



Capacity in regulation

Martin Lodge and **Andrea Mennicken** explore why a turn to issues of regulatory capacity is of mounting importance

Regulatory debates are often dominated by questions about appropriate techniques and approaches. Without claiming to be 'behaviourally informed' or being 'risk-based', no regulatory proposal is likely to make it from the drawing board to the messy world at the front level. Debates have also focused on institutional architectures, namely, whether jurisdictional boundaries are 'fit for purpose' in view of changing business and consumer markets.

Both of these debates are, of course, important. However, what is often left behind are questions about regulatory capacity. Yet, such capacity related debates are of mounting significance, especially as regulators increasingly realize that formal statutory provisions offer only limited insight into questions of perceived agency 'performance'. The old orthodoxy that regulatory 'independence' is essential for high performance has come under criticism as regulators with similar statutory powers have been shown to perform rather differently. Most importantly, perceived independence is related to perceived regulatory capacity, and therefore reputation, rather than formal statutory provisions.

How then does a capacity-related concern change the parameters for debates about regulation – in general and with respect to particular domains? One key shift is that it focuses debates on underlying pre-requisites for particular interventions to work. These resources relate not only to questions about financing – both in terms of level and stability, but also to organizational fire-power (e.g. in terms of technical skills and sheer numbers of staff) and the ability to access, process and disseminate relevant information.

Secondly, attention is drawn to different types of capacities that regulatory regimes need to develop – and to the interplay across these different types. For regulatory regimes – institutional arrangements that formally and infor-

mally link state and non-state organizations together in the production of regulatory effects – to perform, a range of different capacities need to be present. Building on the work from Lodge, together with **carr** research associate Kai Wegrich (Lodge and Wegrich 2014), we can distinguish four different types of regulatory capacity:

- › Analytical capacity: the ability to diagnose trends, to understand developments and forecast future developments
- › Delivery capacity: the capacity to organize regulatory processes
- › Oversight capacity: the ability to conduct effective monitoring and enforcement
- › Coordination capacity: the capacity to bring together dispersed stakeholders and other agencies in decision-making.

There are distinct ways to think about regulatory capacity when conceptualized in this way. One is to reflect on organizational dynamics and resources. The above typology asks regulatory organizations to consider what kind of capacities they have, what 'deficits' might exist and what kind of capacity prerequisites need to be in place to ensure effective regulatory interventions at organizational level. Another way is to consider these capacities at the level of the individual, working for the regulatory organization. No individual is likely to be 'best in world' across all four capacities, so it raises questions about the kind of competencies that regulatory agencies ought to attract and how they wish to reward them.

A final, third, way of considering capacities is to consider their distribution at the regime level, namely across dispersed sets of regulatory actors involved in information gathering, standard setting and behaviour modification. These generic regulatory activities often involve different, overlapping sets of actors, across levels of government, and across state and non-

state boundaries. In view of the reality of dispersed regulatory governance, identifying what capacities exist across organizations, and how to assemble them remains a central challenge.

Furthermore, a concern with capacity asks us to take note of potential impediments for capacity building. One is political uncertainty; another concerns legal uncertainties; a third relates to uncertainties with regards to the available funding to develop the above named capacities; and a fourth, final one to organizational and system-wide attention barriers (e.g. through intra and interorganizational silo building). Especially in the literature on development and regulation, such potential impediments to regulatory capacity have been widely diagnosed. The traditional answer to these challenges has been to rely on 'low capacity' devices (such as non-discretionary long-term contracts). However, such low capacity devices have hardly provided a satisfactory answer to questions of system-wide regulatory development and stability. Moreover, low capacity devices, such as non-discretionary contracts, often lack flexibility and are inadequate for the building of competent adjustment capacity, for example in view of continuous demands for 'updating' and renegotiation, the need to address new trends that were unforeseen, as well as changes in societal demands and funding (as also noted in this issue's article on Brazil and the importance of 'disciplined discretion').

Regulatory capacity is only likely to evolve in relatively stable political and legal climates (see here also the recent challenges posed to regulation by the uncertainties accompanying Brexit). It is highly unlikely that capacity-rich regulation can exist where any regulatory decision can be undermined by direct appeals to political masters, or frustrated by long-term haggling in the court system. Likewise, transboundary issues pose particular challenges for regulation and the development of regulatory capacity. As this issue's

article on transboundary crisis management in the EU highlights, regulatory capacity in this context is critically dependent on multiple actors devoting resources and motivation to particular activities. In such a system, where one unit's failure may have systemic repercussions in other jurisdictions, questions about how to develop coordination capacity become even more problematic and salient, and they raise questions about the roles and relevance of 'national sovereignty' in public administration.

Finally, there is the question about legitimacy. What capacities (regulatory powers) are 'acceptable' in the eye of political, industry and public opinion? After all, limiting regulatory capacity might be exactly what is required given complaints about red tape, risk-averse bureaucrats and the need to support individual enterprise. Similarly, in an age of depleted public budgets and spending reductions for public services, advocating a reform agenda for 'capacity-rich' regulation might also appear problematic.

So what should be done about regulatory capacity? One possibility would be to rely on individual ad hoc adjustments of regulation. Such, largely reactive responses would focus on those areas where public salience is most interested, but it would not consider the long-term and would also not offer a thorough consideration of the kind of future (e.g. analytical) capacities that might be required for the continued support of regulatory frameworks (see here also the articles in this issue on the regulation of new information technologies). Another recipe would be to rely on an overall framework for capacity enrichment. Such a central initiative would face the inherent reluctance of different regulatory actors to

be 'organized' by an inevitably control-interested central government department. It would also most likely lead to an emphasis on broad themes over bespoke capacity requirements (i.e., concrete regulatory action guiding); and it would likely lack interest in transboundary questions, particularly in those of a transnational nature. Finally, there is the option to rely less on formal centralization and more on informal cooperation, exchange and mutual learning. Here, questions such as peer review learning and the need to build and maintain collaborative linkages across organizations would be central. However, such initiatives need active nurturing and resources, including financial resources from the centre (i.e. government), and they usually fossilize quickly in those areas deemed 'irrelevant' to the central mission of individual organizations and ministries.

In sum, debating capacity in regulation is of fundamental importance. It raises questions about the kind of state we are living in; it puts the spotlight on organizations' attempts at developing their reputation for capacity, and it emphasizes the importance of considering underlying prerequisites before succumbing to the hype of modern high intelligence regulatory approaches.

References

Lodge, M. and Wegrich, K. (2014/eds) *The Problem-solving Capacity of the Modern State*, Oxford University Press.

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