

# Implementing regulation

A review of the international academic literature

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State of the Art in Regulatory Governance Research Paper 2023.13



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# ***Implementing regulation: A review of the international academic literature***

**State of the Art in Regulatory Governance Research Paper – 2023.13**

Professor Jeroen van der Heijden

April 2023



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To cite this research paper:

van der Heijden, Jeroen (2023). *Implementing regulation: A review of the international academic literature. State of the Art in Regulatory Governance Research Paper – 2023.13*. Wellington: Victoria University of Wellington/Government Regulatory Practice Initiative.<sup>1</sup>

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<sup>1</sup> This is an early draft of a book chapter that will appear as: Jeroen van der Heijden (2023) "Regulation and implementation." IN: Sager, F., Meyrot, C., and Keiser, L. (eds), *Handbook of Public Policy Implementation*. Cheltenham: Edward Elgar.

## Abstract

For long, regulation has been conceptualised as one of many tools for public policy implementation. Questions are then posed about what types of regulation will be most suitable to achieve public policy goals. Yet, regulation itself needs to be implemented as well and it is in this process of implementing regulation that additional challenges rise: how can regulatory frontline workers (also referred to as street-level bureaucrats) best engage with the targets of regulation? How can regulatory agencies best allocate their limited regulatory resources? Whether should government undertake the implementation of regulation, or can it be done by others? This research paper first reviews a body of literature that considers regulation 'merely' as an implementation tool for public policy, and then it touches on a body of literature that is interested to understand how to implement regulation best. It concludes with suggestions for future research in both these areas.

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## 1 Introduction

Writing a short research paper on the implementation of regulation is challenging. In academic writings on public policy, regulation is often seen as one of the many tools for implementing public policy (Anderson, 1977; Howlett, 2020). Likewise, in public policy practice, regulation is typically part and parcel of what Hill and Hupe call 'and the rest is a matter of implementation'—indicating that more often than not, it is assumed that once the policies have been developed on paper, implementation is 'an assumed residual in the process towards goal realization' (Hill & Hupe, 2022, p. 4). Thus, a discussion on the implementation of regulation could either be seen as futile because regulation 'equals' policy implementation; or as too nit-picky because it deals with the 'implementation of implementation'.

Yet, we do not have to approach regulation as 'merely' a tool for public policy implementation. A broad regulatory literature conceptualizes regulation—its politics, development, implementation, assessment, and change—as much more than the 'implementation side' of public policy only (Baldwin, Cave, & Lodge, 2012; Drahos, 2017; Levi-Faur, 2011). This research paper is informed by that literature. It first addresses some critical debates about regulation as a tool for implementing public policy. Then it addresses some of the critical debates about the implementation of regulation itself. Finally, the research paper concludes with some reflections on future research directions for studying regulation as public policy implementation and the implementation of regulation itself.

## 2 Regulation as a tool for implementing public policy

As a public policy implementation tool, regulation is an intentional process to direct the behaviour of individuals and collectives towards a predefined aim through various interventions. These interventions typically include setting standards, monitoring and enforcement, and penalties for non-compliance or rewards for compliance (Scott, 2012; Windholz, 2018).

In short, contrary to public policy implementation tools such as welfare provision, education or taxation, regulation does often not directly deliver the intended public policy goal. Instead, it verbalizes (usually in written form) the behaviour that, if followed by individuals and collectives, is expected to lead towards the intended public policy goal. For example, to limit fatal incidents on roads within city boundaries, a speed limit of 50 km/h is set, compliance is monitored through speed cameras, and non-compliance is penalized with fines.

Because regulation typically seeks to achieve the intended policy outcome through the behaviour and actions of individuals and collectives (the 'targets' of regulation), it allows for considerable flexibility: regulatory interventions can be tailored to local circumstances or those of a particular group of targets. But it also comes with considerable uncertainty. The intended policy goals will only be achieved if targets behave as expected. Most academic and policy debates about regulation as a tool for public policy implementation are concerned with this issue.

### From prescriptive to performance-based regulation

Suppose regulation is to achieve public policy goals through the behaviour and activities of individuals and collectives. In that case, the first challenge for regulators is whether to specify that behaviour and those activities in meticulous detail or with broad brush strokes. Traditionally, regulators have opted for prescriptive regulation to set out those behaviours and activities that were allowed and not allowed in detailed, strict standards and legalistic terms (OECD, 2002). Yet, from the 1980s onward, such one-size-fits-all regulation has increasingly been critiqued for being cumbersome, costly to industry, hampering innovation, and overall ineffective (Freeman & Kolstad, 2006).

In response, governments worldwide have begun to implement alternatives that allow targets of regulation much more freedom considering the *exact* behaviours or activities that are allowed or not allowed. These alternatives are typically referred to as performance-based regulation or goal-based regulation (May, 2011). Rather than exactly prescribing what is allowed and what is not, this type of regulation explains the performance that needs to be achieved. For example, rather than prescribing in a building code that a door should be at least 2.2 meters high, 0.85 meters wide, and have a door handle at 1.0 meters from the floor, the regulation would state the performance that needs to be achieved, that is: the door should give a safe passage from one space to the next. It is then up to the targets of regulation to find a solution that meets this performance (Meacham, Bowen, Traw, & Moore, 2005).

Yet, the assumed strength of performance-based regulation is its weakness as well. Particularly challenging for this approach is that at some point in the regulatory process, the regulator must

decide whether the solution offered by targets meets the performance-based requirement.<sup>1</sup> With performance-based regulation, that decision may be delegated to individual regulatory frontline workers, who may rely on their judgment to make that call—which could introduce considerable inconsistencies (Mumfort, 2011). Also, over the years, it has become clear that often targets of regulation want certainty in the regulatory process and to be told what is expected from them (May, 2007). For this reason, governments have begun to combine performance-based regulation with 'deemed to satisfy solutions' that prescribe how performance-based requirements can be met (Deighton-Smith, 2008).

### From deterrence to nudging

A second challenge for regulators is to ensure that targets of regulation comply with regulation. This often involves a process of monitoring and enforcement (discussed in what follows), but also the orientation of regulation itself can contribute to compliance (Van Rooij & Sokol, 2021). Traditionally, regulators have opted to use a deterrence-based orientation. The deterrence-based orientation aims at deterring non-compliance prior to non-compliance (Reiss, 1984) or at sanctioning non-compliance after the law has been broken (Hawkins & Thomas, 1984). The central assumption underpinning this orientation is that the higher the chance of getting caught for non-compliance and the higher the sanctions for non-compliance, the less willing targets are to break it (Thornton, Gunningham, & Kagan, 2005).

From the 1960s onward, the deterrence-based orientation has been critiqued for various shortcomings. These include that it is ineffective, brings about problems with enforcement, and aims too much at end-of-pipe solutions (Fairman & Yapp, 2005). As a result, regulators have been trialling alternative orientations to overcome these problems. Alternatives to the deterrence-based orientation aim at spontaneous obedience to regulations (Ogus, 2004) and aspire to the maximum effectiveness of public means and activities by encouraging those features that bring about spontaneous obedience and weakening those that bring about non-compliance (Parker & Lehman Nielsen, 2017). Spontaneous obedience is considered to proceed from feelings of moral disapproval about breaking the law (Tyler, 2022).

The most recent development in this area is actively embracing insights from behaviourally-oriented research by regulators (Gofen, Moseley, Thomann, & Weaver, 2021). The best-known example is 'nudging' (Thaler & Sunstein, 2008). This orientation to regulation acknowledges that humans often lack the cognitive abilities, time, and capacity to collect and process all the information required to make optimal compliance choices. Instead, humans' err' in systematic and predictable ways from the assumed rationality that for so long has underpinned regulation (and public policy more generally), which may (partially) explain non-compliant behaviour (Ariely, 2008). Therefore, regulators are repeatedly advised to include these heuristics and biases in their regulatory designs to help their targets avoid situations of non-compliance and ease compliant behaviour (Van Rooij & Fine, 2021).

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<sup>1</sup> Of course, there is also the more general regulatory challenge of 'ex ante' measuring the future performance or outcome of a regulated object or entity.

## From regulation by government to regulatory governance

A third challenge for regulators is whether they should design and implement regulation themselves, if they should collaborate with their targets in doing so, or if they perhaps could rely on self-regulation by their targets. Up to this point, this research paper has implicitly assumed that regulation is carried out by government. Indeed, that has been the conventional model for a long time: governments would design and implement regulation, and their regulation typically was prescriptive and deterrence-based (Van der Heijden, 2021a). Yet, as with so many areas of public policy, the neo-liberal shift that started in the 1980s has raised a range of questions about whether regulation by government only is the best approach for achieving societally desired ends (Osborne & Gaebler, 1992). Arguably, the information advantage that targets of regulation have over the regulator stands in the way of the latter developing 'optimal' regulation (Huysse & Parmentier, 1990). The regulator may lack relevant technical or specialist expertise about the topic to be regulated, or it may lack a deep understanding of the targeted sector or collective (Griffiths, 2003).

For these reasons, regulators have long been advised to engage with their targets in developing regulation and sometimes in its implementation. Such forms of co-regulation range from consulting targets in developing government-led regulation (OECD, 2011), to allowing targets to fully self-regulate (Short, 2013). Yet, the risk of involving targets in the development of regulation is that they capture the regulator to such an extent that it will serve their personal interests rather than those of the public at large (King & Hayes, 2018). And the risk of relying on self-regulation by targets themselves is that the regulator may lose touch with the regulated (policy) area or that targets are not capable of achieving desirable societal ends through their self-regulatory regimes—or even cause harm (Porter & Ronit, 2006)

Acknowledging the challenges and risks of pure government-led regulation, pure self-regulation, and overreliance on the targets of regulation in the development and implementation of regulation, current-day regulation often involves a mix of a variety of actors and organizations: governments, targeted firms and individuals, and the beneficiaries of regulation (Windholz, 2018). As in many areas of public policy, the shift from government to governance (Rhodes, 1996, 2007) is visible in regulatory governance too. Where regulation was traditionally understood as government-led, top-down, and based on intrusive and deterrence-based interventions, it has become a collaborative approach that involves public and private parties, applies a variety of incentives to seek behavioural change, and combines aspects of top-down and bottom-up steering (Lobel, 2012).

### 3 Implementation of regulation itself

The earlier discussed debates about regulation as a tool for public policy implementation predominantly concern the design of regulation. Yet, regulation must be implemented to ensure that the behaviours and activities of individuals and collectives it seeks to influence align with the predefined aims it seeks to achieve (Van der Heijden, 2016). Debates about how regulation should be implemented typically concern questions about how regulatory frontline workers (also referred to as street-level bureaucrats) can best engage with the targets of regulation, how regulatory agencies can best allocate their limited regulatory resources, and whether government should undertake the implementation of regulation or if others can do this as well (or perhaps even better).

#### From formalistic and facilitative enforcement styles to a mixture

One of the main challenges of implementing regulation is that it involves making context and situation-specific assessments about the compliance behaviour of targets by a regulator. Typically, regulatory frontline workers have to make these decisions and are given considerable discretion to do so (Lipsky, 1980). Giving them discretion helps to overcome the problem that regulators cannot capture every possible situation in regulation and standards—discretion then allows frontline workers to balance service delivery and rule enforcement (Hill & Hupe, 2022). But how to deal with this discretion? This is where the notion of enforcement styles comes in—that is, regulatory frontline workers' behaviour towards a target of regulation (Lehmann Nielsen, 2006).

The broader regulatory literature has long distinguished between formal and facilitative enforcement styles (May & Winter, 2011). A formalistic style is characterized by rigidity and a legalistic approach towards regulatory enforcement, which is carried out 'by the book'. A formalistic frontline worker will resort to sanctioning non-compliance once observed (Bardach & Kagan, 1982). A facilitative style is characterized by flexibility and a consultative approach towards enforcement. Rather than directly penalizing non-compliance, a facilitative frontline worker may explore with the target how the situation of non-compliance can be resolved (May & Wood, 2003). It remains unclear, however, which of these two styles yields the best outcomes (Braithwaite, 2011).

The understanding that both enforcement styles have their strengths and weaknesses is at the base of one of the most renowned regulatory models: responsive regulation (Parker, 2013). Building on the various insights on regulation as a tool and the implementation of regulation, regulators are advised to not opt for an extreme stance (full deterrence-based or full compliance-based regulation, and purely formalistic or purely facilitative enforcement) but rather mix different regulatory orientations and enforcement styles. The model promotes using different, less punitive and less restrictive strategies and preferably mixing different strategies: 'the trick of successful regulation is to establish a synergy between punishment and persuasion' (Ayres & Braithwaite, 1992, p. 25). The relationship between the regulator and those subject to regulation, and the regulator's ability to choose between different sanctions and rewards, is regarded as the strength of this model (Braithwaite, 2011). The model has seen broad application worldwide, with different levels of success (van der Heijden, 2021c).

### From 'first-come, first-serve' to risk-based regulation

Another main challenge of implementing regulation is the decisions that need to be made about allocating a regulator's limited regulatory resources. Typically, regulators lack the resources (i.e., staff and funding) to monitor and enforce every behaviour and activity in their jurisdiction. It is often also not desirable for regulators to check if all activities and behaviour in their jurisdiction meet regulatory requirements: many targets of regulation comply simply out of habit, because it is the social norm, or because they have a moral inclination to do so (Feldman, 2018). Focusing on them would 'waste' resources that could be better allocated to monitor and enforce the behaviour and activities of those targets that are less inclined to comply.

Likewise, allocating regulatory resources on a traditional 'first-come, first-serve' basis may also fail to yield desirable outcomes (Hahn, 1990). For example, regulators may deplete their resources to address small risks early in time and later lack resources to address a severe ones. To overcome these issues, increasingly since the 1990s, regulators have begun to embrace risk-based approaches to regulation and enforcement (Van der Heijden, 2021b). Applying the type of risk-management practices that gained popularity in the private sector (Renn, 1998), regulators seek to map those areas and targets where non-compliance is most likely or where the consequences of non-compliance are most severe for public wellbeing, the environment, public health, and so on (Renn & Klinke, 2016). Risk-based regulation and allocation of regulation resources can be understood as 'rational, objective, and transparent ways of prioritizing work, and the deployment of limited regulatory resources' (Hutter, 2017, p. 103).

Risk-based regulation is said to have both advantages and disadvantages. It is often perceived as more effective and efficient, as priority is given to certain enforcement activities, and as more legitimate, as certain choices are more analytically-based (Hutter, 2005). Nevertheless, these choices are viewed as the downside of risk-based regulation, as it is impossible to objectively determine a risk (Fisher, 2010). In addition, the analytical approach of defining risks by combining chance and effect may give a false sense of security (Rothstein, Irving, Walden, & Yearsley, 2006).

### From implementation by government to involving regulatory intermediaries

A third challenge related to the implementation of regulation itself is whether government should take up this task or leave it to others, such as independent auditors, registered certifiers, or even citizens (Gunningham & Grabosky, 1998). Sometimes, they may be better positioned to monitor and enforce compliance with regulatory requirements than government. For example, industry bodies may have better access to their members, a better understanding of where non-compliance is likely, and an incentive to trace the 'bad apples' in their member base (Parker, 2006). Alternatively, whistleblowers and citizens as 'surrogate' regulators may be able to inform regulators about difficult-to-observe forms of non-compliance that they have witnessed in their organizations or neighbourhoods (Kampourakis, 2021).

Also, in the slipstream of debates about the privatization of public service delivery (such as waste collection, utilities, and healthcare) that started in the 1980s, questions have risen about the possibility of contracting out or outsourcing regulatory tasks such as monitoring, enforcement, and sometimes punitive action to the private sector by government (Van der Heijden, 2010). Those in

favour of this approach argue that due to competition and the ability to specialize, these non-governmental parties will be able to deliver regulatory and enforcement 'services' more cost-effectively than government agencies can, which results in economic benefits (Johnson, 2004). However, those that worry of it argue that it may negatively affect the transparency or accountability of enforcement processes and that problems of regulatory capture may arise when targets hire their inspectors (Naderpajouh, Peihua Zhang, & Hayes, 2022).

Acknowledging the now vast landscape of formal and informal involvement of non-governmental parties in monitoring, enforcement, and punitive tasks (as well as in regulatory design), a call was recently made to systematically include these 'regulatory intermediaries' in studies of and debates on regulatory governance (Abbott, Levi-Faur, & Snidal, 2017). The vast literature that has followed up on this call has not only improved our understanding of regulation as a tool for and approach to public policy implementation, but also that the dividing line between 'formal' public policy implementation through regulation and 'normal' day-to-day practice of individuals and collectives is often quite blurry (Levi-Faur, Kariv-Teitelbaum, & Medzini, 2021).



## 4 Outlook and future research trajectories

This research paper has explored the main challenges of regulation as a public policy implementation tool and the main challenges considering the implementation of regulation. It has indicated that regulation is much more than 'merely' a tool for public policy implementation and, more importantly, that questions need to be answered about how regulation will be implemented when it is chosen as a tool for public policy implementation. Finally, the research paper has indicated that the closer one zooms in on the implementation of regulation, the less clear it is where 'formal' public policy implementation by governments and others ends and where the 'normal' day-to-day practice of individuals and collectives begins. This likely holds for other public policy implementation tools and approaches as well.

The research paper has also illustrated that regulatory governance provides fertile ground for future research as a public policy implementation tool and an object of implementation studies. A central area for further inquiry is the range of the trade-offs between competing public policy values that often need to be made in regulatory governance: it will be difficult, if not impossible, to achieve optimal effectiveness, optimal efficiency, optimal equity, optimal accountability, optimal transparency, and so on, at the same time through regulation. Such concessions are at the heart of the public policy process (Stone, 2002). They will not simply disappear by transferring the oft-difficult choices about these trade-offs from 'high-end' public policy design to 'frontline' regulatory implementation.

Another area for further inquiry concerns the growing reliance on regulation as a tool of public policy implementation and the growing reliance on non-governmental individuals and organizations in implementing regulation. Regulators are often given considerable discretion in the development and implementation of regulation. Still, typically, the public cannot hold regulators responsible for their actions (i.e., regulators cannot be voted out). The growing reliance on non-governmental regulatory intermediaries may only amplify these challenges of public accountability and raise challenges of procedural justice (the growing reliance on intermediaries may reduce the transparency of the processes by which regulatory decisions are made). In other words, whilst regulation has become a central tool of public policy implementation, the public has little control over it through traditional democratic processes (see further, Levi-Faur et al., 2021). This raises the question: to what extent is (more) democratic control of regulatory implementation needed, and how can it be achieved?

A final area for further inquiry is the regulation of regulation itself: how can the implementation of regulation be best regulated to achieve desirable outcomes? The regulatory theories and analytical frameworks typically applied to understand how to 'best' steer individuals and collectives in society towards public policy aims could also be applied to regulators and their activities (Van der Heijden & Hodge, 2021). For example, how can regulators themselves overcome the biases and heuristics they seek to address in their targets? What criteria (i.e., regulations) regarding the skills, knowledge, and conduct of those working in regulatory positions can improve the implementation of regulation? Or,

to what extent do whole-of-government expectations<sup>2</sup> (i.e., regulations) about, among others, cost-benefit analyses and regulatory dispute resolutions improve the coherence and consistency of regulatory implementation by different regulatory agencies?

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<sup>2</sup> Examples are the Administrative Procedure Act (APA) in the United States, and the Better Regulation agenda in Europe.

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