

**Public goods, private means.  
Antinomies of accountability in third generation environmental policy**

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Abstract

The paper addresses accountability as classical problem of political modernity that becomes today particularly troublesome. Full accountability is possible only between identical subjects; but then it is a self-referential exercise with no actual purpose and content. To be fruitful accountability must circumvent self-reference and address alterity, open itself to unexpected questions, unforeseen claims.

The antinomy of accountability surfaces in new governance arrangements. Private actors expand their public role by means of contracts or single-handed obligations. Their growing engagement in the policy making by means of contracts and single-handed obligations calls for an increase in controls. However the logic of contract is intrinsically circular, self-referential, preventing any account to and for whatever lies outside the world produced by the contract itself.

This issue is addressed by focusing on third generation (neither command-and-control nor market-based) environmental policy instruments. Widely adopted in Europe as well as elsewhere, they include a variety of solutions based on joint public-private agreements, voluntary schemes and self-regulation. Overall these approaches seem to endorse two assumptions: that environmental protection, sustainability, human health and well-being are better ensured by turning to private means, promoting 'beyond compliance' corporate behaviour and building on the direct interaction of private actors; that *de iure* or *de facto* empowering of the latter is consistent with a strengthening rather than a relaxation of democracy, with the market or other sub-political arenas being the place where democracy is (to be) increasingly practised.

Evaluation of third generation regulatory instruments, however, is quite controversial. High expectations and praises are confronted with complaints about their weak legitimacy, effectiveness, efficiency and equity. I argue that such complaints can be traced to a systematic inability of contractual arrangements to address public (i.e. third-party) issues and claims. There is, in other words, a mismatch between the emerging use conditions of environmental goods, as the result of social and technical change, and the connection between users and their actual publics.

Is there a way out of the deadlock of contractualization? I have no ready made answers. In the last section, however, some possible evolutionary paths of regulation will be outlined.

Keywords: environmental policy, accountability, public, contract, governance.

Introduction

There seems to be a core antinomy in accountability – a paradox, an unresolvable contradiction. Complete fulfilment of its aims corresponds to its emptying. Full accountability is possible only between identical subjects; but then it is a self-referential exercise with no actual purpose and content. I can tell you everything and you can grasp everything I say if you are just like me; but then you have nothing to learn from me, nor I from you. Complete

disclosure verges on closure and silence. This classical political problem becomes particularly troublesome in current governance arrangements. To be fruitful accountability must circumvent self-reference and address alterity, open itself to unexpected questions, unforeseen claims.

This is the argument I develop in this paper<sup>1</sup>. From a systems theory perspective the antinomy of accountability is one of many cases of self-reference to be found at social and bio-physical level<sup>2</sup>. Yet its relevance for society can hardly be overestimated. It characterizes political modernity from its beginning and has been described in many ways. Hobbes's Leviathan expresses the will of individuals who submitted themselves to his own will; thus he is fully accountable to them, but no account is either necessary or possible. For Schmitt (1922), sovereignty consists in the ability to decide on the exception to the rule. A sovereign is at the same time within and outside the legal order. Calling himself outside any rule he states the rule to be applied. He is ruler to himself, thus fully accountable but at the same time unaccountable for that. Similarly, for Benjamin (1977) law originates from an act of violence that cannot be legally justified. Attempts to make legal systems fully accountable inevitably drive to paradoxes. On what grounds, for example, can a constitutional rule be self-entrenched, i.e. state that its own change is not allowed? Can an amendment clause be applied to amend itself (Suber, 1990)?

For centuries this antinomy remained hidden within political and legal systems, springing out only in dramatic historical passages – revolutions, totalitarianism (Agamben, 1998). Liberal democracies kept it at bay in increasingly differentiated and secularized societies by extending citizenship rights while preserving the reference to 'the people' as the source of power to which its exercise has to be accounted. However, growing individualization and privatization of social relations, increasing focus on personal autonomy as property of oneself and of the outcome of one's labour (Pulcini, 2001), brought into question this normative ideal. Freedom of will has been increasingly conceived as the possibility to express in full one's own subjectivity, individuality, to immunize oneself from onerous communal belongings and duties (Esposito, 2002). The means by which this can be obtained is the contract. Contract frees from undesired social relations allowing at the same time to obtain what one desires from the others without engaging with them in a personal relationship. Freedom is based on the immediate and permanent liquidation of the debt (Godbout, 1998).

Accountability is stressed as a core element of new forms of governance (EC, 2001a). Its aim is to help preserve what keeps society together in a context in which state or community-centred relationships of responsibility lose relevance. Yet this purpose may be hindered by the contractualization of social relations. Trust, legitimacy, solidarity and other social goods increasingly depend on the ability of contractual arrangements to replace traditional forms of vertical and horizontal answerability. The problem, however, is that the logic of contract is intrinsically circular, self-referential, preventing any account to and for whatever lies outside the world produced by the contract itself.

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<sup>2</sup> The notion of self-reference roughly corresponds to that of circularity. According to systems theory there are different types of circularity (Luhmann, 1984). Elements of a system may refer to each other (e.g. a clause of a contract that refers to another clause); a process may apply to itself (e.g. a statement that endorses a statement); a system may refer to itself (e.g. a law that appeals to the basic principles of the legal system). A major case of self-reference is self-reproduction, which allows a system to be at the same time open and close to its environment, new elements being produced only according to its own elements. For example, if a contract specifies the circumstances in which it can be amended, no event is contractually relevant (i.e. may become an element of the contract) if it cannot be assigned to such circumstances. For any interested subject the issue then becomes whether a given event is to be interpreted as a case in point.

A thorough elaboration of this argument would extend far beyond the limits of this contribution. My discussion uses few concepts, drawn from governance studies, political philosophy and social theory, and empirical references mainly focus on the environmental field. Therefore I do not pretend to advance any definitive statement, but only to outline what seems to me a major issue deserving adequate attention. The first section addresses the issue of self-reference by looking at the last wave of contractual arrangements in environmental governance. The second section elaborates on the notion of public as a core element of accountability. The third section discusses in more detail the self-referential structure of contract and its implications. The fourth section compares two ways of living with the antinomy of accountability: celebrating self-reference or dealing with alterity. The last section outlines some possible evolutionary paths of regulation.

### Accountability and self-reference in the environmental governance

Accountability is an intrinsic feature of human relations of reciprocity, and a core feature of democratic systems (Power 1997). Why is it attracting so much interest and attention nowadays? Answers usually point to the current transformation of governance, from state-centred hierarchical steering to decentred horizontal networks of public and private actors, be they the result of neo-liberal reforms or the unforeseen effect of their combination with a self-steered globalization of economy (Strange, 1996; Rhodes, 1997). The expanding public roles of private actors, their growing explicit engagement in the policy making and implementation, with consequent blurring distinction between public and private, call for an increase in controls (Power, 1997). Interactions between interdependent actors, supposedly provided with the best knowledge of the state of the affairs in their own field, may be expected to improve policy effectiveness and efficiency (Letza et al., 2004); however, this cannot be taken for granted and has to be accounted for. In its turn, legal liability increasingly depends on compliance with contractual or single-handed obligations rather than the rule of law.

The rise of accountability has also been referred to the growing saliency of the semantics of risk, as an effect of the detraditionalization and individualization of society (Beck, 1986; Giddens, 1990). These processes increase social complexity and entail a decline of authority and traditional ties of solidarity. The weaker the perceived legitimacy of power (i.e. the weaker the authority), the stronger the requirement of justification (Warren, 1996). The weaker the sense of belonging, the social grounds of the division of labour and the distribution of burdens and benefits (the right to hold social positions, manage public questions, define collective goals, get valuable resources), the feebler the shared assumption of responsibility for the consequences of decisions, and the higher the requirement of justifications and accounts (Pellizzoni, 2005). Rather than replace it, this shifts trust investments from actors to controllers, often depersonalized into expert systems and procedures of verification of which the supposed beneficiary has little knowledge (Giddens, 1990; Power, 1997; Pedersen and Neergaard, 2006). Organizational artefacts replace interpersonal relations.

A major example of this trend can be found in environmental policies. This field shows an impressive record of innovation of instruments and approaches. Not inappropriately someone has talked of a 'silent revolution' (Theys, 2002). The third generation of approaches (after command-and-control and market-based regulation) has emerged in the 1990s. They include three main categories of instruments (Prakash and Kollman, 2004): mandatory information disclosure through labels or emissions registers, such as the US Toxic Release Inventory Program (TRI); business-government partnerships such as the US 33/50 and Project XL programs or the Dutch covenants; government- and non-government-sourced management

systems such as ISO 14001, the EU EMAS, the US chemical industry Responsible Care Program or the Forest Stewardship Council (FSC) certification. These instruments can be regarded as part of a broader family of corporate social responsibility (CSR) approaches aimed at contributing to sustainable development and quality of life, the common feature of which is to be found in their voluntariness (EC, 2001b; Bendell and Kearins, 2005). In its turn CSR is part of a broader growth of ‘private governments’, that include the so-called *lex mercatoria*, i.e. the corpus of trade usages developed outside national legislations, somehow similar to the middle-age ‘merchant law’ (Teubner, 2002). Also ‘political consumerism’ can be included in this trend, as a kind of bottom-up, self-regulatory policy-making consisting of consumer choice of producers and products ‘with the goal of changing objectionable institutional or market practices’ (Micheletti et al., 2004: xiv).

Third generation approaches epitomize what is usually meant by ‘governance’: the expansion of horizontal networks, participation, negotiated partnerships, bottom-up initiatives, civil society direct responsibility-taking, against top-down state centred steering or pure market exchanges. According to their supporters, third generation environmental policies (and more in general CSR initiatives and private governments) effectively address the problems of both command-and-control and market-based regulation (Prakash and Kollman, 2004). The former – consisting basically of a target, like an emission limit of a pollutant, and a penalty to be applied if such target is not met – drives to over-legalization; lacks flexibility with regard to the dynamics of technology and economy; prevents ‘fine tuning’ to local social or environmental conditions; suffers from knowledge gaps about the environmental and health impacts of human activities and people’s willingness to bear cost schedules for regulations; may lead to spend money on relatively insignificant risks; requires effective and costly monitoring and sanctioning systems. Rather than requiring addressees to comply with a legal obligation, market-based instruments seek to influence them, a typical example being fiscal charges on emission units of pollutants. These instruments provide more operational flexibility. However they also require effective monitoring and sanctioning, together with well specified property rights, i.e. effective state-centred institutions and regulations. Moreover approaches such as tradable permits legitimize arbitrarily settled levels of pollution and may promote relocation of polluting activities in less expensive neighbourhoods inhabited by disadvantaged groups.

Against these drawbacks, better environmental protection, or better economic efficiency in front of an equivalent environmental performance, are ensured – so the argument goes – by promoting ‘beyond compliance’ corporate behaviour and building on the direct interaction of private actors. Even information disclosure is not ‘mandatory’ in the traditional sense of command-and-control regulation: it does not specify required outcomes but leaves firms free to self-regulate on the grounds that it is in their interest to present themselves as ‘green’ to their contractual stakeholders (customers, suppliers, bondholders etc.) and non-contractual ones (neighbouring communities, NGOs etc., up to the public opinion at large). All third generation instruments, thus, follow a contractual logic, regardless of whether formal deals are made or not. In the latter case they basically consist of single-handed obligations towards specified or unspecified ‘counterparts’.

Overall, third generation instruments share the assumption that public goods such as the protection of the environment and human health are better ensured by turning to private means. A second assumption underlies many of these arrangements: *de iure* or *de facto* empowering of private actors is consistent with a strengthening rather than a relaxation of democracy. The market or other sub-political arenas seem the place where democracy is (to be) increasingly practised. For example, one can talk of a ‘corporate’ deliberative democracy whenever private actors enact deliberative settings to gather stakeholder insight into and advice about their choices and behaviour on environmental or social matters. Voluntary

agreements have rather a neo-corporatist flavour, being based on a direct confrontation between government authorities and private interests. Self-regulation clearly refers in a general sense to neo-liberal views of the democratic state. And as for political consumerism, it implicitly or explicitly draws on economic theories of democracy, to the extent that it conceives of consumers as citizens who cast their 'vote' for or against a particular corporate policy.

An impressive bulk of literature has grown around third generation environmental instruments, yet their evaluation remains controversial (see e.g. Gunningham and Grabosky, 1998; Steinzor, 1998; Harrison, 1999; Kollman and Prakash, 2001; Prakash, 2005; Pedersen and Neergaard, 2006). High expectations and praises are confronted with complaints about the weak legitimacy, effectiveness, efficiency and equity of such approaches. Partially this may be due to the lack of sufficient empirical data and the necessity of counterfactual reasoning for comparing voluntary and self-regulation with command and control and market-based one (EEA, 1997). However major criticisms seem to refer, directly or indirectly, to accountability. Corporate ecological commitments cannot be taken for granted (which brings back in the issue of controls and sanctions). It may be mere 'greenwashing' (Laufer, 2003). Sectoral targets may encourage free riding, with 'polluters' taking advantage of the improved performance of other firms (Börkey and Lévêque, 2000). Agreements may be used to postpone or forgo possibly stricter command and control regulation (EC, 1997). Inadequate monitoring and sanctioning weakens the strength of many voluntary commitments (Andrews, 1998; Bressers and de Bruijn, 2005). Thus, accountability is crucial.

Reliability of decision-making and subsequent verifications is a matter of insight (access to and selection of information), hindsight and foresight (ability to process it)<sup>3</sup>, and independence from the accountable actor. Qualities not easy to achieve and possibly conflicting. 'Third party' verification, performed by independent organizations, should be more reliable than 'second party' one, carried out by trade associations or other industry groups (Cashore et al., 2004). However, as many scandals testify, even independent auditors may be tempted to accommodate the business they certify (Andrews, 1998). Moreover, they may suffer from informational asymmetries (Power, 1997) – gathering and interpreting data may be exceedingly difficult or time-consuming if the accountable actor is reluctant to cooperate – which may press them to concentrate on documents rather than facts, respect of formal requirements rather than substantive outcomes (Kimerling, 2001).

There is another issue that springs out from some criticisms (Ost, 1994; Steinzor, 1998; Cashore et al., 2004; Pellizzoni, 2004). It looks like a structural flaw rather than a problem of application, adjustment and refinement. Voluntary and self-regulation should combine particular interests with general ones. However such combination does not have any necessary relationship with state-of-the-art environmental performance. Verification usually concentrates on how a given goal has been pursued or achieved rather than how and why such goal has been set. And this not so much because of faulty accountability designs, as because of the logic of voluntary regulation. Its alleged efficiency in front of growing difficulties in setting reliable output standards lies just in the fact that goals and means are negotiated or defined by the firms themselves, as part of their own autonomy as economic actors who retain the right and duty to 'use their resources and engage in activities designed to increase their profits' (Friedman, 1962: 133). Thus, the viability of environmental goals more ambitious than those fixed and their balance with profitability are likely to remain unaddressed. Accountable actors set the frame of their accountability with little possibility for stakeholders and auditors to question such choice.

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<sup>3</sup> Information selection and processing involves both cognitive competences and normative commitments, from individual interests to cultural or professional value assumptions.



The considerations above are not limited to environmental issues but resonate in broader discussions about CSR. ‘Partnerships can develop only where the company is interested in achieving the goal concerned...[and] the range and level of obligations [firms] are expected to fulfil are largely left to their discretion’ (Newell, 2005: 545-546). For example, ‘crucial economic issues tend to be excluded from the contents of CSR standards’ (Frynas, 2005: 587), like the impacts of industrial infrastructures on local people’s subsistence, the firms’ freedom to invest and disinvest at will, the adverse effects on national economies of heavy reliance of export of natural resources.

Thus usable, fruitful accountability seems to ask for more than information, competence and independence. It requires access to the issue-framing. The accountable actor’s self-definition of issues and goals dramatically narrows the scope of deliberation about choices or verification of their implementation. Involvement of contractual and non-contractual stakeholders is not automatically an answer. It may even worsen the problem, with the good of someone misleadingly taken for the good of all. The issue of participants’ selection and equal stance is intensively debated both in the literature on public deliberation (see e.g. Parkinson, 2003) and in the CSR one. Stakeholders’ representatives are often bound to accept the issue-framing of the accountable actor. Or, in questioning it, they usually defend their own interests and viewpoints, that do not necessarily coincide with unrepresented ones. NGOs, as well as government representatives and academics, have their own agendas and may suffer from ‘capture’ by the answerable interests (Bendell and Kearins, 2005). There are also problems of ‘intra-community accountability’ (Newell, 2005), with women and younger people being often left outside deliberative settings, particularly in developing countries. Most resourceful participants may prevail on the others (Boström, 2006). Entrusting selection to the accountable actors of course increases the risk of a narrow representation of concerns. On the contrary, suitable procedural rules may lower the risk of unbalances<sup>4</sup>. However, the basic problem is that broadening inclusion by itself does not ward off but simply broadens self-reference in issue-framing, with likely growing difficulty and resistance to acknowledge residual externalities of decisions.

Accountability can be enlarged beyond formal settings of deliberation or verification by providing information to ‘extended peer communities’ (Funtowicz and Ravetz, 1993) composed of various categories of stakeholders, as happens with mandatory information disclosure. However, also this solution does not represent in itself an answer to the problem of the framing of accountability. On the one hand such communities have even less possibility than those taking part in proper deliberative settings to bring such framing into question. They have to rely on the information spontaneously provided by the answerable actor. Though accessible and comprehensible such information may say nothing about the reasons for a technical or commercial choice, about the possible alternatives and why they were discarded. Moreover, extended communities may only indirectly express their dissatisfaction, through the market or the public sphere.

On the other hand, we are confronted again with the problem of self-definition of the terms by which an assessment is carried out. Consider political consumerism. Consumers increasingly choose producers and products according to considerations of justice, fairness, personal and family well-being, animal welfare, environmental protection. Through boycotts

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<sup>4</sup> An interesting example comes from FSC, where decision-making power is balanced between environmental, economic and social interests (Cashore et al., 2004). Apart from the existence of unrepresented interests and the power differentials between stronger and weaker represented interests, one has to bear in mind other unbalances: between large and small firms as regards their ability to bear the costs of CSR initiatives; between developed and developing countries as regards the ability of their governments and civil societies to exert pressures on corporate behaviour or the setting of sectoral standards (Falkner, 2003; Frynas, 2005; Newell, 2005; Bendell and Kearins, 2005).

and ‘boycotts’ they perform ethical or political assessments of business and government practices. Though sometimes ‘unreliable and capricious’ (Micheletti et al., 2004: xv) and exposed to ‘greenwash’ and other forms of manipulation, ‘political consumerists argue that citizen concern for their private lives can be used in a beneficial way for society at large. Privately oriented virtues have, thus, a public role to play’ (Micheletti, 2003: 160).

This is the crucial point because it mirrors on the demand side what CSR and third generation environmental instruments assume on the supply side. Actually, when consumers ‘engage in collective action in very concrete, problem-oriented local networks’ (Micheletti, 2003: 20) they do not seem provided with any distinctive feature from other forms of mobilization<sup>5</sup>. Thus, in its proper meaning political consumerism consists of *individual* specifications of firms’ answerability, personal assessments of what the public good is and how one’s own shopping behaviour can affect it. However, research suggests that decision is affected by its setting: as many types of ‘personal environmentalists’ (Jamison, 2001), political consumers are more agenda takers than agenda setters, accepting government or corporate issue-framings more easily than organized groups (Tovey, 2005). As with corporate self-regulation – and leaving aside the many factors hampering consumers’ ability to consistently connect behaviour with values and beliefs (Pedersen and Neergaard, 2006) – the question, therefore, is: can any public interest be privately, self-reflexively defined?

### Accountability and publicity

Being accountable or answerable means being required to justify one’s own conduct, to provide reasons for that, explanations for such action (Pellizzoni, 2004). Accountability is usually described in terms of a dual relationship, between principal and agent. However, this description is likely to be inadequate. As we have seen, governance is said to blur the distinction between public and private. But what is public and what is private? Without turning to the endless literature on this issue, we can observe that agents may be confronted with seemingly different types of principals. The preceding section showed that the adoption of CSR initiatives is expected to be both economically and socially or ecologically viable. More in general, the rationale of governance is that it should be able to effectively combine the private and the public interest by means of agreements rather than a ruling authority or market mechanisms (Letza et al., 2004). It should be justified in terms of both shareholder interests and of a variety of stakeholder concerns. With respect to the relationship between corporate managers and owners the latter represent a third party. In itself this is not a novel situation. Traditional financial accounts address both shareholder and stakeholder concerns<sup>6</sup>. However the latter are gaining weight, with new actors and claims coming to the fore, to the point that ‘corporate self-regulation [may] reflect not so much a desire by corporations to govern themselves but a need to respond to public pressure’ (Falkner, 2003: 79) in a context of growing independence from the state.

This trend draws attention to a theoretical point: the notion of answerability refers to justifying one’s own conduct in front of a judge (Pellizzoni, 2004), that is towards a third party. This relationship is also at the core of the notion of publicity. Public discourse has been related to three different codes (Ku, 2000): inclusion/exclusion, openness/secrecy,

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<sup>5</sup> This of course regards protests and other types of mobilization in the public sphere. However, even mere joint shopping choice, as practised by some consumer groups, has a symbolic value that exceeds its impact on the sales of particular producers or retailers (Hobson, 2002).

<sup>6</sup> This double function is related to the economic actors’ recognised social role as producers of individual and at the same time of collective wealth. See Friedman’s statement reported above and, behind it, the powerful metaphor of the invisible hand on which I shall come back later.

accountability/domination. We can say the former refers to *who* is able to speak; the second to *what* is possible to talk about; the third to *how* one is allowed to talk. However, according to Dewey, 'a public consists of all those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have those consequences systematically cared for' (1927: 245-6). Publicity, thus, entails acknowledgement that someone is entitled to meddle in our own business, to have a say, to judge it. Transactions are private when their consequences are deemed to affect only the directly involved actors; they are public when participants (whoever they are and whatever they are talking about) discuss and act (also) by considering external interests and viewpoints. As a consequence, what is public and what is private cannot be specified once and for all, in substantive terms (Benhabib, 1992).

Thus, if inclusion is a matter of democracy and openness is a matter of transparency, accountability is a matter of publicity. It involves a third party (the public). There is no 'private accountability' as such, in the sense that any account requires reference to some independent viewpoint and criteria. To judge means to confront the object of judgement with a (cognitive, normative, affective) term of reference external to the relationship between agent and principal. Such a term, thus the public, has to be specified. Being accountable *to* somebody implies to say *who* the latter is (thus also *for* what we have to account, and *how*: by using what language, factual or principled references etc.). Thirdness means to be outside a given relational setting but may also be a particular configuration of the relation itself. This happens when we gain experience of the extraneousness of the other; when for some reason (an effort of mind, an intuition, an event) we 'make the other strange' (Gurevitch, 1988). The other is no more a stereotype, a construct, a mirror of ourselves. We find the third, the public, in our fellow counterpart. Thirdness, thus, is saliency of a point of view external to a relationship, experience of the non-identity of the other, realization of the friction between our world and the other's world, between us and 'the world'. At the same time it must not be a total extraneousness: in this case the other would lack any entitlement and ability to look at, question, judge us (Lévinas, 1961). Comparison implies the existence of common features. Confrontation with a total alien is impossible or meaningless (Lyotard, 1983). The third is not 'one of us' but at the same time belongs to a broader 'us' that we grasp but have to specify. The third looks like a 'stranger', as Simmel (1908) and many others after him define it: someone who at the same time is close and distant, member and non-member, an involved but detached observer of the community, the latter being continuously challenged to understand the former's features, claims and goals, which appear hard to classify and often require recourse to analogical reasoning.

Accountability, therefore, means first to acknowledge a difference between 'us' and 'them', and then to search for those elements by which we actually recognise difference and that may provide terms for inclusion. Such inclusion is always tentative, contingent. It can be more or less adequate, according to our ability and willingness to grasp and address difference. Many factors affect the understanding of the public: awareness of possible consequences of actions; how consequences are defined; normative judgements as regards the consequences deemed to be controlled; whom is regarded to be directly and indirectly involved (Geuss, 2003). Defining the public is a difficult task, particularly if it is a counterfactual, self-reflective endeavour, as with future generations or interests unrepresented at the deliberative table. The risk is of failing to make the other strange, to produce a mirror of oneself. To *start* from an 'us' rather than *arrive* to it. To find thirdness within sameness and identity rather than the opposite<sup>7</sup>. If this happens accountability becomes pure self-reference;

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<sup>7</sup> To recognise, actually, means to *acknowledge* the relevance of something, to extract it from the cognitive, normative or affective indistinct; but also to *re-cognise*, cognise again, to grasp something we knew but had disappeared from our conscience. Does this mean that alterity is accessible only as an iteration of identity? Not



publicity becomes privacy. Typical indications of private, self-referential, fictitious accountability are the lack of friction between answerable subjects and their public, statements about third party concerns as being ‘entirely our own’, disappearance of conflict and unaddressed questions.

This is the antinomy of accountability. The latter requires publicity, thirdness, alterity. But then its task can never be entirely fulfilled. If it does, then it contradicts itself. If agent, principal and public overlap everything could be said but nothing has to be said. Everything the accountable subject does is just what everyone would have done or asked for. Full accountability is possible only between identical subjects, as a self-reflexive, empty exercise, a mirror that mirrors itself. Accountability, thus, is a fruitful endeavour only when it acknowledges otherness as something that cannot be brought back to sameness (Shearer, 2002; Durand and Calori, 2006) and engages with it in a never ending dialogue where reciprocal understanding is always partial and contingent.

### Re-entering the public: accountability and self-reference in contractual arrangements

To whom and for what one may be required to account? Situations vary hugely. Yet at a basic level any account refers to a community and a solidarity framework according to which a division of labour, a particular distribution of roles, burdens and benefits, is legitimized. As already noticed justifications appeal, though often very indirectly, to acknowledged rights to hold social positions, manage questions of common interest, define collective goals, take communal responsibilities, get valuable resources. Such distribution of social goods is maintained as ultimately in the interest of ‘all’ – agents, principals, acknowledged third parties<sup>8</sup>.

Accountability spreads today in a context where state and community-centred institutions are declining, while at the same time a growing number of public goods are becoming commons, with consequent impending ‘tragedies’ (Hardin, 1968) – i.e. problems of under-maintenance and over-exploitation – and need of regulation<sup>9</sup>. This is due to the increase in the number of users and their ability to exploit goods, as a result of scientific-technical advancement and other intertwined reasons: demographic, economic, political, legal, cultural, ‘natural’ (i.e. not ascribed to human action, as climate change in the pre-industrial era). When one breathes an air polluted by industries and traffic; when access to a beach is hampered by crowds of tourists; when a town council transforms a park into a building site; when new biotechnologies select and transfer genetic traits from one living being to another: in these as in many other cases air, sunshine, land and genes become (perceived as) commons rather than public goods.

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necessarily, if one conceives of ego and alter not as opposed but as reciprocally constitutive entities in a dynamic relationship (Esposito, 2002). I cannot elaborate on this very important point.

<sup>8</sup> Justificatory arguments are of two basic types, according to an instrumental or principled definition of interests: either my control over a material or immaterial good (from soil to knowledge) yields more than you would get by managing it by yourself, or it follows on a moral or religious rule: if you accept it you will get a reward, in this or another life; if you disregard it you are bound to be swept away by the consequent disorder of the world.

<sup>9</sup> According to a mainstream definition (Ostrom et al., 1994) commons, like rivers or open grazing lands, entail easy subtractability and difficult excludability. Their users have equal access and competing interests. Public goods are instead characterised by difficult excludability and subtractability. Everyone has access to them without affecting the others’ use. Paradoxically, thus, public goods have no proper public (as I have defined it)! Note however that some of them, like sunshine, are available without any social labour; others, like the security provided by police, need it and are regulated accordingly. Then such rules are accounted for by referring to some transcendent point of reference. God, human nature, fairness, the people, the common good: these and other notions provide a fictitious third party, the purpose of which is to hide the basic political antinomy.

The combination of weakened state authority and communal ties with an increased need of regulation leads to fully privatized accountability arrangements. Traditionally, limits are set to the owners' freedom to decide about their use of, and non-owners access to, goods. Property rights and contract capabilities are subject to the rule of law, aimed at protecting non-user, public interests. However, the scope of this endeavour is narrowed by the decline of command and control regulation and the spread of 'private governments', with major implications for accountability. The more the freedom of private actors is confronted with a ruling authority, the more their accountability can ultimately be brought back to the political forum where the regulatory frame has been established<sup>10</sup>. The weaker such frame, the greater the actors' freedom to find a balance between different interests – their own and the public ones, as specified by themselves. Third parties do not impinge any more on the contract as a transcending principle (the people's will, the common good) that finds concrete inflection in the mediation of competing interests within political institutions. They become a fictitious entity produced by the contract itself.

Environmental policies offer ample evidence of that. Many third generation instruments create clubs of users who share a non rival interest in their use and maintenance (Prakash, 2005). Firms that subscribe voluntary agreements or adopt ISO 14000 or EMAS are expected to take them seriously, bearing the related costs, because the benefits they can get depend on the effectiveness and credibility of their implementation. The alleged strength of the approach lies precisely in this squaring of the circle: firms act in their own interest (improving market competitiveness and attractiveness) and at the same time in the interest of the public (improving economic efficiency and environmental protection). Yet, as already noticed, they cannot be made accountable for anything more than those commitments that they have negotiated or freely established with a single-handed obligation. The same happens with any CSR or consumer initiative, to the extent that accountability is framed by the answerable actor or its principal<sup>11</sup>. Accountability, thus, ultimately depends on how the parties to a formal or implicit deal define the public. They are sovereign in Schmitt's sense<sup>12</sup>. They decide on a state of exception. No overriding rule may be applied to define and balance private and public interests. They are ruler of themselves.

Systems theory provides perhaps the most effective description of this issue. According to Luhmann, 'in a fully individualized, functionally differentiated society any individual system can perceive external inputs only in terms of "perturbations" or "irritations" that to become meaningful need to be interpreted according to its own code' (Luhmann, 1993: 494)<sup>13</sup>. This is why political steering becomes increasingly problematic. If politics operates through the exercise of power and economy is sensitive only to money, the former cannot drive the latter but only aspire to promote its self-steering, a self-amendment in the desired direction (Luhmann, 1997). As citizens, persons may be committed to reducing environmental damage

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<sup>10</sup> For example, if someone regards the way I legally use my property as detrimental to the public interest, she will have to appeal to legislative powers to modify the corresponding rules.

<sup>11</sup> Command-and-control regulation is not disappearing, but enters an ambiguous relationship with third generation approaches and more in general with CSR. Voluntary or self-regulation replaces state regulation but at the same time benefits from legitimation by government authorities. It improves compliance with state regulation but at the same time replaces government responsibility-taking (Kollman and Prakash, 2001; Falkner, 2003; Prakash, 2005).

<sup>12</sup> The notion of 'consumer sovereignty' seems particularly appropriate from this viewpoint.

<sup>13</sup> Codes are binary oppositions by which systems elaborate information from the environment, producing their own elements of meaning. Codes, in other words, allow the self-reproduction of systems (see note 2 above). For example, science applies the true/false code, while law applies the right/wrong one. As studies on the legal use of scientific expertise show (Jasanoff, 1995), what constitutes a 'sound evidence' takes a very different meaning in a laboratory and in a court room, where expert opinion is processed according to legal criteria of meaning.

or promoting development. As entrepreneurs they cannot but look at the cost-effectiveness of their business, if they are to survive.

However, how do ‘irritations’ operate? A proper translation is impossible because any individual system works according to its own code. There is ‘an unreconcilable cleavage between language games, one language game does not and cannot “exchange” elements with another one. A language game can only be provoked to link up with a sentence that makes part of the other language game. No exchange takes place; rather it is a “re-enactment” [...] [that] is neither translation nor trans-substantiation of the old element, but an independent reaction to something else by which the game creates a new element. [...] A language game never “contains” elements of another game, but only its own elements that “link up” to elements of the other game’ (Teubner, 2002: 207).

The key concept here is that of *re-entry*. ‘A distinction re-enters itself if it is copied into itself. It then reappears as part of its own space, as part of what it distinguishes’ (Luhmann, 1993: 485). ‘Whenever we make an “observation” we draw a “distinction” of two sides and make an “indication” of one of them. [...] Now the distinction between the two sides makes a “re-entry” into one of these two sides; it reappears in itself. [...] Then it is no longer the old distinction. It is the “representation” of the distinction within one of its poles. It is the “internalization” of the external/internal distinction. A system makes self-referential use of the distinction between self-reference and hetero-reference’ (Teubner, 2002: 205). Re-entry thus designates a process by which an observation, i.e. the distinction of something from something else (an act of sovereignty in Schmitt’s terms), is reproduced, represented within one of the poles of the distinction.

In our case this means that the public becomes a distinction internal to the private pole of the distinction between private and public. What is public and what is private is privately established. The external becomes a category of the internal. The third is included only in the sense that it re-enters as a codified description. The differentiation between inner and outer side is internalized and so becomes ‘visible’, ‘meaningful’. For example, cost-benefit analyses or insurance programs re-enter the difference between monetary and non monetary values, such as human life or the extinction of a plant species, by fixing a monetary value to the latter. Firms re-enter the distinction between profit and environmental protection or community development by assessing the profitability of ecological or development programs. Consumers re-enter the difference between tastes and ethical or political issues within their own buying behaviours, i.e. within choices of taste.

Thus, if apparently nothing prevents self-regulating actors from looking for and listening to third party claims, in an increasingly individualized and differentiated society there are fundamental obstacles to this endeavour. Consider what the structure of contract implies. 1) Actors are understood as fully rational and autonomous individuals – i.e. non-divided, united to themselves, being of their own, separated from others. 2) They are only contingently tied and definitively released after completion of the exchange. 3) Any power asymmetry disappears behind the formal equivalence of counterparts. 4) Exchange is symmetrical because so defined by the counterparts’ will; thus, goods are perfectly substitutable, between them and with money. 5) No other concern is relevant unless specified and accepted by the contracting parties. 6) To be considered, third party interests must be made to fit in the deal, the contracting parties being by definition the only stake and goal-setters. Thus, the public is tailor-made, framed within the issue as defined in the deal.

As regards the contracting parties, their formal equality is apparently similar to the one typically provided in political forums. To ensure it substantially means in this case to limit or ban restrictive covenants favouring the more powerful parties. However, presence and effectiveness of suitable rules depend on the weight of political and legal institutions at national and international level. The weaker the latter, the feebler the former. The more the

state retreats the less the stronger parties are compelled to keep at bay their predominance or are even able to recognise it (to recognise alterity within the contract, within their self-framing of the deal). Moreover, also the most 'sensitive' parties may find it difficult to consider public interests to the extent that voluntary and self-regulation does not provide forums for unpacking and discussing issue-framings comparable to those of political institutions in terms of broadness, transparency, equal stance of participants. Admittedly, this is in part a matter of design of appropriate deliberative procedures. But the literature on CSR and private governments shows that profitability represents a meta-frame overarching any other issue and concern. By their very nature 'companies are not development agencies' (Frynas, 2005: 593). Thus even the most publicly-oriented initiatives are likely to be framed by self-regarding aims (improving corporate image, maintaining a stable working environment etc.). Research actually shows that, when substantial benefits are provided, rather than proper responses to stakeholder needs and claims they are 'philanthropic gestures' (Frynas, 2005: 586; Newell, 2005: 546), i.e. sovereign decisions by which the others' good is self-referentially defined.

To sum up. Within political institutions the antinomy of accountability – the community as accountable to itself for itself – was somehow circumvented by providing suitable forums for the confrontation of concrete interests, the public one resulting from contingent agreements the scope and fairness of which was related to the effectiveness of rules enforced under the assumption of a reciprocal political obligation. Such forums, adjusted and refined by trial and error over centuries, are now increasingly replaced by, or reproduced within and according to, contracts or single-handed obligations, with the sovereignty to decide about public interest taken by private actors. The narrower the scope of such sovereignty (profitability as meta-frame, self-organization of deliberative forums, limited acquaintance with issues reaching beyond the scope of organizational activity, etc.), the narrower the sovereigns' view (their willingness and ability to conceive) of third parties, and the more self-reference shines through. If social, economic and political change threatens the traditional bases of trust, legitimacy and solidarity, contractualization therefore seems hardly a suitable answer. Rid of old institutional constraints the antinomy of accountability spreads like a worm in the networks of governance, possibly further eroding the social ties.

### Living with the antinomy

The problem outlined in this chapter has the structure of a deadlock. The crisis of state-centred political institutions reveals the antinomic core of their relationship with citizens. Efforts to make institutions more transparent and accountable are confronted with growing dissatisfaction with their unaccountable and inefficient self-referential logic. Governance tries to thrust back the problem by transferring powers to horizontal networks, strengthening at the same time their accountability as an answer to the weakening of traditional bonds of trust, legitimacy and solidarity. However, the contractual structure of the networks reproduces and spreads the antinomy. Governance may promote 'reflexivity' in regulation, but not necessarily in the positive sense usually stressed (Fiorino, 1999). The ambivalence of the term – reflexivity as extrovert learning or introvert mirroring of oneself – is indicative of the ambiguity of the whole process.

Indeed, it is possible to acknowledge this issue without drawing negative conclusions about its social effects. Systems theory provides again the clearest statement of this argument. If individualization and differentiation of society entail a growing 'collision of discourses' (Teubner, 1996), what are the results of a 'link-up' operating through 're-entries'? If Luhmann is ambivalent on this point, Teubner explicitly maintains that the spread of autonomous private governments is capable to effectively replace the old social order, their

interaction producing a spontaneous harmony by means of ‘productive misunderstandings’ (Teubner, 2002).

From this viewpoint, accountability works not despite but because it is misleading. It provides misunderstood answers to misunderstood questions. So, for example as regards development initiatives, many of them exist because firms interpret community needs in terms of philanthropic gestures to ‘calm down’ their social environment, while local people read their own deprivation as an ‘entitlement’ to receive gifts (Frynas, 2005). And as regards political consumerism, firms respond to political or ethical questions because they interpret them as economic questions (shifts in product demand), the only ones that make sense for them, while consumers welcome modifications in product provision because they meet their concerns. One may object that consumers may not misunderstand firms, no sincere ethical commitment being expected from them. Yet consumers’ concerns are *not* economic while the firms’ ones are: a fundamental mismatch of meanings remains, and the bet is that non-economic aims can be re-entered in full as economic ones. Actually the question is: what (there is no possible who!) ensures that any desired outcome will be achieved? Why misunderstandings should be productive rather than destructive? Above all, in a context of reciprocally unaccountable actors, who and how may decide that an outcome is positive or negative, and for whom? Can agreements be considered positive as such, independently from the sovereigns that make the crucial distinction between private and public interests, sameness and otherness, re-entering the latter as an instance of the former?

Indeed, the very notion of a productive misunderstanding is contradictory, since by definition a process with no drivers can have no purposes as well. At a closer look one grasps that the systems perspective on governance suggests a new version of the invisible hand: a mysterious, quasi-magical meshing of fully separate and reciprocally blind individual systems or spheres of action. Such reformulation, however, is even more problematic than the original. On the one side the invisible hand rested on a network of broader social ties (Sen, 1987; Pulcini, 2001), now remarkably weakened. On the other side, the invisible hand was supposed to work, as it were, ‘automatically’: individuals contributed to the common good by simply looking at their own interest, while in its ‘governance’ version actors decide at the same time for their own and for the common good. Leaving aside the question of who should and could be the evaluator of such good, the unlikelihood of win-win outcomes is suggested, if anything, by analyses of systems interaction in non-trivial, real life situations; analyses that stress the typical unpredictability (to say nothing of driveability) of their results (see e.g. Norgaard, 1994). In developing countries there are plenty of ‘non functioning white elephants’ (Frynas, 2005: 587) – unfinished buildings, unused machines, broken devices – testifying the failure of dialogues of the deaf, of misunderstood misunderstandings between companies and local people. And consumers’ ecological concerns often create new market segments, with consequent increase in resource depletion and waste production. The sovereigns of the distinction between private and public are to be expected to gain first and foremost, just because they re-enter the latter into the former. If and what gains will extend to the environment, disadvantaged groups or other stakeholders, it is a tricky question that self-referential accountability is ill-equipped to answer.

The idea of productive misunderstanding, like those of ‘structural coupling’ or ‘resonance’ preferred by Luhmann (1993), is indicative of the difficulty to conceive of something – a bridge, a tie between functionally differentiated spheres – that is still needed if society is to survive but is extraneous to a logic of separation, immunization and unaccountability. This logic lies deep inside modernity, the contractualization of governance representing its full-fledged expression<sup>14</sup>.

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<sup>14</sup> Current communitarian revivals, from religious fundamentalisms to the plea for cultural rights in liberal democracies (Gutmann, 1992), seem to offer a (not necessarily desirable) alternative. However they follow the



Modernization is an encompassing process centred on rationality, universal rights of individual freedom and equality, a dynamic, forward-oriented vision of life (Kumar, 1995). Everyone is or is going to become a citizen, accountable to his or her own fellow citizens, i.e. to him or herself. There is no one outside the modern city – no one worth of consideration. If there is someone ‘out there’, they look like barbarians. I use this word in its original meaning, to be found in Plato or Aristotle (Berti, 2003). Barbarians are people who talk a totally different language, so it is impossible to dialogue with them, to grasp and consider their claims. There is no way to understand each other. There is no dialogue and reciprocal accountability. The only possible relationship with barbarians is war – unless they start to talk our own language, unless they apply for the status of citizens.

We can recognize here a typical stakeholder dilemma in front of CSR: either to enter ‘community-based accountability strategies’, i.e. informal, sometimes illegal, ‘micro-strategies of resistance’ like petty sabotage and blockades or popular and worker epidemiology, aimed at ‘registering dissent rather than expecting to bring about change in the behaviour of the company’ (Newell, 2005: 547), or to gain weight in private governance at the cost of leaving unpacked its underlying premises (overall benefit of profit-seeking initiatives, market as driving force etc.), leading to forms of interdependence or co-optation that automatically legitimize corporations and entail a loss of cognitive, normative, financial autonomy (Falkner, 2003; Klintman and Boström, 2004; Boström, 2005).

Though a major part, this is however only part of the story. Self-reference dominates but it does not totally bar a dialogue between identity and alterity. The literature on environmental governance and CSR reports cases of successful dialogue, constructive relationships of accountability; and this in a variety of contexts ranging from Swedish eco-labelling (Boström, 2006) to Nigerian community development initiatives (Frynas, 2005). They usually entail time and energy-consuming efforts to provide fair and broad representation of concerns, promote community empowerment, set up appropriate forums for confrontation and reciprocal learning.

Insight from case studies is very valuable. It can be so also to understand the extent to which corporate commitments, in a context of competition and growing stakeholder awareness and expectations, may promote a snowball effect. And, moreover, to understand the role of the unconditional cooperation, unconstrained assumption of responsibility, retreat from the exercise of a power, intentional payment of avoidable costs, that seem to lie at the core of some successful experiences (Frey, 1997; Baccaro, 2000). Such features share a resemblance to a particular form of gift: the non-reciprocal, open, ‘first’ gift (Simmel, 1908) with which – as with blood donation, a mother feeding her baby, or the attribution to environmental entities of an ‘existence value’ independent on any present or future use – one ‘gives something for nothing’ (Gouldner, 1973), renewing the social tie beyond the symmetrical relationship of contract and formal reciprocity (including modern citizenship), as well as beyond the closed, self-referential asymmetry of corporate philanthropy, humanitarian aids (Latouche, 1992), and any other gesture of sovereign benevolence.

If, as has been argued (Esposito, 2002), what we have in common is what is not of our own, an absence rather than a presence, a deficiency rather than a good, an original gift that can never be reciprocated in full, then the best clue to how we can circumvent the antinomy of accountability is perhaps provided by the distinction between barbarians and strangers. To grasp it we have again to look at ancient Greece. Differently from the former, the latter were recognised as part of a deal, by which reciprocal rights and duties were defined (Derrida,

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very logic of immunization they pretend to counter, since community is invariably understood in substantial terms, as provided with a proper essence: a blood, a soil, a language, a tradition, a religion, a core value system. Any of these instances reproduces the antinomy of accountability: as a member of the community I am accountable only to those who are just like me and for what is of our own.

1997). Strangers did not become citizens, they retained their status; however, being provided with a recognisable identity, they could build stable relationships with the city. Publicity in accountability entails, as we have seen, just that: the acknowledgement of strangers, people who are not and will not become part of us, principals and agents, with which we can however talk and find contingent, revisable agreements. The acknowledgement that in our turn we are strangers to others, who have to account for whatever they are indebted to us.

## Conclusion

What are the salient features of this alternative logic to contract, that has much in common with Bataille's notion of *dépense*? What are the institutional arrangements that may promote it? I am able here to advance only some ideas about these crucial questions.

The public space expands only when two conditions are fulfilled: there is neither a commitment to reciprocation (asymmetry) nor a closed tie, defined once and for all (opening to further subjects and instances). This type of relationship could be defined *understanding* and distinguished from other three situations: the contract, where relationships are closed and symmetrical; the one where relationships are symmetrical but open, as in many forms of reciprocity; the one where relationships are closed and asymmetrical, that can be defined *domination* (the sovereign benevolence, the impersonal provision of a service to the customer etc.). According to this definition, an understanding is thus an open and non-reciprocal obligation. We assume it towards another not as a symmetrical counterpart but as a third party, a subject whose claims we are likely to never fully grasp and acknowledge, but represent as well a yardstick by which to evaluate decisions and behaviours.

What role is likely to play this type of policy approach in future? The answer is contingent on an assessment of different possible evolutionary paths of regulation. From an analytic viewpoint the most relevant ones seem to me the following. First, a continued expansion of *contractualization*. I shall not comment further on this. Second, what may be called *segregation*, i.e. a fragmentation of collective life in increasingly autonomous, unaccountable spheres based on cognitive, territorial, religious or other differences. Contractualization can be conceived as a specific case of segregation, fostered by the modern dynamics of individualization and functional differentiation. It could lose weight in future if new major non-individualistic and non-functional social or political cleavages would emerge, as already partially indicated by communitarian revivals and religious fundamentalisms. A third path can be called *hyerarchization*, with old or new actors building their overarching role on a range of possible values (efficiency, competitiveness, knowledge, security, health, religion etc.). This possibility, which could drive to a chaotic overlapping of powers and fields of influence rather than a consistent world order, is often downplayed by the rhetoric of networks and globalization but should not be dismissed. It can already be perceived in the increasing relevance of private governments, the reorganization of world politics according to political and economic 'blocs' (the US, the EU, Russia, China), and the re-emergence of 'pre-eminent national interests' as a justificatory argument for questionable policy choices<sup>15</sup>. A fourth path can be called *responsiveness*: the expansion of regulatory approaches centred on relationships of responsibility where the accountable actors refrain from answering self-established questions and keep a receptive attitude to external inputs, trying to take seriously alterity without aiming to transform it into sameness (Pellizzoni, 2004).

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<sup>15</sup> The argument of national interest is increasingly used with reference to technological innovation and economic competitiveness to delegitimize local oppositions and justify the disempowering of local communities. In Italy recent examples come from the regulation of electromagnetic fields and current controversies over methane gasification plants and high speed railway infrastructures.

This entails flexibility or permeability of institutional boundaries and policy arenas, readiness to bring into question inclusion-criteria and issue-definitions, and appropriate rules for handling such kind of processes (Pellizzoni, 2003) – admittedly, a major task. From this viewpoint, two important issues that empirical research could help clarify are whether responsive orientations depend on appropriate institutional designs rather than mere contingencies – to what extent responsiveness is a matter of social learning – and whether the growing saliency of uncertainty in issue- and goal-definitions, insofar as it destructures interests and identities (Pellizzoni, 2003), may help overcome the logic of self-reference.

More in general, the way the four regulatory paths intertwine and the factors that may lead to a predominance of the one or the other in the near future represent a particularly interesting and important topic for research.

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