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## Retailing Governance? The Rise of Accountability Communities

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### New Modes of Regulatory Governance

New modes of transnational regulatory governance have grown rapidly in reach and scope in the Asia-Pacific. One example is the entry of China into the WTO and the concomitant legal changes that this has entailed in the national system of administrative law. Other examples are the emergence of new dimensions of transnational regulatory governance ranging from networks of central bankers (e.g., the East Asian Central Bankers network) public-private partnerships (e.g., the Global Fund for Malaria eradication) to private standard setting organizations that exercise 'legislative' power by seeking compliance with various codes and standards (e.g., the Forest Stewardship Council).

Hence the certainties of administrative law — its location, nature and purpose — are dissolving; administrative law is now more varied, diverse and diffused. As Sedley argues, this 'systematic dispersal of the sites of power beyond the confines of what we had learned to recognise as the state, old certainties of public law are no longer there' (Sedley 1997: Foreword). Decentring, in this context, means that governance is located in multiple sites, engages a number of non state actors and deploys a range of techniques that move regulation beyond the traditional structures of public law. Within these various decentred sites of governance — such as private-public partnerships, regulatory networks and transnational non governmental standard setting organisations — old certainties about accountability no longer hold, posing questions such as:

- who is the relevant authority?
- who is affected by decisions of various governance agents?
- from 'whom' should those affected by decisions seek account?

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These questions have produced a vigorous accountability agenda to relocate public law values within these decentred sites of governance. The boundary spanning nature, between Westphalian and Weberian, of this regulatory governance makes issues of accountability especially problematic.

'Westphalian' boundaries are transcended by the extensive use of administrative and regulatory instruments for global governance. Many of these new regulatory instruments have established mechanisms of *review, monitoring and participation*, to control the administrative acts of international public agencies and incorporate public values. One such value that has assumed significance in global regulatory programs is the principle of participation, that is, the notion that clients or recipients of programs need to be involved in the process of formulating and implementing governance programs. Take for example, the case of the Poverty Reduction Strategy Papers (PRSP) of the World Bank and the IMF. The PRSP is a nationally formulated policy document which provides mechanisms for consultation and deliberation — including with non governmental organizations (NGOs) — and deliberates on policy strategies for poverty reduction. This is not merely a matter of extending public law principles to these new sites of public power, but rather, one of constituting and defining the 'public' in these new sites of governance.

Accountability standards have been established by private organizations such as corporate governance standard bodies or labour standard monitoring organisations. In exercising such legislative power these private authorities transcend 'Weberian' boundaries of public and private spheres of action. Through what means do these organisations draw legitimacy? Labour standards in particular represent an interesting example of the development of transnational accountability communities around international NGOs and monitoring organizations (Arthurs 2001). More intriguingly, public law principles are being applied by the private standard setting organisations in private domains. In this way the enforcement of these 'accountability values' constitutes a 'public domain' within private production and commercial regimes. The Cambodia-US bilateral textile trade agreement which included labour standards is especially revealing on this score in that it required substantial compliance with international core labour standards. These practices of accountability perform a pivotal role in giving legitimacy, providing a basis for review and managing conflict resolution within private commercial domains.

### **Accountability Communities**

'Who' is accountable to 'whom' becomes a crucial issue in new modes of governance. The thrust of a substantial literature on regulatory governance at the global or national level is towards a search for substitute mechanisms of accountability and monitoring, operating outside formal governmental institutions. And here, what I term 'accountability communities' perform a crucial function. Accountability communities are complex and composed of public and/or private organisations and they: a) perform legislative,

monitoring and compliance activities in specific functionally based regulatory regimes within and beyond, national boundaries; b) operate through institutional forms such as deliberative forums, markets, or use of network mechanisms; and c) possess particular understandings of accountability that binds various actors together.

#### *Constituting a 'public domain'*

In both 'Westphalian' and 'Weberian' frameworks the 'public domain' is taken for granted. However, within the new modes of governance this domain itself is now the focus of concerted political action. These actions delimit the boundaries and ideological meaning through which 'publicness' is asserted, contested and regulated, thereby enabling the constitution of the 'public' domain in which this accounting is to be given. However, the more substantive question at stake here is the process through which the 'public' is defined in these regulatory regimes. Here, accountability communities determine a form of 'institutional membership' within a private or policy regime.

Labour standards in particular represent an example of the development of transnational accountability communities around international NGOs and monitoring organizations. One such instance is the development of various forms of corporate conduct that have evolved in the aftermath of several well-publicized scandals involving poor working conditions, use of child labour and low wages. In countries such as China, Vietnam and Cambodia, NGOs have been active in promoting — though not always with great success — labour standards within the multinational enterprises. These standards and codes of conduct require the participation of an accountability community which includes such actors as private standard setting organizations, public agencies and transnational organisations, working through a combination of market and legal pressures and a particular understanding of core labour standards rather than rights. One example is the 'Better Factories Program' in Cambodia, where government together with the ILO and the US Ministry of Commerce require registration with the inspection regime of the ILO's Better Factories Program in order to export (see <http://www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1> ).

Hence regulatory regimes incorporate public law principles within complex transnational production chains. More importantly, they advance certain forms of publicness and 'associational membership' within regulatory regimes. Nevertheless, as we have seen in the case of labour standards, this institutional membership is located in regimes whose purposes are directed towards specific regulatory or policy ends. For example, in the Cambodian Better Factories Program the establishment of an innovative inspection regime has facilitated more effective compliance with core labour standards. Decentralized systems of governance through the use of instruments of code of conduct serve to constitute an accountability community, but one limited to a 'public domain' located within a private regulatory regime. In effect this means, as Alston (2004)

cogently argues, that the shift towards core labour standards is detached from a conception of political rights and empowerment and increasingly becomes a flexible notion to be incorporated via various policy specific agreements.

#### *Control over epistemic resources*

Accountability communities exercise control over accountability language and practices, in other words, over epistemic resources. Control over these epistemic resources is an important source of legitimacy in boundary spanning regulatory settings. Such control over these discursive resources also allows actors to determine the nature and form of the institutional setting through which 'accounting' takes place. The PRSP of the World Bank and the IMF establishes a particular accountability community as it explicitly calls for dialogue and participation with a range of government and non governmental stakeholders. In fact, the World Bank constantly reaffirms that the PRSP is not merely about producing public documents, but is itself a means of furthering a dialogue or deliberation on poverty related issues. Yet, participation — its meaning, boundaries and implementation — requires the enrolment of regulatory agents such as consultants, NGOs and academics, who control the language and institutional sites of accountability.

From this perspective, these regulatory agents mediate between those governance agents with authority in a regulatory regime — e.g., a corporation, or transnational agency — and the constituents within that regulatory domain. This is a distinctive kind of representation which relies on the substitution of indirect forms of representation that is not based on the authorisation of those being represented. Regulatory mediation of this kind serves to transform the political language of rights into the technical vocabulary of 'problem solving'.

The emergence of these 'problem solving' actors within a regulatory framework may well suggest a more fundamental transformation of the politics of rights. In the case of China we find that complex birth control policies and programs which were usually associated with coercive command and control regulatory techniques, are now crafted within a more 'self governing' regulatory system designed to meet international standards of quality care and choice. It has been argued that this included an emphasis on human rights, 'partly to mobilize the public against program abuses, partly to provide birth workers with concrete standards of conduct' (Greenhalgh and Winckler 2005: 149).

#### *Retail governance*

The effectiveness of accountability structures depends on how they are anchored within specific state or transnational structures. So, even when private regulatory actors dominate an accountability community they remain anchored to various state or transnational agencies. Even private legislative power is exercised in the shadow of the state. For example, the OECD Guidelines for Multinational Enterprises are voluntary codes of

conduct but accompanied by what are called National Contact Points (NCPs) that police these guidelines. The system of NCPs allows NGOs to have a monitoring role in relation to private companies, but operate in the shadow of the state. The Cambodia-US bilateral textile trade agreement seeks substantial compliance with international core labour standards. As a result of this agreement the Cambodian government requires registration with the inspection regime of the ILO's Better Factories Program in order to export. Again these inspection regimes are anchored within broader national and transnational structures.

This monitoring role is itself subject to another level of governance: meta-governance or the governance of governance. Consequently, accountability communities perform a kind of retail function for the wholesale suppliers of the regulatory chain. Therefore scholars and policymakers need to locate these communities within the supply chain of regulatory governance. To appreciate the complexity of regulatory governance we need to understand the 'who and where' of the wholesale end of governance. This might mean that Singapore can promote transparency within certain segments of the financial or commercial sector (the 'retail' side of governance), but retain the capacity to determine which sectors are subject to this transparency (the 'wholesale' side of governance) (Rodan 2004).

### **Policy implications**

#### *Regulatory supply chain*

The new accountability agenda is increasingly the focus of many developmental programs within the World Bank and through development agencies such as AusAID. Yet, in these programs or indeed in the academic commentary on accountability promotion, there is little appreciation of the broader political context in which governance takes place. Accountability practices and communities are embedded in political and social relationships. A limited and narrow focus on retail governance may obscure more fundamental problems in the wholesale part of the regulatory supply chain.

For some, retail governance represents the triumph of the politics of pragmatism. Decentred standard setting is regarded as a form of institutional experimentalism focused on learning and puzzling about policy problems rather than power (Sabel and Dorf 2006). But this preoccupation with the institutional analysis of regulation tends to neglect the more important political questions, especially: how is the public domain reconstituted and how are new forms of political rule organized? Hence we need to be more circumspect about the growing interest in notions such as experimentalism or responsive regulation (Braithwaite 2006) that promote decentred regulatory activities as institutional forms with democratic possibilities. Clearly, decentralised regulation may well promote accountability as an expression of public law principles. But taking these accountability communities in isolation comes at the expense of obscuring the regulatory supply chain of which accountability

communities are but one element.

In policy terms this means paying more attention to where and how accountability communities are anchored. Often, as argued above, accountability mechanisms operate in the shadow of the state. This allows us to think much more creatively about possible harbours for accountability communities in a way that challenges, or even leads to, the transformation of the 'wholesale' end of governance. For example, it might be possible to use trade unions as part of an inspection regime for labour standards. This is not a simple matter: the capacity, scope and independence of trade unions might well be at issue. The point here is that conceptualising regulatory governance as a kind of supply chain allows us to explore alternative frameworks to target the entire chain instead of just the retail end.

This point also has broader relevance for members of 'accountability communities' who need to view their role in political rather than technocratic terms. In particular, given the importance of these communities in shaping the boundaries of the public domain and the nature of the collective goods, these processes need to be seen as a form of political contestation, albeit one that often occurs outside the formal political arena.

#### *Meta-constitutions and accountability communities*

One important effect of the increasing significance of accountability communities is the development of 'associational membership' within functionally defined areas— be they in commercial areas (e.g., labour standards) or environmental governance (e.g., forestry stewardship arrangements), or policy regimes (e.g., the Chinese birth control system). In each of these areas a putative 'public domain' is emerging through the application of various public law principles and standards. As I have suggested, accountability communities are the vehicles through which these public law values and principles are incorporated into these functional realms. But there is a fundamental paradox in the emergence of these new accountability communities: the incorporation of some public law principles into the regulatory regime at the same time also leads to the subordination of these very principles to various specific broader policy objectives in policy regimes such as those pertaining to the environment, trade and public health.

Hence, to the extent that principles such as participation and review operate, these are often directed at processing individual claims conducted in expert languages and directed towards technocratic ends. In addressing a specific grievance they may limit, or even undermine, the capacity for systemic change. Consequently we need institutional mechanisms that enable a broader and more visible elaboration of public law norms through new kinds of meta-constitutional principles. Meta-constitutional politics has recently emerged as an important development in advanced liberal as well as transitional democracies through the development of constitutional courts or various institutional forums that

determine the basic rules of the political game.

However, it may be possible to apply meta-constitutional politics to various private or hybrid (public and private) regimes as a means of systematically elaborating public law principles and values through which wider systemic issues may be identified. This meta-constitutional politics may include a range of deliberative forums that sit above various accountability communities, thereby permitting contestation of the languages of accountability itself. It may include provision for a system where accountability communities operating in different domains are able to submit to a constant process of peer review. Equally, in some cases it might be possible to provide for individuals with a choice between competing accountability communities.

A meta-constitutional perspective effectively seeks to not only entrench the rights to contestation at the individual level but also to create opportunities to contest the languages of accountability itself. In this way it may well generate a broadening of the membership of accountability communities to include a wider range of actors and furthermore, increase the range of alternatives to hold 'authorities' to account. As new modes of governance grow in significance, the notion of contestability rather than accountability or responsiveness provides a way of extending constitutional rights to new domains of governance. This may well be an important arena for future political debate.

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