

# RESPONSIVE REGULATION – IT TAKES TWO TO TANGO

Julien Etienne revisits the influential idea of responsive regulation on its twentieth anniversary.

Responsive Regulation by Ian Ayres and John Braithwaite was published two decades ago. In that time, the book has enjoyed a growing influence in the field of regulation studies. It continues to influence many practitioners in a variety of regulatory fields, particularly in English-speaking countries.

A 20th-anniversary offers us an opportunity to reappraise this work. There are many aspects of the book that might be discussed with hindsight. In particular, the enforcement philosophy in responsive regulation deserves a second look, because it has been extremely influential, and because several empirical studies in recent years have put it to the test.

Responsive regulation frames regulatory encounters through the eyes of the regulator. Not just any regulator but a skilled and resourceful one, presumably capable and willing to push regulatees into compliance by making good use of discretion and judgment.

Ayres and Braithwaite's main idea is simple and yet dynamic: a "responsive" regulator would enforce regulation by interacting with regulatees as though they were law abiding and trustworthy. According to the theory, this should contribute to bringing to the fore the regulatees' "better self". If that were to fail, however, regulators should begin "escalating" the so-called "pyramid of enforcement" with incentives and disincentives, and eventually coercion, while simultaneously adjusting their assumptions about what makes regulatees tick to obtain compliance.

Unfortunately, a string of empirical studies published in recent years have shown that things are not working this way in practice (see Mascini 2013). Even when regulators try to be "responsive", they may alienate regulatees such that the intended "cooperation" between regulator and regulatee may fail to materialise. To put it bluntly, if regulatees do not recognise a well-meaning regulator from an ill-meaning one, then responsive regulation cannot work.

Such mismatches should not be surprising, however. Indeed, much of what happens in regulator-regulatee interactions is ambiguous and open to interpretation. Rules can be too vague, and compliance issues complex. Breaches of mutual expectations are a case in point: a breach might be intentional, but it might also be the result of external pressures imposed by a third party, or it might be purely

accidental. It is often impossible for the other party to be certain and in due time which one it is. Hence, a regulator may believe it is one thing and the regulatee be convinced that it is another.

The ambiguous nature of regulatory encounters may be more than just a minor hurdle for those who think about regulatory relationships. At the least, it makes it difficult to assume that a good regulatory relationship depends only upon the regulator's skill. Cooperation between regulators and regulatees is therefore also a question of whether they have a common understanding of what is going on, that is, a common template to make sense of their ambiguous interactions. This is neither a given nor is it something that regulators can easily impose on regulatees. In fact, whichever shared understanding exists between a regulator and a regulatee is more often than not a compromise between the respective goals and expectations of both parties.

All of this pleads for us to adopt a different kind of perspective on regulatory relationships beyond just the regulator's. Let us call this perspective "tango regulation". Just as it takes two to tango, it also takes two to make a regulatory relationship "work".

As our two "dancers" meet for the first time, they probably have their own incompatible ideas about regulation. Therefore, their first interaction may well be painful to watch. As they meet again and again, however, the dancers get the chance to adjust to one another. So far, so good. But that adjustment does not make all ambiguities disappear: repeated interactions do not turn regulatory encounters into a mechanical routine.

In order to prevent regrettable misunderstandings, regulatory dancers must continue to pay attention to the small "steps" their regulatee partner makes in their encounters: having lunch together after an inspection, or using first names instead of formal titles in conversation may be signs that things are going well. The opposite may be an indication that the relationship is strained. Such small, apparently trivial things may help regulator and regulatee to understand and monitor their relationship.

Empirical studies show that there is mutual "responsiveness" in those multiple small steps that participants in a regulatory relationship make to keep it going or to resolve problems. Just as regulators might raise their voice when they are dissatisfied with the regulatee's behaviour, regulatees may express their dissatisfaction in various ways, including shows

of defiance. Like dancers who step back or forward towards their partner, regulatory couples manage their relationship in small moves.

More generally, regulatory couples can be seen to develop common repertoires of do's and don'ts, such as: do not sanction immediately after a breach, start a conversation instead; do not offer gifts or mutual assistance, but limit exchanges to what the written legislation requires instead; do not involve third parties in the discussion and keep to the intimacy of face-to-face meetings. A few false steps, and the relationship might unravel.

The difficulty, however, is that the regulatory tango is not danced in the same way by all couples. Some make sense of their interactions in certain terms that suit them, but these terms would not suit others.

For example, it is often noted that litigation in regulatory interactions is a relationship-killer. It tends to be rarely used precisely to avoid burning bridges and jeopardising future interactions. Yet, there are cases where that does not apply (Coglianese 1996). Another example of an ambivalent behaviour is when one of the parties to a regulatory relationship involves a third party in the conversation, who might be a legal adviser, a politician, an expert, a representative of a professional body, etc. That may be harmless in certain relationships. It might even be experienced as a good thing, for example if both regulator and regulatee value solving their disagreements in a "scientific" way (not an unusual case in risk regulation), to which an expert could contribute. However, whoever takes the initiative to involve a third party may also be perceived by the other party as showing distrust; it is as if one's honesty or competence is being openly questioned and that may strain the relationship.

The same goes for many other types of interactions between regulators and regulatees. One can sometimes observe regulatory relationships characterised by regular warnings and notices and yet experienced as good and cooperative by both parties. But consider another regulatory couple and you might observe the exact opposite: warnings there might be perceived as declarations of war.

In sum, there is so much variety in regulatory relationships that it would be impossible to reduce them to a single model. In an attempt to simplify and yet do justice to the variety of real interactions we might at best identify different styles of regulatory "tango" (Etienne 2013).

## Just as it takes two to tango, it also takes two to make a regulatory relationship 'work'.

This tango metaphor for regulation should not be read as a rejection of "responsive regulation". If anything, it should be seen as a plea for expanding attention to responsiveness in regulatory relationships, beyond that of the regulator only, to the responsiveness of both parties towards each other.

Adopting this perspective may make regulation more complex to describe and design. However, there is no better time for starting to pay more attention to the regulatory tango, as alternative perspectives that remove the relational element from regulatory thinking – like behavioural economics – have become increasingly popular with policymakers. More importantly, economic crises and long-term austerity are putting unprecedented strain on state-society relationships, which can disturb regulatory encounters and translate into lower compliance with regulations and growing defiance towards state representatives.

### References

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