

Courts and the Making of Public Policy

The Capacity of Courts to Handle Complex Cases

Lessons from Technological Risk Regulation

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Executive Summary

- A study of how courts and similar institutions review technological risk standard setting in different legal cultures is useful for those concerned with the issue of the capacity of courts in complex cases because such a study highlights how the concept of capacity is controversial, multifaceted, and malleable.
- There is considerable disagreement over the role of the courts in reviewing technological risk standard setting due to the way in which the controversial nature of technological risk regulation magnifies existing complexities in the role of courts and tribunals carrying out review.
- Much of this complexity is derived from the fact that the capacity of a court or similar body is multi-dimensional and encapsulates institutional capacity (both interactional and contributory), and constitutional capacity. Institutional capacity is the capacity to understand technological risk issues and develop law on the basis of that understanding. Constitutional capacity is the power inherent in a court or tribunal to carry out review.
- A number of examples can be given of how these different forms of capacity are malleable and open to different interpretations. Thus for example, different approaches to the nature of judicial review results from different understandings of a court's constitutional capacity. Likewise, what is understood to be the institutional capacity of a court will vary with understandings of what is law.
- Policy and legal reformers must think in a more nuanced fashion about the issue of the capacity of courts. In particular, they must distinguish these different types of capacity and recognize their malleable nature.

The Capacity of Courts to Handle Complex Cases

Lessons from Technological Risk Regulation

Technological risks are environmental and health risks that arise from human activity, particularly human industrial activity. These risks are shrouded in scientific uncertainty, are widespread and unexpected in their impact, and are the subject of considerable socio-political dispute. Their regulation has proved necessary but controversial and has given rise to questions regarding the capacity of *any* institution to deal with them (Beck 1992). Courts in reviewing regulatory decision-making are no exception. The capacity of courts to review technological risk decision-making has been a vexed legal question, subject to cycles of reform and intense disagreement. Examples include the creation of specialist courts and tribunals, and the controversy surrounding the World Trade Organisation (WTO) dispute settlement system.

From the description above, an examination of the capacity of courts and similar institutions reviewing technological risk decision-making may at first sight appear irrelevant to those thinking about the capacity of courts more generally. Technological risk is a highly specialized topic, and the review of regulatory decision-making is only one judicial function among many. However, a study of this area helps in developing a more nuanced and sophisticated account of the capacity of courts to deal with complexity. In particular, such an examination highlights that the concept of capacity is multi-dimensional and malleable.

This policy brief provides an overview of technological risk regulation and assesses the role of courts in reviewing the same. In doing so, it shows that the question of the capacity of courts is problematized by at least two different aspects: constitutional and institutional capacity, both of which are malleable and context-specific. The conclusion discussed the implications of these two features of the capacity of courts for legal and public policy reform.

This policy brief not only considers the role of mainstream courts in reviewing technological risk standard setting but also specialist courts, tribunals, and dispute settlement bodies. This is because while these bodies have often been set up or utilized as alternatives to courts, the capacity of these institutions are equally multi-dimensional and malleable.

Technological risk regulation

In most Western jurisdictions, the overwhelming response to the identification of technological risks has been to regulate them. Whether it be pollution from industrial activity, the inclusion of potentially damaging chemicals and other additives in products, or the development of new and potentially destructive technologies, the response of states has been to create regulatory regimes. These regimes have two controversial features.

First, the standard setting aspects of these regimes require decisions to be made about whether a particular risk is unacceptable or acceptable (Jaeger et al. 2001). If the risk is unacceptable, the activity or product deemed to cause the risk is regulated. Regulating technological risks is particularly controversial, due to scientific uncertainty, the widespread impact of these risks, and the fact that risk acceptability is a value-laden concept.

The second reason why technological risk regulation has been controversial is due to the fact that it is overwhelmingly being carried out by administrative bodies. Legislatures have delegated the substantive responsibility for regulating these risks to nonelected public bodies because standard setting requires considerable amounts of diverse information, a range of expertise, communication among a variety of groups, and the application of generalized normative

prescriptions to specific circumstances. The problem is that public administration suffers from an ongoing legitimacy crisis in that the nonelected power it possesses is not easily justified in systems committed to liberal democratic constitutionalism. The questions of legitimacy are magnified in the context of technological risk regulation because standard setting is socio-politically controversial and requires administrative decision-makers to yield considerable power, which due to scientific uncertainty and the heavy reliance on expertise is not easily subject to scrutiny.

The courts' role in reviewing technological risk decision-making

One significant response to the problems of administrative legitimacy has been to vest courts and similar bodies with powers to review administrative decision-making. This limits administrative decision-makers and holds them to account. Conventionally, this form of review is called 'judicial review'. What is meant by that term varies from jurisdiction to jurisdiction but, in essence, it means that courts should be engaged in limited review of decision-making to ensure that a decision-maker does not overstep the power delegated to them by a legislature. This limited nature of review reflects the constitutional interrelationship between legislature, administration, and courts.

In some jurisdictions, judicial review has been supplemented by legislation that allows courts and/or specialist tribunals to carry out full review of decision-making (often called merits review) so that a court or tribunal has the power to remake the decision. Thus in Australia, New Zealand, and Sweden there are environmental courts that review the bulk of technological risk decision-making (Grant 2000). Furthermore, because technological risk standards can act as barriers to trade, such standards have also become the subject of review before supranational and international bodies such as the European Court of Justice and the WTO Appellate Body.

The law and theory of judicial review is notoriously doctrinally complicated and the same is true of these other forms of review. This is because the legal

boundaries of administrative power are rarely clearly delineated, and this is particularly the case when public administration is delegated considerable discretion. The review of technological risk standard setting by administrative decision-makers is an area in which the complexities of these forms of review become particularly evident. The controversial nature of technological risks and the contested role of public administration magnify the existing complexities of any form of review. If a particular technological risk is uncertain and controversial then it is not clear whether regulatory action in relation to it is legally valid or reasonable. Likewise, if there is little agreement over what is the role of public administration in regulating risks, courts will struggle to determine what a reasonable exercise of administrative discretion is.

Not surprisingly, judicial and/or merits review of technological risk standard setting has proved to be one of the most fraught and unsatisfactory areas of law. In the US, for example, there are hundreds of cases in which Federal Courts have struggled to develop a coherent approach to reviewing this form of decision-making. Likewise, the creation of state environmental courts in Australia to review these forms of decisions has resulted in a body of decisions which are impressive in their diversity. The European Court of Justice (including the Court of First Instance) has struggled to develop a framework for review in this area and the World Trade Organization's (WTO) Dispute Settlement Panels and Appellate Body have produced reports which reveal the real difficulties they have encountered in ensuring that state risk regulation decisions comply with WTO obligations.

Each of these courts, tribunals, and dispute settlement bodies are fundamentally different and each of them is operating in distinct legal cultures. Despite these dramatic differences, there has been a perception that the problems that these institutions face derive from a lack of capacity. The answer, therefore, of many commentators is to alter the capacity of a particular court or tribunal. This alteration process is usually understood in functional

terms as increasing the scientific capacity of a body. Thus the typical proposal is to create a scientific court or to create an expert panel (Cavicchi 1993).

The problem with these suggestions is that they ignore the fact that the review of technological risk standard setting is not just a scientific exercise. Technological risk regulation standard setting is a profoundly controversial activity carried out by a contested public institution, and the role of a court or similar body in reviewing that institution is by no means clear. In such circumstances the issue of the capacity of a court is inevitable and unavoidable. Recognition of this reality needs to be part of considerations regarding the capacity of any court. In particular, two aspects of capacity are important to highlight: its multi-dimensional nature and its malleability.

The multi-dimensional nature of capacity

The Oxford English Dictionary defines capacity as 'mental or intellectual receiving power; ability to grasp or take in impressions, ideas, knowledge.... the quality or condition of admitting or being open to action or treatment; capability, possibility'. Applying such a definition to the context of courts dealing with technological health risks, we can see that the concept of capacity has two aspects. First, courts can have an institutional capacity; that is, the 'mental or intellectual receiving powers' to deal with technological risk issues. The second aspect of capacity is the 'quality or condition of... being open to action': this is a form of constitutional capacity. I consider each of these in turn.

Institutional capacity

First, capacity concerns 'ability' and in particular 'mental and intellectual power'. This is best described as a form of institutional capacity, which is what is generally conceived of when discussing the capacity of courts in reviewing technological risk standard setting. Courts and other bodies are perceived to struggle with their task because they do not have the 'mental and intellectual power' to understand the science involved in assessing

technological risks. This is why many argue that 'science courts' should be set up, or that technical issues should be referred to expert panels.

But institutional capacity is not as straightforward as that. Courts, tribunals, and dispute settlement bodies *do* have institutional capacity in relation to legal issues and are expected to further the development of law through their judgments and decisions. The perceived lack of institutional capacity is in relation to the ability of judicial decision-makers to fully understand scientific issues. A distinction thus emerges between two different but interrelated types of institutional capacity: institutional contributory capacity and institutional interactional capacity (Collins and Evans 2007). For courts to have contributory capacity in developing the law they need to have interactional capacity in understanding the disciplines, such as science and technology, that the law is called upon to relate to. These two very different types of capacity need to be fostered in different ways, in order that institutional interactional capacity always serves the interests of institutional contributory capacity.

The importance of this interrelationship can be seen in relation to specialist environmental courts. These courts are specialist for two reasons. First, they are better equipped with interactional capacity, in that their judges have knowledge of environmental issues, or their evidentiary procedures allow for more information to be heard. Second, such courts are specialist because they are understood to contribute to the development of environmental law. Indeed, for many commentators it is the way that these courts further environmental law doctrine which is important (Stein 2002). This form of contributory capacity can only occur, however, because of the interactional capacity of such courts.

Constitutional capacity

Institutional capacity is not the only form of capacity that a court, tribunal, or dispute settlement body has in relation to reviewing technological risk standard setting. As the OED definition makes clear, capacity is also about 'the quality and condition' of an

institution to deal with an issue. This form of capacity is inherent in an institution: it is its innate ability to carry out a particular function. In terms of a court, tribunal, or dispute settlement body it is the intrinsic power to carry out review, a power that derives from the law. For tribunals and dispute settlement bodies it will derive from fundamental legal documents such as legislation or treaties. For courts, it derives from the constitutional framework in a legal culture. As such, this form of capacity is best described as constitutional capacity.

The concept of constitutional capacity may not seem immediately relevant to review of technological risk standard setting but it has played a fundamental role in shaping how courts and other institutions have approached review in this area. In particular, the reluctance of courts in England and Australia to review technological risk decision-making has been less the consequence of a lack of institutional interactional capacity and owes more to the fact that such review has been seen to overstep the court's role (Fisher 2001). This is because such review would involve substantive review of administrative discretion, while courts should be restricted to only reviewing whether a decision-maker has stepped beyond his or her legal boundaries.

Like institutional capacity, constitutional capacity is also not straightforward, albeit for different reasons. Constitutional capacity is complicated by the fact that the constitutional foundations on which a court, tribunal, or dispute settlement body are operating are not settled. Within the United Kingdom there has been an ongoing debate about the constitutional justifications for judicial review (Forsyth 2000). Different understandings of justifications result in different roles for the court. Likewise, the role of specialist environmental courts in reviewing risk regulation standard setting on the merits is not always clear. Is such a body simply carrying out more aggressive and intensive judicial review or is it rehearing the case in adjudicative form (Fisher 2007)?

The constitutional capacity of a court is directly linked to the constitutional capacity of the institution

it is reviewing. Thus if public administration is understood legitimately to wield wide-ranging discretion then a court will understand that in reviewing such a decision it should not interfere too much in the exercise of that discretion. Likewise, the WTO Appellate Body in considering whether a state has complied with the WTO Sanitary and Phytosanitary Agreement is acutely aware that its review must be shaped by ideas of state sovereignty (Oesch 2003).

The malleability of capacity

So far I have highlighted that the capacity of a court is multi-dimensional and includes institutional (contributory and interactional) and constitutional capacity. Experiences from the review of technological risk standard setting by courts, tribunals, and dispute settlement bodies also highlight the fact that the concept of capacity is highly malleable in that both the definitions of constitutional and institutional capacity can vary from context to context and also within a particular context.

The malleability of constitutional capacity

Constitutional capacity is inherently malleable because it necessarily varies with legal and constitutional culture. Thus, for example, the constitutional capacities of the US Supreme Court and the WTO Appellate Body to review technological risk standard setting are fundamentally different because they rest on different legal foundations. The former is reviewing pursuant to principles of US administrative law while the latter is reviewing a decision to ensure that a state has complied with a WTO Agreement. Likewise, the constitutional capacity of the European Court of Justice will vary depending on whether it is enforcing the Treaty, considering a preliminary reference, or reviewing the legality of action by community institutions.

What is less obvious is that courts will shape their review in accordance with what they understand the role and nature of public administration to be. A good example of this can be seen in relation to how two judges of the District of Columbia Circuit of the US Federal Court of Appeals, Judges Leventhal and

Bazon, developed two very different approaches to judicial review of technological risk standard setting in the 1970s. Both judges thought that the role of the courts in judicial review was to ensure that those engaged in technological risk standard-setting took a 'hard look' at the issue before them. For each judge, however, the 'hard look' was of a very different kind. Leventhal understood technological risk regulators as expert fact finders and thus argued that the best way for a court to ensure that risk regulators carry out their task properly is to ensure that there is a firm factual basis for decision-making and that decision-makers establish the reasonableness and reliability of their methodology. In contrast, Chief Judge Bazelon understood technological risk regulation as uncertain and socio-politically controversial. He argued that the role of judicial review is to 'ensure that all the issues are thoroughly ventilated' and that 'complex questions should be resolved in the crucible of debate through the clash of informed but opposing scientific and technological viewpoints'.¹ As such, review must ensure that such debate and ventilation had occurred. Each of these judges understood what the legitimate role of public administration was differently and this led each judge to take a very distinct approach to judicial review.

The malleability of institutional capacity

Concepts of institutional capacity are also malleable. US courts carrying out judicial review perceive that they have greater institutional capacity to review technological risk standard setting than courts in the United Kingdom. This is because US courts are understood to have a greater role in policing administrative power than UK courts. A consequence of this is that there is a large body of US case law concerning judicial review of technological risk standard setting, while in the UK such case law is almost nonexistent.

The malleability of institutional contributory capacity also rests on the fact that what is understood to be law and open to legal determination is not fixed. In turn, this also means that concepts of interactional capacity are also flexible. Thus, for example, whether something is 'likely to have a significant effect' on the environment may be held by one court to be a legal issue, another a factual one, and another court a mixed question of fact and policy.² How the question is characterized will directly determine whether it is in a court's capacity to consider it. The reasons for this malleability vary. In part it is to do with the malleability of constitutional capacity, in part to do with the fact that the law-fact-policy divide is not a clear one, and in part to do with the need to manipulate the concept of capacity in particular situations so as to achieve particular ends.

Conclusions and future directions

The discussion above makes clear that the capacity of courts in relation to reviewing technological risk standard making is far more complex than much of the present policy debate presumes. Indeed, there are no simple solutions to the problems that commentators identify in this area. Yet policymakers should not despair. Three important conclusions can be derived from the above analysis.

First, technological risk regulation is inherently controversial and thus it comes as no surprise that the review of such decisions is also controversial. Debates and disagreements about the capacity of courts in this area reflect that fact and are inevitable.

Second, capacity is a multi-dimensional concept that involves institutional (contributory and interactional) and constitutional capacity. Discussants should attempt to identify more precisely the particular type of capacity they are concerned with. What that requires in the first instance is an examination of the actual institutional and constitutional capacities of a

1. The quotes are from *International Harvester v. Ruckelshaus* 478 F 2d 615 (DC Cir 1973) and *Natural Resources Defense Council v. Nuclear Regulatory Commission* 547 F 2d 633 (DC Cir. 1976), respectively.

2. *Timbarra Protection Coalition Inc v. Ross Mining NL* (1999) 46 NSWLR 55.

court, tribunal, or dispute settlement body, both in a particular legal culture, and in a particular context. These vary dramatically and no discussion about these issues can proceed on the basis of directly comparing the capacity of one reviewing institution to another.

Third, discussion should proceed on the basis that the concept of the capacity of a court, tribunal, or other institution is not fixed. This is not only because it varies from legal culture to legal culture and context to context but also because these different forms of capacity are subject to different interpretations in particular contexts.

All of the above may seem alarming but developing this more nuanced understanding of capacity brings with it the potential to develop more subtle, less radical approaches in thinking about the capacity of courts, tribunals, and dispute settlement bodies to review technological risk standard setting. Thus, for example, the most effective means of improving capacity may not be the creation of a science court, but reform of the contributory and constitutional capacity of an existing court by the passage of legislation to change the grounds of review. Likewise, increasing the interactional capacity of a court could be done through reforming evidentiary rules (Edmond 2008).

In conclusion, whilst the review of technological risk standard setting is a niche area of the law, the above analysis shows that it can provide valuable insight into the more fundamental issue of the capacity of courts to effectively handle complex cases.

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