example, has pointed out that nothing much of substance may turn on this as 'public law' values are also present in private law,[139] and whilst the Human Rights Act is applicable only to 'public' bodies, writers such as Hunt have suggested that it is open to an interpretation which would give it 'horizontal' effect.[140] It might be that these arguments do not so much meet the point that the public/private dichotomy in law is misconstrued, as get around it, but that debate is for another time.

The point here is not to discuss what accountability may mean and the various forms it could take but to note the relationship between the concept of regulation employed and its normative implications. To focus again on accountability, discussions of regulation that raise accountability as an issue have to be assuming that there is an ability to call to account, i.e. that there is something or someone that can be made accountable (so ruling out 'social forces') and that accountability will make a difference to the actions of the 'regulators' (so ruling in intentional actions). Thus concerns for accountability can only coherently be coupled with one of the narrower conceptions of regulation suggested above, and not with a broad-ranging conception that would embrace the whole table, for it makes no sense to call for the 'accountability' of culture, for example, or of technologies, or of 'the market'.

[139] D. Oliver, *Common Values and the Public-Private Divide* (London, 1999).

[140] M. Hunt, 'The Horizontal Effect of the Human Rights Act' [1998] *Public Law* 423; B. Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Act and Privacy: Lessons from Germany' (1999) *ICLQ* 57; Sir William Wade, 'The United Kingdom's Bill of Rights' in J. Beatson (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998); G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 *MLR* 824.

Conclusion

The decentring analysis thus has a number of significant implications. It opens up the cognitive framework in which regulation is viewed but, as noted, at the risk of conceptual incoherence. It has implications for questions of regulatory design, but also more fundamentally for the conception of regulation itself, and depending on the conception of regulation employed, may have significant normative implications, not least for issues of accountability of the diffused regulatory actors that the decentring analysis reveals: the conduct of the conduct of conduct. It also has implications for an understanding of the role of government, and for an understanding of law. The decentring analysis emphasizes the de-apexing of the state: the move from a hierarchical relationship of state-society to a heterarchical one. That shift from hierarchies to heterarchies implies a different role for the state, one of mediator, facilitator, enabler, and for the skills of diplomats rather than bureaucrats.[141] But it is suggested that the hierarchy of state-society will be difficult to dismantle in some ways, notwithstanding the empirical claims that the state has been displaced from the centre by developments at the global and mezzo level. This is for two reasons. First, because states still have the monopoly on the legitimate use of coercion and the authority to make binding law. There will always be the potential that those powers will be used. Secondly, because in democratic countries, at least, governments are elected in the expectation that they will act to resolve collective problems—it is hard to explain to complaining electors that governments cannot in fact perform that function and that the problem is being remitted back for consideration. There is an expectation that the state will perform its public responsibility as guardian of the 'public interest' (however that may be defined). Given those two factors, it is suggested, a truly horizontal relationship between government and others is unlikely to be possible. Hierarchy will always lurk behind heterarchy, and negotiations will always be in its shadow.[142]

[141] J. Black, 'Regulation as Facilitation: Negotiating the Genetic Revolution' (1998) 61 *MLR* 621; Black, n. 75 above; Rhodes, n. 108 above.

[142] Black, n. 75 above; I. Koppen, 'Ecological Covenants: Regulatory Informality in Dutch Waste Reduction Policy' in Teubner, Farmer and Murphy, n. 3 above.

The decentring analysis is also significant for our understanding of law, and perhaps law's understanding of itself. As Murphy has expressed it, 'the question is not whether law can survive without hierarchy but rather how law can learn to understand itself in a world of horizontally rather than hierarchically configured relations'.[143] Teubner and others have noted the globalization of law has decentred law-making from nation states to various sectors of society: contracting parties, technical committees, epistemic communities. Its source is civil society, but it is not in the 'warm communal bonds' of rural or traditional communities, but in the 'cold technical processes' of global specialist networks.[144] Thus decentring, and not just by globalization, raises the issue of the development of a theory of legal pluralism,[145] and of the nature of the relationship between regulation and law.

Decentring the analysis of regulation thus poses questions which range from issues of regulatory design to the more fundamental questions of the nature and understanding of regulation, the consequent role of the state, and our understanding of law. These questions entail discussions that range far wider than the limits of this paper. The aim has been simply to show how a decentred analysis of regulation means that we can no longer escape the need to address the question of just what it is that is being 'decentred', what it is that we want the concept of 'regulation' to do, and what some of the implications of that decision might be. To reiterate, the assumption that regulation can be decentred clearly denies an understanding of regulation which couples regulation exclusively with government. The concept of regulation is therefore being required to do more than simply enable us to consider particular forms of governmental action. But just what 'regulation' is being used to do, and why, and how are questions whose answers are at best contested and at worst simply incoherent. It is a debate which is sorely needed, however, and one of the aims of this chapter is to promote it.

[143] W. T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford, 1997), 184.

[144] G. Teubner, ' "Global Bukowina": Legal Pluralism in the World Society' in G. Teubner (ed.), *Global Law without a State* (Aldershot, 1997).

[145] Itself a significant debate: for a recent review and critique see e.g. B. Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27 *J of Law & Soc.* 296.