

Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of Meta-regulation

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Meta-regulation has developed as a method of harnessing the self-regulatory capacity within regulated sites whilst retaining governmental authority in determining the goals and levels of risk reduction that regulation should achieved. This paper critically analyses the capacity of meta-regulation to resolve chronic regulatory challenges through subjecting the approach to a ‘characteristic’ analysis where the challenges of securing compliance are discussed in light of an appreciation of both the nature of regulatory policymaking as well as economic and social pressures that shape the normative orientation of a regulated site. Meta-regulation shows considerable potential, yet remains vulnerable because of its disassociation of compliance from context. The paper explores how under adverse conditions, the “regulation practice gap” widens and the rigour of a meta-regulatory approach may see it used as a political solution to a legitimacy problem rather than as a carefully thought through approach to an agreed upon critical risk.

Regulatory failures and ‘regulatory crises’ (Hancher and Moran 1998) often lead to successive reforms with public and political expectations that revisions and refinement will lead to “best practice” solutions, robust control mechanisms that will minimize the risk of harm (and in some cases tragedy) reoccurring. The setting for this paper is to explore one trajectory in regulatory policymaking, ‘meta-regulation’ (Parker 2002, Braithwaite 2000) and in particular meta-regulation as a response to high profile disasters. Under a meta-regulatory strategy, the aim is to enhance the self-regulatory capacity of organizations to achieve more than is legally required for regulatory compliance. To achieve this, meta-regulation requires regulated sites to work with key stakeholders (both inside and outside of the company) to develop risk management strategies that become, through requirements of registration and/or licencing, formal regulatory requirements for that site. This model allows regulators to ‘meta-regulate’, to monitor and assess the self-regulatory efforts of organizations and worksites. This approach to regulation fits well within a philosophy of government that sets the direction and goals for policy outcomes and monitors adherence to those goals. It is the regulated entity, however, (organization or workplace) that devises the means to reach the required level of risk reduction as stipulated by the regulator.

This form of regulation has many advantages, particularly where causes of harm are complex and require constant vigilance. The promise of meta-regulation as a response to catastrophic risk lies in its potential to bring together an organization’s understanding of risk and appropriate methods of risk reduction with the demands and expectations of the regulator. Nonetheless, even sophisticated regulatory responses that enhance the self-regulatory potential within organizations and worksites remain vulnerable at a number of

levels: through selectively addressing risks, by generating false expectations and in subverting social concerns and unease with promises that regulatory solutions can provide ‘win win’ outcomes to often complex social problems (see also Sunstein 2005, Gibbs 1996, Harvey 1989, Beck 1992).

It is necessary to understand that risk and the meta-regulatory approach to risk reduction exists in a contingent space. That is, the way certain risks are perceived and others ignored and the solutions that are seen to be appropriate or inappropriate depend in part on the nature of the precipitating event or ‘regulatory crisis’ that led to reform (Curran 1993, Kunreuther and Slovic 1996, Sunstein 2005), the particular economic and cultural context within which that event occurs (Selznick 1992, Douglas 1992) and political realities, collectively that shape which risk is dealt with and in what regulatory manner (Hall and Taylor 1996). The result of these contextual complexities means that no regulatory strategy (including meta-regulation) to any risk or harm can be anchored by an easy assumption that a particular approach represents the ‘best regulatory strategy’. Further, meta-regulation, like all regulatory solutions to risk runs into difficulties when assumptions are made about the capacity of a ‘problem solving’ approach to regulatory policymaking that views particular risks as amenable to amelioration without creating difficulties elsewhere (c.f. Sparrow 2000).

In its appraisal of meta-regulation this paper builds on and develops further a framework (termed regulatory character) that was generated to provide a means to bring together a practical enquiry into regulatory compliance with a reflective appreciation of how broader economic, cultural and political pressures affect the challenging task of regulation (Haines 2005, 2003). This earlier work on regulatory character is developed here both to integrate a broader literature base and to clarify the concept to allow assessments of regulation and regulatory compliance in a practical but academically defensible manner. Regulatory character is best understood as an heuristic device that concentrates attention both on the context within which compliance takes place whilst also taking account of how the regulatory solution itself is shaped by political, economic and social perceptions of risk.

In combining a concern with both the efficacy of a particular regulatory strategy with an appreciation of how that strategy was arrived at, regulatory character draws on several distinct literature bases. The first is literature concerned with various ways compliance can be maximized in order to achieve its goal of raising standards generally (see for example Ayres & Braithwaite 1992, Black 1997, Gunningham & Grabosky 1998, Parker 2002). In terms of this literature, regulatory character provides a means to understand how regulatory initiatives work in the ‘everydayness’ of organizational and individual activity. In particular, it concentrates attention on the independent impact of formal regulation, itself resulting from a particular political and bureaucratic milieu, as distinct from economic and social pressures that guide individuals and shape norms within a regulated entity.

In understanding the imperatives behind reform, regulatory character as developed here takes into account a diverse body of literature that questions the capacity of instrumental law to realize both its stated aims and to enhance ‘the public good’ more generally

(Teubner 1998, Scott 2004, Sunstein 2005, Habermas 1989a, Hall and Taylor 1996, Colomy 1998, DiMaggio & Powell, 1983). For authors such as these the easy appeal of applying more, and different forms of, regulation and enforcement strategies glosses over chronic underlying difficulties. A regulatory solution can be understood as a temporary fix to underlying tensions present in the society itself. Such pressures, identified variously as psychological (Sunstein 2005), economic (Harvey 1989) or systemic (Teubner 1998) mean that regulation can be understood as a symptomatic response to underlying societal stress, or an uneasy compromise between divergent interests (Hall and Taylor 1996). Thus, regulatory reforms following a crisis of some sort are neither inevitable, nor if they do occur particularly rational (Haines and Sutton 2003, Busch, Jorgens and Tews 2005). Regulatory reform does, however, have advantages¹ (over say, nationalization or removal of particular industries or activities) in that arguably it allows the maintenance of a market economy with its emphasis on competition, efficiency and small government whilst also maintaining political legitimacy to the extent that action has been taken (Braithwaite 2000). Essentially, regulation is a means of control that attempts to remove (or considerably reduce) targeted risks from a given activity (for example the risk of an explosion at a chemical plant) whilst maintaining the rewards such activity promises (whether in the form of particular products or services or the provision of employment and returns on investment).

Meta-regulation and the regulatory response to disasters

First, however, it is important to outline some examples of recent reforms that follow a meta-regulatory approach. Meta-regulation is a goal oriented, iterative and developmental process of rule generation where the goals are set by the regulator (i.e. the specific level of risk reduction that will be deemed acceptable), but where the generation of method to accomplish that outcome is developed by the regulated organization. Critically, the model sees the generation of those rules not purely as a “top-down” edict put in place by senior management, but rather a collaborative process. Personnel within organizations, together with key stakeholders develop processes and procedures for risk management whilst engendering “pro-compliance” motivational postures within the regulated site so that the risk reduction goal of the regulator will be achieved if not exceeded (Parker 2002). The ultimate aim of such an approach is that risk reduction in areas specified by the regulator will become institutionalized within the company, part of the nature and culture of the particular organization or worksite.

Under meta-regulatory strategies that have resulted from high profile events, such as industrial disasters, the organization or site develops a comprehensive strategy to minimize the particular risks demanded of them by the regulator, for which some form of licence or approval to operate is obtained. The licensee or approved organization is responsible for devising the ‘regulations’ by which it will abide (subject to regulatory scrutiny). Meta-regulation, then, develops further a trajectory well-canvassed by the regulatory literature, and is reflected in the discussion of various approaches such as co-regulation (Ayres & Braithwaite 1992), enforced self-regulation (Ayres & Braithwaite 1992; Fairman & Yapp 2005) and process or management-based regulation (Coglianese & Lazer 2003). ‘Meta-regulation’ with its collaborative approach to rule generation is arguably the most well developed of these approaches and incorporates elements of these

other approaches into a schema where the aim of the regulatory framework is designed to encourage the self regulatory impetus within a company in a defensible and accountable manner (Parker 2002 see in particular chapter 9). The general development towards a co-operative approach to rule generation (but not regulatory goal) has been identified as the way forward by some (Braithwaite 2000; Parker 2002; Coglianese & Lazer 2003; Hopkins & Wilkinson 2005), but for others yet another example of an organization ‘digging its own regulatory grave’ a new turn in what Teubner (1998) labelled juridification (Haines & Sutton 2003).

One specific regulatory initiative in this mould is the safety case model, developed progressively in the United Kingdom and European context following the Piper Alpha (Paterson 2000) and Seveso (De Marchi et al. 1996) disasters subsequently championed in Australia by the Victorian WorkCover Authority (Hopkins 2001; Heiler 2005) and emulated more recently in Australia by the National Offshore Petroleum Safety Authority (NOPSA). However, the model is not unique to major hazard regulation. In the wake of the terrorist attacks of September 11th and Bali in 2002 a similar model is being promoted as the means to reduce the risk of critical infrastructure (in particular ports and airports) being the focus of the next terrorist attack (Dillingham 2003; Department of Transport and Regional Services 2005). Security Plans, like safety case requirements, also require adequate demonstration to the regulator of systematic hazard identification, risk analysis and risk management, in a process that involves communication and consultation with key stakeholders.

These examples might be considered at the “intensive” end of meta-regulation where government oversight of the regime is high. The aim of such approaches is one where a systematic and detailed process of hazard identification, risk assessment and risk management is developed, approved by the regulatory authorities and subsequently implemented by the site in question. In terms of the safety case model, the process generally involves several stages (1) An assessment to ascertain hazard level of the particular site (e.g. a chemical facility) (2) Registration with the regulator if the hazard level of the site is above a stated threshold (3) A detailed hazard analysis of the facility (4) Development of control measures, together with documentation and specification of performance standards to be met (5) Development of a safety management system (6) Development and documentation of emergency management procedures (7) Development of process for keeping procedures up to date (*Occupational Health and Safety (Major Hazard) Regulations (Vic) 2000*). The meta-regulatory element of such an approach is its emphasis on collaboration and local accountability – to increase the ‘permeability’ of the organization (known as a major hazard facility (MHF)). The safety case must be developed with health and safety representatives and key personnel from each workgroup on site and disseminated to all employees. In addition, relevant material must be discussed with the local community through regular community meetings and with the local municipal council. A copy of the final safety case must be deposited in the local community library. The material presented to the regulator is then assessed both in a desktop audit and on site checks. It is clear from this brief description that such an approach should not be confused with self-regulation since the adequacy of the outcome, (i.e. an assessment of whether the risk been sufficiently reduced) and the diligence (or otherwise) of the process of risk management the site engages in remains under the

scrutiny of the regulator. A key aspect of these regimes is a requirement that sites must demonstrate to the regulator how their internally generated plan will reduce any risks relevant to the regime to an acceptable level. Finally, regulatory approval of the risk management plan must be obtained from the regulatory agency who then undertakes ongoing monitoring of the plan in practice.

Overall, the safety case process has been found to be highly resource intensive in order for it to produce beneficial results (Heiler 2005; Hopkins & Wilkinson 2005). For this reason, whilst “intensive” versions of meta-regulation might be seen as at the cutting edge of regulatory policymaking, regimes such as this are implemented selectively. The safety case requirement for chemical facilities and oil refineries (arguably one of the most well-developed meta regulatory regimes) is considered particularly appropriate in cases of complex intersecting hazards, where the probability of a particular set of circumstances arising is low, but the potential impact is high. These approaches may also be highly technical and ‘expert intensive’. Safety case regimes rely on sufficient scientific and engineering expertise, as well as a robust process of communication and negotiation with workers and the community in order to devise a plan that is both effective and seen to be effective.

Regulatory Character

In undertaking an assessment of meta-regulation, regulatory character requires conceptually separating out the formal legal framework of regulations from the context to be regulated as the first step in the task of trying to understand the full complexity of the regulatory challenge and the potential for a particular regulatory strategy, such as meta-regulation, to meet that challenge. This separation builds an understanding of regulation around what Kahn Freund (1974) termed the ‘law/practice gap’ with scrutiny applied to both sides of that gap: the demands of the lawsⁱⁱ and regulations and the target’s behaviour in light of those demands (Haines 2005: 27-36). In exploring meta-regulation, regulatory character frames analysis around both the regulated site charged with developing a risk reduction framework and the regulatory strategy comprising laws, regulations, codes, standards and so on aimed at reducing that particular risk. Individuals (both employees and managers) within the regulated organization or worksite are understood as acting in light of a situational ethic which shapes their attitude and responses to the organizations and the regulator’s demands (see also Hawkins 2002). Essentially, regulatory character frames enquiry around three separate elements: the norms of the regulated entity, norms that guide behaviour in the context to be regulated (under meta-regulatory regimes this is either an organization or a worksite); the individuals (employees both on the shop floor and management) found within that organization or worksite and the formal regulatory regime set up to control a particular form of risk (see Figure 1). In terms of understanding the nature of the compliance challenge on the ground, regulatory character focuses the exploration of a given regulatory regime around three related sets of questions (boxed 1-3 in Figure 1): (1) How do the authoritative norms of a given site (e.g. an MHF) relate to a particular regulatory regime? That is, how is the regime interpreted normatively within this place? (2) How do various individuals (e.g. managers, supervisors and workers) behave with respect to authoritative site norms? That is, what does it mean for each of these individuals to ‘act

appropriately' in this context? And (3) How do these same individuals relate to, (i.e. work with, use or ignore) the formal regulatory regime? Do they, for example, use the mechanisms contained in the regulatory regime as the principal means to alert relevant others about relevant hazards or problems, or do they see them as incongruent, irrelevant or unhelpful in their need to survive or thrive within a particular place?

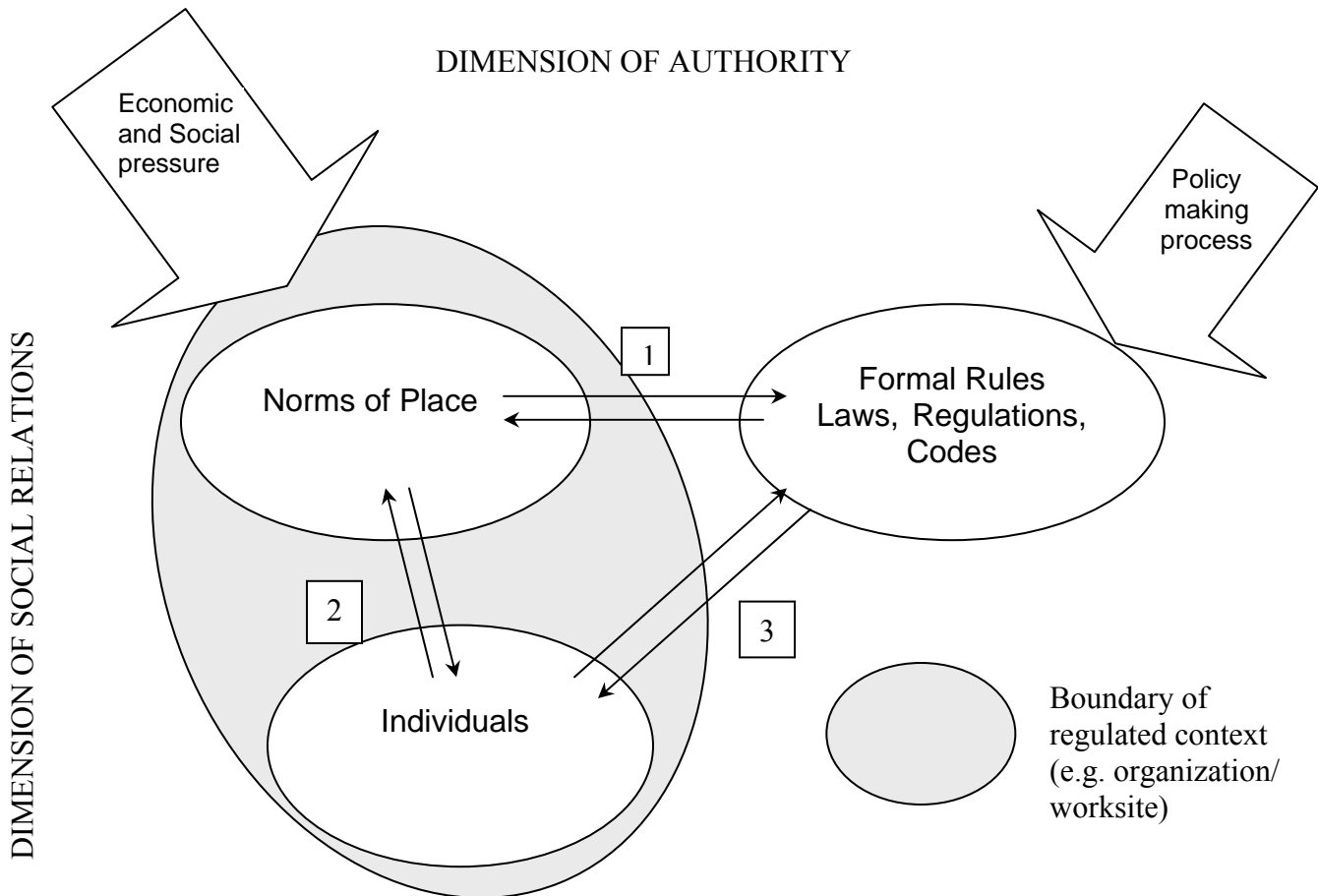


Figure 1: Regulatory Character (adapted from Haines 2005: 34).

As shown in Figure 1 above, two axes frame regulatory character: the dimension of social relations and the dimension of authority. In its nascent form, regulatory character drew inspiration from both Durkheim and Weber in conceptualising these two axes. Thus the axis of social relations was framed around Durkheimian insights into the norms of place and how these shaped both individual expectations and responsibilities. Different forms of social order are infused with an understanding of an individual's roles and responsibilities that taken together re-affirm the collective whole (Durkheim [1933] 1964). In terms of social relations, this initial Durkheimian frame was developed further by drawing on the cultural theory of Mary Douglas (1966, 1992) as developed by

Christopher Hood (1998) in *The Art of the State*. Douglas' and Hood's work emphasizes how, in different contexts, the normative values underpinning social order differ. For Hood and Douglas four 'ideal typical' norms infuse perceptions of order namely: individualism, hierarchism, egalitarianism and fatalism. So, an organization infused with individualistic norms of competition and individual achievement, for example, would accommodate increased economic pressure by emphasizing the need for individual effort (accompanied by commensurate reward) whilst a more hierarchical organization would be guided by principles of deference to authority and of valuing prior learning in responding to similar challenges. In contrast, egalitarian norms would emphasize negotiation and forms of deliberation to reach consensus that would guide collective problems solving, whilst fatalists work according to scripts and routines in response to challenges without appreciation of a sense of either their instrumental or symbolic purpose.

Because this axis of social relations springs from a Durkheimian base and centres on notions of culture in shaping individual behaviour clearly it resonates with other areas of writing that also have developed either as an elaboration or critique of Durkheim. Scholars within management, political science and sociology draw on similar themes, themes present in sociological institutionalism (DiMaggio and Powell 1983), neo-functionalism (Colomy 1998) and organization theory more generally. Indeed, these themes also are the bedrock of a broad range of theoretical traditions grappling with what is termed "the action, structure and culture debate" (Koelble 2005: 231). Clearly, dealing with the breadth of potential contained within these theories is beyond the possibilities of a single paper.

Nonetheless, perennial themes exploring both organizational culture and the nature of institutions *are* relevant and are usefully drawn on in any development of the concept of regulatory character since they can help develop sensitivity towards what regulation can, and can not achieve. In particular, themes present in these literatures of the drive for identity and legitimacy in understanding how both regulated organizations and regulatory agencies act are relevant. Here, the work of Pedersen and Dobbin (2006) in bringing together the organizational cultural emphasis on identity and the neo-institutional emphasis on legitimacy is particularly helpful in highlighting the dual tensions within organizations, both those charged with regulating and those being regulated. Government regulators are faced with developing regulatory policies and in undertaking enforcement in a manner that is understood by both the public and their political masters as robust and effective whilst regulated organizations must carve out a place within a particular economic market which generates ongoing business with customers (which may be part of other industries as well as individuals) as well as engendering the necessary commitment from employees and others (e.g. contractors) who work on a particular site.

The importance of organizational identity and legitimacy brings to the fore the importance of understanding the nature of power and authority both within the context of a regulated organization and in terms of the laws and regulations themselves. This concern with power is brought into regulatory character by virtue of the second axis framing the model, the dimension of authority (see figure 1 above). In understanding regulation, assessing the degree to which a regulated organization or worksite acts in

response to legal and regulatory demands (i.e. those regulations have authority within the organization) is a central focus of study. Regulatory character understands that alternative sources of authority, generated by the 'norms of place' within the organization or site shape what behaviour is and is not acceptable in that organization or workplace independently from formal legal sources of authority.

Critically, regulatory character understands these norms of place, the resulting cultural milieu and the behaviour of individuals that is shaped by them on a particular site not as an essentialist given, but as arising from economic and other structural dependencies and opportunities that have shaped historical ways of behaving and understanding in that place. In terms of norms, the model borrows from Selznick's concept of "organizational character" (1992) in his understanding of organizational norms as developing from economic and other structural dependencies of organizations (for example the need to have ready access to a certain commodity, needing to attract certain sorts of people with particular skills or the need to retain good relationships with key individuals or groups both within or outside the organization), rather than being an essentialist given (Haines 2005: 37-52). Thus, the way a regulated organization or worksite responds to regulatory demands can be understood as resulting from what some term as the broader 'regulatory space' within which it exists (Shearing 1992, Haines 1997, Hancher and Moran 1998) acts. This regulatory space comprises economic and social pressures that independently shape organizational or site norms and so organizational and individual behaviour.

From the perspective of regulatory character the norms found within a regulated entity may change as a result of changing economic circumstances (e.g. diminished access to resources, changed market conditions leading to increased use of contractors), or heightened social pressure (what Thornton, Kagan and Gunningham 2003 term the 'social licence'). Clearly, too, changes are possible through the other key components of regulatory character: changes in regulatory responsibilities (in Thornton et al's (2003) terms the 'legal licence') or through the sustained efforts of individuals (in what Colomy (1998) has termed 'entrepreneurial projects'). But the impact of any one element is not direct, but mediated through existing normative organizational or worksite assumptions about 'how things should be done' or what is 'appropriate'. In other words, change needs to overcome the problem of inertia, the drag of existing ways of behaving and acting in the world. Regulatory character requires the independent consideration of formal regulatory regimes and of individual action apart from an understanding of organizational or worksite norms. In this way, regulatory character allows exploration of how norms and individuals shape and are shaped by relationships within a given regulated setting.

Further elaboration of this axis of authority is also necessary. As stated above, this axis is anchored in notions of power and interest, themes central to Max Weber whose work forms the basis of understanding this dimension of regulatory character. The discussion above has explored this with respect to the influence on the norms of the regulated organization. This axis, though, extends across the "regulation/practice gap" to form the basis for understanding the process of regulatory reform and how internal rules are generated in response to regulatory demands (see Figure 1 above). Following a Weberian perspective, regulatory character understands laws, regulations, and codes and ancillary documentation not as a given, an axiomatic public good which rightly command

compliance, but rather formal obligations that result from a legislative and policy making process (Haines 2005: 52-56). The key Weberian concepts drawn on here are of rationalization and, to a lesser extent bureaucratization.

Rationalization, for Weber, was the transformation of a value (in this case a governmental objective of reduction of some form of risk) into a formal rule-based system (in this case a regulatory regime) (Weber [1948] 1991 see especially p 92-3, 216-221, 224; Weber [1925]1954, for a useful summary see Giddens 1995: 43-51). It is a transformation at the heart of regulatory reform. When a particular risk is realized: an explosion occurs at a chemical facility or some form of critical infrastructure is attacked by a terrorist group, a consensus is formed around reducing that risk. Reducing the potential for future disaster is valued, and the need to translate this valuing of human life into a set of regulations takes place.

For Weber, rationalization was fraught with challenges. Indeed, his central thesis was that values when institutionalized as formal laws, the rules and protocols developed inevitably fall prey to the problem of 'the iron cage', where rules proliferate and yet the spirit of the law persists in escaping the letter. Thus the culmination of rationalization (namely the rules themselves) that aimed to enshrine certain values ended up in subverting those very same values (Weber [1948] 1991, Weber [1925]1954). A classic example of this process in the regulatory arena is the progressive development of tax law, where specific rules intended to preserve the 'tax take' by government create the very loopholes exploited in any good 'tax minimization' scheme. Tax evasion is merely the extension of poorly thought out tax minimization strategies since legal strategies are both legal – but unethical (Mc Barnett and Whelan 1999, Shah 1996, Sutton 1989). For Weber, this subversion of values by the letter of the law was inextricably bound up with the development of the law itself.

Part of the difficulties that arise in a regulatory policy-making process is that the rationalization process involves audiences and concerns that are independent from those directly concerned with the particular risk and mitigation of relevant risks at the organizational or site level. This may result in a regime that requires action by the regulated organization that may do little to reduce risk, but that are seen as important by key audiences either observing or taking part in the policymaking process. For example, in the earlier work on regulatory character it was found that regulatory reforms following an industrial fire in Thailand were framed as much to signal legitimacy to outsiders (such as trading partners) as it was to have an effect of improving safety on the ground (Haines 2005: Chapter 8). The nature of the reform process means that the resulting legislation and ancillary regulations were framed with more than just risk reduction in mind. They also needed to be seen as legitimate to key audiences, audiences with which the political elite need to maintain a relationship. In this way, the gap between the regulatory regime and how the organization behaves and acts widened. In cases where reform has high political purchase (such as in the aftermath of a disaster), the regulator may well be working with legislation and regulations whose function is much more than simply to reduce risk on the ground.

In exploring the axis of authority, for some readers the similarities between regulatory character and historical forms of institutionalism will be evident. Both are concerned with legitimacy and the asymmetries of power and both are concerned with historical institutional legacies that lead to policies (in this case regulatory policies) that resonate with past strategies and both share an interest in unexpected consequences of reform (Skocpol 1995, Hall and Taylor 1996, Katznelson 1998, Peters, Pierre and King 2005). Indeed, to some extent it could be seen as belonging within an institutionalist frame of reference. But there are important differences. Firstly, regulatory character is interested in two separate institutional settings: the institutional setting of the regulated organization or worksite (where the workings of economic power and diverse social interests clearly affect context norms as explained above) and the institutional setting that comprises those individuals and organizations instrumental in the development of the regulations themselves (e.g. legislative making bodies such as parliament and regulatory authorities responsible for policy development and enforcement). The particular focus of regulatory character is the intersection between two independent institutional settings, and is designed to enhance understanding of how both affect the challenges of regulatory compliance.

A second difference is regulatory characters' emphasis on Weber's work on rationalization and associated forms of rationality as opposed to principally the development and modification his understanding of bureaucracy. So, as discussed above the concern for regulatory character is with the development (through a process of rationalization) of the regulations themselves (within one institutional frame) and subsequently how those regulations are received and responded to by the regulated entity (i.e. a separate institutional frame). Under a meta-regulatory regime, this rationalization process is critically involved not only in policy formation (i.e. from a macro frame), but in the translation of the "outcome based" edict of the regulator into the detailed procedures that form the regulatory framework for that site (at the micro level). The challenges of creating procedures that are followed habitually by individuals at a worksite is one of the enduring challenges for regulatory compliance (McBarnet and Whelan 1999, Reason 1997)

Understanding the challenge of regulation through the lens of rationalization (both of policy formation and procedural development at the site level) is critical, for example, to analyses of the benefits and drawbacks of "outcome based" as opposed to prescriptive standards. Rather than understand each as a policy choice able to be selected freely from a range of options, regulatory character understands their respective problems as arising from their relative positions in the rationalization process (c.f. Black 1997). Outcome-based regulations (as an expression of substantive rationality) capture the essence of the regulatory aim, yet depend upon the good faith and efforts of the regulated entity (i.e. is dependent upon their response to these regulations) and further involve substantive judgements by the regulator of what constitutes compliance. Related problems, of poor faith by the regulated organization or calls by them for greater objectivity and clarity in what constitutes compliance, spur greater and greater levels of prescription. High levels of prescription in turn bring with them different problems, problems of strategic or routinized compliance with rules where the initial aim of the regime seems lost. High levels of prescription sets the scene is set for a "back to the basics" or "back to the

essence” reform motive – and the return of outcome-based models. For regulatory character, the swings in regulation between outcome and prescription are understood as temporary resting points on a continuous cycle between substantive (or value) rationality and formal rationalityⁱⁱⁱ, where the intrinsic challenges highlighted by Weber in his understanding of rationalization animate debates that result in a shift closer to the diametric opposite point in the regulatory cycle.

Weber’s work on rationality is important too for understanding the importance of and the challenges to building an appreciation within the regulated entity of the values that underpin a given regulatory regime (Black 1997). Ideally, the regulator is working in a context where the norms underpinning the regulatory framework are seen as legitimate and morally right. In such a case, compliance may occur because of value rationality – “I act this way because I am moral and these are my values too”, or because they are strategically valuable “I act this way because this is the way I will succeed”. Alternatively, then, non-compliance may occur because the values are not seen as legitimate (“These are not my values, my values require a different course to be taken”) or because they are not strategically useful (I do not comply because by complying I will not succeed) (see also Kagan and Scholz 1984).

It is the (somewhat challenging) regulator’s task to try to close the gap between regulatory expectations and the regulated entity’s behaviour by using the compliance measures they have at their disposal. The regulator clearly is constrained by their distance from the everyday actions and norms that are present within the regulated entity (that is, regulator and regulated inhabit different institutional worlds). The seriousness of the regulator’s challenge can usefully be understood through the lens of regulatory character. As is shown by the arrows in Figure 2, the compliance mechanisms available to authorities can only directly affect one of the three relationships that make up regulatory character: namely those between individuals and formal rules. Compliance efforts can only indirectly influence site/organizational norms and the everyday relationship between individuals and those norms. Indirect influence on organizational or site norms may take the form of regulating key individuals considered to have particular influence over the site (e.g. senior managers, owners, site operators) and/or regulating the process the site must adhere to in order to be considered in compliance with the regulations. Normative change, not just behaviour change, is often the aim of the suite of various punitive and persuasive measures available to the regulator (see for example Parker 2002). However, as the arrows indicate, the responses of both individuals and the regulated entity as a whole to the overtures of the regulator are not under the regulator’s control. So for example, the ‘backstage’ activities of regulated businesses and their negotiation with government may clearly affect what tools the regulator has at their disposal (Reichman, 1998), so that their ‘kit bag’ may be less than complete.

Regulatory character, then, allows close scrutiny of the regulatory and compliance challenge. It provides a means to explore the ‘regulation/practice gap’ and to understand what might account for the contours of that gap by analysing and understanding the authoritative norms of a regulated organization or worksite as well as separate consideration of the particular elements that are contained within a particular regulatory solution. Regulatory character also takes account of both a micro and macro level

context. At a micro level it provides a framework to stimulate researchers to explore how the norms within a regulated organization or worksite affect what they understand as their regulatory responsibility as well as how key individuals (for example, shop floor workers, middle managers, senior managers) act with respect to the regulations in their daily activities. At a macro level, the model invites an appreciation of what economic and other constraints shape the norms and values of the regulated entity as well influences external to the regulatory environment that shape how ‘the best regulatory solution’ is arrived at.

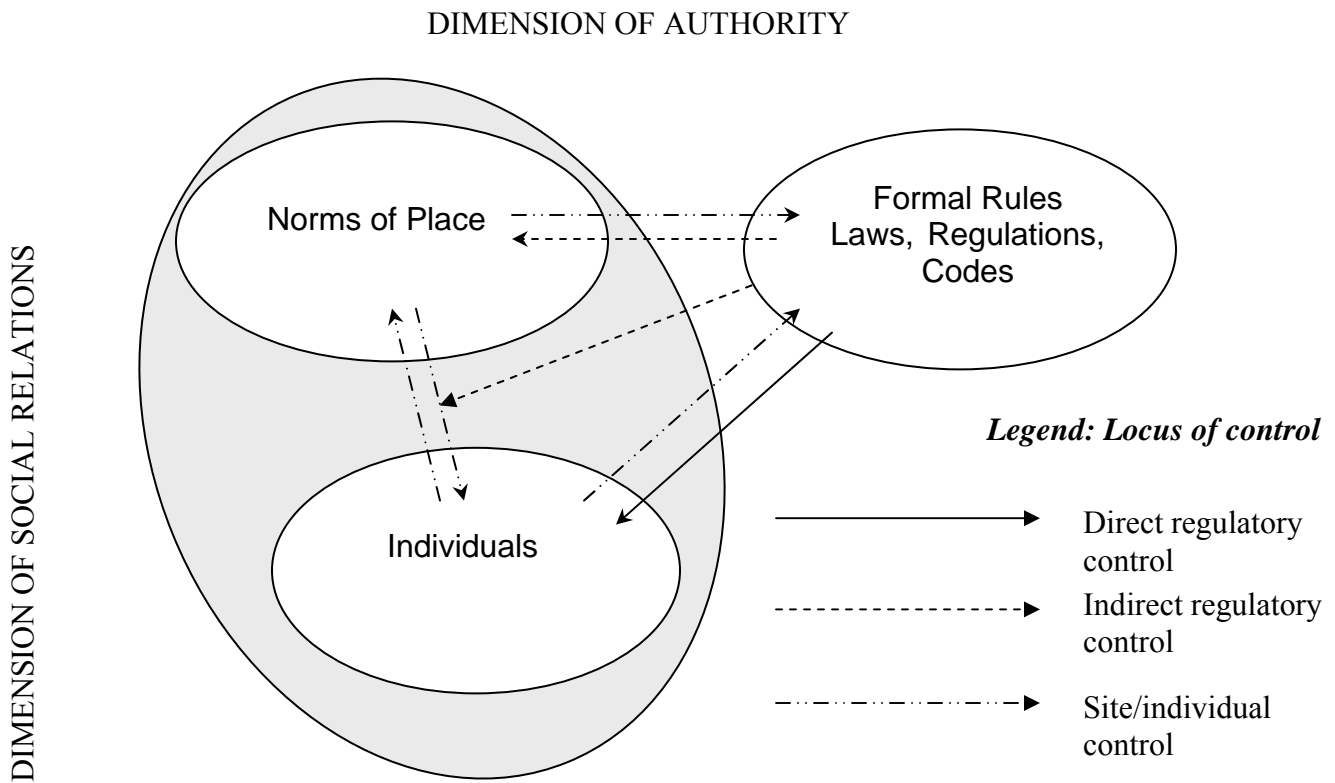


Figure 2: Regulatory Character and the compliance task.

Meta-regulation and micro-analysis: the potential of meta-regulation in overcoming chronic compliance challenges

The optimism expressed in the regulatory literature for meta-regulation makes sense in light of regulatory character since the potential for enhanced communication between regulator and site as a whole is increased and so reducing the ‘regulatory/practice gap’. Further, a feature of meta-regulatory regimes, evidenced in the safety case approach, is that they require a wide range of actors be involved in both the development and implementation of the site-specific set of rules and processes, approved by the regulator, that may enhance both compliance and risk reduction through beneficial interactions between the various stakeholders^{iv} The safety case regime, for example, emphasizes negotiation with employees and local communities so that the rules governing production within a particular hazardous facility come together in an open, rigorous and evolving

way (De Marchi et al. 1996). Ideally, a regulatory framework thus formed accurately reflects the demand for risk reduction from a community whilst also shaping how individuals within a particular worksite behave and relate on a day-to-day basis. In short, the rules developed by the site and approved by the regulator and the norms of the organization work in harmony. In doing so, it enhances the probability that individuals will relate through the formal processes developed, that the resulting procedures form a ‘living’ document that shapes behaviour.

Yet, for Weber, rules generated internally to a given setting also need to be seen in light of the problems of rationalization, and are themselves vulnerable to redundancy and manipulation. Such problems are reflected in the regulatory literature that point to the incapacity of internally generated procedures (such as standard operating procedures) to effectively mould organizational practice (merely remaining as rules books gathering dust on the shelves whilst critical information about risk fails to be communicated in a timely manner) (Reason 1997; Hopkins 2001, Woolfson 2007) or their limited effectiveness when regulated organizations develop internal procedures specifically in order to comply with the letter of the law whilst simultaneously avoiding the spirit or intent of the rule makers (McBarnet & Whelan 1999; McMullan & Perrier 2002).

In terms of regulatory character, the difficulties regulators have in overcoming these chronic problems of less than satisfactory compliance make sense. As discussed above and illustrated in Figure 2 above, the problems arise specifically in those elements and interactions over which the regulator has at best indirect control: the normative orientation of the regulated entity (how important and relevant they see the values enshrined in the formal regulatory regime), the everyday relationship between individuals and the organizational or site norms and finally how both organizations and individuals *respond* to the rules and formal overtures of the regulator. So, the regulated site may be driven by different norms or expectations from that of the regulator, with the result that they may have great difficulty in understanding what the regulator actually expects of them. Even if the regulated site does understand their regulatory responsibilities, they may choose to respond strategically, (perhaps to achieve some other desired goal) and so doing the bare minimum to achieve compliance. Alternatively, the regulatory regime *itself* may be driven by considerations that are not conducive to better risk-reduction. Regulators may be hampered by successive reforms creating multiple and complex rules designed to ‘solve’ previous weaknesses in a regime or their regulatory tools may be made ineffectual by the ‘back stage’ overtures of powerful interests (Reichman, 1998). So, any regulatory regime faces challenges both in the way the regime interfaces with the regulated site (and the individuals within that site) and the capacity of the regime to actually achieve risk reduction in the first place^v.

It is the elusive potential newer ‘meta-regulatory’ regimes (such as a safety case approach) contain for overcoming these chronic problems of formal regulatory regimes that is significant and worth exploration. Can their insistence on drawing in more players into the regulatory process and requiring sites to develop their own procedures to reduce risk (thus making rules more relevant for particular sites) overcome the problems of rule redundancy and manipulative compliance? Clearly, much of the compliance literature that argued for meta-regulation argues that this approach can bridge the

‘regulation/behaviour gap’. In arguing this way, such literature contains an implicit or explicit repudiation of Weber. Proponents of such approaches argue that regulation properly designed can overcome the pitfalls he identified, of redundancy or perverse outcomes and so can close the gap between regulatory expectation and the standards and risk reduction behaviour of regulated entities (Ayres and Braithwaite 1992, Parker 2002). Indeed these newer regulatory strategies based on direct engagement where organizations develop their own site specific rules and procedures ratified by the regulator might be viewed specifically to address the concerns Weber had in mind.

Broader literature of critical relevance to exploring the potential of these co-regulatory strategies and their capacity to overcome Weberian pessimism is found in writing that directly engages with his work. In the socio-legal field both Arthur Stinchcombe and Jurgen Habermas critique Weber’s understanding of the inherent pathologies of formal systems (Stinchcombe 2001:179-93; Habermas 1996: 66-73) and in doing so, contain valuable insights into the potential of meta-regulation. In quite different ways, both Stinchcombe and Habermas argue that perverse outcomes and the proliferation of rules are not inevitable outcomes of the development of formal rules. Given the right conditions and when applied in their proper place formal systems, (to which we can include meta-regulation), can be productive and worthwhile.

Arthur Stinchcombe in his 2001 work *When Formality Works: Authority and Abstraction in Law and Organizations* tackles Weber head-on. Formal processes properly devised, Stinchcombe argues, are central to the creative capacity of complex contemporary societies and by extension central to the capacity of regulations to reduce risk. For Stinchcombe (2001:182-188), Weber’s errors included firstly, a mistaken emphasis on the multiple varieties formal systems can take without sufficient emphasis on the functions those systems were set up to serve and how well they fulfilled that role. Secondly, Weber tended to focus on the increasing detail of formal systems without sufficient appreciation of how formal systems could be improved (rather than undermined) by development of that system (including, at times, greater and greater specification of what needs to be done). For Stinchcombe, what is needed is a focus on how multiple ‘formal’ systems can work together to create effective outcomes, particularly when informal understanding within a particular context is integrated with those formal systems (Stinchcombe 2001: 189-92). Laws and regulation can, and do, work to order complex societies in the desired direction. Bad outcomes simply result from bad formalization; they are not an inevitable side-effect of the process itself (p.17). Rules, well thought out, order activity and facilitate organizational processes in a manner that secures desired goals.

What, then, is ‘good’ formalization? Stinchcombe (2001:18-52) lays down three criteria: (1) cognitive adequacy, (2) communicability and (3) a trajectory of cognitive improvement over time. So, a formalization process must accurately portray the nature of the problem in a full, but economical and clear manner that includes the majority of relevant circumstances. Further, the conceptualization of the problem must be clearly articulated to those with a responsibility or interest to act on it. It must be able to be transmitted from those charged with defining and analysing the problem, to those who must work with the end process developed. Finally, the formal process developed must

contain within it a trajectory of improvement; yesterday's conceptualization must be improved by today's account. Improvement must also take place in the increasing capacity of the abstraction to plumb the depths of the problem. A formal process must take measures of a state of affairs that is more than superficial as many surprises lurk beneath the purview of a formal system. For Stinchcombe, formal processes that are guided by these three elements are truly 'abstractions that govern' (pp. 41-2), formalizations that can claim authoritative worth and justify their capacity to guide behaviour.

Certainly, a meta-regulatory regime would appear to be a good candidate to develop a set of site-specific rules would fit the criteria for an 'abstraction that governs'. For example, in a safety case regime, relevant sites (e.g. an oil refinery or chemical plant) must compile a 'case for safety' based on a comprehensive hazard assessment and risk analysis to ensure the multiple ways in which a catastrophic explosion and fire might arise within their facility are fully understood and each potential cause adequately controlled (see for example WorkSafe Victoria 2006a). In this way, the technical features of regulation are achieved. Further, communicability is central, with procedures devised by each site to ensure the 'usability' of the resulting processes that guide operator behaviour, as well as the availability of useful information for surrounding communities (WorkSafe Victoria 2005). Finally, 'continuous improvement' has been the mantra not only of safety cases, but of occupational health and safety more generally for some period of time (Fitzgerald 2005; Gerard 2005; Klein 2005; WorkSafe Victoria 2006b).

Indeed, Stinchcombe's work highlights some critical elements in meta-regulatory strategies (see figure 3). From the perspective of regulatory character, cognitive adequacy requires both an understanding not only the technical features of the risk to be controlled, but also the normative features of the context within which the risk arises. The first task of a regulatory regime is to make sure that policymakers understand both the technical features of the risk problem and the context within which it arises sufficiently well that the rules developed by the organization or site will, if adhered to properly, achieve the risk reduction goal they intend. This requires judicious action on behalf of the regulator to ensure that they not only provide sufficient guidance to sites in order for them to understand what is required to reduce risk to an acceptable level but are able to motivate sites to draw on that guidance in good faith (through a range of punitive and persuasive measures) and to make sure that they also understand enough about the site to assess when an adequate job has been done as documented in the risk management plan. Each of these elements comprising the technical, value and self-interest facets of motivating and ensuring compliance pose considerable challenges to the regulator. Communication, Stinchcombe's second criteria for rulemaking, also is a significant challenge for both regulators and sites. For regulators a key task is communication of the requirements of a risk reduction plan, and for the sites demonstrated compliance with those requirements (i.e. their 'case for safety') (see Figure 3). Finally, Stinchcombe's emphasis on continuous improvement might also be understood as a requirement for adaptability of a regulatory regime since any set of rules must allow a sensible adaptation of the rules so that they apply to a range of sites in a way that is consistent with risk reduction (see Figure 3).

DIMENSION OF AUTHORITY

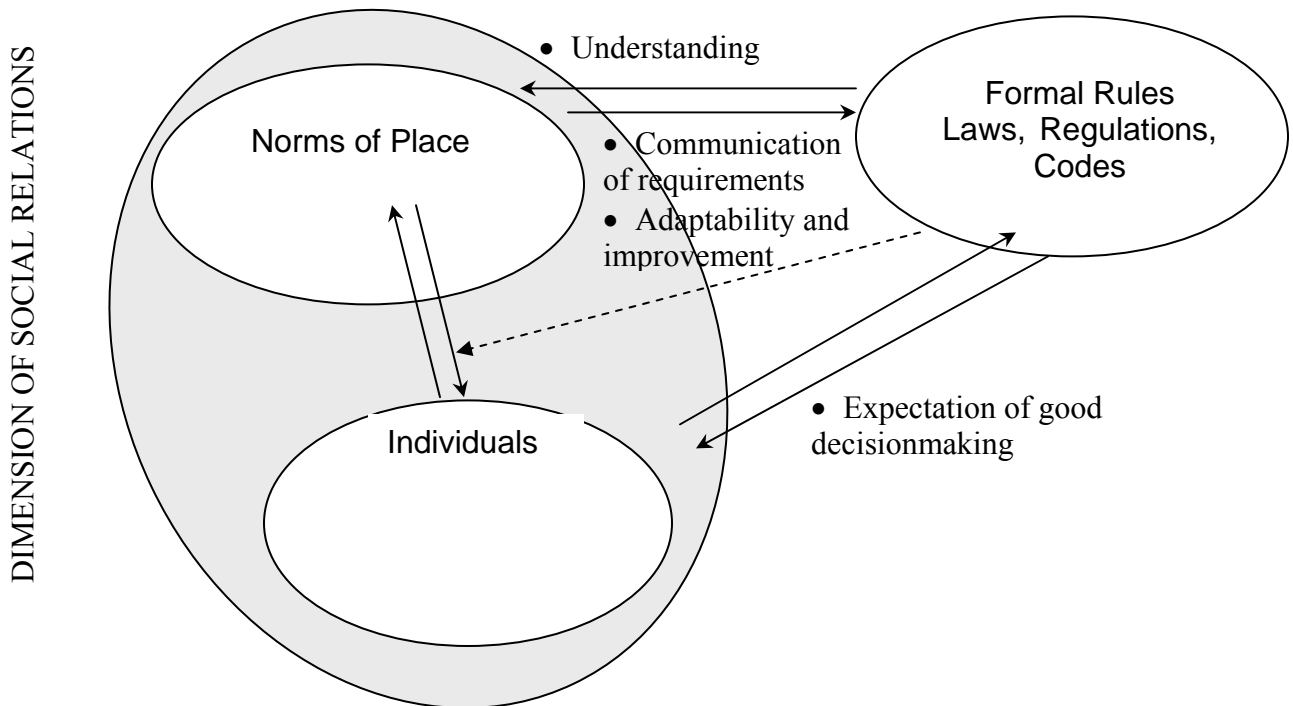


Figure 3. Regulatory Character and Stinchcombe.

Yet Stinchcombe (2001) in a welcome antidote to Weber's pessimistic views of formal processes perhaps underplays key concerns Weber outlined in his evaluation of the capacity of technically capable formal systems to remain as living documents rather than ossified (and restrictive) skeletons of a bygone state of affairs. Stinchcombe argues that slavish adherence to ever tightening rules specifying what should and should not be done are not inevitable – rather those with the authority to work with a legally authoritative document can make sense of it so that particular rules are used when appropriate and circumvented or altered on the ground when they don't make sense. This assumption of Stinchcombe is illustrated in figure 3 as a broken arrow. Rule-users (in particular knowledgeable trade staff and professionals) interpret rules in order to create good outcomes, outcomes in line with the intention of the rules themselves. Stinchcombe draws on the example of the blueprint, plans which often contain errors yet are essential for those involved in construction. Even rule errors (not simply lack of clarity) are not a

threat to the integrity of the building that eventuates (Stinchcombe 2001: 67-71). The intersection of different formal and informal systems (e.g. building codes intersect with blueprints and plumbing standards together with knowledgeable plumbers and architects) allows mistakes to be corrected.

However, it is not clear that the technical capacity of rules, and in particular those found within regulatory regimes, is sufficient to ensure good outcomes. This involves more than simply assessing and enforcing 'compliance'. Outcomes such as this depend, particularly in cases of uncertainty, on the willingness and capacity of rule users to use their discretion to 'flesh out' rules in appropriate ways and for regulators to appreciate when strict legal compliance is and is not appropriate. There are significant implications of this for a successful regulatory outcome. First, it suggests that averting potential disasters within chemical plants, for example, requires not only good rules and processes contained within the 'safety case' itself, but thoughtful and committed producers and users of those rules, a finding in line with Stinchcombe's argument outlined above. Both the regulator and the regulated site must have the capacity to assess whether the risk management regime enshrined in the site procedures will actually reduce risk. What this means is that neither a formal risk management document, for example, nor the regulations upon which they are based can, in of themselves, produce good outcomes^{vi}. Documents and plans must be produced and implemented by knowledgeable and dedicated staff, though a process of dialogue with both workers and community.

Clearly, it is not always the case that either the producers, or the users, of rules share similar goals. Problems of self-interest and conflict over which risks and problems demand regulatory attention are ever present. Put simply, it is not at all clear that the need for technical competence in rules framed to solve one form of regulatory problem, whilst it may be essential, is sufficient to produce good outcomes. The capacity of the regulatory regime to constrain narrowly based self-interest clearly is essential to regulation and forms the basis of the literature on regulatory compliance. However, also important is that there is commensurability between the priorities the regulator places on given risks with the priorities of the regulated organization and the organization's various stakeholders. All regulatory regimes, meta-regulatory forms included, take as a given the importance of addressing the particular risk that lies at the heart of a given regime. The broader values, political and social concerns that shape which 'problem' it is that needs addressing often are missing from regulatory analyses (see for example Ayres and Braithwaite 1992, Sparrow 2000, Parker 2002). Meta-regulation depends, arguably more than other forms of more prescriptive regulation, on the regulator and the regulated organization understanding risk priorities the same way – that is placing greater value on addressing some risks in preference to others.

It is the elaboration of this problem of strategic manipulation (either in pursuit of self-interest or competing value commitments (or both)) where Habermas' strength lies, and where his own resolution for the problem of pathological formalization resides. Habermas' work points to the limits of a regulatory 'problem solving' approach and demonstrates that whilst regulation may well have an important role to play in contemporary society, regulations used uncritically to gloss over value conflict, or to

pacify an anxious public will inevitably lead to regulatory rule making that creates more problems than it solves.

Habermas' (1981) particular interest is in developing ways to overcome value conflict through analysis of the way communication develops and what gets communicated. In part, he bases his argument on an extension of Weber's seminal work on rationality. Critically, Habermas pushes a Weberian analysis of rationality to make the critical distinction between purposive (means/end) rationality and strategic rationality. In this way Habermas emphasizes how a Weberian analysis can highlight that where there is value conflict for example rules can be used strategically in the pursuit of goals *other than for which they were intended*. Such strategies may, of course, encompass the desire to institutionalize or defend other values, or simply means to pursue of self-interest. Whilst Weber's analysis in part focuses on the way means subsume ends with reference to a given goal to be achieved, Habermas (1989a; Erikson & Weigård 2003: 22-6) points out that it is the strategic use of means for competing ends is what often undermines the integrity of a formal system (in Habermasian terms 'colonization of the lifeworld'). To avoid this, Habermas argues that law (and by extension, regulations) must reflect the values and norms of a society for it to be seen as legitimate. Strategic use of law, or other rules, for alternative ends threatens the relationship between law and value. In this situation, communication about what rules should be in place, and how they should be used or complied with, is distorted. So, to take Stinchcombe's blueprint example, where a contractor finds problems with the blueprint and they have underbid for that contract (for example under a competitive tendering bid for a local public hospital) they may use that misspecification as a means to gain more money. This challenge to the blueprint may see the generation of additional rules by the developer that then constrain the useful discretion of builders and trade staff on the ground (that may in turn have a negative effect on the capacity of that hospital to serve the local community).

For Habermas, the prevention of this problem clearly requires that there is a common understanding and a common purpose developed before the rules are put in place. From a Habermasian perspective, what is missing in the current proliferation of instrumental law^{vii} is debate about the core values that should underpin law, and extrapolating from this, should also underpin regulation. Habermas argues that the key to progress within contemporary society is the development of a genuine debate about values and what constitutes the common good through 'communicative rationality', a form of debate and conversation aimed to reach understanding that has the potential to resolve value conflict and create consensus (Habermas 1981, 1989a). Habermas sees the ideal resolution of difference as one where citizens engage in dialogue that is sincere, factually supported and right in relation to its normative context (Habermas 1981, 1989a). Such communication, Habermas argues, allows judgements to be made in terms of what should happen and what values should hold in what context (for a succinct discussion, see Powell and Moody 2003).

What is so important about this for regulation? Several points come to mind. For Habermas (and in contrast to positivist notions of law), neither law nor regulations that accompany law have ultimate authority in and of themselves. The authority of law stems from its connection to shared values expressed by the broader society (Eriksen &

Weigård 2003:158-167) – and it could be added, those charged with complying with the regulations. With respect to regulation, researchers have highlighted the importance of normative commitment to particular values for a regulatory regime to succeed, whether a commitment to safety or corporate ethics of another kind (Black 1997; Parker 2002). Further, many conflicts around regulation pertain to the mistrust of one party or another that regulations are being used strategically, either in the pursuit of other (unshared) values or to further self-interest. So, for employers, occupational safety is unhelpfully tied to industrial relations (see Robens 1972), whilst for workers employers use of screening tests as a precondition of employment, for example, is an illegitimate intrusion into their private lives in the pursuit of profit (Mathews 1993). Irrespective of the worth of these arguments, both concerns point to the mistrust generated when one side views recourse to regulations as a ‘strategy’ in pursuit of ulterior ‘ideological’ or ‘self interested’ purposes. This is precisely Habermas’ point. First, there must be an agreement about the legitimacy of the value to be pursued, before the formal process can be effective. Seen through a regulatory lens, Habermas in his elaboration of communicative rationality is identifying all three features necessary for regulatory success: technical competence (‘fact’), the setting aside of narrow self interest (‘sincerity’) and the need to come to a consensus on values to be pursued (‘right in relation to its normative context’) (Habermas 1981, 1989a).

The implications of a Habermasian analysis, then, is that development of a regulatory regime requires a genuine exchange to take place concerning the values to be pursued, and only once these are agreed should there be debate about the appropriate means by which such values can be enshrined in a formal, institutional form. To some degree, meta-regulation would appear to at least have the potential to fulfil this requirement as the boundaries around the regulated organization or worksite are made permeable. The emphasis within some forms of meta-regulation on communication with community members and employees in developing their procedures seems to emulate what Habermas might have in mind as being ‘communicatively rational’^{viii}. The dialogue that can be created between site management, employees and community members has the potential to create a local regulatory framework that reflects the needs of each of these representative groups.

Yet meta-regulation can only ever be partially successful because it is based on a form of policy that assumes a single risk requires addressing. One of the strengths of dialogue underpinning the development of a site specific regulatory set of procedures (as is required under a meta-regulatory approach) is that it allows all involved to express concerns, that is for example, for residents to highlight their concerns with having a chemical plant in the neighbourhood or for employees to express misgivings about particular chemicals at their workplace and through dialogue to develop common ideas about what is and what is not acceptable for a community member (whether it is a chemical facility, employee or a local resident) to do. But, each particular regulatory regime requires concentration on a particular form of risk and the development of a risk management strategy shared by residents, employees and managers around that particular risk. However, the concerns expressed by residents may not be so easily corralled to one form of risk, rather their concern may be of community amenity and notions of a ‘good neighbourhood’ rather than purely reduction of risk of a chemical plant exploding and

affecting the surrounding houses. If the concerns of stakeholders extend beyond those of the regulatory regime there will be a mismatch, one which cannot by its very nature be solved by regulations aimed at one risk in preference to another. So, residents may express their concerns about the neighbourhood through a safety case consultative meeting, for example, if that is the only forum available, but their concerns may be far broader than the safety case regime allows. In such a scenario, it is difficult to have the rational debate Habermas' argues is required for law to work well. A particular regulatory initiative defines the problem from the outset, and yet definition of the problem is precisely what needs to be discussed. In reality, community concerns always are broader than allowed for under a single regulatory regime. Without a broader debate and resolution, the scene is set for multiple regulatory regimes to proliferate around each individual form of risk, with little capacity to assess which of the risks deserve greater priority or more intensive resources.

A related problem arises at this point, namely the role of technical material used to inform residents about how well the chemical facility is discharging its obligations under a safety case risk reduction plan. For Habermas (1989b), a rational dialogue involves understanding the technical detail ('facts') and making sure that the assurances a chemical plant might provide about its risk management plan make sense in light of the technical material provided. The provision of this material may well be of assistance, indeed it is essential if the concern is narrowly concentrated on one particular form of hazard the plant poses to the community. Technical material here aids the dialogue process. It requires, however, that community members be sufficiently well-informed so they can understand what they are being told and for them to critically assess its capacity to reduce risk. This poses a significant, but perhaps not insurmountable hurdle. Nonetheless, if Habermas is right, understanding technical detail is a pre-requisite for adequate communication about risk is to take place.

However, the provision of technical data may work in ways other than an informed dialogue about the veracity of its detail. It may act to engender trust by increasing the apparent transparency of the company, for example, even if the detail is only partially understood by residents. The provision of technical information here works symbolically as a reassurance that a particular facility is concerned about residents. This may well be beneficial, but engendering trust is not the same as assuring good outcomes in the long term – particularly if that outcome may negatively affect residents (cf. Tyler 2000, 2003). So, generating trust is only beneficial if the concern of the residents' is captured by that particular form of risk and the technical methods developed by the company do indeed reduce that risk. If the concern of residents' is broader than this particular hazard the provision of data by the company showing that such a risk is being mitigated may only act as a temporary salve to residents' agitation. Mistrust may arise when an environmental spill occurs, for example, an incident not captured by the safety case process. Where there is a mismatch between concern and data, the provision of technical data to community groups may masquerade as assurance in an ideological rather than communicative manner (Habermas 1989b). Further, companies may become adept at providing information that reassures and looks good, rather than making the effort to educate residents so as to enhance their independent evaluation of risk.

Security plans aimed at preventing terrorist attacks against key infrastructure, a recent co-regulatory initiative, provide even more of a challenge than do safety cases in terms of envisioning an adequate dialogue that could take place between stakeholders that could usefully inform a security plan so as to avoid the proliferation of more and more requirements to reduce the potential for an unknowable level of risk. Security plans, by definition, already have in mind a particular risk – namely the risk of a terrorist attack. Within European, North American and Australasian societies it is hard to imagine that the users of critical infrastructure (airports, ports, electricity networks and so on) would have as a principle concern the protection against a terrorist incident (as opposed to, say, safety of the aircraft or the need to maintain the electricity supply) to the extent that they would be willing to spend considerable time and resources assisting in the development of a security plan. Access to those most affected by a terrorist attack in order to develop a security plan is likely to be difficult. Further, because of the particular risk concerned, a security plan necessarily separates itself from those it is trying to protect (since a passenger boarding a plane may turn out to be a terrorist, so too might an airport employee). In the place of a broader dialogue with stakeholders, the assessment of adequacy is likely to fall to experts and politicians. Without the capacity for a dialogue with the broader user population, then, a Habermasian perspective would suggest it is difficult to assess when a security regime has done enough – or indeed done too much (and taken resources needed elsewhere) in reducing the possibility of a random attack.

In summary, at the level of ‘micro’ compliance, the interface between the formal regulatory requirements and the actual response by the regulated organization or site to their regulatory responsibilities, meta-regulation appears to have key advantages. The emphasis on a collaborative development not only of specific risk controls but also of a normative orientation of the organization towards the reduction of a particular risk bodes well for enhanced compliance and genuine risk reduction. There would appear to be considerable potential within a meta-regulatory approach to narrow the “regulation practice gap” at the heart of a characteristic analysis. Further, the challenges Weber foresaw in his analysis of rule development (of procedures gradually becoming more and more removed from everyday practice) would appear to be somewhat ameliorated under a meta-regulatory approach.

By drawing on the work of Stinchcome (2001) and reading his work through regulatory character the preconditions for success of a meta-regulatory approach becomes clearer. In particular the importance of understanding the risk problem comprehensively – that is how it arises within the regulated site itself it brought into sharp relief. The first task, then, for a regulator is to understand the risk problem. Secondly, the task is to communicate what is required and then to facilitate the development of procedures that can provide adequate levels of risk reduction over time. Critically, Stinchcome’s (2001) work highlights that a formal regulatory regime, meta-regulation included, requires not only adequate technical capability but also a commensurate normative framing of the problem between the regulator and the regulated organization and a willingness by the users of the procedures to “flesh out” procedural gaps in ways that enhance the risk management project. These three facets of a regulatory regime: technical capacity, normative orientation and the capacity to deal with strategic self interest are further extended through Habermas’ work. Again, working with regulatory character keeps the

distinction between norms of the regulated organization, the individuals that comprise that organization and the formal regulatory regime clear. Through Habermas, though, the complexity of the regulatory enterprise itself becomes clear. Whilst meta-regulation fares quite well in terms of Stinchcombe's demands, the Habermasian need for normative commitment to precede technical capacity renders a regulatory solution vulnerable. Whilst clearly reducing certain risks is necessary and potentially amenable to a meta-regulatory solution the inclusion of a broad range of stakeholders into development of appropriate procedures brings with it the possibility that such stakeholders will find the particular risk itself less compelling than some other concern they may have with the particular organization or site in question. In such a scenario, the meta-regulatory cart under the control of a specific regulatory agency may be placed prematurely in front of the risk 'horse'.

Meta-regulation and macro-analysis (1): Regulatory reform

At this point it is important to take a closer look at the macro-level concerns important to a characteristic approach: namely the regulatory reform process (the subject of this section), and the potential impact this has on what risks are subject to regulatory reform and the form of regulation deemed appropriate to deal with that risk. The subsequent section focuses on the broader economic and political factors that shape the "norms of place" of the regulated entity.

Perhaps a useful starting point for this discussion is the Weberian observation that human disasters make a mockery of existing rules (Weber 1991 [1948] p220-221). Not surprisingly, then, it is often some form of disaster that engenders reform (Hancher and Moran 1998). In the context of a disaster, the existing rules in place aimed to reduce risk have been seen to have failed. In political terms, crises pertinent to existing regulatory regimes present both threats and opportunities (Boin, McConnell and t'Hart 2006). Political responses to crises such as industrial disasters can either enhance or completely undermine public faith in their elected leaders (Boin and t'Hart 2003). Further, politicians may choose either to try to dampen down public fears or to heighten fear for short-term political gain (Boin, McConnell and t'Hart 2006, Habermas 1979). In terms of regulatory reforms, political choices are to be made between a refining of existing regulatory approaches or a wholesale repudiation of past initiatives and a reworking through of what is required to ensure 'this never happens again'. Both refining existing regimes and complete redesign of regulatory arrangements are evident; however the research and writing certainly from within the historical institutionalism field would suggest that retention of the status quo through minor adjustments is more likely than wholesale change (Hall and Taylor 1996). Indeed, arguably it is regulatory accretion that is the most likely response to a regulatory failure as it allows the political sense that something has been done, without seriously changing any deep seated structural arrangements (Curran 1993, Habermas 1979, Haines & Sutton 2003).

What is clear from a characteristic point of view is that the pressures underpinning regulatory reform (and so the resulting regime that regulators must enforce) and those shaping the norms found within a regulated context are not one and the same. Institutionally, they inhabit separate spheres. This means that the audience for reform

may not principally be the regulated entity and that audience may be rather ignorant of the actual impact any reform may have on the operation of the regulated organization or worksite and its capacity to reduce risk. In short, if the respective pressures and influences on regulatory reform and the “norms of place” within the regulated site push in different directions, then the gap between them is going to widen, irrespective of attempts at the level of compliance policy and practice to bring them together (see Figure 4 below). Unless there is some resolution of these tensions and pressures between norm and regulatory demand outside of the specific site setting regulators and regulated organizations are faced with an impossible task. Regulators may find themselves faced with constant pressures to act in ways that reassure audiences but that militates against genuine risk reduction whilst within regulated sites, such as a chemical plants or airports, key individuals charged with complying with regulatory demands will be placed in positions that make it impossible to comply both with the demands of workplace norms and the requirements of the laws, rules, or meta-regulatory regime.

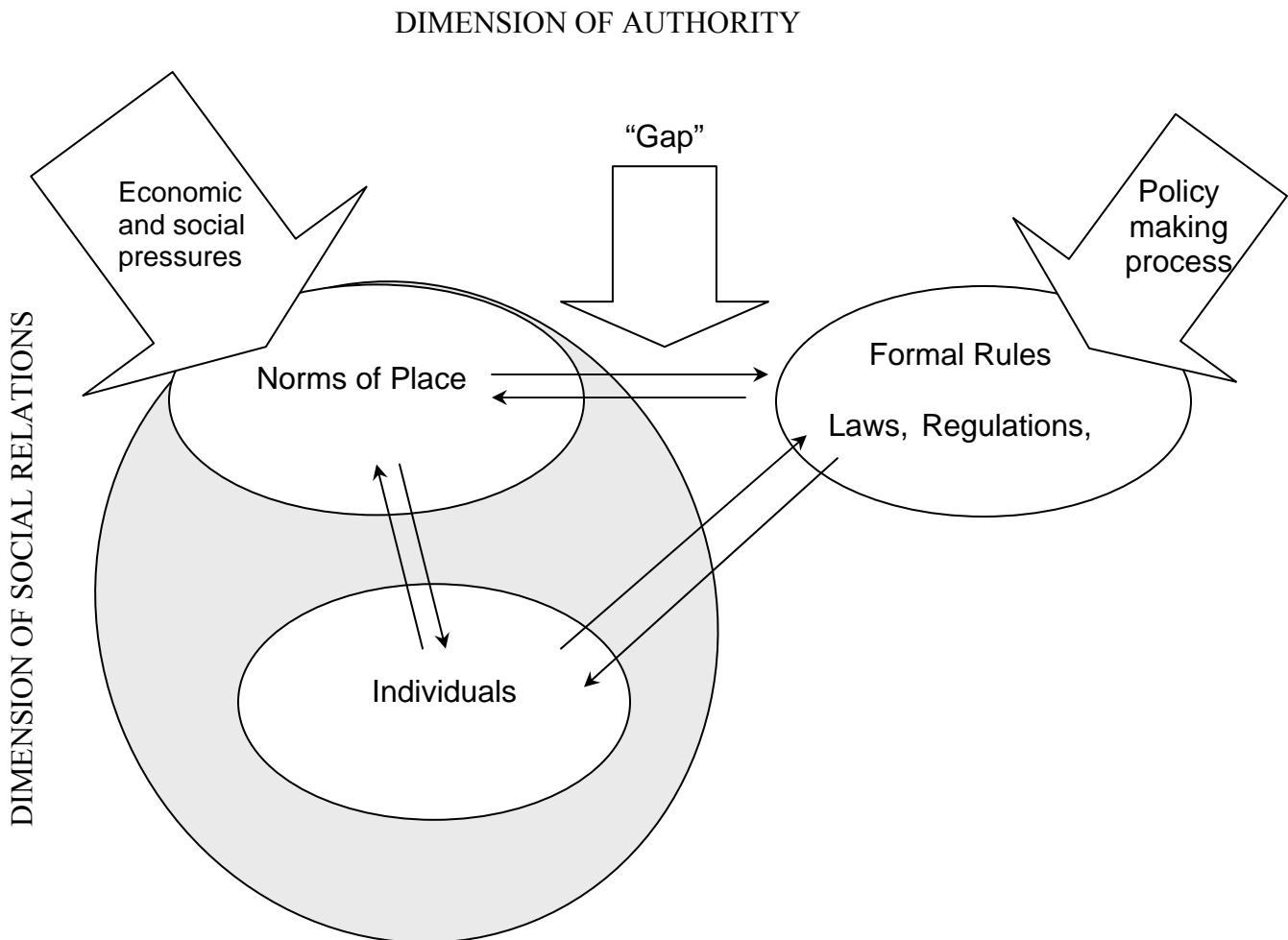


Figure 4: Impact of the policy making process on the “gap” between expectations in regulations and norms and practices.

Clearly, an important task for research is to understand the conditions that lead to divergence between regulations that result from a reform process and the norms and everyday pressures at the site level. Only one aspect of this problem will be explored here, namely the need for public reassurance following a crisis. In terms of regulatory reform the nature of the particular risk event (and its impact of the public psyche) that drives a particular reform can be critical to the particular outcome. In particular, events that evoke fear or dread have a particularly problematic translation into law. These types of risk are central to Sunstein's (2005) book *Laws of Fear*. In the book, Sunstein demonstrates how, in cases of high impact or dread, people cease to take account of probability of a given impact occurring, a phenomenon termed probability neglect. In fact, probability is seen as meaningless and science purporting to show otherwise is discredited. Further, accountability measures (often measured by the proclamation of more law or development of more regulation 'just in case' a further problem might arise) to reassure interested parties they are heard can oversimplify the underlying complexity of the choices being made. Reassurance that current levels of regulation are adequate is much harder (Sunstein 2005:125).

Policy development processes within a regulatory bureaucracy can exacerbate this problem. Sunstein (2005) draws on research that shows that group decisions left unchallenged augment the biases of the individual members. Hence, if the policy division of a regulatory agency is staffed by members who share the same views with respect to a particular risk, then the resulting regime will be more extreme than any one individual would have created on their own (Sunstein 2005: 98-99).^{ix} This is particularly an issue for security regulations where critical decisions are left to security experts (necessarily separate from the general public) who share similar views on the likelihood of the risk and the adequacy of the measures put in place.

Sunstein's arguments that some 'dreaded' risks gain particular regulatory attention brings back into view Habermas' argument on the limits of instrumental law in promoting 'the good society'. Sunstein (2005: 181-7) shows well how regulatory decisions necessarily impact on the decisions people make. Regulation in one area affects the way a particular context is ordered, making some choices easier and others harder. Regulation brings about benefits by reducing the likelihood of one type of risk being realized, but at the same time increasing the likelihood that another will occur. These risks are not simply those between risks to public goods being prioritized over private benefit^x (e.g. safety and profit). Through regulation, the risks to society are shifted – but are not removed. One example Sunstein (2005: 150-3) uses highlights this well, using the example of developing tighter rules around safety standards in nursing homes or boarding houses (often as a result of a catastrophic fire or public furore over ill-treatment of vulnerable citizens). Tighter regulations may improve standards, but will see some residents lose their homes as some private operators are forced to close.

From a compliance perspective, this dilemma is more complex. Sunstein assumes that the promulgation of regulations will automatically engender compliance. Clearly, this is not necessarily the case. So, taking the boarding house example, there is a third alternative: namely that the new tighter regulations will reassure the public, but boarding houses will stay open and find ways around the regulations, either through poor compliance or

minimal compliance or “creative compliance”. It is this third option where the ‘gap’ illustrated in Figure 3 has widened due to competing pressures pushing the two sides further apart.

Regulation, then, may well be more often a win-lose scenario than a win-win one. Sunstein argues that these gains and losses need to be made explicit, not hidden behind an exclusive emphasis on the particular harm in question in order for an informed decision to be made. In the boarding house example, regulatory reforms, then, can ostensibly assist marginalized communities (by increasing the standard of housing), but may also increase the level of non-compliant homes or decrease the stock of homes available at an affordable price.

For Sunstein (2005: 129-148), it is scientific evidence, rather than Habermasian communicative dialogue, can provide the basis for discussions around the costs and benefits of a particular regulation and inform good policymaking. In so doing, the science underpinning such calculations can provide the mechanism to move from a reactive stance (what he calls ‘Type 1’ thinking), to a reflective stance (or ‘Type 2’ approach). In other ways, too, science has provided the means to move away from a reactive approach to a social problem, towards a more considered process. Sunstein (2005: 149-74) argues that regulatory costs and benefits can be assessed independently from political considerations. In exploring his boarding house example, Sunstein argues that it is a political question as to whether, as a result of increased standards in regulation and consequently increased rent, the homeless are either given subsidies either to assist them in finding new accommodation or whether the pool of government-provided accommodation is increased.

However, this neat division between regulation and politics may be difficult. Indeed, the political nature of government initiatives (such as the subsidies mentioned by Sunstein and other forms of income support) designed to ameliorate the negative consequences of regulatory decisions highlight the interrelationship between the two. Here, the importance of regulatory character’s integration of the insights of Douglas (1966, 1992) and Hood (1998) illustrate the difficulty with Sunstein’s argument. Within a particular cultural and political frame of reference, one that Douglas (1966) would argue as individualistic, the idea of subsidies is an anathema as it undermines individual motivation and effort (see also McClusky (2002)). For others from a more paternalistic^{xi} or egalitarian orientation the idea of subsidies would be quite acceptable, even necessary. So, subsidies or welfare provisions may defray the impact of new regulatory requirement, yet decisions about the appropriateness of such subsidies are contested, with divergent views reflecting the underlying values of respective political positions.

As with the illustration of the regulation of fire safety standards in boarding houses above and the possibility of subsidies, there is no easy separation of “science” from “politics” in debates about risks in contemporary society. In particular, discussions of appropriate scientific studies to assess and deal with risk also must deal with the nature of politics and influence by both elected governments and various audiences situated outside of formal democratic political institutions (in Beck’s (1992) terms “subpolitics”; see also Holzer & Sørensen 2003) on the way regulations emerge.

The interaction between “subpolitics” and formal political institutions in the context of regulatory reform and scientific assessment is complex and illustrate how contemporary conditions have the potential to widen the gap between what is seen as “good” reform (namely that seen to reassure the public) and an actual understanding of what drives the behaviour on the ground. Habermas’ (1979) early work emphasized the need to take account of attempts to bolster formal political legitimacy in understanding what laws and regulations developed and why. Habermas’ (1979) argued in *Legitimation Crisis* that the increasing mistrust that is developing between citizen and politician results in politicians using instrumental law as a means to assure an increasingly sceptical public that its decisions are made in the public interest. As the distrust in formal political institutions increases, there is an increased motivation for governments to draw on “science” to legitimate their policies (Habermas 1989b). At the level of “subpolitics” professional associations, activist groups and corporations also work to influence what gets regulated and how (Beck 1992; Reichman 1992; Sellars 1997). “Subpolitical” activity can also selectively draw on scientific studies that support their particular political position. Various groups’ criticizing and questioning political commitment and action in turn generate responses by politicians keen to be seen to be active and responsive. This political need to be responsive to public perceptions of risk can undermine long-term strategies that can both increase well-being and trust in political institutions (Noll 1996) – and in the appropriate and effective use of regulations. For both Habermas and Noll, certain types of debate and narrowly focussed political pressure groups can undermine progressive change. It follows then that science may have a significant challenge in remaining politically disinterested in its assessment of risk and regulation when the social environment is emotionally charged.

Analysis of the worth of a particular form of regulatory regime independently from both its context and the specific form of risk it is purported to reduce then has its limitations. The similarity of the risk control measures (i.e. a move towards a more “meta-regulatory” approach) put in place by both occupational health and safety and security authorities belies the disparate views commentators and those directly involved in “subpolitical” activity take on both the degree of potential harm that results from a failure of security or plant safety, the level of resources that should be garnered to reduce the risk of harm and indeed whether regulation really is an appropriate response to the problem at all. What is clear is that a great deal of uncertainty surrounds the potential for catastrophe – and as DiMaggio and Powell (1983) have argued, uncertainty is a predictor of policies that (at least superficially) mimic each other in order to gain legitimacy. These similarities may reflect the presence of mimicry and attempts at shoring up legitimacy in government – rather than a well thought through attempt to reduce catastrophic risk. What regulated contexts share is a political need to retain the benefits of the industries concerned. Rarely is elimination of risk by way of elimination of activity considered.

It is unlikely in the face of such onslaught that any one regulatory technique can, in of itself, resolve and placate these broader political pressures. So, meta-regulatory approaches aimed at high consequence low probability events, for all their advantages, remain vulnerable at a range of levels. At the macro-level vulnerability stems from broad societal conflict over the nature of the risk (does it exist? How serious is it?), the proper role of science in determining the extent of the risk (should experts tell us how likely it is

to be realized?) and political efforts to emphasize certain risks at the expense of others (is this one the particular risk we should really be worried about?). At the site level threats to the integrity of a meta-regulatory regime include pressures of the workplace that militate against ongoing compliance with site-generated, regulator-approved rules. Alternatively, both rules and compliance may be perfectly adequate to reduce the risk specified by the regulator, yet can become overburdened by impossible political demands based on community fears not for risk management, but for elimination of all risk. Here, demands for ‘continuous improvement’ in safety case documentation or in the security area demands for greater and greater scrutiny of employee backgrounds may mask politicians concerns about their own political legitimacy, rather than simply being a means to progressively improve risk reduction.

In short, the regulatory regimes are formed through a political process. This process, particularly when spurred on by public fears, can lead to regulations aimed more to placate various audiences, rather than genuinely reduce risk. Meta-regulation may find itself the latest in a long line of “best practice” regulatory solutions whose necessary limitations will see its eventual fall from grace.

Meta-regulation and macro analysis (2): Normative change in the regulated entity resulting from economic and social dependencies

From a characteristic approach to regulation, analysis of how regulations develop is only one aspect of the macro-level influences on the challenges of regulatory compliance. Equal consideration needs to be made to broader factors that impinge on the institutional and normative development within the regulated organization or worksite (see Figure 4 above). At a macro level, then, a characteristic account aims to not only to assess the nature of regulatory reform but what broader economic and social pressures influence the norms or the regulated site.

Clearly, analysis of this trajectory is complex and the discussion here should be seen as illustrative rather than comprehensive. The central point is to dispel notions that diverse organizations – or the same organization over time – will reflect similar or even identical guiding norms, (and so will respond to overtures from the regulator in similar ways) are unhelpful. Further, there are organizational norms that are more conducive than others to certain forms of risk reduction. So, studies such as Diane Vaughan’s (1996) work on the Challenger disaster show how the norms within NASA and within space exploration more broadly changed over time, from norms emphasizing engineering excellence (which promoted harm reduction) to an emphasis on productivity or ‘value for money’ where the risks associated with space flight were minimized. What is important here though is her assessment of how the norms of the organization changed in response to the broader context. Critically, she argued that the broader policy emphasis, including the budgetary allocation to NASA had a significant impact on what was seen as “normal” risk management behaviour within NASA itself.

Perhaps a more pertinent example in exploring the shaping of organizational and industry norms within the context of low probability but high consequence risks is changes to the US nuclear safety standards that followed the Three Mile Island incident. Joe Rees’ 1994

work is a classic illustration of high levels of safety within the nuclear power industry were achieved not through direct regulatory overtures, but because the industry feared being legislated out of existence should any further incident occur. Heightened social pressure combined with a particular industry structure brought about norms highly attuned to risk reduction. Social pressure motivated the industry (through their self-regulatory body the Institute of Nuclear Power Operations) to develop a rigorous set of inspections of each other to keep each plant safe. Rees (1994) shows how a 'community of fate' was created where each nuclear power plant had a very real incentive to ensure not just compliance but absolute levels of safety were achieved. A climate of constant risk awareness was generated. However, recent changes to energy policy in the US have seen the protective economic shield around the nuclear industry competitors removed so that it now bears the full weight of competitive pressure from other industry generators: coal and gas fired generation. These cheaper alternatives place considerable stresses on the nuclear industry, and in particular INPO. It is likely that the norms of the industry will change, without necessarily any change in the legal and regulatory safety framework governing nuclear power plants.

Rees' (1994) work together with Selznick's (1992) understanding of organizational character is also reflected in Thornton, Kagan and Gunningham's, (2003) concepts of social, economic and legal 'licences' that shape an organization's responsiveness to regulatory demands. Like Selznick (1992), Thornton et al (2003) point to the critical role economic resources play on attitudes towards regulatory demands. Similar to Rees' (1994) they also see the critical role social disapproval plays in shaping how organizations will use the resources they have at their disposal. Social and economic factors play a critical role in how an organization responds to its regulatory responsibilities. Nonetheless, Thornton et al (2003) also point to a subjective element involved in an organization assessing future economic success (see also Haines 1997p 156). Organizations may share similar economic, social and legal 'licences', but may make different decisions in terms of where future success lies.

In terms of the success of meta-regulation which industry is being controlled and under what social, political and economic conditions clearly is important. Industries under threat of extinction because of public fears, following Rees (1994), may well embrace meta-regulation with particular vigour. So too, may companies that have been vilified by the public for past events – such as Bhopal, or Flixborough. Indeed, Parker (2002) emphasizes the importance of "catching" organizations at a vulnerable moment (including after a high profile and successful prosecution) in order to re-orientate their processes towards compliance. However, a characteristic analysis would suggest that changing economic and social conditions external to the regulated organization (including the suite of economic changes associated with the dual economy (Harvey 1989)) may also work against the success of a meta-regulatory strategy where those conditions lead to organizational norms shifting away from risk reduction. Alternatively, the authority of the regulatory regime may diminish relative to other demands on the regulated organization in a manner hostile to ongoing normative commitment to compliance – even where compliance procedures are internally generated. Several possibilities arise when such conditions arise: firstly, regulated organizations may challenge the regulator to clarify what is meant by compliance (setting the scene for

increased prescription), they may lobby government for a lowering of standards (in essence by-passing the regulator's authority), they may shift location to a more 'conducive' regulatory environment or, in the absence of community or regulatory scrutiny, maintain a semblance of compliance with their internally-generated regulator-approved regime but one where actual everyday behaviour becomes predicated on competing considerations. In short, meta-regulation makes an impressive attempt to bring a broader range of external pressures on an organization to reduce a particular risk, yet remains vulnerable to changing circumstances beyond the regulator's control.

Conclusion

Meta-regulation has considerable appeal in overcoming chronic challenges associated with regulation, problems of rigidity with an overabundance of prescriptive rules and alternatively the reduction in standards that accompanies a shift to self-regulation where both the procedures and outcomes are under the control of the (self)regulated community. Meta-regulation suggests that flexibility in rule application need not be associated with lower regulatory standards. Indeed, the example used here of the safety case approach to the reduction of major hazard risk demonstrates that when associated with sufficient resources, a meta-regulatory approach may well lead to considerably higher standards, aided by the monitoring efforts not only of the regulator but key individuals within regulated organizations and local community members. A key strength of the approach is its orientation away from a "command and control" method in the development of procedures (but not necessarily in terms of enforcement of the outcome standard) towards a more organic approach able to tailor risk reduction to a particular site.

Analysis of meta-regulation in light of regulatory character highlights the strengths of this regulatory approach, but also ongoing challenges. The three sets of relationships at the heart of regulatory character: between formal regulatory requirements and 'norms of place' (the norms of the regulated site or organization); between individuals and norms of place in the regulated site and between those individuals and formal regulatory requirements (illustrated in Figures 1-4 above) emphasize the importance of a separate appreciation of the everyday contextual realities as understood by a regulated organization distinct from the priorities set by the regulator. The regulatory task, then, involves as much securing a normative alignment as it does technical compliance, a point reinforced by drawing in Stinchome (2001)'s view of formal rules as "abstractions that govern" that command authority within the target site. Again, meta-regulation by bringing in a broader range of actors enhances the leverage for any necessary normative reorientation as well as some capacity to reduce self-interested manipulation of rules.

Yet, no-one regulatory approach, meta-regulation included, can remove the gap between regulatory expectations and the behaviour of the regulated organization. This is because regulations can only ever work directly through relationships with key individuals within the regulated entity. The impact on site norms, developing as they do from an institutional frame separate from the regulator, is only ever indirect, as is regulatory influence on how individual employees relate to site norms (for example by requiring certain procedures be adhered to or certain committees, such as safety committees be formed). No regulatory approach can control directly how the organization will respond

to regulatory overtures, or whether individuals within those organizations will use formal regulatory procedures in order to get some risk addressed. The authority of the law sits alongside other pressures that influence organizational norms and so organizational and individual behaviour. Analyses of regulation, then, need to develop a more nuanced understanding of how technique and context combine.

Finally, an analysis of regulatory technique through regulatory character does not take refuge in an assumption that the risk reduction goals of a regulatory regime are an automatic good. This would make the regulatory task appear much easier than it is in reality. Regulatory approaches, including those utilizing a meta-regulatory approach, exist in a contested environment where risk priorities are placed according to varying social, political and economic demands. Indeed in a context of high political anxiety, macro level concerns may see meta-regulation as a solution in search of a problem, rather than a considered solution appearing as best placed to resolve an agreed upon critical risk. Here, the gap between regulation and organizational practice may result not from simple organizational recalcitrance of some sort, but a mismatch of expectations between the audience of regulatory reform, local stakeholders both inside and outside of the organization charged with the development of site specific procedures to reduce a particular risk. Organizational norms may view the risks as defined in regulation a far cry from the pressing needs and risks that will determine the organization's future. In short meta-regulation may be "as good as it gets" in terms of an approach to minimize significant and pressing risks, but analysis of when it is best used and when it may simply represent a political face saving measure or divert necessary resources from some more pressing and socially destructive hazard are questions meta-regulation alone cannot answer. Whilst regulatory character cannot state 'a priori' what risks are and are not appropriate to be dealt with through meta-regulation it does provide the tools to analyse regulatory techniques in context and so help avoid the over-reach of regulation as an "off the shelf" solution to pressing social problems.

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ⁱ I mean advantages here in the sense of political advantages, rather than making a value statement about “rightness”. Clearly, for some (e.g. Harvey 1989) the contemporary market economy is at the centre of the problem and this quality of regulation would not be considered sustainable or desirable in the long term.

ⁱⁱ It should be appreciated that Kahn Freund was intimately concerned with the philosophy and political orientation that underpinned law. For this reason, he was sceptical of the capacity of what he termed “legal transplants” in proving effective in countries and regions with a very different political orientation and political system to the recipient nation. Therefore, it is somewhat of a simplification to place his work merely in the context of compliance, but this is done to aid clarity of the central argument.

ⁱⁱⁱ For those unfamiliar with Weber’s concepts of rationality, value rationality is characterised by action based on values (irrespective of the consequences of that action). Means/ends rationality is based on the goal to be achieved; action is thus directed towards a particular goal. Substantive rationality is value rationality expressed by an institution, and formal rationality is behaviour directed towards compliance with formal rules (see for a summary Levine 1985 p152-162)

^{iv} Such regimes reflect the ideals of ‘tripartism’ and ultimately point to the distinction Ayres and Braithwaite make between co-regulation and enforced self-regulation (Ayres and Braithwaite 1992: 102) a model where the interests of the affected community are taken into account when risk reduction measures are put in place.

^v These challenges are magnified in the context of the risks that have a low probability of occurrence but are of high consequences in terms of the potential harm that would be experienced. With risks such as these the challenge of monitoring what is an adequate response by the regulated site is complex since the absence of a catastrophic event may not be a good indication that these problems have been overcome. Measures of non-compliance need to be tailored carefully so they are actually relevant to the long term goal of avoiding catastrophic harm.

^{vi} Indeed, it is possible to go further and argue that ‘good’ regulatory reform in of itself also cannot produce change, but depends upon committed staff and receptive ‘regulatees’.

^{vii} Law intended to produce behaviour change rather than create conditions for social interaction of some sort. Instrumental aims are a central feature of regulation.

^{viii} There is an interesting parallel here with Ayres' and Braithwaite's (1992) notion of tripartism where those most critically affected by a particular risk need to be an intrinsic part of the compliance process.

^{ix} It seems to me that a regulatory reform agenda that attempts to make regulations accountable to competition principles tries to impart some sort of a balance – through the lens of making the laws fit market norms. However, it fails to question its own individualistic ideological stance (based in neoclassical economics) or provide a basis for genuine dialogue. Hence, it tends to add to the distance between regulation and behaviour rather than reduce it.

^x Although clearly this may be an issue.

^{xi} Paternalistic here is meant in the sense of a clear hierarchy within a society where those with more resources are charged with responsibility for those who have less.



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Title:

Regulatory failures and regulatory solutions: a characteristic analysis of meta-regulation

Date:

2006

Citation:

Haines, F. (2006). Regulatory failures and regulatory solutions: a characteristic analysis of meta-regulation. In, Proceedings, Annual Meeting, Law and Society Association, Baltimore, MD.

Publication Status:

Unpublished

Persistent Link:

<http://hdl.handle.net/11343/34947>