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A Meta-Regulatory Turn? Control and Learning in Regulatory Governance

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Summary

The steering of organisational and individual behaviour is a central challenge of contemporary governance. This is important not only for regulation of such matters as the environment, employment relations and financial markets, but also for issues of fundamental rights concerning the behaviour not only of businesses but also of government. Long experience suggests that highly prescriptive approaches to regulation are frequently ineffective or even counterproductive. One reason for this is that we show considerable ingenuity in turning demands to change our behaviour to suit our own interests rather than meeting the public interest. Other reasons include the limited knowledge about the behaviours to be steered and limited capacity for monitoring and enforcement held by governments. An alternative way to think about the problem of steering behaviour is to reduce the emphasis on top down control and seek to exploit the capacity of targeted individuals and organisations both to regulate themselves, to monitor each other and to learn about how they may benefit from pursuing more public regarding objectives. Corporate social responsibility initiatives provide only one example of such a process at play. This piece will evaluate this meta-regulatory approach to governance, both its potential and known shortcomings, as a basis for developing regulation which is both more effective and more efficient. It addresses also the legitimacy issues associated with a 'meta-regulatory turn' in governance.

1. Introduction

The financial crises which have enveloped much of the industrialised world since 2008 are only the latest incidents to cause policy makers and academics to question the effectiveness and desirability of dominant models of regulatory governance. Whilst there is widespread disenchantment there is little consensus on either the causes of problems with regulation nor on the possible solutions. It is more or less inevitable that in a crisis vulnerable governments should assert the needs for more stringent regulation and, at least implicitly, attribute responsibility for failures to weaknesses in control. This is not the only way to think about the problem. A precisely converse position would be that market actors placed too much dependence on regulation to guide their behaviour ('unless it is prohibited I can do it'), taking insufficient responsibility for knowing what they should do upon themselves.

An alternative to more stringent regulation is to think about the problem of steering behaviour so as to reduce the emphasis on top down control and seek to exploit the capacity of targeted individuals

and organisations to regulate themselves, to monitor each other and to learn about how they may benefit from pursuing more public regarding objectives. Corporate social responsibility initiatives provide only one example of such a process at play. This piece will evaluate the meta-regulatory approach to governance, both its potential and known shortcomings. The objective is to set out an argument for ways in which this further technique might provide a basis for developing regulation which is both more effective and more efficient, without losing sight of the need for legitimacy.

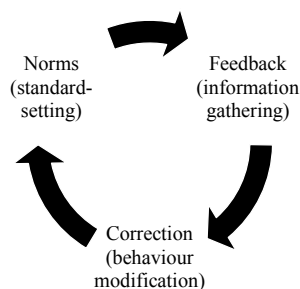
2. Regulation and Its Challenges

2.1 Regulation

The steering of organisational and individual behaviour is a central challenge of contemporary governance. Regulation is both a core solution and a core problem. As a policy solution regulation is attractive because it is relatively inexpensive and transparent as a means to demonstrate that governments are being responsive to policy problems as diverse as environmental degradation, anti-competitive behaviour, dangerous products, misleading commercial practice, problems of employment rights, risky financial behaviour and even the behaviour of governments themselves over such matters as human rights.

Regulation is a key instrument of contemporary governance involving the setting of norms, together with mechanisms of feedback and correction (figure 1). In the US system these different elements were combined from the late nineteenth century in independent regulatory agencies with powers to make rules, to monitor for compliance and to enforce where they found breaches. Within Europe and other OECD member states regulation experienced a policy boom from the 1980s, not only seeing a surge in the establishment of regulatory agencies, but also a recognition of the significance of regulatory modes of governance which deploy monitoring and enforcement of compliance with rules as their core mode, with or without specialised oversight agencies. It became apparent that governance through rules and oversight was not novel in Europe in this period, though its deployment was growing. Rather, long-established institutions and practices had become identified as a distinctive regulatory mode of governance.

Fig.1 Key Regulatory Functions



2.2 Challenges of Regulation

A core premise of regulation is that it is possible to steer behaviour in reasonably predictable ways. Long experience suggests that highly prescriptive approaches to regulation are frequently ineffective or even counterproductive. One reason for this is that we show considerable ingenuity in turning demands to change our behaviour to suit our own interests rather than meeting the public interest. It is difficult to set down in rules with sufficient specificity the behaviour or outcome that is required. Or, somewhat distinctly, the standard that can be set down in a rule has poor congruence to the outcome that is required.

A second reason of regulation being ineffective is that governments frequently have limited knowledge about the behaviours to be steered and limited capacity for monitoring and enforcement. Agencies have addressed these problems with prioritisation strategies and selective enforcement which call into question the uniformity with which regulatory law is enforced. In the case of the global financial crisis there is a significant debate as to whether the regulatory dimension of the failures was a product of regulation which was overambitious in the reassurance that it could provide as to the risks created in financial markets or that regulation was insufficiently prescriptive, because it was based on principles rather than rules.

3. The Limits of Classic Regulation

3.1 Diffusion of Formal Regulatory Powers

A central idea in contemporary regulatory scholarship is that it is unrealistic and unhelpful to conceive of regulatory power being concentrated in independent state agencies. Even in those jurisdictions (including most of the OECD member states) where there is significant experience in delegating some powers to regulatory agencies the capacity for action by those regulators is often limited. This is first because formal powers are often shared, with ministers and legislatures frequently retaining power to make or call in rules and with powers to apply formal sanctions frequently requiring application to a court through costly processes of litigation. The existence of these shared powers, whether or not they are frequently deployed clearly limits the capacity of agencies to act alone. The effects of diffusion of formal regulatory capacity are further accentuated by the powers to make regulatory norms and to monitor implementation held by supranational organisations, centrally the European Union institutions, within the EU, but also within other international regimes such as that of the World Trade Organisation. The European Commission, in particular, acknowledges limits in its capacity, and seeks to foster engagement and learning in its regimes through the development of networks.

3.2 Diffusion of Informal and Private Power

The observation that power is commonly shared within regulatory regimes is further strengthened when we consider informal power. Informal power in regulatory regimes derives from the possession of key information and also financial resources by, amongst others, regulated organisations and also non-governmental organisations (NGOs).

Furthermore, state regulatory capacity is often not the only show in town. In many important areas of the modern economies, there is implicit or explicit delegation to the private or self-regulatory capacity of firms, trade associations, standard-setting bodies and so on. Such private regulatory capacity operates both at national and transnational level. Whilst such capacity may be delegated in

statute, it may also derive from varied forms of contractual arrangements, both bilateral and multilateral.

3.3 Regulatory Capitalism

These observations about the diffusion of regulatory capacity, referred to by Braithwaite, Levi-Faur and others as constituting 'regulatory capitalism', do not neglect the important trend towards the growth in numbers of regulatory agencies across most OECD member states, and also the growth in rules in many sectors of the economy. Rather regulatory capitalism locates the growth in regulatory agencies and rules within broader phenomena of diffused governance as a means to understand why we might expect classic regulation through agencies to be of limited effect and to enable us to consider how it is, in practice, supplemented by other institutions and practices.

3.4 Learning in Regulatory Capitalism

Regulatory capitalism offers a diffused model of regulatory governance in which, for most regimes and policy domains, we should not expect one agency or organisation to be very powerful in what it can command others to do. Rather, relationships within regulatory regimes are often characterised as involving a high degree of interdependence, such that the capacity of one organisation to act effectively is dependent on the actions of others. Each organisation may feel it has a substantial degree of autonomy, albeit constrained by the capacity of others. This is most obviously true in respect of the classic relationship between a regulatory agencies and a regulatee where the outcomes of the regime are shaped by the conduct of both sets of actors, in responses both to each other and varied aspects of the environment in which they operate.

If the capacity for control is limited for each of the various organisations involved then they need to orient themselves around some other mode of action. I suggest that is just as useful to orient action around learning as control. Learning here includes learning about the power and capacity of others, their incentives for action, their preference and motivations, and how one might key into these in order to stimulate an appropriate response. The imperative for learning applies as much to regulatees and third parties as it does to regulators, since each has the capacity to do things, such as supplying information, which will affect the others and secure a behavioural response.

4. Applying Meta-Regulation

4.1 Meta-Regulation and the Role of the State in Regulatory Capitalism

If it is correct that relationships within regulatory regimes are best characterised as interdependent then this begs the question what is the appropriate role of the state? If it unrealistic to expect regulation always to exert detailed control over organisations targeted for regulation, then what role is left? Observations about regulatory capitalism do suggest that state organisations should be more modest in their expectations as to what they can achieve through direct control. But these observations are also suggestive of a significant role for the state in steering or orchestrating activity within regulatory regimes. In some sectors it may be possible to encourage the emergence or development of forms of self-regulatory or private capacity. This kind of activity, the regulation of self-regulation, has been termed 'meta-regulation' by Parker and others.

4.2 Meta-Regulatory Regimes

Private regimes offer the advantage of strong industry knowledge, support for the regime from the industry, and reduced cost for the state. The private actors might learn more about their

preferences for regulation and market advantages flowing from private regulation, such as the reassurance and confidence which it gives to users of their products and services. Risks of cartelization, and pursuit of self-interest are often likely to be present. A key role for the state exists in overseeing private regulation, either implicitly, for example through threats of legislation ('the shadow of hierarchy') or explicitly through establishing an oversight regulator to oversee the exercise of delegated powers. Such oversight can be achieved through empowering the oversight regulator to request changes to private rules or to challenge directly or through the courts decisions concerning the application of sanctions to regulated organisations found to be in breach of the rules.

4.3 Examples of Meta-Regulation

Numerous examples of regimes which deploy some form of meta-regulation can be found both at national and supranational level. These regimes are characterised by a central role for private organisations such as firms and associations in establishing the regime and/or setting the norms or standards and/or monitoring and enforcing for compliance. The involvement of the state includes implicit encouragement or observation and more formal and institutionalised oversight. Examples include corporate social responsibility (Box 1), professional regulation (Box 2), advertising self-regulation (Box 3), and the EU regulation of commercial practices (Box 4).

Box 1 Corporate Social Responsibility

Moves towards encouraging businesses to engage in practices of corporate social responsibility (CSR) have engaged the state in soft encouragement to businesses to engage in more responsible business practices in respect of such matters as the environment and human rights. A somewhat harder mechanism sees states requiring companies to specify what they have done about CSR (without necessarily requiring firms to undertake any particular actions). These soft and harder measures create an environment which encourages firms to learn about market advantages in engaging in CSR and to engage in surveillance and benchmarking against the activities of others in their sector with the potential for laggards to learn from leaders.

Box 2 Professional Self Regulation

Strong traditions of self-regulation in professions such as healthcare and law have increasingly been challenged in many countries, partly in response to scandals, and partly as part of a wider pattern of reduced deference to professional judgement. Changes which seek to provide stronger reassurance about professional regulation do not necessarily involving sweeping away self-regulation. A number of Australian states have introduced public regulators with a statutory role to oversee aspects of setting and enforcing professional codes by professional organisations in the legal sector. The UK has introduced a meta-regulatory public body to oversee professional codes and complaints practices administered by professional councils in the health professions. Such developments retain many of the strengths of self- or professional regulation, whilst providing public reassurance

Box 3 Advertising Self-Regulation

Many industrialised countries engage some degree of self-regulation to address matters both of taste and accuracy in the practices of the advertising industry. Though regimes are varied they typically involve the setting of codes (often based on the Consolidated International Chamber of Commerce Code on Marketing and Advertising). The UK regime administered by the Advertising Standards Authority (ASA) originated in market concerns about the reputation of the industry in face of concerns about the legitimacy of the techniques deployed to sell products. But successive UK governments have encouraged the ASA to develop both the content and processes in respect of codes and complaints so as to steer the regime in such a way that public objectives for advertising regulation can be met. Thus there is an implicit delegation of public power, recognised as such by the courts. This confidence in the private regime for advertising was attested to by a decision to extend the ASA remit by supplementing its non-statutory powers over print advertising with the explicit delegation of statutory powers over broadcast advertising. Within the EU the European Commission has been willing to engage with self-regulation of advertising and recognise its key role in providing reassurance over compliance with advertising standards. The legitimacy and effectiveness of self-regulation at national level is significantly bolstered by participation in the activities of a network coordinated by the European Advertising Standards Alliance.

Box 4 EU Regulation of Commercial Practices

Many businesses within the European Union market their products with a claim to be a member of and/or to follow the requirements of a particular code of practice, typically set by a trade association. The EU Unfair Commercial Practices Directive includes amongst its misleading actions 'non-compliance by a trader with commitments contained in codes of conduct by which the trader has undertaken to be bound' where the trader has undertaken to be bound by a code and its commitments are not simply aspirational (2005/29/EC, art 6(2)(b)). This measure requires member states to apply sanctions for such misleading actions. This oversight does not set any minimum requirements for self-regulatory codes, but rather holds businesses to their commitments to follow them. For this reason the technique is very much meta-regulatory.

5. Conclusion

5.1 Policy Implications

5.1.1 A More Modest Role for the State

The analysis offered in this brief is suggestive of a more modest role for the state in the way it thinks about regulatory control. But, equally, it offers an enhanced role for the state in observing, learning about and steering regulatory capacity which is held by others. It creates a challenge to be creative about recognising how the capacity not only of businesses, but also NGOs and government organisations can be deployed to achieve public objectives, not through direct control, but rather through indirect steering. This may be done using formal powers of oversight and delegation, or the informal capacity of government to collect and deploy information. Such an approach raises challenges not only in demonstrating effectiveness but also ensuring legitimacy of actions that involve both public and private action in regulatory regimes.

5.1.2 Assuring Legitimacy

Virtually any traditional or remodelled version of regulatory governance raises significant problems of legitimacy. In the case of the regulatory agency model, it is typically a key characteristic of the regime that it should operate at arms-length from elected government, with limited capacity for ministerial direction. This insulation is designed to permit agencies to implement efficient regulatory strategies without interference which might be driven by short-term political concerns. An alternative which emphasises the capacity of regulated actors to set, monitor and enforce norms over themselves is perhaps even more vulnerable to questioning on the democratic grounds that elected government is not even responsible for such matters as appointment and calling to account. Accordingly any discussion of 'meta-regulation', the steering of self-regulatory capacity, as an alternative to traditional regulation must address the problem of democratic governance. The assignment of monitoring and steering capacity to public agencies or government departments may provide part of the answer. A more radical solution is to begin to conceive of regimes as creating their own community of stakeholders within which a form of democracy, engaging all those affected,

might be effectively developed. Examples of such democratic governance at the level of particular regulatory regimes are suggestive, but limited to date.

5.2 Implications for Research

5.2.1 Effects and Effectiveness

For researchers, there is much that is not well understood about the effects and effectiveness of regulatory regimes. Research should be undertaken to compare the effects of well-defined meta-regulatory regimes across sectors and across jurisdictions to better understand the conditions under which both the primary regulatory activity and the steering and oversight might be expected to be effective. Equally such research might shed light on the kinds of conditions under which meta-regulation is unlikely to be effective and where direct control by government through ministries or agencies, ‘mega-regulation’, might be more effective.

5.2.2 Legitimacy

A second set of challenges relate better addressing the legitimacy issues associated with regimes in which a good deal of power is delegated, implicitly or explicitly, to private actors and understanding the conditions under which a function form of democratic governance for such regimes might emerge and be recognised as such. The potential pay-off for identifying a source of legitimacy for non-state governance at the regime level is that this might permit us to think of effective meta-regulation which does not engage the state in the oversight role, but rather deploys the techniques associated with market or community activity in giving regulated actors reasons to be effective in their setting, monitoring and enforcing of norms.

5.3 Implications for Training the Lawyer of the Future

Lawyers of the future will require fresh approaches to legal doctrine and a stronger understanding the limits to their capacity as lawyers in order to better understand their role in this complex, interdependent regulatory environments.

5.3.1 Legal Doctrine and Legal Pluralism

At the level of doctrine, domestic public law must be located alongside contractual rules and practices which underpin many private regulatory arrangements and related dispute resolution, and which are frequently transnational in effects. A key lens for understanding competing normative legal orders is offered by legal pluralism with its questioning of the form and sources of law in regulatory governance and beyond. Such an approach assists not only in understanding the effects of law in regulatory regimes, but also in seeking the sources of legitimacy for regulatory governance which deviates significantly from traditional models rooted in administrative law.

5.3.2 The Regulatory Environment and the Sociological Citizen

It is of great significance that lawyers understand the limits to legal powers in regulatory governance. The ability to locate oneself and one’s capacity for action, interdependent with the capacity of others, requires us to stimulate a form of what Silbey and colleagues refer to as ‘sociological citizenship’ in those who are going to be effective at what they do. Being effective

in an environment where powers are diffused requires lawyers to learn about what others can do and how that capacity can be harnessed. Tomorrow's lawyers will frequently deploy skills both of analysis and negotiation.

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Biography

Colin Scott is Dean of Law and Professor of EU Regulation & Governance at University College Dublin. He was previously a Professor in the College of Europe, Bruges, a Reader in Law at the London School of Economics and Senior Fellow in Public Law at the Australian National University Research School of Social Sciences. His main research interests are in the field of regulatory governance. He has undertaken research projects on regulating the public sector (funded by the UK Economic and Social Research Council), communications regulation (funded by the Leverhulme Trust), reflexive governance (funded by EU 6th Framework Programme) and transnational private regulation (funded by the Hague Institute for Internationalization of Law). He has published articles with many of the leading legal and interdisciplinary journals and is author, co-author, editor or co-editor of eleven books. He is a co-editor of *Legal Studies* and was programme chair for the ECPR Standing Group on Regulatory Governance Biennial Conference in 2010, held in Dublin.