

# Regulation and Risk Today

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Risk and regulation have become important organising concepts for a wide variety of public and private actions. The invention of risk as a concept is closely related to wider social ideas based on agency, that we have the capacity to identify the probability of certain adverse events and the harm these are likely to cause should they turn out.<sup>1</sup> The idea of risk enables us not only to identify and take appropriate actions to prevent the harm arising, but also to use calculations to allow those who share risks (such as harm to property and person arising from motor accidents) to pool their risk through taking out insurance.<sup>2</sup> Some public services, notably firefighting, originated as a private mechanism for serving customer of insurance companies and reducing the latter's exposure, by putting out fires.<sup>3</sup> Major sociological figures such as Ulrich Beck and Anthony Giddens have suggested that the period of late modernity which we are living through may be characterised as a "risk society" in the sense that we face and are aware of multitudes of risks which may have a relatively low prospect of turning out, but which may have catastrophic consequences.<sup>4</sup> The tsunami which engulfed the Fukushima nuclear plant in Japan in 2011 provided a key example. The global financial crisis of 2008 was caused, at least in part, by large numbers of interrelated transactions which generated a hitherto barely-noticed "systemic risk" across different classes of financial and non-financial institutions, such that the triggering of one financial action, would then lead to a sequence of further adverse consequences in a range of weakly-related market sectors.<sup>5</sup>

Regulation has also taken on enhanced significance in societies characterised today as regulatory states or as exhibiting regulatory capitalism.<sup>6</sup> While regulation may be conceived of as state actions to oversee business by setting, monitoring and enforcing rules,<sup>7</sup> the hall marks of regulatory governance are today seen within a wider range of relationships including those between state entities (where discretion has frequently been

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<sup>1</sup> Ortwin Renn, "The Contribution of Different Types of Knowledge Towards Understanding, Sharing and Communication Risk Concepts" (2010) 2 *Catalan Journal of Communication and Cultural Studies* 177.

<sup>2</sup> R Ericson, D Barry, and A Doyle, "The moral hazards of neoliberalism: lessons from the private insurance industry" (2000) 29 *Economy and Society* 532.

<sup>3</sup> Frank Sharman, "Fire and Fire Laws Up to the Middle of the Eighteenth Century" (1991) 22 *Cambrian Law Review* 42.

<sup>4</sup> Merryn Ekberg, "The Parameters of the Risk Society: A Review and Exploration" (2007) 55 *Current Sociology* 343.

<sup>5</sup> Scott E. Harrington, "The Financial Crisis, Systemic Risk and the Future of Insurance Regulation" (2009) 76 *Journal of Risk and Insurance* 785.

<sup>6</sup> John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar 2008).

<sup>7</sup> Julia Black, "Critical Reflections on Regulation" (2002) 27 *Australian Journal of Legal Philosophy* 1.

replaced with rules and tighter monitoring of performance) and also between private actors (where increasingly we see private rules being developed and applied through contractual instruments) and deploying a wider range of instruments going beyond rules.<sup>8</sup> Accordingly adherents of regulatory capitalism see regulation as a core mode of governance for a very wide range of relationships, with pluralised and hybrid models both for setting and implementing a wide range of norms which aim to change behaviours.<sup>9</sup> The interface between risk and regulation started with the challenge of risky activities such as nuclear power, and novel processes for which the risks were not well defined (such as the development of genetically modified foodstuffs).<sup>10</sup> Even with nuclear power we have seen quite pluralised models of regulation, ranging between public regulation of the core activities of both public private nuclear power generators, to include also the development of self-regulatory regimes over nuclear power companies and their power installations.<sup>11</sup> There has been a tendency for the conception of risky activities to grow as a key justification for regulation, to include the operation of commercial aircraft, the provision of healthcare services. Concepts of risk have been important in focusing attention on the regulation of product risks, moving beyond civil liability regimes to develop more proactive administrative and criminal regulation of product safety, embracing such instruments as mandatory labelling and information and duties to recall products. The courts have explicitly used cost-benefit analysis to determine what kinds of risks are tolerable and when a duty to mitigate risks arises.<sup>12</sup> Within the EU, in particular, a precautionary approach to regulating safety has been evident.<sup>13</sup>

Arguably the regulation of risky activities remains a central focus at the interface of risk and regulation. Increasingly, and especially since the global financial crisis, regulators of financial markets have placed a focus on risky activities. Within such processes risk has become increasingly important in shaping not only *what* to regulate, but also *how* to regulate using models of “risk-based regulation”.<sup>14</sup> For example, in the case of food safety regulation, processes of inspection are increasingly shaped by ideas about what degree of riskiness is exhibited by particular kinds of food premises and also by the track record of particular food premises. The kinds of food premises which typically present higher risks should be inspected more frequently (and perhaps more stringently) as should those with a track record of poor practice (whatever the overall level of riskiness in the particular sub-sector).

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<sup>8</sup> Anne-Lise Sibony and Alberto Alemanno, “The Emergence of Behavioural Policy-Making: A European Perspective” in Anne-Lise Sibony and Alberto Alemanno (eds) *Nudge and the Law – A European Perspective* (Oxford: Hart Publishing 2015); Colin Scott, “Regulation in Age of Governance: The Rise of the Post-Regulatory State” in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation* (Cheltenham: Edward Elgar 2004) 145.

<sup>9</sup> Colin Scott, “Regulatory Capitalism, Accountability and Democracy” in Jacint Jordana, Andrea Bianculli, and Xavier Fernandez Marin (eds) *Accountability and Regulatory Governance* (London: Palgrave Macmillan 2014).

<sup>10</sup> Christopher Hood, Henry Rothstein, and Robert Baldwin *The Government of Risk* (Oxford: Oxford University Press 2001).

<sup>11</sup> Joseph Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago: University of Chicago Press 1994).

<sup>12</sup> Cento Veljanovski, *The Economics of Law* (London: Institute of Economic Affairs 2006).

<sup>13</sup> David Vogel, *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton: Princeton University Press 2012).

<sup>14</sup> Rob Baldwin and Julia Black, “Really Responsive Risk-Based Regulation” (2010) 32 *Law & Policy* 181.

A distinct trend also has been the deployment of risk instruments, such as insurance, within regulation. Most of us are subject to some kind of regulation by our insurance companies, whether it is a responsibility to maintain our cars in good working order (so as to avoid accidents), or keeping our homes locked (to a specified standard) and with working alarms fitted. The potential of insurers to act as regulators of conduct has been identified,<sup>15</sup> but developed remarkably little within the scholarly and practice literatures. Thinking about the very wide range of activities which insurers insure, we do hear urban legends about community activities being curtailed because the insurers would not permit it, but we hear very little of the positive behaviours promoted by insurers which positively affect our societies (for example by reducing car accidents, burglaries, and workplace injuries) not through preventing activities, but rather by using insurance contracts to mandate that they are undertaken in a safer fashion.<sup>16</sup> It is important to ask whether there is potential for better regulation policies to mandate that consideration should be given as to whether the incorporation of requirements in insurance contracts might offer an effective way to regulate certain behaviours. Whilst we understand too little of this potential, we understand even less of the extent to which insurers monitor and enforce the conditions they incorporate in their contracts, something that would be necessary in order to place more systematic dependence on such private instruments for public regulatory goals.

The success of the *European Journal of Risk Regulation* in attracting scholarship of very high quality over the last seven years is testimony to the distinctiveness and vibrancy of the field. Unsurprisingly the field still faces significant challenges. The first is conceptual and in particular how to exploit the potential to move beyond the regulation of risky activities to embrace also the role of risk and risk instruments in regulation (for example in shaping regulatory practices and regulated behaviours).

A further set of challenges are methodological. While risk regulation generally has attracted scholarship from a number of disciplines, including sociology, political science, economics and law, the kinds of large scale studies of risk regulation which typically draw on multiple disciplines to recast problems and how to approach them in interdisciplinary fashion are not yet much in evidence. We do not yet, for example, see European Union Horizon 2020 funding being put towards risk regulation as a field of enquiry, notwithstanding its obvious significance for both economic and social well being in the EU and beyond. Such projects have stronger potential not only to challenge our assumptions as to what we know about risky activities and their regulation, but also to dig deeper into the processes through which the risk regulation is undertaken and how it is implemented, whether successfully or not, but also with a greater or lesser degree of unintended effects, some of which may be counterproductive.<sup>17</sup>

A third set of challenges concerns the techniques of risk regulation. As we might expect, the regulation of risky activities has traditionally been conceived of as involving public agencies overseeing businesses using rules. Increasingly we see private regulators

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<sup>15</sup> Richard V Ericson, Aaron Doyle and Dean Barry, *Insurance as Governance* (Toronto: University of Toronto Press 2003).

<sup>16</sup> Simon Halliday, Jonathan Ilan and Colin Scott, "The Public Management of Liability Risks" (2011) 31 *Oxford Journal of Legal Studies* 527.

<sup>17</sup> Peter Grabosky, "Counterproductive Regulation" (1995) 23 *International Journal of the Sociology of Law* 347.

developing standards over risky activities and their incorporation into contracts which are subject to associational or individuated monitoring and enforcement (but, as yet, without much understanding as to how effective or reliable such private regulatory implementation may be). The setting of private norms for risk regulation raises challenges for democratic decision making and forces us to ask to what extent private rule makers can take on characteristics of elected and representative legislators, for example through extending rights to participation and transparency, and also by subjecting themselves to new forms of oversight and accountability, akin to the “global administrative law, and extending to private decision makers”.<sup>18</sup>

A quite distinct set of technique issues arises from the growing interest in the behavioural sciences. This field highlights the potential for shifting attention away from the behaviours of regulated business towards the intended beneficiaries for regulation. Behavioural approaches to risk go beyond seeking to better inform consumers, but also shape their choices through giving greater prominence to what policy makers conceive of as better choices (better diet, more exercise or better financial provision, for example). Behavioural approaches are attractive because they are apparently less intrusive, suggestive rather than mandatory in respect of behaviours, and are sometimes labelled as a form of liberal paternalism. However they have attracted a range of criticisms, to the extent that they are less transparent than more direct regulatory instruments, and that they interfere with moral agency by restricting choice *de facto* if not *de iure*. While in the United States an Executive Order from the President mandates federal policy makers to deploy behavioural approaches to policy making (15 September 2015), the opportunity to include such techniques within the EU Better Regulation package adopted in 2015 was missed.<sup>19</sup>

The field of risk regulation has come a long way over the last decade or two, but many interesting questions remain to be explored and new approaches might be developed. In this short piece I have tried to hint at just a few of the challenges the field should address over coming years.

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<sup>18</sup> Carol Harlow, “Global Administrative Law: The Quest for Principles and Values” (2006) 17 *European Journal of International Law* 187.

<sup>19</sup> Alberto Alemanno, “Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda” (2015) 6 *European Journal of Risk Regulation* 344–356.