INTRODUCTION
In an article which prompted my invitation to this conference, I noted that procedures and institutional structures which facilitated participation were being advocated to address a range of perceived regulatory problems, from the ‘big picture’ issues of globalisation, the rise of the risk society, and the failures of the steering state, to the more mundane issues of telecommunications regulation, corporations and insolvency law, and environmental regulation. These calls echo with those writers in regulation who are both advocating and observing the rise of the ‘new regulatory state’ or even the ‘post-regulatory’ state in which the state moves from the direct regulation of behaviour to the adoption of indirect techniques, a move which Scharpf has described as ‘social gardening’ rather than ‘social engineering’.

As I noted in that paper, proceduralisation is a term which is used to encompass both the basket of new techniques of regulation which characterize or are prescribed for the ‘post’ regulatory state including enhanced participation, and the quite particular technique, advocated by Teubner, of changing organisational processes so as to ensure internal democratization and external responsiveness. It was on this latter meaning that my article focused. The two facets of this is latter meaning of ‘proceduralisation’: democratisation and responsiveness, are clearly linked, but it is on democratisation that the argument was centred. In a critique of Teubner I argued that advocating internal democratisation and external responsiveness could not take the form, as Teubner argued, of a ‘mere’ technique of regulation devoid of any substantive values. At the very least, one had to be able to identify
which of its ‘consequences’ a system had to be responsive to and how much responsiveness was enough. More particularly, one also had to ask which conception of ‘democratisation’ was being advocated, in particular was it a model of liberal democracy, or of a more complex and more demanding model of deliberative democracy. If it was the former, this would be a fairly ‘thin’ form of proceduralisation: the extension of egoistical voting beyond the institution of the legislature or political elections. If the latter, this would be a ‘thick’ form of proceduralisation, and moreover would have strong resonances with Habermas’s theory of deliberative democracy and procedural law, resonances made all the stronger by Teubner’s own engagement with Habermas’s work, in particular a shared focus on the changing and multiple roles of law as an instrument and expression of forms of contemporary governance.

In considering Habermas’s conception of deliberative democracy and procedural law I argued that his theory posited a concept of the state and of regulation that was over-centred on the classic triumvirate of the legislature, executive and judiciary, and invoked a distinction between politics and the life-world that is too clear cut. Habermas’s main acknowledgement of the changing face of contemporary governance is to extend his requirements of deliberation to the administration. But this is woefully inadequate for those who argued that in order to understand the nature of contemporary governance the focus of attention has to be shifted from the state to non-state actors who interact with each other and the state in varied and complex ways. This conception of regulation as ‘decentred’6 ‘multi-centred’7 or ‘nodal’8 challenges any theory of governance which focuses predominantly on the state. They have particular relevance for Habermas, given his reliance on the institutions of the state to provide the conditions for the attainment of deliberative democracy, and to act as ‘sluices’ which ‘cleanse’ the multiple deliberations of the public sphere as they pass through.9

The article further argued that even where deliberation can be injected into the regulatory system, there are a range of difficulties to be overcome. Many of these are well noted in the extensive literature on deliberative democracy, and my article focused on just one: how to ensure communication between participants who did not share a communicative rationality. Facilitating communication in these circumstances, I argued, required, amongst other things, strategies of translation and dispute resolution. ‘Social gardening’ deliberative democracy style would require regulators to move from being bureaucrats to diplomats. In considering the ability of regulators to pursue these strategies, the article was pessimistic, arguing that regulators, particularly state regulators, were not best placed to perform these roles for a range of reasons: depending on the distribution of decision making authority, they would rarely, if ever, be in the position of true mediators, and moreover their own communicative rationalities may impede their ability to understand another’s, let alone translate it.
The article also ended with two questions: in what aspects of the regulatory system and in what stages of the regulatory processes can we realistically ‘inject’ deliberation or participation of either a thick or a thin form, and to what extent are some or all of the techniques of procedural regulation or the ‘post’ regulatory state compatible with the substantive aspect of ‘thick’ proceduralisation?

This paper takes those two questions as its starting point, but refines them slightly. First it sets them more firmly in the context of decentred understandings of regulation. Secondly, it focuses on only one set of techniques, those related to enforcement. As such it omits many other issues, but pleads the benefits of brevity and the demands of time.

The first part of the paper briefly outlines what it being referred to by ‘decentred’ approaches to regulation, arguing that if we adopt a perspective which displaces the state from the centre of a regulatory system, the polycentricity of regulation is more clearly revealed. The second part outlines some of the implications of taking a decentred approach for how we understand and perhaps develop regulatory systems as enrolling the differential regulatory capacities of actors to perform different regulatory functions, in ways which move us far beyond the simple dichotomy of statutory versus self regulation. In the third part it is suggested that as a consequence of adopting the perspectives of decentred regulation and enrolment, we can see more clearly not only the fragmented nature of regulatory processes, but also the potential ‘entry’ points for democratization or at least participation in different regulatory functions. In other words, we do not have to see regulation as an activity which to be effective is or has to be performed by hierarchical bureaucracies acting in accordance with formal rationality. The fourth section then uses examples from enforcement processes to illustrate how this may be achieved, and what some of the 5 preconditions for success might be, before in the final part asking how these examples can be used to develop further ideas of ‘constitutionalising’ polycentric regulation.

DECENTRED UNDERSTANDINGS OF REGULATION

‘Regulation’ as a social and political activity is universal; however the term ‘regulation’ is not one that travels well, and those who have attempted to study regulation outside English-speaking countries will be aware there is often no parallel term. So in order to at least set the parameters of the debate, ‘regulation’ here is used to mean a sustained and focused attempt by state or non-state actors to alter the behaviour of others which is otherwise valued as useful to society with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.10

This is not to say that outcomes may result that were other than those that were
intended, simply that the activity of regulation is a purposive one, even if the purposes achieved are not those intended, or indeed that no purposes are achieved at all. Most importantly, however, no particular institutional or organisational arrangement is assumed in the definition, neither are particular techniques. Regulators may operate at a transnational, supranational, national or sub-national level, and boundaries between regulator and regulated might shift. Both regulators and the regulated may be governments, formal or informal associations, firms, individuals, and play other roles: professional advisors, accreditors, auditors, non-governmental organisations, charities, voluntary organisations, and so on.

The core understanding that many have of ‘regulation’ is some form of ‘command and control’ (CAC) regulation: regulation by the state through the use of legal rules backed by (often criminal) sanctions. ‘CAC’ has also however become shorthand to denote all that can be bad about regulation, including poorly targetted rules, rigidity, ossification, under- or over- enforcement, and unintended consequences. The extent to which CAC does or does not live up to this caricature is an empirical question which has been debated elsewhere. More importantly for this discussion, CAC regulation posits a particular role for the state against which the ‘decentring’ analysis is counterposed. It is ‘centred’ in that it assumes the state to have the capacity to command and control, to be the only commander and controller, and to be potentially effective in commanding and controlling. It is assumed to be uni-lateral in its approach (governments telling, others doing), to be based on simple cause-effect relations, and to envisage a linear progression from policy formation through to implementation. Its failings are variously identified as including the following: that the instruments used (laws backed by sanctions) are inappropriate and unsophisticated (instrument failure), that government has insufficient knowledge to be able to identify the causes of problems, to design solutions that are appropriate, and to identify noncompliance (information and knowledge failure), that implementation of the regulation is inadequate (implementation failure), and that those being regulated are insufficiently inclined to comply, and those doing the regulating are insufficiently motivated to regulated in the public interest (motivation failure and capture theory).

As noted, many discussions of CAC regulation to an extent set up a straw man, which can easily be knocked down. Nonetheless, there is a set of alternative perspectives on the nature of government-society, and intra-society interactions which posits a more decentred conception. These writings have both descriptive and prescriptive aspects. They share neither the assumptions nor the diagnosis of the ‘centred’ analysis of regulation, and embrace a far wider set of techniques than the ‘rules backed by sanctions’ of CAC regulation. The main intellectual influences are Foucauldian inspired analyses of governance, and systems theory, particularly as filtered through Teubner, though for many the intellectual roots are more pragmatic.
A decentred conception of regulation has five central notions: complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private.

**Complexity** A decentred understanding of regulation emphasises both causal complexity and the complexity of interactions between actors in society (or systems). There is an increasing recognition that social problems are the result of various interacting factors, not all of which may be known, the nature and relevance of which changes over time, and the interaction between which will be only imperfectly understood. More conceptual writings also draw attention to the dynamic interactions between actors and/or systems, and to the operations of forces which produce a constant tension between stability and change within a system (loosely defined). Those interactions are themselves complex and intricate, and actors are diverse in their goals, intentions, purposes, norms and powers.¹⁵

**Fragmentation** refers to fragmentation of knowledge, and fragmentation of power and control. The fragmentation of knowledge is more radically formed than the more familiar problem of the information asymmetry between regulator and regulated: that government cannot know as much about industry as industry does about itself. In a decentred understanding of regulation, it is not assumed that any one actor has all the information necessary to solve social problems: it is not a question of industry having, government needing. Rather, no single actor has all the knowledge required to solve complex, diverse and dynamic problems, and no single actor has the overview necessary to employ all the instruments needed to make regulation effective. The problem is sometimes more radically framed to be that not only is knowledge fragmented but that information is socially constructed - there are no such things as ‘objective’ social truths. This conclusion is arrived at via various theoretical routes, most influential in regulatory writings has been autopoeisis. Autopoietically closed sub-systems, such as politics, administration and law, construct their images of other subsystems only through the distorting lens of their own perceptual apparatus, that is through experiences of their environment and in terms of their own binary oppositions. Thus the information systems possess about other systems is simply that which they have themselves constructed in accordance with their own criteria.¹⁶ The conclusion is also reached through various strands of new institutionalism, discourse theory, cultural theory and some decision making theories: that is that decision makers, organisations, etc, construct images of their environment in their own image, or through their own cognitive frames.¹⁷

Decentring analyses also draw on Foucauldian notions of power to emphasis that in addition to fragmentation of knowledge there is fragmentation of power and control. Government does not have a monopoly on the exercise of power and control. Rather it is dispersed between social actors and between actors and the state.¹⁸ Moreover, as many have observed, the regulatory systems existing within social
spheres are seen as equally, if not more, important to social ordering as the formal ordering of the state. Regulation occurs in many locations, in many fora; there is ‘regulation in many rooms’. 19

**Autonomy and Ungovernability** Observations of fragmentation relate to the third central aspect of a decentring analysis, and that is the autonomy and ungovernability of actors (or systems). Autonomy is not used in the sense of freedom from interference by government, rather it is the idea that actors will continue to develop or act in their own way in the absence of intervention. Actors or systems are self-regulating, and regulation cannot take their behaviour as a constant. Regulation is, as Foucault said of governance, the ‘conduct of conduct’, 20 or as re-phrased by Rose, ‘to act upon action’. 21 This has several implications, first and most obviously that regulation will produce changes in behaviour and outcomes that are unintended (though not necessarily adverse), a well recognised empirical phenomenon in regulation. 22 Second, that its form may have to vary depending on the attitude of the regulatee towards compliance, an attitude which it can itself affect, again recognised in practice in regulatory literature. 23 Third, that no single actor can hope to dominate the regulatory process unilaterally as all actors can be severely restricted in reaching their own objectives not just by limitations in their own knowledge but also by the autonomy of others, 24 a clear counterpoint to the assumptions of theories of ‘regulatory capture’. Whether that is because of the actors’ capacity to employ power and resources for action, 25 or because of the inherent characteristics of the system, or for some other reason, is a moot point. Fifthly, that the autonomy of the actor will to an extent render it insusceptible to external regulation. Here, autopoiesis has the more radical analysis of autonomy. Autopoeticists diverge on the meaning of autonomy, but broadly it refers to the self-regulation, self-production and self-organisation of systems which are normatively closed but cognitively open. 26 The consequence: that no system can act directly upon another. Attempts to do so will result in Teubner’s well known regulatory trilemma: the indifference of the ‘target’ system to the intervention, the destruction of the ‘target’ system itself, or the destruction of the intervening system. 27 Finally, that subjects or systems have the capacity to regulate themselves, a capacity that has to be harnessed for ‘government at a distance’ to be effective.

**Interactions and Interdependencies** A decentring analysis has as part of its core the existence and complexity of interactions and interdependencies between social actors, and between social actors and government in the process of regulation. 28 Regulation is a two-way, or three or four-way process, between all those involved in the regulatory process, and particularly between regulator and regulatee in the implementation of regulation. In Offe’s terms, regulation is ‘co-produced’. 29 However the relationship is not seen to be one in which society has needs (problems) and government has capacities (solutions). Rather each is seen as having both
problems (needs) and solutions (capacities), and as being mutually dependent on each other for their resolution and use. These interactions and interdependencies should not be presumed to be contained within national territorial borders: analyses of globalisation emphasise that they may extend well beyond them.

**Rejection of the Public / Private Distinction** In decentred analyses, regulation ‘happens’ in the absence of formal legal sanction - it is the product of interactions, not of the exercise of the formal, constitutionally recognised authority of government. The collapse of the public / private distinction as a useful tool for analysing governance and regulation is manifested in the identification of ‘hybrid’ organisations or networks that combine governmental and nongovernmental actors in a variety of ways. To the governing alternatives of bureaucracies (hierarchies) and markets have been added associations - the ‘private interest governments’ identified by Streeck and Schmitter which comprised the new corporatism. The concept of authority still played a role, however, for these organisations shared in the state’s authority to make and enforce binding decisions. Added more recently are networks: the interactions of a range of actors, of which the state is only one, and which it has been argued government both does use and should use to govern. Governance, and regulation, is seen by some to be the outcome of the interactions of networks, or alternatively ‘webs of influence’ which operate in the absence of formal governmental or legal sanction. In a decentred understanding of regulation, therefore, formal de lege authority plays an ambiguous role.

There are four main implications of a decentred perspective on regulation. First, it suggests a diagnosis of regulatory failure which is based on the dynamics, complexity and diversity of economic and social life, and in the inherent ungovernability of social actors, systems and networks. Secondly, regulation is revealed to be polycentric, or multi-nodal: to occur in many forums which are often interrelated in complex ways, and in ways which belie a clear dichotomy between ‘state’ and ‘self’ regulation. Even in predominantly state based systems of regulation, non-state actors will be involved at various sites in ways that are not apparent if an approach is adopted which centres only on the state, and conversely predominantly ‘self’ regulatory systems may involve many different relationships with the state and with other non-state regulators.

Thirdly, there is a set of prescriptions as to the types of regulatory strategies that should be adopted which is tied more or less loosely to this conceptual base. The hallmarks of these decentred strategies are that they are hybrid (combining governmental and non-governmental actors), multifaceted (using a number of different strategies simultaneously or sequentially), and they are indirect. The diagnosis of regulatory failure provided by the decentring analysis suggests that regulation should be a process of co-ordinating, steering, influencing and balancing interactions between actors / systems, and of creating new patterns of interaction which enable
social actors / systems to organise themselves, using such techniques as proceduralisation, collibration, feedback loops, redundancy, and above all, countering variety with variety.  

The impetus for many of these prescriptions comes from autopoiesis: the functional differentiation of society into cognitively closed, normatively open self-referential systems, though analyses of the tools of regulation to be employed may only be weakly attached to this particular theoretical base. In most instances, discussion occurs in the context of how the state should design regulatory mechanisms in order to achieve its objectives, and indeed some have been labelled as the strategies of the ‘new regulatory state’. The role that the state plays in any of them will range from full participant to mere guiding hand or threatening shadow. The decentring analysis suggests however that similar forms of strategies will have to be used whether or not the state is present at all, even in ghostly form.

Fourthly, it is worth noting that there is less consensus on the particular normative goals that should be achieved in using such strategies. For many, the goal of regulation is the project of welfare economics: the correction of market failure, and traditional conceptualisations of ‘regulation’ have assumed it to be an activity directed principally towards that objective (and correspondingly, anything that was not so directed was not ‘regulation’). In the standard treatments of ‘regulation’, the ‘why regulate’ question is nearly always answered in terms of the correction of market failures, with the occasional nod to distributional or other ancillary aims. However, that goal is being displaced, and others added. Notably, the management and distribution of risk: regulating the ‘risk society’ is a burgeoning academic and policy area and there are signs that existing systems of regulation, for example UK financial services, are coupling the correction of market failure with the management of risk as their organising principles. Other goals which it is argued regulation should pursue, in particular by those coming from a socio-legal base, are access to justice, or legitimacy, or the achievement of social justice in some form. Alternatively, normative goals are sometimes framed functionally as in Teubner’s version of system’s theory, in which the normative goals of regulation must be to create the conditions for responsiveness, to prevent the entropy or self destruction of systems, and to stimulate system integration. Whether those normative goals are confined to systems of regulation in which the state is involved, or whether they extend to regulation conducted by all social actors (assuming we can extend ‘regulation’ beyond the state), is an equally contentious debate, which is addressed further below.

**REGULATORY ACTORS, CAPACITIES AND ENROLMENT**

Decentred analyses of regulation may resonate with sociologists of regulation, but they are potentially problematic for policy makers. They emphasise complexity and fluidity over simplicity and predictability and give a complex and thick description...
of a regulatory system which provides little succour for those who seek to regulate, be that the state or another actor. The notion of regulatory enrolment is simultaneously an attempt to provide an analytical framework which can facilitate the description and understanding of contemporary regulation and which can form the basis of critiquing the system, and an attempt to provide some help to those who seek to regulate in recognition of this complexity and fluidity. It has five main elements, which are interrelated. These are the disaggregation of what regulation entails in functional terms, the identification of actors who are or might be involved in the regulatory system, an analysis of their regulatory capacity, relating that capacity to different regulatory functions, and an analysis of the interrelationships that arise between the actors in the regulatory system.

**Disaggregating regulatory functions**

Cybernetics, various strands of which have been increasingly influential in writings on regulation in law and political science, suggests that there are three core functions that have to be performed in order to ‘regulate’ something, and these have to be performed in an on-going, dynamic process. These are setting standards, gathering information on the current state of behaviour including the attainment of standards, and modifying behaviour. Interpreted narrowly, this cybernetic disaggregation of regulation does not tell us very much that we did not already know. In particular, it runs the risk of simply redescribing CAC regulation: regulation involves forming rules, monitoring compliance and ensuring enforcement, either through negotiation or the imposition of sanctions or some combination of the two. To avoid this, we need first to broaden our conceptions of these functions to include identifying problems and goals, as well as writing rules, and to broaden methods of behaviour modification beyond modes of enforcement, and secondly to recognize the interrelationship between the three elements: ways in which information is gathered, for example, will affect both how problems and goals are identified, and how behaviour is modified (eg speed cameras).

**Identifying actors**

In identifying actual or potential regulatory actors we need to move away from the bald categories of state, market, associations and individual regulated firm, and indeed from the dichotomy of state vs self-regulation, and to consider in more detail, and more systematically, who the different actors might be and how they might (or might not) be inter-connected. The range of actors may include governmental and non-governmental associations at the international, national and sub-national level; market actors (eg those further up the supply chain); gatekeepers or persons who control key resource that firms need, for example credit ratings agencies, insurers, auditors, internet service providers; advisors, for example legal,
management, risk and IT consultants, accountants and other ‘knowledge intermediaries’; competitors and professional counterparties; community and voluntary associations; charities; consumers; the regulated firm and individuals within the firm, including compliance officers, front line personnel and CEOs; influential individuals, eg ‘policy entrepreneurs’ and ‘grey panthers’; and the courts.

**REGULATORY RESOURCES AND REGULATORY CAPACITY**

So far, so familiar. The analysis needs to go further if we are to progress in understanding how regulation is or could be constituted. What is suggested is an analysis of the regulatory capacity of different actors to perform different regulatory functions and consideration of how they are or might be enrolled within a regulatory system.

Regulatory capacity has no clearly agreed definition and any discussion is clearly going to be in answer to the implicit question: capacity to do what? Here the question is, who has the capacity, alone or in combination with any other, to perform all or any of the regulatory functions effectively both now and in the future in such a way that furthers the (conflicting) purposes of those seeking to regulate and which is normatively acceptable.

Regulatory capacity, it is suggested, is a composite notion, consisting of the actual or potential possession of resources plus the existence of actual or potential conditions that make it likely that those resources will be deployed both now and in the future in such a way as to further the identified goals of those seeking to regulate resolve identified problems, however vague and contradictory those might be. It consists thus not just of the possession of resources but the ability and willingness to use them.

Any assessment of what resources are necessary to perform a regulatory function is likely to vary at the detailed level with the particular context. However, it is suggested that distilling from the literature on the operation of regulatory systems, six key resources can be identified as being critical to the performance of at least one or more regulatory functions. These are: information, expertise, financial and economic resources, authority and legitimacy, strategic position, and organisational capacity. An actor might possess a resource directly, or indirectly in that it might have access to the resources of others. An actor may also be a resource for others. For example, the fact that a particular actor is requiring a certain form of conduct might provide leverage to another actor who is better placed to affect the relevant behaviour. Thus a regulator may be a resource for a compliance officer: the fact that an enforcement official is coming down hard on a regulated firm might give a compliance officer the leverage she needs to ensure that management take the issue seriously. Or a private sector advisor (eg management consultant) may be a resource for a regulatory official or manager within a firm seeking to implement internal management changes.
INFORMATION
It is well recognised that information is a key resource for all regulatory functions. Information on which to base policy decisions, as well as information how the potential targets of regulation act, interact and are likely to react, is indispensable to the formation of standards and the development of techniques of behaviour modification, and information has to be timely, relevant and reliable, or at least have the potential to be made reliable. That is equally true of a state or national regulator as it is of a firm, of an industry association, or indeed a parent. But as the decentring analysis emphasises, any single actor is likely to have only part of the information necessary. National regulatory bodies often have information on levels of implementation and compliance in its own jurisdiction, but not in others; or macro-level data but not micro-level.51 ‘Non-scientific’ knowledge and experience can be vital in developing effective risk regulation regimes. 52 One of the arguments for involving non-state associations in deliberations on policy is to enhance the information available.53

EXPERTISE
Expertise is a critical regulatory resource as expert discourses have a critical role in defining issues, patterning organisational structuring and control, and mediating between governmental policies and their implementation.54 Expertise can thus be an important source of power. 55 In a regulatory context this is manifested in the domination of particular conceptualisations of problems at different times, and how certain definitions of problems or potential solutions open up issues such that they become seen as the preserve of many participants or potential participants, or conversely close them down, defining them as the preserve only of particular groups of ‘experts’.56 For the conflict may be not only in the conflict of lay versus expert discourses,57 or economic versus non-economic discourses,58 but between expert discourses as to which dominates. For example, the debate relating to the patenting of human genetic sequences is characterized by the competing discourses of law, biology, ethics and economics.59

AUTHORITY AND LEGITIMACY
Authority and legitimacy are also well-recognised as key resources contributing to the capacity to regulate.60 The two are separate but interconnected. By authority is not meant necessarily legal authority, thought that might be the form that it takes. Rather by authority is meant whether or not what an actor says or requires makes a ‘practical difference’ to the way that others act or behave, and whether it does so simply by virtue of the actor saying it. In other words, does the mere fact that a particular actor stipulates that a particular course of conduct should be followed mean that others (though by no means all) will alter their conduct not as a result of a rationalistic pursuit of preferences but principally out of a sense of obligation, or because that actor is respected or esteemed within the community for whatever reason.61
Legitimacy is a distinct but related resource, and serves a dual role in the analysis. First, there is a relationship between legitimacy and effectiveness. Second, the possession (or not) of legitimacy is a normative as well as an empirical assessment - including legitimacy as an element of regulatory capacity thus provides a normative dimension to the analysis. Again, by legitimacy is not meant whether or not an actor has the legal power to act. Rather is meant whether or not an institution or organisation is perceived as having a ‘right to govern’ both by those it seeks to govern and those on behalf it purports to govern.\(^6\) The perceived possession of this right may be based on a wide range of criteria: the representativeness of an organisation, for example, or the nature of its procedures, its legal mandate, its efficiency, its expertise, its effectiveness.\(^6\) That criteria is likely to vary with a range of different audiences, leading often to a legitimacy paradox. In other words, there may be many ‘legitimacy communities’, ie communities whose legitimacy criteria may be quite opposed.

**Strategic Position**

Strategic position is by its nature a relative concept; the question is, does the actor occupy a key position vis a vis the ultimate target of the regulation. For example, does the actor possess a resource that the target needs or desires, such as finance or access to a market, or indeed trust or respect.\(^6\) By definition, ‘gatekeepers’ are those that possess a strategic position.\(^6\) The resource might be financial, knowledge-based, or it may be something more intangible, for example credibility or trust, acceptance and respect.\(^6\)

**Organisational Capacity**

Much of the work on enforcement of regulation concludes that the reason that both negotiative and deterrence compliance strategies fail is due to lack of organisational capacity to comply, rather than being related to lack of willingness to comply or rational calculation to non-comply.\(^6\) Weaknesses in organisational capacity have also been identified as a critical problem in regulating small and medium enterprises.\(^6\) Organisational capacity refers in part to the ability to handle complex technical problems,\(^6\) but may be extended to the ability to solve problems more broadly,\(^6\) and the ability to learn.\(^6\) It also refers to the capacity of an organisation to regulate its own internal affairs, and thus for the organisation itself and for those actors charged with regulatory functions within it (including management functions) to have the resources above and to deploy them within their organisation.

**Deployment of Resources and Changes in Capacity Over Time**

As noted, however, resources are only one element of regulatory capacity. What is equally as important is how those resources are being or are likely to be used. In addressing this issue, institutionalist literature suggests a range of factors that are likely to be relevant.\(^7\) These may be divided for ease of exposition into two sets,
internal and external factors. External factors include the legal environment, the economic and market context, the institutional / organisational context, and the political and social context. Internal factors mean the actor’s interests, preferences and thus their incentives, whether those are seen as exogenously formed as in economic analyses, or formed endogenously as in sociological analyses: their values, perceptions, ideas, ‘culture’, ‘worldview’ or ‘cognitive frame’. In other words, the way they see the world and their place in it, how problems are defined, and what are considered to be appropriate solutions. Moreover, organisations are not ‘black boxes’. Instead they have ‘multiple selves’: different individuals and groups within organisations are likely to have quite different interests and quite different mind sets, which may operate in tension with one another. Which becomes dominant is likely to be the result of a complicated process of the deployment of power and institutional position.

Finally, as regulatory capacity is likely to change over time, and possibly rapidly, an important element in assessing regulatory capacity is the likelihood of any change, its probable direction, and its likely consequences. Indeed, changes in regulatory capacity might themselves be the intended or unintended outcome of strategies of enrolment. For example, a market actor who currently provides information to the market about a firm might be enrolled in the regulatory process in that the information might be used as a formal part of the government regulatory assessment of that firm: environmental audits are one example, another from financial services is the use of rating agencies’ assessments of credit worthiness of banks in assessing capital adequacy requirements. However, the fact that the information becomes used for such a purpose may itself introduce a new set of incentives for both firms and rating agencies, which in turn may lead to inaccurate or partial information being given, which then negates the effectiveness of the regulatory strategy. An important element in the assessment of regulatory capacity is thus the resilience of that capacity: in other words, how susceptible the capacity is changes in resources and in internal and external factors, and what the implications are for the success of the enrolment strategy in different scenarios of change.

**Enrolling actors in regulatory processes**

Different resources are valuable for different regulatory functions, with the result that certain actors may be well-placed to perform some regulatory functions but not others. If an actor could combine in some way with another actor that possesses a different configuration of regulatory capacity then the capacity of both could be increased. This potential for interconnections to increase overall capacity can be overlooked; rather complex sets of interrelationships such as networks are usually critised, often rightly, by public lawyers and others for blocking publicly optimal
governance or regulation, or for obscuring lines of accountability. Nonetheless, the significance of interlinkages in enhancing regulatory and governance capacity has long been noted in the governance literature and in the literature on the sociology of control, and has recently entered the more mainstream regulatory literature. Sometimes described as 'webs', more frequently as 'networks', the significance of such interlinkages is that they enhance the capacity of any one actor to achieve its goals. Much of the analysis stems from Granovetter’s seminal argument on the ‘strength of weak ties’. In other words, that linkages between actors that are relatively weak in terms of mutuality, time, and degree of reciprocity may nonetheless serve a cohering function, and the more an individual is embedded in a network of weak ties, the more their capacity for action may be enhanced. This may be used by individuals to their strategic advantage: Callon and Latour for example define power as the ability of any one actor to enrol others to achieve that actor’s aims.

Although the term ‘enrolment’ can conjure up images of networks, enrolment as understood here does not necessarily imply that the actors exist in a network relationship (ie patterns of interrelationships that involve a variety of actors each pursuing their own goals, between whom there are relatively stable sets of inter-relationships, and critically, who are dependent on one another for resources) nor does it imply that this is an unqualifiedly superior form of arrangement to other types of inter-relationship. Moreover, it should be noted that who is enrolled and who is doing the enrolling is a matter of perspective. From the perspective of a compliance officer in a firm, for example, he or she may seek to enrol a regulator (be it a trade association or statutory regulatory agency or some other actor) to bolster his or her own authority within the firm; however from perspective of the association or agency it is enrolling the compliance officer in the task of modifying the behaviour of others within the firm. Moreover, the strategy of enrolment may be used consciously or unconsciously, implicitly or explicitly, and may occur without any changes in formal rules or the formal distribution of power or functions. Furthermore, relationships of enrolment or assessments that ‘X is enrolling Y’ do not necessarily mean that X will succeed in ensuring that Y will act in the way that X is anticipating or hoping they will act. Enrolment does not mean the end of unintended and unforeseen consequences, nor is it to be assumed (as the Chicago school assume) that the enrolled actor is simply a cipher for the aims and objectives of the enroller.

Finally, there are a number of dimensions to enrolment, and thus a number of perspectives that may be used to analyse the form it takes. Enrolment may be analysed by looking at the nature of the inter-relationship between actors, but also by looking at the function that an actor is being enrolled to perform, the resources that are being enrolled, and the character of the enrolment (formal or informal, iterative or random / ad hoc), and these dimensions may be considered individually or in any combination.
IMPLICATIONS OF THE DECENTRED ANALYSIS AND REGULATORY ENROLMENT FOR DEMOCRATIZATION / PROCEDURALISATION

The argument thus far has been first, that analyses of regulation should adopt a decentred perspective, which will reveal the polycentricity of regulation and the multiple and shifting roles that different actors play in a regulatory process. Secondly, that the activity of regulating requires actors to have regulatory capacity, in other words to have access directly or indirectly to particular resources and have the willingness to deploy those resources for regulatory ends. Different resources are differently valuable for different regulatory functions, so different actors will be more or less able to perform those functions. Further, enrolling actors with differential regulatory capacities in regulatory processes can enhance the regulatory capacity of the system as a whole. Finally, understanding those patterns of enrolment can help us better to understand how regulatory processes work, and provide a basis for how they can be improved against a range of criteria, including legitimacy.

It is on this latter point that the remainder of the discussion will focus. It was argued above that legitimacy is a key regulatory resource; moreover including legitimacy as a resource gives the analytical framework a critical edge: to what extent are actors involved in the regulatory process who do not possess legitimacy? As noted above, criteria for legitimacy are likely to be contested, which will always ensure this question has a complex answer. In the following argument, the criteria for ‘legitimacy’ will be taken to be the degree to which the requirements of thick proceduralisation, or deliberative democracy, are met by the actor / forum in which regulatory activities are being carried out (eg of the standard setting body, or a firm or other association involved in the regulatory system). This is clearly not the only criteria of legitimacy, even for constitutional legitimacy, for that embraces other values: compliance with the rule of law, transparency, accountability, due process and so on. But it will serve to focus the argument for the moment.

Decentred analysis and notions of regulatory enrolment, it is suggested, can assist us in the quest for greater proceduralisation or democratization of regulation because they emphasise fragmentation both of the process of regulation and of the range of actors involved. Fragmentation and complexity is usually criticized for obfuscating accountability or the application of constitutional values such as democratization, often with good reason. Multiple actors performing multiple roles means not only many entry points but many veto points, a high potential for policy incoherence and endless opportunities for blame-shifting and evasion of responsibilities, as any observer of UK railways regulation will agree. But there is a potential upside to decentred analyses, which is that ‘mapping’ regulation in ways which reveal its polycentricity (or multi-nodality) and which highlight the different ways in which multiple actors are enrolled in those processes can help us break down the question of how and where democratization, or other desired constitutional values, can be
inserted into the process. For if we are to make progress in improving the responsiveneess of contemporary regulation to these values we need to think at a detailed and micro level. We cannot ask ‘how can regulation be made responsive to democracy / the rule of law / procedural fairness / pursuit of justice as nondomination’ and expect either a simple answer or one which would be relevant to every regulatory system. We have to start from the bottom up – how can this regulatory process, or even this part of this process, be made responsive to those values?

In beginning to answer this question, I suggest that it is helpful to go back to the different regulatory functions and to pose the question: how can this function be democratized, or more broadly, constitutionalised?

This question is most often posed with regards to the first identified regulatory function: setting policies and objectives, including the determination of rules or principles (either legal or nonlegal). It is with regards to this issue that most of the focus on widening participation and democratization occurs: what should we as a society identify as a problem and what should we do about it. In turn, the argument is how can we democratize those who are making decisions on these issues, be they the international standard setting organizations of the WTO, IMF, or other intergovernmental organizations, technical standard setting bodies, national or subnational legislators or executive bodies, or even corporations. However, there are other regulatory functions, notably information gathering and modifying behaviour. As noted above, some of the work on deliberative democracy which focuses on the role of associations in decision making emphasizes the significant informational advantages of including a wider range of participants in the formation of policies, principles and rules.87

It is on the third, related aspect of the regulatory function that I want to focus here, however, and that is behaviour modification, for two reasons. First, it occupies the ‘black box’ usually labelled ‘implementation’, which is usually ignored in the broader debates on democratization. Emphasising implementation is not to deny the inevitable and continuing interrelationship between policy formation and implementation; rather it is to emphasise that the focus is on everything that occurs once the legislation has been passed, principle agreed to or standard set. For there is always a danger that even if the initial stages of establishing the regulatory principles there was a high degree of deliberative democratization there will thereafter be a gradual process of incremental exclusion of participants, leaving only conversations between regulator and regulated; what rational choice institutionalists would term ‘coalitional drift’.88 Secondly, focusing on this aspect of regulation brings us back to the question posed at the start, which is what the relationship is between different regulatory techniques and proceduralisation: what would ‘deliberative democratic techniques’ of regulation take the form of, even assuming it is apposite to talk of deliberative democracy in terms of a regulatory technique?
It is clear that some regulatory techniques are not at all deliberative in their operation, particularly those which are based on what Lessig calls ‘architecture’. These involve no deliberation or even conversational interactions in the way that they modify behaviour (though considerable deliberation is possible in their design). Bentham’s pentopticon is the most famous theoretical example of this technique. Milder examples are the spaces which are designed in such a way as to ensure that people move in particular directions; these modify behaviour without any conversational interaction between the regulator (here the person who designed the space, though for some the space itself) and the regulated (the person walking through). Studies in policing have shown the importance of the design of public spaces for preventing crime. Using architectural techniques for crowd control can be a major aspect of health and safety regulation. For example, in the London Underground there are always more escalators bringing people out of the station than there are taking them in, to limit the numbers waiting on the platforms at any one time (on the rare occasion the escalators are working at all). Lessig provides another example: the design of computer software ensures that I take certain actions not others, or have access to only certain parts of cyberspace or not others. The spacing of barriers in the road next to customs posts can effectively inhibit ‘ramming’ of customs checks without any need for deliberation between driver and customs official. These techniques, it should be noted, are particularly interesting as they differ from other non-discursive techniques, such as road signs, traffic lights, speed cameras, not so much in that they offer me less choice of whether or not to comply, but that they place physical and not simply normative barriers in the way of my non-compliance.

Other techniques involve a comparatively high degree of conversational interaction, particularly the most common technique of regulation by rules or principles. Indeed, regulatory conversations are a central feature of most regulatory systems. By regulatory conversations I mean the communicative interactions between regulators, regulated and others involved in the regulatory process concerning the operation of that regulatory system, including interpersonal communications, documents, guidance notes, policy briefings, seminars, conferences and so on. I distinguish regulatory conversations from deliberation in the sense the latter is used in deliberative democratic theory, as conversations do not necessarily conform or even aspire to the conditions of the ideal speech situation.

In particular, regulatory conversations are a central feature of systems of regulation based on written norms. Written norms are central to a wide range of regulatory techniques: they form a core part of regulatory techniques or combinations of techniques including the various forms of self regulation, meta-regulation, competition, associational or procedural regulation, and are the basis of many ‘economic’ tools of regulation such as taxes, subsidies and instruments such as tradeable permit systems, as well as franchising, licensing and audit regimes. Written norms have
two central features which make them particularly problematic regulatory instruments: their temporal aspect, they speak from the past or present but purport to govern the future, and their linguistic aspect: they are linguistic structures which require interpretation. How they will 'work' depends on the interpretation they receive. Regulatory conversations about the prescriptions for the conduct necessary to resolve particular problems and the meaning and application of those prescriptions in particular circumstances are likely to be a central feature of those regulatory systems that employ them, though they are often likely to be closed conversations between regulator and regulated.\textsuperscript{95} Further, particular techniques of regulation are themselves based on conversational interactions: proceduralisation itself, and strategies of co-regulation, negotiated regulation, even models of corporate social responsibility, all emphasise deliberation as a central feature of the regulatory technique, not simply a by-product of it.

Further, regardless of the techniques employed to modify behaviour, regulatory conversations are likely to be a central characteristic of the regulatory process where the task of regulation is uncertain and ambiguous, and where agreement on the definitions of problems and solutions presupposes an extensive inter-subjective sharing of ideas and negotiations of meaning. Regulation of risk provides an obvious example; but conversations will also be important in the more general situation in which regulators are given broadly defined and conflicting objectives to fulfil or principles to follow, where they operate in a dynamic context in which problem definitions are complex and shifting, and the consequences of regulatory action uncertain.

To the extent that regulatory conversations are already a central part of many regulatory techniques, they may be more or less open to thick proceduralisation in principle (ie they have the potential in theory to be democratized in the sense required by deliberative democracy albeit in practice this may not be realized. As noted above, it is difficult to make generalizations on this issue: what is necessary is a more fine-grained consideration of how proceduralisation can occur in the different regulatory functions and in different regulatory locations.

**PROCEDURALISING ENFORCEMENT PROCESSES: LESSONS FROM RESTORATIVE JUSTICE**

In choosing to focus on the behaviour modifying aspects of regulatory systems, one could look at the entire basket of regulatory techniques, clearly a significant task. Instead, I focus here on just one: enforcement. Enforcement is clearly a significant part of any regulatory process, but here I do not confine enforcement to mean the application of civil or criminal sanctions by a court. Rather the focus is on those instances where the regulatory requirements have been breached, and those whose role it is to respond to breaches have chosen to do so (for not all breaches of regulation
are responded to, even though they are known about). How they choose to respond remains an open issue, and clearly the line between action that is labelled monitoring and that labelled enforcement is a fluid one. Moreover, whilst examples from state-based regulation are drawn on here, the approaches discussed need not be, and indeed are not, confined to state-based systems of regulation.

In the UK at least, the traditional mode of enforcement for regulatory offences in state-based systems is criminal prosecution and/or the application of civil sanctions by a court, and/or administrative sanctions usually involving fines and/or remedial plans by regulatory agencies. Those involved in determining the sanction to be imposed are the institutions of the court or agency, and participation in those decisions is limited to the offending firm and their legal advisors, although the regulatory agency might have a disciplinary panel whose membership embraces a wider range of stakeholders (e.g. worker, consumer or practitioner representation). Enforcement actions by non-state regulators often include financial penalties and exclusion.

Democratising the enforcement process in regulation has not received nearly the same attention as democratizing the processes of policy formation and norm-setting. Moves have been made in this direction by John Braithwaite, however, who has argued that regulation could and should learn from the experience of restorative justice in the enforcement of criminal law.96 Restorative justice processes, ideally, are about restoring victims, offenders and communities, where what is to be restored is whatever it is that is important to those groups, to be deliberatively determined by those ‘stakeholders’ in any particular circumstance, that is by the offender, the regulator and the victim.97 As Braithwaite continues to elaborate throughout the book, restorative justice is a group process of polycentric problem solving which often requires the definition of the issues to be broadened well beyond the offence itself, which incorporates the principles and practices of reintegrative shaming, and which empowers affected communities to deal with the consequences of injustice and transform private troubles into public issues.

It is not, however, an entirely subjective process which is impervious to external assessment: what the parties agree is not necessarily acceptable just because they have agreed it. In this respect Braithwaite seeks to escape from the normative paradox of deliberative democracy, though he does not interact with that literature. Public accountability of restorative justice processes is also critical in ensuring the publicisation of what might otherwise remain private processes of justice, and can thus help to avoid one of the feminist critiques of ADR and mediation processes. Restorative justice, in Braithwaite’s model, should be evaluated in terms of its effectiveness at promoting respect for fundamental human rights as enumerated in various international statements on human rights, and more particularly at the restoration of values including human dignity, property loss, personal injury, damaged human relationships, communities, the environment, emotional restoration, freedom,
compassion or caring, peace, empowerment or self-determination and a sense of duty as a citizen. It should not however have as its primary objective the promotion of apology, mercy and forgiveness, on the basis that these should only be given voluntarily or they will be worthless. Creating spaces in which they might be forthcoming is an appropriate objective; mandating them is not. Further, restorative justice processes should be constrained by the principles of republican justice and more particularly by rights that are fundamental to liberal conceptions of the rule of law.

Research on restorative justice processes is at present mainly confined to criminal justice processes, not regulation. However, Braithwaite argues that the principles of restorative justice can be, and have been, manifested in regulatory processes. He seeks to marry his conception of restorative justice with his model of responsive regulation, developed with Ayres. Responsive regulation is a strategy of regulation in which regulators respond to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is required. The ‘regulatory pyramid’ which Braithwaite developed with Ian Ayres has become an established feature of the regulatory literature. The pyramid is a set of regulatory enforcement and sanctioning tools of increasing punitiveness and severity; the strategy of responsiveness is that in deploying these tools regulators start at the bottom of the pyramid, with persuasion, working their way up only if the regulatee’s response is non-co-operative at each successive stage. The critical element is that the escalation should be seen to be inexorable and credible, and as organisationally and procedurally quite separate from the bottom rung, ie out of the personal control of the particular enforcement officer dealing with the firm.

What responsive regulation provides restorative justice with is an institutional structure in which the consequence of not following the voluntary restorative justice processes or honouring its principles is an escalation of interventionism and sanctioning. In other words, in the criminal justice context the legal process will take over, with all the increased sanctions, costs etc that that entails. What restorative justice gives responsive regulation is a practical and normative framework for what should occur at the bottom rung of the pyramid. That is, that the process of persuasion should not simply take the form of a closed dialogue between firm and regulator, but should be broadened to include wider stakeholders, notably victims, and should encompass the key elements of the restorative justice process including reintegrative shaming and stakeholder restoration.

In one striking example, Braithwaite illustrates the potential of restorative justice approaches to enforcement to democratise the process, and to deliver responses from the firm for its behaviour which mirrored the polycentric nature both of the issues and, I would argue, involved the enrolment of a range of regulatory capacities of actors within the regulatory system. In the mid 1980s, a number of insurance companies in Australia were implicated in defrauding consumers through misrepresentations
about policies sold to them. In the case of one company, Colonial Mutual Life (CML), the worst abuses occurred in twenty two remote Aboriginal communities. Once the breaches were discovered, the regulatory agency instructed top management from the insurance companies to visit the communities. They in fact had quite lengthy visits, meeting victims, local Aboriginal community council, the regulators, local officials at the social security department where premiums were being deducted from social security benefits, and some executives went back deeply ashamed of what had occurred. Meetings were then held in Canberra with insurance regulators and industry associations and even the prime minister about follow up regulatory reforms. The plurality of participants led to an agreement with CML which voluntarily compensated 2000 policy holders, and CML funded the Aboriginal Consumer Education Fund to ‘harden targets’ for future attempts to rip off illiterate people. It conducted internal investigation into its compliance programme and to identify those responsible. Press conference was then called to reveal enormity of the problem. Over 80 individuals were sacked in the firm, including some senior managers, and one large corporate agent dismissed. Procedures for welfare checks were changed at the social security department and there were regulatory and self regulatory changes concerning licensing of agents and changes to the law. Restorative justice thus led to polycentric problem solving, and in the terms of the framework set out above, recognised the various roles of a range of different actors, enrolling their regulatory capacities within the regulatory system.

Christine Parker has argued that the use of enforceable undertakings in Australian trade practices law can be characterised as an example of restorative justice. Enforceable undertakings are, as their name suggests, undertakings entered into by the firm to conduct remedial actions which are agreed in negotiation with the regulator, and that agreement is legally enforceable with sanctions attaching for its breach. The ACCC uses enforceable undertakings in cases where there is evidence of a breach of the regulatory requirements as an alternative to prosecuting or taking civil action. Agreeing an undertaking does not require an admission of liability from the firm, but it is the ACCC’s policy not to use undertakings where the firm denies liability. Parker reports that the undertakings typically include, firstly, a positive commitment by the alleged offender to cease the alleged misconduct and not recommence it, secondly, provisions for compensation, reimbursement or redress to affected parties, and other corrective action as appropriate (eg corrective advertising); thirdly a requirement to implement a compliance program and to have the implementation of that program independently reviewed, and finally, though less frequently, the enforceable undertaking may also include requirements that the Commission calls ‘community service orders’ such as funding or implementing an industry or consumer compliance education program. She characterizes the practice of determining enforceable undertakings as a form of ‘restorative justice’ and argues
that properly structured, and when nested within a pyramid of credible and more onerous regulatory sanctions, they can meet criticisms of both fairness and bias whilst delivering innovative, flexible and expansive undertakings that go beyond what a court would order with the purpose of identifying, correcting and preventing the original breach and its underlying causes.

Parker uses the example of how ‘telephone slamming’ was dealt with by the ACCC in 2000 to illustrate how restorative justice processes are being used in regulation. ‘Slamming’ refers to deceptive door-to-door sales tactics and telemarketing methods that result in customers’ services being illegally (ie without legitimate authorisation) transferred from one service provider to another. Once the CEOs became aware of the evidence the ACCC had of how egregious the conduct of their agents had been, and the fact that their companies would be liable for that conduct, the case was settled by enforceable undertaking and admissions to the court. In the undertakings the companies agreed to notify all customers acquired during the relevant period of the breaches that had occurred and to invite them to make contact if they felt they had been affected. They also agreed to consider all complaints and, where they found that a transfer was not authorised, to reverse the transfer if the customer wished, and reimburse all payments made by the customer during the relevant period, or not seek payment for services provided during that period. Finally the enforceable undertakings included provisions for the telecommunications companies to review not only their own compliance programs but their selling channels and methods and arrangements for transfer, with the result that most moved the bulk of their marketing from direct sales to telemarketing, over which they could exercise greater control. In addition the relevant trade association drafted a new customer transfer code addressing all the issues raised in the ACCC investigation, and the telecommunications and marketing companies agreed to donate substantial sums to fund education programmes for consumers, a programme designed by the trade association in consultation with ACCC and consumer groups.

These examples are drawn from state-based systems of regulation. However there is no reason why restorative justice style processes need be confined to such systems. Braithwaite uses the examples of the treatment of bullying in schools to show how democratisation of the decisions of how to respond to breaches in desired standards of behaviour together with the ‘conference technology’ of restorative justice circles can result in ‘whole school’ responses to the problem which provide, he argues, ‘better’ outcomes on a range of criteria than more closed, dyadic processes or the immediate use of sanctions without any prior negotiation (ie moving too fast up the enforcement pyramid). He also draws on Rees’s work on the development of selfregulatory systems for the regulation of the safety of nuclear power installations in the wake of Three Mile Island which involve extensive peer review and participation in inspections as an example of how ‘restorative justice’ approaches can
deliver outside of state-based systems of regulation. Parker has shown similar results in the way that breaches of sex discrimination rules are dealt with in firms.\textsuperscript{106}

The work on restorative justice is highly pertinent for debates on the proceduralisation or democratization of regulation, simply because it advocates a democratic mode of decision making in the exercise of a key regulatory function: enforcement. Moreover, it accords with ‘thick’ conceptions of proceduralisation for although it does not draw closely on the theoretical underpinnings of deliberative democracy, it clearly has strong resonances with it and could be 31 sited without much difficulty in that theoretical framework. Moreover, many of the criticisms leveled at restorative justice processes (domination, stigmatization, role of facilitators and so on) are also leveled at deliberative democracy processes. In answering these, Braithwaite exhibits much of the same optimism as those who are committed to public reason in deliberation, and shares Habermas’s conviction that consensus can and will be reached on key moral issues in society. He also offers some useful prescriptions, based on empirical evidence, of how deliberations should be structured to facilitate participation. He proposes that the ‘technology’ of conferencing in restorative justice is superior to dyadic negotiations on the one hand between victim and offender, and direct democracy on the other, as it involves circles of participants who are specifically invited on the basis of their relationship with the offender and the victim: so helping to meet the problem of domination and stigmatization on the one hand, and failure to participate on the other.

However, even if we accept Braithwaite’s defence of restorative justice and share his pathological optimism in its potential,\textsuperscript{107} there are three difficulties which are faced in simply ‘enrolling’ restorative justice processes into regulatory systems to enhance their democratization. First, it is clear from the evidence reviewed that deliberative processes of enforcement are only effective when nested within a set of credible sanctions. There still needs to be a big stick somewhere: these can be found in non-state systems, one might just have to look harder; alternatively the non-state system may in some cases be able to enrol state systems of sanctions to provide it with the necessary clout. The need to find a stick, though, suggests a limit to the effectiveness of deliberative processes on their own to deliver desired regulatory outcomes, in this case changes in behaviour and remediation, in circumstances where the force of the better argument is insufficient, and where the potential for reneging on any agreement reached is high.

The second issue is that the examples that both Braithwaite and Parker draw on to illustrate how restorative justice has been introduced into regulatory systems may be deliberative between those who are involved, but the set of participants is limited to the firm and the regulator. The victim is often excluded, as are wider groups of stakeholders. In excluding the victims the examples they draw on do not always meet their own criteria for restorative justice, and in doing so perhaps implicitly
reveal the limit to which restorative justice processes as used in criminal justice can be directly transposed into regulatory settings.

Victim involvement in restorative justice processes in the criminal context occurs in two main decisions: whether restorative justice processes should be used at all, and what the ‘restoration’ is that should be made. However in all the examples Braithwaite and Parker give of the use of restorative justice in regulatory contexts it has been the regulator who has the authority to decide whether or not to impose a sanction that has the authority to decide whether a restorative justice enforcement process will be used. Further, whilst in some of the examples that they cite of restorative justice in regulation do include direct participation by victims or representative victim groups (eg Aboriginal communities in the CML case above, and involvement of residents’ committees in determining responses to breaches of nursing home regulation), other examples (eg telephone slamming) do not include victim participation in the decision, although they do involve compensation being paid to victims.

Thus whilst their examples are excellent case studies in imaginative and targeted responses to regulatory breaches, which recognise the polycentricity of the problem and involve the enrolment of the regulatory capacities of a range of actors to perform different types of regulatory function, one has to ask to what extent they are all examples of restorative justice, or at least of the ‘democratisation’ of the enforcement process. For example, in the case of telephone slamming at no point were the victims involved in the deliberations as to what remedial and compensatory actions should be taken. And indeed, there are a number of features characterising the victims which suggest that their involvement would not be as straightforward as in the CML case. Victims were a diffuse group, considerable numbers were involved, but the loss in each case was relatively small. Moreover, they were not easily identifiable to the telecommunications companies themselves, nor would the victims easily be aware of the fact they were victims. It is hard to get victims to participate when no one knows who they are. This is not a facile comment: in a similar exercise in the UK relating to pensions misselling, one of the main obstacles to awarding compensation to victims of misselling was trying to identify who those victims were. This was partly because identifying whether or not a person had suffered a loss involved complex actuarial calculations (though in practice these were short circuited in the pensions review and it was simply assumed that certain classes of people would have been worse off). It was also because companies simply did not have adequate records of who they had sold policies to, and victims had no idea that they might have been missold.108

There are ways in which these problems could be addressed: victims’ action groups can participate, for example, are often quick to form once a problem has been adequately publicised in the media, providing at least an example of the spontaneous
action of the public sphere)), though there are always issues about the representativeness and internal democratisation of any representative group. The point is not that the lack of victim involvement illustrates an implicit and insurmountable problem, it is rather that the examples these authors draw on to illustrate how restorative justice has been introduced into regulatory processes do not make their case as well as they could, because critically they lack victim involvement at the two points in the process that restorative justice models demand it. They also mean that the discussion of restorative justice in regulation glides over an issue which is dealt with in great detail in the context of criminal justice, and that is, who should participate in the deliberations, how wide should the net be cast, and how can their participation be managed.109

The third issue points to the potential for the deliberations in restorative enforcement processes to reach agreement, and to meet the requirements of the ideal speech situation. Braithwaite argues restorative justice works best where all agree that an action is morally wrong, as this can facilitate an appeal to higher loyalties.110 For, drawing on Habermas, he argues that the closer we get to conditions of undominated speech, the more overwhelmingly it will be the case that evils such as violence will be nearly universally condemned. Indeed he sees this as a virtue: 'a nice moral feature of restorative justice. is that restorative justice might work only with crimes that ought to be crimes.' So, for example, he argues restorative justice would not work to deal with cases of obscenity as participants may dispute whether obscenity should be a crime. He does not see this as a problem, however, as he argues that 'most criminal offenses brought to justice in democratic societies are more like the violence case than the obscenity case: they are unambiguously wrong to most citizens attending conference.'111 However this is not the case in regulation. The distinction usually drawn between criminal law and regulation is that the latter is directed at behaviour which is not seen as valuable in a community, whereas the former seeks to modify behaviour which is otherwise seen as valuable. As a result, perhaps, regulation is fraught with moral ambivalence: where is the moral force in environmental law, or financial services law, or consumer protection? Indeed, the moral ambivalence of regulation has been explained as influencing compliance processes in other contexts.112 One is likely to have many who will dispute whether the regulatory provision is valid at all: appeal to higher loyalties, and thus to a different communicative rationality, is unlikely to work quite so well. Moreover, the need for translation will arguably be higher, though little is said on how this can be achieved.

It should not be surprising that some of the most intractable problems of deliberative democracy remain unresolved by restorative justice processes, particularly as the latter are still in their infancy. Nonetheless, it is suggested that the restorative enforcement processes can be used to illustrate the broader argument that this paper is making, which is that if we disaggregate the regulatory process we can begin to
see more clearly which aspects of it can be proceduralised in particular cases. It is through this micro-level approach, in which the polycentricity of regulatory processes is recognised and the multiplicity of actors and the variety of regulatory capacities analysed, that we can make more progress in the debates on proceduralising polycentric regulation.

**CONCLUSION: PROCEDURALISING AND CONSTITUTIONALISING REGULATION**

This paper has sought to address two questions: assuming we adopt a decentred analysis of regulation, in what aspects of the regulatory system and in what stages of the regulatory processes can we realistically introduce deliberation, and to what extent are some or all of the techniques of procedural regulation or the ‘post’ regulatory state compatible with the substantive aspect of ‘thick’ proceduralisation? It has argued that adopting a decentred perspective on regulation reveals its polycentricity, and that using the analytical framework of regulatory capacity and regulatory enrolment can facilitate a more nuanced and fine-grained understanding of a regulatory system. This in turn can help us to identify potential ‘entry’ points for proceduralisation, for the introduction of deliberation. In addition, it has suggested that some regulatory techniques may be more amenable to proceduralisation or democratization than others. Some techniques, notably those based on spatial architecture, are not based on communicative interactions for their implementation and operation, and so ‘proceduralising’ them makes no sense. Most other techniques, however, do involve regulatory conversations, and thus there might in certain cases be the potential for those to be democratized. The paper has addressed one set of techniques, those relating to enforcement, to examine how democratization could be realized in practice.

Throughout the paper, the focus has been on ‘thick proceduralisation’ or the introduction of deliberative democratic processes into regulatory systems. Proceduralisation is only one normative goal, however. It may be that we do not want deliberative democracy (because, for example, we doubt the benefits of consensus in regulation) or that we despair of ever attaining it. This does not preclude the need for other constitutional values to be applied to polycentric regulation, such as due process, transparency, predictability or proportionality. The key question for patterns of contemporary governance is how these broader constitutional values, not just those of deliberative democracy, can be met, given that many of the actors are non-state bodies, to whom these constitutional principles have not always applied. It is suggested that in order to progress in this debate we need to look at the micr-level, at specific situations, and that by using the analytical perspectives of decentring and regulatory enrolment we can begin not only identify more clearly where different constitutional values need to be introduced, and how this can be achieved.
NOTES

1 Reader, Law Department and research member, ESRC Centre for the Analysis of Risk and Regulation, London School of Economics and Political Science. This paper was written whilst on research leave funded by the ESRC, and I thank them for their support.


6 N. Gunningham and P. Grabovsky, Smart Regulation (Oxford: Clarendon Press, 1998);


13 Particularly the work of Niklas Rose.

14 Eg Rhodes.

15 Kooiman,

16 See Teubner.
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See eg Mayntz who argues that highly institutionalised and organised subsystems may resist political control, but argues that it is not their self referential closure which makes intervention difficult but the actions of identifiable actors in resisting intervention / creating autonomy by employing the power resources and capacities for collective action characteristic of highly organised societal sectors: R. Mayntz, ‘Governing Failures and the Problem of Governability: Some Comments on a Theoretical Paradigm’ in J. Kooiman (ed), , 17.


Kooiman, above.

Rhodes, n. * above.


See eg Rose, n. * above, 16 et seq


Eg Teubner, n. * above and related analyses.

References at n. * above.


C. Parker, Just Lawyers (Oxford, 1999).


For an argument on the ‘horizontality’ as well as ‘verticality’ of rights and obligations see eg J. Habermas, Between Facts and Norms (transl. 1999).


Eg Hood, Rothstein and Baldwin, pp.23-27; whilst they discuss the alternative enforcement techniques that might be used (compliance vs deterrence strategies), there is little suggestion of other forms of behaviour modification, and in particular how the alternatives to CAC might fit into the descriptions of the control functions as set out there.


For examples of this type of activity, and indeed of compliance officers asking enforcement officers to act in a more ‘sanctioning’ manner to enable them to achieve just this effect, see C. Parker, The Open Corporation: Self Regulation and Corporate Citizenship (Cambridge: CUP, forthcoming).

Saint-Martin, for example, argues that management consultants increase the capacity of public officials charged with implementing reform helping them to overcome bureaucratic resistance: D. Saint-Martin, Building the New Managerialist State (Oxford, OUP, 2000), 198.

See eg Hall and Soskice, Varieties of Capitalism **.

B. Wynne, ‘Where Sheep May Safely Graze’ **.

Cohen and Sabel

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55 See references at n. * above, Hall, Knorr-Cetina.

56 Hajer.

57 For a good overview see Royal Society, Risk: Analysis, Perception, Management (1992).

58 Eg B. Morgan, Social Citizenship... **.

59 J. Black, ‘Regulation as Facilitation: Negotiating the Genetic Revolution’ (1998) 61 MLR 621


63 For discussion see R. Baldwin and J.C. McCrudden, Regulation and Public Law (London: Weidenfeld and Nicholson, 1987); and Baldwin and Cave, n.* above.

64 Trust and respect, for example, are key resources in the implementation of Braithwaite’s theory of restorative justice: Braithwaite, n.* above; id., Crime, Shame and Reintegration (Cambridge: CUP, 1989).

65 See references at nn.* above.

66 On the role of trust and respect in governance and restorative justice see respectively Sharpf.; Braithwaite.


70 Eg Sparrow, The Regulatory Craft.


73 On the latter see N. Gunningham [CARR Discussion Paper].


75 For further discussion and examples see J. Black, ‘Mapping the Contours of Contemporary Financial Services

76 See Black, ‘Enrolling Actors in Regulatory Processes’.

77 The embeddedness of actors is a key element of regulatory capacity in Stirton and Lodge’s analysis: n.* above.


80 Braithwaite and Drahos, n.* above; Stirton and Lodge, n.* above.

81 eg Braithwaite and Drahos, ibid.

82 M. Granovetter, ‘The Strength of Weak Ties’ (1973) 78(6) Am J Sociol 1360.

83 For discussion in a regulatory context see eg Stirton and Lodge, n.* above.


86 For further discussion and examples see Black, n.* above.

87 Above n.*.

88 eg McNollGast; Macey.

89 Lessig, Code; see also C. Hood, Tools of Government (**) .

90 Shearing, Disney World

91 Garland

92 Sparrow, Regulatory Craft.


95 Black, Rules and Regulators.

96 J. Braithwaite, Restorative Justice and Responsive Regulation (Oxford: OUP, 2002); and that restorative justice can learn from responsive regulation.
One of the critical elements in restorative justice is to structure the conference so as to include representatives from all the different segments of an offender’s life: to merge roles that the offender might otherwise want to separate (RJRR, 87). Involving firms’ or others whose respect the CEOs of the offending firm respect could be a valuable addition to a restorative enforcement process.

For example, there may be a case for extending participation to include members of the firm’s peer group. One of the critical elements in restorative justice is to structure the conference so as to include representatives from all the different segments of an offender’s life: to merge roles that the offender might otherwise want to separate (RJRR, 87). Involving firms’ or others whose respect the CEOs of the offending firm respect could be a valuable addition to a restorative enforcement process.

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