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Digital Regulation and Questions of Legitimacy

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ABSTRACT

Governments across the world have introduced or are considering new digital regulation to address a range of policy issues, from long-standing concerns about illegal and harmful content online to more recent debates about the risks and benefits of generative AI. As new regimes of digital regulation take shape, questions about their legitimacy are likely to become ever more central. Focusing on the model of independent regulation favoured in liberal democracies, this article notes that the general problems of legitimacy regulators faces may be aggravated in the case of digital regulation, since the factors believed to make regulation effective (technical expertise, agility, adaptability and collaborative relations with industry) widen the gap between regulators and democratic publics and increase the likelihood of 'capture' by powerful stakeholders and ideologies. Rejecting both technocratic and populist-decisionist responses to these legitimation problems, the article draws instead on work that rethinks regulation along more deliberative democratic lines. To improve the legitimacy of digital regulation, the focus should be on increasing the quality of justification between regulators and their publics, ensuring not just that those involved in regulation justify their decisions to those they affect and are supposed to serve, but that members of the public are empowered to reflect on, test and contribute to shaping these justifications.

1 | Introduction

There is a growing agreement that governments need to play a stronger role in regulating digital technology. Governments have introduced or are considering new regulation to address a host of policy issues, from long-standing concerns about illegal and harmful content circulating online to more recent debates about the risks and benefits of generative AI (Flew and Martin 2022; Kretschmer, Furgal, and Schlesinger 2022; Schlesinger 2022). Given the pace of technological change and the complexity of digital technology as a regulatory object, much attention is focused on how new regimes of government regulation can be effective. But there are equally important questions about how digital regulation can secure public legitimacy. In the context of declining public trust in government and recent populist challenges to public institutions and expertise, we can expect the legitimacy of new regimes of digital regulation to become increasingly central.

The principle of independence is a defining feature of the approach to digital regulation being favoured in liberal democratic contexts, including Australia, the European Union and the United Kingdom (see Afina et al. 2024), as is true of media and communications regulation more generally (Puppis and Margetti 2012). In this model, while elected politicians set broad policy objectives, they delegate the power to implement policy to independent regulators, who have the expertise to regulate most effectively and should operate above the fray of electoral politics. However, despite independent regulators being used widely, they have been critiqued as suffering from a democratic deficit, especially given the discretion they have to interpret and shape policy in practice (Eriksen 2020; Mansbridge 2017; Rahman 2017; Zacka 2022). Not being democratically elected, the legitimacy of regulators and their decisions tends to be based on their technical expertise and the claim they arrive at 'good' regulatory outcomes through objective evidence. But the decisions regulators make are not just technical issues that can

be resolved objectively: competing values and interests are often involved in regulatory decisions, inviting suspicions that regulators may be 'captured' by particular ideologies or by the most powerful stakeholders they regulate. General legitimation problems faced by independent regulation, I argue here, are likely to be aggravated by some of the distinctive features of emerging regimes of digital regulation. Digital regulation not only involves conflicts between values and interests, but to regulate complex, fast-changing technology effectively, it is believed that regulators must be 'agile' (moving quickly and pre-emptively in the absence of perfect evidence), 'adaptive' (moving away from the law or policy that authorized it in the first place) and 'collaborative' (moving closer to the companies being regulated) (Schlesinger 2022).

One response to legitimacy problems is for elected politicians to play a greater role in regulation. Following the financial crisis of 2008, and subsequent rise of populist politics, researchers have charted a politicization of regulation, whereby regulatory expertise has been questioned, media scrutiny has increased and politicians have been called upon to intervene more (Koop and Lodge 2020). But it is far from clear that involving politicians more in digital regulation will resolve problems of legitimacy. While politicians gain legitimacy through elections, involving them in digital regulation is likely to be contentious. Politicians typically lack the technical expertise and knowledge needed to regulate effectively. In addition, the independence of regulators from political influence is an important normative principle in media and communications regulation, given its clear implications for freedom of speech and other democratic values (Gibbons 2013).

To oppose populist pressures and maintain regulatory independence, regulators may be tempted to double down on a technocratic approach, seeking to avoid the politicization of the regulatory process. However, given the contested nature of regulatory decisions, we can expect some politicization of regulation to be demanded by the public and difficult to resist. Besides which, even if a technocratic approach that seeks to avoid political debate is publicly accepted, it would not be able to secure legitimacy in a normative sense, which depends on digital regulation being adequately explained and justified to the public it affects and claims to serve (Forst 2017; Mansbridge 2017). In other words, some politicization of regulation—in the sense of opening it up to greater public scrutiny, discussion and shaping—is not just likely but desirable. But this need not entail giving politicians a greater role and so undermining regulatory independence. After all, as Habermas (1971) argues in an early discussion of science and technology regulation, a 'decisionist model', where politicians decide on behalf of a passive public, is little more able to achieve the public justification required for normative legitimacy than a 'technocratic' one, where experts resolve regulatory issues in a supposedly objective manner.

Rejecting both technocratic and populist-decisionist responses to the legitimation problems digital regulators face, I draw instead on democratic theorists that acknowledge the politics of regulation but rethink it along more deliberative lines (Boswell and Corbett 2018; Eriksen 2020; Gangadharan 2013; Mansbridge 2017; White and Neblo 2021). These theorists argue that conventional models of regulatory legitimacy, based on independent regulators

implementing policy determined by elected representatives, should be supplemented by deliberative practices that enhance the public justification of regulation. Better practices of justification would mean that those involved in regulation explain and justify their actions to the public they affect, and that publics are empowered to scrutinize, test and shape their claims (Forst 2014, 2017). I argue that such an approach would not only lead to better justified regulatory decision-making (and so increase the 'normative legitimacy' of regulation) but may increase the public's sense of agency over regulatory decisions and willingness to accept them (so generating greater 'perceived legitimacy') (Mansbridge 2017).

My argument proceeds as follows. I start by summarizing recent developments in digital regulation, including the increasing role of governments and associated regulation (Section 1). I then focus on the problems of legitimacy that digital regulation is likely to face, given the limitations of independent regulation as conventionally understood, the politics of regulation and some of the distinctive features believed to characterize effective digital regulation (Section 2). Finally, I consider what a more deliberative-democratic approach to digital regulation would entail and consider how it would promote legitimacy, both perceived and normative (Section 3).

2 | Digital Regulation and the Regulatory State

Regulation is often associated with government and the regulators they establish, but other actors may be involved too. Following one well-known definition, 'regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome' (Black 2002, 25). So understood, the regulation of digital technology clearly involves actors other than governments and the regulators they establish, including international nongovernmental organizations (e.g., the Internet Engineering Task Force, World Wide Web Consortium and Internet Corporation for Assigned Names and Numbers) and private companies, who regulate through design and their own policies. The question then is not whether digital technology is regulated, but who should regulate and how.

Digital technology companies have historically been given significant scope to self-regulate. In the United States of America, Section 230 of the Communications Decency Act 1996 gave companies broad legal immunity for user-generated content they host, but enabled them to moderate content if they choose (Klonick 2017). Legal immunity avoids a potential problem of 'collateral censorship', where companies might decide to police and remove user's content too stringently to avoid liability (Balkin 2000, 434–435). At the same time, under Section 230, the hope was that companies would moderate their services in a way that is responsive to consumer demand, driven by the 'economic necessity of creating an environment that reflects the expectations of their users' (Klonick 2017, 1669). In the European Union, companies were also protected from legal liability. Under the E-Commerce Directive 2000, companies were required to act quickly to remove illegal content once notified, but they were not liable for user-generated content they hosted and had no general obligation to monitor their services.

Companies were 'largely left to decide the extent to which, if at all, they developed a consideration for—and took action in relation to—content for which they acted as conduits or hosts' (Simpson 2024, 4).

The legitimacy of this self-regulatory model has been questioned over time, with more focus being placed on the responsibilities of digital technology companies. Reflecting a tendency towards concentration in digital markets, a small number of companies came to dominate digital technology use through their ownership of prominent platforms (Barwise and Watkins 2018). At the same time, these companies have seemingly proven unwilling to address growing public concerns about harmful and illegal content online adequately or, indeed, other issues such as data protection and privacy. Public debate has come to echo what critical political economy scholars have long argued. Since most platforms are based on business models related to advertising revenue, where both harmful content that enhances engagement and practices that capture and exploit user data may be financially beneficial, the commercial interests of digital technology companies may be opposed to demands to address certain online harms or secure data protection and privacy adequately (Cammaerts and Mansell 2020; Curran, Fenton, and Freedman 2012; McChesney 2013).

In response to public pressure, digital technology companies have sought to 'inspire public trust in their ability to self-regulate' (Akanbi and Hill 2023, 1676). A key legitimation strategy has been to strengthen ties with civil society organizations, with many platforms establishing safety and advisory councils. But the legitimacy of these initiatives is disputed. Firstly, not everyone is able to participate in these processes (Dvoskin 2022, 461). The assumption is that the civil-society organizations who do participate can represent the interests of the users who do not, but the extent to which these organizations are representative of wider publics is debateable. Secondly, it is not clear safety and advisory councils genuinely share decision-making governance, rather than provide a simulacrum of decentralization for the purposes of legitimation. Caplan (2023) notes how these new forms of 'network governance' operate in ways that are often hidden from public view, making it difficult to know how decision-making works and blurring lines of public accountability without necessarily sharing power.

Meanwhile, impatient with corporate self-regulation, governments have introduced or are considering new digital regulation themselves (Bossio et al. 2022; Flew 2021; Flew et al. 2021, Flew and Martin 2022). Winseck and Puppis (2023) have documented the growing focus on digital regulation among policymakers, enumerating over one hundred policy reports and documents across countries. Different areas of policy are relevant to what has been referred to as a 'regulatory turn' (Flew 2021), or 'the emergence of online platforms as a regulatory object' (Kretschmer, Furgal, and Schlesinger 2022, 5). Harmful and illegal content, data protection and privacy, and market competition and consumer choice are long-standing areas of policy concern, joined more recently by debates about the potential risks and benefits of artificial intelligence.

Governments are responding differently to these common regulatory challenges, with distinct approaches to regulation

emerging globally (see Afina et al. 2024). Following the idea of the 'regulatory state', the principle of independence is a defining feature of the digital regulation being considered or adopted within liberal democratic contexts, including Australia, the European Union and United Kingdom, as is true of other areas of media and communication regulation (Puppis and Margetti 2012). In this approach, politicians agree broad policy objectives through legislation, but transfer the power to implement policy to independent regulators, who have the expertise to regulate more effectively and should operate impartially above the fray of electoral politics. Majone (1999) notes several arguments for independent regulation: politicians lack regulatory expertise; a regulator allows politicians to focus on formulating policy; independent regulation can shift responsibility for decisions away from politicians; and independent regulation can help to show policy commitment over a long-term, removing decisions from the exigencies of democratic politics. In media and communication regulation, the independence of regulators from political influence is also viewed as an important normative principle, given its implications for free speech and other democratic values (Gibbons 2013).

As new regulation is introduced, attention is focused on how it will work and be effective. In addition to the knowledge and expertise regulators need, three features have been identified as important to effective regulation: being 'agile', 'adaptive' and 'collaborative' (Schlesinger 2022). First, regulation must be 'agile' to keep up with technological change. Therefore, the OECD (2021) stresses the need for 'agile regulatory governance to harness innovation', while Ofcom (2023a, 4), the regulator responsible for implementing the UK's Online Safety Act 2023, notes the importance of being alert to new regulatory challenges: 'As the recent rapid rollout of generative AI illustrates, the sectors the Act tasks Ofcom with regulating are dynamic and fast paced, meaning that the questions that we will need to answer as a regulator will constantly evolve'. Second, regulation must be 'adaptive' so it can be responsive to new issues. As the OECD (2021) notes, 'innovation-related challenges will often require more flexible and adaptive regulatory frameworks', and this 'increased flexibility may lead to greater discretion in decision-making and case-by-case trade-offs'. Third, there is an emphasis on digital regulation being 'cooperative' to be effective. Coregulation is an important feature of digital regulation (Marsden 2011). Rather than regulate directly, regulators coregulate by overseeing and approving self-regulation by companies. While regulators retain the power to intervene and apply sanctions, regulation is thought to operate best through a collaborative relationship between regulators and regulated companies. As Ofcom (2023a, 9) notes, 'when regulated firms and other stakeholders share the purpose of regulation and see it as fair and effective, they are more likely to support its implementation and contribute to achieving its goals'. Ofcom cites the work of Hodges (2022, 9) on 'cooperative regulation', who contrasts a 'vertical, authoritarian, command-and-control model', with a more effective model of 'cooperative regulation', where stakeholders agree 'common purposes and outcomes' and 'cocreate' rules.

Given the complex and labile nature of the regulatory challenges digital technology present, questions of how regulation will work and be effective are likely to dominate discussions about new regulatory regimes.[1] But there are equally important questions about the legitimacy of regulation, which are not

reducible to effectiveness. In fact, questions of effectiveness and legitimacy might not just be different from one another but in some ways at odds: the same features believed to make regulation effective (expertise, agility, adaptability and collaboration with industry) may exacerbate legitimacy problems by widening the gap between regulation and democratic publics and increasing the potential for 'capture' by powerful stakeholders. Haggart and Keller (2021, 15) are no doubt right to conclude that internet regulation by democratic governments or the regulators they establish are more legitimate than corporate self-regulation, because the 'democratic state remains the entity most able to deliver accountability and legitimacy to its citizens'. But this does not mean we should not be alert to potential legitimacy problems. 'Legitimacy', as the political theorist Jane Mansbridge (2017, 2–3) argues, is best thought of as 'a matter of *degree*, not a binary', opening up the important question of how regulatory legitimacy is improvable.

3 | The Legitimacy of Digital Regulation

In general terms, legitimacy refers to something being 'rightful' and 'justifiable' (Forst 2017, 132). Legitimacy has tended to be analysed in either empirical or normative-critical terms, but it is beneficial to keep both levels of analysis in mind. So, on the one hand, we can ask empirically about what Mansbridge (2017, 3) calls 'perceived legitimacy'. Is an organization and its actions perceived as legitimate? What factors shape these perceptions? On the other hand, we can ask about what Mansbridge (2017, 3) calls 'normative legitimacy'. Are claims that an organization and its decisions are legitimate well justified? What conditions are required for them to be better justified? In the case of regulators, legitimacy claims may be aimed either at those affected by their decisions or those who their decisions claim to serve (Black 2008, 144)—although 'the public', my focus, often falls into both camps.

In standard liberal democratic accounts, regulators are legitimate because, operating within legal frameworks, they implement policy ends on behalf of elected politicians, who are democratically authorized by the public. But this textbook view has been widely critiqued (Mansbridge 2017; Rahman 2017; Zacka 2022). The assumption that regulators implement policy decided by politicians is complicated by the indeterminateness of policy in practice and the latitude regulators have. The more scope regulators have to make decisions, the further regulation travels from the political intentions that authorized it in the first place, raising questions of legitimacy. This general problem is likely to be acute in the case of digital regulation, where, as discussed above, regulation must be agile and adaptive to be effective. As noted above, the OECD (2021) suggests that the flexibility required for digital regulation may result in more discretion in decision-making.

Given this democratic deficit, the legitimacy of independent regulators tends to be understood in technocratic terms, emphasizing regulatory expertise (Dean 2023; Eriksen 2020). One aspect of this is to focus on the quality of the 'outcomes' regulators generate, rather than their connection with politicians or the democratic process. It is common, following Scharpf (1999), to refer to this form of legitimacy as 'output-oriented',

focusing on 'government *for* the people', rather than 'input-oriented', or 'government *by* the people'. Combined with this, regulators often appeal to a particular version of what Schmidt (2013, 5) calls 'throughput legitimacy', referring to what happens in 'the space between the political input and the policy output'. Regulators often justify their decisions as being based on objective assessments of evidence gained through consultation with stakeholders and/or through market analysis, surveys and research (Freedman 2008).

While this technocratic view of regulation remains prevalent, it has been problematized. Technocratic justifications could hold if there were objective answers to regulatory questions, which could be reached through a rigorous analysis of evidence. But, while expertise is important, regulatory issues cannot be resolved objectively in any straightforward sense. Like other areas of media regulation, digital regulation is political, with different values and interests at stake (Eriksen 2020; Freedman 2008). Decisions about digital regulation will often involve negotiating among competing values, such as freedom of speech and protection from harm, or interests among stakeholders, such as technology companies and users (Cammaerts and Mansell 2020; Mansell 2023). There is no guarantee that regulators will be able to generate a fair compromise among competing positions let alone a consensus (on this distinction, see Habermas 1997, 166). Regulators may instead be 'captured' either by particular ideologies or by the most powerful stakeholders they regulate (Mansell 2023; Popiel 2020). The previously mentioned emphasis on 'cooperative regulation', with regulators agreeing 'common purposes and outcomes' with regulated companies, only exacerbates this concern (Hodges 2022).

Claims that regulation is based on a scientific, evidence-based process are also problematized by its distinctive temporality. Analysing today's 'crisis of expertise', Eyal (2019) notes how regulators operate in an uneasy space between the demands of policy (where decisions about how to act must be made) and science (where knowledge can be accumulated slowly and constantly revised). While regulators seek to base decisions on scientific evidence, 'regulatory facts' must mediate between 'open-forward scientific facts' and 'closed, actionable legal and policy facts' (Eyal 2019, 9). This tension is of course worsened by the speed digital technology companies innovate (Aspray and Doty 2023). On the one hand, technological change demands prompt regulatory responses, and so digital regulation must be 'agile'. On the other hand, developing an adequate understanding of impacts requires time, hence, calls to wait for more evidence before deciding how to act. The problem is particularly clear where regulators seek to anticipate future threats. The representational work required in such cases, as Julie Cohen (2016, 182) has argued, clearly betrays the politics of regulation: 'systemic threats are accessible—to regulators, affected industries, and members of the public—only through modelling and representation, and techniques of modelling and representation are not neutral'.

How the legitimacy of new forms of digital regulation is perceived by publics is an empirical question. To investigate perceived legitimacy, we would need to trace which claims are used to justify digital regulation, how these claims are interpreted and contested within the public sphere, and how

differently situated groups respond to justifications on the ground. How this dynamic process of claims-making plays out in practice cannot be predicted in advance. Nonetheless, there are good reasons to think that digital regulation may encounter legitimation problems if justified narrowly through technocratic arguments alone.

First, it is not clear how an emphasis on the scientific, evidence-based nature of regulatory decisions will be viewed by the public in the context of both scepticism about expertise and their limited visibility in the regulatory process. In practice, consultation processes are often dominated by powerful corporate stakeholders, who can provide the types of evidence most valued for technocratic decision-making (Donders, Van den Bulck, and Raats 2019; Freedman 2008). Civil-society groups, providing they are genuinely independent of corporate influence, may represent the voice of users, but this is only ever a partial solution, since their own legitimacy as representatives is debateable (Mansbridge 2017, Obar 2016). Public voice often appears more directly in the findings generated through surveys and other forms of social research conducted by regulators or independent researchers, where they are addressed more as an object to be researched than a participant involved in a political process. Here the public's ability to shape regulatory outcomes is limited, and any impact they do have may not be discernible. As Jane Mansbridge (2020, 16) notes, 'Citizens' perceptions of being heard, let alone their deeper perceptions of owning the eventual law [or regulation], will probably not increase when a survey organization asks the opinion of another person with their demographic characteristics, even if that person's opinion marginally affects the behaviour of an elected or administrative representative in a direction that supports the interests of the person not interviewed'.

Second, when claims to legitimacy rest on the quality of outcomes, and obscure the different trade-offs and compromises involved in their formation, different groups may have unrealistic expectations about what regulation will achieve, regardless of how well different interests, values and other considerations are balanced in the regulatory process. Basing legitimacy on 'outcomes' alone contributes to what Ansell, Sørensen, and Torfing (2021, 349) refer to as the 'consumerist character of contemporary mass democracy', where '[t]he problem with democracy is not only that representative institutions are "unresponsive" but also that citizens are for all intents and purposes excluded from appreciating the tough decisions and trade-offs between competing values'. Even outcomes that reflect balanced compromises among groups will fall short of their expectations, unless the different considerations involved in their formation are clearly communicated. Perceived regulatory legitimacy may then fall as a result.

Reflecting the limits of technocratic justifications, the role of independent regulators has been questioned in recent years and increasingly subject to critique, including from new populist voices (Eriksen 2020; Mansbridge 2020; White and Neblo 2021). Koop and Lodge's (2020) research traces a politicization of regulation in the United Kingdom since the global financial crisis in 2008, with regulatory expertise being questioned, media scrutiny increasing, and politicians being urged to intervene more. As noted above, independent regulation had been viewed

as a way of depoliticizing issues, removing them from public–political awareness and debate, as is true of privatization more generally (see Starr 1988; Wood and Flinders 2014). By creating greater distance between governments and economic issues and problems, independent regulation can be viewed as a response to the 'legitimation crisis' more interventionist governments faced in the twentieth century (Eyal 2019, 94; Habermas 1973). But this detachment has proven hard to sustain. In response to an increased politicization of regulation, politicians have had to move close to regulation and regulators have had to become more politically responsive (Koop and Lodge 2020).

In line with these trends, we might think that public legitimacy could be bolstered by politicians playing a greater role in digital regulation. But, while politicians have democratic legitimacy through elections, involving them more in digital regulation is likely to be contentious. Politicians usually lack the expertise and knowledge required for regulation. As already noted, the independence of regulators from government influence is also a widely recognized normative principle, especially in media and communications regulation, given implications for free speech and democracy (Gibbons 2013). Concerns about independence from political influence have already been raised in relation to digital regulation in the United Kingdom. Reflecting on the powers politicians retain over the regulator Ofcom under the Online Safety Act, Woods and Perrin (2023) argue that it represents an 'unjustified intrusion' in 'decisions that are about the regulation of speech' and constitutes 'unnecessary levels of interference and threats to the independence of Ofcom'. Similar concerns have been expressed about the influence of politicians in the UK's Data Protection and Digital Information Bill (Santi 2022). More generally, critics suggest that undue political influence was also exercised by the previous Conservative UK government through the appointments of the Ofcom chair (Waterson 2022) and the ICO Information Commissioner (Skelton 2021).[2]

To maintain political independence, we might argue that regulation should double down on a technocratic approach, seeking to depoliticize the regulatory process as much as possible. Yet, given the contested nature of regulatory decisions, some politicization is likely to be demanded by the public and hard to avoid in practice. Besides which, even if a technocratic approach that seeks to avoid political debate is publicly accepted, it would not be able to secure legitimacy in a normative sense. The normative legitimacy of digital regulation depends on it being justified adequately to the public it affects and claims to serve. Recognizing a crucial normative difference between justifications that are passively accepted and those which are 'reflexively constructed or tested' (Forst 2017, 38), adequate justification requires meaningful public debate, so that publics have opportunities to consider, challenge and contribute to justificatory claims in light of the different values, interests and considerations at stake. For this reason, the politicization of regulation, in the sense of opening it up to greater public scrutiny, debate and shaping (Wood and Flinders 2014), is not just hard to avoid, but is normatively desirable.

But the politicization of regulation need not mean giving politicians a greater role in regulation and undermining independence. In fact, simply returning power to politicians would not necessarily improve the quality of public justification and so

normative legitimacy. What is important is how justifications of digital regulation are made subject to greater public scrutiny, reflection and shaping. This opens up a different way of thinking about regulatory legitimacy, which maintains the independence of regulators and the space between initial policy decisions and regulatory outcomes (focusing on what Schmidt 2013 calls 'throughput legitimacy') but understands this space as political too. With these concerns in mind, I turn next to consider deliberative democratic accounts of regulation as a way of strengthening both perceived and normative legitimacy.

4 | Deliberative-Democratic Regulation

Dominant understandings of regulation as a technical, apolitical process work against thinking about its democratization. Discussions of democracy gravitate more readily towards elections and relationships between elected politicians, interest groups and the public at large. Yet, given the politics of regulation, political theorists have considered how regulation might be democratized, some looking back to progressive theories of administration in the United States of America (Rahman 2017) and earlier to Hegel's political philosophy (Emerson 2015). I draw here on deliberative democratic accounts of regulation (Boswell and Corbett 2018; Eriksen 2020; Mansbridge 2017; White and Neblo 2021), including work that applies deliberative ideas to media and communication regulation specifically (Edwards and Moss 2022; Gangadharan 2013; Obar 2016; Lunt and Livingstone 2012). Rather than democratize regulation by extending the role of elected politicians or voting, deliberative regulation is focused on the quality of public communication between regulators and publics. More specifically, as I understand it here, deliberative regulation is based on a 'right to justification', where individuals have the right to demand justifications for decisions and structures that affect them and have equal opportunities to reflect on, test and contribute to shaping these justifications (Forst 2017, 42–43 2014; see Moss 2018). Such a demanding ideal of justification is what Mansbridge (2017, 4) calls 'aspirational': it is difficult if not impossible to realize fully, but it provides a means to evaluate existing practices critically and to identify new ones that are normatively beneficial.

A key principle of deliberative regulation is that regulation is adequately justified to the public it affects and claims to benefit (Boswell and Corbett 2018; Mansbridge 2017). Regulators and other actors involved in regulation should, as Boswell and Corbett (2018, 620) put it, 'seek to explain the actions they take in administering laws and policies, making explicit their interpretation of those laws and policies, the discretion they have drawn on in the process and their reasons for doing so'. Decisions should be justified through reasons that can gain wide reflective public support, and which, at minimum, are not rejectable on moral grounds. As Forst (2001, 362, 2014) stresses in his account of deliberative democracy, the principles of 'reciprocity' and 'generality', as defining features of public reason, are decisive in weeding out unreasonable claims from those that are 'shareable' (i.e., can be 'reciprocally and generally argued for') even if not 'shared' by all (i.e., viewed as the best justifications).

How would a greater emphasis on public justification change existing practices? Consider, for example, regulatory transparency. Regulators already make information about their activities and decisions available. Viewing these transparency practices through the lens of public justification raises critical questions. First, to what extent is regulatory information legible to the public? Making something visible does not mean it will be understood (Ananny and Crawford 2018, 980–981). To bridge what Obar (2016) calls a 'technocratic divide' in regulation, where expert discourse hinders public participation, information must be aimed at the general public, and presented in ways that are accessible and meaningful to the diverse groups that make 'the public' up (Bates et al. 2024). Second, to what extent does regulatory information reach the public? Is it, for example, restricted to a regulator's website or promoted through public information campaigns, or at the point of encountering regulation, through 'media literacy by design' features, such as 'labels', 'overlays', 'prompts', 'notifications', or 'resources' (Ofcom 2023b)? Third, does public-facing information go beyond just informing the public about the existence of new regulation? While important, information provision is not justification. Public communication should explain why regulations are the way they are, shedding light on the process, and the considerations and compromises involved in regulatory decision-making (Freedman 2008).

To ensure regulation is well justified, the public must have opportunities to consider, challenge and potentially shape justificatory claims. Promoting public reflection is important given the fundamental normative difference between justifications that are passively received and those that have been 'reflexively constructed and tested' (Forst 2017, 38). In practical terms, this means giving the public meaningful opportunities to question justificatory claims made by regulatory decision-makers and to request further justifications (Mansbridge 2017). It also means promoting and engaging with robust public debate about regulation, so that different considerations and options may be reflected upon, including those that challenge the position of powerful stakeholders and currently hegemonic views (see Cammaerts and Mansell 2020).

This aspect of deliberative democratic regulation poses further critical questions of existing regulatory practices, but this time focused on public engagement. Are there opportunities for the public to ask regulators questions, to express their own views, and to challenge justifications? Can the public reflect on a wide range of views around regulation, including those that challenge hegemonic ones? Are publics engaged in the regulatory process primarily as objects of research or as participants in a political process, who have a 'right to justification' (Forst 2014)? When the public participate, do they have scope to comment on all aspects of the decision-making process, including the values and direction of regulation, or are they limited only to certain aspects?

The literature on deliberative democracy identifies ways an ideal of public justification can be more closely approximated in practice. In her account of public deliberation and the Federal Communications Commission in the United States of America, Seeta Peña Gangadharan (2013) stresses that there is no single way to make regulation more deliberative and attention needs

to focus on communication both within regulators and outside in the public sphere. In relation to the latter, regulators should seek to widen the groups in the public sphere they engage with: this would include listening out for the voices of those adversely affected by inadequate regulation and who reflect the public sphere's role as a 'warning system with sensors' (Habermas 1997).[3] The more groups regulators consult, the more access points are provided for members of the public to enter the regulatory process (Bevir 2006). Associational and activist groups in the public sphere ideally play a role of 'translators', who 'speak for publics, give them visibility, and mesh public concerns with a political process' (Gangadharan 2013, 9; see also Obar 2016). At the same time, the public sphere is not a site of discursive equality: while new voices may emerge if sufficiently motivated, the public sphere is skewed in favour of certain groups and perspectives. Short of structural change to address these inequalities, deliberative democrats emphasize the importance of complementing macro deliberation in the public sphere with other interventions. 'Deliberative mini-publics', such as citizens' juries or citizens' assemblies, may help to mitigate inequalities by selecting diverse participants through random selection or stratified random sampling, offering payments to compensate participants, and by providing participants with relevant information, access to experts, and time and space to deliberate on issues together. A considerable body of evidence points to the value of deliberation, noting how mini-publics encourage participants to reflect on and change their views, while having a 'positive impact on knowledge, internal and external efficacy, confidence and satisfaction in the deliberative process and civic engagement' (Smith and Setälä 2018, 304). Mini-publics could play different roles in digital regulation: they might be used as part of improved consultation processes (see Edwards and Moss 2022) or to hold regulators to account for decisions subsequently (see Bevir 2006 on 'citizen committees'). There is not space to develop these ideas further here, which are pursued at length in the literature on deliberative democracy (Bachtiger et al. 2018). Suffice to say, there are credible ways regulators can provide publics with better opportunities to request, reflect on and contribute to shaping their justifications and so more closely approximate an ideal of public justification.

Greater public engagement, being harder to manage than a depoliticized, technical processes of decision-making, may seem risky for regulators. But decisions cannot be adequately justified, and so normative legitimacy secured, without justifications being well tested. The public may, for example, accept technocratic arguments that decisions are best left to 'the experts', or they may just take existing arrangements for granted, believing no alternative is conceivable: a form of perceived legitimacy Suchman (1995) calls 'cognitive legitimacy'. But neither of these possibilities would mean that regulation is justified with good reasons that have been tested and reflected upon. This is why it is important to distinguish between 'perceived legitimacy', which may be based on untested views or the presumed absence of alternatives, and 'normative legitimacy', which is based on the quality of public justification (Mansbridge 2017).

If, by improving processes of public justification, deliberative regulation would enhance normative legitimacy, what about perceived legitimacy? While empirical research would be needed to substantiate this, there is good reason to think perceived legitimacy among publics would increase. As Rahman (2017) argues forcefully, a democratized regulation process would give individuals and groups more scope to shape regulatory decisions in line with their own interests and values. But, what is more, deliberative democrats maintain deliberative processes can improve perceived legitimacy even when groups disagree with particular outcomes. It is not realistic to expect everyone to agree with regulatory decisions, but those who disagree are more likely to accept decisions when: (1) the reasons for them have been explained, (2) they have attracted significant and at least majority support from other members of the public, (3) they are not 'reasonably rejectable' on moral grounds and (4) they may be reopened again in subsequent rounds of decision-making (Forst 2001, 365). A deliberative approach may help to mitigate the problem of unrealistic expectations about regulatory outcomes, which I identified as a factor affecting perceived legitimacy earlier. By exposing people to different viewpoints, considerations, and trade-offs, deliberation can nurture 'the sentiment that sound democratic decisions balance the views and interests of different groups in society' (Ansell, Sørensen, and Torfing 2021, 350). For these reasons, more deliberative regulation should help to improve the perceived as well as normative legitimacy of regulation.

The ideas in this section focus on improving processes of justification among regulators and their publics. Some democratic reformers might advocate going further. Rather than just strengthen justificatory relations between regulators and the public, would it not be more democratic to give publics actual decision-making power? Could deliberative mini-publics make regulatory decisions? Could citizens vote directly in referenda or elect regulatory decision-makers as representatives? These are important possibilities to consider, which could enhance the democratic nature of regulation. Yet, as Mansbridge (2017, 39) argues, there are also reasons to be cautious about democratizing regulation in these ways. First, how would citizens in assemblies or committees be accountable to members of the public who are not present? Would one group of not-accountable-enough decision-makers be replaced by another? Second, how would voting for regulatory representatives or directly in referenda be balanced with the ongoing need for regulatory independence from politics? Would these processes tip the balance too far away from regulatory expertise in favour of politicization?

The need for ongoing technical expertise in regulatory decision-making is important to underscore. As I have emphasized, digital technology is a complex regulatory object. Technical knowledge is clearly needed if regulation is to achieve its goals, even if these goals are subject to greater public scrutiny and steering. But, more than this, technical knowledge is important in helping publics to reflect on what is possible. Often, as Habermas (1971, 120, emphases in original) notes, 'Publicly administered definitions extend to *what* we want for our lives, but not to *how* we would like to live if we could find out, with regard to attainable potentials, how we *could* live'. The challenge is to connect technical, expert knowledge about what the digital *could* be with public debate about what we think it *should* be. It is only in this way that regulation can fulfil its promise to enhance our agency over our digital environments.

5 | Conclusion

The social theorist Andreas Reckwitz (2021) has argued that an ongoing crisis of neoliberalism, one symptom of which is the rise of populist politics, is bringing about a shift in economic regulation in Western democracies. He predicts that a new paradigm of 'regulatory liberalism' is emerging, which seeks to 're-embed' economic processes socially and culturally (Reckwitz 2021, 159). The growing role of governments in regulating digital technology may then be part of a broader shift away from neoliberalism. But any new or strengthened government regulation faces difficult questions of how to establish its legitimacy, in the context of not just ongoing neo-liberal critiques of government but also more recent populist attacks on public institutions, expertise and the so-called 'deep state' (White and Neblo 2021). I have argued that these legitimacy concerns are likely to be pronounced in the case of emerging regimes of digital regulation. This is not only because decisions about digital regulation involve negotiating among competing values and interests, but because features believed to make regulation effective (expertise, agility, adaptability and collaboration with industry) are likely to exacerbate legitimacy problems by widening the gap between regulation and publics and increasing vulnerability to 'capture' by powerful stakeholders and ideologies.

Whereas one response to these legitimacy challenges is for elected politicians to play a greater role in regulation, I have looked instead to deliberative democratic models of regulation as a way of strengthening regulatory legitimacy, while retaining regulatory independence (Boswell and Corbett 2018; Eriksen 2020; Gangadharan 2013; Mansbridge 2017; White and Neblo 2021). Deliberative regulation focuses on the quality of the relations of public justification between regulators and publics. The aim is to ensure that those involved in regulation explain and justify their actions to the public they affect and serve, and that the public have opportunities to reflect on, test and shape these justifications (Forst 2014, 2017). By improving the quality of public justification, I have argued that such approaches would not only lead to better, more justified regulatory decision-making (and so normative legitimacy) but may also increase the public's sense of agency over these decisions and willingness to accept them (so generating greater perceived legitimacy) (Mansbridge 2017).

The public communication of regulators remains an under-researched area of media and communication studies. Building on existing studies in this area (Deacon and Monk 2001; Popiel 2020; Puppis and Margetti 2012, Puppis et al. 2014), more research is needed to investigate the relationship between regulatory communication and perceived and normative legitimacy. This paper has set out theoretical parameters for such research, focused on the analysis of practices of public justification. Such research would need to be both empirical-descriptive and critical-normative. One task would be to investigate the ways in which regulation is justified to the public, how justifications are interpreted and contested within the public sphere, how different groups respond and with what effects for how legitimacy is perceived. At the same time, the research would also need to be attentive to the role of power in legitimating regulation and evaluate the processes by which regulation is justified critically in light of what good justification entails.

How would such a critical analysis proceed? Following Forst (2017, 48–51) framework for analysing justificatory power, attention would need to focus both on the content of justificatory discourses and actor's capabilities to shape them. First, research should critically analyse the discourses through which regulation is justified, identifying the values and interests they promote (Popiel's (2020) analysis of the regulatory discourses of the Federal Communications Commission provides a notable example; see also Ali and Puppis 2018). Such critical analysis must be alert to how discourses can close off the 'space of justifications', impeding debate over what could be contested and inadequately justified decisions (Forst 2017, 49). Discourses of regulatory expertise, for example, might in practice exclude non-experts and insulate regulation from scrutiny (Freedman 2008; Obar 2016). Similarly, an emphasis on national security, an increasingly prevalent feature of digital regulation (Schlesinger 2024), can have a depoliticizing effect. After initial 'hyper-politicization' that justifies government intervention, framing a contested issue in security terms acts as 'a tool through which to then impose a definitive position that closes down political debate' (Wood and Flinders 2014, 164). Second, as well as focusing on the content of justificatory discourses, a critical analysis must evaluate the opportunities differently situated groups have to question, reflect on, and contribute to shaping justifications. This would mean critically analysing specific factors that give certain stakeholders more voice and influence in regulatory contexts (Edwards and Moss 2022; Donders, Van den Bulck, and Raats 2019; Freedman 2008; Lunt and Livingstone 2012). It would be mindful too of how justificatory power is distributed unevenly in the public sphere more broadly, given unequal resources and the differing capabilities of groups (Bohman 1997; Moss 2018).

Finally, a critical analysis of regulatory justification must consider how public justification can be improved. Digital regulation may never achieve full legitimacy in the demanding sense I have advocated here, for this depends upon an 'aspirational' ideal of public justification that is difficult to realize in practice (Mansbridge 2017, 4). But relations of public justification may always be enhanced and normative legitimacy increased. A key task then is to identify structures and practices that can improve public justification and to support actors, operating both inside and outside regulators, who are developing such structures and practices on the ground. As new regimes of digital regulation take shape, such efforts will be critical if these regimes are to build and sustain much needed public legitimacy.

Endnotes

[1] Whether regulation *is* effective in practice is a different question that warrants further investigation. I thank one of the anonymous reviewers for making this important point.

[2] I am grateful to one of the anonymous reviewers for suggesting I make this important point about appointments.

[3] Being adversely affected by poor regulation can be an important mobilizing factor behind wishing to participate in regulatory

debates. Consider, for example, prominent campaigns run by family members of children whose death has been linked to social media (Moloney 2023). I thank one of the anonymous reviewers for making this important observation.

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