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Regulatory Excellence and Lucidity

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The excellent regulator performs in a manner that raises it above the merely satisfactory or competent agency. The hallmark of such excellence, it will be argued here, is lucidity – a clarity of approach in delivering on the essential tasks of regulation. The notion of regulatory lucidity is set out in more detail below and an explanation given of both the challenges encountered in pursuing lucidity and some of the strategies that regulators can adopt in order to rise to those challenges. Around the world regulators increasingly adopt “risk-based” approaches to regulation, it will accordingly, also be asked whether regulatory excellence poses special challenges and calls for particular responses in such regimes.

Regulatory Excellence as Lucidity

There is a difference of kind between the satisfactory and the excellent regulator and this distinction turns on the lucidity with which the latter regulator will discharge the array of tasks that it is charged to perform. The excellent regulator, on such a view, is marked out by a level of conscious clarity that is systemic and sustained.

This lucidity, or conscious clarity, will be marked, in the excellent regulator, by three key qualities. In delivering the appropriate regulatory outcomes effectively and at lowest cost they will be *attuned* to their settings so that they are heedful of such matters as differences in ideas and approaches, the constraints imposed by cultural and institutional settings, and the potential of different regulatory options. Overall, they will be highly conscious of the challenges that they face. They will be *intelligent* in that they know precisely what they are setting out to achieve; they operate systems that allow them to process information expertly so as to assess their own performance and to explain their actions to stakeholders and those to whom they are accountable. Such intelligence is thus inward and outward looking insofar as it serves as a basis for both ensuring that the regulator’s own tactics are appropriate and for explaining and justifying regulatory actions to those inside and beyond the agency.

Lucid regulators will also be *dynamic* and display both a sensitivity to changes in their regulatory environments and an ability to adapt their regime to such changes.¹ The excellent regulator, moreover, will not only perform well currently but will offer assurance to regulatory stakeholders that such a level of performance is likely to continue into the future. It will do so by being able to show that it has developed high levels of institutional competence across all aspects of its work activities. This contrasts with the position in which the regulator relies on a charismatic leader rather than the deployment of a highly skilled team. (Where an organization’s performance depends on an individual, who may depart from the agency, this will not offer institutional assurance.)

Regulatory excellence, accordingly, involves both excellence in performance and in institutional qualities or characteristics. For reasons of space, however, the discussion below is confined to the issue of excellence in performance.

The excellent regulator will perform extremely well across the whole array of activities that it carries out. Lucidity, accordingly, will be demonstrated by the excellent regulator in discharging all of the essential regulatory tasks in an effective way: in setting *objectives*; producing appropriate *substantive outcomes*; and serving *representative values* through processes that further such matters as accountability, procedural fairness, and justification.

Why is excellence to be judged in relation to these three tasks? First, the setting of *objectives* underpins and gives focus to all of a regulator's activities and it provides a basis for stakeholders to plan their affairs. For this reason, setting objectives can be seen as a fundamental deliverable of regulation rather than a mere means to an end. It is an activity, moreover, that the excellent regulator will perform in a manner that is seen as legitimate by affected parties.

As for appropriate *substantive outcomes*, delivery of these might be considered at first glance to be the core measure of regulatory performance. If a regulator produces the mandated outcomes (at non-excessive cost), why be concerned about anything else? We might be happy with this situation if the nature of such results was uncontentious and the regulatory mandate for these results was clear and beyond contention. The reality, however, is that regulators' mandates tend to be imprecise and malleable, dynamic and contentious. These features mean that parties who are affected by regulation will demand the serving of *representative values* so that they can participate fairly and adequately in the construction, development and implementation of mandates. They will, accordingly, want regulatory processes to be fair and open, transparent, and accountable.²

Regulators will face a series of challenges in setting objectives, delivering appropriate substantive outcomes, and serving representative outcomes. The key to excellence lies in meeting those challenges lucidly through approaches that are attuned, intelligent, and dynamic.

Lucidity in Setting Objectives and Delivering Substantive Outcomes

Excellent regulators will establish their objectives with lucidity but in doing so they will confront a number of hurdles. A lucid regulator's first need is to stay attuned to the challenges that it faces.

Challenges

It is normal for regulators to be charged to further outcomes that are imprecisely defined. There are a number of familiar reasons why this is so. Legislatures and governments may know that there is a problem that needs to be controlled through regulation but they will have limited expertise in analyzing that problem; they will normally not have information on how the problem will develop; and they will recognize the need to give the regulator a degree of discretion that will allow them to deal with issues as they arise.

In relation to many issues, there will be multiple views on the nature of the problem to be addressed and the objectives that the regulator should be pursuing. A core difficulty for most regulators is that different groupings of regulated concerns will differ markedly in what they see as the legitimate objectives of the regulator and what constitutes “satisfactory,” “good,” or “excellent” regulation. Producers and consumers, large and small concerns, for instance, will often diverge markedly in their views on objectives and mandates, and the regulatory mandate will not have been defined in legislation in a manner that resolves such differences of conception. As a result, debates over the regulator’s objectives may involve considerable contention and what the mandate calls for may be uncertain.

Regulatory excellence demands that such uncertainties are resolved in a clear, effective, and acceptable manner. That this may be no easy task is demonstrated by considering an example. Many regulators around the world are charged to further sustainable outcomes, or to encourage sustainable development, or to recognize the value of sustainability.³ Sustainability, however, is a principle understood in so many ways, that covers so many disciplines,⁴ values and time-periods⁵ that setting objectives with clarity is difficult. These challenges are compounded by priorities that are at tension as well as evidential uncertainties on central issues.⁶ They are perhaps at the severe end of the scale of regulatory difficulty but similar hurdles are encountered by the many regulators who are called upon to pursue such broadly-stated ends as “the public interest” or “the satisfaction of reasonable consumer demands.”

With many broadly-stated objectives, a first issue is *content* – what is the meaning of the notion of such concepts as “sustainability” or “the public interest”? Different regulated concerns and interests are likely, as noted, to have their own readings of the mandates that are set out in legislative form, and a first difficulty for any regulator is to produce a vision of the mandate that will be acceptable across the array of affected parties and external observers. A further challenge arises where different disciplines or conceptual frameworks offer varying approaches to key objectives. In the case of sustainability, for instance, economic, environmental, and social perspectives offer their own separate approaches to the formulation of sustainability objectives and the relative priorities of economic, environmental, and social considerations is often unclear. Multiple objectives and values may be implicated, with trade-offs between present and future gains and losses. There is no readily available, un-contentious way to deal with such matters as the balance between the needs of today’s less affluent consumers and the environmental interests of future generations.⁷

Where numbers of regulators are involved in an area, it may be extremely difficult to ensure that all of these subscribe to a common conception of the values or the objectives in question.⁸ When, moreover, there are such contests, this presents powerful regulated concerns with considerable opportunities to grasp the initiative in defining the objectives of a given regime.⁹ In “meta-regulatory” regimes that delegate front-line risk management functions to corporate operators, there is a special danger that those operators will seek to further conceptions of regulatory objectives that are self-serving.¹⁰

A further regulatory challenge can arise when the very idea that objectives can be established with some precision is contested. Thus, Bob Gibson and his colleagues argue that the principle of sustainability offers no clear prioritising or resolution of conflicts between criteria to

be taken into account in decisions but a set of, sometimes imprecisely defined, desiderata that are to be adverted to in a variety of ways and which will not necessarily prevail over other values and objectives.¹¹

Regulatory excellence demands not merely that the content of objectives is captured clearly, it calls for clear thinking on the *status and force*, and *role*, of mandated objectives. Thus, regulators need to avoid confusion on whether the objectives being set are legally binding, whether they are intended to have a degree of precision that underpins implementation, or whether they merely set out values to be accorded respect in decisions and policies. Further issues include whether the objectives serve to found enforceable rights or merely set aspirations down on paper.¹² The excellent regulator must also be certain whether a relevant aim is a principal or a secondary objective. The role of the objectives must be clearly envisaged insofar as the regulator knows whether they apply generally or to specific projects, institutions, and policy areas only.

All of the above difficulties are compounded by data challenges and evidential uncertainties. Regulators have to collect and analyze data in order to set objectives and operationalize these, but this may not be easy in some sectors or in relation to some risks. In the case of sustainability, for instance, valuations of future social and environmental effects – such as intra-generational equity and conservation of bio-diversity – are especially difficult to quantify and even current data levels often stand in the way of setting sustainability objectives.¹³

These kinds of difficulties are added to when multiple governmental departments and agencies are involved in a regulated activity and they collect data by different methods and according to different framing values and assumptions. When, moreover, regulators have to render account to other institutions, the ways in which they engage in dialogue with different bodies will impact, *inter alia*, on the ways in which they construct arguments and use information.¹⁴ For many regulators, the sheer number of institutions (governmental and non-governmental, public and private) that have interests in the issues they address is likely to produce pressure to conceive of objectives in a plethora of ways. This point, it should be noted, applies not merely to relationships that are based on formal duties to render account; it has force whenever regulators engage in collaborative relationships with other institutions, engage in routine conversations with them, or seek legitimation from them. A further problem that regulators may face when they seek to set out their objectives is that domestic and supranational courts are likely to have an impact on this front and may offer their own binding vision of objectives. All such pressures stand in the way of clear and consistent understandings of aims.¹⁵

A further set of challenges arises when regulatory objectives are set within political and governmental priorities, or business conditions, that are volatile. In such scenarios, even the most highly legitimate of regulatory objectives have to be adjusted in order to maintain credibility or to adapt to market changes. A core challenge here is to balance two conflicting appetites of regulatory stakeholders: for changes that will meet new expectations or economic circumstances and for the stability that allows businesses and others to plan their investments and affairs.¹⁶

Even where government contexts are not volatile, regulators may have to deal with the efforts of governments to take over the task of bringing objectives into focus. One governmental

strategy that is designed to foster precision in regulatory missions is the promulgation of binding governmental guidance for regulators. The idea here is that central government office holders can flesh out legislative objectives in an authoritative and democratic manner so that regulators are assisted in working to aims that have some certainty.

This is a system that has been deployed in a host of areas, including the UK environment sector, but experience in the latter area reveals that this is not a device that guarantees regulators an easy route to lucidity. In that domain, a system of statutory guidance was deployed in an effort to give content to statutory obligations on sustainability. The Secretary of State for Environment, Food and Rural Affairs was required under section 4 of the Environment Act 1995 to issue legally binding guidance to the UK Environment Agency on what the Secretary of State saw as an appropriate contribution to sustainable development. The Agency was bound to follow this guidance in pursuing Agency objectives.

The 2002 Statutory Guidance, however, made manifest the difficulties involved in giving content to a broad notion such as that of furthering sustainable development. A central difficulty was that the Agency's objectives did not, in themselves, flesh out any general concept of sustainable development. Some objectives referred to sustainability, some referred to the need to conserve certain resources, and many objectives were stated without reference to sustainability.

In this instance, questions of *status and force*, as well as *role*, compounded the difficulties of establishing the *content* of objectives. At some points, the Agency's obligation to further sustainability called on the Agency to produce certain outcomes; at other points it seemed to demand the serving of certain values, or the Government's policy objectives. The Government's Guidance, indeed, did not so much instruct the agency to follow a particular approach to sustainable development as to suggest that the Secretary of State's position on the appropriate Agency contribution to sustainable development was revealed by referring to the Government's sustainable development objectives as set out in a White Paper.¹⁷

The difficulty was that the objectives referred to did not offer a great deal of help on *content, status and force, or role*. They played political policy as well as legal roles and they did not so much offer an approach to understanding the legal requirements of sustainable development as provide a cryptic list of ten policies to be considered in making policy. The Secretary of State's guidelines thus did little to assist the Agency in giving clear content to the objective of furthering sustainable development.¹⁸

The above account is thus an example of a failure to facilitate regulatory lucidity through the production of governmental guidelines on regulatory objectives. In the case recounted, the guidelines did not so much help the regulator to render objectives more clear as to offer a cascade of sub-principles and sub-objectives that purportedly derive from the highest level of principle and whose status and force as well as role was uncertain. For the excellent regulator, the challenge is to produce clarity of vision in the face of such governmental inputs.

Turning to the delivery of appropriate substantive outcomes, the excellent regulator will build on clearly identified and legitimated objectives before gathering information about problems, issues, and challenges that need to be overcome to further those objectives.¹⁹

Regulatory excellence then demands devising positive strategies for dealing with identified problems and applying these strategies on the ground so as to modify behavior when necessary to produce desired outcomes at lowest feasible cost.

When gathering information on issues and problems, regulators are very often confronted by institutional structures and constraints that hinder detection and information collection, and which add to the difficulties of collecting data, especially in relation to issues as that are intrinsically complex and contestable (such as matters of equity between generations or classes of consumer). Poor institutional co-ordination will impede information gathering,²⁰ as will any differences of view on objectives that stem from differences between cultures and disciplines.²¹

With respect to the development of strategies, special challenges arise when there are varying conceptions regarding the *content, status and force*, and *role* of the values and objectives to be furthered. In relation to the example of sustainability, for instance, such variations will impact on strategic choices: parties who see sustainability in political terms, for instance, will not see enforcement choices in the same way as those who see the principle as legally binding. Where numbers of agencies and departments are involved in an area, individual institutions may be wedded to particular intervention strategies and, again, this may stand in the way of coherent and co-ordinated approaches to strategic design.

Many of the challenges that regulators encounter in developing strategies will also be faced when interventions are made in order to modify behavior. Thus, the methods used to apply any given intervention tool may be subject to contestation. In any regulatory intervention regime, it is difficult to ensure that common conceptions of risks, problems, and approaches can be fostered across organizational levels (or across horizontal divisions of departments).²² When regulatory objectives are highly prone to contestation and competing conceptions, the challenges just noted will be all the more severe, as will those of producing performance indicators with secure foundations. A similar point can be made regarding regulatory efforts to respond to changes in a dynamic fashion: where objectives are contested, regulators often have to negotiate of numbers of settlements between many parties and the need to engage in complex renegotiations is an impediment to dynamism.

Responding to Challenges

The excellent regulator will, as noted, be aware of the above challenges and will respond to these lucidly by adopting attuned, intelligent, and dynamic approaches. In establishing clear objectives, lucidity demands an awareness that a variety of conceptions of objectives must be accommodated. How can this be done so that legitimate conceptions of objectives are developed and sustained by regulators? Numbers of commentators have suggested that the way forward lies in developing procedures for consultation and policy development that allow, so far as possible, agreed conceptions to be generated in the face of differences of discourse and interests.²³

An early pioneer of this approach in the UK utility sector was Don Cruickshank who, as Director-General of Oftel, the telecommunications regulator, instituted a practice in the 1990s of publishing the draft Annual Management Plan of Oftel and consulting stakeholders on it. The

aim of this strategy was to enhance transparency and foster legitimation of the regulator's vision of its annual objectives. The agency reported:

There has been public debate on the work programme contents prior to publication. All interested parties were invited to comment on the shape, content and focus of this year's Management Plan. This process culminated in a well-attended public meeting. The public discussion by a regulator of its intended work plan is unique but we have found it to be an extremely valuable process and one I would recommend to others. This draft has benefited significantly from the constructive input of both consumers and companies and thus will ensure that Oftel makes the best use of limited resources.²⁴

There is considerable potential in such approaches but it is one thing for a regulator to develop and legitimize a statement of high level regulatory objectives; it is another to ensure that such conceptions of aims are promulgated consistently through the regulatory organization and across the various co-regulators (public and private) and governmental levels (corporation, state, local and supranational) that are involved in controlling an activity or industry. The lucid regulator will be attuned to this issue and will develop and implement strategies for ensuring cross-organizational consistency of aims.

The basis for making a lucid case for the regulator's vision of objectives is not just staying attuned to differences of viewpoint; it is intelligence and dynamism. The excellent regulator will build on a strong, evidence-based analysis of issues and there will be a dynamic aspect to the setting of objectives insofar as the lucid regulator will operate systems that are sensitive to *changes* in expectations, preferences, political constraints, and other aspects of the regulatory environment. This will mean that objectives are adjusted where necessary to cope with these mutations.

Overall, a key mark of the excellent regulator will be the ability to produce a statement of objectives that is clear about not merely the content of those objectives (what they demand) but also about their force and status as well as their role and scope. The excellent regulator, moreover, will be sensitive to the need to adjust objectives where necessary.

On the matter of producing substantive outcomes, lucidity calls, again, for an awareness of the challenges noted above, and for approaches that are attuned, intelligent, and dynamic. Successful information gathering activities have to take on board the reality that different organizations and interests will gather and supply information in divergent ways, on different assumptions. The lucid regulator will address such challenges with appropriate strategies, such as by, perhaps, activating steps to bring greater consistency to information collection. Intelligence will be displayed through expert analysis of data and, as with the construction of objectives, there will be an addressing of the difficulties caused by divergent approaches, uncertainties of evidence, and needs to adjust to change in a responsive manner. In the sustainability field, for instance, feedback systems have been said to be an especially effective way for the intelligent and dynamic regulator to address the indeterminacies of sustainability related policies.²⁵

In developing strategies and applying these on the ground so as to produce desired results at lowest cost, lucidity means that the regulator will deploy intervention strategies in a way that takes on board the varying sensitivities of different regulated concerns and the need to customize intervention approaches so as to maximize their effectiveness and positive impact. Intelligence and dynamism will be displayed by the lucid regulator through identifying regulatory strategies, priorities, and intervention methods in a way that is supported by a high quality analysis of relevant evidence, which is sensitive to changes in markets, preferences and so on, and which commands support across the agency and within the body of regulated concerns as far as this is feasible. Such strategies and identified priorities will also provide the lucid regulator with a basis for both performance evaluation and the adoption of any required regulatory changes.

Serving Representative Values

The more that regulators face indeterminacies in the content, status and force, or role of their mandated objectives, the greater the challenges they confront when they seek to both serve representative values appropriately and demonstrate that they have done so.

Challenges

It is especially difficult for a regulator who faces high levels of indeterminacy in objectives to convince parties of its fairness. Complexities in, and contests over, unresolved mandates provide myriad opportunities for powerful parties to influence regulatory approaches and actions in a self-serving manner. Accusations of substantive bias are liable, accordingly, to be difficult to defend against.

As for procedural fairness, a special difficulty that many regulators face is that they operate within decentered, fragmented regulatory regimes in which interests and claims are made by a very wide range of methods.²⁶ This makes it very difficult to create assurances of procedural fairness because comparisons cannot readily be made on a single plane; there is, simply, little obvious procedural equivalence. Similar issues arise in relation to fairness of access and participation. A message that is open and transparent to one kind of stakeholder may be opaque to another type. Again, the need to render account and justify regulatory actions involves mirroring challenges since account is often rendered through a host of different types of conversations or claims.

Responding to Challenges

The lucid regulator will respond to the above challenges in a manner that is attuned, intelligent, and dynamic. Such a regulator will, accordingly, seek to demonstrate *substantive* fairness by showing that decisions and policies properly take on board and respect the interests of affected parties. It will have the evidence in hand to demonstrate the paying of such respect, and it will ensure that its abilities to justify its actions will sustain over changes that impact on the regulatory environment.

The lucid regulator will respond to the need to show *procedural* fairness by attuning itself to the different procedural standpoints of its various stakeholders. It will deal with those

stakeholders through a variety of procedures but will take all feasible steps to demonstrate that those procedures are equivalent in their procedural fairness and will lay emphasis on such matters as ensuring the representativeness of those who have access to its processes, and the equivalence of opportunities to impact on outcomes. The lucid regulator will also take steps to ensure informational fairness and will be prepared to act in a facilitative role so that it assists and enables participation where this is necessary for the required equivalence (where necessary by packaging information in the form best most digestible for the party at issue). It may involve using best offices to organize negotiations and settlements between parties of different positions so that disagreements are minimized. Such efforts, moreover, will seek to straddle institutional divisions so that access to one decision or policy-maker is not devalued by perceived exclusion from the processes of other agencies that are involved in the regulatory issue.

The lucid regulator will, moreover, be clear on the need for dynamism and will be quick to act on changes that affect the fairness of participation. Thus, where a newly complex issue enters the agenda, excellence in regulation will involve the taking of rapid steps to ensure that this new complexity does not exclude certain parties from the relevant processes.

The lucid regulator will respond to issues of access and participation in an attuned and intelligent way and will be prepared to ensure not only that interested parties are identified comprehensively but that it develops and applies processes and information systems that facilitate understandings by the full range of stakeholders. This may require a good deal of bespoke interaction, and the resource implications of this will need to be kept in mind. Also considered, and addressed, will be the dangers that transparency in some aspects of a decision or policy may be undermined by activities within the control of another regulatory body. The dynamism of the lucid regulator will demand that fresh routes to transparency will have to be developed as new kinds of issue come on to sustainability agendas.

In rendering account, regulatory lucidity will demand, in the first place, that the regulator remain attuned to institutional context so that that the different kinds of holders to account will be responded to with the appropriately tailored message. Securing strong justification is, however, a severe challenge for any regulator who faces such factors as indeterminacies, regime complexities, evidential uncertainties, vulnerabilities to change, and high levels of contestability. The intelligent regulator will focus on the need to collect information of the kinds and extent that will maximize the potential to make convincing justificatory claims and the dynamic agency will see the process of justification as an ongoing project that is subject to constant change.

Risk-Based Regulation and Excellence

As noted at the start, very many regulators operate “risk-based” regimes in which analyses of risks guide the regulators’ interventions. This prompts the question whether regulatory lucidity poses special challenges when a regulator operates a risk-based regime. It is arguably the case that this may be the case in a number of contexts and respects, and that regulatory excellence calls for attention to those special challenges.

In setting operational objectives, risk-based regulators have to work from their overall objectives down to key risk objectives so that risk-based assessments can be undertaken. If the

regulator in question is charged to deal with risks that involve high levels of indeterminacy (such as “risks to sustainability”) this is likely to mean, in the first instance, that identifying key risks is liable to be subject to supra-normal levels of contention. The argument that this may prove more difficult than merely identifying key objectives is that the selection of a particular basket of risks exposes the regulator to more acute political pressures than would otherwise be the case – an argument made in some jurisdictions in relation to the pre-financial crisis financial regulator.²⁷

Problems may also be encountered in adjusting risk priorities. The danger in all risk-based systems is that of “model myopia” and the tendency to over-commit to the existing model of risks so that updating does not take place.²⁸ In circumstances where the regulators need to engage in extensive deliberative procedures so as to create broad buy-in to a particular set of risk identifications, adapting to change will be all the more difficult as the hard-earned settlements and agreements that underpin regulation will have to be unpacked. Regulatory resistance to such unpacking may thus combine with model myopia to render their regimes doubly unresponsive to change.

In seeking to deliver the right substantive outcomes, difficulties can arise when a risk-based regulator seeks to attune its interventions to cultural variations and to tailor intervention methods to different operators’ varying understandings of regulatory objectives. Risk-based regulation focuses on identifying the operators that require priority attention (the high risks), it says little about the modes of intervention required and such a focus on targeting may draw the eye away from choices of intervention style – which may be highly contentious.

It is also the case that numerous risks are systemic in nature; they often arise because of cumulations of pressures from pervasive or multiple sources. As was seen in the financial crisis of 2007 onwards, however, the logic of risk-based regulation may naturally focus attention on individual “silos of risk” so that systemic or cumulative risks become neglected. In numbers of regulatory fields, moreover, what constitutes a systemic risk is also contestable (by different operators and regulators alike), a factor that compounds an already considerable difficulty. The more that the regulatory regime is a multi-agency affair, the more serious this problem is likely to be.

Risk-based regulators face special difficulties, furthermore, in measuring their own performance in delivering outcomes. Many control tasks are delegated to operating firms when risk-based regulators monitor operators’ risk management systems rather than take direct steps to control risks. In such “meta-regulatory” systems, the difficulty is that different actors will use different models or “codes” to evaluate risks and this renders risk evaluations complex and opaque. When there are significant cultural variations in the body of regulated parties, this will tend to make these difficulties all the greater.

Risk-based regulators may also find that ensuring that their staff act (and are seen to act) in a fair and consistent fashion comes at a significant price. Assessments of the risks presented by different operators involve the exercise of considerable levels of discretion. The more scope there is for judgment, the more difficult it will be to ensure consistency of approach. The processes for overseeing staff discretions may, accordingly, prove extremely costly and

centralized controls over these matters can, additionally, make the regulator slow to respond to changes in the regulatory challenges it faces.²⁹

As for the risk-based regulator's ability to render account and secure support, there may be further worries. The priorities that risk-based regulation demands may render the regulator especially vulnerable to political attack especially when there are significantly differing opinions on the content, status and force, and role of objectives. When some risks are not given priority, the regulator may be liable to censure from groupings or interests who see those risks to be central to their conceptions of appropriate regulatory objectives.

Clashes of regulatory logic may also impede the use of deliberative procedures to generate consent and support.³⁰ The logic of risk-based regulation is that risk analyses dictate priorities for intervention and the urgencies of intervention methods. In many regulated areas, however, it is necessary to engage in the careful negotiation of approaches and solutions in order to cope with the challenges discussed above (such as indeterminacies in content, status and force, and role of mandate, as well as evidential uncertainties and regime complexities). A good deal of deliberation and facilitation is often required if regulators are to retain the support across stakeholders that they need in order to secure desired outcomes.³¹ There is tension between the mechanical approach of risk-based regulation and the deliberative model necessary to deliver the goods in many areas of regulation.

Public expectations may also introduce a difficulty for risk-based regulators who face indeterminacies of mission. Risk-based regulation is often perceived as promising a technical, rational, systematic solution to control issues but where positions on objectives and risk priorities involve qualitative judgements, evidential uncertainties and indeterminacies, and a multiplicity of divergent opinions, all of these factors conduce to dramatic departures from this promise. Justifications are, moreover, not always strengthened by disclosures about risk priorities; these can have the effect of merely exposing the agency to further attacks for failures to attend to un-prioritized risks. Commitment to a risk model may, in addition, render the regulator un-responsive to stakeholders because it may blind the regulator to changes in various stakeholders' perceptions of priorities.

How, then, can excellence be achieved by the risk-based regulator? The answer is that the general approach adopted should correspond to that of any regulator, namely that challenges should be addressed in an attuned, intelligent, and dynamic fashion in pursuit of lucidity. Risk regulators, like any other regulator, must stay attuned to the hurdles that have to be overcome, whether the source arises from differences in stakeholder perspectives, political pressures, or whatever. In the case of risk-based regulation, the excellent regulator will seek especially to come to grips with such questions as how to select key risks, how to adjust the package of key risks, how to deal with systemic risks, how to gather the information necessary for intelligent assessments of performance, and how to adapt to change in a dynamic fashion. Finally, the lucid risk-based regulator will have a clear strategy for rendering account and justifying its risk priorities and actions – a strategy that meets the pressures that flow from often unrealistic expectations that risk-based systems offer clear-cut answers to regulatory questions.

Conclusion

The factor that marks regulatory excellence is lucidity, as manifested in a clear-sighted and highly-conscious approach to the array of regulatory tasks and challenges that are encountered. The lucid regulator will be attuned, intelligent, and dynamic across the full range of its activities. It will be aware of challenges, contexts, possibilities, and alternatives, and it will address debates over the proper regulatory objectives. It will build on the solid collection and analysis of evidence and it will not only be able to deliver effectively on the substantive and procedural fronts but will be well-placed and able to evaluate its own performance and explain its actions. It will, moreover, be consciously dynamic insofar as it will operate systems that allow it to appreciate any needs for change and to implement the steps needed to adjust its approaches accordingly.

Notes

¹ See Robert Baldwin and Julia Black, “Really Responsive Regulation,” *Modern Law Review*, vol. 71 (January 2008), pp. 59–94.

² See generally Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation* (Oxford University Press, 2nd ed., 2012), pp. 25–39.

³ In the UK, Ofwat, for instance, has a duty under the Water Industry Act 1991 (as amended) to “exercise and perform powers and duties...in the manner...best calculated to contribute to the achievement of sustainable development.” The word “sustainability” is not invariably employed. See, for example, the duty of the Alberta Energy Regulator under the *Responsible Energy Development Act* 2012. Section 2(1) states: “The mandate of the Regulator is (a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta.” The *Environmental Protection and Enhancement Act* (Alberta) recognizes the principle of sustainable development at section 2(c).

⁴ See, e.g., Bob Giddings, Bill Hopwood and Geoff O’Brien, “Environment, Economy and Society: Fitting them Together into Sustainable Development,” *Sustainable Development*, vol. 10 (November 2002), pp. 187–96.

⁵ Virginie Barral, “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm,” *European Journal of International Law*, vol. 23 (July 2012), pp. 377–400.

⁶ See evidence of the Country Land and Business Association to the House of Commons Environmental Audit Committee, *The Sustainable Development Strategy: Illusion or Reality?* (London, House of Commons, Thirteenth Report of 2003-4 Vol.II), Appendix 7, para. 5. In evidence reproduced in the same report, English Nature argues that: “We do not get the sense overall that Government policy making recognizes, or knows how to resolve, potentially

conflicting objectives” (Appendix 9, para. 4.3). See also Productivity Commission of Australia, *Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies* (Canberra, Inquiry Report 5), May 5, 1999, pp.7–9 (noting the difficulty of measuring costs and benefits far off in the future).

⁷ David Pearce, Anil Markandya and Edward Barbier, *Blueprint for a Green Economy*, (London: Earthscan Publications Ltd, 1989).

⁸ See Adrian Cashman, “Water Regulation and Sustainability 1997 – 2001” *Geoforum*, vol. 37 (July 2006), pp. 488–504. The Environmental Audit Committee in its Seventh Report censured Ofwat for demonizing environmental and quality investment by emphasizing its upward effects on prices.

⁹ “Discourses define what is important.” Cashman, “Water Regulation and Sustainability,” pp. 488–504. See also Gavin Bridge and Phil McManus, “Sticks and Stones: Environmental Narratives and Discursive Regulation in the Forestry and Mining Sectors” *Antipode*, vol. 32 (January 2000), pp. 10–47.

¹⁰ On meta-regulation generally, see Cary Coglianese and Jennifer Nash, *Regulating from the Inside* (Washington: Resources for the Future Press, 2001); Cary Coglianese and Jennifer Nash, *Leveraging the Private Sector* (Washington: Resources for the Future Press, 2010); Cary Coglianese and Evan Mendelson, “Meta-Regulation and Self-Regulation,” in *The Oxford Handbook on Regulation*, edited by Robert Baldwin, Martin Cave and Martin Lodge (Oxford University Press, 2010), pp. 146–68.

¹¹ Bob Gibson and others, *Sustainability Assessment: Criteria and Processes* (London: Earthscan, 2005), pp. 88-121.

¹² In the case of sustainability, for example, this is treated within many discourses as a principle of legal relevance but it can be treated as a policy objective only, or as a political or philosophical, rather than a legal principle. *Ibid.*

¹³ Ecologically Sustainable Development Working Group, *Final Report Fisheries* (Canberra: AGPS, 1991). See also Ronnie Harding (ed.), *Environmental Decision-Making: The Roles of Scientists, Engineers and the Public* (Sydney: Federation Press, 1998).

¹⁴ Julia Black, “Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes,” *Regulation & Governance*, vol. 2 (June 2008), pp. 137–64.

¹⁵ The courts, as yet, have to develop a strong role on sustainability issues, see Katia Opalka and Edward Myszka, “Sustainability and the Courts: A Snapshot of Canada in 2009” *Sustainable Development Law & Policy*, vol. 10 (Fall 2009), pp. 58–65; John Gillroy, “Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of ‘Environmental Sustainability’ in International Jurisprudence,” *Stanford Journal of International Law.*, vol. 42 (Winter 2006), pp. 1–52.

¹⁶ See generally Robert Baldwin, “Regulatory Stability and the Challenges of Re-regulation,” *Public Law* (April 2014), pp. 208–28.

¹⁷ As set out in the White Paper, *A Better Quality of Life: A Strategy for Sustainable Development in the UK* (London, TSO, CM 4345, 1999).

¹⁸ House of Commons Environmental Audit Committee, *The Sustainable Development Strategy: Illusion or Reality?* (London, House of Commons, Thirteenth Report of 2003-4 Vol.II).

¹⁹ On the importance of an adequate informational base see Productivity Commission of Australia, *Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies*, pp 15–16.

²⁰ See *ibid.*, pp. 14–15, 97.

²¹ *Ibid.*, p. 14.

²² See Robert Baldwin and Julia Black, “Risk Regulation: What’s the Problem?” (forthcoming).

²³ See, e.g., Derek Bell and Tim Gray, “The Ambiguous Role of the Environment Agency in England and Wales,” *Environmental Politics*, vol. 11(3) (Fall 2002), pp. 76–98; Gibson and others, *Sustainability Assessment: Criteria and Processes*, pp. 107–11.

²⁴ Oftel, *Draft Work Programme for 1998/9 and Beyond* (London: Oftel, 1998).

²⁵ Productivity Commission of Australia, *Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies*, p. xxx, available at <http://www.pc.gov.au/inquiries/completed/ecologically-sustainable-development/report/esd.pdf>.

²⁶ Black, “Constructing and contesting legitimacy and accountability in polycentric regulatory regimes,” pp. 137–64.

²⁷ See Julia Black, “Paradoxes and Failures: ‘New Governance’ Techniques and the Financial Crisis,” *Modern Law Review*, vol. 75 (November 2012), pp. 1037–63

²⁸ See Julia Black and Robert Baldwin, “Really Responsive Risk-Based Regulation,” *Law and Policy*, vol. 32 (April 2010), pp. 181–213, 189.

²⁹ *Ibid.*, p. 206.

³⁰ Ibid., p. 199.

³¹ See Productivity Commission of Australia, *Implementation of Ecologically Sustainable Development by Commonwealth Departments and Agencies*, pp. 97-122.

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