

Postgraduate University Assignment  
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**Risk-based regulation across the UK has improved the accountability of housing providers to their tenants and effectively ensures good governance and financial viability**

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## **1. Introduction**

This essay addresses the nature of regulation of the housing sector, particularly the deployment of risk-based regulation and co-regulation models, whether this has improved accountability for tenants, improved financial accountability and good governance. The essay drives the overall argument that the proposition is incorrect; that risk-based regulation has created a situation where the language of empowerment and engagement has been used to camouflage an often tokenistic approach, but that financial viability has been improved. In order to achieve this, the essay briefly introduces an organisation that the author consults for, and then engages in an examination of co-regulation and risk-based regulation in theory and practice. It then moves into a discussion of the theory of citizen engagement and empowerment, which in turn demonstrates the weaknesses of the current system.

## **2. Paragon Housing**

Paragon has a comprehensive engagement process with tenants, designed to ensure that they meet the requirements of the Localism Act (2011), particularly with regard to including tenant submissions into their annual returns to the Regulator for Social Housing<sup>1</sup>, and in terms of taking recommendations from residents to the board.

The Association has a diverse property portfolio, with tenants organised into Residents' Forums for each location, each Residents' Forum electing a representative to a Residents' Council, which feeds into the Paragon board, making recommendations which the board responds to. To support this process residents are trained in the process of effective scrutiny, so that they can review different service areas. It is also worth noting that the Paragon staff take this process seriously; it is not something that they just pay lip service to, or engage with when it suits them.

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<sup>1</sup> In the duration of the research for this essay was the Homes and Communities Agency (HCA)

## **Risk Based Regulation**

Two aspects of risk-based regulation need to be considered. The idea of co-regulation and what it is intended to achieve, and the more theoretical proposition of risk analysis from which the practice area derives its name.

### **2.1.Co-regulation**

A traditional regulatory environment is where there is an overarching regulator, usually underpinned by a statutory instrument or other legislative basis; that is, the regulator has the force of law behind it, so that its activities and most importantly its judgements carry weight within the sector. In this example there is a regulator in place, which was known as the Homes & Communities Agency (HCA), reformed by the Localism Act (2011) (amended in 2015).

However, the system that is in force is actually a system of co-regulation; this occurs where the regulatory burden is shared between a government-sponsored entity and the private sector that it regulates. In this case, it is not quite as simple as a public/private dichotomy because, as the description of Paragon indicates, a number of stakeholders are involved in the regulatory process including the HCA, the Housing Association, and the residents.

The thesis that underpins the idea of co-regulation is two-fold, and broadly rational to a point. The first element is simply one of burden and efficiency; given that the majority of issues that might be referred to a regulator are quite low grade, then it does not make sense for everything to be referred to a regulator (CLG 2010a; 2010b). That would result in a huge bureaucracy at the national level, and it would likely reach poor and slow decisions (CLG 2010a; 2010b). The second element is linked to this, in that the involvement of the private sector and other stakeholders not only distributes this burden but also makes better quality decisions because the locus of decision-making is moved closer to the end user (CLG 2010a; 2010b).

However, while the principle of this is not particularly disagreeable, the way that it manifests itself in practice reveals a number of flaws. In the case of housing, the role and constitution of the HCA, and very particularly their regulatory committee, has

proved rather problematic. While the organisation has a statutory underpinning, the actual remit of its regulatory arm was limited when monitoring ‘consumer’ matters; which resulted in the idea that it would intervene only in cases where there was “serious detriment” to tenants. In theory, that concurs with the broad conception of co-regulation because it means that the national regulator would only intervene in the most serious cases, and the lower-grade regulation would be devolved to co-regulating partners (Lund, 2017). However, the core issue in this very specific example is that “serious detriment” is rather non-specific, and the HCA has been accused of applying it rarely and inconsistently when it does so.

## **2.2.Risk Analysis**

Co-regulation is part of a wider field of regulatory practice known as risk-based regulation. As with co-regulation itself, this is based on the theory that suggests that regulators need to target their resources effectively, rather than trying to offer a blanket or universal approach.

It is based on using risk analysis tools that have emerged from industries like insurance regulators targeting the areas of their responsibility where the greatest risk lies (HCA, 2016; McNeil, Frey & Embrechts, 2015). In most cases, there is an assumption that increasing complexity equates to increasing risk, though there is rarely much in the way of a thorough justification for this assumption (Manville et al., 2016; Priemus & Dieleman, 2002).

In the case of the HCA, therefore, they note that their risk-based regulation approach means that they target their regulatory efforts toward those housing providers that they perceive to be the most complex. They define this as any housing organisation that has management responsibility for more than 1,000 units, however that may be geographically spread. There appears to be no particular rationale for the 1,000 figure, it is essentially an arbitrary division of regulatory responsibility (Rothstein, Borraz & Huber, 2013). It is also curiously ignorant of the possibility that small but geographically dispersed housing providers, or those that house vulnerable tenants, might be considered complex or high-risk as well (cf. Hemingway, 2011; Livsey & Price, 2013; Means, Richards & Smith, 2008).

### **3. Financial Viability**

To start with the positive aspects of these regulatory frameworks, it would seem appropriate to argue that the financial viability of Housing Associations has improved through the approach of risk-based control. Some Housing Associations emerged in part as a response to the difficulties of managing the costs of social housing when they were within the broad portfolio of services offered by Local Authorities, to drive financial efficiency in the main.

The proof of the approach can be seen in the lack of a major insolvency or financial scandal at a Housing Association of any size, since this regulatory approach has been used. While Housing Associations always argue that they require further funding, they have been sustainable and the model of providing housing through independent associations has been argued to be better than the one that went before it, with consumers evidently protected well from any major failures (Lund, 2017).

On the other hand, it might be argued that the recent spate of mergers to create huge Housing Associations is evidence that smaller and medium associations are not viable; however, that is a commentary on the economics of scale, and not necessarily a product of the regulatory environment (Lund, 2017). Further, it could be argued that the use of low cost but dangerous products in places like the Grenfell House disaster is evidence that Housing Associations are only surviving by cutting corners. Alternatively, it could be observed that this is more the outcome of political funding decisions than regulatory failure

### **4. Engagement and Power**

The previous sections have set out a review of the idea of risk-based and co-regulatory models, on the basis that they have a reasonable theory behind them, and have improved financial sustainability but not necessarily consumer choice and power. The purpose of this section is to flesh out what might be meant by ‘poor quality’ and then to connect that to some theory about power and engagement of citizens in regulation.

The overall rationale for risk-based and co-regulation is not simply about making things more efficient, but about making services better for the end user by – in theory at least – giving them more power through meaningful engagement in the regulatory process, such that they have a voice in the decisions that are made about them or on their behalf. All of that is laudatory, and it would be difficult to suggest otherwise; there is very little academic literature that suggests that residents should routinely be side-lined (Lund, 2017).

Much academic work has tried to understand the notion of citizen engagement and empowerment. Shelley Arnstein’s (1969) model, known as the ladder of engagement, is widely regarded as the most effective organisation of the principles involved.

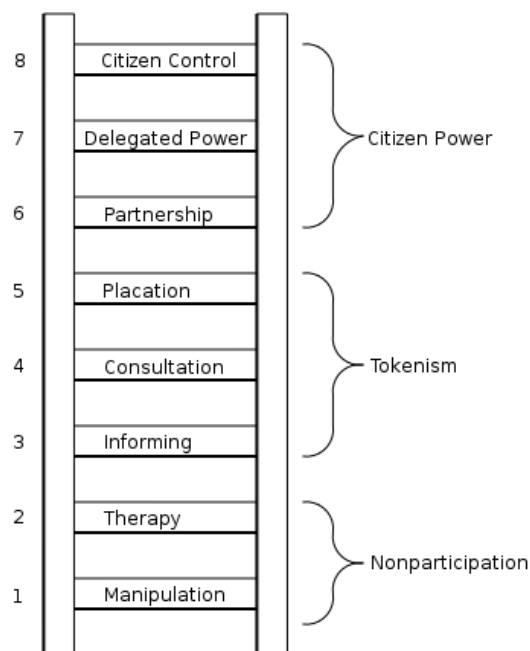


Figure 1: Arnstein’s Ladder of Engagement (source: Arnstein, 1969: 216).

The model is quite straightforward, with the ladder split into three stages of engagement, which describes the ladder toward a state where citizens – or in this case tenants – are properly engaged and given power over their own lives. Clearly, the non-participation and tokenism stages are negative and significant because they express Arnstein’s view that in most cases, things that are dressed up in the language of empowerment and engagement very often are not connected to any meaningful power.

In the case of the HCA and the wider field of co-regulation and risk-based regulation, something quite odd has happened. The HCA and the Localism Act (2011) have essentially imported all of the language of rungs six, seven and eight on the ladder of engagement, when what they are actually delivering to the citizens on the ground are the facets of rungs three, four and five. Thus, they have appropriated the language of citizen power and used it to camouflage their tokenism, something that has been observed in housing for decades (Bignall, 2007; Cornwall, 2008; Flint, 2003).

In some ways, the entire concept of co-regulation as offered by the HCA and experienced by social housing residents smacks of tokenism, but there is evidence to the contrary at places like Paragon. Clearly, the process of residents' forums, feeding into a Residents' Council, supported by resident scrutinisers gives a positive impression of tenant engagement. Moreover, the requirement for Paragon to include the outcome of the process in their return to the HCA and to respond formally to recommendations made by residents would give a positive inflection. Furthermore, there is nothing to suggest that the residents are unhappy with the arrangement.

However, there is an interesting contrast to be drawn with the Housing (Scotland) Act 2001, which has a similar objective but enshrines the role and importance of tenants more formally in the legislation rather than guidance, with advisory organisations designed to support the process. This arguably has had the effect of delivering more power to the residents through what amounts to the same processes, largely (Lund, 2017). Similarly under the Regulatory Framework for Housing Associations Registered in Wales.

## **5. Regulatory Failure**

In most areas of regulation, there is rarely a single example that demonstrates the limitations of the regulatory regime comprehensively; most often there are a series of smaller examples the point to weaknesses in certain areas, but for which counterpoints can also be made. However, the tragedy of the June 2017 fire at Grenfell Tower in Kensington and the subsequent investigations has revealed exactly how regulatory

failure happens in this sector. In this specific example, the regulatory failure can be said to be a failure to engage with and respond to consumer concerns, despite them being voiced through the accepted protocol.

Among the investigations of the Grenfell tragedy was an analysis of the role of the Tenant Management Organisation, which managed the property for the landlord, Royal Borough of Kensington and Chelsea, and with the input of residents groups. What this analysis shows was the co-regulation worked well, right up to the point where the residents want to do something that the landlord does not want to do. In terms of risk-based regulation (albeit without HCA involvement as this is a Local Authority landlord), it would be reasonable to suggest, in order for that to work as a theoretical model, the notion and calibration of risks has to be carried out with some expertise, and with caution. What the Grenfell tragedy revealed was that the calibration of risks in various elements of housing management was in part carried out by those with a commercial interest in them (cf. Malpass & Victory, 2010).

In terms of co-regulation, to say that the HCA was found wanting in its interpretation of “serious detriment” could be an understatement. The residents’ representatives in the co-regulation of the housing provider were extensively engaged in the plans for the refit and modernisation of the building, but the course of events proved that they had no real power (cf. Watt (2009) for context). They raised repeated and detailed concerns related to fire safety, but since their counter-proposals involved spending more money, they seemed to be ignored. In addition, in terms of equality and diversity, it has been suggested that there is evidence that the systems and processes of tenant engagement perpetrate a form of institutional racism and discrimination against those who do not necessarily speak English as a first language. While there are few concrete examples of deliberate discrimination, it would seem reasonable to argue that the systems as set have barriers to access to particular groups of people, whether by design or unconscious bias (cf. Lund, 2017).

This reveals, in stark terms, what the end point of co-regulation and risk-based regulation can be. It is a case of an area of law and policy where there is a divergence

between what people want the policy to achieve, and what will actually happen when it is implemented (cf. Cowan, Cowan & McDermont, 2006; Maier, 2003).

## **6. Conclusion**

The tone of this essay has tried to be balanced about the practices associated with the idea of co-regulation and risk driven regulation, but has tended toward the negative. That should not be taken as a reflection of the processes within Paragon as the case example; perhaps the final word should be that co-regulation and associated processes are what you make of them.

The essay has argued that risk-driven regulation and co-regulation is problematic because it relies on a proper understanding of risk that is not perverted by vested interest, and the co-regulatory partners having genuine power in the arrangement. In both points, it has been demonstrated that there is often a considerable difference between theory and practice. Given the revelations that have emerged from the Grenfell Tower disaster about the quality of housing regulation, it is easy to see where the failures in the deployment of these models have been made real, and therefore it is not possible to argue credibly that governance and accountability have been improved.

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