

The Emergence of a Risk-Control Approach to Regulation

New Insights Lecture by Malcolm Sparrow

Malcolm K Sparrow is Professor of the Practice of Public Management at Harvard University's John F. Kennedy School of Government and author of *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*. His research deals with the risk-control functions of government, and the special managerial challenges faced by social regulation and law enforcement agencies. He emphasises the practitioner's experience and a managerial approach he describes as 'craftsmanship'.

In January 2006, Professor Sparrow spoke about these topics as part of the *New Insights Lecture Series* run by the Civil Service College. What follows are edited excerpts from his lecture.

Controlling Bad Things and Untying Knots

Professor Sparrow introduced his lecture as "the story of watching practitioners". He said he had observed regulators across a wide range of industries from the vantage point of academia, analysed their actions, and fed the analysis back to the practitioners.

He described risk management briefly as "the control of bad things". The hypothesis underlying most of his work is that controlling risk is an important science or art which has distinctive patterns of action that we need to understand. Some people and some professions are better at risk management than others and there is much to be gained from a cross-industry perspective.

The phrase 'risk management' has been so used in other areas that it is tainted. In America, risk management principally means financial risk management. To Canadian federal agencies, it

means protecting against litigation from private citizens. A broader concept than 'risk' is that of undoing harm. One analogy I have in mind is that of undoing knots. Give a knot to an adult to undo and then give it to a young child and see how they approach the problem. A child who is not quite ready for this might pull and tug and then look away. The child gets frustrated and might pull harder and make it worse.

The mature approach to undoing a knot is that you hold it close and look at it this way and that. You take a little time and turn it until you really understand the structure of this knot. Then you begin to realise, oh, if I just pull this strand, maybe it'll release that one. Then, I have to pull another and provided that I do it in the right sequence and quite delicately, the whole thing will just go 'poof' and you get this magical moment when it all comes apart.

Similarly in risk control, you find some important vulnerability of the risk itself that makes it evaporate. This approach is available to us as regulators in the business of unpicking social harms. It is a skill that we should recognise and understand. The hypothesis for you to test is whether there are patterns of thought and action which are distinctive to the business of risk control—the control of bad things which is different from the promotion of good things—and are absolutely central to much of the role of government.

The Regulatory Pendulum

Prof Sparrow argued that there is increasing pressure on regulatory agencies around the world to show results. He described how the approach to regulation in the US changed in the 1990s to illustrate these pressures and why regulatory agencies need to be able to tell a compelling story of how they carry out their work.

In the early and mid-1990s in the US, there was a traditional approach to regulation. This model was reactive, somewhat adversarial, incident-driven and enforcement-centric. Industry thought this regulatory stance was harsh, especially compared to the approach of European regulators who were softer, friendlier, more reasonable, co-operative and conciliatory.

There was a switch in the mid-1990s when the Democrats led by President Clinton occupied the White House and the Republicans dominated Congress in the US. The Republicans trusted that industry would do the right thing and battled against the Democrats to get government off the back of industry by reducing regulation. The Republicans attempted to abolish the Occupational Safety and Health Administration (OSHA). In fact, they had a slogan for this. It said: "Replace OSHA with a brochure." We don't need enforcement, we just need information. Industry can be trusted. Give us the information, they'll do the right thing. They also wanted to weaken the Environment Protection Agency (EPA) and the Food and Drug Authority (FDA). They failed and the Democrats won the public battle. In fact, the public did not trust industry and the thought of government trusting industry was scary to them.

Clinton established the political middle ground and wanted to take the teeth out of pro-regulation and demonstrate that regulation could be reasonable and 'smart'. This led to a switch to a new model which focused on compliance assistance, customer service, partnerships, a problem-solving approach and preventive programmes.

As a result of this change in the approach towards regulation in the political administration, US regulators split into two main camps. One camp supported the old model and this was made up mainly of middle-aged, experienced males who did not trust people. Those espousing the new model comprised young, new female officers who championed the customer-service approach and tended to be political appointees and liberal arts graduates. The camp supporting the old model thought the other camp was naïve and the camp supporting the new model called those who supported the old model enforcement dinosaurs.

When the pro-enforcement camp lost, enforcement numbers and aggregate outputs fell, resulting in agencies unwittingly sending a message that they did not do enforcement anymore. This phenomenon became known as the

'bean dip bunker' and was experienced by the OSHA and EPA in 1995 when emphasis was on the customer-service approach. The Internal Revenue Service (IRS) also experienced a fall in the number of judicial reviews, audits and use of harsh collection techniques because of its reluctance to upset taxpayers, whom they saw as their customers. This led to Congress questioning the effectiveness of the IRS.

Typically, when enforcement numbers fall, overseers will ask regulators to explain the dip. When regulators replied that they were using innovative measures that had broader reach and caused less grief, this was seen by overseers as attempts to cloak inaction with innovation. When asked to prove otherwise, regulators could not. Nowadays in the US, the term 'enforcement quotas' is not used but regulators who know the importance of enforcement use the term 'credible deterrence' to describe enforcement quotas.

That's the swinging of the regulatory pendulum. Government creates a harsh agency because there's an uncontrolled problem. Mostly, it's controlled. Now, all of a sudden, there's no reason for the agency to be so harsh; it's become unpopular. It loses its credibility and funding. Industry complains and the agency gets pushed back the other way. As it gets soft, the public get worried because there's some other emerging threat and a new agency has to be created because the previous one lost its teeth.

So you have this natural swing from harsh-to-soft, from soft-to-harsh, and if you can't go back to harsh when appropriate, somebody else will take your place, depending on what the risks of the day are.

Craftsmanship in Regulation

Professor Sparrow compared regulators to craftsmen who are the experts in their field and are in the best position to judge which tools are best suited for accomplishing the task at hand.

Regulators should first agree that they have the same objectives, before deciding on the appropriate tools. The debate should not be over ideology. What you're really trying to do is learn the risk orientation. That's the strategic innovation. All the questions about whether we should be harsh or soft, whether we should use enforcement or education, whether we should

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be reactive or preventive or proactive, are tactical, risk-specific choices.

Imagine you're a craftsman and you're working in your store making bookcases, beds and other beautiful things. Your boss walks in at the end of year and says, "Good work this year. We've sold some nice pieces but I have a concern. Next year, I'd like you not to use the hammer and the drill so much because they sort of cause us a problem. I'd like you to focus on other softer, gentler tools. Can you use fine sandpaper? In fact, the one we really like is the buffing cloth. Could you spend 20 hours more per week using sandpaper and the buffing cloth and do a little less hammering and drilling?"

Just imagine how you would feel. You're a craftsman. Here's your workbench in front of you. Behind you on the wall are all of these tools and you have a task to accomplish. You would tell your boss, "Don't you understand that the essence of craftsmanship is to focus on the task. Once I understand the task and what I'm trying to achieve, I have the full range of tools available to me and it is my skill, my experience, the essence of what I am that helps me understand which methods to use on what kind of problem."

What you really need is regulatory craftsmanship. Yes, you still need your enforcement agents but you want to keep them locked up most of the time. You need to know when you should let them out and what for and why. Picking and choosing your methods and designing programmes to fit very specific issues—that's the essence of regulatory craftsmanship.

So I begged federal regulators and state regulators in the States, please, put aside your ideological preference. "Should we focus on prevention or reaction?" Some people think that that's a question in general that we should be

able to answer. I don't believe you can. The answer is, "It depends." Which tool? It depends. Which time? It depends. What style? It depends. These are tactical risks, specific choices and how you address them affects how you organise your regulatory agency.

Innovation and Methods of Analysis

Professor Sparrow presented two theories of how events in the external world lead to specific action at the agency level and examined the role of innovation in this process. When writing The Regulatory Craft, he analysed the winners of a major innovation award in the US. He found that the biggest number of finalists produced innovations in systems of analysis and methods for identifying and solving problems. Many of these innovations included pattern-recognition systems and new ways of looking at things. He argued that a mature risk control system would need the ability to analyse data from multiple sources in different ways. New issues would emerge and resources could then be organised around them.

One of the important lessons in risk control is to understand what dimension to use. This is part of the teaching done by Herman Goldstein for the police profession. He said, "Well, you're good at hot-spot analysis. But some of these problems aren't defined in those terms. There're many other dimensions that you should consider. What about repeat offenders? What about repeat victims? What about classes of victims that are vulnerable? What about methods of committing a crime? What about an issue like domestic violence which is not concentrated geographically or even very much by social strata?" You've got to be able to think in lots of different dimensions until you really understand the natural shape and size of these issues.

Some of these systems—for picking up parts of data, slicing and dicing it this way or that—are broader than others. Some of them are uni-dimensional. They take one data source, do one kind of analysis and enable us to see one kind of problem. But as risk control matures, there are multiple data sources and many kinds of analysis. Organisations must learn to be able to spot patterns in lots of different dimensions. These are mostly ways of seeing things that you wouldn't have seen before, so that you can then organise resources around them.

This is one route to get you from observing external events to developing tailor-made solutions for specific problems. I'm not suggesting that any of these agencies actually abandoned their core operational processes or their major functions or programmes. All of those things probably have to remain. But when they act like this more frequently, the citizens applaud.

If the core purpose or mission of social regulatory agencies is to identify and control risks, then why do we make such a big deal out of it when they act like this? The answer: Because it's not the norm, because it's awkward organisationally. When you really focus on these risks, you find that they don't line up nicely with your functional programmes or even your agency boundaries. So when you are faithful to the risks themselves and really understand those structural dynamics and components, you end up having to work awkwardly with other partners in the cross-functions and between processes in order to address these problems.

Changing Organisations for Long-term Risk Control

What I discovered working with practitioners is that they wanted something much shorter, quicker and much easier to remember than my book. When I was working with the OSHA re-design team, they thought their job was to produce a prescription that would help OSHA survive. But we were trying to teach OSHA to be effective in the intervention on occupational hazards. Somebody in this group said, "I want to be able to tell my wife what we're doing that's different. So, never mind the 365-page version, can we have the short sentence version?"

This is what we eventually came up with:

Pick important problems. Fix them. Then tell everybody.

In other words, it's not enough to just do it—you have to learn how to tell a story too in a persuasive fashion.

It seems common sense and obvious. Often when I meet an agency and I say this to the staff in the audience, they get angry: "Who are you to tell us this? Everything we do is about this." Or perhaps they say, "Look, here is a problem that we identified and fixed, so we already do this."

My response is, "Well, that's terrific, I'm not taking that away from you. The question is not whether you did this once or twice, but are you set up operationally to do this all the time? Is this built into your structure, your system? Or is it still exceptional peripheral or innovative? If it's true that you do this routinely on important social problems, then I'm going to ask you a set of simple mechanical questions and you should be able to trot out the answers quick as a flash.

First question: Whose job is it to pick?" They look blankly. I say, "I want a name. Maybe it's not a person, but a committee or a group. When did they last pick? What's the list that they picked from? How did things get on the list?" Very difficult questions. "What did you do with the problems you didn't pick?" There's always more to work on that you possibly take on, so you have to know how you dispose of the things suggested by somebody that you weren't selected because they weren't important.

"Now, the next questions: What does important mean? What is the list of criteria that you encourage your managers to consider in figuring out what is important? Is it just scientific hazard and exposure or do you take into account irrational public fears or political pressure on concerns? How are they supposed to balance these issues? Where's the list of things that they must consider and the list of things they mustn't consider so as to keep out corruption?"

If you do pick important problems, which ones are you working on now? What's the portfolio of projects where you're trying to produce visible risk reduction result and how are they going? Where's the file that shows me progress-to-date and the executive summary that the managers could ask for in a flash? Do you have records? Is this built into your reporting system? Even if you have spotted the important problems, do you have a method for fixing them? Can you actually allocate people to work on them from all relevant

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disciplines and from other agencies? How long do you give them? What schedule do you have? What protocol do they work through? How do they report and answer to? When do you decide that you've reduced a risk enough that you can close the project and move on to something else?" Very complicated.

When I explain these simple mechanical things and they can't answer any of these questions, they begin to understand what this actually requires inside the organisation, the kinds of discretion being exercised, the kind of choices that would have to be made and defended. These same people, 20 minutes later, typically say, "Oh, I understand. We could never do that here."

Apparently there's nothing complicated about this idea except doing it. The bigger the agency, the older the agency, the better established the agency, apparently the harder it is to do this. New, young ones have a real opportunity, but even then, if you're not careful, you build your systems and structures according to the problems of the day and five years later, you're still doing the same thing because that's what you've set up. That's become the theory of operations.

Unrelentingly Difficult Work

People who have actually worked on this process of risk control say it is not simple at all; it is complicated and organisationally awkward. It is different work than what they normally spend most of their day on. It's intellectually and analytically demanding in a way that nobody could anticipate, and nobody warned them just how hard it was going to be.

One of my colleagues describes the work as "unrelentingly difficult". So much of what we do in government requires a brain once upon a time and then a lot of muscle and activity for many years. This work doesn't require so much muscle. It's surgical—the problem goes away, almost magically. I wish you all, however you can get it, the kind of success that many of these agencies have begun

to discover, adopting this pure and simple task of orientation.

What they discover is that yes, they did join public service because they wanted to make the world a better place. All they're doing here is learning that an efficient way of doing this is by picking the world apart and then picking it apart again, all the way down until you have a specific actionable project. By doing this you make the world a better place, piece by piece by very carefully identified piece, and that's a little bit different from what we do in some other parts of our life. ■