

COMMENTARY ON MACRAE REGULATORY IMPACT ASSESSMENT: A PANACEA TO OVER- REGULATION?

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Donald MacRae offers a welcome and succinct intervention from an experienced regulation practitioner. MacRae argues convincingly of the perils of unchecked standard setting in the name of safety – the well known twin ills of additional burdens on industry and constraints on individuals’ liberty. While over-regulation in the name of safety may perhaps fairly be seen as Perrowian ‘normal accident’ of administrators’ encounters with uncertainty, MacRae rightly notes the unresolved and thorny questions about the legitimacy and accountability of those who ‘increase the safety ratchet’ whatever their motivation. Who are qualified to exercise these judgements? How do we ensure they can be held responsible for their actions (or inactions)? Recognition of this risk of setting the wrong standards has triggered two responses from within the standard setting community – specifically the work of UNECE WP.6 and INMETRO in Brazil. This commentary ponders what these nascent responses themselves imply for legitimacy and accountability and whether regulatory impact assessment offers a panacea to over-regulation.

(Why) are legitimacy and accountability needed at all? In determining whether or not new safety standards need to be set, any standard setter or de facto regulator requires their actions to be accepted but they must also be able motivate behavioural responses (Black, 2008: 148). To use MacRae’s arboreal example, only would-be regulators that command legitimacy, and are seen to be accountable, will be able to convince industry that they should halt their calls for a standard to be set on tree safety inspection and reassure citizens that they can go on country walks safely.

The task here should not be underestimated. Standard setting bodies’ lack of formal regulatory powers and non-state character means that there is no legal authority for them to motivate compliance. This challenge is complicated further where these bodies are comprised of various individual organisations which have formed a specialist network around an issue (Black, 2008: 148 on enrolment). In this ‘polycentric governance regime’ (Black, 2008), legitimacy is socially, not legally, constructed and contested. In the context of risk governance, such would-be regulators are concerned with the perception of both the regulated and the recipients on whose behalf a standard is (or is not) being set – what Black calls the ‘legitimacy community’ (2008). So, legitimacy is bestowed by others, and is a function of the

alignment of the beliefs and actions of the regulator with the beliefs and expectations of this wider and heterogeneous legitimacy community.

Legitimacy is about achieving, or at least working toward, a congruence of values across all those affected by action or inaction by standard setters. Specifically, organisations that claim regulatory roles but lack traditional legal authority face challenges on three fronts (Black, 2008: 145-149). They must aim to be:

- pragmatically persuasive – convincing legitimacy communities that the action they advise and their decision-making processes and structures reflect society's interests;
- normatively engaged and able to show that they are dealing with the issue in hand in an appropriate way; and, most importantly,
- cognitively plausible – passing the test that they are necessary in the first place.

What claims to legitimacy can be made by the two quality assurance responses outlined by MacRae? INMETRO is clearly aware of the need to both reflect and inform citizens on the risks they should take seriously and how to approach safety claims made for products. Of course, establishing legitimacy across such a wide social base is a high wire act for INMETRO – as MacRae points out 'its very high public profile can turn against it if it gets an issue badly wrong'. The UNECE WP.6 has positioned itself as a hub with which a selective legitimacy community of standard setters can engage. The task here is to develop methods for risk prioritization which this network can take down to industry and, ultimately, to the citizen-consumer. Though UNECE may not need to directly win the hearts and minds of wider society, its position at the centre of a complex network of linked actors does mean that society's interests and perceptions will impinge on its work. Standard setters, regulated industries, NGOs and governments all have their own legitimacy claims to be met (see Black, 2008: 147-148) and the linkages between these actors will necessitate the adoption of positions that the UNECE may not otherwise have contemplated.

Claims that the UNECE *should* be a hub around which standard setters can converge are bolstered by its willingness to consult with that community. How it communicates its survey findings and involves its network in setting its agenda will play a key role in meeting the normative legitimacy challenge. INMETRO, by contrast, reports directly to citizens cashing out very publicly the tradeoffs and countervailing risks that result from intervention in standard setting. What is less clear is its input legitimacy. It is unclear, for example, what role legitimacy communities have in setting the agenda that INMETRO follows.

Finally, on cognitive legitimacy, one way of assessing how necessary UNECE and INMETRO's and their work actually is would be to ask the counterfactual. What would the world of standard setting be like if they did not exist? INMETRO can make substantial claims to necessity, their technical expertise gives industry in Brazil an institutional focal point and the civic engagement it encourages through *Fantastico* serves an important educative function. It is, of course, too early to judge the necessity of the UNECE initiative. Suffice it to say that its challenge must be to prove the worth of such a broad based approach to a similarly wide network of standard setters.

Accountability mechanisms are the central means by which legitimacy communities can control the activities and values of would-be regulators and, if they diverge, bring the regulators' standards closer to their own (Black, 2008: 149). As a federal agency, INMETRO is subject to the traditional forms of oversight – legislature and court. In addition, the agency gives a very public account of itself and its work through its weekly television broadcasts. UNECE's distance from the centre of government rules out traditional democratic and legal oversight mechanisms (see Scott, 2000) as well as more innovative media-based strategies. Thus, we are not assessing the extent to which UNECE is, or should be, subject to formal systematic scrutiny and sanction. This is important, not merely because it addresses the non-state, non-regulatory reality of the polycentric world of standard setting, but because it also helps avoid claims that accountability can only be ensured through a never ending chain of oversight bodies scrutinising other oversight bodies. Rather, we are interested in extended types of accountability through which trust can be established in polycentric settings (Scott, 2000). Both UNECE and INMETRO suggest that accountability can be founded in an evidence-based approach to standard setting. In what ways can regulatory impact assessment help actors give account for their actions?

RIA deploys analytical techniques – cost benefit analysis (CBA), most notably – to identify the costs, benefits and countervailing risks associated with a product or prospective intervention. The analytical cornerstone of better regulation, RIAs aim is to rationalize prospective regulatory action using codified methodologies to create a consistent, standardized approach. The fundamental goal here is economic efficiency. Certainly, the epistemic findings of RIAs can be readily summarized and communicated across a wide network of actors using a scorecard format and common analytical language (see Renda, 2006). However, we also know that RIA can be a barrier to integrating the latest evidence into the regulatory process (Dunlop, 2010). Multiple case studies also show it is used as a figleaf for political and symbolic processes and that, despite its consultative component, its use as a vehicle for wider social dialogue should not be overstated (Dunlop et al, 2010). Moreover, a good deal of salient, noncodified information is lost or omitted in RIA summaries and the objectivity of the analysis overstated (Kysar, 2010). The value judgements that determine what evidence is used and how it is weighted, for example, in cost-benefit analyses, are exercised out of general view (Ackerman and Heinzerling, 2004). But, if our concern is the accountability and legitimacy of oversight arrangements this lack of transparency is problematic particularly in issues and products characterized by uncertainty. How, and whether, these data debates are resolved and communicated determines the capacity of RIA tools and procedures to meet multiple communities' various legitimacy claims about what is morally and culturally appropriate, what meets their interests and what is necessary in risk regulation.

RIAs are not objectivity machines, rather the knowledge they produce and functions they serve are negotiated on the ground. This is no reason to reject RIA as a useful tool in risk regulation and standardization of course. Indeed, the contingent character of RIA processes may be an asset to standard setters trying to satisfy a variety of stakeholders. The initial commitment of a standard setter to carry out the RIA is an incomplete contract that can be shaped by these legitimacy communities. Where standard setters are prepared to facilitate these framing contests, and accept that these often lead to outcomes that may be very different from their original aims, the dynamic nature of legitimacy and accountability can be accommodated.

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