8 Self-regulation, Meta-regulation, and Regulatory Networks

Regulation, as noted in the last chapter, can be carried out by the state or by a variety of other organizations—notably by self-regulatory institutions, such as professional bodies, by trade associations, or by public interest groups, business partners, consumers, or corporations. Non-state organizations can be subjected to various degrees of oversight by the state and a host of different mechanisms can be used to effect such supervision. In this chapter, we look at the issues raised when control functions are exercised by self-regulators and by corporations acting under 'meta-regulation' arrangements. We then explore the challenges of using regulatory mixes and networks—of using combinations of instruments and regulatory organizations.

Self-regulation

Self-regulation can be seen as taking place when a group of firms or individuals exerts control over its own membership and their behaviour.[1] In Britain, it is encountered in a number of professions and sports and in sectors such as advertising, insurance, and the press.[2] A host of arrangements can be seen as self-regulatory and variations in the characteristics of self-regulatory regimes

[1] On self-regulation in general, see J. Black, 'Constitutionalising Self-Regulation' (1996) 59 *MLR* 24; A. Ogus, 'Rethinking Self-Regulation' (1995) 15 *OJLS* 97; National Consumer Council, *Self-Regulation* (London, 1986); A. Page, 'Self-Regulation: The Constitutional Dimension' (1986) 49 *MLR* 141; id., 'Self-Regulation and Codes of Practice' (1980) *JBL* 30; id., 'Financial Services: The Self-Regulatory Alternative', in R. Baldwin and C. McCrudden, *Regulation and Public Law* (London, 1987); R. Baggott and L. Harrison, 'The Politics of Self-Regulation' (1986) 14 *Policy and Politics* 143; Bardach and Kagan, *Going by the Book*, ch. 8; I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford, 1992), ch. 4; R. Baggott, 'Regulatory Reform in Britain: The Changing Face of Self-Regulation (1989) 67 *Public Administration* 435; C. Graham, 'Self-Regulation', in G. Richardson and H. Genn (eds), *Administrative Law and Government Action* (Oxford, 1994).

[2] For a study of self-regulation and the American legal profession, see T. Rostain, 'Self-Regulatory Authority, Markets and the Ideology of Professionalism' in R. Baldwin, M. Cave, and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford, 2010).

can be identified.[3] A first variable is the governmental nature of self-regulation. An association may self-regulate in a purely private sense—in pursuit of the private ends of its membership—or it may act governmentally in so far as public policy tasks are delegated to private actors or institutions.[4] Both forms of activity may, indeed, be combined. The process of self-regulation may, moreover, be constrained governmentally in a number of ways—for instance by statutory rules; oversight by a governmental agency; systems in which ministers approve or draft rules; procedures for the public enforcement of self-regulatory rules; or mechanisms of participation or accountability. Self-regulation may appear to lack any state involvement, but in reality it may constitute a response to threats by government that if nothing is done state action will follow.[5]

A second variable concerns the extent of the role played by self-regulators. A full role may involve the promulgation of rules, the enforcement of these on the ground, and the monitoring of the whole regulatory process. Self-regulation, however, may be restricted to one of these functions—where, for instance, rules are drafted by a self-regulatory organization but are enforced and monitored by a public agency. Self-regulation may merely operate as an element within a regulatory regime—a point to be returned to below.

[3] See Ogus, 'Rethinking Self-Regulation', 99–100.

[4] See Graham, 'Self-Regulation'; Baggott, 'Regulatory Reform in Britain', 435; and for studies of self-regulation in particular sectors see S. Dawson *Safety at Work: The Limits of Self-Regulation* (Cambridge, 1988); R. Baldwin, 'Health and Safety at Work: Consensus and Self-Regulation', in Baldwin and McCrudden, *Regulation and Public Law*; R. Ferguson, 'Self-Regulation at Lloyds' (1983) 46 *MLR* 56; M. Moran and B. Wood, *States, Regulation and the Medical Profession* (Buckingham, 1993); V. Finch, 'Corporate Governance and Cadbury: Self-Regulation and Alternatives' (1994) *JBL* 51; C. Scott and J. Black, *Cranston's Consumers and the Law* (3rd edn, Cambridge, 2000) ch. 2; I. Ramsay, *Consumer Protection* (London, 1989); A.G. Jordan, *Engineers and Professional Self-Regulation* (Oxford, 1992); Sir D. Calcutt, *Review of Press Self-Regulation*, Cmnd. 2135 (London, 1992–3); J.J. Boddewyn, *Global Perspectives on Advertising Self-Regulation* (Westport, CT, 1992); M. Moran, *The Politics of the Financial Services Revolution* (London, 1991); J. Black, *Rules and Regulators* (Oxford, 1997); Office of Fair Trading (OFT), *Voluntary Codes of Practice* (London, 1996); OFT, *Raising Standards of Consumer Care: Progressing Beyond Codes of Practice* (London, 1998). For a study of 'Responsible Care' in the Australian chemical industry see N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford, 1998), ch. 4.

[5] See Black, 'Constitutionalising Self-Regulation', 27. The fear that such threats may induce was seen in the late nineties in relation to the accountancy profession. At the time, Roger Cowe noted in the *Guardian*'s City Column: 'Accountants have not been seized out of the blue with a desire for regulation. They are terrified of having it done for them by a Government that has already stripped them of the power to regulate on investment advice' (21 Feb. 1998). The Accountancy Foundation was set up in 2002 as an independent overseer of the accountancy profession. The Foundation's functions are now carried out by the Professional Oversight Board, a part of the Financial Reporting Council. In the legal arena, the Legal Services Act 2007 established the Legal Service Board in another movement towards independent supervision of a profession.

The degree of binding legal force that attaches to self-regulatory rules is a third variable to be noted. Self-regulation may operate in an informal, non-binding, voluntary manner, or it may involve rules of full legal force that are enforceable in the courts. Finally, self-regulatory regimes may vary in their coverage of an industrial sector—they may apply to all those who participate in an activity (perhaps because screening or licensing of entry is applied), or they may cover only those who join an association voluntarily.

WHY SELF-REGULATION?

The case for self-regulation, or incorporating elements of self-regulation into governmental regulation, rests principally on considerations of expertise and efficiency. Worries about self-regulation tend to centre on concerns relating to mandates, accountability, and the fairness of procedures.

EXPERTISE

A familiar claim in favour of self-regulation is that self-regulatory bodies can usually command higher levels of relevant expertise and technical knowledge than is possible with independent regulation—that, for instance, financial services practitioners know much more about their sector than a civil servant or bureaucrat ever could. It can be counter-claimed that such expertise and knowledge can be 'bought in' by bodies independent of the profession or membership, but proponents of self-regulation may respond that it is the ongoing proximity of links with the profession or membership that keeps expertise honed and information up to date—that such ongoing links are unlikely to be sustained where regulators are fully independent of the regulated group.

An aspect of expertise also relates to regulatory effectiveness.[6] It can be argued that self-regulators have a special knowledge of what regulated parties will see as reasonable in terms of regulatory obligations. This level of understanding, it may be claimed, allows self-regulators to make demands that are acceptable to affected firms or individuals, and this produces higher levels of voluntary compliance than is likely to be the case with externally imposed regimes of control. Misjudging levels of acceptability, the proponents of self-regulation argue, leads to low levels of voluntary compliance, high enforcement costs for taxpayers, and inefficient controls.

[6] On self-regulation and implementation, see W. Streek and P.C. Schmitter (eds), *Private Interest Government: Beyond Market and State* (London, 1985), 22–5.

EFFICIENCY

One set of arguments used by advocates of self-regulation emphasizes the potential of self-regulation to produce controls efficiently. Thus it is contended that self-regulators, with their easy access to those under control, experience low costs in acquiring the information that is necessary to formulate and set standards. They, furthermore, have low monitoring and enforcement costs and they are able to adapt their regimes to changes in industrial conditions in a flexible and smooth manner because they act relatively informally and tend to enjoy the trust of the regulated group.

The informality of voluntary self-regulatory systems can also be said to provide remedies where more formal systems would not. Thus, on 5 February 1998, Lord Wakeham, Chairman of the Press Complaints Commission (PCC), expressed fears in the House of Lords that if the Human Rights Bill were to graft a 'statutory superstructure' onto the voluntary press complaints system of self-regulation, negative consequences might flow. He argued that voluntary self-regulation allowed disputes to be resolved swiftly because of the commitment of newspaper editors and the amicable, informal way that the PCC conducted its work. It also, he maintained, allowed ordinary people to take up complaints against the press without having to find large sums of money. A move to place the scheme on a statutory footing, he feared, would place the courts in control, and would change the dispute resolution process into one characterized by legal defensiveness and lack of cooperation. Resolving differences and servicing apologies would be far more difficult within a legalistic system than in a cooperative regime, and the legal expenses involved would make remedies unavailable to ordinary citizens.[7]

As far as costs to the public purse are concerned, a further point in favour of self-regulation is that it tends to be paid for by those engaging in the regulated activity—this contrasts with the costs of external, or independent, regimes which are usually borne by the taxpayer.

Not all arguments under the efficiency heading do, however, favour self-regulation. The costs to the public purse of approving self-regulatory rules may be considerable, and the rules written by self-regulators cannot be assumed to be immune from the problems afflicting rules in C & C regimes—notably those difficulties associated with legalism, standard-setting, and enforcement. Where, moreover, self-regulation operates as a voluntary mechanism, not all of those who participate in a sector may subscribe to self-regulation. Much here depends on the incentives to participate that are

[7] See *The Times*, 6 Feb. 1998, p. 46. See also J. Black, *Rules and Regulators* (Oxford, 1997), 30–7 on 'interpretive communities' and the effect of shared interpretations in obviating the need for detailed specifications through rules.

provided by a self-regulatory system. These may include qualifications, certificates, or marks of quality (e.g. doctor, architect, British Standards); access to trading space (e.g. on exchanges); or avoidance of exclusions or boycotts of non-members (e.g. trade associations or cartels). Such incentives may often prove powerful, but where they are not fully effective, it is common for organizations to seek explicit recognition from the state and controls to make membership compulsory.[8] Self-regulation, in such circumstances, will then operate within a state-maintained framework. Where membership is not comprehensive, the public may prove to be ill-protected by a regime that controls the most responsible members of a trade or industry but leaves unregulated those individuals or firms who are the least inclined to serve the public or consumer interest.[9] In some sectors, indeed, the role of self-regulation has been severely limited because of difficulty in controlling mavericks to the extent necessary to assuage public concerns.[10]

MANDATES

The essence of a mandate claim is that the regulation at issue serves legitimate ends—as commonly identified with reference commonly to a set of legislative objectives. Apart from the usual problems of determining the content of the mandate, the special difficulty with some self-regulatory regimes is that the relevant objectives may be drawn up by bodies with no democratic legitimacy—for instance, by the members of a private association. It is then hard to justify actions that affect parties outside the association or to argue that the public interest is being served. On some issues, the public may demand that the government take responsibility for the regulatory function.

Such difficulties are less severe in self-regulatory regimes that are directed towards objectives that are set down in statutes or where individuals or groups with some democratic legitimacy have a role in drawing up objectives—for example, where a Secretary of State, a local authority, or

[8] See T. Daintith, 'Regulation' in International Association of Legal Science, *International Encyclopaedia of Comparative Law* (Tübingen, 1997), vol. 17, ch. 10, p. 20.

[9] See Scott and Black, *Cranston's Consumers and the Law*, 39. On the 'consensual paradox' and the tendency to regulate those who are least in need of regulating, see R. Baldwin, 'Health and Safety at Work', in Baldwin and McCrudden, *Regulation and Public Law*, 151–3. The National Consumer Council (Self-Regulation) has argued that those who have not agreed to follow the self-regulatory scheme tend to be the main source of consumer problems (noted, Graham, 'Self-Regulation', 195). The Director General of Fair Trading's report *Timeshare* (London, 1990) argued that limited membership of the controlling Timeshare Developers' Association meant that self-regulation was not working and that legislation was necessary in the timeshare sector. See also OFT, *Raising Standards of Consumer Care*, on the problem of the non-applicability of codes to non-members and the case for moving towards standards rather than codes.

[10] Graham, 'Self-Regulation', 196, cites the estate agencies sector as one in which voluntary self-regulation was encouraged by the Office of Fair Trading with little success, and legislative measures were subsequently taken.

other elected body fixes aims. Even in such cases, however, those sceptical of self-regulation may assert that special problems of capture arise—that such legitimate objectives or rules will tend to be subverted to private purposes where their pursuit and application is given over to a private body that is accountable to its private members and is in effective control of relevant information.[11] It can be said that this will be the case particularly where the self-regulator's functions include updating and formulating policies, interpreting rules, and adjudicating on applications of those rules. As far as enforcement is concerned, it has been alleged that self-regulatory bodies have an especially poor record in protecting the public interest through enforcing standards against errant members.[12] In numerous studies reference has also been made to the tendency of self-regulatory bodies to act anti-competitively on access requirements and prices, so that members' interests rather than those of the public are served.[13]

ACCOUNTABILITY

Critics of self-regulatory systems may see their existence as making manifest the capture of power by groups who are not accountable through normal democratic channels.[14] It would be a mistake, however, to think that all such systems are wholly unaccountable and free from controls other than those applied by members. As already indicated, self-regulators may be subject to non-member controls in a host of ways, notably to constraints deriving from the following:

- statutory prescriptions and objectives;
- rules that are drafted by or approved by other bodies or ministers;
- ministerial guidelines or criteria for consideration by the self-regulator;

[11] See Ogus, 'Rethinking Self-Regulation', 98–9.

[12] See R. Abel, *The Legal Profession in England and Wales* (Oxford, 1988), 250–8; Ogus, 'Rethinking Self-Regulation', 99. The OFT has noted that the large majority of trade associations have neither the powers nor the will to exercise effective control over those who breach codes of practice—see OFT, *Raising Standards of Consumer Care*, 16–17: 'trade associations, set up for the benefit of members, frequently are neither comfortable nor effective in the role of sectoral regulator'.

[13] See, e.g., S. Domberger and A. Sherr, 'The Impact of Competition on Pricing and Quality of Legal Services' (1989) 9 *International Review of Law and Economics* 41; A Shaked and J. Sutton, 'The Self-Regulating Profession' (1981) 47 *Review of Economic Studies* 217.

[14] See Ogus, 'Rethinking Self-Regulation', 98–9; N. Lewis, 'Corporatism and Accountability: The Democratic Dilemma', in C. Crouch and R. Dove (eds), *Corporatism and Accountability* (Oxford, 1990); I. Harden and N. Lewis, *The Noble Lie* (London, 1986). Graham, 'Self-Regulation', 203, makes the point that self-regulators operate outside the scope of the departmental select committees of the House of Commons and there is no equivalent to scrutiny by the National Audit Office, though the Office of Fair Trading does exercise some review in the financial services sector and areas where it has approved codes of practice.

- parliamentary oversight of the delegated legislation that guides the self-regulator;
- departmental purse strings and the influence that these provide.
- agency oversight;
- informal influences from government that are exerted in the shadow of threatened state regulation;[15]
- judicial review;[16]
- complaints and grievance-handling mechanisms (e.g. ombudsmen);[17]
- reporting and publication requirements laid down by government or Parliament.

Lack of accountability is thus not a necessary feature of self-regulation. The public are not liable to trust self-regulators, however, or see them as legitimate, if they are seen to be able to circumvent external controls, or to be more strongly accountable to their members than to the public or those affected by their activities. A field in which there was a dramatic evaporation of public trust in the accountability and transparency of self-regulation was that of legal services in the 1990s—where concerns about the management of complaints against solicitors eventually triggered wholesale reforms of regulation, new institutional structures, and a new regime of oversight.[18]

The key problem in identifying the proper level and form of accountability lies in deciding whether the self-regulation at issue is a matter of private control (a matter for resolution between members) or whether it is governmental (in so far as it affects the public interest) and merits democratic (or judicial) accountability accordingly. For their part, the courts have struggled to produce a clear line on the liability of self-regulatory bodies to judicial review.[19] The judiciary have, for technical and pragmatic reasons, proved

[15] Page, 'Self-Regulation', 149, cites the example of the Takeovers Panel. In 1968, the Government and Governor of the Bank of England threatened direct governmental regulation of takeovers unless the City Code was made more effective.

[16] On which see Black, 'Constitutionalising Self-Regulation' and Page, 'Self-Regulation'.

[17] See e.g. A. Mowbray, 'Newspaper Ombudsmen: The British Experience' (1991) *Media Law and Practice* 91.

[18] See R. Baldwin, M. Cave, and K. Malleson, 'Regulating Legal Services: Time for the Big Bang?' (2004) 67 *Modern Law Review* 787–817; D. Clementi, *Report of the Review of the Regulatory Framework for Legal Services in England and Wales* (London, 2004); Legal Services Act 2007. For a discussion of the US legal profession and the ideology of professionalism, see T. Rostain, 'Self-Regulatory Authority, Markets and the Ideology of Professionalism' in R. Baldwin, M. Cave, and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford, 2010).

[19] See Black, 'Constitutionalising Self-Regulation', who cites as examples of 'current confusion', *R* v. *Lloyds ex p. Briggs* [1993] Lloyds LR 176 (Lloyds Council not liable to review) and *R* v. *Insurance Ombudsman ex p. Aegon Life Assurance Ltd, The Times*, 7 Jan. 1994 (Insurance Ombudsman Bureau not subject to review).

reluctant to review the sporting associations[20] but, in cases from *Datafin*[21] onwards,[22] have decided that bodies whose source of power derives from neither statute nor the prerogative may, nevertheless, be reviewed where they exercise public law functions, their power has a public element, or there is a 'governmental interest' in the decision-making power in question. Identifying when power is 'public' or governmental for the purposes of review has not, however, been made easy by the judges, who have applied a number of tests and stated, for instance, that where private power extends over substantial areas of economic activity, or affects the public interest and the livelihood of many individuals, this will not necessarily be subject to the rules of public law.[23]

How can the courts move towards a more coherent approach? Black has suggested that the courts, at least, should not look to the 'public' or other nature of the self-regulatory body when considering what systems of accountability are appropriate, but should look to the nature of the particular action or decision at issue; that a multifaceted approach to 'public' be taken (one recognizing the public nature of actions mediating different systems[24] within society, rather than simply state-to-individual relations); and that self-regulators be required to adopt processes that empower affected parties, rather than give expression to existing power relationships and parties of influence.[25] The value of such an approach lies in seeing each self-regulatory action or decision in its particular governmental context and in tailoring attendant calls for accountability accordingly. It recognizes that one body can have a number of different personae or functions—acting governmentally or in a regulatory manner on some issues but also being a corporate body, entering into contracts as a commercial enterprise or behaving as an employer in other contexts. It also urges that, as well as providing scrutiny through judicial review, the courts should seek to set the decisions or functions at issue in an institutional and procedural context that allows affected parties to participate appropriately. Such a flexible, or particularized, approach to accountability does, however, make it difficult to make general statements about acceptable arrangements.

[20] See, e.g., *Law* v. *National Greyhound Racing Club* [1983] 3 All ER 300; *R* v. *Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 2 All ER 853; *R* v. *Football Association ex p. Football League* [1993] 2 All ER 833. *R* v. *Jockey Club ex p. RAM Racecourses* [1993] 2 All ER 225.

[21] *R* v. *Panel on Take-overs and Mergers ex p. Datafin Plc and another* [1987] 1 All ER 564.

[22] See, for example, *R* v. *Chief Rabbi ex p. Wachmann* [1993] 2 All ER 249.

[23] See L.J. Hoffman in *R* v. *Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 2 All ER 853 at 875. Monopoly power does not ensure control at public law—see, e.g., *R* v. *Chief Rabbi ex p. Wachmann* [1993] 2 All ER 249; for criticism, see D. Pannick, 'Who is Subject to Judicial Review and in Respect of What?' (1992) *Public Law* 1.

[24] That is, different 'functional systems' such as the political, economic, and legal systems.

[25] See Black, 'Constitutionalising Self-Regulation', 54–6.

FAIRNESS OF PROCEDURES

As already indicated, schemes of self-regulation are liable to criticisms of unfairness in so far as non-members may be affected by regulatory decisions to which they have poor or no access. Past experience suggests that self-regulators have a sporadic, unstructured, and patchy record of consulting those with interests in the workings of their systems.[26] Third parties may also be excluded from the negotiations that establish self-regulatory regimes and their objectives, in the first place.[27]

The courts might act to demand proper access for affected parties on the lines noted above in discussing accountability but, as yet, self-regulators are free from general legal duties to consult non-members before taking decisions or devising policies. Nor are they subject to general duties to give reasons for the actions or decisions that they have taken.

The National Consumer Council (NCC)[28] has argued that self-regulatory regimes must be able to command public confidence, and has advocated that self-regulatory schemes should operate from within statutory frameworks and that each one should, *inter alia*, include the following basic features:

- strong external involvement in the design and operation of the scheme.
- as far as practicable, a separation of the operation and control of the scheme from the institutions of the industry;
- full representation of consumers and other outsiders on the governing body of the scheme;
- clear statements of principles and standards governing the scheme—normally published in a code;
- clear, accessible, and well-publicized complaints procedures to deal with code breaches;
- adequate sanctions for non-observance of codes;
- the maintenance and updating of the scheme;
- annual reporting.

To summarize on the case for self-regulation, the acceptability or otherwise of a self-regulatory regime falls to be judged, at the end of the day, by the five criteria discussed above, and for each rule or regime the relevant trade-offs have to be assessed. A key consideration may be whether the expertise and efficiency gains to be achieved by self-regulation do out-balance any

[26] See Graham, 'Self-Regulation', 198.

[27] See I. Ramsay, 'The Office of Fair Trading: Policing the Consumer Market Place', in Baldwin and McCrudden, *Regulation and Public Law*, 191.

[28] NCC, *Self-Regulation*, esp. p. 15. See Graham, 'Self-Regulation' and the reservations of Lord Wakeham concerning the placing of regimes on a statutory basis—discussed above.

weaknesses in mandate definition, accountability, and fairness that will remain after appropriate steps have been taken to ward off criticisms on these fronts.

It was noted above that self-regulation may play a part as an element within a scheme of regulation. A mechanism allowing for self-assessment may, for example, be incorporated within a regulatory compliance system, or a role may be given to regulated firms (or organizations thereof) in drafting the rules that government officials will enforce. It may be that such a combination of self-regulation and regulation will offer a level of performance and acceptability that is unobtainable by resorting to either strategy singly.

In order to throw more light on the potential of such 'partial' self-regulatory mechanisms and to move towards identifying the kinds of context in which use of such mechanisms will lead to results superior to externally imposed regulation, we now consider a well-known approach to self-regulation.

Enforced Self-regulation and Meta-regulation

Ayres and Braithwaite[29] distinguish enforced self-regulation from 'co-regulation'. Co-regulation they take to refer to industry-association self-regulation with some oversight and/or ratification by government.[30] Enforced self-regulation, in contrast, involves a subcontracting of regulatory functions to regulated firms.[31] Which functions should be delegated will vary by context, say Ayres and Braithwaite, but such delegations may include some or more of: the devising of their own regulatory rules, the monitoring of compliance, or the punishing and correcting of episodes of non-compliance. Thus, the primary function of government inspectors would be to audit the efficiency and rigour with which delegated functions are carried out. It is anticipated, however, that old-style direct government monitoring would still be necessary for firms too small to mount their own compliance-seeking operations. Violations of privately written and publicly ratified rules would, moreover, be punishable by law.

[29] I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford, 1992), ch. 4.

[30] See P. Grabosky and J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Melbourne, 1986).

[31] Ayres and Braithwaite, *Responsive Regulation*, 103; Julia Black argues that enforced self-regulation as conceived by Ayres and Braithwaite is not self-regulation proper, since self-regulation best describes the situation in which 'a collective group imposes regulation on its components'—see J. Black, 'An Economic Analysis of Regulation: One View of the Cathedral' (1997) 16 *OJLS* 699 at 706.

The term 'meta-regulation' similarly refers to processes in which the regulatory authority oversees a control or risk management system, rather than carries out regulation directly—it 'steers rather than rows'.[32] In the version put forward by Christine Parker and others, meta-regulation involves delegation of the risk control function to corporations.[33] The primary control responsibilities are thus carried out within the risk management systems of corporations and the regulator's role becomes the auditing, monitoring, and incentivizing of these systems. Thus, in the USA, the Environmental Protection Agency has for some time recognized and encouraged the use of Environmental Management Systems (EMSs)—intra-corporation policies and measures that are designed to control risks to the environment.[34] These systems create rules and management processes, and they structure resource allocations in pursuit of organizational goals. They can be subject to a variety of scrutiny mechanisms and involve degrees of oversight ranging from the voluntary/self-regulatory model to the strongly meta-regulated version. They may be certified to meet international EMS standards or standards set by trade associations,[35] and they may be independent of regulatory rules or linked to specific regulatory controls.

The potential advantages of delegating regulation down to the corporation are said to be numerous.[36] The expenses and strictures of command and control regimes can be replaced by systems that are cheaper and more effective because corporations are given the freedom and incentives to work out what, for their mode of operating, is the best way to avoid the given mischief. Under meta-regulation, each company will write a set of rules tailored to the specific context of the firm, and these rules will be scrutinized by a regulatory agency. This brings the further advantage, in, say, the environmental field, of better protections for the public because more stringent rules can be demanded of firms with lower compliance costs. Non-uniform standards can thus produce better results than across-the-board rules, which unduly restrict some firms yet are too lax in the case of others. Firm-specific

[32] On the general case for 'steering rather than rowing', see D. Osborne and T. Gaebler, *Reinventing Government* (Boston, 1992).

[33] See C. Parker, *The Open Corporation* (Cambridge, 2002); J. Braithwaite, 'Meta Risk Management and Responsive Regulation for Tax System Integrity' (2003) 25 *Law and Policy* 1–16; P. May, 'Performance-Based Regulation and Regulatory Regimes' (2003) 25 *Law and Policy* 381–401; M. Power, *The Audit Society* (Oxford, 1997), chs. 2 and 3; C. Parker, 'Regulator-Required Corporate Compliance Program Audits' (2003) 25 *Law and Policy* 221–44; C. Coglianese and E. Mendelson, 'Meta-Regulation and Self-Regulation' in R. Baldwin, M. Cave, and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford, 2010).

[34] See C. Coglianese and J. Nash (eds), *Regulating from the Inside* (Washington, DC, 2001).

[35] Coglianese and Nash cite the examples of the Responsible Care program of the American Chemistry Council and the Sustainable Forestry Initiative of the American Forest and Paper Association—see *Regulating from the Inside*, 4.

[36] Coglianese and Nash, *Regulating from the Inside*, ch. 1.

rules and processes, it is also claimed, can be more precise than industry-wide rules, which tend to be highly complex or else vague because they attempt to deal with a problem in all its possible contexts.[37] The introduction of new rules is also easier with firm-specific rules, since it is not necessary to await industry-wide agreement. Managers are, moreover, said to be more likely to innovate and to improve controls than under a standard-setting instrument and regulatees are more likely to attune their own standards of behaviour to the expectations of society when they are given the responsibility to govern their own behaviour, rather than being dictated to with a rule. Managers who espouse the relevant objectives may perform to a level that they would not achieve under regulation and a meta-regulatory regime may improve the overall system of management with the result that 'win-win' solutions are achieved—value for shareholders is increased at the same time as the regulated mischief is controlled.[38] It is also said that the general cultures of corporations and industrial sectors can be changed as firms are asked to think for themselves about the challenges of controlling, say, pollution and levels of consciousness about responsibilities can, as a result, be raised.[39]

Most states, moreover, possess very limited enforcement resources and, as a result, inspection coverage tends to be thin. Meta-regulation can expand coverage dramatically, ease pressure on the public purse, and lead to businesses bearing the costs of their own regulation. Meta-regulation can additionally increase the quality, frequency, and rigour of inspections for rule infringements.[40] Proponents of meta-regulation will also suggest that corporate compliance staff are likely to have superior specialized knowledge and better awareness of 'where the bodies are buried' than external inspectors, and that such compliance staff may possess more extensive powers with which to detect infringements than are available to public officials.

Offenders would also be more effectively disciplined than under governmental regulation because firms can be rewarded for rigorous systems of risk management and discipline. This contrasts with the incentive to conceal infringements under government regulation. Finally, burdens of proof may be lower under meta-regulation and more violations will be dealt with by disciplinary steps than would be the case with prosecutions. The more precise

[37] On the complexity of across-the-board rules see R. Baldwin, *Rules and Government* (Oxford, 1995), 162.

[38] M. Porter and C. van der Linde, 'Green and Competitive' (1995) 73 *Harvard Business Review* 120–34.

[39] See N. Gunningham and J. Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19 *Law and Policy* 363–414; P. DiMaggio and W. Powell (eds), *The New Institutionalism in Organizational Analysis* (Chicago, 1991).

[40] On self-monitoring and constitutional issues, see W. Howarth, 'Self-monitoring, Self-policing, Self-incrimination and Pollution Law' (1997) 60 *MLR* 200.

and less complex rules that are associated with meta-regulation may, again, encourage effective enforcement.

Advocates of meta-regulation tend to place a good deal of emphasis on the need for law, legal institutions, and regulators to link the internal capacity for corporate self-regulation with the internal resolve to self-regulate. The aim is to build up companies' commitments to, as well as their capacities for, self-regulation. This can be done 'by motivating and facilitating moral or socially responsible reasoning within organizations by inducing corporate crises of conscience through regulatory enforcement action, legal liability and public access to information about corporate social and legal responsibility'.[41] Legal liabilities, moreover, must be 'tied to incentives for, and guidance on, standards for self-regulation processes through restorative justice'.[42]

A second requirement, for some commentators, is that law and regulation should hold corporate self-regulation accountable 'by connecting the private justice of internal management systems to the public justice of legal accountability, regulatory coordination and action, public debate and dialogue'.[43] This can be achieved: 'by providing self-regulation standards against which the law can judge responsibility, companies can report and stakeholders can debate. This allows private management issues to become matters of public judgement.'[44]

Christine Parker suggests that there are two main ways to use liability to increase a company's commitment to self-regulation. First, liabilities can be adjusted by reference to the company's self-regulation programme.[45] This might involve making liability (and the quantum of sanctions) depend on the existence or otherwise of an effective self-regulation system[46] (as operates with due diligence defences for strict liability offences, or could operate by linking liability to non-adherence to governmental guidelines on compliance programmes). A second strategy is an accountability approach which uses the coercive powers of courts or regulators to require or encourage a company to implement a self-regulatory system when a breach has been alleged or has

[41] Parker, *The Open Corporation*, 246. On the development of 'organizational virtue', see F. Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Oxford, 1997), chs. 2 and 7–10.

[42] Parker, *The Open Corporation*, 246. 'Restorative Justice' here involves a corporation in putting right what has gone wrong (e.g. compensating an injured worker), but also in identifying errors and putting in place systems and safeguards to prevent, detect, and correct wrongdoing in the future (e.g. redesigning a manufacturing process to eliminate pollution) see Parker, *The Open Corporation*, 253–4 and generally Braithwaite, 'Meta Risk Management'.

[43] Parker, *The Open Corporation.*

[44] Ibid.

[45] Ibid., 256. See also W. Laufer, 'Corporate Liability, Risk Shifting and the Paradox of Compliance' (1992) 52 *Vanderbilt Law Review* 1343, 1382–92; J. Gobert and M. Punch, *Rethinking Corporate Crime* (London, 2003), 334–5.

[46] See *In Re Caremark International Inc Derivative Litigation* 1996 WL 549894 (Del Ch Sept 25 1996) discussed in Parker, *The Open Corporation*, 257–78.

occurred. Here, a company would be placed on 'probation' until it institutes such a regime.[47]

Regulators and governments, moreover, can encourage compliance by further strategies such as using rewards and incentives to encourage corporations to develop new regulatory and compliance approaches. In the field of pollution, for instance, tax breaks can be used to lower the costs of abatement and both practical guidance and technical assistance can be given.[48] State authorities can, in addition, encourage good risk management systems by granting public recognition to high-performing corporations (e.g. through certification processes or publications of best practice or league tables). Regulators may grant areas of freedom from inspection and detailed regulatory oversight to trusted companies or they may allow certain management teams the flexibility to devise their own methods of compliance.[49] In the alternative, certain processes or technologies can be mandated by regulators, and commitments to self-regulation can be stimulated by enforcement actions or negative publicity.[50]

Systems of meta-regulation are not, however, problem-free and, as is clear from the work of Ayres and Braithwaite and others,[51] a series of difficulties can be anticipated. Ill-intentioned, ill-informed, or inefficient firms may fail to devise appropriate rules. Experience with self-assessment procedures in the British food-safety and the health and safety sectors suggests that such firms, and most small and medium enterprises (SMEs), are very likely to do nothing about designing control systems or compliance procedures until they are

[47] On corporate probation see J. Coffee, R. Grunen, and C. Stone, 'Standards for Organisational Probation' (1988) 10 *Whittaker Law Review* 77; B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge, 1993), 147–53; F. Warwin and J. Schwartz, 'Corporate Compliance Programs as a Component of Plea Arrangements and Civil Administrative Settlements' [1998] *J of Corporation Law* 71–87. On varieties of strategy to encourage responsibility, see Gunningham and Grabosky, *Smart Regulation*. The *US Sentencing Guidelines for Organisational Sanctions, Guidelines Manual* (Washington, DC, 1991) provide for an organization's culpability scores to be reduced if they have a reasonable compliance programme, and lack of such a programme may (in larger companies) trigger a probation order—see S. Simpson, *Corporate Crime, Law and Social Control* (Cambridge, 2002), 101–2.

[48] Coglianese and Nash, *Regulating from the Inside*, ch. 8.

[49] See the discussion of the tiers of regulation operated by the Oregon Environmental Quality Commission in Coglianese and Nash, *Regulating from the Inside*, ch. 8.

[50] Parker, *The Open Corporation*, 267–70. Ancillary tools for encouragement of self-regulation may involve, e.g., licence condition concessions; exemptions from normal regulation; allowing companies the flexibility to account for outcomes, rather than detailed processes; and allowing companies immunities for self-disclosure and self-correction: F. Warwin and J. Schwartz, 'Corporate Compliance Programs as a Component of Plea Agreements and Civil Administrative Settlements (1998) *J of Corporation Law* 71–87. On varieties of strategy to encourage responsibility, see Gunningham and Grabosky, *Smart Regulation*.

[51] Ayres and Braithwaite, *Responsive Regulation*, 120–8; R. Fairman and C. Yapp, 'Enforced Self-Regulation, Prescription and Conceptions of Compliance within Small Businesses' (2005) 27 *Law and Policy* 491–519; J. Black, 'Talking About Regulation' (1998) *Public Law* 77.

galvanized by the government regulator.[52] They are essentially reactive. This point applies to the monitoring and enforcement, as well as to the drafting of rules. In the case of SMEs, Fairman and Yapp make the point that the managers of these enterprises are likely to see compliance not as an ongoing obligation but as a periodic negotiation with an inspector.[53] They will, accordingly, tend to think of themselves as compliant until they are told otherwise by an official. SMEs, moreover, will tend to dislike a meta-regulatory system more than a prescriptive regime, since the former will have: 'all the features of a regulatory approach that SMEs will find difficult to comply with. It is complex, systems-based, not linked to harm, process-oriented, difficult to judge compliance, and difficult to implement.'[54] They will, understandably, be less compliant under a meta-regulatory regime than under a prescriptive 'command' regime or one involving an interventionist 'educative' approach.[55]

Where the firms regulated are small in size and numerous, it may thus be more effective to rely on government officials to enforce rules than to rely on firms to mobilize independent inspectoral expertise. Similarly, there may be advantages in centralized regulation where the accumulation of expertise in a government body is likely to lead to more rigorous innovation than would be the case with firm-specific controls. Firm-specific drafting of rules may, also, lead to higher levels of industry capture, and worse protections for consumers and the public, than would be the case with government regulation. Firms might be expected to expend large sums on devising rules to suit their interests and to circumvent the spirit of government requirements. The state would have to spend similarly large sums to avoid such departures from public interest objectives. (Whether this is the case or not may depend *inter alia* on the distribution of interests, resources, costs, and benefits in a sector.) Ensuring adequate access to rule-making processes for consumers and affected interests would also prove extremely difficult if firm-specific drafting was adopted.

Inconsistencies of standards might result from the rule approvals process—because, for instance, concessions might be made to economically weak firms (to protect employment) or, in contrast, made to economically powerful firms in reflection of their political influence or organizational muscle. In such scenarios, absolute standards are replaced with a 'moral relativism'[56] and middle-range firms would be prejudiced. Some firms, indeed, might be severely damaged by the costs that enforced self-regulation would impose on them. In some areas, the expenses of drafting rules might be bearable,

[52] Baldwin, *Rules and Government*, 162–4.
[53] Fairman and Yapp, 'Enforced Self-Regulation', 512–14.
[54] Ibid., 512. [55] Ibid.
[56] Ayres and Braithwaite, *Responsive Regulation*, 123.

in others they might put the survival of weaker firms at risk. Rule-making and rule-approval costs, moreover, would be large, since the government regulator would have to scrutinize a large number of particular rules (often devised with low levels of commitment and competence) instead of devising a single set of general rules.[57]

The confidence that can be placed in meta-regulatory regimes thus turns in no small part on the faith that is placed in the capacity and commitment of the corporation to self-regulate in the public interest. The sanguine view is, perhaps, represented by Parker, who puts forward an ideal type of 'permeable' self-regulation in which corporate management is open to a broad range of stakeholder deliberations about values and legal regulation facilitates and enforces this permeation:

> In the open corporation management self critically reflects on past and future actions in the light of legal responsibilities and impacts on shareholders. They go on to institutionalize operating procedures, habits and cultures that constantly seek to do better at ensuring that the whole company complies with legal responsibilities, accomplishes the underlying goals and values of regulation and does justice in its impact on shareholders (even when no law has yet defined what that involves).[58]

The ideals of meta-regulation, as presented by Parker, may be easy to sympathize with, but such an approach presents a number of serious challenges.[59] A first is the difficulty of persuading corporate managers to see the world in anything like the same way that regulators view it. Commentators from a systems theory perspective, such as Luhmann and Teubner, have long pointed out how social sub-systems (such as economy, law, politics, etc.) are wedded to their own self-referential ways of understanding the world so that they fail to communicate unproblematically.[60] In the light of such analyses, a fear is that the views that business managers take of regulatory responsibilities differ

[57] Black, 'Talking about Regulation', 98–100, notes the contention of Ayres and Braithwaite, *Responsive Regulation*, 121, that approval costs can be reduced by routinizing the approvals process. She objects, however, that failing to deal with rules individually undermines the whole enforced self-regulation enterprise. The Office of Fair Trading (OFT, *Raising Standards of Consumer Care*, 13) has, moreover, cited the heavy resource demands involved in negotiating, monitoring, and revising voluntary codes of practice and has suggested moving towards introducing core standards to replace codes.

[58] Parker, *The Open Corporation*, 292–3.

[59] On the particular challenges of applying proactive strategies to smaller companies, which are not dealt with here, see N. Gunningham and R. Johnstone, *Regulating Workplace Safety* (Oxford, 1999), 92–4.

[60] See, e.g., N. Luhmann, 'The Self-Reproduction of Law and Its Limits' in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Berlin, 1985); N. Luhmann, *Social Systems* (Stanford, 1995); G. Teubner (ed.), op. cit.; G. Teubner, *Law as an Autopoietic System* (Oxford, 1993).

in kind from the visions of regulators and do so to a degree that rules out effective dialogue.[61]

Field research, moreover, suggests that such fears are not ill-founded.[62] When senior corporate managers talk of their punitive regulatory liabilities, the picture is not of a single set of regulatory liabilities (e.g. regarding pollution) to be dealt with rationally, but of a host of widely differing regulatory risks that are complex, incompletely known, or assessed and dealt with in an often unprioritized and highly reactive manner. More strikingly, when managers do act in an informed manner, they may not see compliance in the same way as regulators. The regulator may see non-compliance as 'misbehaviour' and the trigger of a sanction such as a fine, but a business manager in a larger firm may see non-compliance as a mixture of business opportunities and risks.[63] Managers may see regulatory liabilities as risks to be managed, not as ethically reinforced prescriptions. Compliance provides one way of managing such risks, but another potential response is to side-step liability—notably by: 'shifting the more dangerous and criminogenic aspects of their operations to subsidiaries located in the third world or developing countries'.[64] Risk-shifting by domestic outsourcing is a potential risk management strategy closer to home, as is taking such steps as: organizing the business so that operations or production processes are not dramatically affected by the imposition of a regulatory sanction; developing public relations systems that can limit any reputational losses caused by regulatory sanctioning; developing contingency plans to reduce the market or competition effects of a sanction; working on staffing arrangements to limit the human resource impact of sanctions; designing customer and supplier relationships that are resilient in the face of regulatory sanctions; increasing insurance arrangements to cushion liability; and restricting activities that are liable to give rise to regulatory sanctions (e.g. by silencing whistleblowers).[65]

A danger with meta-regulation is, thus, that, as sanctions become tougher, corporations see 'resilience management' as the way forward, rather than compliance. In so far as this proves to be the case, this may impose limits on the state's capacity to induce even larger companies to self-regulate in

[61] See also J. Black, 'Proceduralising Regulation Part II' (2001) 54 *Current Legal Problems* 103 on hermeneutic accounts of differences and incompatibilities in language, understandings, schemes of perception, or cognition.

[62] See R. Baldwin, 'The New Punitive Regulation' (2004) 67 *Modern Law Review* 351–83.

[63] See W. Laufer, 'Corporate Risk Shifting and the Paradox of Compliance' (1992) 52 *Vanderbilt L R* 1343, at 1402–4; S. Simpson, *Corporate Crime, Law and Social Control* (Cambridge, 2002), 52. As noted, in an SME the manager may well be unaware of non-compliance.

[64] J. Gobert, 'Corporate Killing at Home and Abroad' (2002) 118 *Law Quarterly Review* 72, 72–3.

[65] See J. Black, 'Using Rules Effectively' in C. McCrudden (ed.), *Regulation and Deregulation* (Oxford, 1999); see also Parker, *The Open Corporation*, 252 for acknowledgement of these dangers.

pursuit of compliance. To take an example, a strategy of varying the sanction imposed on a company in accordance with the quality of its compliance regime will be the weaker insofar as the company outsources relevant regulatory risks or insofar as the formal sanction fails to trigger ancillary impacts on the company because these are managed competently (e.g. reputational effects are limited by astute public relations).

Pessimism about the possible alignment of corporate and regulatory objectives can be reduced, say some commentators, by fostering the integrity of individuals within corporations so that they can act to bring social and business values into alignment. Top managers and self-regulation professionals can, on this view, play an important role in producing such alignment and can be encouraged to do so where private managers are 'connected to public justice' within corporations that are 'permeable' in the sense that they engage in a constant deliberative dialogue with their various stakeholders and regulators.[66]

This leads to a second major challenge faced by proponents of 'meta-regulation' on the Parker model. This is to develop meta-regulation and to stimulate corporate self-regulation in a manner that produces coherence and harmony between corporate and social ends, rather than confusion and conflict. In Parker's permeable corporation (which is conceded by Parker to be an ideal) it is advocated that corporate management should be open to a broad range of stakeholder deliberations about values and that managers should reflect on their actions in the light of their legal responsibilities, potential impacts on stakeholders and inputs from regulators: ('The open corporation is the good corporate citizen in deliberative democracy.')[67]

Deliberative regulatory procedures are challenging at the best of times[68] but the strategy of stimulating corporate deliberations on self-regulatory activity is one that has to confront a particularly daunting array of difficulties. Hugely divergent interests are affected by the corporate activities to be self-regulated. These interests may range from those of managers and shareholders to regulators and interest groups, from employees to consumers, and from small business partners or suppliers to large conglomerates. These divergencies may be reinforced by differences in legal obligations and statutory objectives and duties. Where, accordingly, a corporation is encouraged to be highly deliberative regarding its potential actions, it may be difficult to be confident that such deliberations will produce agreements rather than dissent, or that they will lead to action rather than deadlocks and stultification. Parker's hope is that more, and earlier deliberation, will allow

[66] See Parker, *The Open Corporation*, 294.
[67] Ibid., 293.
[68] See generally, J. Black, 'Proceduralising Regulation Part II' (2001) 54 *Current Legal Problems* 103.

open corporations to 'reap the reputational rewards of leadership and innovation'.[69] Others may fear that permeability and deliberation will, at least in some circumstances, lead to regimes of high-cost, high-friction management that are characterized by delays, obfuscations, fudges, indecisiveness, confusion, and inaction.[70] Whether a given company has the resources and staff expertise to commit to such deliberation is an additional issue.[71] A further question is whether a company will see itself as a 'deliberative organization' at all. Many companies will see themselves in quite different terms—as organizations that sell products and services so as to make a return for shareholders within a framework of discipline by the market. Deliberation, they may think, is not what they are about, and they will be ill-inclined to commit to it.

A different fear is that corporate managers may often see deliberations as matters to be managed and upon which leadership is appropriately exercised. (This, they may estimate, is the only way to reconcile deliberation with the commercial need for fast, decisive action.) They may, as a result, see the way forward as 'selling' certain policies and persuading affected parties that their way of self-regulating is appropriate.[72] If such an approach flows from their self-conception, they are liable to develop 'deliberative' procedures that are manipulated and controlled, rather than genuinely participatory, and which are distorted in favour of private corporate ends, rather than the pursuit of legitimate regulatory objectives. It might be argued that such fears can be overstated and that the professionalism of key actors such as compliance professionals will reduce tendencies to manipulate self-regulation in pursuit of profits.[73] Such reassurance, however, might be more readily gleaned in businesses where the compliance professionals are necessarily close to the core of management—in, say, the pharmaceutical industry, where risks are technical and highly focused, rather than in businesses where activities are highly disparate and risk portfolios are very extensive. In a general manufacturing and distributional enterprise with a variety of products, a host of risk areas will be involved and compliance professionals may be comparatively ill-positioned to influence general managerial culture.

[69] Parker, *The Open Corporation*, 299.

[70] On the dangers of assuming that intra-firm regulation will be possible without recreating the familiar problems of external regulation, see J. Black, 'Decentering Regulation' (2001) 54 *Current Legal Problems* 103, 123–4.

[71] See Gunningham and Johnstone, *Regulating Workplace Safety*, ch. 3 on systems-based regulation and smaller companies.

[72] On techniques of political management, see M. Moore, *Creating Public Value* (Harvard, 1995). On the problems regulators may have in monitoring 'management-based regulation', see C. Coglianese and D. Lazer, 'Management-Based Regulatory Strategies' in J. Donhue and J. Nye (eds), *Market-Based Governance* (New York, 2002), 208–11.

[73] See Ayres and Braithwaite, *Responsive Regulation*, 125–6; J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London, 1984); Parker, *The Open Corporation*, 294–5.

A further problem is that extremely divergent ways of seeing the world will often be involved in the above deliberations. (Systems theory, as noted, points to the difficulties posed when communications are sought between the worlds of business persons, regulators, politicians, interest groups, lawyers, risk professionals, and so on.) When corporations deliberate on compliance matters, experts in an array of fields may be called upon to speak to parties who are 'lay' in various respects. One possible way out of these difficulties is through 'thick proceduralization'—processes in which 'mediators' can play an enabling role by 'translating' the messages and logics of various systems or groups so that others can understand and so that communications can be facilitated across different systems and groups.[74] In such processes, the hope is that parties with very different perspectives can engage in effective deliberation.

The challenge of making such deliberation work effectively and fairly, however, is not inconsiderable. A first question is who is to take the lead in mediating and translating—the corporation, the regulator, a pressure group or another private or public body? Mediation contests, confusions, and fragmentations, may, on a pessimistic view, substitute for first-order discussions. Even if responsibility for mediation is clearly and uncontentiously allocated, serious issues of democratic legitimacy and accountability may arise.[75] Nor can it be taken for granted that the regulators or corporations fulfilling the mediation role can do so with the disinterestedness and expertise that is required if processes are to work to the general advantage.[76] The mediators will have their own worldviews, rationalities, areas of expertise, and technical limitations. Carrying out the translator role demands receptiveness to the worldviews, logics, and value systems of other actors and unrealistic demands may be made of translators' commitments to open disclosure. The dangers are that the mediator/translator will lack the application and expertise to be able to unpack and translate the arguments of the various interests into forms that others can understand; that they fail to manage mediation in a way that is fair to all parties and avoids manipulation by the

[74] See Black, 'Proceduralising Regulation Part II', 599.

[75] Control over decision- and policymaking may be thought to be too distanced from elective institutions (see J. Black, 'Proceduralising Regulation Part II') and openness in corporate deliberations may be thought to fall short of full democratic accountability, not least because managers owe duties principally to their shareholders—though see Parker, *The Open Corporation*, esp. 227–33 on Corporate Justice Plans that would give 'permeability to shareholder contestation' through enforcement of stakeholders' legal rights. On the costs and challenges of monitoring the performance of self-regulatory and systems-based regimes, see Gunningham and Johnstone, *Regulating Workplace Safety*, ch 5. State monitoring may prove hugely expensive; 'paper-audits' may leave accountability weak and auditing by third-party organizations may be objected to as undemocratic, lacking independence, and unacceptably expensive for smaller companies.

[76] See Black, 'Proceduralising Regulation Part II' (on regulators as translators); K.Yeung, *Securing Compliance* (Oxford, 2004), ch. 6.

powerful; and that they fail to provide the focus that is needed if there is to be efficient production of policies, decisions, or actions.

Where, then, does this leave the argument? Scepticism about the potential of command, punitive, and rational deterrence routes to regulatory compliance might favour greater reliance on meta-regulatory strategies that involve more proactive stimulation of the self-regulatory capacities of companies. There are, however, dangers in trusting too much to the capacities of regulators, companies, and others to align the way that corporate managers and state officials will see the world, deliberative processes, or regulatory requirements and objectives. The dangers that flow from excessive trust on this front are that the integrity of compliance professionals and senior managers will not lead corporations to act in a wholly public-spirited manner, that corporations which are trusted to be open and permeable will be inefficient as organizers of deliberation (not to say as managers generally) or, worse, highly manipulative. The fear is that regulatory processes, as a result, will lack legitimacy and prove unfair, exclusive, and inefficient.

Regulatory Mixes and Networks

The best regulatory outcomes will usually involve mixtures of institutions and instruments.[77] It is no easy matter, however, to design the optimal mixes or to state in advance which institutions and instruments will work together harmoniously. The proponents of 'smart regulation'—Neil Gunningham, Peter Grabosky, and Darren Sinclair—do, however, emphasize the importance of this issue.[78] They seek to identify mixes that are: inherently complementary; inherently incompatible; complementary if sequenced; and complementary or otherwise, depending on the specific context. They suggest, for example, that information-generating instruments tend to be complementary to most other instruments (e.g. to commands, self-regulatory controls, and economic incentives). In contrast, the prescriptiveness of command instruments will often clash with the flexibility that an incentive-based measure such as a tax rule offers to the regulatee.[79] In the case of multiple, as opposed to bipartite, mixes, greater emphasis has to be placed on the particular context and the risk being controlled. Gunningham and Grabosky, however, suggest that one way to deal with the complexities of mixing instruments is to use a

[77] See the discussion of hybridity between different 'modalities of regulation' in A. Murray and C. Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65 *Modern Law Review* 491–516.

[78] N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford, 1998) pp. 422–53.

[79] Gunningham and Grabosky, *Smart Regulation*, 438.

strategy of 'sequencing'. The idea here is that: 'certain instruments would be held in reserve, only to be applied as and when other instruments demonstrably fail to meet pre-determined performance benchmarks'.[80] In the alternative, new instruments would be tried where others have failed, and the broad hope is that the overall dependability of the policy mix can be improved.

Such an incremental or trial-and-error approach, however, has two sides. On the one hand, it appears sensible to seek to improve regulatory regimes by amending strategies and mixes of instruments in the light of experience. On the other, there are dangers to be avoided. A policy of 'chance it, review, and adjust' runs the risk of doing damage through the use of ill-considered regulatory designs. An excessive propensity to adjust regulatory methods will, moreover, create uncertainty and is liable to be met with an outcry from regulated corporations.

An alternative design strategy is that offered by Malcolm Sparrow's 'regulatory craft' approach.[81] This places one version of risk-based regulation—namely problem-solving—at the centre of regulatory policymaking. It separates out the 'stages of problem-solving'[82] and stresses the need to define problems precisely, to monitor and measure performance, and to adjust strategy on the basis of performance assessments. It also accepts the 'dynamic nature of the risk control game'.[83] Sparrow tells us to target key problems and solve these by developing solutions or interventions and 'implementing the plan'.

The difficulties of the 'regulatory craft' analysis are discussed in more detail in Chapter 12 below, but it suffices to note here that focusing on a mischief by defining it as 'the problem' may only offer modest help in seeking to devise strategies for responding to it. What may be more useful is to identify the challenges that have to be faced, the available options (in terms of tools and strategies), and the kind of process that will foster working towards an optimal application of tools and strategies over time.

An approach to regulatory design that is perhaps broader than 'smart regulation' is the 'really responsive' viewpoint.[84] This will be discussed in more detail in Chapter 12 below, but its essentials should be noted here. The 'really responsive' approach has two main messages. First, that, in designing and developing regulatory systems (and especially complex, multi-actor regimes) attention has to be paid to five main matters: the *behaviour, attitudes and cultures* of regulatory actors (including associated regulators as well as regulatees); the *institutional settings* of the different regulators; the *different*

[80] Gunningham and Grabosky, *Smart Regulation*, 444.
[81] See M. Sparrow, *The Regulatory Craft* (Washington, DC, 2003).
[82] Ibid., ch. 10.
[83] Ibid., 274.
[84] See R. Baldwin and J. Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59–94.

logics of regulatory tools and strategies (and how these interact); the *regime's own performance* over time; and finally, *changes* in each of these elements. The second message is that regulatory designs and developments should take on board the way that regulatory challenges vary across the main tasks that regulators have to carry out—namely: *detecting* undesirable or non-compliant behaviour, developing tools and strategies for *responding* to that behaviour, *enforcing* those tools and strategies on the ground, *assessing* their success or failure, and *modifying* them accordingly.[85]

What the 'really responsive' framework sets out to offer is a framework for considering how, in any given context, the main challenges of design can be addressed and how issues of regulatory mix can be analysed. It takes on board not only the issues of instutitutional and instrumental variety, but also the significance of variations in regulatees and regulators, as well as the difficulties of effecting performance assessments. In addition, it addresses the needs to cope with changes in challenges and objectives, and to come to grips with all of these issues across the variety of tasks that regulators have to perform. The possible downside of really responsive regulation is that it poses a daunting set of questions for regulators and involves a high level of analysis. The upside is that it organizes strategic thinking in a way that identifies the main regulatory challenges that have to be faced if objectives are to be realized.

NETWORKS AND COORDINATION

When an activity is regulated by a network or assemblage of regulators, the arrangements may be complex. In the same field, there may be trans-national regulators setting 'soft law' standards, state regulators or departments implementing supra-national legal requirements, national regulatory agencies applying a variety of regulatory instruments, and sub-national non-state regulators such as standard-setting authorities, professional self-regulators, and industry-based certification bodies. In addition, regulation may encompass a diverse array of voluntary bodies, regulated firms, and other organizations. Many of these regulatory actors may, moreover, apply the norms of both state-based regulators and trans-national or sub-national non-state regulators, and they may be both advised by an array of consultants and have to conform to conditions imposed by other bodies such as insurance companies.[86]

[85] For a more detailed discussion of the 'DREAM' framework see chapter 11 below and see R. Baldwin and J. Black, *A Review of Enforcement Measures* (London, 2005).

[86] See J. Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a "Post-Regulatory World"' (2001) *Current Legal Problems* 103–46; R. Baldwin and J. Black, 'Understanding Regulatory Cohabitation' (forthcoming).

In such networks,[87] considerable coordination challenges arise.[88] It cannot, for instance, be assumed that all of the involved regulators will have the same substantive objectives or normative conceptions of the 'good'. Their capacities, skills, and resources are also liable to vary, and this is likely to affect not only their preferred approaches to regulation but their responsiveness. Thus, some regulators within a network will possess the ability to modify their operations in order to cope with changes and others will not. There are also liable to be variations in regulatory cultures—the assumptions, conventions, and values that underpin, and are reflected in, regulatory interventions. Finally, it will often be the case that different regulators will occupy different positions within broader political and legal infrastructures so that they are answerable to, and controlled by, other governmental institutions in different ways.

Responses to these challenges tend to come in the form of different modes of coordination, and distinctions can be drawn between five different such modes.[89] One familiar approach to coordination within government networks is by means of *hierarchy*.[90] This involves a top-down arrangement in which a central control body lays down rules and policies that provide direction to inferior institutions within the network. Hierarchies are often established by legal frameworks. A second mode is *community*. Coordination of a network by community occurs when a stable group of peers engages in mutual recognition of membership and where there is a sharing of a common set of interests. A typical example is professional or industry-based self-regulation.

A third approach to coordination is *network management*—which is commonly marked by a lead party taking positive steps to facilitate concerted network actions. This type of coordination is often achieved by the 'manager' body developing or steering processes that either encourage negotiations and interactions or foster the conditions for collective behaviour by building levels

[87] 'Network' here refers to the situation in which numbers of regulators exert control or influence over a domain, topic, or risk—and do so concurrently. On the narrower sense of 'network'—which refers to a particular mode of non-hierarchical social organization—see G. Thompson, *Between Hierarchies and Markets: The Logics and Limits of Network Forms of Organization* (Oxford, 2003), 6; L. Martinez-Diaz and N. Woods, *Networks of Influence?* (Oxford, 2009).

[88] J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137–64; E. Bardach, *Getting Agencies to Work Together* (Washington, DC, 1998); M. Sparrow, *The Regulatory Craft* (Washington, DC, 2000); on transnational coordination issues, see K. Abbott and D. Snidal, 'Strengthening International Regulation through Transnational New Governance' (2009) *Vanderbilt Journal of Transnational Law.*

[89] See W. Kickert, E.-H. Klijn and J. Koppenjan (eds), *Managing Complex Networks* (London, 1997); H. Sullivan and C. Skelcher, *Working Across Boundaries* (Basingstoke, 2002); S. Goldsmith and W. D. Eggers, *Governing By Network* (Washington, DC, 2004), ch. 2.; D. Chisholm, *Co-ordination Without Hierarchy* (Berkeley, 1989).

[90] D. Marsh and R. Rhodes, *Policy Networks in British Government* (Oxford, 1992).

of consensus to points that allow for action on a given issue.[91] Quite distinct, however, is a fourth approach—one based on *rituals*. Rituals are structured processes that serve to organize not only the actions taken by network members but the meanings that participant individuals or organizations give to events or decisions. They may be adopted voluntarily or imposed by statutes, managers, or other methods, but the essence of ritualistic network coordination is that embedded processes drive forward the collaborations that are found within the network.[92] Finally, coordination can be left to *markets*. In collaboration through markets, the idea is that coordination is achieved 'through the "invisible hand" of the self interest of participants' who are willing to exchange resources and conclude agreements in order to attain mutually beneficial solutions and higher levels of collective welfare.[93]

The significance of the particular mode of coordination that is encountered in an area may be considerable. It has been contended that when different strategies of regime or network coordination are put into effect, those different strategies may produce intra-network relationships and exchanges—'regulatory cohabitations'—that are quite distinct in nature.[94] Thus, it can be expected that in 'hierarchical' cohabitations, there will be a very different set of relationships, negotiations, and communications from those encountered in cohabitations that might be described as 'community', 'managed', 'ritualistic', or 'market-organized'. For those regulators who would aim to justify their activities to other co-regulators and for those who would criticize other regulators within their networks, there are challenges that are quite differently conceived within the different cohabitations. Within a regime based on hierarchies, for instance, relationships will be based on lines of authority and attitudes will be shaped with reference to the requirements of authorities and rules. A key motivation will be the accepted need to comply with the requirements of those bodies that are superior within the hierarchy and with the rules that are laid down to govern behaviour. Within community-organized networks, attitudes relate to perceptions of the common interest—or the commonly accepted policies that serve as a focus for the community. A central motivation is the sustaining of continuing acceptance within the community.

[91] R. Agranoff, *Intergovernmental Management* (Albany, NY, 1986); W. Kickert, and J. Koppenjan, 'Public Management and Network Mangement: An Overview' in Kickert, Klijn, and Koppenjan, *Managing Complex Networks*; R. Gage and M. Mandell, *Strategies for Managing Intergovernmental Policies and Networks* (New York, 1990).

[92] See N. Machado and T. Burns, 'Complex Social Organization: Multiple Organizing Modes, Structural Incongruence and Mechanisms of Integration (1998) 76 *Public Administration* 355.

[93] See B.G. Peters, 'Managing Horizontal Government: The Politics of Co-ordination' (1998) 76 *Public Administration* 295, 298; B. Marin, 'Generalised Political Exchange' in B. Marin (ed.), *Generalised Political Exchange* (Frankfurt, 1990).

[94] See Baldwin and Black, 'Understanding Regulatory Co-habitation'.

In managed networks, attitudes and motivations will not be left to the individual regulatory organization, but will be steered and influenced by the managing agency—which will seek to manipulate these in a manner that contributes to the managerially constructed set of network objectives. It can, in turn, be expected that interrelationships and accountability issues will be set within a context of managerial/functional interactions, rather than hierarchical, rule-structured, or community-established ones.

Where rituals hold sway, the central motivation of many regulators will be to use ritualistic processes in a manner that serves their own organizational interests. Their broad attitude will be that interactions with other agencies can best be seen in terms of their impacts on achieving success in rituals. Claims and responses will be processed through embedded procedures and will be structured accordingly. As for market-based regimes, attitudes and motivations can be seen in traditional market terms—and regulatory bodies can be expected to deal and negotiate as selfish and rational maximizers of their own agency interests. In market-based cohabitations, claims and responses will bear the character of exchanges that are engaged in by different parties who aim to negotiate and advance self-serving outcomes. Messages will be designed not to achieve compliance with rules, or common positions, or understandings, but will have the character of offers to buy or sell in order to self-maximize.

'Cohabitation' theory also suggests that the production of regulatory outcomes is also liable to vary according to cohabitation style. *Hierarchical cohabitation* brings the potential to establish common goals, but the considerable risk is that in complex regimes that cross different levels of government, and which involve various types of public and private body, the available authority will not suffice to eliminate non-hierarchical relationships. The existence of such counter-regimes and cultures will, in turn impede both the establishing of common goals and delivery with respect to such goals. Adaptability to change may also be sub-optimal in hierarchical cohabitations if there is not leadership from the top and if upward communications are poor. As for accountability and other representative values, one special problem within hierarchical cohabitations is that assumptions of responsibility will tend to vary dramatically across the network and that those lower down the hierarchy will tend to shift responsibility to 'higher authorities'.

In *community cohabitations*, the establishing of common goals is again possible, but this is liable to be impeded where interests diverge. A special danger is that confusions of messaging will tend to undermine both delivery on objectives and the serving of representative values of accountability and openness. The strength of *network management* is that this can be used to broker agreements, to develop common responses to problems, and to steer

attitudes and motivations in a productive direction. Managers, in addition, can often work with and around the divergent capacities and limitations that co-regulators experience. Managerial strategies can, moreover, facilitate the network's capacity to adapt to changed circumstances. In relation to representative values, the strength of managerial cohabitation is that common communications systems, claiming processes, and responding approaches can be fostered and efforts can be made to develop common understandings on such matters as modes of rendering account. Modes of evaluating performance can, accordingly, be shaped by the managers.

In *ritualistic cohabitations*, processes can be used to allocate institutional roles and to encourage the development of common aims and approaches by ordering experiences, creating shared meanings, building feelings of community, and encouraging trust. They may be used to facilitate the development of discourses that generate bodies of common knowledge, generalized ways of seeing challenges and problems, and authoritative versions of situations and values.[95] The difficulty, however, is that, in the absence of authority, rituals may not suffice to reconcile all interests and perceptions and this may impede the establishing of objectives and an organized regime for delivering on these. Rituals, moreover, can lead to stultification if they are followed unthinkingly.

In the case of *market-based cohabitations*, there may be significant difficulties in agreeing objectives in the absence of hierarchical or managerial pressures and in cases where regulatory actors are reluctant to collaborate. Outcome deliveries are likely to be prejudiced where the pursuit of self-interests will produce cohabitations that are ill-organized and which tend to be associated with frequent efforts to shift blame. Adaptability to change may also be limited in so far as self-interested regulators will seek to address new challenges through collaborations only in order to further their own agency interests. This produces the further danger that collaborative action will be undermined, as changes are seen by some regulators as opportunities to gain competitive advantages over their co-networked regulators.

Such 'pure forms' of cohabitation are unlikely to be encountered in practice and 'complex cohabitations' are liable to be widespread.[96] The value of the cohabitation analysis is, however, that it draws the connection between three elements: the mode of network coordination essayed in an area, the type of cohabitation arrangement that networked regulators inhabit, and the delivery of substantive and procedural regulatory outcomes.

[95] On rituals and discourses in medicine, see N. Machado, *Using the Bodies of the Dead* (Aldershot, 1998).

[96] See Baldwin and Black, 'Understanding Regulatory Cohabitation'.

Conclusions

As with many other regulatory distinctions, the contrast between regulation and self-regulation can be portrayed in ways that are too stark.[97] Nearly all regulatory mechanisms incorporate some elements of self-regulation—whether this involves an input into the drafting of rules or a firm's monitoring its own compliance. Nearly all self-regulatory mechanisms of governmental significance are subject to some degree of external state influence—even if this is merely the 'shadow' of potential governmental regulation. The trick, as was shown in discussing enforced self-regulation, is to make use of that mix of regulation and self-regulation that best serves legitimate governmental purposes and so merits the strongest claims to support. Analysis of particular regulatory tasks and contexts is essential in bringing about that deployment, as is an awareness of the potential of different varieties of regulation and self-regulation.

Self-regulatory and meta-regulatory approaches have an important role in regulation, but enough has been said above to suggest that they offer 'solutions' that are often no less contentious than those provided by command and control instruments. As for mixes of regulatory methods, these are likely to provide the only realistic responses to challenges in many regulatory contexts. The central issues in relation to mixes are how to design and identify optimal mixes and how to do so in a manner that satisfies the criteria of legitimacy that were reviewed in Chapter 3. Part of that legitimation process relates to the production of appropriate regulatory outcomes and, as the discussion of regulatory networks indicated, much here will turn on the mode of network coordination that is adopted and the kind of regulatory cohabitation that results.

[97] See D. Swann, 'The Regulatory Scene', in K. Button and D. Swann, *The Age of Regulatory Reform* (Oxford, 1989), 4.