

Empirical Associative Regulation – Drawing Future Regulatory Tools from the Experience of the Past

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Abstract

Traditionally, theories on regulation have suggested choosing the “right” regulatory tool for a given situation of desired behavioral steer, using a broad theoretical approach of understanding the factors involved in the regulatory realm and speculating or deducting from it toward the efficient choice.

In contrast, I am arguing that the process of choosing the “right” regulatory tool should be guided by an opposite process, in which a database of regulatory success and failure case studies will be created. The institute (i.e., governments, regulation agencies, etc.) seeking to steer behavior using regulatory tools (“the regulator”) will search this information body using the specific characters of its situation (i.e., regulated field, regulation aims, regulatee’s type, etc.), and will use associative thinking to complete missing data in those situations where it will not find a perfect match for its circumstances.

Once the regulator will find the best fit to its situation, among the case studies in the database, and after implementing this regulatory tool in such situation, the regulator will have the responsibility of measuring the success/failure of its choice, and hence enriching the database further for future use by itself and others. It is assumed that this approach will establish regulation and regulatory tools as an empirical process of selection guided by an accumulated body of knowledge, that will eventually create a more efficient and successful regulation and hence, desired behavior.

In the first part I will create an example of the way case studies will be indexed into the data base of regulation case studies. The second part will discuss regulation measurement and will detail the feedback mechanism meant to enrich the regulatory data base forming a system which is self-developing. Finally, I will address possible problems with the suggested system.

¹ PhD student, Osgoode Hall Law School – York University, Toronto, ON, Canada; this article was born from the discussion held in the study group on regulation and governance at Osgoode Hall Law School. Each of the participants brought to the group his own field of research and looked at it from the regulatory point of view. This mixture of legal fields, shown through the regulatory lances, made me conceptualize the idea expressed in this article. I would like to thank the group participants and especially my supervisor, Professor Liora Salter who inspired me with her passion for regulation. In addition, I would like to thank Jodi Patt for her valuable help.

1. Introduction

On February this year, a European academic approached the ECPR Standing Group on Regulatory Governance Email List with a request for teaching cases/class exercises that focus on regulatory instrument choice and regulatory impact analysis. Several suggestions had been made.² However, what was obvious from this experience was that there exists a lack of case study data base in regulation from which inferences can be drawn for educational needs, as in the said example, or for practical needs.

When one thinks of the many existing and commonly used data bases of court judgments, legislation, psychological experiments and others (e.g., LexisNexis, Westlaw etc.), the absence of a similar device for regulation and regulatory case studies seems surprising and keenly necessary. One possible reason for this absence is the attitude according to which regulatory case studies are too complex and contain many factors and variables that would make it impossible to index and conduct searches in a helpful manner.

This paper argues that a systematic associative oriented indexing and search mechanism of regulatory case studies will lead to a highly functional data base that will facilitate a friendly search and will enable users to draw valuable lessons for desired regulatory regimes and tools.

In psychology associations are relations between conceptual entities.³ They are relationships between objects, feelings and ideas. Memory appears to be structured as an associative network that serves the purpose of informing about relationships between different things. The attempt to index the regulatory case studies and the search mechanism in an associative way will draw upon this definition and will try to create and find relations, both in the indexing process as well as in the search mechanism, that are associative in their nature.

Moreover, it is assumed that since the human brain uses associative mechanisms, and regulation's goal is to steer human behavior, employing an associative approach to the regulatory

² Scott Jacobs, Managing Director at Jacobs and Associates suggested their RIA course <http://regulatoryreform.com/ria-training.html>; Tom R. Burns, Professor Emeritus of Sociology, University of Uppsala, Sweden suggested two articles: <http://www.thecommonsjournal.org/index.php/ijc/article/view/260/217>, The second article has appeared recently (2011) in Human Systems Management, The EU case studies are presented in substantial detail in Marcus Carson et al, "Paradigms in Public Policy: Theory and Practice of Paradigm Shifts in the EU", Peter Lang Publishers and David Bach, Professor of Strategy and Economic Environment, IE business School, Spain, suggested an old HBS case on RWE and regulation of electricity in Germany.

³ Wikipedia, http://en.wikipedia.org/wiki/Association_%28psychology%29

data base will make it inherently efficient and valuable in finding the optimal suggestions for a requested regulatory solution.

In the first part of this paper the suggested indexing method will be demonstrated on three case studies. As it will be demonstrated, apart from the basic factors as the country where the case study was conducted in and the regulator and the regulatee identity, a thorough analyze will be conducted in order to produce a 'head note', just like the one that is done in legal data bases, that will include the core subjects of the specific data base.

The second part of this paper will deal with regulation measurement and the feedback mechanism which is suggested as an integral part of the regulatory data base. A uniform and valid measurement that will feed the feedback mechanism will enrich the data base and will turn it into an even more valuable tool.

The third and last part will discuss possible problems that the data base creation and usage as well as the measurement method and feedback mechanism might raise. The technological infrastructure that will enhance the suggested regulatory database is beyond the scope of this paper. It is sufficient to say that advanced technological techniques can facilitate a sophisticated, friendly and efficient data base.

2. Case Studies Indexing

In order to be used in the regulatory data base, the regulatory case studies should be indexed in a persistent, systematic, thoughtful and associative method. It is important to analyze each case study according to its structure, methodology and specific characteristics. This task should become easy with time for it is anticipated that the more the suggested data base will gain popularity and draw users, the case studies' authors will adjust themselves to the data base requirements and present their case studies in a way that will easily correspond with the data base indexing method.

In this way, along with the feedback mechanism, the data base will become a self-sustained, searchable knowledge body, further amplifying its efficiency and cost effectiveness.

I. Coke Oven Emissions: A Case Study of Technology-Based Regulation⁴

Field: Emission, Clean air, Pollution

Research type: Historical Review

Country: United States

Regulatory body: Government – Federal/State

Regulated body: Coke Industry

Theme: How well the technology-based regulation approach has worked in the control of coke oven emissions

Head note: Require each major source to achieve the lowest level of emissions that has already been achieved by a major source within the same group of industrial sources – technology-based regulation – coordination of regulation among agencies – technology-forcing regulation – cancer – health-based standards – pilot testing – technology-inducing approach – regulatory discretion – unreasonable risk approach

II. Why people obey the law: experimental evidence from the provision of public goods⁵

Field: Sanctions

Research type: Empirical Study

Country: Switzerland

⁴ John D Graham and David R Holtgrave, Coke Oven Emissions: A Case Study of Technology-Based Regulation, 1 Risk – Issues in Health & Safety 243 (Summer 1990).

⁵ Tyran, J.R. and Lars Feld (2002), ‘Why people obey the law: experimental evidence from the provision of public goods’, CESifo Working Paper No. 651(2), January, Centre for Economic Studies and Institute for Economic Research, Munich, pp. 1-33.

Regulatory body: Experimental

Regulated body: Undergraduate students of business, law and economics

Theme: Whether mild law increases efficiency in the provision of public goods through a process of norm-activation

Head note: Deterrent effect of legal sanctions - expressive law - social norms
– public goods – voting - free-riding – mild law – severe law –
conditional cooperation – efficiency – exogenously -

III. Evaluating instruments for regulation of health care in the Netherlands⁶

Field: Health Care

Research type: Empirical Study

Country: Netherlands

Regulatory body: Independent agency within the ministry

Regulated body: Health care services

Theme: Assess the effect of supervision instruments on the quality of regulatory output of the regulator

Head note: Health care regulation – measure and monitor of performance –
detection – quality of health care – regulatory instruments –
indicators – inspectors – risk-based supervision – validity and
reliability – objectivity - discretion

⁶ Saskia, M. Tuijn, Paul B. M. Robben, Frans J. G. Janssens and Huub van den Bergh, Evaluating instruments for regulation of health care in the Netherlands, Journal of Evaluation in Clinical Practice 17 (2011) 411-419.

3. The Feedback Mechanism

This is an essential part of the regulatory data base that will make sure that the data base is a developing body of knowledge. It is suggested that the data base user will be obliged to measure the efficiency and success/failure of the regulatory tools he is employing further to searching the data base. After conducting this measurement, the user will report back to the data base on his results.

In addition, it is suggested that scholars who conduct regulation case studies will prepare a research report that will be easy to insert into the regulatory data base. These direct additions to the data base will make it an even more powerful and valuable tool for regulatory tools evaluation.

4. Possible problems

Due to its new and revolutionary nature, the regulatory data base might pose several methodological, practical and theoretical problems. The first problem is the immense work needed in order to set up the basic regulatory data base. In order for the data base to be meaningful, there is a need to index hundreds of regulatory case studies, an ambitious project that needs to be carried out by a number of regulatory scholars over an extensive period.

For that to happen, a prominent regulation institute should 'pick up the gauntlet' and allocate resources for this project. However, it is estimated that the outcome will change the way we think today about regulation and choose regulatory tools to steer behavior and therefore, very beneficial. Moreover, the founding institute can charge a fee for using the database, hence not only returning its investment but making a substantial and prolonged profit from it.

Another criticism that may arise is the nature and validity of the associative component of the data base. The associative component is inherently illusive and will become vivid and clear only when the data base will be actually formed and created. This is a unique and ground breaking element that will evolve as a process through the indexing creation and should be referred to as guidance to those conducting the indexing as well as for the search mechanism.

