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Regulatory Excellence via Multiple Rationalities

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*“All of them are right; what is wrong
is only what they deny, not what they affirm”*
(Kaplan, 1964: 28–30).

The search for organizational excellence, while commendable on moral grounds, is prone for disappointment. Disappointments may emerge both because there are many and sometime conflicting dimensions of excellence and because there are many organizational roads for excellence. Some of these roads are more familiar and promising than others, but some are also riskier and more uncertain. This is because excellence itself is a polymorphous concept; there are simply too many dimensions of excellence.

My contention here is that the amalgamation of three trends: agency independence; expert-based decision-making, and risk-centered approaches creates a trilemma in the search for excellence. And consequently this amalgamation may multiply the risks of governance failure and produce new uncertainties. Mine is not a call for institutional conservatism, stagnation, or incrementalism. Instead, my aim is to advance a strategy for excellence via careful institutional design and investment in an open and deliberative environment within autonomous rather than independent organizations. The emphasis of regulators should be on crafting institutional designs that allows their organizations to be “really autonomous” via the nurturing of autonomy and diversity of experts and expertise. This approach, as will become evident, reflects a clear preference to promote excellence of organizational capacities rather or before the promotion of excellence in outcomes.

Professional domination, mono-rationality, and tunnel vision are common pathologies of organizations. What this essay does is to assert that organizations that are knowledge-oriented are more susceptible to these pathologies. In addition, it asserts that this propensity for failure is increasing when the organization adopts risk regulation and emphasizes excellence. My aim is to focus on the ability and capacity to bring together diverse kinds of expertise into the decision-making process and in this way to allow different and multiple rationalities to play out within the organization. I then distinguish between independent and autonomous agencies, portraying the first as part of the problem, while the later as part of the solution.

This essay first surveys the current set of practices and disciplines involved in the regulatory governance of agencies and how career patterns define the expertise balance and composition of agencies and organizations more generally. I then discuss how three particular ways of thinking can improve the set of views and expertise for

better regulatory governance. I conclude the discussion with questions around how to embed diverse knowledge and perspectives into the workings of regulatory agencies and organizations.

I. The Trilemma of Excellence

Agency independence, expert-based decision making, and risk-based regulation are three very useful strategies for excellence. Still, when they come together they may represent a trilemma and a challenge for good regulatory governance. Let us start with agency independence from direct political control. Independence increasingly has become the “gold standard” for regulatory excellence and *sine qua non* for excellent performance and outcomes. For example, central bank independence, together with the expectation that these central banks will adopt increasingly narrow mission goals, led the way in the 1980s and 1990s as one of the most important reforms in the structure of the state and fostered in other regulatory realms the creation of hundreds of so called “independent regulatory agencies” (Levi-Faur, 2005; Jordana et al., 2011). The model that originated in the financial sector (central banks and the supervision of stock exchange) now dominates the regulatory organization of the state and signifies the rise of the regulatory state and the diffusion and transplantation of agencies in numerous spheres and nations around the world. Independence, and “agencification” more generally, are supposed to shield expert decision making from undue influence and prevent two important kinds of capture: capture by politicians and capture by business. Capture biases the decision making process within agencies and therefore the public policy process more generally. Accountability, transparency, and regulatory competition are often proposed, and rightly so, in order to reduce the vulnerability of agencies to capture. Nothing of this sort is usually taken in the institutional designs of agencies. The risks of professional dominance or even “professional capture” are not commonly considered central to the agency mission and design. What one should consider more seriously, I assert, is the tendency of professions to monopolize “jurisdictions” and thus to capture the agency. The probability of agency capture by one profession may increase with the increase in agency independence on the one hand and the strengthening of the role and functions of experts in policy processes.

Not many, especially in our academic circles, would dispute the suggestion that a necessary condition for a best-in-class regulator is “world-class knowledge” and access to “world class experts.” More than at any time in the past, we live in a “knowledge economy” and “knowledge society,” which favors “reason-based” political and organizational processes. Even if one does not personally accept these suggestions, I doubt many would dispute the argument that current social, economic, and political processes (not to mention scientific and technological processes) are clear taking government in this direction. In many respects, this is evident in the rise of special type of expert: the “regulocrats.” Like bureaucrats, the regulocrats build on their superior expertise when compared to non-specialists. Still, unlike many of the post-war bureaucrats, the regulocrats of today have one leg in their professional group — be it engineering, planning, law, economics, public administration, management, sociology, or science. Not only do the regulocrats regulate rather than provide services and manage delivery, but they also have an affiliation to professional groups and peers outside the state and their organization that was rare among the class of post-war bureaucrats. (There are, of course, differences across nations and sectors.)

Still, knowledge, rationality, and reason are always mediated (not to say mobilized or abused) by political processes within and outside organizations. It is common to contrast experts *versus* politicians and to bring forward the tensions inherent in democratic policy making, where different types of legitimacy and authority are conflicting. These tensions are real and should be discussed in any analysis of regulatory policy making. Still, our focus here is not on the black-and-white dichotomy between the experts and the politicians. Professionals have political skills and use them frequently even if they do not “run” for office (cf. Wilson, 1980). Experts are involved with political struggles within and outside their professions. These struggles represent legitimate and even useful competition between ideas as long as they do not result in “professional domination” and a culture of unreflective knowledge and mono-rationality.

Perhaps the best example of professional domination nowadays is the hegemony that economists enjoy in regulatory policy (Dezalay & Garth, 2002; Fourcade, 2009). This hegemony is expressed in their pro-privatization, pro-market, and pro-liberalization recommendations in many economic spheres, including finance, where other points of view and rationalities are only presented on a limited basis. Still, the challenges of professional domination are not confined to the role of the economists. They unfold in struggles such as managers *vs* physicians; physicians *vs* nurses; psychiatrists *vs* psychologists; psychiatrists *vs* social workers; engineers *vs*. lawyers; lawyers *vs*. field workers; planners *vs*. engineers; and so forth. The claims for hegemony and the boundaries set for a monopoly in different “jurisdictions” are clearly a characteristic of the processes of professionalization and expert led decision making. Abraham Kaplan, in *The Conduct of Inquiry* (1964), observes:

In addition to the social pressures from the scientific community there is also at work a very human trait of individual scientists. I call it the law of the instrument, and it may be formulated as follows: Give a small boy a hammer, and he will find that everything he encounters needs pounding. It comes as no particular surprise to discover that a scientist formulates problems in a way which requires for their solution just those techniques in which he himself is especially skilled.... The fragmentation of a science into ‘schools’ is by no means unknown even in as rigorous a discipline as mathematics; what is striking in behavioral science is how unsympathetic and even how hostile to one another such schools often are.... For the experimentalist science progresses only in the laboratory; the theoretician views experiments rather as guides and tests for his models and theories; others see the most important task making counts and measures, or arriving at predictions, or formulating explanations; the field worker and clinician have still other viewpoints. All of them are right; what is wrong is only what they deny, not what they affirm. (Kaplan, 1964: 28–30)¹

The suggestions that experts have interests, are competing for hegemony, and suffer from tunnel vision will not be strange to sociologists of the professions such as Abbott (1988) or political economists who worked on the politics of knowledge and the relations between politics, think tanks, and the distributive allocation of

¹ I thank Clinton T. Brass for the reference

positions and funding to certain professions and rationalities on the expense of others (Levi-Faur, 2005). They are also confirmed by studies of “institutional logic” that compete for attention and prominence and are studied mainly by institutional sociologists (e.g., McPherson and Sauder, 2013).

Agency independence and expert-based decision making are increasingly accompanied by the adaptation of risk-based approaches to regulation and governance (Hutter, 2001). Risk approaches are nowadays, and in contrast to the less recent past, “promoted as a universal organizing concept for improving the quality, efficiency, and rationality of governance” (Rotstein et al., 2013, 215). Risk regulation prioritizes some harm over others and requires the calculation of probabilities and impact of potential adverse outcomes. The criteria for regulatory action are not normative or legal, but utilitarian. Like any other imperialist approaches for governance, risk regulation creates its own privileged actors, institutional arrangements, and requirements for decision making and divisions. Experts with high capacities in econometrics and mathematical modeling are privileged as risks are being caudated, frameworks for risk assessment are being introduced to organization, new roles of risk officers are being carved into the organizational structure, and new debate and challenges around terms such as “the precautionary principle” emerge. Risk regulation is fascinating phenomenon and so is the new and innovative understanding of the state role as “risk manager” (Moss, 2004). One important element in the debate around risk regulation that is rarely being discussed, however, is that it increases the reliance on experts in the decision making process and that its strong reliance on modeling and econometrics increases the dangers of professional dominance.

How is all of this relevant to our search for policies that promote excellence? My suggestion is to avoid professional dominance, mono-rationality, and tunnel vision in favor of institutional designs that protect, promote, and nurture the diverse ecology of expertise. The next section of the paper therefore turns the attention to some constructive proposals for excellence in regulatory governance via the diversification of expertise and the managed competition of ideas, perspectives, and rationalities.

II. Excellence in Regulatory Capacities

Managed competition of ideas recognizes the need to balance dominant expertise and rationalities by careful institutional design that protects the less privileged forms of expertise within the organizational space and hierarchies. I focus my attention on professions such as criminology, history and political science that are either not commonly found in regulatory agencies or alternatively are not privileged within their hierarchies and discursive domains. In other words, my emphasis here is not only on the diversification of expertise but also on identifying the type of institutional design that will maximize free and informed competition between ideas.

II.1 Do we need a “chief criminologist” in regulatory agencies?

There are many reasons why the Securities and Exchange Commission (SEC) failed again and again in the prevention and timely action against fraudulent behavior in high-profile cases such as Enron, Bernie Madoff, and AIG. One plausible reason,

according to William K. Black (2004), is that the regulators thought like “auditors” not like “criminologists.” The SEC, and the government agencies that were supposed to support it, were also under the dark spell of the idea that rules against fraud are not essential or even necessary because financial markets are efficient. Black’s argument aligns well with the idea of the rise of the new regulatory state and the transformation of criminology going hand in hand with the demand for more and new criminological knowledge (Bayley and Shearing, 1996; Braithwaite, 2000).

There were times when criminology was mainly about social deviance, “street-level” individual crimes, deterrence, prisons, and punishment. But not anymore. The agenda of the criminology profession nowadays includes compliance, the emergence of social norms, corporate crimes, white-collar crimes, a wide range of mechanisms for dispute settlements, and a wide range of enforcement strategies, such as naming and shaming. What criminologists bring to the regulatory process is an understanding of deviant behavior and compliance strategies in organizations. In this regard, they have perspectives, capacities, and types of knowledge that are highly relevant to regulatory agencies that prioritize compliance, whether with finance and antitrust rules or with food safety and other forms of risk regulation. Perhaps a “chief criminologist” could not have prevented the Enron, Madoff, and other recent financial scandals. Still, the rationale for institutionalizing the function of a chief criminologist in regulatory agencies is strong enough to allow us to turn the question around and ask: How come and why do criminologists not occupy more prominent positions in regulatory agencies?

II.2 *Do we need a “chief historian” in regulatory agencies?*

While we all know in some detail, or are expected to know, the histories of our respective countries, only some of us know well the histories of our organizations, and even fewer of us systemically and authoritatively use lessons from our organizations’ histories in decision making and argumentation. Does history matter in organizational life? If so, do organizations think “historically”? And what are the costs and benefits involved in thinking historically?

My argument is that historical learning, reasoning, and awareness should be incorporated more systematically into the strategic processes and practices of the decision making of excellent regulators. Such a practice may make present-minded and future-oriented regulators more effective policy makers. Historians are the custodians of an organization’s memory, that is, the collection of events, decisions, procedures, and conflicts that define the inside and outside of the organization from the moment it was first conceived. Such a job is probably better taken with a comparison to other organizations and with an eye toward political, economic, and social developments that shape its legitimacy, capacities, and legal and political mandates. We need organizational history in order to avoid the mistakes of the past and to extend our views and understanding of the options for action and inaction at any given moment. To do so, we need to actively form strong “organizational memories” and use the processes that create and enhance organizational memory in a manner that will allow the regulators and regulatory agencies to actively connect their “memory” to current practices of “knowledge management” and decision making.

Organizational history can also help form a strong organizational identity. By “strong,” I mean preferably not in terms of manipulated image and thus the abuse of disciplinary tools, but strong in the sense of possessing a reflexive understanding of the organization’s history. Such an identity-building process should allow flexibility and adaptation in the organizational identity itself. The benefits of a strong organizational identity include the promotion of organizational ethos and commitment to the basic values and goals of the organization. Both organizational memory and organizational identity may facilitate the role of regulatory organizations as learning organizations. At the same time, that may help the organization to meet its basic intellectual and social legitimacy concerns. The intellectual awareness and capacities of a historian may enhance the regulators’ courage to speak the truth to people in power.

On top of the service that historians can make to fostering organizational memory and identity, and therefore setting the groundwork for better processes and organizational learning, we need “chief historians” because historical reasoning or thinking is useful to decision-making. “Historical analysis,” we are told, “lacks the predictive precision that is usually claimed by quantitative or social science models. What it offers instead is a systematic way to understand the changing context of organizations, communities, and policies within which planners pursue their profession” (Abbott and Alder, 1988, 472).

The question then comes up about how to make historical knowledge more prominent in the life of organizations. The next question is then how to make historical knowledge more prominent in the life of organizations. Obviously, these are not easy questions to answer. For sure, this is a job that should not be trusted only to the “chief archivist” of the organization. The “chief historian” job in organizations should be elevated from the basement to the higher floors. The challenge is not only to apply historical analysis, but also to do it right.

II.3 *Do we need a “chief political scientist” in regulatory agencies?*

There are various and many ways in which a “chief political scientist” may be useful in regulatory agencies. The most obvious is in designing political strategy at the regulatory, parliamentary, and judicial arenas. Still, I’d like to focus my attention here on a particular function that I find especially important. The increasing role of regulation in the policy-making process and the accompanying process of professionalization of policy making require us to think differently and creatively on the political process and the meaning of democracy. The expectations for democratic control via transparency, mechanisms of accountability to many stakeholders, and for direct and open participation in the agencies’ life, decision, implementation, and evaluation processes require new institutional designs. The experts in these institutional designs are often political scientists. They can and should be able to integrate democratic innovation such as deliberative polls, town meetings, e-democracy, and citizen juries. In doing so, they not only add democratic criteria to the assessment of the agency’s performance but also turn attention from measures of output legitimacy to process and input legitimacy.

III. Conclusions

To summarize, when we consider how to promote excellence, we should also consider how excellence may change the composition of the agency's diversified stock of expertise. To the extent that such a process of expansion in the role of experts is possible, one should consider the challenges that can arise when only a limited kind of expertise exists in an agency. These challenges—professional domination, mono-rationality, and tunnel vision—are serious enough even without concrete and concentrated efforts to apply risk-based regulation and to maximize excellence. Public policy processes in general and the regulatory processes in particular are increasingly expert-dominated. The growing tendency to recommend risk regulation as a best practice in regulatory decision making increases even more the dominance of certain type of experts, often economists with advance technical capacities in econometrics, statistics, and modeling techniques. Agency independence increases these problems and challenges as it may secure the position of dominant profession and its monopoly on decision making within its respective jurisdiction. To overcome the problems associated with such dominance, I have suggested that regulators had better design institutions that allow other professions creative and useful roles in regulatory decision-making, implementation, and evaluation.

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