

IS REGULATION RIGHT?

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Most of us think it proper to study regulation but it is harder to say how regulation can be carried out properly. Regulators, indeed, seem to be on a hiding to nothing – they are routinely savaged in the press, they are seldom informed that they have got it right and hardly ever told what a balanced or successful regime of regulation would like. It is accordingly worth pausing to consider why regulators have such a rough ride, whether they can ever get it right, what sort of future they can look forward to.

The rough ride seemed to start when the public and commentators fell out of love with traditional command and control regulation. Until the seventies and eighties regulators in Britain and North America appeared to be highly respected as expert officials who acted in the public interest in controlling the behaviour of the private sector. Then discontent grew on a number of fronts: red tape and regulatory rules were objected to as over-intrusive; over-regulation was pointed out in all quarters; regulators were accused of capture - of acting not in the public's interest but in favour of the regulated industry or themselves and their own organisations. These concerns were reinforced with diminishing general faith in experts and a growing public appetite for accountability, reason-giving and transparency. Questions, moreover, were asked about traditional 'command' forms of regulation in which regulators set standards and enforced these. A plea went out for "less-restrictive" and "incentive-based" forms of regulation that would leave managers more free to manage, that would decrease the discretionary powers of regulators, that would free enterprises from red tape and let them breathe.

Into the nineties the trend continued and political parties of different persuasions carried on the quest for more accountability and transparency, less red tape and alternatives to command regimes such as increased reliance on self-regulatory methods. A new thrust was the urge to substitute competition for regulation whenever possible and life became still more difficult for regulators as they were subjected to cost-benefit testing by central government; individuals with distinctive approaches to utility regulation were attacked for the 'cult of personality' they fostered; European law placed a more intrusive hand on the wheel of British regulation; and the growing technical complexity of, and interconnection between, many regulatory regimes and risks made it increasingly difficult for regulators to explain themselves convincingly to the public. Modern regulators might feel that a host of cards are stacked against them and there are, indeed, a number of reasons why their lives will tend to be unsatisfactory.

For a start, the different functions that they are asked to carry out involve considerable and inescapable tensions. Regulators often have to decide how to allocate goods such as franchises and licences between different parties and they have to be seen to be doing this fairly. At the same time, however, they have to take into account their own long term plans and to act under a number of governmental constraints if they are to protect their budgets and develop the relevant sector. Fairness, as a result may not appear to be one of their high priorities. They will also have to make expert judgements, often in highly technical and dynamic fields, and the balancing of a host of arcane factors in such processes may again not sit easily with the notion that their decisions and policies should be made in an intelligible and open manner.

As far as transparency is concerned, regulators will also face two contradictory demands. On the one hand their regulatees and advisors (often accountancy firms) will demand that discretions are reduced and that regimes are made open, predictable and consistent with the rule of law. They will accordingly, demand the promulgation of guiding rules. On the other, the same individuals may complain that the regulatory rules they face are over-restrictive and strangling enterprise. They will, in addition, seek to take advantages of a key weakness of precise rules – their vulnerability to circumventing by those who can side step the rules with 'creative compliance' on the advice of astute advisors (often accountancy firms).

There is a fundamental tension, also, between the notion of disinterested regulatory action in the public interest and the reality that regulators have to live with their political masters. Nor, indeed, can regulators rely on Ministers to make their lives as easy as possible. Here there is an uncomfortable reality for regulators to face. Ministers are the individuals who are best placed to allow regulators to develop processes and strategies that will maximise the latter's public support and legitimacy. It is not, however, in the interests of Ministers to help to maximise regulators' legitimacy. Ministers, after all, know that they will often have public policy differences with regulators and they will be disinclined to increase the hands of their potential opponents beyond a comfortable point – better, they may think, to have that future public row with someone that the public distrusts.

In this difficult world it is easy to shoot down the regulators and the designers of regulatory systems. The processes of criticism that are indulged in may not, however, always be fair. Here it is worth drawing a few lessons from that most criticised of regulatory regimes – the one brought into effect by the Dangerous Dogs Act 1991. This is the system of control that is cited more than any other as an example of how not to go about regulating. The Blair Government's own Better Regulation Task Force cited the Dangerous Dogs regime as poor regulation made manifest.

If, however, we look more closely at the 'pit-bulls' regime a number of points emerge. First, this was a regulatory task of high intrinsic difficulty, notably because it is extremely hard to identify dangerous dogs as a class or to say with any precision what constitutes a pit-bull terrier. In the case of pit-bulls this is not a distinct breed of dog (merely a 'type') and no registration system is to be found. Attacks on humans, moreover, may be caused by less stigmatised breeds and there is the further large problem that (as Barbara Woodhouse would have said) the owner rather than the dog may be the real danger. To criticise the dangerous dogs regime as bad regulation may have involved a failure to take on board the intrinsic difficulty of the regulatory task and a reluctance to focus properly on the quality of regulatory craft displayed. In all regulatory assessments this distinction between difficulty and craft may have to be made.

A second point to emerge from the Dangerous Dogs Act experience is that governmental officials, Ministers and the public may often mis-assess regulatory performance in the distorting light of the given media response. With dangerous dogs there was a huge shift of media reactions that those in government found hard to cope with. Before the Dangerous Dogs Act was passed the media were full of stories of savaged children. Afterwards, the typical tabloid coverage involved a picture of an 'alleged' pit-bull behind bars and a headline on the lines: "Trudy on Death Row: Family Fight for Pet." Dangerous dogs regulation may not have been poor regulation so much as a Ministerial public relations disaster.

A third lesson to be gleaned from dangerous dogs is that regulators may find it difficult to gain whatever credit is due to them because the benchmarks upon which they are assessed are so numerous and confused. The Better Regulation Task Force (BRTF) criticised the dogs regime but if an attempt is made to apply to that regime the BRTF's own criteria for good regulation, we find that (if pitfalls to be avoided are taken into account) these criteria number into double figures. The regulator's problem, moreover, is that these criteria are all at tension and no guidance is given on how the various desiderata should be traded-off. On, say, the matter of accountability all regulators are told that this is a good thing but they have difficulty in knowing how much efficiency to trade-off in pursuit of whatever level of accountability is acceptable.

Does the above set of daunting difficulties suggest that regulators face only the most dismal of futures? One thing that is clear is that regulation will continue. Some commentators, such as Majone, talk of our moving into a 'regulatory state' in Europe in which statutory regulation tends to replace older forms of state intervention. Even traditional command regulation can look to a long life. Many of the 'less restrictive' alternatives to command systems (such as taxes and franchises) have been found to reproduce some fairly familiar difficulties: complex rules have to be written; enforcement has to be carried out; capture looms as a danger. There have been no easy 'incentive-based' answers to the old regulatory questions.

As for giving regulators appropriate credit, there are steps that can be and in some areas are being, taken to facilitate this. The problem of trade-offs can be responded to by making it clear what sort of compromises are acceptable and to be aimed for. This can be done by statements of objectives that can be ratified through disclosure and debate. Thus, regulators can publish work plans and policy objectives and can hear comments on these. This is a process that clarifies mandates and potential trade-offs – it has been developing in the utilities in recent years and the Utilities Act 2000 demands work plan publication at regular intervals. How far such strategies can work in technical fields of risk remains an issue, however.

Attention also has to be paid to areas of responsibility – to the issue of who is assessable for performance and on which fronts. To this end it is necessary to engage in further research on how regulatory regimes operate. Early interdisciplinary work on regimes by LSE CARR members suggests that a number of factors have to be borne in mind when assessing whether regulators have got it right.

First, if regimes are broken down into information gathering; standard setting and behaviour modification components we find that the quite different pressures and challenges affect those components. If, moreover, we focus on risk regulation, we find notable variations in regime characteristics across components. To take an example - of 'regulatory aggression' - the same regime may devote intensive pro-active attention to information-gathering but may have a half-hearted approach to behaviour-modification through enforcement. The significance for credit-giving here is that explanations and assessments of regulation that are offered across-the-board may prove highly simplistic and a more disaggregated approach may be necessary.

Second, a look at risk regulation regimes reveals a highly complex web of responsibilities. An institution may act to control a risk - say, the cancer risk arising from benzene in the air - but constructing 'the benzene risk regulation regime' is a complex matter because a host of controls from beyond that institution may act (directly or indirectly) to inhibit discharges (regulations on car exhaust manufacture may, for instance, control benzene levels).

Indeed, not only regulators' responsibilities overlap: the regulator and the regulated industry or firm may act jointly on a number of issues. The message again is that assessments of regulatory performance, questions of design, and analyses of regulatory developments have to take on board not only interactions between concurrent regimes but also the ways that regulators may act jointly with governments, regulatees and even consumers in achieving results.

Third, an examination of regulatory regimes through the lense of risk analysis emphasises that regulation, if properly carried out, will intervene in economic or social life at the appropriate stage of operations. In some risk areas this may involve precautionary activity and attempts to stop hazardous situations from arising. In other areas the astute regulator will act to control the dangerous situation that has already come into being. In relation to some risks, though, resources may best be used to deal with the harms that are caused when dangers produce undesired effects. This approach may involve punishing harm creators or attempts to improve the resilience of harm sufferers. The message here is that in evaluating regulation it is not enough to assess whether a given regime is being implemented efficiently – questions also have to be asked about the quality of the regulatory strategy being put into effect, about the possibility that action at an alternative stage of risk creation or harm causing would produce superior results.

Such concerns for design also prompt the question whether regulation rather than risk design and management within firms, or the body of consumers is the best response to the risk. In posing this question, moreover, it will be necessary to consider which stage of this process from risk creation to harm will best be responded to by the different strategies. Sophisticated assessors of regulatory performance will consider these issues in dealing out plaudits or adverse criticisms.

Giving regulators credit where this is due also means facing up to the difficulties of dealing with the lay public. Time has run out for regulators' claims to blind faith in their expertise – this will not be forthcoming. The challenge for regulators in coming years will be to deal with ever more complex issues and risks yet to find ways to engage with the public concerning those issues and risks. One means of doing this may be to institute the sort of mediation practices that some regulators now espouse – to see education, training and communication with the public as a core aspect of the regulatory function. Regulators, on this view, are established not merely to control and facilitate but to make policies, trade-offs and difficult choices intelligible to non-specialists.

To conclude, there are reasons for regulators to be nervous but not without hope. A number of structural realities and tensions mean that regulators will always be vulnerable to criticism. The challenges facing regulators become more severe as time passes and the guidance they have been given on performance has not been precise. There are nevertheless grounds for staving-off despair. Regulators and commentators are starting to come to grips with strategies for increasing the transparency and accountability of regulatory processes. There is growing awareness that mechanical, technical or 'objective' approaches to policymaking have to be replaced with more democratic procedures that allow 'irrational' expressions of preference, and lay voices a genuine role in regulation – particularly where risks are at issue.

As far as assessing the rightness of regulation is concerned, the future lies in understanding the complexities of regimes and in mapping out the respective roles of Ministers, regulators,

industry, pressure groups and consumers. Due credit can only be given if the full texture of regulation is taken on board. A broad strand of CARR work aims to contribute on that front.

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