



What Makes A Regulator Excellent? A Risk Regulation Perspective

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Regulation is extraordinarily difficult. It is about balancing and achieving multiple objectives (<https://www.law.upenn.edu/institutes/ppr/bestinclassregulator/>) and balancing multiple interest groups/stakeholders. Excellence might be viewed differently depending on where you stand, for example, as a member of the public or as a business, and when and where you ask the question. This is because regulatory objectives and interests not only vary between groups but they also vary across time and across countries. Excellent regulators need to be able to handle this complex and shifting landscape, one that is often not of their own making.

This paper will consider these issues from the perspective of risk regulation, the view that a crucial feature of regulation is that it attempts to control and manage risk (Hood et al, 2001). This is itself a situated view, developing in the 1990s in the social science literature and since then emerging as a distinctive interdisciplinary area which bridges regulation and risk management studies across a number of social science disciplines¹. It partly reflects a more general trend to view the world and make sense of it through the lens of risk. It has also emerged alongside changes in regulatory practice. This paper will first consider some of the reasons for the emergence of this perspective and why it has become so prominent, and then consider the implications of this for regulatory excellence.

Risk Regulation and Excellence: Anticipation

For many social scientists risk regulation is a very modern phenomenon, a real expression of what some have termed the ‘risk society’ (Beck, 1992). This is a society in which there is an orientation to the future and a belief that we can control and manage risks (Bernstein 1996; Giddens 1999). Moreover it is a society in which risk has become a key organizing concept (Power, 2007). Excellent regulators, it follows, aspire to satisfy demands for the anticipation and control of risks. These are very great expectations and arguably unreasonable expectations which come to the fore when things go wrong and regulators are blamed for not foreseeing events (Haines, 2011; Hutter 2011). There are many examples of this, ranging from the financial crisis to terrorist events: witness the emerging debate about whether the French police and intelligence services should have predicted the Charlie Hebdo murders² or the 9/11 Commission’s pronouncement that the intelligence agencies and governments had failed to prevent the attacks because of failures of ‘imagination’ (Zelikow et al, 2004, Chapter 11).

It is partly for these reasons that many regulatory regimes have turned to explicitly design their operations in terms of systematic risk assessment and prioritization (Black 2005; Hutter 2005). The adoption of apparently rational, objective and transparent ways of prioritizing work and deploying limited regulatory resources may be appealed to should a crisis require defensive measures to avoid blame and liability (Black, 2005). But this move also arises from

¹ See generally Hutter 2006 for an account of the development of this perspective.

² For example, <http://time.com/3667663/charlie-hebdo-attack-terrorism-intelligence/>

other contemporary imperatives which define excellent regulation, some of which are discussed under the generic title of the 'New Public Management' (Hood, 1991), including the adoption of risk based approaches by public sector departments. Excellent regulators thus become defined as excellent risk managers. They are also adept at dealing with the associated so-called 'better regulation' agendas.

There have been repeated deregulatory initiatives since 1980s using the changing language of burden, deregulation, better regulation, and regulatory impact (Dodds, 2006). The costs and benefits of regulation have explicitly been at the centre of these debates in the form of normative claims about 'burdens' and 'red tape'. In policy terms these concerns have become encoded in cost benefit analyses, regulatory impact assessments and to some extent risk based regulation which also incorporates calculative and probabilistic thinking about regulation (see below). These technocratic, apparently rational, approaches aim to make regulation more efficient, rational and fair and in so doing they disguise some of the very real political and ethical decision-making that lies at the heart of regulation.

Risk Regulation and Organizational Risk Management

There are a variety of ways in which regulatory and risk management templates have blurred. The most fundamental is through the use of risk assessment tools by regulators, especially those derived from natural science and economics. More recently some jurisdictions have mandated a more general move to risk based approaches as a way of organising regulatory activities. In the UK for example, the Hampton Report (2005) on 'effective inspection and enforcement' led to risk based regulation becoming the cornerstone of Treasury recommendations for regulation and the Legislative and Regulatory Reform Act, 2006, enshrined the Hampton principles, making them mandatory.

There is no firm definition of risk based regulation but it generally includes a commitment to a risk- based philosophy which translates into a framework for governance, organising regulatory work, and agency resources. It involves the formalization of regulation through the employment of technical risk- based tools emerging out of economics, for example, cost-benefit approaches, and science, for example, risk assessment techniques (Hutter 2005). As such, it usually involves cycles of risk identification, measurement, mitigation, control and monitoring. Risks are identified and assessed, a ranking or score is assigned on the basis of this assessment, and inspection and enforcement is undertaken on the basis of these scores (Black 2010). It is a systematic approach which takes a holistic view of regulation and risk management and conceptualise risks as interrelated to each other, as having potential consequences for broader economic, social and political environments.

Excellence in this context places numerous demands on regulators. These include demands that regulators have access to accurate information so that they have a clear idea of the risks they are regulating. This is not always as clear cut as some presume. At a technical level the past is not always a good predictor of the future, for example, with respect to environmental risks climate change may well be increasing the incidence and patterns of natural disasters thus rendering their incidence and location less predictable. At a political level science can become embroiled in politics, for example, 'Climategate' which involved a politically motivated challenge to the status of scientific evidence and expert knowledge relating to climate change. It may be

difficult to secure a robust evidence base. It is also crucial that regulators have staff with the technical skills to use risk based tools. They need to be able to critically appraise the value and validity of available data sources and be able to manage and integrate various data sources. They also need the skills to interpret the data and act on the basis of it (Lloyd- Bostock and Hutter, 2013). In short regulatory excellence requires good data, analytical rigour and good judgement.

But regulation is not just a matter of technical excellence, far from it. As Mary Douglas (1992) explained in her seminal work on risk, while risk assessments may be presented as scientific and neutral they are also inherently moral and political. Regulation involves choices about the distribution of resources, for example, the relative value given to individual or collective goods, and the ways these may be reflected in the technical tools of risk based regulation. Determining acceptable costs in cost benefit analyses has been a matter of dispute, the argument being that indirect costs and benefits are rarely considered, and that the interpretation of the figures depends upon perspective (Ackerman and Heinzerling, 2004). Even if the causes and costs of risk are clear, acceptable risk must still be defined, and that is essentially a political decision. Similarly fundamental questions such as how much weighting should be given to potential impact, how much to probability, and how much weight should be given to public opinion are not simple technical questions. They are inherently political.

Risk regulation and Interests/Politics

Being an excellent regulator is in many senses aspirational but it also needs to be pragmatic and realistic. Risk regulation is a messy world where the regulator is seen by some as ‘the fall guy’ in a system where governments distance themselves from difficult, sometimes irreconcilable problems, and so feel free to criticize the decisions made by regulators (Douglas, 1992). Regulators may be criticized for being too harsh when things are calm and being too lax when risks have been realized. An excellent regulator has to have their eyes open to this. Governments and politicians are fickle. While they speak anti regulation rhetoric they can be quick to regulate post disaster and to create complicated meta- regulatory structures, including ‘better regulation’ and ‘deregulation’ organizations, the net effect of which has been to increase regulation (Braithwaite, 2008; Jordana et al, 2009).

Excellent regulators learn to deal with the ambivalence that is encoded in the word regulation: it is about management not elimination, about control and restriction, but also adaptation and flexibility, about balancing risk against other factors. It does so in the interests of markets, organizations, stakeholders, consumers and also the economy and global economy. These may not always share common objectives hence regulation can be a balancing act. The job is about balancing various interests and risks and negotiating partisan interests. Excellence means managing this balancing act and the series of difficult issues associated with it, so it demands impartiality.

The regulatory process holds many risks for regulators and the regulated alike (Hutter, 2010). There are the risks of either not regulating serious problems or over regulating small risks. Regulators need to judge when to intervene and when they should leave organizations to get on with managing risks on their own. This involves appreciating the complexities of so-called stakeholder groups – businesses vary enormously in their regulatory capacity and views towards regulation. The public is not a homogeneous grouping either, there are many publics

with different risk concerns and varying risk appetites which can change, most notably in response to accidents. Excellent regulators need to be adept at managing both groups.

There a variety of factors which explain variations in businesses' capacity to manage the risks they generate, for example, motivational factors, organizational capacity, and changing circumstances (Parker and Neilson, 2011). The optimal solution is to align, where possible, regulatory and organizational interests. In some sectors there may be a 'natural' alignment of interests, for example, a major risk event could mean the destruction of a site and the possibility of going out of business. This does not necessarily mean that the business has the capability to manage but it does at least have high motivation to do so. At the organizational level this may be mirrored by seeking solutions to compliance problems which align with wider interests. A simple example: for many decades railways and regulators struggled to get workers to wear high visibility vests when working on or near the tracks; this was solved by providing comfortable protective clothing which was totally high visibility. Excellent regulators help to facilitate these solutions and this includes leveraging a wide range of motivations to manage risks, for example, reputational issues, education, and the threat of legal sanction³.

The public is an even more disparate group than business. It may be organized, as in the case of green markets for example, but this is atypical. Yet regulators hold an important duty, sometimes explicit, sometimes implied, to protect the public. This presents another set of regulatory risks which excellent regulators need to be able to negotiate. For example, there are fine lines between enabling choice, directing choice and restricting choice. Regulators need to be careful not to be seen to endorse particular products but to provide impartial, evidence based advice, they also need to be careful not to take responsibilities for risks caused by others. Excellent regulators need to be adept at selecting policies and regulatory tools but they also need to be adept at communicating these. And this also means being able to communicate the intricacies of the legal and possibly financial constraints under which they operate and very importantly their political neutrality. One means of aiding this, which has been increasingly advocated, is to be transparent about the decisions made, in particular to be open about the reasoning used to make regulatory decisions (Lodge, 2004). This is in fact one of the rationales and attractions of risk based regulation (Hutter 2005) but experience shows us that transparency does not necessarily protect regulators from criticism or indeed blame should things go wrong. Partly for this reason excellent regulators also need to think through their crisis management and contingency planning.

A Final Note

Regulatory excellence is difficult in a national context but in a transnational context things are greatly exacerbated. 21st Century regulators need to be able to operate on a world stage. They are increasingly being asked to regulate risks which are transnational and have no national boundaries. In this context excellent regulators need to scale up all of the above to grasp the complexities, technical, moral and political, on a global scale. In this context excellent regulators should be:

³ This is at the heart of 'smart regulation' (Gunningham and Grabosky, 1998) and also responsive regulation (Ayres and Braithwaite 1992).

- seen to set high standards of risk regulation
- set good models which are recognized to be exemplary and
- other countries want to follow
- engage in- and lead – transnational discussions
- and preferably be highly regarded in their own countries.

We live in a global world where risks, and the demands on regulatory excellence are fast expanding, and embracing transnational co-operation and negotiation demands excellent diplomatic skills

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