Accountability and Governance under the New Regulatory State

John Braithwaite
Law Program
RSSS
Australian National University

The nightwatchman state of classical liberal theory (Nozick 1974) and the Keynesian welfare state are both phenomena of the past. We live today in what scholars in my field increasingly refer to as a new regulatory state (Majone 1994; Loughlin and Scott 1997; Parker 1997; Braithwaite 1999). This means a state where most police are private police, where many prisons are private prisons, regulated by the state. Not privatisation and deregulation — the Hayekian policy package — but privatisation and regulatory growth. When we privatise telecommunications, we create Austel, a new regulatory authority. Most recently, privatisation moved to the heartland of the Keynesian state with the privatisation of the Commonwealth Employment Service. But we could not do it without creating new regulatory oversight for employment services.

To use Osborne and Gaebler's (1992) metaphor, we live in a world where the state might be doing less rowing, but it is doing more steering. University teachers, slumped over their oars, know this from personal experience. The Osborne and Gaebler metaphor actually does not go far enough in capturing the changes that occurred in the nature of governance.

Foucault's (1991) governmentality lectures get us closer to an understanding of the way government is no longer a unified set of state instrumentalities. The sovereign is not dead, but it is just one source of power. Moreover, the state is an object as well as subject of regulation. It is regulated by the IMF, Moody's, the Security Council, the International Organisation for Standardisation, the World Trade Organisation, among other institutions. We live in a world where many centres of power both steer and row. And each steers its own rowing being mindful of the steering and rowing being undertaken by other private and public institutions.

The realities of the new regulatory state pose severe accountability problems. The power of the state police might be constrained by legal rights. In the world of the new regulatory state, when it wants to abuse these rights it might contract the work out to a private policing organisation that is not subject to them, or suggest that private litigants do so. Eighteenth and 19th century traditions of constitutionalism are therefore of constrained relevance to accountability in the world of the new regulatory state. Constitutions obsessed with the abuse of public power miss the point when

so much public power is delegated to private powers and when, in any case, accumulations of private power pose the greater threats to our freedom. In the mid-1990s, we finally reached the point where the majority of economic powers in the world were corporations rather than states (Anderson and Cavanagh 1996).

'Accountability in Australian Government' might therefore be read as a topic that grows out of an anachronistically state-centred mode of analysis. Consider as an example the separation of powers as a foundational governmental practice for securing account-ability. In Montesquieu, and among 18th and 19th century constitutional designers, this is simply a tripartite separation of public powers among the legislature, the executive and the judiciary. The doctrine still matters in this impoverished form and can be jeopardised if, for example, a High Court judge acts as a political hack of the executive. But a relevant separation of powers for a world where private powers pose many more threats to liberty than public power would effect separations both between and within public and private powers. This means that not only is political science an anachronism, but public law as something separate from private law and private self-regulation is equally so.

How then would we think of the separation of powers in respect of a new regulatory state where telecommunications is privatised? The major telecommunications provider in a country has enormous power, more so if as in New Zealand it is taken over by one of the major American providers, something that will be standard if the Multilateral Agreement on Investment is promulgated in a strong form. If a nation is invaded, control of telecommuni-cations infrastructure, which is essential to both the economic functioning of the nation and to its defence, is a pivotal concentration of power. It might be such an important power that we want a fourth branch of government — a regulatory commission with a degree of independence from the legislature and executive — to check its abuses of power. In turn, we might want the International Telecommun-ications Union to be able to check certain abuses of power of the national regulator. Internally within the privatised telecommunications provider, we might want to ensure an effective separation of powers among shareholders,

directors and managers. We might want a board audit committee that supervises a creative and efficient network of auditors from one part of the giant organisation to scrutinise auditors from other parts. Within its management, we might want to better separate powers — between production and quality management, for example, between production and environmental management, between production and privacy. We might want to give a telecommunications consumers' council some significant powers within the governance of the organisation, and so on.

In another paper, I have argued that it is wrong to assume that plural separations of powers are necessarily a drag on economic efficiency (Braithwaite 1997). To take an example that most post-Keynesian economists would regard as clearcut, there is an efficiency gain from having a central bank with powers sharply separated from those of the mainstream branches of government, especially from the executive.

There are, however, concerns that cut the other way. In a recent paper Carol Heimer (1998) points out that increasing accountability risks a loss of responsibility. Bacdach and Kagan (1982:323) also expressed it well in their influential book on regulation: 'The risk of having the state push accountability requirements into the farthest reaches and deeper recesses of social life is that, in the long run, everyone will be accountable for everything, but no one will take responsibility for anything. Thus the social responsibility of regulators, in the end, must be not simply to impose controls, but to activate and draw upon the conscience and the talents of those they seek to regulate'. What we must avoid is accountability mechanisms that cause regulated actors to work defensively to avoid blame, instead of creatively, to seize responsibility for achieving valued outcomes.

Among other things, separations of private and public powers are ways of coping with bounded rationality. The central bank focuses somewhat myopically on a monetary policy that will keep inflation under control. The judiciary focuses on ensuring that the central bank does so in a way that is lawful without worrying about whether it has done a good job of managing inflation. Mapping institutions onto the bounds of rationality can make sense because of the

dictum that if you have many objectives, you have none. The bank that dabbles too much at reducing unemployment may actually give up on fighting inflation as a result. The court that makes judgments about whether the central bank has performed well in fighting inflation finds itself straying beyond the bounds of its competence.

Heimer (1998) points out, however, that we have not only bounded rationality but also bounded imagination. Separations of powers that sensibly carve out limited spheres of rational calculation may bound the imagination of the policy process. So might many other forms of accountability.

Is there anything general we can say about how to preserve responsibility and imagination, while assuring accountability and being realistic about the bounds of rationality? What I have called a 'republican architecture of trust' is one kind of answer (Braithwaite 1998). The objective of a republican architecture of trust is to enculturate trust while institutionalising distrust. This means nurturing interpersonal trust in and between organisations while structuring organisations so that surveillance and accountability occurs naturally.

A simple device for achieving this in Canberra is an interdepartmental committee (IDC) that recommends the winner of a contract, for example. The ostensible objective of the discussion on the committee is to ensure that all the considerations relevant to ensuring that the most efficient supplier gets the contract are aired. But there are latent functions with respect to accountability as well. It is harder to bribe a committee than a minister making the decision alone. It is at least a little harder to conceal the award of a contract on improper grounds if the grounds must be discussed in an open meeting and minutes kept which would be available to the police or the ombudsman. These arguments have even more force if there are representatives of outside interests, say, an environmental group, on the IDC. Again, the manifest function of the environmental group's presence is to ensure that environmental considerations are not neglected and to enable community participation in government; the latent function is that the outsider is more likely to blow the whistle on impropriety.

Above all else, a republican architecture of trust requires the abandonment of hierarchical architectures of trust. Dicey's (1960) parliamentary sovereignty is just one instance of such a hierarchical doctrine of guardianship (whereby a regulatory authority can be conceived as guarding citizens, a minister guarding the regulatory authority, and parliament the minister).

The hierarchical conception of guardianship is trapped in its own logic. Guardians like auditors are recruited to catch abuse of trust. But what if the guardians are untrustworthy? The only answer can be another layer of guardianship above them. In the hierarchical model, the only check on abuse by an nth order guardian is an $n+1$th order guardian. But then if the $n+1$th order guardian is corrupt, the whole edifice of assurance can collapse. We see the practical manifestation of this regress with police departments which, like fish, tend to rot from the head down. There is a simple solution to the puzzle. Arrange guardians in a circle and there is no infinite regress. The logical structure is that everyone becomes a guardian of everyone else. In the most redundant guardianship design possible, all the arrows will point in both directions and arrows will also cut across the circle. The degree of redundancy needed for any given risk of abuse is a matter for contextual judgment.

Arranging guardianship in a circle is one view of how the constitution of a republican democracy is different from that of a liberal representative democracy. The institutional embodiments of circular guardianship in business regulation, for example, are multiparty (ie including community groups) dialogic regulatory institutions where the actions of those in the circle are transparent and contestable from outside the circle (Ayres and Braithwaite 1992:54–100). We see these with some, but not most, American and Australian nursing home regulation. Government regulators sit down with representatives of nursing home management, staff and the residents' committee in an open problem-solving dialogue that leads to negotiated solutions to regulatory problems. Threat and the politics of distrust are rarely necessary in such negotiations. Management more often than not respond in a trustworthy way to the climate of trust because they can see that the very process of dialogue empowers the other participants with dangerous knowledge they could use against management. Manage-

ment is not confronted with a residents' committee that threatens them with litigation by an advocacy group lawyer. Even though that threat may be neither made nor thought by the residents' committee, management can look behind the trusting demeanour of the committee to see that such a capability is a structural fact of a residents' committee empowered by the knowledge gained from participation in dialogic regulation and by the existence of competent advocacy groups at their disposal outside. By getting the structural conditions of republican regulation right, it is possible for regulatory encounters to be based on trust, with deterrence always threatening in the background but never threatened in the foreground (Ayres and Braithwaite 1992:49–51). Of course, such an accomplishment would always be fragile, which is why regulatory institutions must be dynamic, and responsive to their own histories of misplaced trust.

So I am suggesting that there are two civic republican answers to the question of who guards the guardians: (1) communities of dialogue wherein each is recursively accountable to every other (dialogue that, without threatening distrust, naturally exposes abuse of power to community disapproval); and (2) civic virtue nurtured by trust. Limited, yet promising strategies can be seen in practice in the empowerment of Aboriginal communities in the regulation of the police, residents' committees and advocacy groups in nursing home regulation, environ-mental groups in environmental regulation, worker representatives in occupational health and safety regulation, consumer groups in the regulation of banks, women's groups in affirmative action regulation, even the Australian Shareholders' Association in securities regulation.

Carol Heimer's (1998) paper on responsibility versus accountability, bounded imagination versus bounded rationality, has caused me to ponder the limits of a republican architecture of trust, conceived in this way. What the organisational psychology research has long told us is that deliberation in groups is good for improving the inductive quality of decision-making — ensuring that useful perspectives on and facts about the problem are not neglected. Individuals are better than groups at deductive reasoning. A committee will do better at solving differential equations by sending its best

mathematician away to work on it alone. But then it might also want to appoint its second best mathematician to check the solution.

Perhaps there is a need for a sequencing of deliberative architectures. When we first confront a problem, we are best to cultivate *imagination* and offers to take *responsibilit*y for sorting out aspects of the problem by deliberation in a group. The imagination-responsibilising stage can then set up an *accountability* framework: Jack will be accountable for solving the equation, Jill for reporting back to the committee whether Jack got it right, Jenny for tabling a design for the bridge that incorporates Jack's maths alongside all the other considerations discussed by the committee. Finally, the whole committee is accountable for reviewing Jenny's design to assure itself that it has not been 'a group of the unwilling, picked from the unfit to do the unnecessary'. Such assurance comes from an architecture of trust that nurtures *willingness* of the most *fit* to take responsibility only for those things that are *necessary*.

Accountability is institutionalised in the nominated accountability of Jack, Jill and Jenny and the final vote of the committee to trust Jenny's design. Responsibilisation is nurtured through open-textured preliminary discussion that encourages Jacks, Jills and Jennys to step forward. The bounds of imagination are also expanded in this initial deliberative phase. Then bounded rationality takes over as more expert individuals apply decision-making heuristics, rules of thumb, short-cuts to boundedly rational designs. Making a virtue of the bounded rationality of competent experts assures that the committee is not an animal that 'keeps the minutes and loses hours'.

Practitioners might find these remarks both excessively abstract and simple-minded. While they would be right to think this, I hope they might also find that there are some conceptual tools in these simplifications that can inform contextual wisdom about how to:

1. Abandon the idea of achieving 'Accountability in Australian Government' in favour of securing accountability of public–private governance in the framework of a 'new regulatory state'.
2. Abandon Montesquieu's tripartite separation of public powers in favour of pluralised

separations within and between public and private powers.

3. Draw on both private and public sector managerial creativity to expand the envelope of bounded imagination.

4. Abandon hierarchical accountability architectures that bound willingness to take responsibility for making a contribution.

5. Iterate between nurturing participatory democracy and nurturing competence.

Competence is conceived as grounded in training in decision-making heuristics that actually work in a world of bounded rationality. Participatory democracy in its proper place can not only enhance accountability; it can improve scanning capabilities for the discovery of competence. My message therefore is that it is not inevitable that bounded rationality cripples imagination, that participatory democracy destroys competence and that accountability destroys responsibility. A contemporary theory of institutional design for the new regulatory state can render those virtues mutually reinforcing.

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