

Chapter 33

The “Smart” Regulatory Framework

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ABSTRACT

Based on the recognition that neither the command-and-control nor the self-regulation mode based regulation can accommodate the ever growing complexity of the financial market, this chapter argues that a new regulatory regime is needed. This chapter discusses the four theoretical concepts -- governmentality, reflexivity, responsive regulation and ‘smart’ regulation – that anchor a proposed alternative “smart” regulatory framework.

INTRODUCTION

The philosophical underpinnings of macroeconomic management have long been the subject of heated debate and spirited contention, as witnessed in the evergreen controversy about the relative superiority of command-and-control over self-regulation as the better mode of directing macroeconomic events. Dissatisfaction with the performance of both approaches has provoked the search for new economic paradigms to guide policy makers and, in particular for the purposes of this book, to structure and guide policy decisions aimed at securing and protecting the viability of the financial system.

Our search for a new and improved regulatory paradigm starts with a reappraisal of the notion of government and its relationship to individuals,

including its legitimacy to wield power, regulatory or otherwise. Thus this chapter opens with an extended discussion of the concept of governmentality. This philosophically-based discourse sees government as a continuum that extends from individual self control to societal control. It explores the manner in which individuals cede control and power to the state and its institutions. Out of this discussion then flows a critique of the role that neo-liberalism assigns to the state.

Unfortunately, the discussion of governmentality *per se* does not generate guidelines for a new regulatory stance. But it does offer two insights. First and foremost, it characterizes governmentality as a complex interaction of individuals, institutions and authorities. It also introduces the reflective manner which ultimately results in the rationalisation of the exercise of power. These two

threads are shown to be implicit in the concepts of reflexivity and responsive and smart regulation.

Therefore, the chapter will proceed by first familiarising the reader with the notion of governmentality, later subsections of the chapter then outline the particulars of reflexivity, responsive regulation, and smart regulation, before weaving them together to develop a benchmark against which the Basel II framework can be evaluated. The last section of this chapter investigates whether Basel II can indeed be deemed to be ‘smart’ regulation.

GOVERNMENTALITY

The discussion of the new ‘smart’ regulatory paradigm begins with the notion of *Governmentality* (Foucault 1978, 1980, 1983, 1991; Dean, 1999). This approach details the manner in which notions of state and society emerge through a reflective process. This analysis of and reflection upon government practice delivers a rationalisation of the exercise of power. Further, as old notions of equitable equilibrium or justice give way to new notions of political economy, questions of governing “too much” or “too little” come to the fore in an exploration of the implications of governmentality for the role neo-liberalism assigns to the state.

Foucault’s Concept of “Governmentality”

Whereas many forms of contemporary critique still rely on the dualism of freedom and constraint, but from the perspective of “governmentality,” the polarity of subjectivity and power ceases to be plausible: government instead refers to a continuum and is based on a broad conceptual sense.

Michel Foucault coined the concept of governmentality¹, in his lectures at the Collège de France from 1977-1979². He sought to study the “autonomous” individual’s capacity for self-control and how this autonomy is linked to forms of political

rule and economic exploitation³ (Lemke, 2000, p.4). Foucault uses the notion of government in a comprehensive sense, one geared strongly to the older meaning of the term and adumbrating the close link between forms of power and processes of subjectification. So, the “art of government” describes government as not limited to state policies alone. Rather it includes a wide range of control techniques that apply to a wide variety of objects, from self-control to ‘biopolitical’ control. As described by Foucault, “government also signified problems of self-control...government is conduct of conduct” which ranges from ‘governing the self’ to ‘governing others’ (Foucault in Burchell, 1991a, p. 48, Foucault, 1978, p. 16-7).

Foucault’s concept of “governmentality” develops a new understanding of power, not only in the form of hierarchical, top-down power of the state, but also including the forms of social control in disciplinary institutions as well as the forms of knowledge. Foucault’s lectures reveal that some of the features of governmentality are:

The ensemble formed by the institutions, procedures, analyses and “reflections,” the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target “population,” as its principal form of knowledge political economy, and as its essential technical means apparatuses of “security” (Foucault in Burchell, 1991a, p. 101-3).

Authors such as Thomas Lemke (2000) point out that Foucault’s definition of governmentality identifies the reciprocal constitution of power techniques and forms of knowledge. And that it also provides a semantic link of governing (“gouverner”) and modes of thought (“mentalité”)⁴ something which indicates that it is impossible to study the technologies of power without an analysis of the political rationality underpinning them⁵.

Juniper also argues that the conceptual apparatus of the assemblage–power–knowledge–, is applied to a new theme: the analysis of gov-

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