

Regulatory Architectures for a Global World:
On the Varieties of Regulatory Capitalism

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Abstract

Regulation has emerged as the most distinct feature of the new global order of regulatory capitalism. In this new global order, rule making, monitoring and enforcement are becoming major instruments of governance at both the national and global level. This paper clarifies some aspects of the emerging new global order of regulatory capitalism and develops distinctions between different varieties of regulatory capitalism. It is asserted that these varieties of regulatory capitalism are produced by the interaction of varying degrees of civil and state regulation and variations in the composition of the networks that serve as the backbone that transforms autonomous jurisdictions into interdependent ones. Accordingly, the paper distinguishes between Corporatist, Pluralist, *Étatist*, and Laissez-faire forms of regulatory capitalism.

Regulatory Architectures for a Global World: *On the Varieties of Regulatory Capitalism*

Regulation has emerged as the most distinct feature of the new global order of regulatory capitalism. The architecture of regulation is increasingly also the architecture of global governance. Unfortunately the importance of regulation, rule making, rule monitoring and rule enforcement is still largely unacknowledged by scholars of political economy and public policy, who predominantly focus on issues of redistribution and development.¹ Consequently, we know more about the politics of the welfare state and the developmental state, and the varieties of welfarism and developmentalism, than we know about the politics of regulation and the varieties of regulatory capitalism. Dilemmas of growth and material and symbolic exclusion are still major issues on the public agenda; however, they are now increasingly framed and shaped as regulatory issues. Instead of the direct provision of services and standards of behavior, states and other organizations are increasingly turning to indirect, hybrid forms of regulation. This may well result in a transformation of the politics of redistribution and development and consequently in the expansion of the arenas of regulatory politics at the expense of others arenas. To the extent that these expectations are empirically valid, political economists should direct more attention to the study of regulation.

This paper asserts that it is necessary to examine the changes in the global order since the 1970s not only as an expression of "regime change", but also as an expression of arena-shift. The new governance involves a shift in the locus of politics and policy – from redistributive and development politics and policy to regulatory politics and policy. Over forty years ago we were taught that policy sometimes determines politics, and that different patterns of politics can therefore be expected to evolve in different policy arenas (Lowi, 1964). Accordingly, one might suggest that concepts, methods and theories can be expected to reflect the basic characteristics and dilemmas of a particular arena of policy. Taking this into account, one can go further and suggest that changes within the redistributive and developmental arenas since the late 1970s are of a lower order when compared to the most significant change – the change in the arena of politics and policy. Regulation and regulatory politics may better represent the political, economic and sociological aspects of change than the politics of welfare and development. If this contention is even partially valid, it is good

news, as well as providing a great challenge for scholars of regulation. It is good news because it promises more scholarly and public attention; it is a challenge because the critical contributions to date – theoretical, methodological and empirical – were made in the redistributive and developmental arenas, and in a context which differs substantially and qualitatively from the arena of regulation.

The assertion that regulation and the political economy of regulation are nowadays increasingly important is relevant not only because we know relatively little about the political economy of regulation. It is also important because the intellectual hegemony of neoliberalism represents an important obstacle for the study of regulation. It is repeatedly asserted that we live in a neoliberal era under a neoliberal hegemony - an era in which the state is on the retreat and the authority of markets is on the rise. Implicit in much of the literature in political economy is the assumption that marketization is far more deserving of our scholarly attention than regulation. According to the literature, therefore, we should be striving to explain deregulation, market mechanisms of control, privatization, convergence on market policies and the general contraction of the state.

An different research agenda might guide us to collect evidences and pose questions on the dynamics of the birth, growth and death of rules; on the emergence of regulation as a distinct function in the policy process; on the spread of regulatory agencies as best practice; on the growth of international and global regulatory regimes; and the institutionalization of smart and indirect forms of regulation. The notion of regulatory capitalism reflects this agenda. It points to unsettling evidences of regulatory expansion amidst privatization and liberalization, and therefore develops a research agenda on the dynamics of rules and rule making as a subject of political economic research. As already asserted, it also shifts the focus of scholarship from the politics of distribution and development to the politics of regulation (cf. Lowi, 1964). Building on the proposition that regulation is the expanding part of government, and that it is a major tool in the construction and maintenance of multi-level global regimes, this paper aims to clearly define the notion of regulatory capitalism and to point to certain aspects that are involved in its emergence as a global order.

What constitutes regulatory capitalism as a global rather than a merely national order is the interaction between civil and state regulation in both national and global arenas. In this

global order, both civil (business and non-business) and state organizations are on the loose, navigating within and beyond domestic and global political and policy streams (to use Kingdon's metaphor [1995]). This requires us to move beyond the regulatory state and pay close attention to the interaction between civil and state forms of regulation. In this regard the emergence and consolidation of systems of hybrid forms of regulation, and in particular systems of meta-governance and meta-regulation, is of especial interest. Consequently, it is suggested that any discussion of the changing global order and the role of regulation within it should take into account the growth not only of regulatory agencies and intergovernmental regulatory regimes, but also the growth of Civil Regulation and private governance regimes within and beyond the nation-state. This is grounded more theoretically in the "state-within-society" approach, as formulated in Joel Migdal's *State in Society: Studying How States and Societies Transform and Constitute One Another* [2001]. There, Migdal suggests that a framework of analysis that takes into account processes at the levels of both state and society is the most adequate for understanding political change. The effort to understand and conceptualize regulatory capitalism thus rests not only on the state-centered approach (and thus the rise of the regulatory state), but also on a society-centered approach (and thus the sociological processes that lead to the rise of the regulatory society). Varieties of societal and state organizations, as reflected in the relative strength of state and civil forms of regulation, give rise to four varieties of regulatory capitalism: Laissez-Faire, Pluralist, Corporatist and Étatist.

The first section of this paper presents the notion of the regulatory state and clarifies its origins, as well as its various dimensions and meanings. The second section explores the notion of 'civil regulation' and discusses some of its major implications. The third section interlinks the notions of regulatory state and regulatory society so as to constitute the notion of regulatory capitalism. At the same time, it builds on the comparative political economy and comparative public policy literatures in order to examine the conditions that are essential for a theory of interest intermediation, and which therefore should be preserved when moving from distributive and redistributive arenas to the regulatory arena. The fourth section proceeds to develop some distinctions between different varieties of regulatory capitalism; in particular, between laissez-faire, corporatist, pluralist and Command & Control types of regulatory capitalism. The fifth section concludes the paper.

I. The Regulatory State and State-Centered Regulation

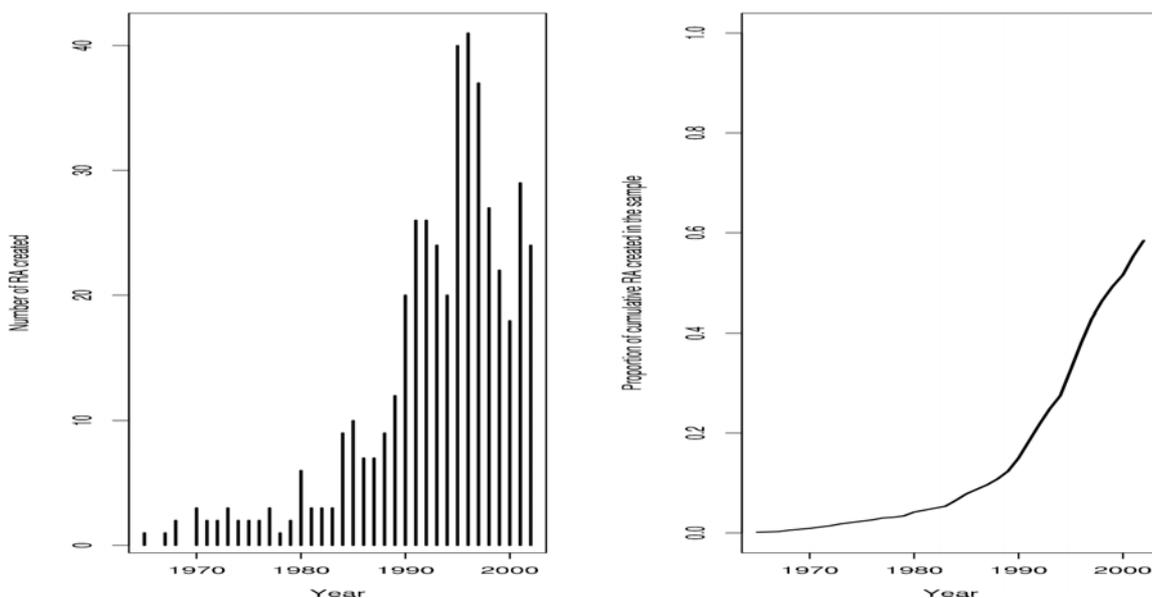
Since the 1990s, the concept of the Regulatory State has proved especially popular (Moran, 2002, 391; Loughlin and Scott 1997; McGowan and Wallace 1996; Hood et al., 1999). Students of political economy and public administration have found it useful in conveying important aspects of political and economic reforms in Europe (Majone, 1994; 1997), Latin America (Manzetti, 2002; Jordana and Levi-Faur, 2006), East Asia (Jayasuriya, 2001), Germany (Muller, 2002), Britain (Moran, 2003), and even China (Pearson, 2005). At the same time, study, research and consultancy concerning regulatory reforms has become a growth industry.

The regulatory state is a multi-dimensional concept. As a first step, it should be differentiated from the welfare state and the developmental state. The Welfare State may be defined by its primary focus on one of several types of policies. Specifically, the politics, policies and administration of the welfare state are primarily geared toward redistribution. Similarly, the Developmental State focuses on distribution policy to a degree that marginalizes other instruments of policy making, such as regulation and redistribution. These distinctions allow us to turn to the regulatory state: the Regulatory State invests in rule making, monitoring and enforcement, at the expense of other types of policies. The term Regulatory State "suggests [that] modern states are placing more emphasis on the use of authority, rules and standard-setting, partially displacing an earlier emphasis on public ownership, public subsidies, and directly provided services. The expanding part of modern government, the argument goes, is *regulation*..." (Hood et al., 1999, 3).

Another way to understand the concept of the regulatory state takes us to its discursive origins in the United States. In order to trace these origins, I conducted a bibliographic search in library catalogues and the *Google* search engine. This search revealed that the notion of the regulatory state emerges for the first time in the United States in the early 1960s. The earliest reference to the notion in a book title, and probably also the first to apply and use the term, is James E. Anderson's *The Emergence of the Modern Regulatory State* [1962]. Anderson's book discusses the growth of national level regulation in the United States between 1887 and 1917, "the first great era in the development of national regulatory state" [ix]. The term Regulatory

State, as he coins it, captures the growth of government regulation mainly via the establishment of regulatory commissions at the national level. These agencies aim to correct or prevent abuses and evils in the capitalist system, especially those caused by the rise of industrialism, and represent an effort to extend democratic control over the economic system and infuse it with a social conscience (Anderson, 1962, 155). The notion of the Regulatory State as suggested by Anderson in the early 1960s, and which lasted through to the 1980s, is based exclusively on the American experience, and indeed was deployed solely in relation to the particular system of governance in the United States. Anderson's notion signifies what might today be called the 'old American regulatory state'.

Figure 1 a&b: Expansion in the Number of Regulatory Agencies



This 'old American regulatory state' seems to be gaining popularity in other countries. While the number of regulatory agencies in the United States has not grown since the mid-1970s,

such agencies have become popular elsewhere in the world. In a recent survey of the establishment of regulatory agencies across 16 different sectors in 49 countries from the 1920s through to 2002, Jordana and Levi-Faur found that the number of regulatory agencies rose sharply in the 1990s (see Figures 1a & 1b). Indeed, the rate of establishment increased extremely dramatically: from less than 5 new autonomous agencies per year from the 1960s to the 1980s, to more than 20 agencies per year from the 1990s to 2002 (rising to almost 40 agencies per year between 1994-1996). By the end of 2002, we could identify an autonomous regulatory agency in about 60% of the possible cases (Jordana, Levi-Faur, Fernandez, 2007). Probably more than anything else, it is the establishment of these agencies that makes the regulatory state an attractive term for social scientists.

The growth in the number and popularity of these agencies suggests that the global order since the 1980s is increasingly neoliberal, and that the global has been diminishing the authority of the national (Braithwaite and Drahos, 2000; Braithwaite, 2007; Weiss, 1999; 2003; Levy, 2006). However, there are wide gaps between the dominant narrative and the emerging regulatory realities. Braithwaite (2007) bluntly termed it the 'neoliberal fairy tale', suggesting that regulation is too important a feature of the current order simply to be left out of political economy and public policy accounts of change. Similarly, to note a couple of recent examples, both Moran (2003) and Levy (2006) reported findings that the state "after statism" remains an activist state. Its missions are evolving rather than eroding, and at the most general level it is moving from a market-directing to a market-supporting orientation.

However, there is yet another concept of the regulatory state which carries a rather new and different meaning from the one that focuses on regulatory agencies. This notion may be derived from Harold Seidman's study of the American administrative state (*Politics, Position and Power*, 1986; an edition was written in collaboration with Robert Gilmour). Seidman's notion of the regulatory state emphasizes the shift from delivering services and evaluating results (the positive state), to complying with rules and regulations (the regulatory state). According to his formulation, complexity of governance brought administrators to try and govern through the use of regulatory conditions: "If one cannot control the players, then the next best thing is to dictate the rules of the game" (Seidman and Gilmour, 1986, 129). The result is documented in the fifth edition of his book: "less than 10% of the federal budget is

spent on domestic programs performed directly by federal employees and the lion's share of federal programs are administrated by independent third parties through grants, contracts, and transfer payments" (Seidman, 1998, 109).² Whereas Seidman's narrative sees regulatory commissions as establishing an alternative mechanism to the courts in, conflicts of interest and inherent uncertainties regarding the conditions of delivery in complex system of governance reintroduce the courts and the judges as significant sites and actors, sometimes the most significant sites and actors, in the administrative process (Seidman, 1998, 109).

If, for Anderson, the origins of the regulatory state lie in the Populist and Progressive eras, for Seidman it emerges in the 1960s, but was only coherently formulated as a political platform by Ronald Regan's administration. While the growth of big business sets the functional rationale for Anderson's old regulatory state, it is the growing complexity of social and economic life that shapes Seidman's understanding of the new regulatory state (a term first coined by Braithwaite [1999; 2000], which is somewhat similar to Scott's [2004] description of the 'post-regulatory state'). Whereas Anderson's regulatory state builds hierarchical Command & Control systems to govern the economy, Seidman's regulatory state is signified by administration through third parties. While the old regulatory state focused on the regulation of business, the new regulatory state is preoccupied with the regulation of both for-profit and non-profit organizations. At the same time, it invests greatly in the regulation of its various constituent components (e.g. regulation within government; see Hood et al. 1999). What Anderson called "the regulatory state" was titled the 'positive state' by Seidman. There are therefore at least two dominant notions of the regulatory state within social science discourse in the US: one involves Command & Control regulation by regulatory agencies, and the other steering by third parties.

Finally, an additional dimension of the term 'regulatory state' is offered by Giandomenico Majone's conception of a European Regulatory State (Majone, 1994, 1997). Building on Seidman's understanding of the changes in the politics, economics and society of the 1980s as a transformation from a "positive state" to a "regulatory state", Majone single-handedly invented the notion of a "European regulatory state" (Moran 2003, 17). The transformation of Europe and the rise of a European regulatory state, he argued, is evident in the amalgamation of five shifts: (a) from taxing and spending to rule making; (b) from centralized bureaucracy to autonomous agencies; (c) from party and parliamentary politics

to legalistic and professional politics; (d) from a corporatist to a pluralist political culture; and (e) from direct to indirect political accountability (Majone, 1994; 1997). Implicit in Majone's characterization of the European regulatory state is an understanding of the regulatory state as a multi-level system where regulatory functions are migrating upwards. The characterization of the European regulatory state clearly is derived from and reliant on Harold Seidman's conceptualization of the new regulatory state as regulation by setting the rules of the game and monitoring compliance by third parties or proxies.

There are, therefore, varieties of regulatory states, and these varieties express different periods in the development of capitalism (old and new, pre- and post-1970s); levels of analysis (global vs. national); and the extent and form of control (direct or C&C, or indirect via third parties). It may well be that these different conceptions of the regulatory state represent different aspects of complex and multi-dimensional systems of governance.

II. Civil Regulation and the Regulatory Society

Alongside the growth of state regulation as expressed by the partial indicators that we have on the number of rules, the number of regulatory agencies and the restructuring of the state, it is possible to identify growth and expansion in the scope of the application of civil forms of regulation. The concept of civil regulation refers to the institutionalization of voluntary global and national forms of regulation through the creation of private (non-state) forms of regulation intended to govern markets and firms (Vogel, 2005; 2006). Civil regulations attempt to embed international markets and firms in a normative order that describes responsible business conduct. 'What distinguishes the legitimacy, governance and implementation of civil regulation', Vogel tells us, 'is that it is not rooted in public authority. Operating beside or around the state rather than through it, civil regulations are based on 'soft law' rather than legally binding standards: violators are subject to market rather than legal penalties' (Vogel, 2006: 2-3). Market penalties should be understood here not only as direct and immediate economic outcomes, but also as penalties that are related to the standing and reputation of the corporation and its managers and employees. Because penalties can be high, even if they are not based on legal norms and state enforcement, it might be useful to distinguish between 'voluntary regulation' and 'civil regulation'. While

the two notions retain a close affinity, civil regulation, unlike voluntary regulation, may, at least in principal, possess coercive aspects.

Voluntary regulation includes a broad category of social and human behavior in which regulatory compliance is not imposed on the individual or the organization, but rather is partly or wholly based on the choice and the institutional design of the *regulatees*. The motivations for voluntary regulation may differ, and so do the results, yet there is one constant feature that serves as an umbrella for a broad range of regulatory strategies, namely the consistent commitment, which is not required by law, to control behavior in such a way as to minimize the regulatee's freedom of action. Voluntary regulation is a historical phenomenon that precedes modernity and is recognized in wide areas of business and social activity. Scholarly and public interest in voluntary regulation derives from a recognition of the shortcomings of 'regulatory formalism', which include: (a) expensive and cost-ineffective regulatory strategies (Breyer, 1993); (b) inflexible regulatory strategies that encourage adversarial enforcement (Bardach and Kagan, 1982); (c) legal constraints on the subject matter, procedure and scope of regulatory discretion; (d) and *regulatee's* resentment, which leads to non-compliance or 'creative compliance' (McBarnet and Whelan, 1997). Although the turn to voluntary regulation is partly a response to the failures of formal regulation, this does not mean that it is itself either problem-free or costless. The basic puzzle of why firms and other social and economic organizations would take upon themselves responsibilities that are not mandated by law is still in need of more scholarly attention, and its scope and implications need to be more clearly determined (Arora and Cason, 1996; Prakash, 2001).

Self-regulation is a basic and common form of civil regulation and is often, but not always, voluntary. It is the activity that takes place when social and business actors exert control over private action via collective action (Baldwin and Cave, 1999: 125). The self-regulatory regime is based on a certain level of agreement and will to cooperate between various stakeholders, including professional and business competitors. Self-regulation may include a wide variety of techniques and instruments covering various facets of collective action. It may be defined with one or all of the following aspects: entry regulation (e.g. having a licence to operate a service); exit regulation (e.g. the withdrawal of a licence to operate a service); cost regulation (e.g. the price of professional services); service regulation (e.g. the

level of service expected from the provider); content regulation (e.g. degree of violence); and standard regulation (e.g. degree of acceptable noise).

Third-party regulation is yet another common form of civil regulation (although it may also be applied as a statist strategy where one agency of the state requires third party auditing by another state agency). Here processes of accreditation by third parties are a central enforcement strategy and 'a voluntary contractual relationship between regulated entities and the party auditing the facility in place of relying solely on the regulatory agency as enforcer' (Kunreuther, McNulty and Kang, 2002: 309). Third-party regulation is a prevalent feature of modern life. One of its more popular forms is 'auditing'. Indeed, the notion of auditing is now used in a variety of contexts to refer to growing pressures for verification requirements (Power, 1997). Third-party regulators are sometimes called 'gatekeepers' (Kraakman, 1986). These include senior executives, independent directors, large auditing firms, external lawyers, securities analysts, the financial media, underwriters, and debt-rating agencies (Ribstein, 2005: 5-6). Volunteerism is a measure and characteristic, however, of the *regulatee*, and not necessarily the third party. The incentives to the third party to enter into these relations might be economic, and indeed they often are, but they can also be enforced by the legal regime (either by the state or by the civil organization that shapes the regulatory regime).³

The development and expansion of civil regulation is most often perceived as an outcome and a derivative of the failures, or at least the limits, of state-centered regulation. For others it is often window-dressing that is designed to mask the cynical strategies of profit maximization by business and other privileged interests. Be that as it may, civil regulation may also reflect a social transformation, or, more specifically, the emergence of a society that is increasingly turning to regulation as a reflection of the decline in social trust and increasing intolerance for risk. That much is often reflected by the notions of the "disciplinary society" (O'Neill, 1986), 'audit society' (Power, 1997) and most concretely the 'regulatory society' (Clarke, 2000; Braithwaite, 2003). Common to all of these notions is the understanding that political power is grounded in social structures beyond the state (Rose and Miller, 1992). From this perspective the expansion of civil regulation is driven by two different social developments, though which have the same outcome.

The first of these two developments is a growing intolerance to risk and the associated dilemmas of risk management, where the marginal costs of risk reduction are growing exponentially. We may or may not live in a risk society, that is, at a hi-tech frontier with consequences that no one completely understands, and which generates a diversity of possible futures and outcomes (Giddens, 1998: 25). However, regardless of whether risks are objective or subjective, a growing intolerance of risk, propelled by media coverage of policy fiascos, has led to the emergence of new paradigm of risk. The policy oriented knowledge of this new paradigm gives rise to risk regulation, in other words, a 'systematic way of dealing with hazards and insecurities induced and introduced by modernization itself' (Beck, 1992: 21). Risks - rather than property rights or egalitarian concerns - thus become a major rationale behind regulation, including civil regulation. The second development may be associated with the public's declining trust in society's major political and social institutions. The assertion that "We audit, and we regulate, when we cease to trust" (Moran, 2000, 10) is one way of understanding the relations between trust and the rise of regulation in general, and civil regulation in particular. Trust-centered analyses see the rise of regulatory institutions (and paradoxically their problems as well) as part of broad changes in the expectations of citizens from politicians, professionals and institutions (see, Wilks, 1996, 553).

III. Regulatory Capitalism

The way capitalism is organized and governed is changing (Rosenau & Czempiel, 1992; Braithwaite and Drahos, 2000; Slaughter, 2004). A regulatory explosion – the proliferation of different mechanisms of control at both the national and global level – is balancing out the effects of neoliberal reforms and is creating a new global order that is characterized in important ways by regulation (Levi-Faur, 2005). The consolidation of the regulatory state and regulatory society, and the more general expansion in the number of rules, are the pre-conditions for the emergence of this new regulatory order. The emergence of global networks of professionals, consultants and policy advocates combines national components into a loosely integrated system which might best be called regulatory capitalism. The most visible and numerable aspect of this new global order is the emergence of new arenas of regulatory order, as well as the growth in the number of innovative regulatory instruments. Quantitative measures are yet to be nominally and operationally defined, and the

burdensome empirical work is ongoing, but to the extent that regulation and regulatory reform are creating a new global order, we should expect that the empirical results will demonstrate a growth in the number of regulatory arenas and instruments.

How should we best define the new global order of regulatory capitalism? One definition was offered in a lecture by Chairman William E. Kennard in a conference on Internet Telephony in September 2000. For Chairman Kennard, then head of the US Federal Communication Commission, regulation is too often used as a shield to protect the status quo from new competition, as well as a sword to cut a pathway for new competitors to compete by creating new networks and services. It is always easier for Business to prowl the halls of Congress, suggests Chairman Kennard, than to compete in the rough and tumble of the marketplace. Accordingly, he suggested that regulatory capitalism is when companies work to change the regulations instead of working to change the market. Or more succinctly: "Regulatory capitalism is when companies invest in lawyers, lobbyists and politicians, instead of plants, people and customer service... Regulatory capitalists would rather litigate than innovate... it works best for companies that have the resources and know-how to play the regulatory game". This derogatory view of regulation and of regulatory order is based on anachronistic, not to say populist, understandings of the relations between regulations and the market. Regulations not only constrain markets, they also enhance them. Markets do not exist independently from regulation. On the contrary, regulations constitute markets.

Nor did Chairman Kennard take into account the possibility that businesses, as well as non-profit organizations, can invest in lawyers, lobbyists, politicians and litigation while at the same time increasing their investment in plants, people, customer services and innovations. The two strategies do not necessarily contradict one another, and, at least in some respects, can complement one another. Chairman Kennard may also wish to consider the fact that better regulatory systems are a source of competitive advantage for firms, industries and nations. Investment in better regulation and even in new systems of regulation may characterize the best and most innovative companies, rather than the "corrupt" and the "laggards". For instance, the introduction of new types of green energy depends on an overhaul of the regulatory system. Without the inputs and the demands of green energy businesses these regulatory systems are unlikely to change. While regulatory capitalism is prone to business capture and cronyism (often leading to other derogatory notions such as

booty capitalism and crony capitalism), it is hard to find an acceptable, legitimate and effective alternative to the expansion of regulation.

Furthermore, Chairman Kennard did not take into account the fact that regulatory capitalism is not only defined as a political, economic and social order that is driven by business interests, but also by the growing intolerance to risk. Notions such as risk-free society lead social advocates to promote a regulatory response to market externalities. A similar source of regulation that affects economic activities is the 'rights revolution', which touches on the working conditions of labor via parliamentary and regulatory modes of interest intermediation in the face of the declining power of the labor unions. In short, Chairman Kennard's definition of regulatory capitalism is too ideological and partial to be acceptable. What is the alternative that this paper has to offer?

Regulatory capitalism denotes a political, economic and social order where regulation, rather than the direct provision of public and private services, is the expanding part of government, and where legal forms of domination are increasingly conditioned by functional rather than territorial considerations. Power in regulatory capitalism is allocated along functional demarcation lines, and thus its distribution varies from one arena to the next. The distribution of power and the corresponding form of interest intermediation in each arena are shaped by the particular interaction of civil and state forms of regulation. The forms of interaction may vary across arenas and give birth to four varieties of regulatory capitalism: Laissez-faire, *Étatist*, Pluralist and Corporatist. In arenas where both state and civil forms of regulation are strong, we may expect the emergence of hybrid forms of regulation, and in particular of meta-regulation. The particular variety of regulatory capitalism is the functional equivalent of labor market corporatism. More generally, the legitimacy and effectiveness of the regulators, the regulations and the regulatory order shape the economic performance, the quality of democracy and the vitality of the social spheres.

Figure 2 portrays the various facets of regulatory capitalism in the widest possible manner. More regulation is observed not only in the context of the traditional relations between governments and business but also within the state, within corporations, and in social (and not only economic) arenas. To better understand the new order of regulatory capitalism we

need to clarify the notions of the regulatory state and the regulatory society, and to point to the consolidation of intergovernmental structures of regulatory institutions beyond the state and in parallel to the growth of global regulatory society.

Insert figure 2 about here

One important characteristic of regulatory capitalism is that it is a fragmented order. Regulatory regimes differ widely as they are legitimized as a functional order and are thus largely tailored to the specific problem they are meant to tackle. This does not mean that these institutional designs do not reflect the interests of the actors, yet the dangers of over-generalization regarding the locus of power beyond specific arenas are particularly salient here. The fragmentation, the over-reliance on regulation, the pluralist and relatively open arena, the ideological preference for civil regulation, the multi-level regulatory structure, and above all governance through administrative regulatory agencies – all characteristic of the emerging order of regulatory capitalism – are also often used to characterize the American (or to be more accurate, the US) polity. Yet, while appealing, this metaphor is also misleading. It is misleading in the sense that it ignores history and path dependencies, and it is misleading in the sense that it ignores the limits of the policy arena on politics, or in Lowi's terminology, the strong effects of policies on politics. If anything, it is the European Union's style of governing and implementation of regulations that are spreading nowadays, and which may be more indicative of the direction, values, forces and power structure that are propelling the new order of regulatory capitalism. In the last two decades, the United States has taken the back seat as 'model proponents' (not least because of its schizophrenic attitude toward regulation), and EU is currently leading the way. This is not to say that the US is acting in a strategic way so as to create a regulatory regime that might advance the interests of some of its most important economic and social groups. Indeed, the contrary would appear to be true; but it might be the case that the emerging order may well have European tinges, and will reflect EU patterns of interest intermediation rather than American ones.

IV. Varieties of Regulatory Capitalism

The general trend toward a capitalist order which is sustained, and legitimized by rules, rule making, rule monitoring and rule enforcement is accompanied by the production of particular varieties of regulatory capitalism. It is both possible, and indeed most important to distinguish between types of regulatory capitalism as they emerge from varying degrees of civil and state regulation. A typology of the modes of regulation, as they emerge from this intersection, is presented in Table 1. For the sake of convenience, a simplistic distinction between 'strong' and 'weak' forms of regulation is made.

		Civil Regulation	
State Regulation		Strong	Weak
	Strong	Regulatory Corporatism	Étatist Regulatory Capitalism
	Weak	Pluralist Regulatory Capitalism	Laissez-faire Regulatory Capitalism

Table 1: Varieties of Regulatory Capitalism

This distinction gives rise to four types of regulatory capitalism. **Étatist** regulatory capitalism reflects regulatory regimes where civil regulation is weak and where state regulation is strong. It represents the adaptation of the Westphalian order to the regulatory arena, and in particular the expectations for its adaptation to the realities of multi-level governance. The ideal types of supranational and intergovernmental forms of the European public policy both fall under this category of regulatory order (cf. Jessop, XXXX). In the literature on regulation, étatist forms of regulation are often described as systems of Command & Control and with prescriptive types of rules. Prescriptive rules tell regulated entities and individuals what to do and how to do it, and tend to be highly particularistic in specifying required actions and the standards for adhering to them (May, 2007, 9). This variant of regulatory capitalism usually enjoys a high degree of capacity to impose sanctions, as well as clear cut lines of responsibility and thus accountability. Yet these advantages come at a price: strict authoritarianism, unreasonable rule and capricious enforcement practices impose needless costs and generate adversarial relations between regulators and regulatees.

Laissez-faire regulatory capitalism emerges from the interaction of weak forms of civil and state regulation. Both civil and state regulations are rudimentary elements of the regulatory order which rests on rather limited, soft forms of rules. This variety of regulatory capitalism represents the ideal of the neoliberal enthusiastic who sees both state and civil forms of regulation as constraining economic and political liberties and therefore advocate deregulation. Laissez-faire forms of regulatory capitalism represent the contraction of the political (and not only the state) and the expansion of market mechanisms of control. The dynamics of governance in this type of regulatory capitalism either face backwards to the transformation of rules into principles (that is, unspecified or vague rules; often also known as standards), or forwards, toward the consolidation of regimes that are based on principles from their very outset (Braithwaite, 2003)

Pluralist regulatory capitalism emerges from the interaction of weak forms of state regulation and strong forms of civil regulation. This variety of regulatory capitalism represents the Americanization of the global order in the sense that group competition and contestation create public arenas of regulation that do not rest on public sanctions and public authority. The growth in scope and diversity of voluntary forms of regulation suggests that this variety of regulatory capitalism is gaining prominence at the expense of other forms of regulatory capitalism. When compared to other forms, this particular type of regulatory capitalism is characterized by adversarialism, frequent changes within the regulatory regime, and high rates of regime demise. The types of rules that may best represent this kind of regulatory capitalism are process-based regulation (sometimes also called management-based regulation), or performance-based regulation. Process-based regulation advances systems for monitoring risks by the regulatees (May, 2007, 10; Coglianese and Lazer, 2003); performance-based regulation emphasizes regulatory outcomes and focuses on results, while leaving it to the regulated entities and regulated individuals to determine how best to achieve the desired results (Coglianese et al., 2002). In doing so, these two types of rules avoid conflicts that may evolve around prescriptive behavior and reduce enforcement and monitoring costs. In systems where state-centered sanctions are limited, these types of rules are most likely to proliferate.

Corporatist regulatory capitalism emerges from the interaction of strong forms of both civil regulation and state regulation. In arenas of redistribution these conditions may lead to the consolidation of a corporatist order. In arenas of distribution, and especially in the context of issues of economic development, these forms may lead to the creation of coordinated forms of capitalism. The type of rules that are most likely to result from the interaction between strong civil and state regulation varies with the particular hybrid form of regulation, but in general the corporatist type of regulatory capitalism does not employ prescriptive rules. In the regulatory arena the interaction between strong state and civil regulations results in various hybrid forms of regulation. Four of them are of particular importance. The first is co-regulation, where responsibility for regulatory design or regulatory enforcement is shared by the state and civil actors. The particular scope of cooperation may vary as long as the regulatory arrangements are grounded in cooperative techniques and the legitimacy of the regime rests at least partly on public–private cooperation. A second form of hybrid regulation is enforced self-regulation, where ‘the government would compel each company to write a set of rules tailored to the unique set of contingencies facing that firm. A regulatory agency would either approve these rules or send them back for revision if they were insufficiently stringent’ (Ayres and Braithwaite, 1992: 106). Rather than having the government enforce the rules, most enforcement duties and costs would be internalized by the *regulatee*, who would be required to establish its own independent compliance administration. The primary function of government inspectors would be to ensure the integrity and transparency of the work of the compliance group of the regulatees. State involvement would not stop at monitoring, however. Violations of the privately written and publicly ratified rules would be punishable by law (Ayres and Braithwaite, 1992).

A third form of hybrid regulation is meta-regulation. The notion of meta-regulation is closely related to the notion of enforced self-regulation as formulated above; however, unlike enforced self-regulation, it allows the *regulatee* to determine its own rules. The regulatory role of the state is confined to the institutionalization and monitoring of the integrity of the work of the compliance group of the regulatees. In this sense, it is about meta-monitoring (Grabosky, 1995). In Christine Parker’s formulation, the notion of meta-regulation has been used as a descriptive or explanatory term within the literature on ‘new governance’ to refer to the way in which the state’s role in governance and regulation is changing (Parker, 2002). Meta-regulation ‘entails any form of regulation (whether by tools of

state law or other mechanisms) that regulates any other form of regulation' (Parker, forthcoming). Thus, it might include the legal regulation of self-regulation (e.g. putting an oversight board above a self-regulatory professional association), non-legal methods of 'regulating' internal corporate self-regulation or management (e.g. voluntary accreditation to codes of good conduct), or the regulation of national law-making by transnational bodies (such as the EU) (Parker, forthcoming). As put by Bronwen Morgan, it captures a desire or tendency 'to think reflexively about regulation, such that rather than regulating social and individual action directly, the process of regulation itself becomes regulated' (Morgan, 2003: 2).

A fourth form of hybrid regulation is often known as 'multi-level regulation'. Here regulatory authority is allocated to different levels of territorial tiers – supranational (global and regional), national, regional (domestic) and local (Marks and Hooghe, 2001). There are various forms of multi-level regulation depending on the number of tiers that are involved and the particular form of allocation. Regulatory authority can be allocated on a functional basis (whereby regulatory authority is allocated to different tiers according to their capacity to deal with the problem), or on a hierarchical basis (where supreme authority is defined in one of the regulatory tiers); alternatively, it may simply be a product of incremental, path-trajectory processes (where the regime is the result of the amalgamation of patches, each designed to solve a particular aspect as it occurred on the regulatory agenda). While much of the discussion on multi-level governance (which is a broader term than multi-level regulation) focuses on the transfer of authority between one tier and the next, one should also note that the overall impact of multi-level regulation can be that of accretion. Indeed, the possibility that multi-level regulation may involve the co-development of regulatory capacities in different tiers is only rarely recognized.

V. Conclusions

It might be useful to conclude this paper with four assertions. First, regulation and capitalism are increasingly intertwined, and new forms of capitalism are associated with new forms of regulation. Regulation – rather than privatization and deregulation – best

captures the political aspects of the new emerging order. It may well be creating a thick institutional design that might shape the governance of capitalism in ways that cannot be anticipated or controlled in advance. Neo-institutionalist approaches might capture these aspects (March & Olsen, 1984). Regulatory regimes and regulation and rule making regulatory agencies are not instruments that can be manipulated at will by the principal, or by a coalition of principals. Instead, they are an important part of the institutional order that is largely independent of actors' political strategies. Second, the arena-shift from redistribution and development policies toward regulatory politics, as well as the creation of global policy arenas, carry with them the fragmentation of politics and institutional design and the emergence of more pluralist forms of politics and policy. If our first assertion reveals the large extent to which regulatory capitalism builds on institutionalism, the second connects it to the literature on governance, that is, on de-centered forms of governing (Rhodes, 1996; Rosenau & Czempiel, 1992; Braithwaite and Drahos, 2000; Slaughter, 2004).

Third, the expansion in the numbers of laws, rules and standards at the national level, as well as in the number of state level regulatory agencies, might well be characterized by a growth at the international or global level as well. Fourth, the evidences on the growth of civil forms of interest intermediation do not necessarily suggest a decline in state forms of regulation. The third and the fourth assertions represent the challenge to the zero-sum assumptions that characterize much of the debate on global regulatory change so far, and they help us shed some light on one particular misconception – the zero-sum view of capitalism. In particular, this misconception plagues our understanding of the relations and interactions between the private and the public, the global and the local, and the statist and the civil. Thus, the private and the public are perceived as static spheres which share a constant and fixed arena. When one of these arenas grows, the other declines; the sum is always the same. Yet, the public and the private are social and political conceptions and not a delimited territory. First, what we conceive as private or public is constantly changing. The relations between the two can, and indeed may often be those of mutual reinforcement and mutual growth, and thus positive-sum, rather than zero-sum. Second, the global is not a distinct arena which takes over the local. It might be useful to assess the costs and benefits of the assumption about the zero-sum relations that dominate much of our thinking of the relations between globalization and localization. Third, it might also be useful to critically assess the relations between civil and state regulation. Here too there is strong assumption

of zero-sum relations, though it might be useful to assess an alternative hypothesis about their mutual enforcement and co-development instead. It is still too early to conclude that civil and state regulation are both expanding and therefore we need to adopt a broader analytical view than that which is usually practiced in social scientific research. We need to update our theoretical lenses so as to be able to capture the cases for the current regulatory explosion, and we need to better understand the way that they complement each other, compete with one another, and are often intertwined.

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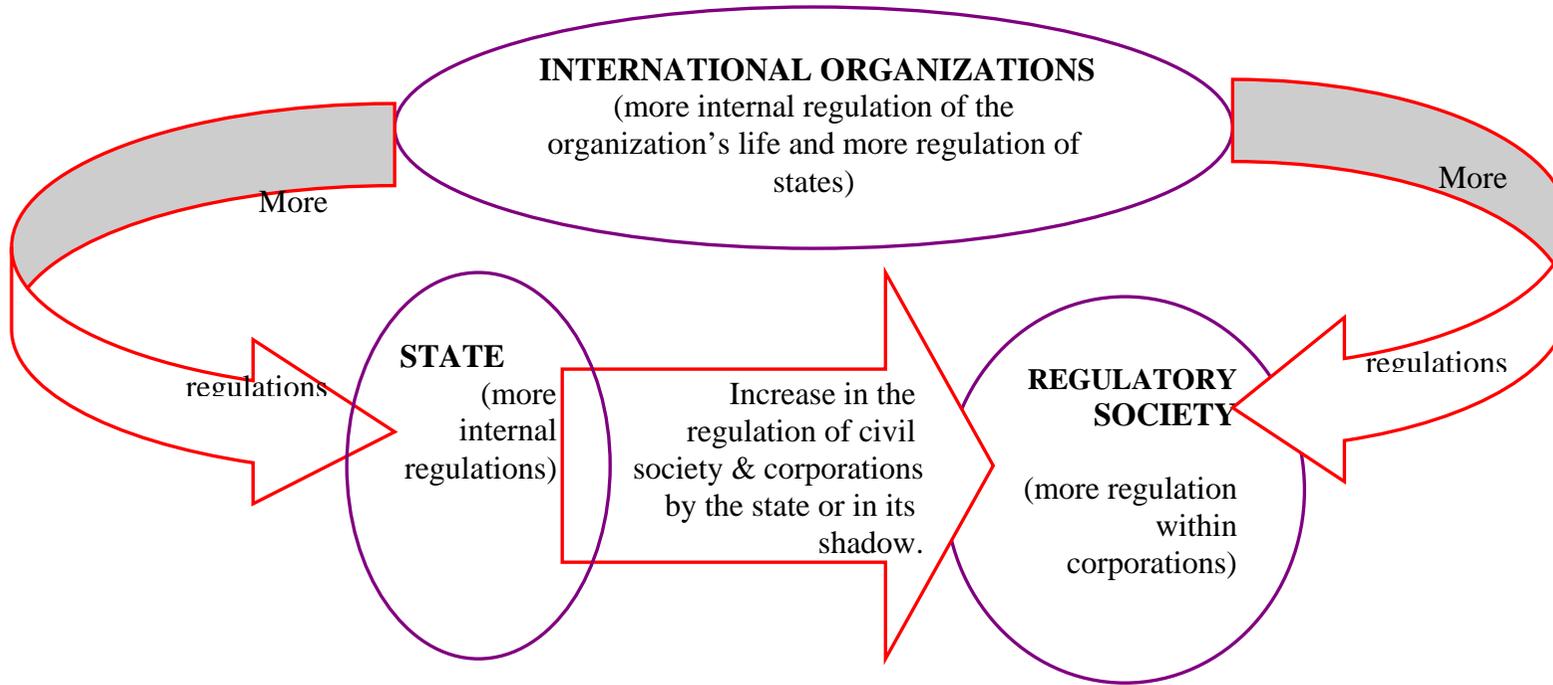


Figure 2: Regulatory growth and regulatory capitalism

Note: regulation within corporations represents a wider process of regulatory growth. The notions of regulatory society, audit society and risk society reflect the social dimensions of regulatory capitalism.

Endnotes

¹ These two disciplines, after all, emerged and were consolidated in the post-war era, and hence reflect the research and public priorities of that period.

² From 1970 to 1980 the size of the civilian executive branch workforce decreased by 120K employees, while total federal expenditures increased about 195 percent (Seidman and Gilmour, 1986, p. 120).

³ An example of third-party regulation that is motivated by market considerations is the SGS Corporation. It carries out inspections, verification, testing and certification; it has been listed on the Swiss Stock Exchange since 1985; and has more than 46,000 employees in over 1,000 sites around the world. Another is EurepGAP, a private sector body that sets voluntary standards for the certification of agricultural products around the globe. It brings together agricultural producers and retailers who want to establish certification standards and procedures for Good Agricultural Practices (GAP). Certification covers the production process of the certified product from before the seed is planted until it leaves the farm. EurepGAP is a business-to-business label and is therefore not directly visible to consumers. A form of third-party regulation that is socially motivated is the ‘green’ or ‘social’ labels that are offered and promoted by non-governmental non-profit organizations (Courville, 2003). A more coercive form of third-party regulation takes the form of criminal or civil liabilities of the ‘third party’ in the event that it fails to perform its duties. Indeed, much of the new expansion of regulation in the field of corporate governance is about the expansion of responsibility and demands for accountability from stakeholders, who are not necessarily the offending persons but still are in a position to prevent non-compliance.