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Dreaming of the Regulatory Village; Speaking of the Regulatory State

Edited by
Michael McConkey
and
Patrice Dutil

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Dreaming of the Regulatory Village; Speaking of the Regulatory State

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Introduction:
Dissecting Discourses of 21st Century Regulatory Governance

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In speaking of regulation and of the regulatory state in polite company one is often greeted with hesitant smiles. Granted, this is a topic that may not, on the surface, interest the cocktail circuit. Noshing on fashionable *hors d:oeuvres*, one is tempted to paraphrase Trotsky's reflection about the coming world war to the workers of Russia. In the IPAC version, it says: You may not be interested in regulation, but regulation is interested in you. In Canada, discussions on cheese and sushi inevitably lead to explorations of the regulatory state!

Regulation, like any act of governance, is a product of dreams and speech. This collection of essays brings together texts that were first spoken at the "International Brainstorm on the Future of the Regulatory State" on two very cold days in Toronto in December 2004. This event, organized and funded by the Institute of Public Administration of Canada, was given a particular "brainstorming" format for two reasons. First, it underscored the growing impact and importance of regulation. Secondly, it reminded the participants that such social and political phenomena are always rooted in some sort of discourse and debate: they are moulded by the ways in which we think and talk about them.

The growing impact of regulation is captured by David Levi-Faur's juxtaposition of statistics in the first essay. He reminds us that over the last few decades the total number of British public servants has declined by twenty-five percent, while during that same period the staffing levels of the regulatory agents of the British government has risen by ninety percent. These figures provide a glowing illustration of the popular adage that the contemporary government aspires to "steer" rather than "row" and give meaning to the talk these days of governance and allusions to the networked state with its decentred, hollowed-out, horizontal features and its post-modern character. Governments at all levels increasingly look to alternative service delivery options such as privatization, partnerships and special operating agencies. The old chain-of-command and command-and-control approaches have increasingly been displaced by practices and processes built upon negotiation, mediation, contract and incentive. In the face of these new forms of governance, how can government ensure that the public good continues to be served?

Regulation – providing the rules, and means to monitor and enforce those rules – would seem to recommend itself as a probable solution, hence the steering rather than rowing allusion. However, the particular form that this apparently evident solution would take was not, in itself, self-evident. The deregulatory discourse of neo-liberalism and the New

Public Management agenda, the pressures of globalization, the new information-communication technology, and the perceived failures and inadequacies of the Keynesian welfare state contributed to an atmosphere of suspicion and ambivalence regarding regulation in many circles. Past efforts at regulation were widely regarded as taking an excessive toll on business competitiveness, failing to properly protect the public, and being generally draconian, rigid and insensitive. In order to garner widespread support, the emerging regulatory regimes would require innovative approaches that succeeded in avoiding the rigidity and insensitivity of the standard bureaucratic model.

Such innovative practices have evolved over recent years as they relied upon more market-based (e.g., tradable permits, labelling), responsive (e.g., education, negotiation), tailored (e.g., contracts, Alternative Dispute Resolution) and trust-based and agency discretion-based (e.g., self-regulation, voluntary and meta-regulation) approaches. The emphasis has been placed on encouraging cultures of compliance rather than legalistic enforcement orientations. It is the emphasis upon these efforts to invent more flexible, sensitive and nimble innovations in response to the growing practical needs of the new networked governance that has led many to evoke an old chestnut: the rise of the regulatory state. There is a new twist, however. While in the past the term "regulatory state" denoted a state where regulations were seen as excessive in character or number, the new term refers to a state that is increasingly defined by its regulatory character.

Needless to say that the shift toward the more adaptive innovations of the regulatory state has drawn criticism and concern. Challenges of accountability, efficacy, legitimacy and transparency are rampant. Some regard these new regulatory approaches as nebulous and subject to abuse by the intended regulatees. Some, such as Steven Tombs in this collection, call for us to think of deliberate regulatory infractions as threats to the public good. As such, he argues that skirting of the laws should be seen in terms of corporate crime, with appropriate legal responses.

All of this draws attention to the fact that the discourse on the regulatory state must do better than focus on objective measures of things like the proportion of civil servant jobs dedicated to regulation or the number of regulations. More importantly, the real meaning of regulation (and by extension its social and political significance), is rooted in the ways we talk and think about it. Our cognitive and linguistic framing of the act of regulation is central to how we understand it, and thereby how we respond to it. Thus, there is no innocent chitchat about regulation and the regulatory state. Everything said about regulation by politicians, leaders in civil society and public servants affects what is done about it.

An appreciation of the importance of such linguistic framing is evident throughout almost all of the papers included in this innovative collection. As indicated above, these texts were generated from a "brainstorm". The idea behind that format too was that serious talk – not mere presentation, but actual dialogue – about the future of the regulatory state was

essential to unlocking its inadequately explored dimensions and potentials.

Thus we subtitled this collection "Speaking of the Regulatory State" not only to underline the observation that our contributors were speaking of it, but more importantly because they are speaking of those who are speaking of the regulatory state. It is only in this flux of ongoing talk that one can begin to untangle the threads of what regulation means and entails under the conditions of today's unique emergence of regulatory governance. Who is speaking of the regulatory state, in what way, to what end, with what affect for regulatory theory and practice?

Twelve intellectuals from six countries contributed to this book. It begins with the broad strokes of David Levi-Faur's analysis of globalization and the transformation of the neo-liberal discourse of deregulation. He argues that, notwithstanding its discursive and ideological promotion of deregulation, neo-liberalism's practical consequences have turned out to be highly regulative. Furthermore, this perhaps paradoxical, certainly unintended, neo-liberalization of regulatory governance is moving us toward a new, regulatory, phase of capitalism.

Levi-Faur characterizes the resulting governance as a form of "indirect representative democracy" in which citizens elect representatives who ostensibly control and supervise experts who in turn formulate and administer policy in an autonomous fashion. A theoretical framework that aspired to alleviate government constraint on civil society and private affairs, through its misanalysis of regulatory history and dynamics, has contributed to the ossification of the bureaucratized public administration that it was supposed to eliminate.

However, if the rigid governance processes of regulatory capitalism pose the threat of diminished democracy, William F. Pedersen argues that they do not assure superior bureaucracy. He points to a contrast to both the discourses of the New Public Management (with its emphasis on negotiation and entrepreneurial, cooperative approaches), and of the proponents of activist government, who wish for a return to greater command-and-control. Pedersen argues instead that the real pressing issue is not the role or attitude of regulatory management, but its competence and capacity. The very best regulatory tools and procedures will not result in improved regulation unless those managing them are able to do so with optimum effectiveness. He observes that virtually all voices in the debates over regulation have neglected this central concern.

He argues that the more discretionary regulatory tools promoted by those who speak from a NPM or neo-liberal position demand greater competence from regulatory managers. There is urgency: demonstrable incompetence undermines the public confidence in regulators required to legitimize the agenda of the proponents of activist government. Despite the differences between these competing regulatory discourses, all discussions of regulatory options suffer when failing to address this serious lacuna in administrative priorities.

Notwithstanding Levi-Faur's warnings about the potential diminishing of representative democracy, the rise of a technocratic orientation will not deliver even its instrumental benefits, suggests Pedersen, if

the technocrats are not adequately trained, oriented and delegated for the challenges ahead. Fiona Haines, however, reminds us that even in a perfect world of technocratic competence, vitally important regulatory challenges would remain unresolved.

Haines argues that expert competence, however high, is always mediated by moderating influences. She points to the role of regulatory "character": the way in which local knowledge, history and politics always serves to translate universal regulatory ideals and objectives into the specific cultural context. She observes that even globalization pressures interact in with regulatory character. She provides a kind of discourse critique of universalist regulatory technocracy and concludes that the cult of the expert offers no transcendent solution. In Haines's words, "science cannot replace politics."

Thus, she concludes, none of the various discourses along the spectrum of regulatory theory, from NPM and neo-liberal style meta-regulation, to the criminalization preferred by many proponents of activist government, can deliver its ideals on the strength of expertise – legal, scientific, managerial, or otherwise. The politics of local context endlessly demands nuance and public debate about collective values.

Haines's argument might be thought of as a warning against the deceptions inherent in what Leo Marx long ago called the discourse of "the technological sublime" (1964): a naïve faith in technology's capacity to deliver us from social ills. Stuart Shulman offers a complementary argument. Like Haines, he finds the regulator's technocratic dream falling short in its denial of the inescapable impact of the political.

He takes issue with the view of those he calls "technological optimists" that online deliberation promises to democratically transform governance generally, and rule-making particularly. Based on two research projects in which he has been involved, he observes that online rule-making thus far has failed to create deliberative exchange while generating volumes of standard form responses from advocacy websites. The spam-like responses have stymied the administrative process and discouraged regulators. The limitations of email as a deliberative medium and the mass email campaign of advocacy groups have inundated rule-makers with submissions that tend to be insular, redundant, *ad hominem* and even rude. Creative and thoughtful submissions are simply drowned out in the process.

Shulman concludes on a more hopeful note, noting that development of natural language technologies may yet force e-advocacy groups to develop more creative electronic interfaces that promote engagement and deliberation prior to submission to online rule-making sites. But this is a political, more than a technical, solution. It is increased deliberation that may make online rule-making effective, not vice versa.

Acknowledging the inescapable needs of the political in no way circumvents the requirement for attention to what can be called the discursive "construction" of regulation. On the contrary, it may very well be that it is nowhere more than in the fray of conflicting political priorities and objectives that one has to be most sensitive to the ways that we speak of regulation

and the regulatory state. Several of the contributors to the brainstorm applied their dissection of regulatory discourse at this level: Frans van Waarden, Steven Tombs, Douglas Macdonald and Jerrold Oppenheim.

Frans van Waarden discusses how the influential strain of neo-liberalist discourse has recently promoted the virtues of free markets. In this discourse, free market defenders advance the idea that capitalism should be free from regulatory hindrance. That discourse has constructed a narrative of markets and regulation caught in a zero sum game: more of either invariably means less of the other. In contrast to this discourse, van Waarden provides an empirically sweeping argument that, far from being caught up in a zero sum-style tug-of-war, markets are – and always have been – dependent upon sound regulatory measures to maintain their existence and effectiveness.

Tracing the historical thread back to medieval times he demonstrates that there has always been a need for regulation to maintain the vitality of markets. Sometimes governments played this role, but it was usually serviced by niche industries. This "business of distrust" provided the level and reliable playing field that enabled people to engage in commerce without fear of being cheated, robbed or betrayed by volatility. Any absence of such regulatory ground-rules permitted – indeed, under certain conditions, encouraged – a level of opportunism and criminality that eroded public confidence and either threatened or even destroyed, markets. The practice of commercial self-regulation suffered the temptations of opportunism endemic to market conditions. This Achilles Heel, combined with economies of scale advantages and a growing acceptance of growth in the state's enforcement of public security, contributed to the growth of direct state regulation.
van Waarden argues that there has always been a synergy between markets and their regulators. He observes that the neo-liberalist agenda of rolling back the state's role in regulation presents conditions may not, in the end, reduce administrative burden and cost. Worse, it may actually contribute to a return (with a vengeance) of social distrust – incurred by heightened adversarial commercial and consumer relations – which would result in an expansion of expensive and burdensome private regulatory measures.

Finalizing his paper against the backdrop of the Dutch and French rejection of the new European constitution, in the spring of 2005, van Waarden draws attention to how all this plays into local anxiety about a perceived neo-liberalist market-based regulatory expansion and homogenization: a kind of regulatory imperialism. Similarly, Steven Tombs echoes concerns with the regulatory discourses of neo-liberalism and globalization – particularly their language of meta-regulation and regulatory compromise.

Tombs takes issue with what he calls the "globalization discourse" on the grounds that it actually creates the very phenomenon that it purports to be merely describing. Addressing primarily workplace safety in the U.K (while inviting the reader to apply the lessons to other sectors and jurisdictions), he argues that empirical evidence reveals that a widely spread haphazard approach to enforcement generally has been accompanied in recent years by a significant decrease in inspection. He cites numerous sources and diverse evidence in

arguing that the recent trend to responsive regulation, directed toward heightened cultures of compliance, pales in regulatory workplace safety effectiveness in comparison to thorough inspection and rigorous enforcement.

Tombs explains the paradox of regulators moving their practice, as a function of globalization discourse, in precisely the opposite direction suggested by the empirical evidence. A key premise in this discourse is the tangibly diminished strength and influence of the nation state in the face of global corporate economics that are too fluid to be rigorously managed within any single jurisdiction. Consequently, the rash of de-regulation and so-called re-regulation (as responsive, adaptive, market-based, etc.) is pursued as competitive advantage devices in the field of national competition for globalized investment. However, Tombs argues, this very discourse, employed by both globalized capital and state policy makers and regulators, creates its own common sense: a supine state facing omnipotent capital, generated as a self-fulfilling prophesy.

Tombs's premise that discourses grounding regulatory cultures have to be considered for the ways that they veil the political moments of indirect regulatory capture, and supply a rhetoric of compliance-avoidance, is echoed in Douglas Macdonald's history of industry's response to environmental regulation. In this case, the discourse in question is that of progressive corporate "greening."

This progressive corporate greening discourse presents a series of phases moving inexorably toward a responsible corporate culture that goes "beyond compliance." This is supposed to begin with the denial and resistance of the 1960s, pass through a 1980s phase of enlightened corporate activism in multi-stakeholder environmental negotiation, to the culmination of the 1990s with voluntary implementation and self-motivated improvement of environmental performance. Macdonald's analysis of industry responses to Canadian environmental regulatory initiatives in six sectors reveals a considerably more complicated dynamic than this tidy progressive corporate greening discourse describes.

He argues that, given a firm's two basic goals of achieving both profitability and legitimacy in the eyes of the public and regulators, a far more complex set of tactical reactions to Canadian environmental regulatory initiatives can be observed. Rather than an evolving enlightenment and sense of social responsibility, Macdonald's analysis reveals that corporate responses have been informed by a correlation between the cost that would result from imposition of a regulatory demand and the degree of policy intervention undertaken to eliminate or change that cost. Thus, this ongoing choice between adaptations or a range of interventions, demonstrates that the politics of profitability, rather than the compliance culture heralded by the corporate greening discourse, has been the driving force behind industry response to Canadian environmental regulation.

Jerrold Oppenheim and Theo MacGregor take on the political ramifications of regulation at its most immediate: as an institution of democracy. They argue that the creation of democratic mechanisms in a regulatory regime not only meets the criteria of

democracy, giving those impacted by decisions and processes a say in their implementation, but also serves to provide more effective and equitable regulation. They identify the key elements in a democratic regulatory regime: transparency of information, in which periodic and detailed reports make all information available; mechanisms for public participation, including process rights, the right of appeal, and funding for such appeals; rule based decisions, that set out their own basis of operation, thus limiting discretion and reducing the danger of arbitrary or capricious decisions; a balancing of all stakeholders' interests; and the protection of investments.

The benefits to all involved, they argue, are numerous. Democratic regulation assures that the rule of law is followed, maximizing the opportunity for all relevant parties to have the critical information necessary to effectively participate in the rate setting, and governance process, of essential services. They conclude with the observation that democratic regulation results in lower and more stable prices, higher quality, lower risk, and more secure investment and employment. They conclude, though, that the most valuable asset of democratic regulation is democracy itself. After all, what conclusions would one be left to draw about a regulatory state in which the regulation is not democratically exercised?

Jefferson Hill's contribution to the discourse is very different. His text constitutes a virtual mechanic's guide to putting together the optimum conditions for regulatory change, providing invaluable information to those looking to institute regulatory reform. He draws a summary of lessons learned in efforts at implementation of regulatory reform drawn from six countries: Mexico, Hungary, Korea, Italy, Australia and the United Kingdom.
Among his key observations is that the most important ingredient for successful reform is the strength and consistency of support at the highest political levels. He also notes that effective and durable reform is a dynamic, long-term process; that communication and the cultivation of public trust is require as is a properly prepared and trained staff; and an inclination towards horizontal cooperation. He observes that the best practices need to be implemented in a manner that is context-sensitive. While he dives into considerably more detail on all these points, it is worth keeping in mind that a determination to be practical does not skirt the challenges of discourse.

Bettina Lange's contribution here illustrates that even the most practically minded technocrats and bureaucrats (even if they are unaware of it) remain rooted in specific and limiting ways of speaking about regulation. How can one address matters of support, communication, cooperation and context, for instance, without suiting-up, at it were, in some vestige of discourse? Claiming science or expertise no longer eludes the charge. We are now merely confronting the functions of discourse at a more abstract level of operation.

Indeed, the final three contributions to this collection take discourse analysis of regulatory governance to this more abstract level. Lange's marriage of qualitative methods and discourse analysis to provide a dissection of "best available techniques" discourse will be of great interest to researchers of regulatory governance. Moreover, the attention she draws to often-unconscious applications of knowledge and

meaning in regulatory negotiations holds out opportunity for a rich reflection. The better regulation scholars and practitioners understand what is happening in the room, the more effective the efforts promise to be.

After a detailed delineating of the terms and benefits of her methodology, Lange applies her approach to an analysis of a technical working group's meeting on a reference document on best available techniques in the iron and steel sector. She finds that the appearance of a surprisingly rapid consensus is actually the product of a power brokerage that dispenses with time-consuming data gathering, scrutiny and discussion. She also notes the subtle currents of particular social relations constantly in the process of discursive formation: e.g., degrees of social distance enforced through formal address, and the use of inclusive pronouns and first names. Her analysis reveals the "best available technique" determination process as infused with a delicate balancing of power exercised through nuances of discursive manoeuvring.

Lange draws our attention to the ways that methods for analysing the regulatory state shape how we understand it and how we think through our visions for its future. Programs and principles, to maximize effectiveness, cannot ignore insights into understanding how we subtly create knowledge and meaning – even unwittingly. To use the phrase she borrows from Michel Foucault, all practices are built upon a microphysics of power: only careful attention to how such nuance and subtlety are created and reiterated in discussions and negotiations over regulation offers the hope of implementing and operating the fairest and most effective regimes.

Liora Salter dissects what she identifies as the three distinct discourses of regulation that have become co-mingled in such a way as to obscure our understanding of the phenomenon. She observes that the confusion inhibits efforts to resolve the long vexing challenges posed by the search for optimal regulatory practice. The first regulatory discourse she addresses is the study of specific regulatory regimes, the identifying of why each is unique in significant ways. It is, in essence, about insights that can be drawn from a comparison of different modes of governance. The second regulatory discourse deals with mainly operational issues. It is about finding the best design for regulation. The third regulatory discourse is about philosophy and values. It is about the nature of the polity, the nature of economic relations and the many possible interconnections between the two. Under the form of this third discourse, discussion of regulation she argues has become caught up in essentially contested terms – differing visions and ideals – of the good society. Such differences are impervious to reasoned debate.

Salter argues that the co-mingling of these discourses has caused the essentially contested terms of the third discourse on regulation to cloud the understanding of the other two discourses – particularly the second, which she considers especially needing to be resuscitated. She sees hope in concluding that the third regulatory discourse can largely be regarded as being spent. To be sure, she acknowledges, the conflicts in values and philosophy, so recently reflected in the third regulatory debate, have not subsided, and the costs associated with the political resolution of the third regulatory discourse remain high. However, the action seems to have moved

elsewhere, away from regulation and into other political spheres. This she concludes to be a good thing: facilitating the need to address the specific problems of regulation, its operational constraints and proposals for institutional innovation.

Like Salter, Colin Scott presents an argument that harbours reservations toward tendencies of a grand narrative building in regulatory theory. He particularly addresses the instrumentalism implicit in notions of "regulatory capitalism" and the "regulatory state." The steering machinery suggested by these portraits of coordinated control, he argues, are premised on a notion of regulatory instrumentalism that is not feasible under the highly fragmented conditions that characterize contemporary regulatory practice.

Scott describes how regulatory practices under conditions of contemporary dispersed governance entail pervasive fragmentation of operation and motive. Differing, often competing, regulatory authorities – intrastate, interstate and extra-state – are usually driven by disparate rationalities. While these rationalities may be coherent and legitimate when viewed locally, they render obsolete any dream of a coordinated regime. Rather, he argues, regulatory governance must be regarded and approached as a dialectical interplay between the various actors – all of whom lay claim to some dimension of legitimacy or resource necessary to enable an optimum regime. Such optimization, though, is found not in the central wielding of an administrative instrument, but in the fluid give and take that concurrently competing and cooperating parties enact in their routine operations. Unlike Salter – who calls for a retreat from abstract theorizing and a retrenchment of practical case and comparative scholarship – Scott would seem to regard this approach as potentially feeding an inappropriate and unfortunate illusion of instrumental potency. Rather, for him, a more abstract and systemic theorizing allows us to better grasp the limitations of bureaucratic rationality and its instrumentalist dreams. With a sound systems approach, regulators and policymakers would be better placed to develop regulatory approaches that would be firmly rooted in the realities of today's governance environment.

This disagreement was just one of many that animated a compelling two-day conversation at the IPAC roundtable that generated these thought - provoking papers. There are others that reveal themselves in the reading of these contributions: the pros and cons of legalistic approaches and adversarialism; the potential and challenges of public participation and deliberation in rule-making; the promise and limitations of scientific and managerial expertise; the legacy of "deregulation"; and the question of for whom regulation is exercised. As at the original roundtable, these issues are not definitively resolved here.

For sure, the final word on the topic was not spoken at this brainstorm. It might be helpful to reprise Fiona Haines's observation that science can never displace politics. She amplified that sentiment during the brainstorm with the point that academia and theory cannot be expected to provide answers to vexing questions that realistically can only be worked out in practice. What they can do, however, is raise the fertile questions: the ones that reward contemplation with the heightened sensibilities that deepen and enrich efforts in finding workable remedies to knotty

regulatory problems. There are no tidy solutions to the complex problems confronting regulators and rule makers. As this collection reveals, the discourses that frame regulation are too plentiful and diverse.

However, the more nimble such regulators and rule makers are in navigating the waters of regulatory discourses, the more adept they may become in isolating the points of leverage that will allow them to intervene constructively on behalf of the public good. Such efforts may demand unprecedented levels of innovation, learning and applied intelligence, but it appears to be the best bet for public administrators to contribute such a narrative to the ever-shifting terrain of contemporary governance.

In an age increasingly defined by globalized standards and expectations – to borrow Fiona Haines allusion – "regulatory dreams" are increasingly those of how we might live in a kind of global regulatory village. It is in the spirit of groping toward such a dream in the challenging context of hard global considerations that IPAC invited the world to its brainstorm and offers this collection of fertile contributions to a conversation: speaking of the Regulatory State; while, indeed, dreaming of the regulatory village.

The Diffusion of Regulation and the Diffusion of Capitalism

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Ours is an era of change, and indeed change is prevalent everywhere, from Latin America to Eastern Europe, from southern Europe to northern Europe and from Africa to Asia.[1] Such change is commonly captured in the notions of privatization and deregulation, and understood as the outcome of the rise of neoliberalism and the sweeping forces of economic globalization.[2] Yet it has significant regulatory components that go largely unnoticed and that are incompatible with either neoliberalism or economic globalization.

This paper highlights the globalization of regulation and the regulatory components that are transforming the neoliberal agenda of deregulation and privatization in unexpected ways. Governance through regulation (that is, via rule making and rule enforcement) is at the same time both constraining and encouraging the spread of neoliberal reforms. Regulatory expansion has acquired a life and dynamics of its own. Regulatory solutions that were shaped in North America and Europe are increasingly internationalized and projected globally. Deregulation proved to be a limited element of the reforms in governance and, where it occurred, it was followed either immediately or somewhat later with new regulations. These regulations are shaping a new global order that reflects the set of problems and solutions that were socially and politically constructed in some dominant countries and regions. While the ideals of democratic participation and discursive democracy have gained some prominence in recent decades, the reality is that many supposedly sovereign polities are increasingly rule takers rather than rule makers (Braithwaite and Drahos, 2000, 3-4). We could now be experiencing a

[1] In the study of change, most attention is devoted to privatization. Yet, from a theoretical point of view, privatization is not necessarily the most interesting aspect of change. Other aspects of what we describe as the 'regulatory revolution' may well be more important.

[2] Neoliberalism is defined for our purposes as a transnational political-economic movement that appears as a reaction to the social-democratic hegemony of the post-war period and that advocates freer markets and less government. The criterion of its success is therefore the separation of markets from politics.

transformation from representative democracy to indirect representative democracy. Democratic governance is no longer about the delegation of authority to elected representative but a form of second-level indirect representative democracy – citizens elect representatives who control and supervise "experts" who formulate and administer policies in an autonomous fashion from their regulatory bastions (Waarden, 2003).

Bits and pieces of this new order have been expressed and explored through the notions of the rise of the regulatory state (Majone, 1997), the post-regulatory state (Scott, 2004), the "deregulation revolution that wasn't" (Vogel, 1996), the legalization of international relations (Goldstein et al., 2001), adversarial legalism (Kagan, 2001; Keleman, 2004), regulation inside government (Hood et al., 1999), the "audit society" (Power, 1997), the regulatory society (Braithwaite, 2003), the growth of internal control systems in corporations (Parker, 2002) and the proliferation of instruments of smart regulation (Gunningham and Grabosky, 1998). Each of these notions captures some important aspects of the new order, but they are not usually explored as the interrelated elements of regulatory capitalism. There may well be some advantages in exploring these elements of the new order in an interrelated way. Thus, it is argued that a new division of labor between state and society (e.g. privatization) is accompanied by an increase in delegation, proliferation of new technologies of regulation, formalization of inter- and intra-institutional relations and the proliferation of mechanisms of self-regulation in the shadow of the state. Regulation, though not necessarily in the old-fashioned mode of command and control[3] and not directly exercised by the state, seems to be the wave of the future, and the current wave of regulatory reforms constitutes a new chapter in the history of regulation.

Much debate has taken place over the causes and impact of neoliberalism, but few doubt that neoliberalism has become an important part of our world (Campbell and Pedersen, 2001, 1; Crouch and Streeck, 1997; Hirst and Thompson, 1996; Kitschelt et al., 1999). Yet a revisionist literature on the impact of neoliberal reforms is increasingly challenging the notion of neoliberal change and the consolidation of a neoliberal hegemonic order. Thus, Frank Castles's work on welfare state expenditure seems to provide conclusive evidence that welfare state expenditure across the rich countries did not decline (Castles, 2004). Linda Weiss's critique of the *Myth of the Powerless State* (1998) and her emphasis on the persistence of neo-mercantilist strategies in foreign economic relations seem now not to attract dissent but to reflect the consensus. Swank and Steinmo (2002) found 'remarkable stability in the levels and

[3] Command and control regulation is conventionally understood as the 'old' way and as 'the staple diet of many politicians.. It refers to the prospective nature of the regulation (the command) supported by the imposition of some negative sanction (the control)' (Gunningham and Grabosky, 1998, 4).

distribution of tax burdens' across the fourteen developed economies and that statutory cuts in tax rates were not associated with reductions in effective average tax burdens. A recent review of the globalization literature across the social sciences concluded that "[t]he most persuasive empirical work to date indicates that globalization per se neither undermines the nation-state nor erodes the viability of the welfare state" (Guillén, 2001, 254). While neoliberalism may well be the dominant discourse, it is not the only discourse available. I suggest that the discourse of regulatory reform and 'good governance' both complements the neoliberal reforms and poses a challenge to some of its simplistic assumptions about the nature of the relations between politics and the economy in general and the state and the market in particular (cf. Campbell and Pedersen, 2001, p. 3). Consequently, it adds another dimension to this revisionist view of the effects of neoliberalism and the rise of a new global order. While at the ideological level neoliberalism promotes deregulation, at the practical level it promotes, or at least is accompanied by, regulation. The results are often contradictory and unintended, and the new global order may well be most aptly characterized as "regulatory capitalism."

The new regulatory order is social, political and economic. State, markets and society are not distinct entities. Indeed, regulatory capitalism rests on an understanding of the relations between state and market along a condominium (Underhill, 2003).[4] The state is embedded in the economic and social order; any change in the state is expected to be reflected in the economy and the society, and vice versa. That much is reflected through the various dimensions of regulation. Thus, efficient markets do not exist outside the state and the society in which they operate, and efficient markets may require not only strong regulatory frameworks but also efficient ones (Polanyi, 1944; Underhill, 2003). Elsewhere I have argued that regulation-*for*-competition may be a necessary condition for competition both in network industries and well beyond them (Levi-Faur, 1998). Efficiency is often achieved through smart regulations that are *a sine qua non* for the efficient function of markets. At the same time, the legitimacy of capitalism rests on the ability of government to mitigate negative externalities through 'social regulation' (or the regulation of risk). Regulation is both a constitutive element of capitalism (as the framework that enables markets) and the tool that moderates and socializes it (the regulation of risk). From this point of view the history of economic development is the history of regulation.

[4] Following Polanyi, the condominium model suggests that 'states and markets are part of the same integrated ensemble of governance… The regulatory and policy-making institutions of the state are one element of the market, one set of institutions, through which the overall process of governance operates' (Underhill, 2003, 765). Political economy often leaves 'society' out of the analysis. For some theoretical foundations for a state-market-society model, see Migdal's 'state in society' approach (2001).

This leads us directly to a discussion of regulatory capitalism in historical perspective.

I. The Origins of Regulatory Capitalism

Capitalism is understood here as an order of economic accumulation that achieved its maturity sometime in the nineteenth century. Maturity implies some coherence between the social and political on the one hand and the economic on the other. This maturity was served mainly by the British hegemony in the nineteenth century, by the social and economic implications of the Industrial Revolution, and by the global echoes of the French Revolution. At the price of some simplification, it is possible to identify three distinct capitalist orders, each characterized by a different division of labor between state and society. These three distinct orders are presented in Table 1 on the basis of a distinction between two major functions of governance: *steering* (leading, thinking, directing, guiding) and *rowing* (enterprise, service provision) (Osborne and Gaebler, 1992). While in the nineteenth century steering and rowing were both dominated by business, the crisis of the interwar period and the process of democratic enfranchisement led to the growth and expansion of the roles of the state, which in many spheres took over both functions. The new order of regulatory capitalism represents a new division of labor between state and society and in particular between state and business. For some it represents a "return to the past," that is, nineteenth century laissez-faire capitalism. In our interpretation it is a distinctive order that critically differs from *laissez-faire* capitalism. In regulatory capitalism, the state retains responsibility for steering, while business increasingly takes over the functions of service provision and technological innovation. This new division of labour goes hand in hand with the restructuring of the state (through delegation and the creation of regulatory agencies) and the restructuring of business (and other societal organizations) through the creation of internal controls and mechanisms of self-regulation in the shadow of the state (Ayres and Braithwaite, 1992, 15).

This scheme of change, like all schemes, may benefit from some qualifications and reservations. To begin with, regulatory capitalism has not abolished earlier state structures and competing modes of governance. Change is embodied not so much in the demise of welfare capitalism as in its augmentation by new techniques of political, social, and economic control. Redistribution seems to have peaked, but it has not been rolled back (Castles, 2004). Moreover, new regulatory institutions, technologies and practices are increasingly embedded in the crowded and complex administrative structures of modern capitalist nation-states. The diversity of regulatory capitalism augments the diversity of earlier state structures. Second, this scheme does not clearly explicate the rise of international regimes as one of the defining characteristics of regulatory capitalism. The global level is simply not there and so neither is a qualified shift from the national to the international.

International competition, coordination and cooperation between the regulatory systems of the United State and Europe are important in shaping the global arena as well as domestic regulatory regimes (Kahler, 1995; Bach and Newman, 2004). The US and Europe certainly use regulation as a form of power to advance the interests of their own constituencies in the global arena (Halabi, 2004; Jessop, 2002; Cerny, 2001; Drahos, 2003). At another level the international order is one in which transnational networks of technocrats and professionals have more influence that ever before (Haas, 1992; Domínguez, 1997; Dezalay and Garth, 2002; Slaughter, 2004).

	Laissez-faire capitalism (19th century-1930s)	**Welfare capitalism (1940s-1970s)**	**Regulatory capitalism (1980s-)**
Steering	Business	State	State
Rowing	Business	State	Business

Table 1:
The transformation of governance and the nature of regulatory capitalism[5]

[5] Table 1 is based on Braithwaite (2000). It was first explicated in a somewhat different format by Jordana and Levi-Faur (2004).

Third, our scheme does not reflect historical, cross-national and cross-sectoral diversity. Historical diversity is reflected in the fact that certain countries, most notably the US, made regulation a major element of their governance systems much earlier than the 1970s. In fact, both McLean (2004) and Moran (2003, 41-42) identify a Victorian regulatory state. The United States system of governance since the end of the nineteenth century, and most visibly and widely during the New Deal, is often labeled "regulatory capitalism" (Yergin and Stanislaw, 2002, 28-48). Sectoral diversity is reflected in the widespread variations in the use of regulation (and regulatory agencies) across different sectors. Governance through autonomous regulatory agencies was evident in many countries' financial sectors early in the twentieth century (Jordana and Levi-Faur, forthcoming). Yet even nowadays the extent, form and scope of governance through regulation vary widely from one sector to another. The current rise of regulatory capitalism is actually about the spread of certain techniques of control more from one sector to another than from one state to another. National diversity is reflected in the various degrees of diffusion of regulatory innovations and practices. In short, if this schematic picture of the changes within capitalism is to be useful, we should keep our mind open to historical, sectoral and national diversities.

II. Regulation beyond Privatization

For some, the expansion of regulation in both scope and depth is a marginal aspect of the new capitalist order. Such a view is traditionally associated with prevailing Marxist and neoliberal approaches that downgrade the role of institutions in general and the state in particular (see Skocpol, 1985, for a review and an alternative). In some guises these approaches converge nowadays in the argument that globalization emasculates the autonomy of the state (e.g. Strange, 1996). Yet even within Marxism and liberalism there are important deviations from the standard view. Neo-Marxist interpretations, such as those of the French school of regulation (Boyer, 1990; Poulantzas 1969; and Jessop 2002), suggest taking the state seriously. One of the most important developments in the discipline of economics is the rise of neo-institutional economics and with it the rediscovery of institutions as an important aspect of the functions of markets (North, 1990; Levy and Spiller, 1996; Williamson, 2000). The notion of regulatory capitalism sits quite comfortably with these revisionists' views of the market and the relations between state and economy. Yet at a deeper level it is grounded in a research tradition that emphasizes the importance of the state and from time to time has to bring it back in (Skocpol, 1985; Weiss, 1998). The notion of regulation and governance through rule making and rule enforcement is essential if we are to bring the state back in once more in our era of globalization.

Nowadays, the discourse of globalization, especially economic globalization, suggests the demise of the state and therefore often

undermines the importance of regulations as mechanisms of governance (although private non-state regulations are increasing, no one suggests that they are even potentially equivalent to state regulation).[6] Many of the assertions of the globalization discourse, especially in its cruder forms, are based on the notion of globalization as a primarily economic process. Yet globalization is also a social, cultural and political process. It promotes not only firms but also tourism, not only integration of markets but also ideas about the appropriateness and desirability of markets. Yet, even if we subscribe to a predominately economic view of globalization, it is possible to "emancipate" regulation from the globalization of firms and markets. Indeed, this is what Braithwaite and Drahos (2000) do when they distinguish between the globalization of firms, the globalization of markets and the globalization of regulation. Sometimes these processes are advanced together, but at other times it is possible to observe the globalization of regulation without a corresponding globalization of firms and markets (Levi-Faur, 2004). This relative independence of the globalization of regulation, which to some extent is manifested in the legalization of international relations, suggests some independence of regulation from the economic order in general and from economic processes and organizations in particular.

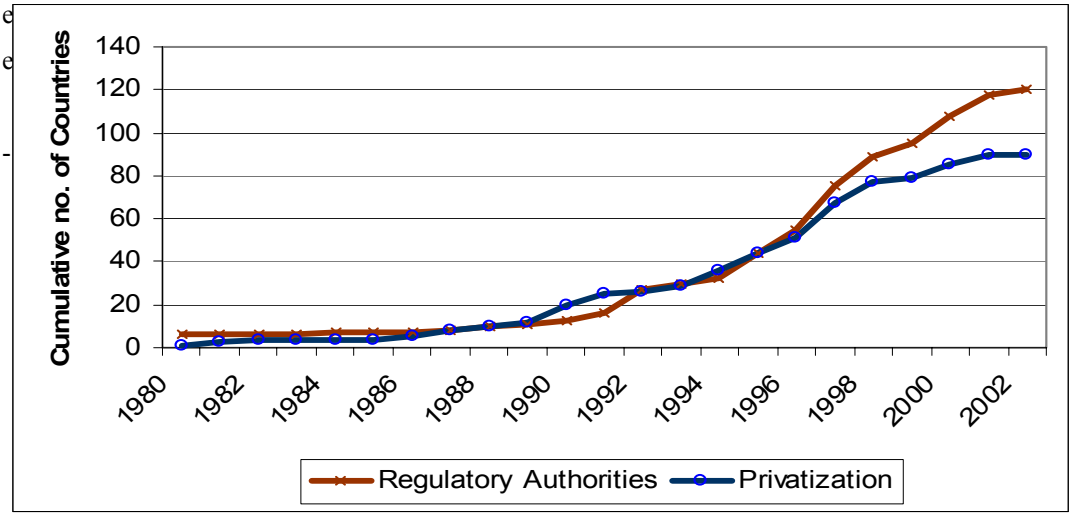
[6] Even the globalization literature seems to shift away from, or at least refine, the consensus on the demise of the nation state (Guillén, 2001, 254).

Political, economic and social perspectives that marginalize the role of regulation and emphasize the primacy of economic processes are therefore part of a long tradition and a wider debate in the social science. This is an important issue that is essential to the progress of social science, and it cannot be resolved here. Instead, we shed light on some of the most important aspects of the regulatory components of "regulatory capitalism." We start with Graphs 1 and 2, which portray the close relations between the decision to privatize and the decision to create regulatory agencies in two sectors: telecoms and electricity. The graphs are based on a dataset of 171 countries, and document the timing of privatization and of the creation of regulatory authorities.[7] The close proximity of the two lines reflects the intimate relations between one of the major features of the neoliberal agenda – privatization – and the rise of regulatory institutions. Yet it would be misleading to conclude that this close association suggests that regulation is just the flip side of neoliberalism. What is interesting

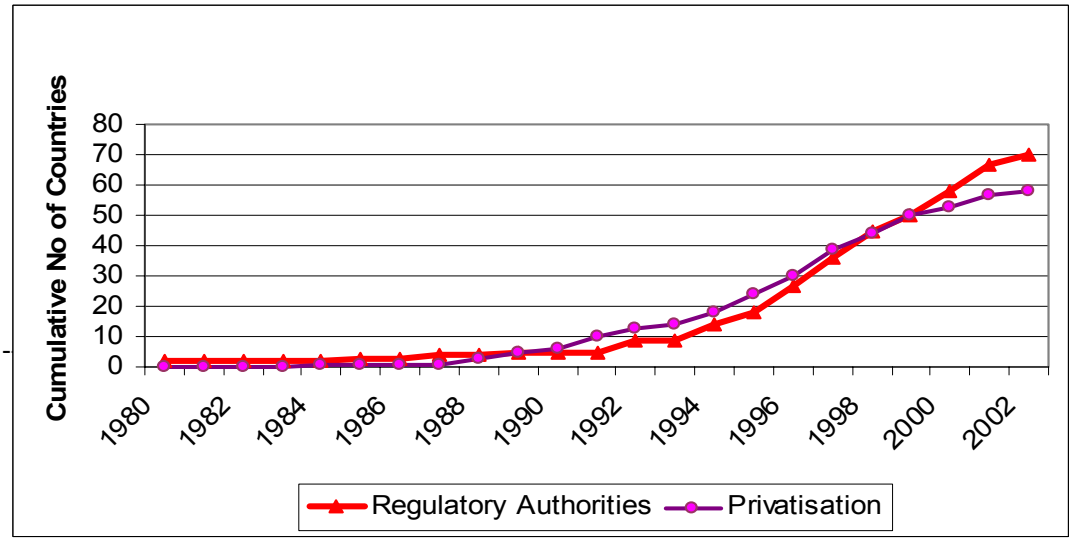
[7] A privatization event is documented when some shares, however few, in the incumbent public operator(s) are transferred to private ownership. Often, the process of selling all the shares lasted many years. In these cases of multi-step privatization, the earliest year of privatization is documented in the graphs. For regulatory authorities, the years refer to the start of operation, not to the date of legislation. Because the sources of the data vary (see below), the countries that are covered do not necessarily overlap. Data were collected by the author. Beware: some over-determination of the diffusion process in the graph is due to the collapse of the Soviet Union, which increased the likely number of candidates for privatization in the 1990s when compared with the 1980s.

to note about these two graphs is that, if for a while privatization was more popular than the creation of regulatory agencies, since the 1990s the opposite seems to be the case. The rationale for the creation of regulatory agencies seems to be stronger than the rationale for privatization. This suggestion is

now being subject to some kind of regulatory agency or commission. Social regulatory agencies and commissions – outside the context of privatization – in areas such as the environment, human rights, food safety, pharmaceutical products and privacy are increasingly diffused across the world (Gilardi,



Graph 1: The Diffusion of Privatization and Regulatory Authority around the World: Telecommunications



Graph 2: The Diffusion of Privatization and Regulatory Authority around the World: Electricity

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While neoliberalism gave strong impetus to regulatory reform, including the creation of new instruments of regulation and the establishment of new regulatory authorities, this should not be considered as a mere balancing act to the rise of neoliberalism. Regulation is a necessary condition for the functioning of the market, not only a compromise between economic imperatives and political and social values. While most of the regulatory agencies that were established are committed to the promotion of competition, the degree to which this competition is enhanced by regulation is giving these policies a neo-mercantilist (e.g., strategic trade, promotion of intellectual property rights) rather than a liberal character (Levi-Faur, 1998). Moreover, regulation is helping to legitimize markets and facilitate transactions by enhancing trust. One way to understand the relations between trust and regulatory capitalism is to suggest that "we audit, and we regulate, when we cease to trust" (Moran, 2000, 10). Another way is to focus on the changing patterns of trust allocation by the public rather than the alleged decline of trust (O'Neill, 2002, 9-10) and therefore to emphasize the transfer of trust from elected politicians to regulators. Yet, whatever the pattern of causality is, the interaction between trust and regulation implies that regulation is more than the flip side of capitalism.

III. Interrelated Components of a New Order

One important assertion beyond the notion of regulatory capitalism is that the various elements of the new order are in themselves highly related. Figure 1 portrays the various facets of regulatory capitalism in the widest possible manner. More regulation is observed not only in the context of the traditional relations between governments and business but also within the state, within corporations, and in social (not only economic) arenas. The scope of growth in these various arenas is still to be documented, and thus Figure 1 should be considered as a heuristic for analysis or a set of hypotheses about the changing relations between economic, society and politics in late-modern societies.

But let me rest my case with some of the insights that might lend initial support for the hypotheses. The seminal study by Hood and his colleagues of regulatory oversight inside the British government found an explosive growth in the investment in oversight. In an era when governments aspired to be leaner and meaner in the name of efficiency, regulators within government – and thus outside the traditional arena of government-business relations - doubled their budget. From the 1980s the British government substantially reduced the number of its direct employees, with more than one civil servant in four disappearing from the payroll between 1976 and 1996. Yet total staffing in public sector regulatory bodies went dramatically in the other direction, with an estimated growth of 90 percent between 1976 and 1995 (Hood et al., 1999, 29-31). It might well be that this growth reflects their role as the chosen instrument for making the rest of the public service leaner and meaner. Indeed, if the patterns of regulatory growth and civil service downsizing had continued at the 1975–95 rate indefinitely, Hood et al. (1999, 42) estimate that late in the present

decade the civil service would have had more than two regulators for every "doer" and over ten regulatory organizations for every major government department.[8]

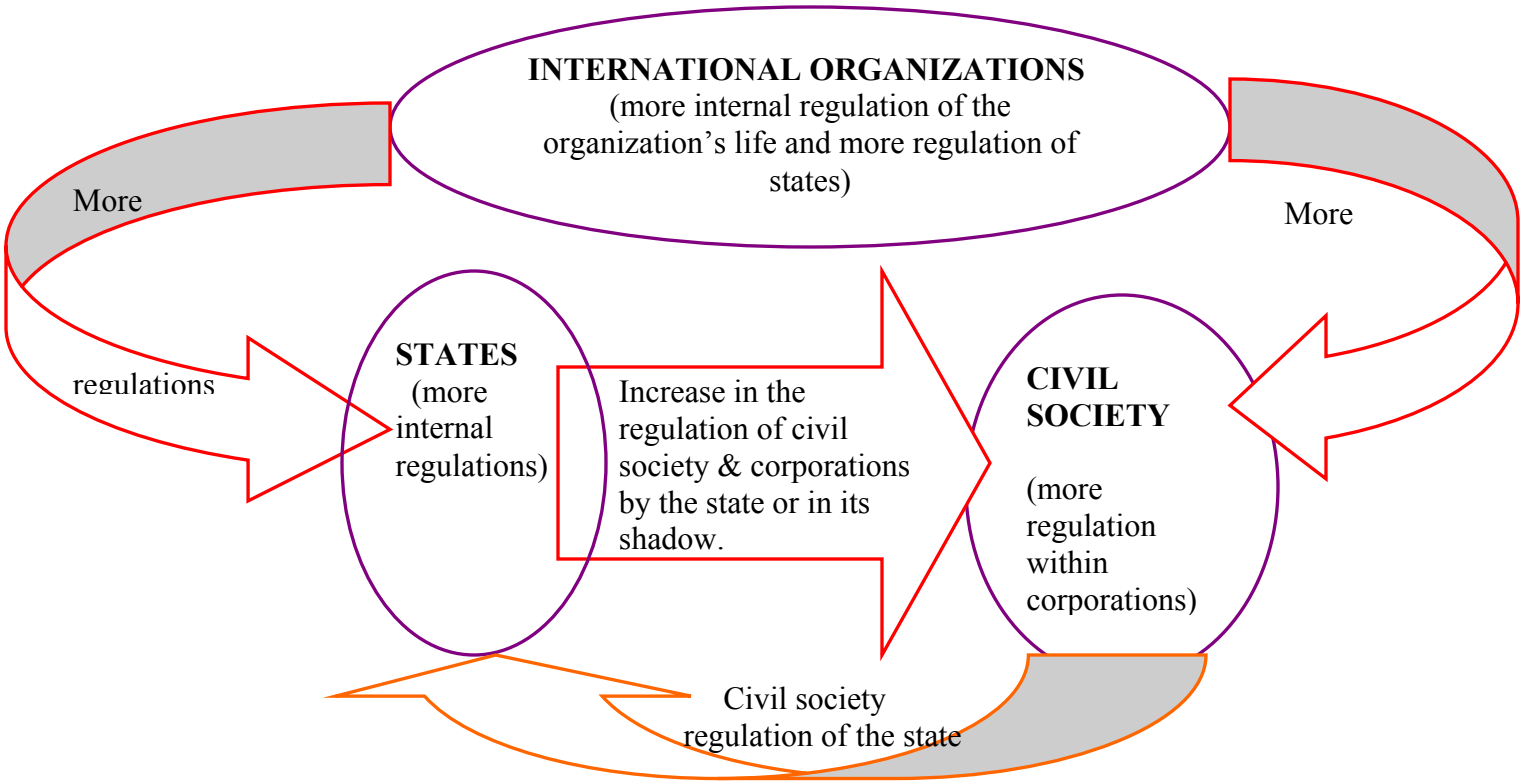

Figure 1: Regulatory growth and regulatory capitalism

Note: regulation within corporations represents a wider process of regulatory growth. The notions of regulatory society, audit society and risk society reflect the social dimensions of regulatory capitalism.

[8] Some of the analysis in this section rests on Levi-Faur and Gilad (2004).

Michael Power (1999) characterizes social development as the rise of "the audit society" (and thus indirectly as the rise of the regulatory society). During the late 1980s and early 1990s, Power observes, the practice and terminology of auditing began to be used in Britain with growing frequency and in a wide variety of contexts. Financial auditing, the traditional regulation of private companies' accounting by external financial auditors, came to acquire new forms and vigor. Among the emerging new forms of auditing were forensic audit, data audit, intellectual property audit, medical audit, teaching audit, and technology audit. Auditing won a degree of stability and legitimacy that institutionalized it as a major tool of governance well beyond the control of business: "increasing numbers of individuals and organizations found themselves subject to a new or more intensive accounting and audit requirement… and a formalized and detailed checking up on what they do" (Power, 1999, 4). The augmentation of auditing practices creates the "audit society," "a collection of systematic tendencies and dramatizes the extreme case of checking gone wild, of ritualized practices of verification whose technical efficacy is less significant than their role in the production of organizational legitimacy…" (1999, 14). Regulatory growth, Power suggests, is not only an answer to the problem of political control over the economy but represents at the deeper social level the demands for legitimacy and trust and the difficulties involved in accepting and dealing with risks. The demand for and the supply of regulation shape the way we act; and while Power is skeptical about the ability of regulation in general and auditing in particular to meet the expectations that it creates, we can take his analysis as one more indication of the growth of regulation outside the relatively narrow scope of neoliberalism (see note to Figure 1).

Another indication of the new order of regulatory capitalism is the proliferation of regulatory instruments to ensure corporate social responsibility. In the past two decades, we have also seen an exponential increase of tools for integrating social justice and environmental protection issues into the governance structure of corporations. These tools include "environmental management systems, corporate reporting systems, codes of conduct, third-party certification systems and ethical investment" (Courville, 2004, 210). Big corporations are just as subject to "red tape" and excessive internal regulation as they are to external regulation. Domestic and self-regulation, whether to enhance social responsibility or to meet the demands of lawyers and insurers, are exploding and the demands on corporations seem only to increase the sphere of internal regulation (Braithwaite, 2003; Parker, 2002). The issue now is not whether corporate social responsibility is effective (or, in more general terms, to what extent regulation achieves its purpose) but the fact that regulation and the formalization of internal structures of governance are increasing.

Regulatory capitalism is a technological as much as a political order.[9] It is technological in the

[9] It would be a mistake to examine the notion of regulatory capitalism only from the point of view of more or less regulation or even of the 'right' or balanced mixture of public control and

sense that it is shaped not only by the debate about more or less government but also by the quest for better instruments of regulation.[10] "Smart regulation," as Gunningham and Grabosky (1998) call it, is defined by the use of a mixture of regulatory instruments, by the mobilization of new regulatory actors and third parties, and by harnessing the enlightened self-interest of individuals and corporations. One of the most interesting indications of the rise of the regulatory capitalism is, therefore, the rise of new instruments of regulation: from eco-labeling and league tables to auctioning, and from "gatekeepers" and "awards" to RPI minus X.[11] Some of these instruments such as price control (even in its RPI minus X form) are compulsory while others, such as eco-labeling, are voluntary. Some are promoted and enforced by non-governmental international organizations; others are enforced by governments and intergovernmental organizations. In all these forms they are important indications of the new order. The new instruments are highly sophisticated but they are also vulnerable to misuse. The auctioning of the frequencies for Third Generation Mobile Technology has resulted in huge incomes for some Europeans governments but may also result in a delay in the introduction of the technology. More important, it represents a new form of taxation on the telecoms industry and, according to some interpretations, led to the crisis in the telecoms industry and consequently also to the world economic recession of 2000–3. There are plenty of examples of sophisticated regulatory instruments that have been used inappropriately. Knowledge-embedded instruments are one of the defining characteristics of the new order of regulatory capitalism and a reason for moderate optimism about their ability to provide more efficient and participatory forms of governance. Efficiency and participation may or may not lead to widespread distribution of the efficiency gains. Regulatory capitalism may or may not take a more social orientation. Yet it is clear that it does not necessarily exclude the possibility of a progressive distribution of resources by means of regulatory instruments when the political agenda will be more inclined to be open to the weakest members of the society.

All in all, the increasing scope and depth of regulation suggest that it is a phenomenon to be reckoned with. The notion of regulatory capitalism that rests on a new division of labor between state and society, on the proliferation of new regulatory agencies, on new technologies and instruments of regulation and on the legalization of human interactions seems to open an agenda which may well become a major area of social, economic and political research

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individual freedom. Regulatory capitalism is driven and shaped to a large extent by the technologies or instruments of regulation.

[10] This seems to have inspired the British Labour government of Tony Blair to change the name of the Deregulation Unit set up by the Conservatives to the Better Regulation Unit.

[11] RPI minus X is a method of price regulation whereby tariffs of monopolies are regulated according to the Retail Price Index (RPI) minus some measure of efficiency (X). It was first applied to British Telecoms in 1984, and then extended to other British utilities as they were privatized. It is now widely used across different sectors and countries (Baldwin and Cave, 1999, 226-38). This instrument is the brainchild of Professor Stephen Littlechild. See the 20th anniversary collection of the Littlechild Report (Bartle, 2003).

Regulatory Reform and Government Management

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Private Law Practice

Introduction

Regulatory scholarship in the United States has traditionally focused on improving the *tools* and *procedures* of regulation, and not on improving the capacity of regulatory agencies to use those tools through, for example, reform of management and personnel systems. Indeed, much legal scholarship on regulation implicitly assumes that not much can be done to improve that capacity.

But there is no reason to believe that improving management capacity would be more difficult than turning many other regulatory reform suggestions into reality, while the gains might be far greater. Indeed, distrust of government's current management capacity already skews policy-making systematically away from approaches that place demands on government management. That skewing effect should be (but generally is not) of particular concern to proponents of activist government.

Describing the Problem

1. Competence and the Regulatory Agencies in General

Nothing in the traditional regulatory law agenda addresses the manner in which government agencies are managed internally – organized and staffed – so as to best achieve their agenda. Yet picking the right tools and procedures to address a problem is neither necessary, nor sufficient, to a desirable result. The competence with which those tools and procedures are employed can either cure their defects if they are bad, or defeat their virtues if they are good. As regulatory problems and their solutions get more complex, and increasingly require the deployment of sophisticated tools of scientific, engineering, statistical, economic, and public health analysis, the role of competence will increase. Moreover, that competence must both be actually employed in the analysis of the problems at issue, and be seen to be employed by the outside constituencies of the agency. Indeed, an agency's reputation for competence, or the reverse, significantly affects its ability to get things done. I have heard several times that the greater reaction against genetically modified foods in Europe than in the United States is due in part to Europeans' distrust of their food regulatory agencies, and American trust in the FDA.

Competence and the appearance of competence are needed for more than individual regulatory decisions.

Making and defending regulatory decisions will be much easier if the agency as a whole can point to an overarching strategy for achieving its goals that its individual actions are meant to achieve, and can show how those individual actions are consistent with that strategy. Devising, fine tuning, and applying such an overall strategy will place even more demands on the agency staff and management systems.

History provides no assurance that instrumental competence at the management and staff levels will produce correct decisions. But it provides ample assurance that the absence of this competence can lead to wrong decisions. Similarly, though instrumental competence will never remove the political element from many agency decisions, it can guide political calculation and set bounds to it.

2. Competence and the Choice of Regulatory Tools

a) *The Types of Regulatory Tools*

Over the last thirty years, scholars and practitioners have defined, described, and analyzed the set of tools that agencies might use to achieve their goals. These tools now include:

- Deregulation – returning governance of a field to the private market and the forces it embodies (or simply declining to regulate a currently unregulated field.)
- The disclosure of certain information by the government, or at its direction, to inform consumers or citizens.
- Market based regulatory approaches, which create new forms of property (e.g., emissions allowances, fishing rights) that the private market can then allocate efficiently.
- Traditional "command and control" regulation in which the government tells private parties what to do (or not do); and
- Regulatory bargaining, in which a government (or a level of government) negotiates with other persons outside its boundaries for a result.

I have tried to organize this list according to the demands an approach places on agency management and staff, beginning with the least demanding approach and ending with the most demanding.

b) *Competence and the Choice of Regulatory Tools*

If an agency lacks management competence it may well simply avoid the use of regulatory tools that would expose that lack. That in turn would shape agency conduct in a manner that should be particularly distressing to supporters of "activist" government. More specifically:

- Deregulation or non-regulation requires no government involvement once the field has been left to private ordering. Some arguments for non-regulation contend that private ordering is the best approach to a particular problem regardless of government competence. This is clearly often true. In other cases, however, advocates concede that there may be a case for government involvement, but that the costs of

that involvement outweigh the likely benefits. The validity of that argument depends in part (only in part) on the incompetence costs of government involvement.

- Similarly, information disclosure and market based approaches often require very small agency implementing staffs, and require minimal interaction with regulated persons, though designing these approaches can present very sophisticated challenges. These programs, too, reduce demands on agency competence once they have been established. [12]

I firmly support market based and information disclosure approaches. But one might speculate that their current popularity does not rest entirely on their indisputable merits, but also on their perceived ability to relieve regulatory agencies of management burdens that the agencies under current approaches cannot carry.

- "Command and control" regulations, though costly to write and issue, once they have been issued embody legal commands behind which agency staff can shelter. They can avoid engaging regulated entities and others on the merits of the issues that the regulation addresses, since the regulation has already answered all those questions and need only be enforced.

Reliance on the tools listed above can mimize the need for agency staffs to engage in detailed negotiation with others on the substance of agency decisions, limiting the need for such negotiations to the few (and controllable) occasions on which regulations must be issued or amended.

Increasingly, however, reformers suggest that United States regulatory agencies, to be effective in the future, must function by negotiating regulatory results with private entities or state and local governments, or by "contracting out" many of their functions. Such approaches increase demands on agency staffs, since they require small groups or even individual staff members to negotiate with outside persons, in a setting of partially conflicting interests, for the best and cheapest method of accomplishing agency goals.

Contracting out can save government resources, allow experts to be hired only as and when they are needed (as opposed to putting them on staff) and reduce costs through competition. Bargaining with the regulated could induce them to disclose to the government new possibilities of achieving regulatory goals that the government could not have thought of or commanded on its own. Bargaining with the regulated can also produce greater acceptance of the final regulatory result. [13]

[12] Market based systems tend to operate automatically if the social cost imposed by the items being traded can be easily and unambiguously quantified. That may be true, for example, when one tonne of carbon emissions or lead emissions is traded for another. Where comparisons are more difficult – for example, comparing the social value of one hectare of wetlands with another – the comparisons can get far more difficult, and therefore impose far greater burdens on agency competence. . For a full discussion, see James Salzman & J.B. Ruhl, 2000.

[13] For a full discussion, see Pedersen, 2001.

Most institutions in our societies function by contracting and bargaining. Yet suggestions that government agencies rely increasingly on these tools are sometimes opposed with the argument that the government will inevitably be out bargained, an argument that is valid only if government agencies are incurably less competent than those they deal with.

3. Agency Competence and Regulatory Procedures

Demands for greater public participation in agency procedures, and greater agency accountability for their decisions, have fueled the evolution of agency rulemaking in the United States into a regulatory procedure that (a) requires full disclosure for public comment of the information supporting agency decisions, and (b) a full response to those comments at the time the agency takes final action, and that (c) subjects the final product to judicial review.

These changes have largely succeeded in their original aim. But in today's rapidly changing world, detailed regulations will often require amendment to keep up with changing times. Only the agency and its staff can write, or approve, these amendments. If the agency is unable to perform that task, inevitably regulation will appear as a less attractive regulatory tool than less intrusive market-based or information disclosure approaches, or simply ignoring the problem.

Agencies have not done well in issuing such amendments. It would seem logical to at least inquire whether this was due to management or staffing failures. But one could read many years worth of administrative and regulatory scholarship without learning that agency management and personnel systems are human creations whose performance might be improved by the exercise of intelligence directed to that end. Instead, this scholarship considers the competence levels of agencies as a "black box" that sets certain apparently fixed limits to the tools that agencies can employ effectively, and the goals they can achieve, [14] or that view a competent and non-political civil service as depending on more wholesale changes in our system of government. [15] Academic studies of the alleged "ossification" of American rulemaking procedures, which is supposed to make it difficult for agencies to amend their regulation in changing times, examine in detail evolution in judicial and White House review procedures, but never even mention management reform. [16]

The Decline of Agency Management

In the future, regulatory agency staffs may well be smaller than they are today. But to do a good job, they will probably need to be of higher quality. Unfortunately, there are good anecdotal reasons to believe that the quality of agency management and agency staffs is getting worse in the United States by comparison to the quality of management and staff in the non-government world.

Over the past thirty years, almost every Presidential administration has been more inclined than the one before it to control for political effect both the staffing of regulatory agencies, and the presentation and (sometimes) the substance of their decisions. To the

[14] See, e.g. Kagan, "Presidential Administration." ("Indeed, these officials' [agency civil service staff] insulation from the public, lack of capacity for leadership, and significant resistance to change pose significant risks to agency policymaking" that justifies an active White House role in setting agency priorities for action).
[15] Ackerman, 2000 (arguing that parliamentary government is more likely to lead to a professional and apolitical civil service).
[16] For examples, see Thomas O. McGarity, 1992 and Richard J. Pierce, Jr., 1995.

extent politics becomes more prominent, detailed technocratic examination of the merits of issues will recede in significance.

Moreover, the traditional model of a civil service career, consisting of long tenure in more or less the same job with fixed routines, is increasingly out of step with a private world and culture focused on constant change and constant adjustment to change.

Private corporations pay immense attention to their management structures and personnel systems. This is not true for U.S. government agencies. Managers at every level regard the personnel system as an alien system to be ignored or worked around where possible, and to be endured where necessary, not as assistance in doing their job.

Paths to Reform

Many recent studies have documented the main defects of the U.S. government management approach, and suggested possible fixes.

On the management level, these include the short tenure of office of most political appointees, the excessive and increasing number of political appointees, and the "layering" of management functions so that government organization charts become more complex and hierarchical even as private organization charts are moving in the opposite direction.

On the civil service level, these include a cumbersome and non-functional hiring system, and, most notably, an inability to reward performance – by higher compensation – or discourage non-performance – by lower compensation or termination.

I don't have either the background or the expertise to comment on the merits of these suggestions. However, the American federal personnel system is itself a "command and control" regulatory program, in which Congress and the Office of Personnel Management (OPM) set down detailed rules that agencies must follow, just as EPA or some other agency might set down detailed pollution control rules for factories to follow. One might suggest from that perspective two procedural suggestions, common in the regulatory reform world, that might also be applied to the federal personnel system, to make any reforms easier to accomplish and evaluate.

a) *Decentralize*

Devolving decision-making authority to the lowest-level jurisdiction with a full overview of the costs and benefits involved has long been a basic regulatory reform principle. That lower jurisdiction will be in far more fluent command of the facts and political constraints, and will have a more immediate motive to act, than some more removed authority.

For exactly the same reasons, the government-wide OPM approach should be replaced in favour of one that encourages each agency to develop its own personnel policies, including salary levels, "contracting out" policy, and promotion and disciplinary procedures, subject only to a few basic principles, such as a ban on considering partisan political preferences in filling most jobs.

Indeed, the case for devolving personnel decisions to agencies is even stronger than the case for devolving regulatory authority generally. Congress originally created agencies to approach problems from an integrated perspective. It makes no sense from that perspective to remove personnel policy – one of the

main tools that private entities use to achieve their goals – as completely from the control of agency management as current law removes it.

Moreover, the centralized approach tends to make the civil service system unreformable. Government-wide civil service reform is simply too large and diffuse a topic to motivate a reform constituency, while that same broad focus makes it easy for those opposed to reform to raise enough objections to stop any decisive action.

Moving control of personnel to the agency level would make it much easier to grasp the concrete benefits and pitfalls of reform. That in turn would motivate both agency management and the interest groups that surround the agency to pursue reform more seriously. It would also fix responsibility for what went wrong or right on the agency management and its Congressional oversight committees, rather than diffusing it into the system as a whole. This, too, would motivate attention to the issue.

Finally, the differences among personnel systems that such an approach would encourage would allow each agency to develop a personnel system adapted to its own needs and traditions. The hostility of the United States administrative system to bureaucratic experiments has long been noted. Competition in designing personnel systems could help correct this problem. As in the private world, it could encourage experiment and innovation on the agency level, and could thus contribute to overall management reform as the unsuccessful approaches were weeded out and the successful approaches were adopted more widely.

b) *Publicize*

The last fifteen years have seen increased use of information disclosure as a supplement to or substitute for regulation. The government requires disclosure of factory releases of toxic pollutants, or hospital mortality rates, or drug side effects, rather than commanding some direct change in conduct. Such reports, if framed correctly, present issues to the political system in a form that facilitates debate on the issues at stake and further action if necessary.

Under a decentralized personnel management system reports on how well or poorly agency personnel systems were working could serve an exactly similar function, describing which changes were succeeding and which were not, and recommending regulatory or legislative changes where appropriate.

Conclusion

Managerial incompetence endangers effective regulatory practice and threatens a distortion of regulatory policy by increasing the costs – both economic and reputational – of utilizing more demanding instruments. This situation threatens not only the quality of regulation but widespread perceptions of its fundamental legitimacy. A key element in reforming such managerial competence lies in reform of the procedures and practices associated to agency personnel systems.

Criminalization, Meta-Regulation and Competing Risks: How dreams become nightmares

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Imagine two regulatory actors, one attempting to bring about better safety standards, cleaner air, fairer markets or more accountable boards – the other to make computers, run a school, a hospital or a farm. What are their dreams, what are their nightmares in their relationship to each other? If you were a regulator, what would be an ideal regulatee, one that fulfilled your highest expectations? And for those who are the regulated (as most of us are in some capacity), what would be the ideal regulator and regulatory regime? To take from the title of the centre sponsoring this publication, what would make "red tape" turn to "smart tape"?

From my own thought experiment, the following comes to mind:

> For the regulator, the dream is one where the organization, its managers and its employees take your goals seriously. They accept them and work with them. You have not only your specific demands met, but are greeted by a self-regulating organization where the goals set by you are realized or exceeded. Of course, you don't want to be out of a job, and luckily, there is enough (but not too much) work to do. For most of those falling short of expectations, merely a nudge (a warning or a raised eyebrow) is enough to set most of your 'regulatees' back on the right path. However, that is not all you need. For recalcitrants, the ones that really get your back up with their sloppy/devious/indifferent attitude and behaviour, there is a perfect regulatory strategy. This strategy is guaranteed to make both that organization and (where necessary) the industry as a whole sit up and take notice.
>
> You turn over in your sleep and experience a reality of an altogether different hue – your worst nightmare. Here the organizations are diverse, but threatening. There are those that you don't even know about, ones that have ignored you for years – yet ones that are capable at any moment of creating havoc. Then there are those you do know about, but are powerless to change. They are manipulative; cleverly they distort the facts of their non-compliance in ways that mean you cannot tackle them. They spread misinformation (whilst remaining within their legal rights) and they have powerful allies, both within the industry and within the government. Should you push your authority too far, there will be a backlash and you are likely to lose the very legal powers you think you need the most.

The best scenario, of course, is one where the regulator's dream meets that of the regulated. So what might be their (our) dreams and nightmares?

> For a business, or a non-profit organization, or a school or a hospital you want a regulator that is sensitive to your world. You are there to manufacture things, provide a service, make money, serve the needs of the underprivileged, educate children or heal the sick. But you don't want to hurt anyone, damage the environment or take what's not

> your due. The regulator understands your situation and the laws and regulations reflect this. So, the goals of the regulator (whether safety, environmental, corporate governance or whatever) seamlessly are woven into everyday practice. The rules, guidelines and codes that are produced are succinct, but comprehensive and practical. They help you do things better. That is, by maintaining high standards of compliance your business is not only sustainable but also more successful, more profitable (or more able to make your budget work better) and more popular with the consuming public.
> But you also have your nightmares. Firstly, you are certain from past experience that there is an unknown regulation out there that will create mayhem for you sometime in the future. Then there are the hundreds, thousands that you are aware of; multiple, competing and time consuming. Your original motivation for being in your business (being creative, maintaining a public service, making a solid world-class business) is seeping away. It is replaced by an impossible task of reducing all known risks (and many unknown) to some ambiguously worded 'acceptable level'. Further, the regulator simply refuses to understand that. Rather they keep threatening you, spreading misunderstanding and misrepresentations of your motives.

These dreams and nightmares are found in various guises throughout the regulatory literature. Regulatory dreams in particular progressively have found their way into regulatory scholarship and notions of "best practice." One prominent example is the notion of a "compliance culture"; if you as a regulator are dealing with an organization that embodies this culture, so the literature goes, you can be reassured that all is well. Such an organization has several features. First there is a commitment to the regulatory goals and, as evidence of that, high status and high profile personnel that take responsibility to put in place processes that promote both compliance and learning. Communication is evident and the various channels that exist ensure that bad news always reaches the right ears where something can be done and further, there are transparent processes that allow adequate monitoring, auditing, reporting and rectification of non-compliance. Finally, there may even be a "community of fate," a group of like-minded organizations that assist each other in compliance issues. Ultimately, the argument goes, an organization with a compliance culture is likely not only to achieve, but also exceed, regulatory expectations and be more successful in its core business at the same time.

Regulatory scholarship long has been concerned with methods to reach this nirvana. The aim for the regulator for the last decade or so has been to engender just such a "compliance culture" within their regulatees specific to their arena of concern. Writers and policymakers propose many different paths that regulators might take. Essentially, they form a continuum from strong "command and control" approaches, for example greater use of the criminal law through to "post-regulatory" proposals which argue that better outcomes might arise beyond the direct control of the state. Where, then, along this continuum might more dream-like outcomes be produced, or where more nightmares prevented?

Criminalization is popular. When disasters occur, in particular when people lose their lives, their health or their life savings there will be a demand that "something should be done" and that "something" most often is the criminal law. The belief in its efficacy is also persistent and

enduring. The demands for use of criminal sanctions, particularly those targeted at individual factory owners or managers have existed since the early days of the factory system (Carson 1979). For proponents, criminalization is "that one great regulatory strategy" that will bring about lasting change. Let the captains of industry see how they feel when locked in a jail cell, where they will be forced to accept the harm they have wrought. Criminal prosecution including stiff jail terms, advocates believe, will deter both specifically (i.e. deter the person who has offended from re-offending) but generally, that is industry as a whole will sit up and take notice.

For others, though, this faith is misguided. Twenty years ago, John Braithwaite looked at the misdeeds of the pharmaceutical industry and came to the conclusion that the criminal law is likely to be ineffective, if not completely counterproductive. In fact, it will militate against a compliance culture. He is not alone, although there are a range of opinions, from those who argue that criminalization is simply one measure amongst many (what might be a termed a strong "command and control" approach) to those who argue that criminalization either will not be effective at all, or will never play any significant role. For these commentators, what is needed is more creativity, a broader web of measures that can prompt and institutionalize virtue. Most recently, this has taken the form of meta-regulation, essentially the regulation of self-regulation, an approach promoted amongst others by John Braithwaite (2002) and Christine Parker (2002).

Meta-regulation tries to capture the teaching moment. Whether this is an actual harm occurring, an offence discovered, or a heightened political context, the aim is to prompt the organization through various strategies to take regulation seriously. The model proposes imaginative use of sanctions such as reparations or enforceable undertakings to shape a compliance culture within the target organization. Meta-regulation is both optimistic and pragmatic. It lays out a method for assisting organizations build their skills and knowledge, and to institutionalize that wisdom within the organization as a whole. This is achieved through what Parker terms "triple loop learning," learning within the organization, between the various subunits of the organization and between the regulator and the organization. For Parker and Braithwaite, dreams can become reality.

Other strategies from these "post-regulatory" perspectives also are concerned at the limits of command and control, but are more wary of optimism in all its forms. General proclamations, for example, that meta-regulation can bring lasting changes to multiple settings are seen in this light. Rather, what is needed is a scaling down of expectations of what regulation can achieve. The world is too complex: unintended consequences, indeed regulatory nightmares, are more common than the dreams that propel us to greater and greater expectations of what regulation can achieve. There are three aspects to this. Firstly, there is a limit to the instrumentalism in regulatory regimes. That is, the purposive element that is at the centre of the overt rationale for regulation either is not or

cannot be present. Secondly, the expectations of what the state can achieve in the public interest is too high. Finally there are limits to law as the principal instrument through which regulation can be achieved (Scott, 2004). Our expectations of what regulation (and in particular state control) can deliver are simply too great.
But how can we tell whether optimism or pessimism is warranted, or whether criminalization can or cannot produce the expected results? Clearly, the answer is that it depends on where and when a particular reform is proposed. A reform in Nova Scotia will be received differently than in Quebec, in the Northern Territory than in Victoria. Policy must be sensitive to context, both at the local level and in the way international and global pressures make additional demands on diverse regulatory environments. It is only when the context is understood, and how regulatory reforms are received by a particular place that it is possible to determine what change should occur and why.

How best, then, can the importance of context be captured and translated into effective regulation? My work, both in the industrialized west and rapidly industrializing Southeast Asia, suggests there are three elements to this. The first element is to recognize the importance of local knowledge when making regulatory prescriptions or predictions.

Secondly, there is the need to understand how broader pressures intersect with the local context. Finally, it is to recognize the importance in maintaining the legitimacy and authority of the state in setting regulatory priorities and regimes. This is not to argue that it can or will ever have the control it desires, but to make a virtue of greater and greater levels of lack of control comes close to aiming for what developmental scholars term a "weak state," where the state lacks legitimacy and authority. In these situations, regulatory nightmares abound.

I will take these one at a time.

Local knowledge and "Regulatory Character"
"Local context" can be taken at a number of different levels, from a particular organization or section of industry, to the level of a particular state or territory. What each of these settings has in common, however, is a "regulatory character": the particular way that individuals, norms and written rules (regulations or laws) intersect. In essence, what regulatory character points to is the need for an ongoing appreciation of the "law/practice" gap.

Regulatory character, I argue, is made up of three basic relationships:

1. The relationship between local authoritative norms and formal written rules (including one or more of laws and regulations, codes and formal company compliance documentation);
2. The relationship between individuals and local authoritative norms that guide their behaviour; and
3. The relationship between individuals and formal written rules.

Understanding regulatory character, the sum of these relationships above, allows a reasonable prediction to be made about what is likely to

happen if any regulatory changes are made, including legislative changes. It explains why in a given context law and regulations do not act in an instrumental fashion since they are translated through these various relationships. Further, laws and regulations may normatively rather than instrumentally express certain beliefs or values or may provide a strategic tool to gain advantage. Mapping regulatory character essentially requires understanding what individuals in a particular place accept and relate to as "normal" authoritative processes and behaviours and how this relates to the people's use (or lack of use) of formal, written rules. Mary Douglas and others (e.g. Hood 2000) have argued that essentially there are four universal norms that guide what is assumed to be "right" behaviour namely: hierarchism, egalitarianism, individualism and fatalism. Each category, or more accurately "ideal type"[17], allows an understanding of "how things are done around here." For example, norms of hierarchism, as the name suggests, prioritize a command structure exemplified by (but not limited to) the military.

Egalitarianism emphasizes group decisions and communication. Individualism uses bargaining through contracts and other forms of individualistic negotiating. Finally, fatalism involves a ritualistic engagement with formal rules or law. Now, of course, this is messy and many permutations are found. What is important, though, is to recognize that there are norms that underpin assumptions about what is legitimate and authoritative behaviour.

A second component is how these norms relate to written rules. Rules may variously be an expression of those norms, merely window dressing to convince outsiders of competency, a reassurance or a strategy to extend certain forms of control, or as in the ideal of "the rule of law" a means to limit state authority.

An important point, however, is that this regulatory character is not an absolute given; it does not materialize from some unique cultural trait, nor is it static. It emerges, at least in part, as a distillation of the historical economic and political conditions of a particular place. However, whilst economic and political history shapes regulatory character, regulatory character also shapes the way such pressures are responded to in the present.

The Global Environment

The importance of the global environment lies not only in the pressures they generate for different locales, but also how these sites translate global pressures through their particular regulatory character. The first point to be made is that increasingly global pressures cannot be ignored. No single place, industry or regulatory regime can consider itself the centre of the universe, able to "go it alone." Globalization is first and foremost "relativization" (Mittleman, 1994) forcing each site to take a stand with respect to international or global demands. These external pressures may be construed as opportunities, to be grabbed and exploited (and

[17] An ideal type is a characterization that captures the essential element of a particular situation or place. It is never found in its pure state, as it is a theoretical construct. However, understanding what ideal types are present in a particular situation will allow an assessment of the likely dynamic present.

be exploited by) as "the way of the future" or shunned as tainted and evil.

Nowhere is this decision for the local setting clearer than when choosing whether to accept or reject the overtures of free trade. The growth of international trade and the priority placed on "market based" solutions is characteristic of contemporary demands on regulatory policy. Another component of globalization, however, weighs heavily on the local regulatory setting, namely what has been termed "global rationalism" or the growth in rule making at the supranational level. There is an increased expectation that different jurisdictions will avail themselves of rules created outside of state and national boundaries.

Whilst there are clearly relationships between these two elements (for example the specific rules and laws governing free trade), it is particularly important to separate out their impact on local regulatory character. The impact of free trade on regulatory character is normative as well as economic. It brings with it certain values, beliefs and expectations. These values are pre-eminently individualistic, and as such they alter how individuals relate to pre-existing norms and in turn, affects those norms themselves. The market brings with it a conception of negotiation, bargaining and contract. It assumes that the motive of individuals in the market is strategic, of self-interested manipulation of the environment. The emphasis, then, is on self-reliance independent from a broader community. Global rationalism works in a different way, through law rather than norms, through documentation not behaviour. It has to be drawn into regulatory character through the pre-existing relationship between written formal laws and rules, norms and individual actors.

Politics and Government

Government in particular, and the political process that accompanies it, has a distinct role to play in shaping the local "characteristic" response to these global pressures. Whilst it is self-evident that no one actor or institution has complete control of regulatory character, the elected government and the political process have legitimate authority to act in ways that other players do not. While the issues here are complex and beyond the scope of this paper, if the state does not have a clear role in regulatory processes, individuals – citizens – will seek to have their injustices met through alternative sources of authority. My work in Thailand (Haines, 2005) and more recently in Cambodia has underscored this.

The political process is, of course, also essential in understanding the contours of the "law practice gap." Both politics and the state are essential in translating collective goals and aspirations are translated into law. Note, however, that these goals are not necessarily instrumental, but can also be symbolic and affective. Without the requisite political leadership, (for example by the delegation of political decisions to the market), regulations cannot be effective. The decision about what the goals of regulation should be is a political one, as is the choice to develop some other form of

social control should regulation be counterproductive. To be sure, in developing policy and law, politicians rely to an extent upon experts (legal, scientific) and also on the citizenry and the market in terms of achieving the approval needed. But ultimately it is a decision they must make.

Proposals for a progressively more modest role for the state beg the question of what replaces it in providing both assurance and direction to collective goals. Suggestions that the market and non-governmental organizations (NGOs) can provide leadership need to look more seriously at weak states that cannot or do not support their people. Markets are creative, but the destruction they leave to environments, cultures and communities is part of that creativity, with depletion of natural resources one obvious example. Further, a wholesale abdication of leadership in the area of risk reduction to the market seems a high-risk strategy, and in light of the legitimate demands of citizens, one destined for failure (Haines and Sutton 2003). There are problems too, with advocating a greater and greater role to NGOs. They can do good work, but are dependent on (private and public) donors that have their own agenda, goals that may or may not work in the local public interest. In addition, NGO-based regulatory regimes, for example, can undermine governments exacerbating pre-existing problems (Haines, 2005). Perhaps it is the privileged experience of commentators from western industrialized settings in their demand for a more muted role of the state that blind them to realities of the "weak" or "post conflict" state that others face.

The role of politics and government is as a mediator between the broader pressures and the local context. The political task is twofold: to reassert control in the face of global pressures (whether by acceptance or rejection of the demands made) and of reassurance, to reassure the citizens of that control. The way the state achieves this often is a reaffirmation of regulatory character, since that character is, at base, an expression of "how we do things around here."

This is not to be Panglossian about the realities of either political institutions or processes. Again the regulatory literature is full of examples of problems, inefficiencies and poor outcomes in the process of law making, regulatory development and regulatory enforcement (once regulations are in place). There are two obvious problems that are well understood. Firstly is the resort to populism. It is here that the perennial demand for the criminal law features prominently. Whilst this demand is rooted in genuine and obvious concerns about the inequalities and injustices in society, it should be understood principally at that level, and not at the level of instrumentalism (Haines and Hall, 2004; Hawkins, 2002). As a criminologist, I am steeped in a paradigm that understands the limits of criminalization as a solution to social problems. Legalism, injustice, juridification, obfuscation and individualization are only a few of the issues involved here. Despite these problems, criminalization is clearly a politically popular measure and the recent increases in criminal penalties (larger fines and greater use of

jail terms) for white-collar offences of various sorts are evidence of this.

The second problem is the use of science and scientific method to solve problems of political leadership and decisions about morality. Whilst science, like law, may assist political decisions to be made, ultimately there is no such thing as evidence-led policy. The political commitment to an outcome comes first, with various pieces of evidence being used to justify the policy. New scientific or other evidence may surface that may change the policy direction, or be used to refine the basic direction. However, science cannot replace politics, and those that try inevitably find themselves caught in a battle of differing scientific opinions (a battle that politicians play no small part in fuelling).

Conclusions

What, then, can be concluded about the potential for regulatory dreams and nightmares? The continuum briefly discussed here, from criminalization, through to meta-regulation and other more sceptical forms of "post-regulation," all have merit. Criminalization understands the public and emotional elements of the reaction to corporate harm; meta-regulation the need to capture and institutionalize good practice and more pessimistic 'post-regulatory' strategies remind us that nightmares seem to surface more readily than dreams.

However, to make any judgement about which path might be taken and where it might lead, serious attention must be paid to context. Each place has a "regulatory character" that is "the way things are done around here," where authoritative norms, written formal rules and individuals interact. Regulatory reforms will be translated through these relationships and so their impact can never be direct. For this reason, whatever appears on the surface as the latest harbinger of a new regulatory dream (whether further criminalization or meta-regulation) often turns out as a nightmare because the implications of the local context are unknown or ignored. In light of this a more modest role for regulation may well be in order. There are limits to both instrumentalism and law in resolving social problems. However, I would argue against the 'post-regulatory' position in terms of the role of the state. Government, and the political processes that accompany it, are central to deciding what risks will and will not be tolerated, whether regulation or other forms of control (e.g. professional privilege) are to be institutionalized, what natural resources can and cannot be used, who must take responsibility for risk reduction and – to an extent at least – how this must be done. The level of genuine debate about our future and the community we want to live in is a vital part of that political process.

There is no doubt that this poses significant challenges, not the least of which are the increasing global pressures associated with free trade and the growth of supranational rule making. However, whilst these challenges are real, so too are the demands of the public for assurance about the measures that will reduce the uncertainties and risks of contemporary life. Demand for the criminal law is a powerful expression of this. Despite the complexity of

modern life, or perhaps because of it, we need lively public and political debate to raise awareness and bring some consensus on what risks must be reduced through public policy and regulation and what can be left to the private sphere (whether profit or non-profit). There is no regulatory "magic wand" that can replace this.

Whither Deliberation?
Mass e-Mail Campaigns and U.S. Regulatory Rulemaking

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Introduction

Imagine if I stood up at a professional meeting and said:

> If only Information Technology had been used to facilitate online dialogue and deliberation with the ENEMY, Al Queda, prior to 9.11, we might have resolved our differences. We might all have come to better understand the other sides' point of view. We might have collaborated to find a better solution than mass murder.

If I said such a thing, aside from thinking I was completely insane the audience would probably howl and hiss in a manner not often seen at such meetings. This first argument is simply not credible. If instead I said:

> If only Information Technology could be better used to facilitate online dialogue and deliberation with the ENEMY, (say, industry, government, the environmentalists, Ralph Nader, or whomever), we might have resolved our differences. We might all have come to better understand the other sides' point of view. We might have collaborated to find a better solution than, say, allowing a sub-optimal dose of mercury pollution into our nation's air that may ultimately harm or kill more people than died on September 11th, 2001.

A few observers might endorse the second argument. Perhaps some would call it democracy's technological cutting edge (Berkman Center 2005; Noveck 2004a; Froomkin 2004; Blumler & Coleman 2001). That is, the potential in the United States for information technology and Internet-enhanced participation in the notice and comment process to become widely distributed, reflexive, transparent, information rich, asynchronous, low-cost, and meaningful (Bimber 2003; Brandon & Carlitz 2002; Johnson 1998). Others more broadly hope for online democratic systems free of the exercise of power, intimidation, deception, single-mindedness, and other forms of even more commonplace treachery (Beierle 2003; Carlitz & Gunn 2002; Coleman & Gøtze 2001; Dahlberg 2001).

It is, of course, only partly ridiculous to compare the dynamics of Jihadist zealotry with the behavior of admittedly sometimes visibly desperate actors in US rulemaking. Allow me to nonetheless suggest that online participation in US rulemaking, at least for the foreseeable future, is no more likely to transform how regulatory decisions are made in the United States than it is to resolve the many issues

underlying our current war on a tactic. While the potential for more meaningful forms of online deliberation is certainly there (Stanley et al 2004), for most participants in the heavy-traffic U.S. rulemakings it is latent and undeveloped.

Technological optimists argue that online deliberation will indeed be transformative someday, but only when it is structured appropriately and by the right people (Noveck 2004b; OECD 2003). I remain less sanguine, based on the state of the art in electronic rulemaking (Shulman 2005), current trends in e-advocacy, and because agreeing upon and then finding the "right people" is terribly difficult (Shulman 2004).

I am currently working on two related National Science Foundation (NSF)-funded projects that grew out of discovering the National Organic Program rulemaking online (Shulman 2003). In that instance, the United States Department of Agriculture (USDA) took in approximately 277,000 comments on their initial proposed standard for the term "organic" in U.S. agriculture. Of those comments, more than 20,000 were submitted via a web form set up by midlevel USDA personnel for a 90-day comment period. Respondents using this online interface had the option to see comments that had already been submitted, no matter whether they came by the web, fax, or postal mail, and to enter their own comments via a web form. In early 1998 it was a substantial innovation at USDA to allow commenters anywhere to see online the comments of others. The organic rule writers we interviewed reported that this "open docket" design resulted in a significant number of comments on other comments. This was, at first glance, suggestive of nascent online dialogue and deliberation in federal rulemaking and on a large scale. We were intrigued and wanted to see if it was part of a trend in eRulemaking (Shulman et al 2003).

So, in one project, we are looking more systematically for signs of deliberation in a set of rulemakings in which the presence of an online open docket and a controversial environmental issue created at least the possibility for some degree of online deliberation amongst commenters with divergent points of view. Last year we trained a total of 10 undergraduates at two universities (Drake University and the University of San Francisco) to code a large and random sample of public comments from three rulemakings where the presence of an open docket created the possibility for deliberation.

Specifically, we were looking for signs in the text submitted that commenters had read other comments, or had otherwise demonstrated the type of behavior that deliberative democratic theorists indicate is desirable. We looked for signs of deliberation instead of preference aggregation, inclusion of difference, respect for a variety of positions, transformation of preferences, as well as expanding and authentic discourse. To date, little evidence has been uncovered in the text submitted that the presence of an online open docket positively transforms the behavior of commenters rendering them more deliberative. It may suffice to say for now, while the study is still underway, that the barriers to online deliberation, at least in US

regulatory rulemaking, are less technical than they are social, political, legal and architectural in nature.

In the other project, with a pair of gifted computer science colleagues, we are developing and testing the efficacy and effects of new information retrieval tools tailored to the rulemaking environment (Shulman 2004). As part of this project, we have convened a series of workshops and focus groups with governmental and non-governmental stakeholders involved in regulatory rulemaking. At these workshops, we demonstrate the state of the art in our research and development of algorithms that can, among other things, quickly and efficiently identify duplicate and unique text added to near-duplicate comments and then we ask how the availability of these and other advanced language processing tools might impact the rulemaking process.

The reason we do this is that agency personnel have repeatedly told us that the emergence of first generation electronic rulemaking has had the singular effect of increasing the flood of duplicative, often insubstantial, mass mailing campaigns. These campaigns exist for many legitimate reasons, politically and organizationally speaking. However, they do little to move administrative rulemaking toward the ideal of enlightened online deliberation and they do much to try and swing the pendulum away from administrative expertise and toward plebiscitary, direct democracy via electronic preference aggregation. This terrifies administrative law scholars and practitioners in the US civil service and fails rather miserably to move the process to a higher deliberative plane.[18]

So, where is all this heading? Interest groups that contract with a thriving e-advocacy sub-sector of the Washington, DC economy now routinely set up clusters of web action centers. The system generates voluminous quantities of mass e-mail comments. One firm promotes itself with a counter on the home page that claims credit for more than 16 million constituent messages this year. Meanwhile, practitioners in agencies face mounting congressional and executive demands for efficiency and effectiveness in the highly charged political and ideological environment that is a backdrop for reading and responding to the comments. With billions of dollars and quite probably the nature of life on earth are at stake, the sad fact is the future of regulatory rulemaking can look a bit bleak.

These machinations occur in part for reasons that have little to do with improving the final rule. Modern data mining and outreach techniques in the Internet-based age mean that increased membership lists and donations are at stake. Groups also seek free media and other forms of Internet-driven publicity (e.g., coverage in blogs). Large public comment outpourings may work as delay and litigation tactics, as well as congressional wake-up calls to revisit an issue. These are only a few of the many reasons for the proliferation of duplicative, insubstantial electronic postcards that federal

[18] Jeffrey Lubbers warns the "overall trend has been away from the expertise model and toward the politics model," as the comments submitted increase by orders of magnitude.

official have been known to speak dismissively of as "awareness" campaigns.

Some groups believe that overwhelming an agency like the Forest Service with form letters will result in a favorable outcome. Devotees to one or the other side in the battle over the Roadless Conservation Area rulemaking might, at this late date, wonder whether all the spilled ink and clicked send buttons have actually been efficacious in the face of mountains of litigation that keep the rule in the courts. While these campaigns are presumed to be largely ineffective because they generate little new information, in some instances (e.g. the EPA's ANPR on the Definition of US Waters post-SWNCC, or the USDA's organic rulemaking, where about 100,000 unique comments carried enormous weight with officials) it does at least appear to contribute to an outcome favorable to the mass mailers. The organizational incentives combined with occasional claims of victory suggest the practice is likely to dominate the near future of electronic rulemaking.

Current Research Activity

Our research group recently acquired (and made available to other researchers) a dataset of 536,975 public comments submitted via e-mail to the Environmental Protection Agency (EPA). With the exception of a smattering of commercial spam e-mail, and a few more than 5,000 that were comments on three other Office of Air and Radiation (OAR) rulemakings, all the email was submitted for consideration as part of EPA's OAR-2002-0056 docket, which is colloquially known as the mercury rulemaking.[19] Officials privately report that departing EPA Administrator Michael Leavitt made the March 2005 promulgation of a new standard and timetable for mercury reductions the top EPA priority.[20]

We have just begun to formally examine the content of the mercury comments. In one ongoing study, 1000 e-mail messages were selected at random and prepared for analysis using Atlas.ti, a qualitative data software package. Five graduate student coders and one graduate student project manager received specialized training in the use of the software. A day-long session included practice with a smaller sample of the mercury rulemaking data and group discussion-based refinement of a coding scheme (see Appendix A), which itself was adapted from earlier efforts with other public comment datasets derived from rulemakings with heavy participation and a central environmental issue.

At this early stage in the research (and in the epoch of mass e-mail campaigns) there are few indications that online deliberation is enhanced within the current eGovernment configuration in the United States. The mass e-mail campaign in particular appears to be an odd and possibly counter-productive tribute to twentieth century notions of one-directional, non-deliberative, un-reflexive nose counting.

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[19] For the EPA's "Basic Information" on the rulemaking, see http://www.epa.gov/air/mercuryrule/basic.htm.

[20] ABC News reported December 11, 2004 that President Bush will make an "aggressive push" in Congress, early in the 2005, for new clean air legislation. See http://abcnews.go.com/Politics/wireStory?id=322212.

Observations from a First Cut through 1000 Mercury Emails

1) E-mail is not a good medium for deliberative acts such as comments on other comments already submitted or respect for different points of view.

It simply does not happen via email. Looking backward, it should have been more obvious that e-mail clients and web advocacy services are simply not setup to promote reflection on, or responses to, comments from people you disagree with. The architecture of e-mail is structurally ill suited for deliberation about the merits of a proposed rule. When a user of a web advocacy form is constructing their unique addition to a form letter (which is delivered as an e-mail), the response is rarely to the actual proposed rule published in the *Federal Register* and probably never to the reasoned claims of the other side. Rather, it is to the appeals and imagery of the advocacy campaign organizers. Perhaps the only real possibility for finding any significant quantity of actual online deliberative behavior might be a sample of only people who comment from inside an actual web-based EDOCKET system, or some other system that fits the architectural definition of an open docket.

2) The ability to amend form letters generated via web advocacy campaigns results in very few substantial additions to pre-formulated awareness campaign text.

Preliminary analysis of the coding suggests that about three out of every four e-mails in the sample were identified as 98-100 percent identical form letters, with another one in six identified as 70 percent identical. These are the categories the Environmental Protection Agency has developed for the manual sorting of mass e-mail campaigns. Hence at least 11 of every 12 e-mails in the sample were identified (by first time student coders) as identical or similar form letters. In a subset of 680 documents that were coded by only one student, a 105 instances of unique text added to a form letter were identified. In the 320 documents coded by two students, 113 instances of unique text added to form letter were identified. In 43 cases, both coders identified the unique addition to a form letter in a document they shared. In 27 cases only one coder identified a unique addition to a form letter, a point meriting further discussion below.

Having had the coders identify 173 unique additions to form letters in our sample of 1000 e-mails, the content was then sub-coded revealing several common attributes and very few substantive comments. The sub-code list included: agency mission (38), anecdotes (5), catering to business (49), children's health (58), disbelief (30), higher values (9), insults (12), public interest/health (52), quickies (37), shame (10), and substantive claim (3). To get a sense of what agency officials find in their e-mail in-boxes, appendix B presents (verbatim) all 37 quickies, which were unique additions to form letters that consisted of no more than 1-2 sentences. In appendix C, samples of the verbatim text coded to children's health, insults, and shame are presented to convey the varied (but not so much) flavor of the "form+" content. It is significant that in 173 unique additions to form letters, there were only three coded as a substantive claim, defined in this instance as something that

might actually impact the decision of a civil servant.

3) Humans appear to make a significant number of analytical mistakes identifying what is unique in a form letter.

In our first round of mercury coding, at least one student with plenty of training and aptitude missed about 40 percent of the identified unique additions to form letters when coding about 250 comments. We cannot say yet how many times both students coding an identical document missed the unique text. For now, there remains little doubt in my mind that the development of natural language technologies for the automatic and reliable identification of duplicate and near-duplicate mass e-mails, and a range of tools for extracting and displaying novel additions to such letters, will radically change the dynamic currently at work. It will lead to a second and third generation e-advocacy sector with perhaps more creative electronic interfaces for promoting informed and effective civic engagement in deliberative electronic rulemaking.

4) Mass e-mail campaigns may do more harm than good if they make it harder to find the useful comments or lower the estimation of the public role in the minds of regulators.

Even if there are a few more substantive (though not deliberative) comments in the mix, (and based on the mercury sample, perhaps less than 1 percent of every addition to a form letter may be substantive) the more the volume increases the more likely that anything good submitted will be lost under the current sorting regime, which consists of hiring for profit contractors and manually identifying "unique comments" by eye while looking at the printed version. Based on this preliminary exploration of the mercury sample, for every one or two brief but substantive comments tacked on to a form letter e-mail you will also have to read 98 or 99 pithy, pleading, condescending, name calling, or otherwise useless comments. It may do more harm than good when hastily typed, unreflective tirades are the bulk of the comments and they drown out the people whose carefully drawn comments might actually make a difference.

Conclusion

The rub is this: whether for good or bad, the current system means that old fashioned rules of thumb, like the 20-page rule, or the letterhead rule, are effective filters for officials who say they know in advance what they will need to read and what it will say. While the occasional lone voice speaks to us about the thrill of finding a gem in amongst a large number of duplicative thoughts, the agencies mostly farm that analytical work out to contractors and focus on what conventionally is known to matter. No doubt the best intentions of emotive, pleadings citizens will continue to result in floods of redundant comments; e-mail is a boon for generating those.

We in the eRulemaking Research Group do not all reach the same conclusions about what is observable so far, neither in the data nor the responses of various actors involved. We are not without some shared hope, however, that innovation both at the federal level and in the NGO and e-advocacy sectors will eventually result in

more meaningful online deliberation in controversial rulemakings.

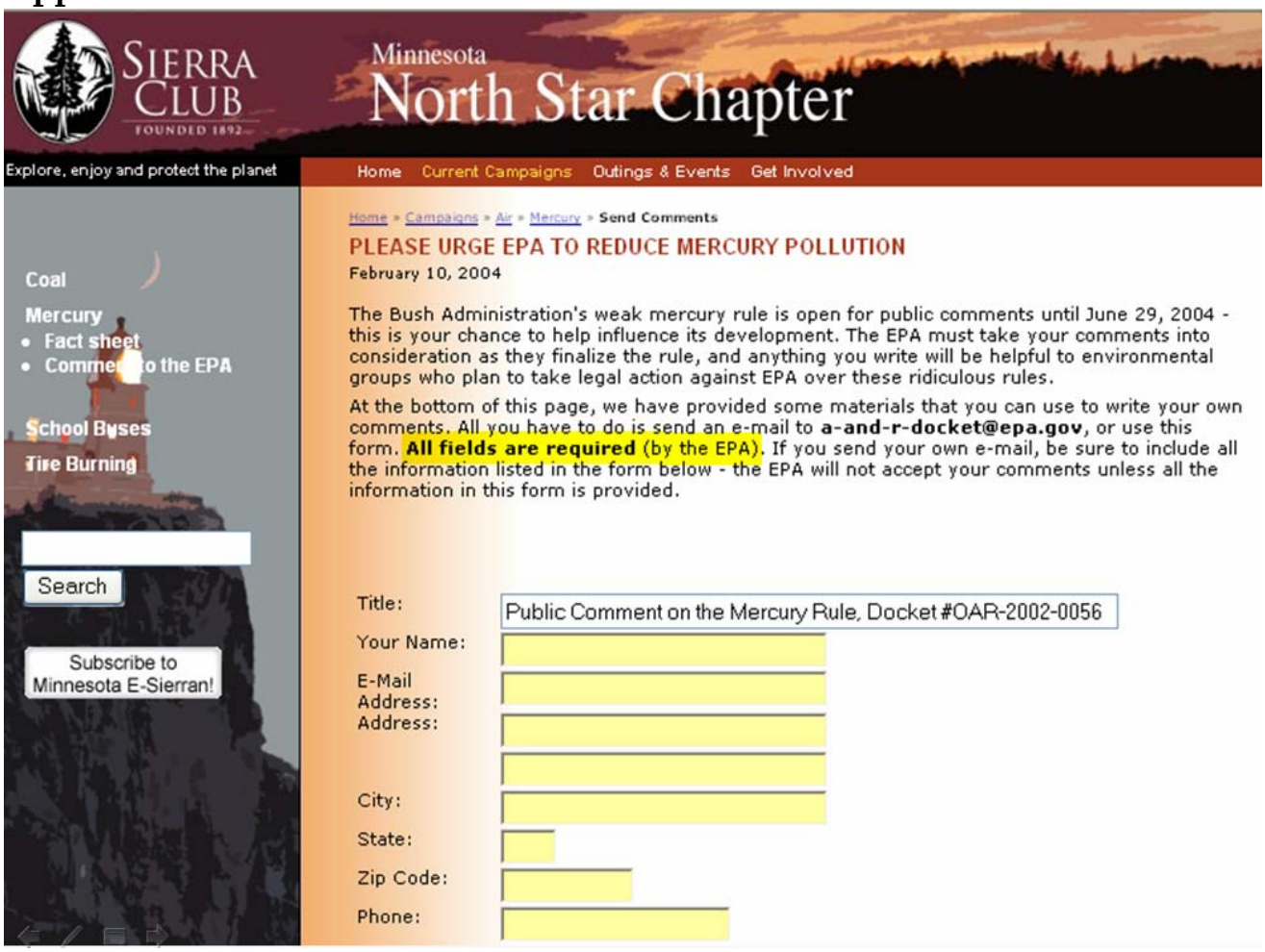
One can imagine deployment of more creative uses of IT by the groups to engage their members in innovative, IT-enhanced efforts to distill the wisdom of the collective. For example, interest groups could retain their ability to mine the participants for data while getting 10, or 20, or even 50,000 people broken up into small groups that brainstorm, deliberate and distill, then the groups aggregate into larger clusters of groups, then clusters of clusters, who all along can visualize via the web, the best ideas, examples, stories as they rise to the top. With a highly interactive goal in mind, you can imagine all sorts of Meetup.com style engagement add-ons and other innovative tools, like those developed by Peter Shane's "PICOLA" project at Carnegie Mellon University[21] and Beth Noveck's "Cairns" project at the New York Law School.[22] There are a number of possibilities about how this might emerge over time, yet to date, they remain largely the dreams of theorists who reside outside the beltway and whose work is at least one-step removed from the actual rulemaking battleground

[21] See:

http://communityconnections.heinz.cmu.edu/picola/index.html.

[22] See: http://www.nyls.edu/pages/2150.asp.

Appendix A


Sierra Club
Founded 1892
Minnesota
North Star Chapter
Explore, enjoy and protect the planet
Home
Current Campaigns
Outings & Events
Get Involved
Coal
Mercury
Fact sheet
Comments to the EPA
School Buses
Tire Burning
Search
Subscribe to Minnesota E-Sierran!
Home » Campaigns » Air » Mercury » Send Comments
PLEASE URGE EPA TO REDUCE MERCURY POLLUTION
February 10, 2004
The Bush Administration's weak mercury rule is open for public comments until June 29, 2004 - this is your chance to help influence its development. The EPA must take your comments into consideration as they finalize the rule, and anything you write will be helpful to environmental groups who plan to take legal action against EPA over these ridiculous rules.
At the bottom of this page, we have provided some materials that you can use to write your own comments. All you have to do is send an e-mail to a-and-r-docket@epa.gov, or use this form. All fields are required (by the EPA). If you send your own e-mail, be sure to include all the information listed in the form below - the EPA will not accept your comments unless all the information in this form is provided.
Title:
Public Comment on the Mercury Rule, Docket #OAR-2002-0056
Your Name:
E-Mail Address:
Address:
City:
State:
Zip Code:
Phone:

Appendix A (continued)

Maine ECO
Maine Environmental Citizens Online

action center | act now | sign up | my actions | how to...

maineeco.e-actionmax.com Wednesday, October 27, 2004

Mercury Pollution Threatens our Health and Environment

You can take action on this alert by reading the information below and following the directions at the bottom.

issue

Stop the EPA's Mercury Plan & Reduce Toxic Pollution

background

On December 15, the EPA released its weak proposal to reduce the danger posed by mercury from power plants. Instead of protecting mothers and children from mercury poisoning, this proposal protects the energy industry by setting targets so weak that the industry will be allowed to continue polluting without using state of the art mercury controls.

According to the Clean Air Act, toxic substances such as mercury must be controlled by the "maximum achievable control technology" (MACT) standard. Two years ago, EPA estimated that under a MACT standard, power plants could reduce 90 percent of mercury from power plants using existing technologies, bringing mercury emissions down from 48 tons to roughly 5 tons per year by 2008.

A sample message appears below, which you may edit before sending.

Attention Docket ID No. OAR-2002-0056

Dear Administrator Leavitt:

I urge you to protect our children, communities, and environment from exposure to toxic power plant pollution. EPA's current proposals permit far more mercury pollution than the Clean Air Act allows and fail to address over sixty other hazardous air pollutants, including dioxin.

There is no doubt that mercury is toxic. The EPA and 43 states have now issued advisories warning people, especially women and children, to avoid or limit eating fish because of mercury. Maine's fish and wildlife are also threatened. Elevated levels of mercury have been found in many of our lakes, rivers, aquatic organisms, fish, and fish-eating birds.

There is no reason to wait to address this serious problem. The technology to clean up these plants is already available and cost-effective. Annual mercury pollution from power plants could be reduced from 48 tons today, to just 5 tons by 2008. Greater demand for the technology and equipment that remove mercury from smokestacks will not only lower the cost, but would benefit US jobs and our economy.

October 27, 2004

Administrator Michael Leavitt

Subject

Attention Docket ID No. OAR-2002-0056

Dear Administrator,

I am writing to urge you to take prompt action to clean up mercury and other toxic air pollution from power plants. EPA's current proposals permit far more mercury pollution than what the Clean Air Act allows, while at the same time fail to address over sixty other hazardous air pollutants like dioxin.

The toxicity of mercury has been proven. EPA's own scientists recently released an analysis estimating that 630,000 infants born in the US each year are at risk of irreversible harm from mercury exposure in the womb. These risks include lowered intelligence, learning problems, and brain damage. In adults, mercury can cause irreversible damage to the brain, kidneys, and cardiovascular system, and is also known to reduce

Sincerely,

Your signature will be added from the information you provide below.

RELATIONSHIP MANAGER

Easy to use Relationship Manager interface

The CTSG Relationship Manager (RM) is the premier Web application for managing your organization's relationship with supporters, and engaging both them and decision makers in high quality personalized communication. The system provides a 360 degree view of your interactions with your supporters—including complete activity information such as communications sent, advocacy actions taken, donations made, new supporters recruited (through Tell-A-Friend), postcards they've sent, a events they have signed up to attend.

The Relationship Manager includes the capability for:

- targeted personalized email communications,
- full data management and control, and
- sophisticated tracking and reporting.

Appendix A (continued)

1. Look over the message below, and **feel free to add your own comments.** Using your own words makes the message more meaningful.

```
Attention: Docket ID No. OAR-2002-0056

Dear EPA Administrator,

Your agency, the Food & Drug
Administration, and 43 states have issued
advisories warning people, especially women
and children, to avoid or limit eating fish
because of mercury contamination.  Even
with these warnings, the Centers For
Disease Control And Prevention estimate
that 1 out of 12 U.S. women of childbearing
age have unsafe levels of mercury in their
blood due to fish consumption.

The best way to protect women and children
from mercury is to eliminate it from its
largest, unregulated source: power plants.
```

Appendix B

Mercury Code List

Comment on a Comment: Text that refers to another comment submitted during the public comment process

Comment on a Position: Text that refers to a position held by an NGO, group, or citizen, **BUT NOT** explicitly noted as found within the docket

Difficult to Code: Text that seems not to fit anywhere, but which also seems significant, or which in some way blurs the boundaries between existing codes

Disrespect: Text in which the substance or tone of the comment demonstrates disrespect for another position, person, group, or comment

Doomsayer: Text that argues in the "worst case scenario" mode

Economic: Text that uses an economic rationale to make a claim

Expertise: Text that invokes an earned right to call oneself an expert (e.g., an advanced degree or job training)

External Authority: Text that gives as a reason for holding an opinion that it is the view of some authority such as a trusted person, organization, religion, science, etc.

Good Quote: Text that is demonstrative of the meaning of a code, the nature of the process, or which is otherwise just so interesting or funny

Information in Docket (not comments): Text reflecting that the commenter has read, and is responding to specific information in the docket **BUT NOT** another comment

Legal: Text that cites a legal basis to make a claim

Personal Experience: Text that invokes personal knowledge, experience, or narrative as the basis for a claim

Proposal: Text that makes a suggestion for a specific new policy or change in an existing policy

Public Health & Safety: Text shows concern for public health and/or safety

Science & Technology: Text that points to scientific or technical knowledge

Social Values: Text that invokes social values to make a claim

Suspicion-Corruption: Text that reveals a commenter is suspicious of one or more aspects/actors in the rulemaking

Trust: Text that reflects the presence of trust in government to make decisions

Unique Text in a Form Letter: Text that is suspected of being added-on to a standard form letter

Appendix C

All 37 Verbatim Passages Assigned the Sub Code "Quickies" Drawn from the 173 Total Quotations Coded "Unique Text in a Form Letter"

(Definition: Quickies are 1-2 sentence additions of unique text to form letters)

What could be more important than keeping our children healthy ? "Money" ? ● Stop this administration from poisoning our families! ● President Bush has an abymal record on the environment. It will be a key factor in not voting for him this Fall. ● Mercury is a scientifically proven risk to children's health and its emissions need to be regulate immediately. ● Safeguard our children, not big business' pocketbooks! ● I find it appalling that anyone would put profits above the health of the American people. ● To protect our most sacred investment in the future, our children. ● Action now will save $$ in medical costs later ● Come on EPA, do your job and protect the people of this country. ● EPA, plz for the sake of our children! have the power plts d!reduce mercury asap. ● In my town the tree leaves are turning black from car emmisions. cough cough. ● I am concerned that corporations are ruling our country todayas follows. ● Cut pollution. Stop destroying our environment! ● Where does the stupidity originate?? ● The current administration is an affront to its citizenry. ● Your agency is called the Environmental Protection Agency - the environment needs your protection now. ● For us non-redmeat eaters whose diet consists of large amounts of salmon and Tuna, the mercury levels are affecting are health. ● We are counting on you to protect our children and all citizens from mercury poisoning. ● A penny saved is a penny earned. A stitch in time saves nine. ● P stands for PROTECTION! get with it, or go away! ● The technology exists to cut mecury pollution--let's do it. I, for one, am willing to pay the extra cost of electricity as a result. ● We expect the EPA to enforce rules to protect Americans against mercury pollution. ● PROTECT THE CHILDREN, NOT THE CORPORATIONS! ● Your mandate is to protect citizens, especially the vunerable. Do not weaken the proposal to limit mercury ● It's disgusting that you place the special interests of a handful of contributors over that of the health of hundreds of thousands of kids. What on earth is wrong with you people? ● How can we even think of postponing doing something about this???? Even 4 years seems too long to get this under control. ● Please don't cave to political pressures, our lives depend on it especially our children's. ● DO not allow the Bush Administration to un-do the efforts of past leaders to stop this dangerous poison from being allowed in unsafe amounts in our water. ● So get it together or we will replace you! ● I don't want to die an early death because of this stuff that george bush does. ● Bottom line, you know that Mercury Pollution is a serious danger. It's time we protected not only our children, but all of our people against this threat. ● Go back to the time of the Clinton Adm. rules and enforce them. ● Mercury is very dangerous to my health and the health of my family. ● Please continue to protect this nation's air and water. We are only as strong as the resources we can protect. ● I DON'T WANT MERCURY IN MY WATER!!!!!!!!!!!!! ● NO cap and trade. Just firm measurable limits on ALL mercury poluters everywhere in the USA ● Please strengthen the BART (Best Available Retrofit Technology) Rule to bring cleaner air to our national parks.

Appendix D

Sample Verbatim Passages from Salient Sub Codes
Drawn from the 173 Total Quotations Coded "Unique Text in a Form Letter"

Children's Health (Definition: Any text that makes a claim about children's health)

Start protecting the citizens, especially the children, by standing up to those whose self interests are running this show. ● The people who will suffer most from this will be poor women and children. ● Doesn't the welfare of our children come first? Enact more regulations for big business and keep our children safe!!!!! ● Since I know that you have professed to care a lot about children, including the unborn ● hopfully this issue will be addressed before it is to late.it is my strong belief that maintaining as healthy an environment possible is of utmost priority.we ALL have children and grandchildren whose future is in OUR hands! ● Mercury is a scientifically proven risk to children's health and its emissions need to be regulate immediately. ● Our children are not a political bargaining chip. Reducing harmful pollution to protect our descendents is common sense and necessary for the survival of our species. ● This nonsense of the Bush administration putting their (big-industry) supporters first, the health of American citizens, especialy children, second, and the environment dead last has got to stop. This is beyond blatant and into the realm of the absurd. ● President Bush, I'm 8yrs. old if you love me and all the rest of us children you will protect us from factory polution, not help them to kill us. ● Cut mercury pollution and save our kids. You should have to try teaching brain-damaged kids! Or being their parents! They are our future. ● There are many children in our family, and we worry that the EPA is taking decisions that may profoundly affect their health, just to accommodate greedy but irresponsible corporate constituencies. ● Each year, many children are born with high levels of mercury in their bloodstreams and this high level of mercury can lead to serious brain damage. I think it is time we realize the faults of our inhumane decisions and take responsibility for the health of future generations. ● Children are a nation's greatest resource. Mercury has been proven to be harmful to humans. We need to protect our children. ● To protect our most sacred investment in the future, our children. ● Our children are our future, please protect them from Mercury. With the lives that are at stake, have mercy on the children. ● Given that you have no compunction about dropping bombs on children it comes as no surprise that you could care less about children in our own country that are effected by mercury poisoning. ● EPA, plz for the sake of our children! have the power plts d!reduce mercury asap. ● I demand responsible action for our children's sake. If you are really a Christian please think of something else other than you and your friends pocket books. ● Please put the health of our children and grandchildren first, before industry profits. If we can't do this, we are truly morally bankrupt.

Appendix D (continued)
Sample Verbatim Passages from Salient Sub Codes
Drawn from the 173 Total Quotations Coded "Unique Text in a Form Letter"

Insults (Definition: Any text that employs derisive rhetoric or direct insults)

Our environment is at a critical state and I am sick and tired of these idiots running the show and ruining everything on this planet. ● Why don't you chew on an old thermometer for a while and see what ingesting mercury will do for you. No? You're too good for that? ● Is this part of George Weasel Bush's "leave no child left unpoisoned" campaign? ● Perhaps it is too late to prevent brain damage in some of our population, as seems to be evident in some of our "leaders", but let's do all that we can to prevent futher damage to our children and grandchildren. ● We only have one earth to live on, and frankly if we ever find that life is possible on Mars, I'd prefer that Bush and all his oil industry friends be sent as the first pioneers of that planet. ● Where does the stupidity originate?? ● Thank you for your diligent persuit of Bush. He's seem hell-bent to ruin this world...all for the love of money. We need to get him out of the White House. He never earned the vote in the first place. ● Dear Members of the EPA, If you all can't protect our environment from the idiots who are trying to destroy our planet then you all need to get different jobs! ● As your own mother would tell you, "GROW UP!" ● You asre filth! Damaging thousands of lives! ● You all belong in the hottest corner of hell for eternity for your greed and unhealthful attitudes.

Shame (Definition: Any text that invokes shame)

This is shameful! ● I demand responsible action for our children's sake. If you are really a Christian please think of something else other than you and your friends pocket books. ● Is seems shamefull that dirty 19th century technology is allowed to exist simply because there is money to be made. ● Your organization is a disgrace. Do your job and protect the _people_ _yourself_ _your family_! ● I think it is a shame what the environmental agency has become under Bush. Shame!Shame! The mercury pollution by power plants is just one of many issues. ● We have three beautiful children who mean more than life to us. Who do you represent when you lift legal limits of lethal substances....who PAYS the price for the greed???? ● Please take seriously this threat to the health of our nation's most vulnerable citizens. If you don't protect them from this poisoning, who will? You have a responsibility to make a difference for the future of our country and your children's children as well, and if you live up to it you will be leaving behind a legacy to be proud of, not one to be ashamed of. ● It's disgusting that you place the special interests of a handful of contributors over that of the health of hundreds of thousands of kids. What on earth is wrong with you people? ● This administration should be ashamed of the way it abuses the environment. What kind of a world are we leaving behind for our children? If there is any moral decency in the EPA, then it should stand up and do the job it was created to do. Protect the environment. Before it's too late for our children. ● It is unconscionable that the EPA wants to allow higher levels of mercury in our drinking water and air. What are you trying to do here? Shorten our live spans? Shame on you and the greedy Bush administration. You all belong in the hottest corner of hell for eternity for your greed and unhealthful attitudes.

The Regulatory State of Distrust: Less Rules, More Market? More Market, Less Rules?

Frans van Waarden
Policy and Organization
Utrecht University

Introduction

"Less state, more market" has become a popular principle for years now in many countries. Neo-liberalism has been sweeping the world since Ronald Reagan's famous statement that "government is not the solution, but the problem." Governments should withdraw, become smaller, and leave more "space" for the market. Markets, rather than governments, should coordinate economic action.

European integration is in essence such a liberal project. It started with breaking down tariff-trade barriers, subsequently non-tariff trade barriers – that is national product and market regulations – followed. While market liberalization was first restricted to sectors that clearly involve inter-state trade, now increasingly the European Commission has set out to liberalize markets that were formerly considered national ones, such as telecom, road transport and haulage, construction, health services, and recently even zoos. And it has banned what it considered impediments to free competition in all these sectors: a great variety of regulation, subsidies, cartels, and mergers. The Amsterdam government was even recently forbidden to subsidize its zoo. The principle of free, unfettered, and fair competition is even formally enacted in the draft constitution now. But that is exactly why quite a few French and Dutchmen voted "no" on the European constitution.

Paradoxically enough, others voted "no," because they were of the opinion that the EU produces too much regulation, and that it interferes with too many details of social and economic life, because it puts too many constraints on national and local politicians. European directives that stipulate the size of mushroom heads up to the millimeter precisely, or that regulate the percentage of cacao butter in chocolate have been the subject of ridicule. Apparently freer markets and more regulation are not contradictions. Why?

Perhaps it is a failure to think that "less government" means more market? And that in turn "more market" can do with "less state." Does less state intervention – *laissez faire* liberalism – automatically produce markets? Is "more market" possible in a situation of "less state"? Is the relation between markets and regulation a zero-sum situation?

Those are the questions I want to address. The experience of the last decade has once again shown that freer markets require more rules. Indeed, it always was a false and even trivial assumption that deregulation will automatically result in more market competition. Rules are needed, though they may be of a different nature. They are more the rules typical for adversarial

social and state-industry relations. Such rules tend to be more rather than less costly to society and the economy. Hence, in the end, liberalization and deregulation produce unintended consequences: it is likely to lead to a) more rules; b) more rigid rule application; c) more performance measuring and control; and altogether d) higher costs of regulation, including litigation.

Free Markets: Many Risks and Uncertainties

Completely free markets, as propagated by *laissez-faire* liberalism, tend to destroy themselves. Free, that is, unregulated, markets provide transaction partners with high risk and uncertainties. In addition, competition in such markets can become very fierce, a veritable struggle of all against all, which add yet to the uncertainties, e.g. about what competitors may do, while the narrow profit margins provide less resources to develop counter strategies.

Liberalists and libertarians consider markets to be natural and spontaneous social orders. And these supposedly can flourish and develop best in the absence of any intervention. However, the "natural state" of society and the economy is one more of disorder than order. Why? In the "natural" economic state risk and uncertainty are too great. Hobbes long ago argued so. In the natural condition of society "there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodions Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth" (Hobbes, 1968, orig. 1651: 186).

Actors need a minimal trust in the honesty of others, trust that these others will abide by the rules of the game, trust in the quality of the goods, that they will not be poisonous or spoil quickly, trust also that the value of the money they trade their goods for will still have the same value tomorrow, trust in the correctness of information, and so on.

The greater the risks and uncertainties, the more economic choices become a gamble. And the greater the gamble, the greater the chance that no action will be taken at all, and that transactions will not take place. Reduction of risk and uncertainty brings stability and predictability, and makes economic transactions more likely and hence also prosperity and growth (North 1990: 3ff.).

It might be that many economists have come to realize that state intervention may be needed to correct for market failures such as information asymmetries, moral hazard problems, externalities, or the underproduction of collective goods. But that there are "market failures" even before there are markets, that markets may need rules to exist at all, is often overlooked. And those economists that are aware of this are mostly located in the heterodox margins of the discipline, such as economic history or institutional economics (North 1990, Hodgson 1993, Williamson 1985).

Strategies of Risk and Uncertainty Reduction

In reaction to the risks and uncertainties of completely free markets, transaction partners develop a variety of strategies, which all sooner or later tend to destroy those markets. Among the timeless repertoire we find:

a) Fraud, deception, corruption and product adulteration: in short "opportunistic behavior," where some opportunity, such as

an information advantage, allows for such behavior. The fiercer the competition, the greater is the temptation or pressure to cheat customers. When this happens too often, potential transaction partners will refrain from engaging in a transaction, and eventually the market may disappear. Such has e.g. threatened to be the case with the Prague taxi-market, where many tourists prefer to walk rather than get cheated or even molested by a taxi driver.

b) Increasing the non-transparency of markets, making it difficult for transaction partners to compare prices and qualities. Recent examples are the complicated pricing systems of telecom companies, including the combined offering of mobile phones with various subscriptions, and minute-rates; or the addition of all kinds of gadgets to new cars.

c) Otherwise increase information asymmetries between, and information advantages over, customers, suppliers, or competitors.

d) Attempts to reduce the fierceness of competition, by increasing one's market power. This can be done through informal collusion, cartellization, and mergers and acquisitions. In the competitive power struggle, competitors are forced from the market, taken over, closed, resulting in a gradual replacement of the market as coordination mechanism by firm hierarchies. This process is reminiscent of the process of state formation: competition between feudal lords (a "political market") resulted eventually in one of the feudal lords acquiring a dominant position and establishing a hereditary kingdom (the Anjou's, Bourbons, Habsburgs), where political power got centralized. A political or economic monopoly is the result. A moderate reduction of competitive pressure may actually be beneficial as it reduces the pressure to do away with markets, i.e. the pressure to monopolize or to cheat. As option (c) leaves most of the market intact, this is as yet to be preferred.

In reaction to such strategies, opponents develop their own counter-strategies. They can try to reduce the risks and uncertainties that result from opportunistic strategies from the others. They can gather information from the neighbors of the transaction partner to find out whether the latter really owns the house he wants to sell. One can hire lifeguards and threaten with fighting squads – not an uncommon method in criminal circles to reduce the uncertainty of transactions. Less drastic is to demand "hostages" or securities from the trading partner, like a bank guarantee or a bank deposit.

The attempt of market actors to assess the reputation of their transaction partners induces these in turn to invest in the creation and protection of reputations, which of course form a constraint on fraud. However, there are many markets where reputations are difficult to establish, such as where it is difficult to distinguish products and identify suppliers. In such markets, a variation of Gresham's law works: bad suppliers drive good suppliers from the market.

Apart from collecting information, market actors can try to play off potential partners, spread the risks by transacting with a variety of partners, develop countervailing positions, e.g., a cartel of food producers against all-powerful food retailers, or try to

conclude "contracts" with partners (e.g. in the case of future supply). That requires information as well: *ex ante* about what exactly to fix and how; and *ex post* about whether the contract partner has lived up to his commitments. The observation of contracts has to be monitored, and if necessary enforced by coercion. In criminal circles, where one can not so easily call upon the strong arm of the state, this is not an uncommon means for contract enforcement. All these individual strategies and counter-strategies cost time and money; they involve transaction costs. And that can frustrate transactions.

Market Provision of Risk and Uncertainty Reducing Institutions

The market itself has first of all provided solutions to reduce these costs and the risks and uncertainties behind them. Some entrepreneurs saw new niches in the market, for information, for rating and certifying reputations, for private enforcement of contracts. They specialized in this, and that allowed them to profit from economies of scale, thus in the first instance reducing the costs.

The history of capitalism is one of institutional innovations that reduced very high risks and uncertainties to more manageable proportions. It started already in medieval markets. In order to satisfy the need for quantity and quality controls, new trades developed, such as those of gold and silver weighers. With the differentiation of the economy in the early 20th century and the subsequent globalization uncertainty reduction became big business. As fewer and fewer people are involved in the primary and secondary sectors of the economy, an increasing share of output and employment is produced by economic sectors that specialize in the reduction of risk and uncertainty: in controlling others on behalf of still others. Much of what is called 'commercial services' is concerned with this activity. They collect information (detectives, credit registration bureaus, consultancy firms, marketing agencies); evaluate it (credit rating organizations); distribute it (advertising, more neutral: consumer organizations); certify the truthfulness of information on behalf of transaction partners (accountants, auditors, notary publics); draft contracts (lawyers and notary publics); monitor and enforce those contracts (assault groups, debt collection agencies, process servers, bailiffs); cover calculable risks (insurance companies, options trade); and investigate the suitability of job candidates (professional recruiting agencies, head hunters, psychological testing bureaus), etc.

However, commercial solutions do have their problems. They are also prone to the seductions of opportunism. They are often paid by only one of the transaction partners and "whose bread one eats, those word one speaks." The Enron-Andersen connection was a case in point. Typically, advertising information tends to be incomplete and biased. Who controls the controllers, the accountants, risk analysts and insurers? Who rates the rating agencies? In response to the need to control controllers and to certify certifiers, whole chains or pyramids of control have developed over time. In the European animal feed industry there are by now at least eight levels of control of controllers. Obviously, this "business of distrust" is becoming ever more costly, thus again raising transaction costs. This calls for more neutral controllers and certifiers, independent from their clients.

Furthermore, private institutions usually cannot do without the backing of an external authority. Free

riders can destroy the reputation of an image or brand name. Bad products drive out good products, and bad entrepreneurs good entrepreneurs. Brand names need protection from a system of law and its agencies and officials. More in general property rights need to be protected and contracts enforced.

Again, private actors have tried to provide solutions to these problems. They formed formal industry associations and tried to agree on and enforce self-regulation by these associations. That has become quite extensive, notably in countries with a legacy of well-organized civil society, such as those parts of the European continent where early merchant cities developed and guilds were formed: Germany, Austria, the Netherlands and Switzerland. Some sectors were particularly prone to industrial self-regulation and here we see it in many countries, such as the liberal professions (physicians, lawyers, accountants, notary publics) or the advertising sector (where the state has been reluctant to intervene because of the sensitivity of the freedom of speech).

The Historical Emergence of State Regulation

Given the disadvantages and handicaps of regulation and control by the market, and civil society itself, eventually the emergent nation-state got involved. Why the state? It has always been in the "business" of reducing risks and uncertainties to the life of its citizens. Many of the public goods it provides do just that. This holds first and foremost for the original and still primary – Hobbesian – task of the state: the protection of its citizens against threats to their life, liberty and property, be they from domestic or "foreign" origin. In the old days, Hadrian's, the Chinese, and medieval city walls created visible borders around – and thereby defined – the "group" to be protected; and watch towers, castles and soldiers aided in keeping out threats, varying from wandering dogs to foreign enemies. Nowadays institutions such as the coast guard, airport security checks, and satellites do in principle the same. Other public goods regulate the "grid" (see the group-grid model of Douglas and Wildavsky 1982), the relations within the demarcated "group." They protect against internal threats: the police against brigands and thieves; infirmaries and hospitals against infectious diseases; and food regulators against "unwholesome" food and its producers: adulterers, swindlers, fiddlers, and crooks.

As to food adulteration: Statutory food regulations have been as old as food markets. In ancient Greece and Rome there were already laws against the colouring and flavouring of wine. In Western Europe laws against adulteration of food and drink arose in the later Middle Ages. Famous landmarks are the British impure food laws from 1226 (Coates 1984: 145) or the Bavarian Reinheitsgebot for beer from 1516. The first "modern" food quality legislation dates from the latter half of the 19th century: in Britain from 1860 (the Food Purity Law), extended in 1874, in Germany 1879, France 1885, Belgium 1890, the Netherlands 1889.

Direct occasion for such intervention were usually scandals and crises, which destroyed the trust in specific products and producers. History abounds with them: the Dutch dairy scandals around 1890; the economic crisis of the 1930s that sparked the development of the French system of *Appellation d'Origine Controlée* (from 1935 on); in the 1980s the Austrian scandal of mixing "anti-freeze" in their wine (to sweeten it). The American FDA emerged out of a scandal with a drug that killed 12 children. The recent

animal epidemics (BSE, foot and mouth disease, pig and chicken pests, listeria) led to a tightening of veterinary inspections, animal feed standards, and got European institutions yet more involved in food regulation, occasioning now the establishment of a European food regulatory agency. Dioxin in German animal feed led to an increase of regulation and control in that sector.

Scandals have also occurred outside of the food sector. The recent Enron/Worldcom /Andersen/Ahold scandals in accountancy led to renewed and stricter regulations regarding the accountancy profession. They led to the Sarbanes-Oxley act of 2002, "the most sweeping overhaul of corporate securities law in 70 years" (Byrnes, 2003). It sets new standards for accountants.

The scandals reduced the trust of the public in private forms of regulation. They made it clear that private solutions to the risks and uncertainties of the market do have problems. Detectives and other reputation rating agencies threaten the privacy of economic actors; accountants – supposed to be independent and neutral – turned out to be subject to temptations of favoritism; customs and norms of clans and communities can be quite strict market-entry barriers; associations suffer from the threat of free riders and have difficulty in enforcing self-regulation; and a proliferation of competing private standards can become self-defeating as they may obfuscate markets rather than increase transparency.

Often, a first reaction of the state to deficiencies of private risk and uncertainty reducing institutions in food markets has been to support them. It did so of course already with the basic legal infrastructure (property rights, contract law, judicial conflict resolution) without which markets, commercial risk reducers, communities, and associations could not function. Furthermore, it increased public trust in commercial risk and uncertainty reducers, such as accountants or insurance companies, by holding these themselves to standards; it helped self-regulating associations solve collective action problems by recognizing them.

Eventually it supplemented or replaced private by public regulations. State authorities eventually got directly involved in countering malicious strategies of transaction partners to offset risks and uncertainties. Already early on they punished fraud, deception, corruption, adulteration – which usually required the development of product and/or production standards as well as standardization of weights and measures; they protected property and contracts; they monopolized and controlled the supply of money; they controlled for cartellization, mergers, and other forms of power concentrations in markets. Where the market and commercial organizations produced a proliferation of standards that threatened to make markets again non-transparent, it set many other uniform and authoritative standards, varying from vocational training or university degrees to food quality certificates. Also it created its own enforcement organizations, such as national, regional and/or local food inspectorates.

Legal systems developed in large part as a response to these economic needs. Once set in motion, these systems acquired a life of their own, and the number of regulations multiplied and their forms because more diverse. New legal specializations developed: civil, criminal, and administrative law; trade law and corporate law; statute and case law; private and public law; social and economic regulation. Ever more rights

are being protected: after goods property protection, now also various intellectual property rights; and more and more interests – producers, traders, workers, consumers and the environment.

Of course state regulation has its disadvantages. State agencies are further removed from the businesses and markets they are to regulate. That makes for greater "principal-agent" problems in the administration and enforcement of regulations. The greater distance between regulator and subject may also imply less legitimacy and hence stronger incentives to evade or circumvent them. That forces regulators and courts (which enforce the rules) to increase the degree of specificity and detail of the regulations, which in turn feed sentiments about the "ridiculousness," "unreasonableness" (Bardach and Kagan 1982), or inflexibility of state regulation. That gives rise to political calls for "deregulation," until the next scandal sets a new cycle of (re)regulation in motion.

The regulatory state is hence nothing new. The (local) state regulated markets already in great detail in the middle ages. The state eventually increased its own production of public goods or semi-public goods besides law and regulations. It got involved in the actual production of utilities, transportation, airports, health services, and social security. What is, relatively, new is that these services are being privatized, and that the state now also becomes first and foremost a regulator of these markets. But it has already for ages been a regulator of all kinds of markets.

Consequences of Deregulation and Privatization

Hence, where the state withdraws, privatizes, deregulates, or forbids self-regulation by trade associations and cartels, other forms of regulation will develop in order to respond to the functional need for risk and uncertainty reduction. The following developments are currently occurring or are likely to occur:

i. **Markets threaten to disappear.** New uncertainties, crises and scandals, that threaten the continued existence of markets, especially of those that – given the nature of the product or the market – are particularly prone to information asymmetries and hence risks and uncertainties. The Stockholm deregulation of the taxi-market has lead to an increase in cheating and made Swedes more hesitant to use taxi-services. The same happened as the result of the deregulation of the taxi markets in Prague and Amsterdam.

ii. **More hierarchies**. Increased uncertainty and aggression on markets provides additional incentives for mergers and monopolization. This subsequently happens, where it is possible –given the nature of the industry, of markets – and where not checked by competition regulation. This can be seen in many liberalized markets, e.g. the American airline and telecommunications markets. Liberalization of these markets led first to many new market entrants, an increase in the number of market players, but soon consolidation, mergers, and concentration followed. Many of these sectors have virtually become oligopolies, duopolies, if not monopolies.

iii. **Increased importance and detail of contract.** Where the state withdraws statutory economic and social regulations, transaction partners are likely to regulate their transaction

themselves. They do so both *ex ante* and *ex post*. *Ex ante* they conclude detailed contracts that regulate those elements that are no longer regulated in statutory law. Thus supply contracts may regulate quality standards, property rights, and honesty of information, liability, and conflict resolution procedures. Labor contracts may regulate working hours, promotion rights, grounds for short terms and dismissals, pension rights, unemployment benefits, etc. As the state withdraws, contract specifications are likely to become more detailed. Where formerly public services have been privatized, direct state control through proprietary managerial control is also being replaced by control through contracts. State agencies that tender off rights to public service provision – in rail and bus transport, electricity supply, medical services – conclude extensive contracts, specifying required performances in great detail (e.g. nr. of bus service frequencies and seats from A to B on weekdays between 9-14 hours). The various actors in these newly privatized markets do so as well amongst themselves. Railroads and rail-infrastructure controllers conclude lengthy and detailed contracts on performance or liability; telecom service providers conclude contracts on interconnection rights and rates, etc.

iv. **More work for courts and lawyers**. *Ex post* such contracts have to be enforced and conflicts have to be settled in court. Conflicts over contract interpretations are brought in court. Even where no contracts have been concluded, and in the absence of statutory economic regulations, transaction partners may seek protection in court under civil law. Workers who are no longer protected by statutory regulations on dismissal may challenge their dismissal in court, if necessary accusing their employer of discrimination or sexual harassment. Customers are becoming increasingly assertive in claiming damages under liability and tort law, notably in continental European countries.

v. **Individualization of regulations.** Thus deregulation is likely to lead to the replacement of statutory law by contract specifications and case law. That is, "regulations" (contracts, case law) that regulate individual transactions are replacing general and codified regulations that regulate collectively many transactions. The costs of transactions governed by such individual regulations are likely to be higher than in the case of statutory law, as less use is being made of economies of scale.

vi. **A proliferation in private self-regulation and private commercial trade marks**. In order to simplify matters, reduce uncertainty, and reduce transaction costs, firms and workers will try to form associations, engage in self-regulation (including cartellization, also of labor markets) and conclude collective contracts: in so far as competition law allows this. This has been the historical trend. Many new (privatized) sectors form associations that design collective trademarks and try to build a reputation for them. In food industry and trade we see currently in Europe a proliferation of muslim "halal" trade marks, as state food authorities limit themselves to regulating scientific safety of food and refuse to get

engaged in regulating food by standards of religious safety. In the Netherlands alone, over fifty "halal" certifiers exist.

vii. **Eventually, new statutory regulation** becomes unavoidable, imposing more and more conditions and constraints on recently liberalized markets. The increasing fraud and corruption has to be checked by new regulation, in order to maintain the trust of customers in business. Thus recent fraud cases on the Amsterdam stock exchange, the American accountancy sector, and among Quebec and Dutch notary publics have led to calls for new and stricter legislation, including conditional licensing. Dutch muslims have been calling recently for state regulation of "halal" food, in order to increase the transparency of the private halal-trade-mark market.

In order to protect markets by ensuring a minimal degree of competition, competition law has in many countries recently been tightened. Cartels are actively prosecuted, and merger-control has been increased. The Dutch neo-liberal wave in policymaking has led to a fundamental change in competition regime, with the prohibition principle replacing the former abuse principle. In addition, a new and relatively independent competition regulatory authority has been created. New and specialized monitoring and control agencies are being created, new regulatory authorities, often specialized in a specific sector: the telecom, public transport, electricity, taxis, health services, the media, etc.

Furthermore, there were usually reasons why in earlier times such sectors became organized as state monopolies. They were "natural monopolies" or public interests were at stake, as was the case in energy supply and rail and bus transport. In a privatized sector such arguments may still be valid, and regulation is usually required to deal with them. The forces working towards a "natural monopoly" – e.g. high sunk costs – have to be countered by competition law and litigation under these rules. Public interests (frequency of railroad service, maintenance of unprofitable lines) have to be secured through contracts.

Especially the latter trend has been identified as the emergence of the "regulatory state," implying that while the state has withdrawn as service provider (of utilities, transport, media, medical services) it has been forced to adopt a new role of regulator of these newly formed markets. However, it should be clear by now that a regulatory state is not really a very new phenomenon. There was already a (very strict) regulatory state in the late middle ages (albeit usually a municipal or regional one), and it developed further (after a liberal intermezzo in the 19th century) in response to the economic crises of the 1870s and 1930s and the class conflict, especially around the end of WWI and the 1930s.

Greater Adversarialism, Formalism, and Bureaucracy

Several of these trends have resulted in loss of trust relations and more adversarial and formalistic relations among private actors and in state-business relations. Firstly, freer, more unrestricted competition creates more adversarial relations in the economy and society. Subsequently, the increased social and economic conflict requires more regulation and more rigid control and enforcement: i.e. also state-business

relations are becoming more adversarial.

Adversarialism is the natural concomitant of liberalism. This is not only true of the social conflict – intrinsic to market competition. It propagates a role of the state that – unintentionally – leads to these adversarial state-industry relations. Where a state intervenes relatively little, it usually intervenes in a negative rather than a positive way: as a controller of basic rules, rather than as a partner and provider of resources (information, capital). Liberalism defines the role of the state as a passive one. It can only check some of the most negative consequences of industry. Just because it is limited to regulation – of monopolies, working conditions, or environmental consequences – business meets the state only in the role of policeman and prosecutor. This influenced business attitudes towards the state, and in turn the attitudes of civil servants to business. The mutual attitude becomes negative: business perceives the state as an irritating meddler in its affairs, as a source of annoyances. Conversely, state agencies feel they cannot trust business firms, who are constantly trying to circumvent the rules and/or appeal the rules in court. Both tendencies, avoidance of rule observation and litigation by business, force the state administration to increase the degree of detail of the rules. Loopholes have to be closed, and chances for winning in administrative appeal procedures should be minimized. Thus administrative operationalizations of regulations tend to proliferate. State inspectors get lengthy rulebooks for use in policy implementation and rule enforcement.

Furthermore, in order to reduce the risks of administrative appeal, bureaucrats become more careful and precise: i.e., more rigid in rule application. They will be less willing to negotiate over rule observation by the clientele, in order to ensure that all firms are treated equally. Concessions to one firm could easily be used as a precedent in court. The overall result is adversarial state-industry relations, a proliferation of detailed rules, high litigation rates, and inflexible rule application and enforcement.

Privatization also adds to the adversarial character of state-industry relations. Formerly the state could secure the public interest through its exercise of property rights of and hierarchic control in public monopolies, often in an informal and flexible manner. After privatization, state relations to such industries become more distant and business-like, and are governed by detailed contracts. This could produce more adversarial relations.

Steven Vogel (1996) provides illustrative examples. He evaluated and compared the deregulation of telecommunications and financial services in Britain and Japan. In particular in Britain, these markets were drastically liberalized. Vogel calls it however “a revolution that wasn’t.” He concludes that although these sectors were liberalized, and are now more coordinated by markets, they are also more heavily regulated. Around the same time that the financial services were deregulated, primarily by the Bank of England (the Big Bang on Oct. 27, 1986), the Department of Trade and Industry introduced a new Financial Services Act. This was tightened after a number of bank failures and other scandals. The government has created special regulatory agencies to control them: Oftel for telecommunications, and the Securities and Investment Board and a number of other more specialized agencies for financial services. These produced thick rulebooks that operationalized the laws. The new law also gave investors the right to sue traders

for violation of regulations. As was to be expected, that prompted the regulatory agencies to further detail the rules, in order to protect investment firms against lawsuits. These firms in turn formulated new detailed contracts in order to limit their liability to their clients. Not only were the new rules much more detailed than the British were used to; they were also more formal, could be challenged in court, and were hence more inflexibly enforced.

The 1994 privatization of British Rail into 25 new railroad companies is another example. The somewhat artificial attempt at creating a market required the development of a complex system of concessions, subsidies, and regulations. In order to attract private investors and to safeguard the public interest, the British state provided still 6.7 billion guilders in subsidies a year, among others to finance investment in the rail network. Of course, this went with a sizeable number of strings attached: requirements as to investments, lines to be operated, stations to be included, train frequency and speed, provision of information to customers, other aspects of the quality of service, and range of prices. Relations between the various companies had also to be specified, in particular liability. What if trains do not connect, if a train of one company breaks down or derails and makes for delays of the train of another company? Altogether, this required 30.000 different contracts to be drawn up, at the cost of 3 billion guilders in fees for lawyers and advisors. The regulatory agencies created the Franchising Director and the Rail Regulator, and closely monitor the behavior of the firms to ensure competition and safeguard the public interest. They have given hefty fines for insufficient investments in new rail infrastructure or for insufficient information at the stations.

In all three sectors, British regulatory style has changed. The informal, consensual and flexible regulatory style which David Vogel still found dominant in Britain nearly 20 years ago (Vogel, 1986) has at least in the deregulated sectors given way to the one he found then typical for the USA: formal, adversarial and rigid.

New Types of Rules and Controls more Costly

That freer markets require and create more rules is still not so much an argument against such forms of deregulation. However, the new forms of detailed rules, inflexible rule application, lengthy and transaction specific contracts, litigation, case law, and liability claims, and the adversarialism and distrust that go with them, could very well produce much higher costs to business and society at large. What they may save on taxes for bureaucrats, they may loose more than double on fees for lawyers. The high costs of such a system can be seen in the US.

Many of the new types of rules are less general, less abstract and more specific to certain transactions. Contract regulations, detailed operational administrative regulations, and case law replace and/or complement abstract codified law. They emanate from a variety of actors: transaction partners, regulatory agencies, and courts. There are more of them, and they are more complex. Therefore, there are more legal experts needed to draw them up and interpret them. They tend to be less transparent and stable. In particular, where the legal profession is also deregulated, and lawyers can advertise and work on contingency fee basis, trial lawyers have an incentive to find exceptions to the rules established by precedent, if that suits their case. As a result, case law tends to develop in unpredictable directions, in particular in a

legal system, which is decentralized, where juries decide on cases, and judges are legal activists, as in the American legal system. Indeed, in the highly litigious legal culture of the US this has led to instability and uncertainty of the law (Kagan and Axelrad, 1997). Economic actors can often be unsure what the courts would rule in a specific case. Even their legal advisors cannot tell them. Hence law, that collective good intended to reduce uncertainty in economic transactions, has become itself a source of risk and uncertainty. Not only does it not perform an essential function of the law: to provide predictability; it actually counteracts that function.

In the face of such uncertainty business needs batteries of lawyers that assist it in drawing up contracts. There may be less statutory barriers to market entry in the US (in most states there are no firm licensing requirements, like e.g. in Germany under the Handwerksrecht); however, there are barriers of a different kind: it takes quite some time and legal advice to start a business.

Rigid rule enforcement styles of regulatory agencies, caused by the threat of appeal procedures and liability claims, have other costs for business. Inspectors of American regulatory agencies readily impose fines, and they can be quite high. This means high compliance costs for business: costs of changing production facilities or transaction procedures so as to fit the detailed, and sometimes unreasonable rules; costs of fines and other sanctions; and costs of lengthy and expensive legal appeal procedures to fight administrative decisions and sanctions. There are also costs to society at large: ineffective and cumbersome rule enforcement, enforcement officers bogged down in lengthy court proceedings, costs of prosecutors and judges, temporary suspension of rules, slowness in decision making.

The adversarialism in relations between transaction partners and in state – industry relations has its own costs: irritation; loss of legitimacy of the rules and of its administrators; the regulatory agencies and its officers; lengthy lawsuits; and lawyer fees. In addition, it produces costly changes in business firms: more levels of internal control, heightened caution and risk aversion, preventive bureaucracy, lawyers that have to be consulted on every move the company makes.

The recent Sarbanes-Oxley Act of 2002 provides a helpful illustration. It did not only set stricter accountancy standards, but created also a new regulator, the Public Company Accounting Oversight Board. In line with the rigid and adversarial policy style that has already for decades characterized American regulators (Van Waarden, 1999) this new agency implements the strict new rules to the letter. The external controls have in the meantime also produced extra levels of internal control in accountancy firms. “At KPMG, the auditors are now reviewed not only by their boss, who focuses on business growth, but also by risk experts, who rate how well the accountant complied with the firm’s rules” (Byrnes, 2003: 68). New control levels have also been created in the companies that the accountants are supposed to control. “Companies have spent at least 1 billion dollars adopting new Sarbanes-Oxley rules. Corporate audit committees are gathering more often for longer meetings and asking tougher questions.” Thus there are at least seven levels of control: PCAOB; Top management of accountancy firms; their risk experts; the accountants; the management of the firms to be controlled; the company accountancy committees; the

company accountants; and, down below, the bookkeepers. In large firms that consist of many divisions and establishments, several additional levels can be added. Outside of this hierarchy there are still separate rules and controls of the Securities and Exchange Commission, the Department of Justice, other federal, state and local inspections and attorneys-general, self-regulating accountancy associations, and insurance companies.

In particular, the costs of litigation and lawyering may increase substantially as regulation through contracts, case law, and tort law becomes more important. They are at least in the US, a country where such regulations are very important.

In the US, the economic sectors of lawyers, accountants, and auditors accounted in 1997 for about two million jobs. That is more than employment in the total American transport industry. The manufacturing of cars, ships, trains, airplanes, space, guided missiles together was only good for 1.8 million jobs (US Bureau of Census). In 1992 it was estimated that the expenditure on legal services in the US amounted to 2.4 percent of the GDP (Richard Sander, 1992) quoted in Kagan and Axelrad (1997, in print; see also Lipset, 1996: 50)). In addition to the litigation and lawyering costs, there are the costs of claims to business, and of liability insurance. These run into the billions of dollars.

The high costs of compliance with detailed regulations, rigidly enforced, and of litigation and lawyering leads to further frustrations and dislike of bureaucrats, regulatory agencies, and lawyers. This in turn could fuel the call for more deregulation; and that leads again to in the end more rather than less regulation. There is a threat of a vicious circle here.

However, one person's cost is another one's job and income. Thus the 'control-industry' has become a veritable growth industry. Distrust has become a booming business. I calculated that of the Dutch working population of seven million, about 1.36 million are busy with controlling others on behalf of yet others. The decline of employment in agriculture (now only one percent in the Netherlands) and industry (a mere 18 percent) has luckily been offset by a growth of work in the service sector; and a large part of that is the "control industry."

Economists have long thought that transaction costs have to be made for real transactions. But one can also look at it from the other perspective: transactions exist in order for there to be transaction costs. They make it possible that people earn a living by reducing risk and uncertainty. The more fraud – or mere threat of fraud – the more work!

European countries that deregulate could find their regulatory and legal system moving in the direction of the US. Britain is clearly on the way. Overall, there seems to be a tendency to more tort litigation. This is part of an overall juridification of society (cf. a.o. Tate and Dallinger 1996, Kagan and Axelrad, 1997). One indication is that the density of lawyers is increasing in the Netherlands, from 35 per 100,000 inhabitants in 1987 to 65 in 1999.

However, there is still a long way to go. The differences have been great. As against a Dutch lawyer density of 65 per 100.000 inhabitants, according to my own calculations, the US boasted a density of 366

lawyers per 100,000 inhabitants. Typical for the distance between the Netherlands and the US is the incidence of asbestos-based tort cases, a conflict of interest in the transaction between worker and employer. By 1991, an estimated 200,000 asbestos tort cases had been filed in the United States. In the Netherlands, less than 10 cases had been filed (Vinke and Wilthagen, 1992), although Dutch law authorizes tort claims against employers, and notwithstanding the fact that in the 1970s and 1980s, the incidence of asbestos-related diseases among Dutch workers was five to ten times as high as in the US. (Kagan and Axelrad, 1997: 5).

Conclusion

Logical arguments and empirical evidence show that deregulation leads to (re)regulation. Freer markets require more rather than less rules. The new rules have often a different form, a form that fits with more adversarial economic and state-industry relations. Such rules though could very well turn out to be more rather than less costly to business and society at large. That could bring big changes to the countries of Europe, in particular the Netherlands.

The country has a long-standing tradition of cooperative and pragmatic relations between business (often organized in trade associations) and of a regulatory style emphasizing flexible rule enforcement ("gedogen") and consensual relations between enforcement agencies and their clientele. There is an eclectic mix of regulatory forms: codified statutory law, self-regulation by industry, collective and individual private contracts, and even contracts between state and industry ("covenants"). This mix allows for pragmatic and efficient solutions to regulatory problems. We have a low lawyer density and a very low litigation ratio (Blankenburg and Bruinsma, 1994). Conflicts are usually resolved in a pragmatic manner and/or with the assistance of sectoral arbitration institutes.

This relatively cheap and efficient Dutch tradition of regulation and conflict management is being jeopardized with deregulation, freer markets, and increased reliance on liability law. Such measures may introduce useful new economic incentives, as economists argue. However, they are likely to have unforeseen consequences such as those described above.

The paradox is that the same liberalism that insists on "less rules, more market" tends to produce in the end "more rules" – more detailed ones, more conflict, greater adversarialism, larger armies of inspectors and lawyers, greater bureaucracy in public agencies and private businesses, and, what the liberals so much deplore, heavier and more costly administrative burdens.

This can be seen from the American example. This "pro-active liberalism" (as distinguished from "*laissez faire*" liberalism) has been typical for the US. Kagan called it "regulatory unreasonableness" (Bardach and Kagan 1982) and "adversarial legalism" (Kagan and Axelrad, 1997) It is in part the result of its relatively free markets (including its free market for legal advice and its entrepreneurial lawyers). This style of regulation and litigation is becoming now also typical of countries where markets are liberalized. Policy formulation and implementation is becoming increasingly adversarial; social and economic relations become more juridified, and litigation rates are increasing.

Regulating Safety at Work: 'What Works?'

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Introduction

The aim of this short paper is to make a contribution to placing back onto academic, political and popular agendas some unfashionable ideas around regulation and enforcement. I do so with specific reference to the context of occupational safety[23], though I hope that aspects of this discussion will have a more general relevance in terms of discussions of "regulation." Further, the frame for the discussion is the question "what works," a framework that has driven a vast amount of criminological and criminal justice research – in the UK and beyond – albeit almost exclusively research focused upon the control of traditional offending. While my empirical focus is upon the UK, the argument developed here may resonate with regulation across a range of national contexts.

Regulating Safety at Work in the UK

While academic commentators in the UK – along with various campaigning groups, notably the Hazards movement[24] – have long pointed to a series of inadequacies in the ways in which health and safety laws are enforced across UK workplaces, the scale of under-enforcement has, hitherto, only been intimated at. But in 2002, after much negotiation (and having paid for access to data), the Centre for Corporate Accountability[25] was able to use internal HSE data to produce the first systematic audit of HSE's enforcement activities (Unison/CCA, 2002a, 2002b). The analysis examined the work undertaken by the Health and Safety Executive's "operational inspectors" – that is to say those inspectors who actually inspect workplaces, investigate reported injuries, and decide whether or not to impose enforcement notices or to prosecute. This report did not scrutinize the work of *all* of HSE's inspectors – it only looks at those that work in HSE's "Field Operations Directorate" (FOD). FOD is the largest directorate within the HSE and its 419 Field inspectors[26] (which represent two-thirds of all HSE's Field Inspectors) are responsible for enforcing the law in 736,000 premises across a range of sectors.

The research used statistical data to analyse the activities of these inspectors over a five-year period – between 1 April 1996 and 31 March 2001. It examines: the number of premises that they inspect; the number of reported incidents that they

[23] The focus here is on occupational *safety* rather than health, the latter raising specific issues in terms of regulation.
[24] A UK-registered charity which provides information and advice on safety, law enforcement and corporate criminal accountability issues; see www.corporateaccountability.org/

[25] www.hazardscampaign.org.uk/
[26] At Spring 2001

investigate; the numbers of enforcement notices that they impose; and the numbers of organizations and individuals that they prosecute. It further analyses how the levels of inspection, investigation, notices and prosecution differ between: five industry groupings (agriculture, construction, manufacturing, energy and extractive industries, and the service sectors); different parts of the country; and in each of the last five years. Finally, the report examines the levels of fines imposed by the courts after conviction.

The most fundamental conclusions of this report are twofold. First, it shows how health and safety is being enforced in a very haphazard way: despite there being detailed policies, the levels of inspections, investigations and prosecutions vary enormously by region and by sector. Second, it documents how, in recent years, there has been a significant decrease in inspections, whilst investigations have increased – albeit from an extremely low level. In summary, the data analysis demonstrated that:

- The number of inspections of workplaces declined by 41 percent in the five years to 2001 – a decrease of 48,300.
- On average, a workplace registered with HSE will now receive an inspection once in every twenty years.
- There has been an increase in the investigation of reported incidents over the five years but, in 2000/01, 3 percent of deaths of workers, 10 percent of deaths of members of the public, 80 percent of major injuries to workers, 93 percent of major injuries to the public, 70 percent of dangerous occurrences, 95 percent of over-three day injuries and 55 percent of reported cases of industrial diseases were not investigated.
- Some very serious injuries are still *not* being investigated, including: 905 of the 1144 reported major injuries to trainees or 126 of the 164 injuries to those involved in "work-experience" over the five year period; and, in 2000/01, 72 "asphyxiations" (44 percent of the total), 31 "electrical shocks" (35 percent of total), 333 "burns" (57 percent of the total) and 418 "amputations" (41 percent of the total).
- Prosecution rates have increased over a three-year period but, in relation to incidents investigated in 1998/9, 67 percent of deaths of workers, 90 percent of deaths of members of the public, 89 percent of major injury to workers, 94 percent of major injury to members of the public, 95 percent of dangerous occurrences, and 99 percent of industrial diseases did not result in a prosecution.
- These percentages of investigation and prosecution, whilst generally low, vary enormously by industry and, perhaps even more worryingly, by region.

Since the period upon which this report was based, the retreat from safety enforcement has gathered pace. For example, while the initial years of the Labour Government, 1997-2000, had seen an increase in resources for HSE – meaning that by 2001 the "average" workplace could expect a visit once every 15-20 years – funding was again

reduced in 2002[27]. These reductions – amounting to, according to HSE, "a significant reduction in spending power" – have raised this spectre of financial crisis in health and safety enforcement. As an example of what may be to come, in May 2004 it was revealed that certain deaths and injuries to members of the public, which hitherto had been investigated by the HSE, will no longer be subject to such inquiry. This new, restrictive policy was set out in internal guidance to inspectors and had been operational from October 2003, and its rationale was clearly a resource driven one. Subsequently, the policy was subject to successful legal challenge by the Centre for Corporate Accountability, found to be *ultra vires*, and likely to be reconsidered by HSE.

The HSE inspectors union, PROPSECT, has lobbied hard for extra resources – and the Select Committee "endorsed" its argument, recommending a doubling of field inspectors (House of Commons Work and Pensions Committee, 2004a, recommendation 9). However, senior management at HSE has eschewed the argument for further resources, and has pledged to work within the new financial constraints, committing itself to "a financial strategy of efficiencies and cost reductions." This rather supine response is the context for recent changes within HSE enforcement practices, indicated by policy and strategy statements which represent what has been termed a "further down playing" of "regulatory solutions" (House of Commons Work and Pensions Committee, 2004a: para 54).

[27] As of 2004, the average inspection of all registered premises, undertaken by HSE inspectors, is 1 in every 20 per annum. They range from 1 in 10 in the construction industry, to 1 in 13 in manufacturing, 1 in 27 in Agriculture and 1 in 36 in the service sector.

More strategically, HSC's recently (2004) launched *Strategy for Workplace Health and Safety in Great Britain to 2010 and Beyond* – though a bland document of very little substance – further downplays formal enforcement, dedicating two paragraphs of its 17 pages to this issue. This is one index of what appears to be a radical shift in HSE enforcement practice. Never a body known for over-zealous use of law, this shift coheres with a recent discussion paper by HSE's Deputy Director-General, Justin McCracken, urging a shift of emphasis to "educate and influence," so "using a smaller proportion of [the HSE's] total front line resource for the inspection and enforcement aspects of [HSE's] work." This "significant shift of emphasis" is justified on the basis of:

> a belief (and we agree that at present our evaluation of the effectiveness of different approaches and techniques is not sufficiently well developed to allow it to be more than this) that by altering the balance in this way will help us to climb off the current plateau in safety performance and to tackle increases in ill health (House of Commons Work and Pensions Committee, 2004a: para 131)

McCracken is right to acknowledge that there is no evidence indicating that such a shift would have a positive effect on occupational health and safety outcomes. Indeed, this line of thinking on enforcement seems designed to accommodate reductions in resources, not one aimed at making the HSE more effective.

The Evidence Base: an overview

The July 2004 Parliamentary Select Committee – whilst producing a list of recommendations that closely resemble the first page of a shopping list of workers demands – also added the

recommendation that "the HSE should not proceed with the proposal to shift resources from inspection and enforcement to fund an increase in education, information and advice," the central component of HSE's new enforcement strategy. "The evidence supports," it continued, "that it is inspection, backed by enforcement, that is most effective in motivating duty holders to comply with their responsibilities under health and safety law" (House of Commons Work and Pensions Committee, 2004a: *para* 142).

This evidence has subsequently been collated and analysed by the Centre for Corporate Accountability.[28] And what it amounts to is a substantial body of UK and international research on what motivates employers to improve their OHS performance. This evidence indicates that:

- all the major reviews of the international literature conclude that the most important driver of management action to improve OHS performance is legislation, backed by credible enforcement;
- this finding is mirrored by the UK research, where the need to comply with the law was the most commonly cited reason for health and safety initiatives amongst all sizes of organizations;
- fear of reputational damage has been identified as another key driver for firms operating in high risk and high profile sectors;
- regulation, inspection and enforcement are key to creating reputational risk;
- the application of enforcement is an effective means of securing compliance in all sectors and sizes of organizations, including major hazard sectors;
- some studies demonstrate significant reductions in individual plant injury rates following inspections coupled with some form of penalty. Brief inspections that did not result in penalties had no injury reducing effects;
- whilst the evidence suggests that UK employers are "legislation driven" and that fear of enforcement is a significant motivator for organizations, there is also substantial evidence to suggest that current levels of inspection, enforcement and prosecution are too low to maximize the impact that regulators could have on employer compliance or to provide a sufficient level of deterrence;
- education and information alone are insufficient motivators of business;
- all of the major reviews (and the majority of UK studies) reveal serious limitations with the "safety pays" and cost avoidance arguments that are commonly relied on by regulatory agencies in this and other countries, and found no evidence outside of the United States that employers are significantly motivated to improve health and safety for financial reasons.
- there is overwhelming evidence from this country and from overseas that collective workforce participation, especially when it operates through trade union channels, has a significant and measurable impact

[28] I am grateful to Courtney Davis, the author of the report, for permission to reproduce almost verbatim its conclusions (see Davis, 2004).

on health and safety outcomes in the form of reduced injury rates.

Notwithstanding problems associated with some of the specific studies supporting the above conclusions, three factors suggest we can be fairly confident in the validity of the main overall direction to which they point:

- first, there is *remarkable consistency* with regard to the findings reported in the international literature, giving rise to confidence in the conclusions reached by the individual studies;
- second, these findings are replicated in relation to research on environmental management, where compliance with regulation was the most commonly cited spur to greater management action;
- and, third, four separate reviews of the international research have reached identical conclusions with regard to what the majority of the studies tell us about the drivers of management commitment to occupational safety, indicating that not only are the findings of the various studies consistent, but also that they are unambiguous.

Now, despite the Select Committee's findings, and the CCA's analysis of current research, Government seems set on a path away from already meagre levels of enforcement, and towards even greater focus on "advice" and "education." Thus the Government's October 2004 response to the Select Committee's own findings was to state that it "continues to endorse" the HSC's 2004 strategy document.[29]

Then, the Hampton Review was established by the Treasury in 2004 to "consider the scope for reducing administrative burdens on business by promoting more efficient approach to regulatory inspection and enforcement without reducing regulatory outcomes" (Hampton, 2004: 1). Its remit covers the work of 59 national regulators, from the Health and Safety Executive to the Agricultural Wages Team to English Heritage and the Insolvency Service. There appears to be no recognition within the Hampton Review that the Health and Safety Executive – charged with the prevention of deaths, injuries and ill-health of workers and the public – warrants consideration somewhat distinct from the Insolvency Service or the Agricultural Wages Team. It is difficult to engage seriously with proposals that fail to acknowledge these differences.

Publishing its interim report in December 2004 – tellingly entitled "Reducing Administrative Burdens: effective inspection and enforcement" – it appears to point towards more focused inspections, greater emphasis on advice and education, and in general removing the burden of inspection form most premises. It is of interest that Hampton's prime source of information on how regulation impacts business upon came from talking to employers – that is to say directors and managers. In relation to safety issues at least, it is simply not possible to understand how the regulatory bodies operate unless you also talk to the other key stakeholders, that is, workforces or their representatives.

The Power of the Contemporary Mindset

So here we have an apparent paradox. On the one hand, a wide range of evidence indicating that enforcement has a key role to play in improving

[29] The Government's Response to the Report, in the form of a letter from the Secretary of State for Work and pensions, published as an Appendix to (House of Commons Work and Pensions Committee, 2004b

standards of occupational safety, including evidence produced by Parliament's own Select Committee. On the other hand, despite public commitments to evidence-based policy, the Government is set on a path which is leading it in the opposite direction to which that evidence points.

The "explanation" for this paradox is clearly complex and multi-faceted. However, here I wish to emphasize the power of new ways of understanding the world which have emerged with the international rise to dominance of neo-liberalism and which are summed up in the word "globalization" (see Steger, 2005). These ways of understanding have profoundly altered the parameters of the "political":

> Politics is, on some readings at least, the art of the possible. The problem is, of course, that what is possible at any given time and place is limited. There are, first and foremost, the familiar practical constraints on political possibility – the availability of resources, appropriate institutional structures, democratic mandates, issues of moral legitimacy, and so on – and these are real enough. However, these are the practical limits particular to the internal functioning of existing political systems. Beyond these there are other, more subtle if equally powerful limits, and they have to do with what is taken to be 'common-sense', 'normal', even 'thinkable', at a given time and place (Cameron and Palan, 2004: 152)

In 1995, in what has become one of the earliest key reference texts on globalization, Malcolm Waters observed that the first usage of the term "globalization" could be traced back to a 1959 issue of the Economist. Even at February 1994, the catalogue of the Library of Congress contained "only 34 items with that term or one of its derivatives in the title. None of these was published before 1987" (Waters, 1995: 2). Yet the same search of the same Library of Congress database at December 2004 reveals some *6,000* such entries, while entering the search term "globalization" in Google (itself a phenomenon which is viewed as a symbol of a "globalizing" world) produces a list of almost *seven million* entries. Globalization is a recent term; but it is also one that has become ubiquitous.

The claim here is that the idea of globalization, and the power of associated language, symbols and practices, defines current and likely political possibilities: certain political possibilities have been closed down, whilst others raised as inevitable, irresistible, in a double-movement beautifully captured in the well-known phrase "There is No Alternative." This is not the place to debate how "real," or otherwise, globalizing tendencies are (see Pearce and Tombs, 2001). For in the very proliferation of globalization discourses, the "realities" these seek to describe are more likely to be brought about, as governments cast themselves as relatively supine in the global game of capital attraction and retention. As Hay and Watson have noted, here with particular reference to Britain and the Blair Government,

> New Labour clearly acts *as if* the globalisation hypothesis were an accurate description of reality. This, in turn, has very real effects The intrinsic link between the material and the ideational is, in this instance perhaps particularly significant. It is not globalisation *per se* which is driving change in contemporary Britain. Given that production relations have yet to be globalised .. how could it be? Rather change is a function of the distinctive and dominant *political understanding* of globalisation now

> internalised by New Labour. The meaning and significance attached to 'globalising trends' tendencies and processes may be as significant in accounting for outcomes as those trends, tendencies and processes reflection (as, and when, they exist) (Hay and Watson, 1998: 815, emphases in original, and Hay, 2004, passim).

Thus, to the extent that globalizing trends – and representations of these – become more significant, then this *does* have consequences for the nation-state, consequences that are generally constraining of any national-state autonomy. In a self-fulfilling-prophecy-like fashion, *globalisation discourses may actually bring into existence those very effects that they purport simply to be documenting*.

The *discourses* of globalization, then, have assumed the status of a hegemonic truth, a new orthodoxy (Pearce and Tombs 2001: 198-202). The "perceived dictats" (Goldblatt 1997: 140) of this "new orthodoxy" (Harman, 1996) are invoked by governments as they seek to attract or retain private capital through various forms of de- and re-regulation, impose massive cutbacks in the social wage, and more generally reproduce the "political construction of helplessness" (Weiss 1997: 15); and it is this orthodoxy to which multinational capital points as it seeks to increase its leverage over national states, and both intra- and inter-national sources of resistance.

The key implication of the hegemony of discourses of globalization is the assumption that governments now exert less political control over economies – economic management is relegated to the task of over-seeing the operation of "free" markets – and over the key actors in these economies, namely corporations and, most significantly, multi- or trans-national corporations. In short, according to this thesis, what we are witnessing is a negative-sum degradation of politics as an inevitable by-product of the rise to domination of the market. One rises as the other falls. Alongside this "pragmatic" recognition comes an almost moral argument – one which elevates private economic activity to the status of an intrinsically worthy end in itself (Frank, 2001). And this elevation in turn coheres with a sustained attack on state, public and in particular regulatory activity, an attack cast in terms of the freeing of enterprise and the valorization of risk. The phraseology of "burdens on business" and "red tape" to refer to laws designed to regulate economic activity has become common currency, the unquestioned implication being that such burdens and tape should be reduced as far as possible – often, as Snider (2003) has demonstrated, with disastrous consequences.

Central to the project of globalization-as-hegemony has been the transformation in popular understanding of a set of institutions – business organizations – from vehicles which represent a means to some other end (the provision of goods, services, employment, and so on), to the status of ends in themselves. And this transformation has involved ascribing a moral status not so much to particular businesses – a task which would be difficult given the consistent evidence of immorality or a-morality on the part of business organizations – but to business, or rather "capital," as a whole.

Thus the phrase "moral capital of capital" is used to highlight the outcome of a process in which moral worth is invested in the activity of business, that activity which brings together capital in legitimate enterprises to produce goods and services (see also Snider, 2000: 171). Business has literally been granted a moral status, viewed as intrinsic to the well-being and health of societies, and thus granted leverage – capital – either explicitly or as an implicit resource to either address or pre-empt issues of stricter external control. Indeed, this moral capital is powerful in a further and more subtle sense, along the lines of Lukes's third dimension or face of power (Lukes, 1974), so that the moral capital of capital means that certain issues simply do not get raised within political nor popular consciousness – for example, the re-assuming of ownership of certain areas of economic activity by the state or some other public entity.

Most crudely, then, the "moral capital" attached to business activity has increased dramatically over the past quarter of a century. Private enterprise, entrepreneurship, the pursuit of wealth, and something called the "market" have all became valorized *as ends in themselves*. Just as the emergence of industrial capitalism was accompanied by a process in which paid work came to be invested with a moral meaning, somehow producing better people their engagement in it, now we have those institutions which organize and control work activity increasingly represented as key moral agents.

One index of this development is that as citizens we are constantly, and it seems to me increasingly, encouraged to believe that the "success" or "failure" of business activity matters to us. Witness, for example, the massive growth in business reporting across a range of media across the past quarter of a century[30], the routine reporting of stock exchange movements from Hong Kong to New York, the build up to and dissection of the financial statements of individual companies, and the entrance of some individual business-people into the cult of celebrity. Now, as with much globalization-related discourse, there are elements of reality here. In one sense, the business world does matter more to many of us than was the case twenty-five years ago. For example as public provision of goods and services has been scaled back in many industrialized nations, the private sector certainly does impinge more readily upon our lives as consumers – whether this be pre-school child care provision, health care, transportation, basic utilities, and so on. Take the case of financial services: while claims of a "popular capitalism" are much more illusory than real, there are larger numbers of (albeit very small) shareholders now than twenty years ago; many of us have monies invested in private pensions, in various savings schemes linked directly to company and stock exchange performance, and in endowment policies, and so on, all of which either creates the reality or the belief amongst many of us that we have a stake in the effective functioning of capitalism in general, and finance capitalism in particular. More generally, then, as Cameron and Palan note, globalization discourses are reproduced through "countless, small, incidental

[30] This is no doubt related to, but not wholly explained by, the enormous growth in the sheer volume of space/time across all media that needs to be filled.

performances on a daily basis," thus contributing to their overall "normalcy" or "plausibility" (Cameron and Palan, 2004: 160).

Recognition of the new moral context in which business operates helps us to make fuller sense of the supine behaviour of even supposed social democratic administrations towards capital. Thus, for example, a succession of British Ministers has stated the aim of the Labour Government as being to make Britain the most business friendly environment in the world (c.f., for example, Osler, 2002, *passim*). There is of course an instrumentalism in such assertions, since national economies depend upon a certain level of economic activity and this need to attract and retain capital. But the suggestion here is that this is not the end of the story. For it is only through a combination of instrumentalism and sheer moral valorizing that we can make sense of some of the trends in governmental behaviour towards capital.

Most fundamentally, then, we inhabit an era in which business interests – which are by definition sectional interests arising out of activity conducted for clear motives – are increasingly represented as *"general" or "national" interests*. Intimately related to the increasing moral capital of capital is the emergence of discourses of deregulation, liberalisation, and privatization. Alongside this valorization of private economic activity has occurred a sustained attack on state, public and in particular regulatory activity. Bureaucracy has become a pejorative term, the public sector increasingly understood in terms of waste and inefficiency, while the phraseology of "burdens on business" and "red tape" to refer to law regulating economic activity has become very common currency, with the unquestioned implication being that such "burdens" and "tape" should be reduced as far as possible. In Britain, such terms have entered the political lexicon to such an extent that they are used ubiquitously, without challenge, even across a range of official Government documents. The power of the widespread and relentless use of such language is not to be under-estimated. Indeed, it is only *slightly* simplistic to claim that in certain national contexts at least, the couplets of "private-good" and "public-bad" have reached the status of almost unquestionable truths – a remarkable achievement given the weight of evidence in terms of the sheer scale and relentlessness of the harms wreaked upon populations by private companies (Hillyard and Tombs, 2004).

Concluding Comments

Let us be clear about the central thrust of this paper. First, it is not being argued that inspection and enforcement are the only elements of an effective regulatory strategy. Nor is it recommended that, in the course of inspection, regulators should seek simply to uncover violations, and should then resort almost automatically to some form of formal enforcement activity. However, it *is* argued that the significance of external inspection, backed by the credible resort to enforcement action, is a necessary, if not sufficient, condition of an effective regulatory regime.

However, the current state of safety regulation in the UK means that formal enforcement action appears barely credible, and that even this low

level of credibility is declining. While there are no doubt a complex of reasons for this, I have argued that a key explanation for the increasing turn from external intervention in the workplace is the dominance of discourses of globalization: as a series of related ideas and assumptions seep into political and popular consciousness, certain forms of regulatory activity become less feasible, others almost "natural" or inevitable. Such discourses justify declining resources for regulators, put them on the back foot in their dealings with a more bullish business sector, and in general force reductions in the levels of protective regulation and, more generally, the social wage.

Following on from this analysis, I would urge that we need to reject (at times, motivated) *assumptions* that formal enforcement activity cannot "work" – in fact, us academics need to point to the weight of evidence which attests to quite the opposite. Further, we need to seek to further integrate empirical evidence with theoretical claims regarding the relationships between companies and regulation. Finally, of course, we should recognise that enforcement activity is just *one* part of a wider strategy for reducing work-related harm. The most well cited, and long accepted, finding regarding safety protection at work is that it is best delivered by strong, active trades unions working through safety committees and safety representatives. But law has a role to play in deterring employers, in seeking to secure deterrence and thus prevention, in punishing the guilty, in providing accountability for the bereaved and injured.

There is no doubt that the forces of neo-liberalism have been ascending across the globe in the past quarter century, nor that – under the guise of globalization – such forces appear almost uncontrollable. Equally, however, "our ability to offer alternatives" rests upon "our ability to identify that there is a choice in such matters, and, in doing so, to demystify and deconstruct" (Hay, 2004: 522). For those of us that aspire to a critical social science, that surely is the foremost

Compliance or Policy Intervention?
The response of industry to environmental regulation

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To understand regulatory processes, there is value in studying the objectives and actions of the regulated entities – those actors whose behaviour must change if regulation is to be successful. The subject of this paper is the response of firms in six industrial sectors to the demands made of them by Canadian regulators for improved environmental performance since the establishment of the regulatory system in the 1960s. The six sectors examined are those that have been at the centre of the most highly visible issues placed on the policy agenda by the environmental movement during that period. The issues and sectors are: (1) pollution discharges to water by the pulp and paper industry; (2) fuel consumption and pollution emissions from motor vehicles; (3) use of non-refillable beverage containers by the soft drink industry; (4) acid rain caused in part by sulphur dioxide emissions from electrical utilities and smelters; (5) toxic chemicals, in the form of both products and pollution emissions, manufactured by the chemical industry; and, (6) carbon dioxide emitted by use of fossil fuels manufactured by the oil and gas industry.

As set out below, the theoretical perspective used here for studying these firms as political actors in the process of environmental regulation is drawn in large part from the sociology of organizations. From this perspective, the firm, in its capacity as both a market and political actor, is seen as a grouping of internal sub-systems, co-ordinated through the use of hierarchical controls by senior management, which is continually engaged with external systems in the state, market and civil society. Continually faced with new external threats and opportunities, the firm must decide for each whether it will adapt to external conditions or intervene in an attempt to change them. Often it does both, as in the case of a new market demand, to which the firm adapts by changing its own behaviour and developing a new product, but which it also seeks to influence, through advertising the product. In the same way, environmental regulation, for purposes of this analysis, is seen as an external threat or opportunity, in response to which the firm will either adapt, through changing its environmental performance to bring it into compliance, or intervene in the policy process to influence the standards and enforcement methods to which it is subjected. Again, the firm will often do both simultaneously.

In distinguishing between adaptive and interventionary responses, it is recognized that the usual process of environmental regulation is

bargaining between the firm and regulatory department. Accordingly, a purely adaptive response – defined here as ignoring the policy debate preceding enactment of law or development of new regulations followed by changing behaviour to comply without prior bargaining – is relatively rare, particularly among the high-profile firms examined here. The second category of adaptive response used here - action that exceeds regulatory requirements and is not the direct result of a negotiating process – is also rare. (Most voluntary agreements between firms, trade associations and regulators, expressed by memoranda of understanding, are the result of negotiating processes in which the threat of regulation is present).

Thus the firm usually intervenes in the policy process, by bargaining, which means the variable of "intervention" is very broad. It is useful, for that reason, to make distinctions amongst three forms of intervention, each of which is associated with a different policy objective pursued by the firm: (1) invite regulation to gain competitive advantage; (2) bargain with regulators to reduce the cost of compliance; (3) privately and publicly lobby the relevant government, going over the heads of regulators and often including offers to "voluntarily" improve environmental performance, in order to block regulatory action. Since firms often engage in several of these activities at the same time, boundaries of these categories cannot be drawn definitively. They are useful for purposes of this analysis, however, since to the extent they are successful each response has a very different impact upon regulatory policy. These categories of responses to environmental regulation are set out in Table 1.

Table 1. Responses to environmental regulation

Adapt	1) ignore then comply[31];
Adapt	2) voluntary action beyond regulatory requirements[32]
Intervene	1) lobby in favour of sectoral regulation[33]

[31] Compliance may happen immediately after enactment of new regulatory requirements or may be delayed. As was the case with the pulp and paper industry in the 1970s, the timing of compliance was itself the subject of negotiation with regulators. Compliance may be associated with lesser or greater degrees of regulatory pressure. Smaller firms, with fewer resources to devote to the public affairs function, are more likely to ignore the policy debate focused on their environmental performance, leaving it to their larger competitors and the sectoral trade association.

[32] The best-known example is the Responsible Care program initiated by the Canadian Chemical Producers' Association in 1986. This might be seen as interventionist behaviour, since the Association itself said this was done in part to prevent imposition of new regulatory requirements. Unlike other voluntary action responses set out in Table 2 below, which stemmed directly from sector-government negotiations, this is categorized as adaptive because it was not the direct result of negotiation with regulators.

[33] For discussion of this "bootlegger and Baptist" phenomenon, see Michael S. Greve and Fred L. Smith, Jr., 1992. An example is lobbying by the Ontario beer industry for regulatory requirements that beer be sold in refillable containers to impede market access by the U.S. industry. See Doug Macdonald, 1996, pp. 12-19.

Intervene	2) negotiate standards with regulators
Intervene	3) political action to significantly modify or prevent regulation

The subject of this paper, then, can be stated more precisely as adoption by the large, visible firms in each of the six sectors listed above of one of these five responses to environmental regulation. The most significant regulatory demands made of these firms and associated responses are set out below. The *results* of the policy interventions identified below, in terms of the extent to which the regulated sectors have influenced the environmental regulation to which they are subject, fall outside the scope of this paper. (That subject is included in the larger study from which this analysis has been drawn.) The focus is upon the environmental policy objective pursued by the firm as regulators work to bring about improvements in its environmental performance.

This study rests upon several assumptions. The first, as stated, is that regulation of the environmental performance of resource and manufacturing sectors is done through an ongoing process of regulator-regulatee negotiation of standards to be achieved, policy instruments to be used by governments, including self-regulation, and time-tables for improved environmental performance.[34] The second assumption is that business, either in the form of a single firm, a sector represented by its trade association or capital as a whole, represented by broad-based associations such as the Chamber of Commerce, exercises significant political power, certainly equal to that of the environmental movement.[35] Thirdly, as set out above, it is assumed that business does not always automatically seek to stall or weaken environmental regulation.[36] Because business is intimately engaged with the regulatory process, is in a position to significantly influence the result, and because the policy objective sought by the firm is not self-explanatory, a focus upon the regulated firm will contribute to better understanding of environmental regulation.

There is a school of thought that argues that the business response to environmental regulation has occurred in a linear fashion from the time that regulatory controls were first imposed in the 1960s to the present. Generally speaking, these studies paint a picture of business going through three distinct phases in its response to the new values of environmentalism and resulting changes in regulation – initially, denial of the problem and resistance to regulation; secondly, by the mid-1980s, active participation with environmentalists and government regulators in multi-stakeholder development of new environmental policy; and then, by the 1990s, voluntary implementation of improvements in

[34] To give just one example from the literature, see Debora VanNijnatten and Robert Boardman, 2002.

[35] See Stephen Brooks and Andrew Stritch, 1991; Neil J. Mitchell, 1997; and Doug Macdonald, 2002a.

[36] See Doug Macdonald, 2002b.

environmental performance going "beyond compliance."[37]

These analysts claim that this evolution of responses has been brought about by two fundamental changes in corporate culture. The first is slowly dawning recognition that money spent on environmental management is a good investment, since reduced waste disposal costs, lessening of regulatory liability and new consumer demands for improved environmental performance all translate into increased profitability.[38] The second is steadily growing acceptance of the values of environmentalism by officers of the firm – money is spent on improved environmental performance simply because it is the "right thing to do."[39] These evolutionary changes within the firm over the past forty years, it is argued, have brought about corresponding changes in the policy objective sought by business as it has engaged with environmental regulators. Although they do not use these categories, this school claims that business has moved from an interventionist to an adaptive response.

The purpose of this paper is to subject this claim to empirical examination by looking at the responses over this time period of six sectors within one country, Canada. As set out below, the major finding presented here is that there has not been a linear progression of policy response in this country through the three stages of resistance, participation and voluntary improvement beyond regulatory requirements. This finding calls into question the implicit claim made by business representatives and analysts such as those cited above that internal corporate culture is the most important variable determining the firm response to regulation. Based on the secondary literature addressing business and environment, there is no reason to doubt the claim that corporate culture, defined as both ideas held by those within firms and organizational structure related to environmental management, has undergone a steady progression of greening.[40] If corporate culture has moved steadily in one direction, but firm policy behaviour has not kept pace it is difficult to believe that culture is the most important causal variable. If not, what is? The purpose of this paper is to explore this research question: *What have been the major factors determining the responses of the sectors examined to regulatory demands for improved environmental performance?*

[37] The argument has been advanced most notably by the business person Stephen Schmidheiny, 1992. It is also made by Frances Cairncross in two works, (1991 and 1995). For a slightly more skeptical presentation of the theme see Carl Frankel (1998).

[38] The examples most often pointed to are pollution reduction by 3M starting in the 1970s and more recently the combination of environmental performance and profitability on the part of Intel carpets: see Forest L. Reinhardt (2000) and Andrew J. Hoffman (2000).

[39] Proceedings, Business as an Environmental Policy Actor: A Roundtable Discussion Amongst Academics and Environmental Professionals, Trent University, October 29 and 30, 1999, available from Doug Macdonald.

[40] For a definition of corporate culture which encompasses both ideas and structure, both of which determine the power to influence firm behaviour held by those mandated to improve its environmental performance, see Toyohiro Kono and Stewart R. Clegg, 1998. For analysis of corporate culture related to environment, see Aseem Prakash, 2000.

The theoretical perspective used to explore this question has three components: the general approach to policy analysis used here; understanding of business as a political actor; and a theoretical understanding of the motivations of the firm as it negotiates its environmental performance with regulators. The first two will be stated briefly and the third, since it is most directly relevant, will be presented at greater length.

This study uses a pluralist approach to policy analysis, which assumes that policy outcomes are the result of bargaining amongst state and non-state actors, most notably, in the case of environmental policy, federal and provincial environment ministries and the firms they regulate, but also including other government departments, environmental organizations, and other relevant actors. That process is shaped and strongly influenced by the institutional context within which it takes place, defined as the established system of rules and decision-making procedures, such as the fact that Canada is a federated country, our system of Westminster-style government, or procedures for environmental impact assessment. The other major influence is the context of ideas, defined as including both scientific knowledge relevant to the issue at hand, but also ideas in the form of values and over-arching societal objectives, such as human rights, economic efficiency and growth, risk, and the ethical standing we are willing to confer upon other species.

While the importance of institutions and ideas is recognized in the analysis provided here, the focus is upon the third in the trilogy of variables commonly examined by pluralist policy analysis: the interest of actors engaged in the policy process. As noted above, the interest (treated here as being synonymous with the term "policy objective") of the firm as it engages with environmental regulators is the aspect of the industry response that is the subject of this inquiry.

Political scientists, sociologists and others, writing from different theoretical perspectives, have examined political activity by business.[41] By and large, they treat the essential nature of the firm as self-explanatory and assume, first, that the market interest of the firm is limited to profitability and, secondly, that this means the policy interest is limited to government actions that will contribute to that end. As noted above, the perspective used here supplements this view by drawing upon organization theory – in particular, population ecology which argues that firm survival depends upon ability to adapt to changing conditions and strategic intervention, which is the effort made to influence those

[41] Edward Epstein's (1969) is an early work, looking more at the business role in elections than the micro-world of regulatory policy. Murray and McMillan (1983) reviewed Marxist, corporatist and pluralist approaches. The same ground is covered by Stephen Brooks and Andrew Stritch, 1991. Neil J. Mitchell (1997) takes as his theoretical starting point Charles Lindblom's, Politics and Markets (1977), because of it's importance in moving pluralist analysis toward recognition of the privileged position held by business. An analysis by Mark A. Smith (2000) convincingly shows that while business exercises dominant power in the relatively private world of sectoral regulation it faces greater difficulties when attempting to influence policy on high-profile issues that, because of their visibility, have mobilized opposition to the business position from labour, social movements, churches or others.

conditions.[42] While profitability and financial survival are seen by organization theory as fundamental goals of the firm, this school also pays attention to another goal that is germane to the policy activity of polluting industries: the search for legitimacy (Suchman, 1995, 571-602).[43]

The theoretical approach used here treats the search for legitimacy as a central part of the interest of firms and, indeed, of all policy actors. Legitimacy is defined here as belief by external observers that the behaviour of the actor is appropriate and in accordance with prevailing norms. It is assumed here that individual humans need self-esteem, which is gained through the approbation of others. Beyond that, all actors, individuals or organizations, continually face the need to both achieve self-interest and to contribute to the collective interest, even if only for the self-interested reason that they must resolve a collective action problem, in which co-operation is the only available means of furthering self-interest. Firms are thus motivated to adapt their behaviour to comply with societal norms, whether or not they codified in regulations, because of the psychological needs of their managers and, often as a rational means to achieve the basic goal of profitability. Both move the firm to act in ways seen as legitimate. To that can be added another motivation: the fact that legitimacy is a source of political power, as noted by one of the more famous analysts of that subject: "Machiavelli's argument is that pure power is impotent; its stability therefore depends on voluntary acceptance, and voluntary acceptance depends on its legitimacy." (Zelditch, 2001: 36).

The premise for this study is that the firm has not one but rather two basic goals which direct all of its actions, whether in the arena of the market or of politics – profitability and legitimacy. The two are interconnected, each supporting the other and are pursued simultaneously. Both are achieved by adaptation – the firm changes its own behaviour to conform to new trends in the market and new governmental pressures, thus achieving both profit and legitimacy. The essential point, though, is that it can also achieve those ends by reaching into both spheres, working to change the ideas and behaviour of customers and regulators.

How, then, can we theorize the more particular subject of firm motivation as it bargains with environmental regulators over demands for changes to the environmental performance of its factories and products? One approach is to simply add the positive and negative motivations. Positive motivations include: (1) possible profitability incentives associated with waste reduction savings and new green market demands; (2) legitimacy gains; and, (3) avoidance of sanctions threatened by regulators. Negative motivations include: (1) possible net profitability loss, even after waste savings are achieved; (2) the same legitimacy might be achieved at a lower cost by advertising to change firm and product image, rather than behaviour or

[42] See Mary Jo Hatch, 1997; Jeffrey Pfeiffer and Gerald R. Salancik, 1978; and Richard W. Scott, 2003.
[43] For study of the concept in the field of environmental policy, see Benjamin Cashore (2002, 503-529).

product design; and, (3) if sanctions are light, rational profitability calculation may well preclude spending on improved performance.

This leads to the conclusion that firm motivation will be decided primarily by the nature of the regulatory demand which it must address – the firm is likely to adapt to demands which cost little and provide high legitimacy gains, but will intervene in an attempt to change more costly demands. For purposes of this study, exploration of the research question set out above is limited to two variables: (1) internal corporate culture; and, (2) the external regulatory demand. The hypothesis is that the latter is more significant. This hypothesis is tested below by examination of responses to the major demands made of the six sectors studied. Before doing so, however, the nature of those demands needs to be briefly presented by means of an historical sketch.

In response to the growing political power of the modern environmental movement during the 1950s and '60s, both levels of government enacted environmental law and established regulatory departments. One of the most visible early issues was discharge of wood wastes and toxic chemicals from pulp and paper plants to rivers and lakes on the coasts and in Ontario and Quebec. Through negotiation with the industry, both the federal and provincial governments put in place new regulatory standards governing these discharges, accompanied by negotiated time-tables allowing considerable time to make the necessary production process changes (Bonsor, 1990).

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Twenty years later, sparked by concerns over newly discovered contaminants such as dioxins, both levels of government again negotiated a new series of regulatory standards (Harrison, 1996.) Air pollution emissions were also regulated and recycled-content requirements were imposed by some of the U.S. states in which the Canadian industry sold its product. Neither issue has been as visible in the news media and for that reason they are not examined here.

Also during the 1970s, environmentalists lobbying pressure led some provincial governments to adopt regulations requiring the soft drink industry to return to the sale of glass, refillable bottles that had been abandoned in favour of cheaper metal cans. The industry responded by an aggressive policy intervention in the 1980s, including funding provided for blue box curbside recycling programs. Although policy varies across the provinces, by and large the industry has been successful in moving governments away from the policy goal of re-use, forcing them to settle for recycling.

Emissions from motor vehicle factories, located in Ontario, were regulated in the early 1970s, along with all other pollution sources, and tighter standards were then imposed in the late 1980s and early 1990s, this time by use of the policy instruments of "voluntary" agreements. Far more attention was focused on performance of the motor vehicles themselves, both in terms of pollution emissions and fuel efficiency. Since the industry sells into an integrated North American market, the issue of harmonization with U.S.

standards has dominated the Canadian policy dynamic. Because the subject of regulation is a product, rather than manufacturing plant, jurisdiction rests with the federal government. Since the 1970s, federal standards governing nitrogen oxides and other tail-pipe emissions have been negotiated. In 1982, Parliament passed the *Motor Vehicle Fuel Consumption Standards Act* but it was not enacted, since the industry agreed to "voluntarily" meet U.S. efficiency standards. As part of its 2002 Kyoto climate change plan, the federal government announced it would press the industry to meet new fuel efficiency standards, something that is still being negotiated (Simmons, 2002).

Pollution emissions, occupational health and transport of chemicals have been regulated by both levels of government since the 1970s, through negotiation with the industry. Responding to the 1984 Bhopal accident and Canadian polling data showing public loss of confidence, the industry in the mid-1980s introduced the Responsible Care program, which requires member companies in the trade association to adopt improved environmental management systems (Moffet and Bregha, 1999). As discussed previously, since this was not done directly as part of a regulatory negotiating process, this is classified here as an adaptive response. In the 1990s, under the rubric of "toxic use reduction," environmentalists began to focus upon chemicals in their capacity as products, above and beyond pollution emissions, lobbying for regulatory action to have some banned. The issue came to a head during Parliamentary review of CEPA in the late 1990s and the industry responded with a major lobbying campaign that succeeded in blocking this initiative (Macdonald, 2002a).

Like other pollutants, acid rain causing sulphur dioxide emissions were initially regulated in the early 1970s, through negotiation with smelters and utilities. The same process was used to develop the 1985 national program, which combined provincial regulation and federal funding. During the 1990s, governments have been negotiating for more rigorous standards (Social Learning Group, 2001).

While acid rain was the most visible issue of the 1980s, that position was occupied by climate change in the 1990s. Almost all sectors, institutions and individuals are included in the potential regulatory ambit, but attention here is limited to the oil and gas sector. The industry negotiated a "voluntary" agreement to reduce carbon dioxide emissions from its own operations in 1995. Seven years later it mounted a major policy initiative, attempting, unsuccessfully, to prevent ratification of the Kyoto Protocol. While doing so, it quietly negotiated new standards for its own emissions, which will be expressed in another voluntary agreement or a legally binding contract (Macdonald et al., 2004).

These regulatory demands and associated responses are shown in Table 2:

Sector	Demand	Response
Pulp and paper, water	1) 1970s: solids, toxics 2) 1980s: dioxins, AOX	Intervene #2: negotiate Intervene #2: negotiate
Soft drink, containers	1) 1980s: return to refillable	Intervene #3: Blue Box funding, modify re-use goal
Motor vehicle, consumption and pollution	1) 1982 federal consumption law passed, not enacted 2) 2002 proposed new federal consumption standards 3) 1970s on, reduce pollution from firms 4) 1980s on, reduce pollution from vehicles	Intervene #3: voluntary action to meet U.S. standards Intervene #3: offer voluntary Intervene #2: negotiate, offer voluntary Intervene #2: negotiate
Chemicals, pollution and product	1) 1970s on, reduce pollution from firms 2) toxic use reduction in 1999 CEPA	Intervene #2: negotiate Adapt #2: mid-1980s, Responsible Care Intervene #3: lobby to block
Metals smelting, acid rain	1) 1970s initial regulation 2) 1985 acid rain program	Adapt #1: negotiate compliance timing Intervene #2: negotiate
Oil and gas, climate change	1) initial demand, early 1990s 2) 2002 Kyoto ratification	Intervene #2: voluntary agreement Intervene #3: lobby to block

Summary of results:

Adapt:	2, early 1970s, mid-1980s
Intervene #1, invite:	0
Intervene #2, negotiate	5, throughout the time period
Intervene #3, block	6, from early 1980s to 2002

As can be seen, there is no linear progression from interventionist to adaptive responses over the past forty years. As discussed above, this means that internal culture is not the major variable determining the sectoral response. The most interventionist strategies, intended to

significantly change or prevent the regulatory initiative were the following:

1) Soft drink industry action, early 1980s, to change the policy objective from re-use to recycling;

2) Motor vehicle industry action, early 1980s and early 2000s, to prevent imposition of separate Canadian fuel efficiency standards;

3) Chemical industry action, 1999, to keep toxic use reduction out of CEPA

4) Oil and gas industry action, 2002, to prevent Kyoto ratification.

Again, it is worth noting that these actions were not taken in the 1960s and '70s, when corporate culture was least green, confirming elimination of that variable. Beyond that, all four have to do with the *product* manufactured by the sector, not the pollution by-products. Factory pollution controls can be upgraded at a relatively minor cost. Regulatory action which will eliminate or limit total sales of some products, such as soft-drink containers, motor vehicles only meeting U.S. fuel efficiency standards, some chemical substances or fossil fuels, represent a much more significant threat. There seems to be a correlation between the cost that would result from imposition of the regulatory demand and degree of policy intervention undertaken to eliminate or change that cost.

The answer to the research question is that the most significant factor influencing industry response is the nature of the regulatory demand, in terms of threat to profitability. Firms adapt or negotiate relatively inexpensive demands but intervene through major political action to change or completely block more expensive demands. Legitimacy is achieved through behaviour change when the cost is low. When changing behaviour is more expensive, legitimacy is sought instead by advertising and public relations methods. The soft drink industry spent considerable sums on studies seeking to show that recycling cans was environmentally superior to transporting, washing and re-filling glass bottles; the chemical industry carried out advertising campaigns pointing to it's voluntary action, even while lobbying to weaken environmental law; and the oil and gas industry touted a "made in Canada" policy as being more legitimate than the foreign-born Kyoto Protocol.

No matter how green its corporate culture, the mandate of profitability leaves the firm no choice but to take political action to weaken costly regulatory threats. Nevertheless, the firm continues to pursue the goal of legitimacy. Further research into factors determining the success of such interventionist political action is needed to fully contribute to understanding environmental regulation through study of the regulated entity.

Democracy and Regulation

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Introduction

Compare two utility regulatory systems – one based on not very democratic "consultation," the other based on democratic objectives embedded in a written constitution. The consultative approach of the United Kingdom (UK), since 1989-1990, rewarded industrial customers and utility shareholders at the expense of citizens. Deregulated residential electricity prices skyrocketed and are still 25 percent above their starting point. In the first seven years of privatization, utility profits went up 172 percent (almost triple) and National Power paid dividends greater than the value of the entire company at time of privatization. Industrial prices have fallen about 13 percent.

By contrast, in South Africa, with a Constitutional guarantee of water for all, access to safe water in just ten years of democracy has increased 45 percent as a result of public investment in infrastructure and a statutory lifeline amount of water for everyone. The goal is to eliminate that last 13 percent who still lack clean water within the next five years.

South Africa has also adopted a statutory electricity lifeline. Electrification of homes has increased 36 percent in just seven years with the goal of doubling electrification to 100 percent just 17 years after statehood.

This comparison, of course, is deliberately overdrawn. The UK makes a substantial effort to reduce what it calls "fuel poverty." And South Africa is struggling to figure out how to involve its citizens in a regulatory process – though at least it *is* struggling – and appears to have bought much of the World Bank mantra that prices must mechanically reflect costs, however unaffordable the result may be. Access to safe water only means no more dependence on polluted rivers; this can still mean a walk of a half-km or more for a bucket of clean water.

The basic point though is valid. Democratic regulation yields better results from every point of view: consumers get affordable and stable prices; capital enjoys a relatively low risk environment for investment; and government achieves fairness and stability.

The Literature

There is a literature supporting the proposition that democracy is an important element of economic prosperity (Barro, 1997: 86, 119). There is an empirical correlation (though no theoretical connection) between democracy and economic growth, although some writers see evidence that political rights may retard growth at a "moderate level of democracy."

Some writers take the view that the data do not support the conclusion that more or less democracy is necessary for economic growth or report that the literature on the effect on growth of democracy and stability is contradictory (Barro, 1997: 61; Feng, 2003: 319 *et seq*). On the other hand, "systematic empirical studies give no real support to the claim that there is a general conflict between political freedoms and economic performance" (Sen, 1999: 150, n. 4).

Other writers see a more positive connection between democracy and prosperity. For example (Feng, 2003: 296):

> I found that political instability and policy uncertainty have significant negative effects on growth. The effect of democracy on growth is positive, but statistically insignificant. However, I argue that democracy affects growth through its impacts on political instability, policy uncertainty, investment, education, property rights, and birth rates.

Similarly, privatization is said to require institutional capacity. State strength – more important to economic development than scope – requires legitimacy, *i.e.*, democracy. Democracy also increases functionality, which opposes the view that transition requires autocracy at least for lowest-developed countries.[44]

The Elements of Democratic Regulation

The elements of democratic regulation are based on political process. Ultimately, everyone must win, so negotiated settlements among interests with similar resources may be democracy's highest form. The basic elements are:[45]

a. Transparency of information. ALL information is available, including by periodic detailed reports.
b. Mechanisms for public participation, including process rights, the right of appeal, and funding. This includes procedures for public intervention, proceedings that are all open to the public, transcribed records of all proceedings, liberal rules for who can participate, and uniform administrative procedures. Training and resources are also essential. It is appropriate for those with a stake to have a regulatory role, but there is often a need for the capacity to participate.
c. Decisions that follow rules in order to limit discretion (e.g., prices related to costs, tempered by a

[44] F. Fukuyama, 2004: 18-20, 26-29, 59. Fukuyama favors privatization. He also cites Barro's finding of negative correlation between democracy and growth at medium (increasing) levels of per capita GDP.
[45] Please consult *Democracy and Regulation* and the *Transfer* article for detail.

standard of justice and reasonableness) and that must set out their basis, so as not to be arbitrary or capricious, and that must address every issue.

d. A balancing of interests so everyone has a stake in the process, and
e. Investments that are protected.

Democratic Regulation Works

The U.S. and Canada remain the high point of democratic regulation. In the U.S., for example, renewed public participation in the electricity regulatory process in the 1970s reversed what had been decades-long price favoritism for industrial customers. For decades, only industrials had been at the table. When a new point of view came to the table, it was heard. Residential rates tripled in the 1970s as a result of OPEC oil pricing[46] and nuclear plant cost overruns. But industrial rates increased by a factor of about 4.5, which eventually led to industrial customer pressure for deregulation in order (many industrials then thought) to capture lower prices for themselves.

The history of regulation is replete with examples of where democracy triumphed – and the many times where it operated less than perfectly.[47] Most recently, in the U.S., a handful of states have demonstrated what happens when democratic regulation is abandoned in the electricity industry:

- In California, prices rose by a factor of ten, costing the state billions of dollars.
- In Texas, residential rates are up about 20 percent since deregulation. So-called competitive prices are higher than regulated prices were before deregulation.
- Ohioans save six percent on their electricity bills, but only because of a deferred utility subsidy that all ratepayers will eventually pay – at $3.21 for each dollar saved.
- Massachusetts' deregulation illustrates the volatility introduced into prices – a price range of 80 percent in just four years. Low-income arrears have as much as tripled.
- In other states, consumers have chosen to ignore the opportunity to choose a supplier– often because there are few or no choices available. Indeed, academic studies and other evidence show that consumers want neither many choices nor uncertain prices.

It is not only consumers who have suffered from U.S. deregulation. Deregulation threatens the financial health of the power industry itself – billions of dollars in value have evaporated as a result of their unsupervised poor planning. Of those not bankrupt, few have investment-grade ratings on their bonds.

[46] Oil was a major electricity generating fuel at the time.
[47] Please consult *Democracy and Regulation.*

Labor losses have been severe as well, ranging from about 30 percent to 60 percent.

Indeed, deregulation has not worked for any essential network service.

- Natural gas prices (at wholesale) more or less tracked the Consumer Price Index (CPI) until the 1970s. Prices were coming down in the 1980s, but flattened for about ten years when wholesale prices were deregulated. Now these deregulated prices have for the first time shot up much faster than the CPI.
- Cable Television prices rose 36 percent from deregulation in 1996 through 2001, three times faster than inflation. More recently (Associated Press, 2005: D1), the US Federal Communications Commission reported average cable TV rates rose 5.4 percent in 2003 and 7.8 percent in 2002; this is about two to three times the rate of inflation.
- Long distance telephone savings have been dramatic since their prices were deregulated in 1984. But most consumers are much more dependent on local service, the price for which has about tripled.
- The chaotic, marketized American health system "fails to protect its most vulnerable citizens." "The entry of for-profit, business-minded companies into health care … [has] given us the world's largest, costliest health care bureaucracy, engulfed by red tape and maddening complexity. … Too often, treatment delayed means care denied" (Barlett and Steele, 2004: 5).
- Airlines prices fell faster before 1978 deregulation than after – and that doesn't count reductions in service quality, seating space, meals, and number of airports served. Prices actually rose 26 percent at monopolized airports like Chattanooga, Tennessee. Yet over the entire history of the industry, in the aggregate, the industry has lost money, so deregulation has not been any better for airlines than it has been for consumers. Indeed, since 1947, airlines have a net loss of $6 billion (Daniel, 2004).

This phenomenon is worldwide:

- **Yorkshire Water Company, Leeds –** The UK privatized water in 1989, projecting that the new companies would invest over 3 billion pounds per year in infrastructure to repair badly leaking systems and allowing them to collect this amount in rates. Instead of investing, the water companies cut staff, decreased investment, and pocketed the difference. In the town of Leeds, the company considered evacuating part of

the city rather than fix the leaky pipes and restore water (Palast et al., 2003: 11, 23).

- **Rio Light goes Dark –** When Brazil privatized its electricity industry, in 1997, it sold Rio de Janeiro's Rio Light Company to foreign investors, including Electricité de France, who promised to improve service. Instead, the new owners fired many of the workers and increased shareholder dividends by over 1000 percent. Unfortunately, there were no maps of the electric distribution system – it was all in the heads of the workers. Blackouts occurred almost every day, earning the company the sobriquet "Rio Dark" (Palast et al., 2003: 9). Throughout Brazil in 2001, IMF policies restricting state investment in power plants resulted in 20 percent mandatory power cutbacks – blackouts – despite there being excess hydro capacity to tap (Palast et al., 2003: 174). Other blackouts attributable to unregulated generators include, of course, California in 2000 and 2001, and the Dominican Republic where privatized generators increased prices more than 50 percent and cut off power when the government couldn't pay (Palast et al., 2003: 175).

- **World Bank and IMF –** The World Bank and other international lending organizations use phrases like "structural adjustments" to disguise what they mean by replacing state ownership of essential services like electricity and water with market forces and private ownership and control. They then will lend money only when these "structural adjustments" have been made. "Thus, the visible hand of state policy is replaced by the invisible hands of international bankers" (Palast et al., 2003: 163, 169).

- **Dabhol, India –** Although the World Bank did not support this particular project, its policies and pressures in India (including suspending loans to non-compliant states) contributed to this disaster, spawned by Enron in partnership with GE and Bechtel. These foreign investors were guaranteed by the state, in US dollars, for payment on all potential output, whether the power was needed or not ("take or pay"). Power was priced three times higher than the cheapest alternative; it wasn't needed. The state is now in hock for hundreds of millions, and Enron is gone (Palast et al., 2003: 170). As of April 2004, the plant had lain idle for three years, since May 2001, when the State had built up a debt of $240 million (Palast et al., 2003: 170; No author, 2004).

- **Nordic Countries –** Prices for generation dropped, at first, but became more volatile as water levels rose and fell and expensive generation was

required to fill the gap. From July 2000 to July 2001 (a period of low rainfall), prices leapt 247 percent. Even when prices fell, industrial customers benefited the most – and in Norway, all prices rose. Meanwhile, employment in the Nordic energy sector fell by 26 percent since 1990 (Palast et al., 2003: 180).

- **Cochabamba, Bolivia –** In 1999 a British company, International Water (a Bechtel company), bought Cochabamba's water utility and immediately raised rates (the Company says 35 percent, consumers say 100 percent) to build a huge dam and expand the local water system. There were no accounts available for anyone to monitor expenditures; no hearing to determine the need for nor costs of the projects. All was done in secret, and was more expensive than alternatives, according to the World Bank, although the Bank pressured water customers to pay the surcharges. In April 2000, Cochabamba citizens took to the streets in protest. Government forces killed two people. Eventually, the price increases were rolled back: regulation by riot (Palast et al., 2003: 125-26).

Democratic Regulation is not Created Overnight – A Quick Tour of 100 Years of Democratic Regulation

Democracy is, of course, a set of interrelated institutions that cannot be set up overnight. The U.S. system of democratic regulation did not emerge full-blown in its present form. It took about 100 years of fits and starts, usually precipitated by a crisis, to develop the policies, principles, and mechanisms found in all 50 states (and 2 cities – Washington, DC, and New Orleans).

U.S. utility regulation actually began in the mid-19th century, with the railroads (which were similar to the electricity industry of today: large investments of capital are needed; they are natural monopolies; and they provide an essential service). At first, State governments granted powers of eminent domain; a few large railroad companies ran roughshod over regulators; and railroads watered stocks and inflated prices. In 1869, Massachusetts formed a state commission for the first democratic regulation of a private utility. The law required railroads to release information to the Commission "at all times, on demand" – emphasizing transparency of information to protect the "public good" (Palast et al., 2003: 108).

In the early 20th century, Samuel Insull in Illinois, who predated Ken Lay of Enron by 100 years, but whose schemes and eventual downfall bore a considerable resemblance, personified "big trusts." Insull and other private utility owners feared the growing popularity of municipal and other publicly owned utilities as a threat. They agreed that state regulation would legitimize their monopolies and guarantee their solvency. During this time, the principle of "just and reasonable rates" was incorporated into

regulatory proceedings (Palast et al., 2003: 111, 113).

In the meantime, a small number of utilities were consolidating, forming multi-state holding companies to escape state regulation. This was often accomplished through stock-watered pyramid schemes. By the end of the Roaring 20's, ten utility systems controlled 75 percent of the electric market in the US – and were not subject to state regulation.

These excesses led to federal intervention in the 1930s, including: the Federal Water Power Act; the Federal Power Commission, established by the Federal Power Act; the Tennessee Valley Authority (TVA); the Bonneville Power Administration (BPA); the Rural Electrification Act; and the Public Utility Holding Company Act (PUHCA) (Palast et al., 2003: 115-18).

Economies of scale, and growth rates of eight percent per year between 1932 and 1973, brought declining electricity rates and very little demand for intensive regulation. But, with the blackout in the Northeast in 1965 and the oil and nuclear price spikes of the 1970's, the need for regulation once again became apparent. Consumer advocates began pressing regulators to take their jobs seriously. The Public Utility Regulatory Policies Act (PURPA) of 1978 opened the monopolies in power generation as a reaction to expensive utility decisions about nuclear power and to promote renewable energy (Palast et al., 2003: 119).

Regulator-mandated long-term planning (Integrated Resource Planning or IRP) in the 1980's forced utilities to look at the cost of conserving energy vs. the cost of generating it. Negotiation (as opposed to, or following, litigation) became a preferred method of resolving conflicts between utilities and consumer and environmental advocates in some states, including Massachusetts.

IRP in the 1980s was one reaction to the oil and nuclear price spikes of the 1970s. Another resulted in the excesses of the 1990's. Following Great Britain's lead, and responding to pressures put forth by large industrial customers, the U.S. began disastrous experiments in deregulation of the electricity industry. These efforts have led to excesses not seen since the 1920's – most notably Enron and other actors in California.

Notable about the crises and excesses along the way is that they have been dealt with and responded to through structures provided by democratic regulation.

The Benefits of Democratic Regulation are Worth the Trouble

Our case for democracy is that it works better for everyone. One genius of successful democracy is that it calibrates decisions in rough proportion to the intensity of all interests presented. This collective wisdom makes decisions in which a broad array of interests has a stake. The interests typically include:

- Low, stable, affordable prices
- Reliability

- Health and other social goods
- Jobs
- Manageable risk for capital
- Economic development
- Political stability

In our view, the price is reasonable: lower profits, slower decisions, economic activity that does not fit in theoretically neat economic models. More often than not, we submit, this balance has been successfully struck by democratic regulation.

Some Future Issues for Democratic Regulation

Among the current challenges for democratic regulation are these:

How to balance short-term and long-term objectives?

For example, there is uncertainty about how to accommodate technological progress without excessive (however that may be defined) disruptions in price, convenience, investment, and employment. The old regulatory model involved customer-financed R&D at places like Bell Labs plus slow financial transitions to minimize stranded investment and loss of jobs. This was criticized as slow, but the alternatives are disruptions such as cell phones and internet phones displacing utility phone service. Is there a balance?

Democracy may be fairly criticized as being more interested in the short-term than the long-term. By contrast, professional expertise, such as is emphasized in a consultative process, is more likely to give weight to what it considers to be appropriate long-term considerations. However, it is not possible to extricate political decisions from technical ones; there often is no single technically "correct" answer. To which we would add that ordinary voters probably have what economists would call a high discount rate: short-term considerations, such as today's price for utility service, may have a greater importance to the population at large than to experts. The value of democracy is to give voice to the needs and desires of the population at large.

How to balance economic vs. non-economic interests?

For example, what is the proper balance between a representative democracy and a right of all those affected by a decision to have a voice? New England has an environmental interest in Ohio electric generating plant siting decisions. Europe and Pacific Islands have a climate change interest in carbon decisions anywhere else in the world. Who gets to participate in decisions that affect them?

Similarly, how are non-economic and non-commercial interests, including low-income interests, represented in a system that requires economic resources to participate?

Finally, how is it possible to balance economic interests of the developed world from dominating the democratic needs of the developing world?

Institutions such as the World Bank say, in effect, to sovereign nations such as India and South Africa: "*we* know you should direct resources from electricity subsidies to other

purposes, such as health, so we will condition loans (including IMF loans) on your doing that by deregulating your electricity sector." What is required for nations such as India and South Africa to be able to successfully resist such pressures to give up their democracies?

Conclusion

Democratic regulation means that the rule of law provides an opportunity for all to obtain critical information and to participate in the rate-setting and governance process of essential services– without rioting in the streets. Democratic regulation results in lower and more stable prices, higher quality, lower risk, and more secure employment. But the most valuable result of democratic regulation is … democracy.

How Have Countries Accomplished Effective Regulatory Reform?

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1. Synthesis of six case studies.

I will give a brief summary of lessons learned from a review of reforms we at Jacobs and Associates carried out recently in Mexico, Hungary, Korea, Italy, Australia, and the United Kingdom. The focus of these case studies was not on the content of the reforms themselves, but on the "whom" and "how they came about," and the ways in which the reform efforts were institutionalized by the respective governments. While the nature of these reforms varied, their implementation raised common issues that we found instructive.

The reforms involved the following:

1. In Australia, the National Competition Policy (NCP) (1994 to the present) was a broad-based effort to change the regulatory and monopoly roles of the national and state governments to strengthen competition in the economy. Each government was to identify regulatory restrictions on competition and eliminate them. Competitive neutrality was to be established to ensure fair competition between government, businesses and private competitors. State governments were to adopt legislation mirroring the federal competition law prohibiting various kinds of monopolistic conduct.

2. Hungary, from 1989 to 1998, moved to create a market-based economy by fundamentally re-orienting the institutions and legal regimes that had been built for the socialist economic policies of the post WW-II regime. At the same time, Hungarian society embraced the construction of a more open and democratic system. The complex series of economic and institutional reforms involved mutually reinforcing policies, including market openness, privatization, liberalization, deregulation, re-regulation, and institution-building across all organs of the government.

3. In Italy, the "Bassanini" reforms (1996-2001) were focused on public governance and regulatory reform. Key objectives were to change the central/local balance of power, and replace "statism" with pro-competitive policies to position Italy to succeed in the more open European market. Reform efforts included: privatization and liberalization of, e.g., electric

power, gas supply and distribution, telecommunications, railways, postal and telegraph services, banking, and local transport; devolution of centrally-based government responsibilities to regional and local levels; cutting red tape and improving regulatory quality; and civil service reform to promote professionalism and greater distance from political pressures.

4. In Korea, the reform program that started in 1998 was based on two key initiatives. The first was a massive deregulation initiative in which the President ordered each government ministry to eliminate 50 percent of all of its regulations. The second was an enduring institutional reform, most notably the establishment of the Regulatory Reform Commission (RRC) to monitor and promote regulatory quality from the center of government.

5. In Mexico, much of the energy of the two presidential administrations from 1988 to 2000 was devoted to redefining the role of the state by minimizing its active role in the market and redefining its regulatory role. The ultimate aim was to shift the relative scope of the private and the public sectors. Mexico initiated and joined into free trade agreements as the anchors and drivers of reform. To take advantage of the opportunities created by the trade agreements, the government intensified and deepened structural reforms, beginning a new round of privatization. Joined with this effort was an effort to reform the regulatory framework, beginning with elimination of regulatory barriers, and moving into efforts to strengthen regulation through creating appropriate market rules and institutions.

6. In the UK, Prime Minister Thatcher initiated a reform effort in 1979 that has turned into a continuum of linked efforts to improve management of the economy, strengthen public governance, and improve the regulatory environment. Highlights include privatization, creation of competitive markets, and independent sectoral regulation of privatized utilities; improving capacities for quality regulation, reduction of administrative burdens; a new competition policy consistent with EU competition law; and improving the delivery of and reducing the administrative burdens imposed by public services at, e.g., schools, police, and hospitals.

2. Successful reforms.

To some extent, this evaluation of national reform efforts covers familiar ground − in that every assessment of the political economy of reform seems to arrive at similar general conclusions.

The most important ingredient for successful reform is the strength and consistency of support at the highest political level. But elected leaders cannot implement reforms alone. Open dialogue and communication strengthen the voices of those who support and will benefit from reform. Losers know what they stand to lose but the gainers will have little idea of what they can expect to win, so the government needs to tell them. And most agree that governments must organize themselves better − coordinate better, mostly.

But these general conclusions are just that, very general. My discussion attempts to identify a richer and more detailed set of the lessons we have learned. This requires one to focus not only on the sources of successful reform, but also on the factors that undermine or counter successful reforms. This also requires a basic understanding that the reform process is dynamic, not static − and those factors that contribute to success at one point may later act to undermine it.

3. Basic Principles for Reform.

I would like now to highlight three strategic concerns, as well as a number of more specific lessons.

3.1 Reformers should prepare for the long haul.

Effective and durable reform is a dynamic, long term process. It is not a single, static program. To be successful, reform should be expected to span more than one political cycle, preferably several.

Bold reforms and early results are desirable, if they are possible. The stronger the initial reform targets and the more successful their implementation at an early stage of the process, the more likely that reform will acquire its own positive momentum. Success breeds success. To persuade stakeholders to support the reform process requires that the government show them concrete achievements.

Perhaps of even greater importance, deep changes at an early stage help ensure lasting political consensus for continued reform. Deep rent-reducing reforms are not popular, but are less likely to be reversed by successor governments, if the hard work is done at the outset. In Hungary, the early market-openness reforms played a vital role to anchor the structural reforms, to attract foreign direct investments, to diminish the social and economic costs of reform through cheaper imports, and to help the privatization process and the transfer of technology needed to sustain growth in the future.

In addition, setting a long-term, dynamic course for reform maintains momentum. Gains from reform tend to dissipate over time with economic and social changes, and there can be constant pressure from losers to reverse or undermine achievements. Reform programs must be reviewed and updated to ensure that they continue to address key needs and deliver ongoing pay-offs for the economy and society.

In Australia, the reform mechanisms were sufficiently robust to survive for the long haul.

Formalities that locked in the reform process helped, such as the public agreements between the national and state governments that included clear goals and benchmarks for next steps.

In Mexico, by contrast, the political and public support was too fragile to hold the course. The Italian experience shows the difficulties that can be faced if effective institutions and processes are not embedded into the reform landscape.

3.2 The political, social and institutional reforms required to carry out structural change are dependent upon the development of the society.

In initiating reforms, one should never forget that reforms are only accepted and are only sustained according to a society's degree of acquiescence. Without resistance from society, top-down technocratic reforms can be implemented quickly and more completely (as in Mexico at the end of the 1980s).

However, if for internal or external reasons (a crisis), the technocrats lose the trust of political leaders, the bureaucracy, the stakeholders or even the general public, top-down reform becomes harder and or even counter-productive. A more consensual strategy is required in that case.

For example, in Mexico, more time will be needed to communicate and build constituencies supporting continuing reform. By the early 1990s, the corporatist model was changing in Mexico, and reformers did not appreciate the shift. The 1995 financial crisis only precipitated the realization that a more open and accountable approach was required. It has taken many years to start establishing the foundation of public acceptance on which future reform in Mexico will be based.

Similarly, an important lesson from Korea is that, to sustain any ambitious program of regulatory reform, the government and country must accept that market discipline is a tool for achieving important national goals rather than a hindrance. Regardless of whether the nature of reform involves political or economic structural operations, reform in Korea is aimed at changing the role of the government and the way the government, businesses, and the public interact in the market.

3.3 A successful reform is more likely if a country implements each of the accepted best practices in ways that reinforce each other.

Best practices for accomplishing reform need to be viewed as an interrelated whole of closely linked efforts. Successful reform is more likely if one implements each of the best practices in a way that each effort is linked – one reinforcing the other in a mutually supportive effort. Following some but not all of the best practices may have the effect of undermining the overall reform effort to cause it to fail – or at least to fail to reach its full potential.

4. Lessons Learned.

These three strategic concerns are quite general. Here are some specific lessons for consideration.

4.1 Political support should change in its style and relations with stakeholders from the time the reform is launched to the time the reform is implemented.

Most studies reach the conclusion that political support – preferably bipartisan – is essential for radical reform. However, the Mexican case study adds a nuance to this. It shows that the nature of political support must adapt as the reform advances and involves different stakeholders.

At the beginning of the reform, political support meant pushing, commanding, and expending sheer political capital in overcoming resistance. That is, launching reform needs more sticks than carrots – supported, often, by an external crisis to justify the reform. But as reforms are adopted, legal texts are enacted, and the implementation phase starts, the nature of the political support needs to change into guidance, steady leadership, more open and participatory approaches, and defense of the reform institutions that will be under fire.

The difficult phase of building stakeholder ownership and constituencies for reform will require different leadership styles, communication skills and mixes of incentives. As the reforms progress, they will need to include a phase of building institutions and human resources.

In Hungary, the massive "Great Adjustment" (1989-1998) was vital to anchor the series of reforms to follow. However, some of the most important reforms required a transformation of the legal and institutional setting required for markets to function. These types of reforms required consensus building and consultation as they required convincing the stakeholders and achieving common acceptance by the public before they could be fully implemented.

4.2 A clear, comprehensive, and well-designed reform plan should start the process, although it should provide room for evolution over time.

A reform plan provides a focus and rallying point for reform, and creates a basis for monitoring and evaluating the progress of the reform. The comprehensiveness of the plan needs to be based on a careful appraisal of the interlinked issues that need to be addressed. A piecemeal approach risks losing time and reducing reform impacts. At the same time, the plan needs to be manageable, capable of being implemented, and corrected over time.

In Italy, at the outset of the reform, a comprehensive and well-designed reform plan persuaded skeptics to support the program. The plan was radical enough in design to be a persuasive answer to the problems it sought to address, rather than limited to a piecemeal approach. There was a clear focus on the core mission of the state to support the privatization strategy. Cutting red tape and reducing regulatory costs was a key ingredient because of the direct relevance to citizens and businesses – important stakeholders. This was backed up by deployment of an array of specific reform tools – self-certification, one-stop shops, codification,

RIA, e-government, and reforms to strengthen the civil service.

Mexico developed a comprehensive reform plan. The pillars of reform: market openness, privatization, and regulatory reforms – were mutually supportive. Market openness increased pressures for economic liberalization, which led to reforms in the public sector capacity for good regulation. This logic of reform helped maintain forward progress as constituencies were created, and helped to push the next phase along.

In contrast, the Korean reform plan suffered from a number of weaknesses. The rigid focus on deregulation undermined popular support for regulatory reform because people began to view regulatory reform as conflicting with politically popular national objectives and agendas. Korean reforms tackled individual regulations rather than regulatory programs, which often involve interlinked groups of regulations. The most effective approach in reforming interlinked packages of regulations is to review the entire package and reconstruct the system of regulations from scratch to achieve the policy goal with the most efficient means.

In the UK, the ad hoc approach to reform proved to be weak in keeping reforms on course. The lack of a publicly endorsed strategy at any stage has slowed reform and announcement to the public of reform results. The accumulation of new initiatives, big and small, has often been difficult for stakeholders, including the government itself, to understand and assimilate. An overall strategy fights for breath in an environment buffeted by ongoing, incremental changes.

4.3 International best practices and agreements can anchor and drive reforms.

A pro-reform international environment can ease the task of convincing local interests to change. Convergence of views within the EU over market freedom, privatization, and structural reforms, as well as the EU impetus for changes to competition policy, provided the UK with arguments and allies for change. Mexico relied upon its membership in the OECD to learn about best practices in regulatory reform, e.g., the need for a central regulatory reform body, the move from deregulation to regulatory quality as the key principle for reform, and the adoption of RIA.

Mexico also linked reforms to international obligations such as NAFTA to provide an anchor to drive reforms. Because an international treaty like NAFTA with significant partners deprives a government of the discretion to unilaterally reverse reforms, it serves to "ratchet" government actions towards comprehensive reform. A treaty can also be used as a powerful argument to push for reforms against interest groups supporting the status quo.

In Hungary, while the details and scope of its reform efforts varied over time, the underlying goal of seeking to join the EU drove reform efforts forward.

4.4 Implementation requires allocation of commitments and responsibilities at appropriate levels, and recruitment of like-minded experts.

The best reform plan can come to nothing – or be not nearly as successful as intended – if sufficient attention and resources are not devoted to its implementation. Making certain that governmental commitments and responsibilities are clearly allocated at the appropriate levels helps key players in their task. A reform plan that articulates reform principles and that takes a consistent, comprehensive approach provides accountability. But this alone is not enough. The players must have sufficient muscle to be able to deliver on their responsibilities. This can mean setting up new bodies without established ties to specific interests.

As a transition country, Hungary made special efforts to develop the necessary institutional arrangements for implementing the market-based reforms, such as the competition office, the privatization agency, and different sectoral regulators. Simultaneously, Hungary sought to constrain this additional executive power within a democratic system of governance, creating a Constitutional Court, the State Audit Office, and the Ombudsman for Civil Rights.

In Korea, the government created highly focussed Regulatory Reform Groups within each central government agency. These units were needed to trigger the changes, break administrative and cultural moulds, and provide new capacities to the public administration. In both the UK and Australia, it has also been helpful for the government to "recruit" high profile business people to advocate and support implementation.

In Italy, in contrast, slow results contributed to a general failure of implementation. The reform plan was successful in setting up a new legal framework and made good headway in some other respects, but these achievements were not consolidated institutionally. Concrete and lasting results can only come through effective implementation that produces the visible results needed to sustain allies of reform.

In Mexico, the design of reforms often overlooked the different needs for their implementation. Some legislative reforms never reached full implementation. Deep changes in regulatory approaches usually require long periods of gestation before they are fully implemented. These key issues were for the most part not properly contemplated during the design phase.

In Korea, regulatory reforms focussed unduly on legal changes, not actual implementation of those changes on the ground. The central pro-reform agency needed to have not only the authority to review legal texts, but also the authority to oversee the implementation of regulatory changes to ensure that they are actually carried out by the regulatory agency. This is particularly important because regulatory agencies can easily dilute the effectiveness of any regulatory changes by such means as administrative guidance and informal interventions with those that are regulated.

In addition, Korean reformers learned that there is a structural bias in modern public administrations in favor of introducing new regulations, even if the social cost of a regulation does not justify the expected benefits. In addition, regulating agencies tend to over-estimate the expected benefits of a new regulation, and under-estimate the potential social costs and negative side effects. To correct this problem, an independent non-regulatory agency should be given the authority to control the quality of regulations. RIA, as an effective tool to evaluate regulatory qualities, could reinforce such a function.

Regulations become excessive and restrictive partly because the regulators are suspicious about the private sector's ability to self-regulate and maintain order by itself. However, the ability to self-regulate and maintain order is not inherent, nor is the market function. These qualities need to be cultivated and the private sector should be given an opportunity to practice self-regulation and become more involved in market functions. In Korea, however, the approach of regulatory reform was neither private-sector driven, nor aimed at self-regulation. This cultural change has just begun, six years after the 1998 reforms were launched.

4.5 Developing supportive institutions sustains reform even as political will becomes unfocussed.

Political leaders tend to lose interest once the political gains of regulatory reform are over. They may look elsewhere to increase their political assets.

As a result, institutions which are preferably new, well-positioned in government (or in relation to government), with adequate resources, are necessary to move the practical reform agenda forward. Just as important, they can become powerful reform advocates binding the process and continuing even when political will weakens.

In carrying out its various reforms over the long term, the UK developed a dense web of pro-reform institutions. This ensured that reform momentum was sustained through successive political cycles. Even though its strength varied, its direction was never lost or changed. When political momentum faltered, the institutions took over and ensured that the reform process continued.

In Korea, regulatory reform, in the form of quality control on any introduction and revision of regulations, has become a part of government operation. In 1998, Korea created a full-time office directly under the President dedicated to the reform of regulations. This began to change incentives in the bureaucracy. A group of government officials formed their career interests around the success of regulatory reform. Since then, the quality control process has continued whether or not the president or prime minister had direct personal interest in regulatory reform.

In contrast, planning in Mexico (including the capacity to adjust quickly to changed circumstances) was insufficient in that some major sequencing problems emerged that undermined the benefits of reform. Competition

and regulatory frameworks were underdeveloped and insufficient to support major privatisation of infrastructure services, undermining support for the entire reform process. Short-term gains were not properly weighed against longer-term sustainability in some cases.

4.6 The national government itself needs to maintain a commitment to implementing reforms.

During the process of implementing reforms, it is important that the national government speak with one voice on the goals for reform, and coordinates how the various ministries implement the reforms. In Italy, successive Prime Ministers, backed by strong leadership from a minister vested with strong powers and the authority to put the reform plan into action, pushed the reform forward. With the 2001 change in government, the reform responsibilities were split among four ministers, leading to progressive failure of coordination which slowed and even reversed the implementation of reform.

In Korea, the regulatory reform mechanism was broader than any previous effort, but still could not create sufficient cooperation between the individual ministries and the central agencies responsible for regulatory reform. More involvement by the budgetary authorities would have been useful to ensure that regulatory reform was included in the daily routines of governing.

In Australia, mixed incentives and lack of reform pressures on the federal government fragmented reform efforts, i.e., the federal government accomplished less in its reform performance relative to most state governments.

4.7 National reform efforts need to communicate with and enroll the support of provincial, state, and local governments for national reforms.

Depending on the nation involved, many national regulatory and other programs are enforced and implemented by officials in provincial, state, and local governments. Just as with the national bureaucracy, officials in provincial, state, and/or local governments are able – through their day-to-day implementation of national and related local programs – to support or undermine national reform efforts. In addition, in some cases, stakeholders and the public may not see the benefits of a national reform unless and until the provincial, state and local governments implement related reforms.

For Australia, the National Competition Policy (NCP) reform was a broad-based reform to change the regulatory and monopoly roles of the federal and state governments to strengthen domestic economic competition. The heads of the Australian states and regional territories and the head of the federal government all signed formal agreements to adopt the NCP. In this way, the state governments took responsibility for their own review activities, which helped ensure they implemented review recommendations. In addition, financial incentives were used to bring state government stakeholders on board. The threat that payments might be withheld if targets were not made (even if it was not used often) did have a persuasive

effect on states to implement reform obligations in some cases.

Even so, in Australia, inadequate understanding and poor communication with state governments slowed reform. Despite the generally transparent nature of the NCP reform process, a clear understanding of its implications did not always percolate down to state governments, which led later to some reform blockages. Communicating the fact that the reform would yield public benefits and was not just "competition for competition's sake" was inadequate, especially at the early stages.

It was also difficult in Australia to ensure that reform efforts remained focused on the original goals. The legislative review program involved having participating governments review some 1,800 separate laws, which were self-selected. Different governments applied the same reform criteria in different ways – basically using the reform process to follow their own agendas.

In Italy, local resistance to reform was greater than anticipated. Liberalization, privatization and outsourcing met greater resistance from local oligopolies than national monopolies. In Korea, regulatory reform at provincial and local governments should have had a higher priority to ensure that reform benefits were translated into action that people could see.

4.8 Ensuring a supportive bureaucracy should be done through building its skills and providing signals from central ministries.

Human resources and administrative quality processes are key to the implementation of reforms. Where necessary, steps need to be taken to ensure that the civil service is equipped for the task of implementing reform, which may mean that reform has to start with the bureaucracy itself. Preparing and training civil servants for their role in reform – which is also a powerful form of communication of reform purpose – can also be anticipated as part of the reform process. Centrally placed structures and the support of finance ministries can be very helpful in this process.

It is not sufficient to have institutions with well-designed missions and appropriate regulatory frameworks. The bureaucracy needs to "buy in" to reform. Regulators and enforcers must understand the reasons for which regulations are created, and the ultimate goal of regulatory or administrative disciplines. The implementing bureaucracy needs to gain a sense of ownership in the reform effort.

In Italy, national labor contracts, agreed through collective bargaining, replaced public law in the regulation of some 80 percent of the civil servants. In this framework, individual contracts determined the length of assignment, duties and salaries, which varied with the level of responsibility and performance. Separation of the administration of politics was promoted through guidelines clarifying respective responsibilities.

But this part of the Italian reform met with especially strong resistance from politicians and

civil servants alike, as well as the Italian Parliament and unions at the local level. The new framework was sometimes openly flouted (for example, hiring without competition). Since 2001 the "spoils" system which connects politicians with civil servants has grown significantly.

A major obstacle in the case of the Mexican reforms has been the difficulty in modernizing the public administration, as well as depoliticizing it.

In Hungary, the bureaucracy remained a staunch bastion of resistance. Despite instructions and precise requirements the civil servants rarely deregulated on their own. For example, senior officials systematically opposed any involvement by the deregulation commissioner from the Prime Minister's Office in overseeing *ex ante* the quality of the draft measures involved. Even if disputes were resolved at the political level, the line ministries would keep postponing their practical implementation, or rendered enforcement more difficult by passivity.

4.9 Effective and ongoing communication at all levels builds continuing support for reform.

More is required than just strengthening the civil service, and enrolling it in support of the reforms. Successful reform also implies continuous and clear government communication explaining the purpose of the reform and its progress. The government needs to communicate not only with the key participants in the reform process but also with the public. The general public may be more likely to turn against reforms if it is ill-informed, and consultation and debate can also help to strengthen the substance of the reforms. The Australian use of a Parliamentary enquiry into the reforms generated considerable press coverage and caught the public's attention.

More basically, the purpose of this ongoing communication is to build a coalition within society around regulatory reform. Stakeholders develop a sense of ownership in the reforms due to participative arrangements.

Narrow political bases should not be relied upon to drive reform, since sustainability is at risk. Spreading ownership of reform across as large a number of stakeholders as possible ensures that reform "champions" emerge who will outlast the demise of any particular individual. In the UK, business and consumers were made part of the reform process and thus did not oppose it, or debate whether it should take place at all.

In Italy, a top-down, bottom-up dual approach to implementation started the reforms off well. A strong central strategy and leadership was complemented by reform implementation mechanisms which engaged all the stakeholders and promoted ownership of the reform, as well as strengthening accountability for results (although that did not last either).

In Mexico, in contrast, the lack of transparency and adequate communication of reform goals, benefits and costs reduced the longer-term acceptance of the reforms. In retrospect, many

reforms needed earlier and stronger efforts to institutionalize and communicate them to society.

Speed of change and flexibility in policymaking is often desirable for launching and implementing necessary changes, but they are no substitute for transparency, dialogue and inclusion of the public bureaucracy, stakeholders and the public in the reform process. Many reforms in Mexico lacked the needed consensus and a sense of ownership by large sections of society and in particular the public administration. This lack of consensus has led to an inherent instability of policy arrangements that ultimately acts as a deterrent for further complementary reforms.

4.10 Monitoring and evaluation keeps players on track, and publicizing results helps to sustain reform momentum.

The core aim of evaluation and publicizing results is to demonstrate the objective benefits of reform to all stakeholders and to disarm the critics. Evaluation also creates effective feedback loops which allow reform programs to be modified and improved over time.

Effective implementation requires that the reformers articulate clear, specific and measurable objectives or benchmarks to track progress, and to avoid the criticism that the reform is too general and abstract. An effective regulatory quality management system should also be in place to encourage adoption of best practices, including evaluation mechanisms to track progress.

But evaluation is generally a neglected part of the policy cycle for most governments. Major reform programs are especially vulnerable in the face of this neglect, as they may take a long time to be fully implemented – at the same time that their justification is under constant and usually hostile questioning.

In the UK, the lack of a systematic evaluation of the aggregate picture strengthened critics and shifted focus from the big picture.

In Mexico, monitoring was neglected, leading to misperceptions and invalid expectations. Monitoring of results suffered from a lack of prior evaluation of costs and benefits, which permitted the overselling of reforms the early benefits of which turned out to be disappointing. The lack of systematic and ongoing evaluation also led to times during which the benefits of reforms were forgotten or minimized by society and politicians, while costs were emphasized, reducing further the support for long-term implementation.

In Hungary, assessing progress of reforms was very difficult. Reform policies seldom established targets, timetables, and surveillance mechanisms to follow up on progress or failures. Reforms were sustained, implemented, ignored or undone based on the changes in political will, the resistance of stakeholders, and external pressures from international investors.

4.11 Market-based reforms require greater transparency and accountability

in the public sector; this takes time to bring about and embed in the ministries.

Experience in Mexico suggests that, as reforms slowly take hold and are internalized in the political and administrative culture, adherence to principles of transparency and accountability becomes vital to the market and the maintenance of trust in a modern regulatory state.

This requires civil service reform through developing rules and capacities across the public administration (for example, through administrative procedures or access of information laws). Central pro-reform offices (and/or the finance ministries) can promote ministry compliance with reforms, helping to ensure the sustainability of existing reforms and ongoing development of appropriate next steps.

One of the most costly regulatory problems is that many regulations and procedures are unclear and subjective. As a result, regulators have wide discretionary power, and the regulated entities are put into an uncertain position in their interactions with the public sector. These uncertainties directly translate into increased business costs. Making regulations and procedures more transparent and predictable can substantially reduce such regulatory burdens.

The Korean regulatory system focused on making regulations and procedures transparent and predictable, mainly through codifying all the regulations issued by ministries, the RIA process, and sun-set provisions. In Korea, the institutional reform was backed up by the Basic Law of Administrative Regulation to mandate the reform and review process. This legal change created a government-wide system that ministries could not evade, such as for RIA. Managing regulatory quality became a part of the administrative process, and as a result, the introduction and revision of regulations were no longer in the exclusive purview of the regulatory agencies.

In order to provide credibility to its reforms and policy decisions, Hungary reinforced its institution-building efforts through the formalization and transparency of its administrative procedures.

Conclusion

The lessons learned from these six cases of regulatory reform implementation suggest the vital importance of excellent process design; strong, effective institutions and communication; horizontal cooperation; a well prepared and trained staff; and consistent support at the highest political levels

Researching Discourse and Behaviour as Elements of Regulatory Law in Action

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This paper critically examines and advocates the combination of a discourse analytical and a qualitative approach to socio-legal research. It suggests that practical research design cannot be separated from an engagement with fundamental social science questions about the relationship between ideas and practices, and postmodernist and modernist perspectives on these. The paper also highlights the importance of methodology for substantive socio-legal debates. It suggests that combining qualitative and discourse analysis may generate new insights into European Union (EU) regulatory law in action.

The first section of the paper briefly outlines why a discussion of research methods matters for thinking about the regulatory state. The second section introduces the research project through which the particular research method advocated here was developed, while the third section discusses reasons for the combination of a discourse analytical and qualitative approach. Section four further explains how some approaches to discourse analysis and qualitative research can be considered as distinct. The fifth and main section of this paper shows - also on the basis of a data extract and introductory analysis - how in practice a discourse analytical and a qualitative approach are combined.

1. Introduction: Why do research methods matter for thinking about the regulatory state?

How we research legal regulation has an impact on how we understand the regulatory state. The focus in this paper is on empirical research methods. They matter because they complement accounts of legal regulation which are informed by formal, abstract theoretical frameworks, such as neo-classical economics or grand social theories, like systems theory. These perspectives have been influential in the literature on legal regulation. For instance, through the concept of market failure neo-classical economics have provided persuasive justifications for regulatory intervention. They have also suggested specific solutions, such as internalizing externalities. Systems-theory, in contrast, has pointed to the limits of communication between the legal system and other societal sub-systems in order to explain failures of legal regulation. But formal, abstract theoretical frameworks start from a number of assumptions about the social world, such as the existence of rational utility maximizing market actors or a perception of social life as organized into structured self-referential systems. Through reference to data, however, empirical research can open up ideas

about the social world to analytical scrutiny. This may also be relevant to the work of policy makers and regulators, in order to avoid the pitfalls of 'black board economics' (Campbell and Lee, 2003) and abstract theorizing which may not fit messy and complex real life regulatory problems.

Empirical research has made a significant contribution to our understanding of the regulatory state, for instance by directing attention to regulatory practices 'on the ground.' It has documented the influence of various interest groups in the process of setting regulatory standards, such as power imbalances between NGOs and transnational corporations, as well as between large companies, on the one hand, and small and medium-sized companies, on the other hand. Empirical implementation studies have also suggested that enforcement activity can be key to the success or failure of regulatory policies regardless of the actual form of legal standards. Hence, enforcement deficits have often been considered as the Achilles heel of regulatory policies. Empirical research has also drawn attention to the fact that regulation in itself can generate new risks, for instance through unexpected policy interactions. Empirical research, however, has not just been important for analysing the regulatory state, but also for developing normative visions for it, informing views about what can and cannot work in practice.

This paper aims to develop an understanding of legal regulation as a social process and hence focuses on qualitative research. More specifically, it advocates the combination of discourse analysis with traditional qualitative research methods, such as participant observation and semi-structured interviews. There are a number of reasons why qualitative research methods can contribute important insights to legal regulation. First, qualitative methods strive to understand the social world through the actors' eyes. The view points of regulators, regulated and NGOs, how they construct the social world, are data. Hence, qualitative research can give a voice to research participants and renders them more visible than, for instance, statistical analysis. In contrast to quantitative methods, qualitative research does not impose pre-defined dependent and independent variables upon the social setting. Second, qualitative research has been particularly valuable for generating rich insights and 'thick description' of the local contexts of legal regulation. Qualitative research often involves the intense study of a smaller segment of the social world. It does not aim to test hypotheses or to uncover universal causal relationships between variables. Instead the aim is to develop small-scale theoretical propositions out of the empirical data. Accounts of local contexts impinging on legal regulation have been developed, for instance, through the concept of 'regulatory character' (Haines, 2003a). Analysis of the local dimensions of legal regulation matters given that economic globalization can involve the transposition of regulatory models from one national regulatory context to another. Furthermore, 'regulatory character' can help to understand limits to harmonizing legal regulation across different national political and legal

settings, in regional integration efforts, such as the EU. Hence, qualitative research is one important method for understanding legal regulation.

The paper, however, argues that we cannot ignore the challenge which postmodernist thinking poses for some of the modernist assumptions that underpin some forms of qualitative research. Postmodernist approaches can be understood as taking modernist views to their extreme conclusion and hence as a particular perspective for opening up critical enquiry of modernism (Smart, 2000: 448).

In particular postmodernism questions three ideas that have been central to modernist ideas on how to gain knowledge about the social world. Postmodernist perspectives have questioned, first, the very concept of rational knowledge and the idea that it leads to social progress, second, that the state occupies a central role in social ordering and, third, that social actors are 'subjects.' These ideas have also shaped how we understand the regulatory state. Hence, tensions between modernist and postmodernist perspectives are relevant not just for methodological debates, but also for substantive debates about legal regulation.

First, postmodernist perspectives have problematized how we actually know about the social world and the functions that this knowledge serves. While modernism has been associated with a search for 'deeper' meanings behind surface realities (Bauman, 1988: 792), postmodernist thinking has suggested that there is no distinction between representations of the world and reality. There is no objective social reality 'out there' about which academic disciplines could generate a 'truth'. Hence, there are no secure, external foundations for knowledge. Instead language, discourses and texts are central to how understandings of the social world are constructed. The meanings generated by language, discourses and texts are instable, never reach full closure and hence always involve ambiguity (Smart, 2000: 450). For Derrida, even social and political institutions as well as systems of thought can be understood as texts, in the sense that they can be read and decoded like sign systems (Smart, 2000: 454).

In debates about the regulatory state this postmodernist theme seems to be echoed in increasing attention to discourse in legal regulation. Debates about different ways of defining, and implementing, legal regulation in epistemic and policy communities – as well as reference to expert discourses that can become contested through counter-discourses – have revealed the lack of secure foundations for knowledge upon which legal regulation can be based.

Moreover, postmodernism's skepticism about secure foundations for knowledge about an external social reality has been accompanied by a decline in interest in grand narratives as valid depictions of the social world. Postmodernism instead points to a multiplicity of perspectives. This is relevant not just for how we analyse the social world but also for normative visions of it. The great narratives of socialism and liberalism

and their respective visions of the centrally planning, interventionist or laissez-faire state are no longer the main structuring device for sociological debates.

This seems to have left its imprint also on debates about legal regulation, where the discussion no longer focuses just on the respective advantages and disadvantages of either state regulation or deregulation, but where it has become accepted that deregulation has been accompanied by re-regulation. Hence, concepts of meta-regulation are perceived to capture better key characteristics of the new regulatory state. Similarly, John Braithwaite combines elements of the Keynesian, Hayekian and new regulatory state for his normative vision of legal regulation. Keynesian elements of the strong state are retained in some areas of activity, such as measures for the elimination of long-term unemployment, in order to create an economic framework that reduces the need for state intervention in the field of criminal justice. The strong state also still plays a role in the funding and operation of state police forces and courts where they are needed as an alternative to markets providing security services or communities developing self-policing programmes. Hence, John Braithwaite suggests retaining only some aspects of a strong Keynesian welfare state. They are complemented with the virtues of the Hayekian liberal vision of harnessing the knowledge and self-regulatory capacity of strong local communities and markets (Braithwaite, 2000: 234). This vision also includes elements of the new regulatory state through some state-oversight of self-regulation.

But postmodernist perspectives have not only questioned modernist approaches towards obtaining knowledge about the social world, they have also questioned the functions that this knowledge serves. In particular postmodernist perspectives have underpinned criticisms of scientific and technical rationality and the Enlightenment idea that greater knowledge leads to social progress. Hence, it has been suggested that "the paradox of modernity is that the pursuit of control and order continually reveals objects and processes that remain to varying degrees beyond control" (Smart, 2000: 466).

This statement seems to echo a key concern in thinking about the regulatory state. Questions about the limits of control have been raised, for instance, in Ulrich Beck's work on the risk society (Beck, 1992). His concept of reflexive modernization points to the contradictory character of modern techno-scientific development. In particular, techno-scientific development is accompanied by the generation of widespread and serious risks. Attempts to control them can even generate new risks. Given the limitations of external forms of control, Beck has also explored options for self-control and self-limitation, again two themes that have been important in the literature on legal regulation.

A second key theme in postmodern thinking has been the decentering of the state as a key site for the expression of political power. Instead postmodernist perspectives suggest that there are

a "multitude of sovereign units and sites of authority" with no horizontal or vertical order (Bauman, 1988: 799, n. 4). Hence, the state or its bureaucracies are no longer perceived as the centers for the exercise of power, but power is instead diffused more widely in the social body. "Decentering the state" has also implications for how we understand society. Postmodernist views have taken issue with the modernist idea of a social system as an "ordered, structured, co-ordinated space of interaction." The key question for sociological inquiry then no longer is how order is achieved among free citizens (Bauman, 1988: 803, n. 4). Legal regulation does not seem to be anymore an important instrument for the rational, formal ordering and integration of society.

The idea of the decentered state also had a significant impact on debates about the regulatory state. There is increasing reference to regulatory communities, instead of just reference to state regulators and private regulated entities. Regulatory communities can be diverse and comprise private actors, such as the regulated themselves, regulators and NGOs who all "share in the state's authority to make decisions" (Black, n.d.). Moreover, the state has also become decentered as the only source of regulatory norms. Not just formal legal provisions, but social and technical norms generated by the regulated themselves or by a wide conception of "all relevant stakeholders" have been harnessed in regulatory efforts.

Third, postmodernism has questioned the Enlightenment idea that rational autonomous subjects are a key element of the social world (Smart, 2000: 450, n. 3). The notion of a "free subject" – in a mutually constitutive relationship with social structures – has been considered by postmodernist thinkers as arising at a particular time in specific cultures, not as a universally valid description of the social world. Instead from a postmodernist perspective economic, political and social structures are just as likely "to think and speak through people" (Danaher, 2000). From a Foucauldian perspective discourse constitutes social actors, there is no independent prior category of actors who use speech as an independent tool. Instead discourses provide spaces in which viewpoints can be voiced and thus subjects constituted. Modernist conceptions of agency, however, have often been perceived as integral to legal regulation. Regulating through law seems to require pre-constituted social actors who can strategically employ law either as regulators or as regulated. From a postmodernist perspective, however, law is not a tool in the hands of social actors, but attention has shifted to how legal – among other discourses – constitute actors.

The following sections explain how the particular method advocated in this paper, a combination of traditional qualitative work with discourse analytical techniques developed in the context of a specific empirical research project on the meaning of 'regulatory law in action' in the context of EU environmental regulation.

2. The research project

What can be understood as "law" and how normativity is generated have been key concerns for socio-legal researchers (Tamanaha, 2001). These questions need further exploration in the context of EU law. Theories of EU integration have emphasized the role of law in the integration process, but have often relied on formal, autonomous, instrumental quasi-state law conceptions of normativity. [48] Official legal actors, such as the European Court of Justice have been a key focus, also for political scientists, studying the role of law in EU integration. The ECJ has been perceived as a major promoter of EU integration, not least through its early doctrines on pre-emption, supremacy and direct effect which characterize the nature of EC law. Political scientists have of course drawn attention to the political context of law, but law has often been portrayed as a separate tool of politics. For instance, in discussions of Weiler's point about the relationship between normative and decisional supra-nationalism (Weiler, 1982), law is perceived as fulfilling in particular Member States' political interests to make political bargains stick by enabling litigants before national courts to invoke the direct effect and supremacy of EC law provisions.

Other accounts have focused more on the independent dominance of law, rather than perceiving it as a tool of politics. They have suggested that sometimes law crowds out politics in EU integration because "juridification" replaces "politicization." [49] In contrast to this, this research project explores the meaning of EU regulatory law in action and its contribution to integration processes. The study analyses how mainly technical actors define the key legal obligation under the EU Directive on Integrated Pollution Prevention and Control.[50] Under this Directive Member State regulatory authorities have powers to require operators of mainly industrial installations [51] to employ the "best available techniques" (BAT), in order to prevent and reduce their emissions to all three environmental media, air, water and land. [52] Art 2. Nr. 11 of the IPPC Directive provides a rudimentary definition of "best available techniques":

> BAT shall mean the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values designed to prevent and, where that is not practicable, generally to reduce emissions and

[48] Burley, Anne-Marie and Walter Mattli, (1993) and Garrett, Geoffrey (1995).

[49] Everson, 1998: 389, referred to by Haltern, (DATE?) and Diez (DATE?).

[50] IPPC – 96/61 OJ L 257, 10/10/1996 at 26-40.

[51] Installations subject to the obligations of the Directive are listed in Annex I. They cover activities from the energy industry, the production and processing of metals, the mineral industry, the chemical industry, waste management activities, pulp and paper production, textile pre-treatment and dying, tanning, slaughterhouses as well as intensive pig and poultry rearing. Furthermore surface treatments, carbon and electro graphite production as well as food production are covered.

[52] Scott, 2000: 260.

> the impact on the environment as a whole. [53]

Annex IV to the Directive spells out further criteria for the determination of BAT. Some of these address environmental considerations, such as waste minimization, energy efficiency of regulated processes and the principles of prevention of damage to the environment and precaution. Others refer to the "costs and benefits of a measure." [54] Finally, Member State regulatory authorities must take into account, but are not bound by, BAT Reference Documents (BREFs) when determining BAT for a specific plant. [55] These BREFs are the result of an EU-wide information exchange between representatives of industry, Member State regulatory authorities and – upon invitation of the EU Commission – environmental non-governmental organization. [56] Implementing the directive requires determining in more detail what constitutes BAT. At the EU level this occurs mainly during the BREF writing process. At the national and local level this happens during the drafting of national implementing legislation and when licences for specific plants are issued. I refer to the various BAT options which different social actors advance as "BAT law in action" and to the final legally authoritative choice of one particular BAT definition in implementing legislation or licences as "state law BAT." [57] But how can "BAT law in action" and its interaction with state law be researched?

3. Reasons for combining a qualitative and discourse analytical approach

Three criteria informed the choice of methodology for the IPPC project. The methods had to be able to answer the specific research question asked and they had to fit the characteristics of the BAT determination process and help to manage restrictions on access to data. The combination of a qualitative and discourse analytical approach fulfilled all three criteria. I use the term discourse analysis here to refer to an examination of discourse in both its linguistic and Foucauldian dimension. A linguistic notion of discourse refers to "informal and formal, including institutionalized, spoken interaction and written texts." [58] Foucault's concept of discourse, in contrast, is more comprehensive and complex. First, it comprises speech acts and any system of signs, not just language. These are taken to represent knowledge about "a topic at a particular historical moment." [59] Second, Foucault's concept of discourse covers not just statements but also the regulated practices that account for statements. [60] Hence, groups of statements on a particular topic, such as the discourse on what constitutes "best available techniques" is captured, as well as the – sometimes hidden – rules and structures which produce this discourse. [61] Discourses can

[53] IPPC Directive, 96/61 OJ L 257 10/10/1996 at 29.
[54] Annex IV, 1st sentence IPPC Directive.
[55] Annex IV Nr. 12 IPPC Directive.
[56] NGOs – Art. 16 (2) IPPC Directive.
[57] In order to study EU regulatory law in action this project draws on three case studies. The first case study covers BAT determinations during the BREF writing process at EU level. The second and third case studies deal with BAT determinations at the national implementing and local licensing stage in Germany and England.
[58] Potter and Wetherell, 1989: 7; Wetherell, 2002: 193.
[59] Hall, 2002: 72.
[60] Foucault, 1972: 80.
[61] Mills, 2003.

generate exclusion when certain statements are kept in circulation while others are marginalized. Hence, discourse is an essential aspect of relations of power. In fact, discourse can be an instrument and effect of power as well as a starting point for resistance. [62] According to Foucault, expert status is an important resource for the production of discourse, since its successful circulation depends on whether statements will be judged as "true" rather than "false." Discourse relies on the idea that there will be limitations on who will be considered to speak authoritatively. [63] Hence, discourse analysis pays attention to the discursive resources which social actors use, such as "category systems, narrative characters and interpretative repertoires." [64] It also examines the distribution, exchange and control of discourse. [65]

In contrast to this, qualitative research analyses a whole range of social interactions, including non-verbal behaviour. Participant observation and unstructured interviewing are often considered as its key data collection techniques. [66] Qualitative research assumes that actors create social life through a range of interpretative practices. Definitions of situations are key to how people act and can thus produce real consequences. [67] Qualitative researchers attempt to understand these through entering the social actors' behavioural world and becoming familiar with its perspectives. [68]

Combining a discourse analytical and a qualitative approach allows us to shift the emphasis from behavioural to discursive aspects of the "law in action" and thus to depart from the classical sociology of law literature and contemporary studies influenced by it. For instance, Ehrlich defined the living law through reference to patterns of behaviour from which a rule can be deduced. [69] These can be empirically identified through observations of further behaviour, such as the experience of informal social sanctions by those who do not comply with the living law. [70] Similarly, Pound's concept of the law in action, though different from Ehrlich's, also considers social actors', in particular law makers' and law enforcers', behaviour, as key. [71] It is an evaluation of their activities—in the light of the normative benchmark of state law—that helps to identify the regulatory law in action that they generate. Hence, some contemporary studies of the regulatory law in action have focused on behaviour by asking how legal actors make discretionary decisions, how they receive state law in regulated and regulatory organisations, how they avoid law and what alternative social norms they create. [72]

A shift to discursive aspects of normativity is not new. Conversations, for instance, have been

[62] Mills, 2003: n. 30, 54.
[63] Mills, 2003: n. 30, 58.
[64] Potter and Wetherell, 1995: 81.
[65] Shapiro, 2002: 323.
[66] Allan, 1993: 177.
[67] Bryman, 2000: 52, 53.
[68] Allan, 1993: n. 35, at 208.
[69] Ehrlich, 1936, discussed in Nelken, 1984: 163.
[70] Ehrlich, ibid.
[71] Pound, 1910, discussed in Nelken, 1984: 165.
[72] Hawkins, 1984; Hutter, 1988; Ross, 1995; Hutter, 2001; and Hawkins, 2002.

perceived as helping to solve problems raised by regulating through legal rules (Black, 1998 and 2002). Conversations, however, are seen here as separate from rule formation and are analysed after formal legal rules have been defined and established (Black, 1998). In contrast to this, the discourse analytical approach in the IPPC project aims to analyse how regulatory law in action feeds at an earlier stage into the creation of state law. It works with a broad definition of discourse, including text, not just conversations. By combining a discourse analysis and qualitative approach the project aims at a full explanation of BAT discourse. This should also address how non-discursive aspects of the social world, which can be accessed through a qualitative approach, shape discourse. The combined approach also allows us to ground BAT discourse in the social *process* of accounting for BAT. This avoids characterising BAT – in an abstract and reified manner – as a discursively constructed norm *concept*. Participants in the BAT definition process do not invoke a BAT concept. Instead they are engaged in a process of describing BAT in which the meaning of BAT appears to be elusive.

Research methods should also fit the actual characteristics of the social process being studied. Two impressions from the initial fieldwork phase seemed to suggest that combining a qualitative and discourse analytical approach would be fruitful. The BAT determination process gave rise to alliances that crossed traditional interest group boundaries. Sometimes, the BAT discourse seemed to suggest that individual social actors influenced significantly BAT determinations. Hence, this process could not be fully captured through reference to pre-given interests and lobbying by distinct social groups, such as "regulators," "industry" and "environmental NGOs." Furthermore there was an opaque and labyrinthine system of consultations over a period of time that provided a number of formal and informal opportunities for various actors to express what they considered as BAT. Hence, the exercise of political power in the BAT determination process seemed complex and more fully captured through Foucault's notion of the microphysics of power. One of the key aspects of this concept of power is that it departs from the idea that power can be possessed, for example by the state or various social actors. Instead power is best understood as a strategy and its effects arise from "small-scale manoeuvres, tactics, techniques and functionings" (Smart, 2002:77). Not conscious intentions, the interests of groups or individuals, but detailed practices are fore grounded in this analysis of power. [73] In fact categories, such as "individual," "group" or "social actor" are perceived as effects of power. Hence, Foucault's concept of power helps to move away from ideas of power as institution or social structure. It even considers various points of resistance as an integral part of power. An understanding of the microphysics of power, however, is not restricted to a ground level perspective on power. It can also assist analysis of macro-level manifestations of power by rendering visible how small-scale tactics of

[73] Barry, 2002: n. 44, at 78.

power can be appropriated for its more large-scale exercise. [74]

While discourse is clearly central to the construction of BAT normativity, initial fieldwork also suggested that social life – beyond the words – seemed to matter for understanding BAT law in action. Surprisingly, some important sources of BAT discourse, such as written records, contained few references to the costs and benefits of technologies and their cumulated effect upon all three environmental media, land, water and air. According to the text of the IPPC Directive, these were, however, key criteria for defining BAT. Hence, it seemed important to consider a broader conception of the social world - accessible through qualitative methods - in order to explain this silence of the BAT discourse.

Thirdly, the idea of combining qualitative and discourse analytical perspectives also developed in response to access opportunities and problems (Banakar, 2002). A focus on selected elements of BAT discourse helped to compensate for restrictions on traditional qualitative observational data about oral BAT negotiations in technical working group (TWG) meetings. In these meetings delegates from EU Member State regulators, industry and environmental NGOs would debate what should be considered as BAT for a specific industrial sector. I was refused access to these meetings, but was provided with an official audiotape recording of a past TWG meeting that, in transcribed form, provided a rich source for discourse analysis. So far I have argued that the combination of a discourse analytical and qualitative approach is particularly suited to answering the research questions of the IPPC project. It needs to be further explained, however, in what way I consider these two approaches as different.

4. Discourse analysis and qualitative research as different methods?

Conventionally the research methods literature does not clearly distinguish between discourse analysis and qualitative research. The important role of language in social life is recognised in both approaches. Some textbooks even consider two approaches towards discourse analysis—conversation analysis and the ethnography of speaking – as a form of qualitative research. [75] Discourse analysis, however, is not necessarily a form of qualitative research. One variant of it – content analysis – relies on quantitative methods. [76] Furthermore some discourse analytical and qualitative methods work with different concepts of agency, social action and the relationship between discursive and non-discursive elements in the world.

Especially qualitative approaches informed by hermeneutics perceive social actors as "conscious, individual, meaning-giving subjects." [77] They are independent language users and language facilitates their agency. Social actors can be "speakers," "hearers" and unaddressed third parties – "bystanders" – in a conversational encounter (Goffman, 2002: 97).

[74] Barry, 2002: n. 44, at 79.

[75] Miller, 1997: 6; Silverman, 1997: 24; and Bryman, 2000: 53.
[76] Taylor, 2001: 10; Bryman, 2001: 178.
[77] Dreyfus, Hubert L. and Paul Rabinow, 1982: 57.

In contrast to this, discourse analysis perceives social actors as constructed through discourse. [78] Subjects cannot be outside discourse and they have little control over it. [79] Descriptions of social life can "become established as solid, real and independent of the speaker." [80] Hence "subjects" in discourse analysis personify the particular forms of knowledge that the discourse produces: "the human voice is conceived merely as another means for registering differences" (Wertsch, 2002: 222). These two different conceptions of agency have implications for the two perspectives' respective concepts of social action.

From a discourse analytical perspective discourse itself accomplishes social action. [81] It can "order, request, persuade, accuse, take sides and disclaim responsibility." [82] When discourse generates social action it acquires a material quality and no longer exists just in a realm of ideas. From a qualitative perspective language fulfils merely a representational function. Texts can "open the door to an understanding of the social world," but cannot be equated with it (Kress, 2002: 35). Whether language is seen as constituting or as merely representing the social world also influences these two approaches' different views of the relationship between discursive and non-discursive aspects of the social world.

Qualitative approaches see discursive and non-discursive elements as linked through a process of interpretation. From a hermeneutical perspective, discourse can be understood and explained through reference to a "horizon of intelligibility," a field of shared social practices. [83] Social actors, including researchers, look for what is "underneath" the use of language, in order to understand how meaning in the social world is achieved. Hence, the non-discursive world becomes an important resource for understanding discourse (Carabine, 2001: 276). For qualitative researchers the discursive and non-discursive world can also be linked through a process of causation. Non-discursive factors, such as pregiven, separate interests are sometimes considered as explanations of linguistic phenomena (Wetherell, 2002: 25).

In contrast to this, Foucault does not intend to explain discursive elements in terms of non-discursive ones. [84] A Foucauldian approach describes the surface details of a discourse. [85] It does not assume that discourse could only be rendered meaningful through reference to exterior shared social practices. [86] There is no "deep truth behind experience" and hence interpretation is considered as an arbitrary and groundless process. [87] Discourse becomes decontextualised. [88] Non-discursive social practices, however, still inform discourse: "…what gets said depends on something other

[78] Dreyfus and Rabinow, 1982: no. 50, at xxii, xxiii; Wetherell, 2002c: 188.
[79] Hall, 2002: 78; Wetherell, 2002b: 12.
[80] Potter and Wetherell, 1995: 81.
[81] Wetherell, 2002b: 15; Wetherell, 2002a: 12; and Mehan, 2001: 346.
[82] Potter and Wetherell, 1989: 32.
[83] Dreyfus and Rabinow, 1982: no. 50 at 51.
[84] Dreyfus and Rabinow, 1982: no. 50, at 82, 83.
[85] Foucault, 1978: 12.
[86] Carabine, Jean, op. cit no. 60, at 276.
[87] Foucault, 1972: 202.
[88] Dreyfus and Rabinow, 1982: no. 50, at 51.

than itself, discourse, so to speak, dictates the terms of this dependence." [89]

Hence, the non-discursive sphere can provide the conditions of existence for a discourse and form the objects of discourse. [90] But it is discourse, rather than non-discursive elements, which generate real, material effects in the social world. In fact, Foucault suggests that there is a circular and complex relationship between the non-discursive and discursive world. He distinguishes between primary and secondary relations. Primary relations occur between institutions, techniques, social forms and other elements that make up the non-discursive world. Secondary relations describe how "practicing subjects reflectively define their own behaviour." [91] Foucault calls relationships between primary and secondary relations discursive practices. They determine "who has the right to make statements, from what site statements emanate, and what position the subject of discourse occupies." [92] Foucault also suggests that relationships between a discursive and a non-discursive sphere vary with the organization of a particular discourse (Brown, 1986: 36). Hence, the archaeological method of discourse analysis searches for the way in which discourse is "articulated" with the non-discursive world (Hunt and Wickham, 1994: 10). Given these different perspectives, underpinning discourse and qualitative research, the question arises how the two approaches, and in particular their criteria for what constitutes "good" data and analysis procedures, can be combined in practice.

5. Combining a discourse analytical and qualitative approach in practice

RECONCILING CRITERIA FOR WHAT CONSTITUES "GOOD" DATA

Validity is a key criterion for evaluating any research data. Do the data shed light on the research question accurately? Sample size can influence the validity of the data and for qualitative researchers sample size matters more than for discourse analysts. From a qualitative perspective data refer to a separate, external social realm. It therefore needs to be considered how much and what type of data are needed in order to generate a valid description of this world. In contrast to this, discourse analysis focuses on a detailed, in-depth analysis of the construction of the discourse itself and hence only a small sample can be entirely sufficient.

The scope of the BAT discourse sample in the IPPC project is limited in two main ways. First, it is a "snapshot" of BAT determinations during a specific time period. I interviewed all those eleven BREF authors which were present in the EIPPC Bureau during the two months that I spent there. Before and since then different staff has worked on BREFs. Second, the BAT discourse sample has a specific geographical focus. Data about BAT determinations in specific licences are derived from one each among a large number of local permitting authorities in Germany and the UK. An examination of BAT discourse from case studies

[89] Dreyfus and Rabinow, 1982: no. 50, at 64.
[90] Foucault, Michel, op. cit. no. 63, at 10, 15.
[91] Dreyfus and Rabinow, 1982: no. 50 at 63.
[92] Dreyfus and Rabinow, 1982: no. 50, at 68.

located in two countries should help to understand which features of BAT are specific to a national setting and which reflect a broader notion of EU regulatory law in action which transcends national characteristics and potentially reflects an EU integration process. Since my data also contained repeated themes, it appears that from a qualitative perspective, too, the sample is big enough to allow inferences to be drawn about the social world narrated in the data. From a discourse perspective the sample is sufficient in order to examine micro interactions in BAT communication as generating BAT law in action.

Reliability is another criterion which can be referred to in order to identify "good" research data. Data are reliable if the same data could be obtained in a replication of the original study. In the case of several researchers collecting data, reliability requires that they can achieve some agreement on their observations and understandings (Bryman, 2001: 270, 201). Hence, reliability means that there should be limits to the extent to which the research data are constructed. This criterion matters, though in different ways, to both qualitative and discourse researchers. From a qualitative approach "good" data should report truthfully about the social world researched and the way in which it is constructed by social actors. Thus, qualitative researchers sometimes involve participants in the validation of research data, for instance by making interview transcripts available for comments by interviewees (Taylor, 2001: 321, 322).

Discourse researchers also strive for "naturalistic" data, but this means that the discourse which is analysed should reflect as closely as possible the research participants' own discourse as it occurs in real-life situations. Interference with the research participants' natural discourse through data collection procedures should be minimized. Whether the discourse itself is actually 'truthful' or not, is irrelevant for discourse researchers, since they do not assume that there is a separate social world which can be accessed through the discourse. Discourse itself is a site of social action.

In order to evaluate the reliability of the data for the IPPC project it is important to consider how and to what extent written documents - which are one of the key data sources for the project - were constructed. From a qualitative perspective their reliability is enhanced because they are complemented by interview and some observational data. Moreover, the German Land environmental ministry records on the TA Luft drafting process [93] were compiled as this process was unfolding. They also appeared to be truthful because they included photocopies of the submissions from various interested parties. The background files for the BREFs varied in their completeness and detail. The truthfulness of the written records may also have been enhanced by the fact that they were constructed in order to support the staffs' own drafting process and, in

[93] The TA (= Technische Anleitung) Luft is an ordinance, a 'Verwaltungsvorschrift.' It is based on paragraph 48 Nr.1 and para. 51 of the German Federal Immission Law (Bundesimmissionsschutzgesetz). It comprises detailed, technical tertiary rules which implement key aspects of the IPPC Directive into German national law.

the case of the German files, also to inform other staff about the progress of the drafting of the "TA Luft." But for wider organisational purposes these records could also be harnessed to portray BAT determinations as rationally ordered, legal and open. From a discourse analysis perspective both written records and the transcript of the audiotape recording are sources of "naturalistic" data. If criteria for "good" data from a qualitative and discourse analysis perspective can be reconciled, does this also apply to analysis procedures?

RECONCILING ANALYSIS PROCEDURES

Both discourse and qualitative researchers share a commitment to rigour in their analysis procedures. For instance, both approaches advocate carrying out deviant case analysis which involves seeking out and accounting for parts of the research data which do not fit the main hypothesis or interpretation. [94] Discourse and qualitative researchers, however, may read, code and theorize data differently. Qualitative researchers tend to read data "for gist," in order to identify the main themes, while discourse researchers often conduct a more fine grained reading, in order to understand the full interpretative repertoire which language users employ in the construction of the discourse. Hence, for qualitative researchers consistency in the data usually indicates that a social phenomenon exists "out there" in the social world or that an internal state can be ascribed to a research participant. [95] For discourse researchers consistent language patterns are not linked to an external social world. They only reveal insights into the construction and function of the discourse itself, while rupture and discontinuities are - also from a Foucauldian perspective - just as important features of discourse. [96]

Discourse researchers' interest in variation has implications, in turn, for coding. Qualitative researchers code in order to aggregate large amounts of unsystematic data into categories which help to manage the data. In contrast to this, discourse researchers do not usually apply extensive coding to the discourse because they do not want to lose sight of its variation. Moreover, some discourse researchers would perceive coding as constructed categories, which themselves should be subject to discourse analysis. [97]

Discourse and qualitative research also have different views about how theory is generated from the data. Some discourse analysis involves reference to preconceived theoretical concepts, for instance from Foucault's work. In qualitative research, however, data are often analysed from a "grounded theory" perspective. This means that small-scale and medium range theory is developed out of the data themselves, without reference to external "grand theory" concepts (Glaser and Strauss, 1967). So, how can these different emphases in qualitative and discourse analysis procedures be reconciled in practice?

[94] Taylor, 2001: no. 74, at 320; Carabine, 2001: no. 60, at 306.
[95] Potter and Wetherell, 2002: 200.
[96] Potter and Wetherell, 1989: 164.
[97] Potter and Wetherell, op. cit no. 77, at 137.

BLENDING QUALITATIVE AND DISCOURSE DATA ANALYSIS - A PRACTICAL EXAMPLE

Introduction

The data analysis addresses initially two questions: what is BAT regulatory law in action and how is it achieved? [98] How do social actors distinguish BAT from non-BAT and how do they arrive at views about what they consider as BAT? I attempt to answer these questions through a two-stage analysis procedure. The first stage draws on a qualitative approach and blends this with some elements of discourse analysis. During this stage I read through the data for gist in order to identify themes. Themes relate, for instance, to the argumentation strategies employed for describing certain technologies and operating procedures as BAT, as well as organizational and procedural features which shape their views of BAT. I look for consistency in the data in order to identify key themes, while trying to remain sensitive to detecting variation.

From a discourse analytical perspective I then code the data into larger chunks, in order not to lose a feeling for the BAT discourse as a whole. I also interrogate the themes about their function. What tasks does the talk accomplish? These coding categories can later be linked and thus can help to detect patterns in the data which contribute to answering the research question. Finally, general propositions can be formulated which can be tested against the data and thus the data - from a qualitative perspective - are treated as "evidence" (Alexiadou, 2001: 65). During this first stage of reading through the data I also identify a limited number of clear "BAT stories." These are self-contained episodes in the data which allow us to trace how specific BAT definitions are achieved.

During the second stage of data analysis this limited number of BAT stories is then more intensively analysed from a discourse analytical perspective. I call these data extracts "BAT stories" because they are each a coherent unit of text which allows us to explain the discourse as a whole. At this stage I am asking: how is the story about what is BAT constructed? Through what discursive techniques are arguments built in order to affirm that one particular technology or operating procedure is BAT? In the following section I will provide an introductory application of these analysis procedures to a BAT story.

A data extract

The following is a non-representative extract from the transcript of the official audiotape recording of the second TWG meeting for the Iron and Steel BREF. [99]

[98] The analysis also addresses a third question of whether and how BAT regulatory law in actioncontributes to EU integration in the field of standards for emissions to air, water and land from the installations covered by the IPPC Directive.

[99] These recordings are routinely produced for all TWG meetings by the EIPPC Bureau. For each BREF there are two TWG meetings for the determination of what constitutes BAT for a particular sector. While the first meeting is usually more concerned with agenda setting and planning the work for the group, the second meeting is usually concerned with discussion of an already written draft BREF and the firming up BAT conclusions. For more detail see Lange, 2002.

About 46 [100] delegates, mainly from Member State environmental ministries and regulatory authorities, from industry and environmental NGOs, are assembled in a meeting room in the EIPPC Bureau in Seville. [101] The discussion is chaired by the EIPPC Bureau co-ordinator, while the author for the Iron and Steel BREF takes the meeting through comments from TWG members on a first draft of the BREF.[102]

[BREF author]:
Another comment tells us that we did not consider top layer sintering and it should be described as a BAT candidate and even it represents BAT. First, my question is, should we describe it, is it BAT and third who can provide me with the full description of a BAT candidate called "top layer sintering" if we agree with the first two questions.

[Bureau co-ordinator]:
Mr. [name of industry delegate] seems to have some answers. Mr. [name of industry delegate]:

[Industry delegate]:
No, I have no answers, but I have some questions. Ah, why is two, ahem, top layer sintering introduced, because it is in existing plants, practically an impossibility to install it. Ah, you have second conveyor belts, you have second dowsing equipment, an ignition hood, everything and it is impossible to install it in existing plants. It is just not feasible. So, I see difficulty, how it could be BAT, even a candidate BAT. So, what is the reason, why is it used, if it is used somewhere. I think it is one in Austria. So, why is it used in Austria?

[Bureau co-ordinator]:
First of all, we might put that question to our Austrian colleague, but I would suggest that just because a technique is very difficult to install on an existing installation that is no reason to exclude it, if it is possible, if you were to build a new sinter strand now, it is a technique that is perhaps there. It is putting a marker down, it is one beautiful case, where it may not be implemented or seen for a very long time, but at least it is information, which is, that is a technique. [BREF author's first name], how do you feel about that?

[BREF author]:
As far as I know this technique has been introduced in order to manage residues with a high content of oil. So they have the first layer, the sinter feed itself and a second layer, with residues containing a high amount of oil. So, this was, is a technique to lower the hydrocarbon content in the off-gas, as far as I know and it is applied in one plant of [name of the company] in [location of the plant] in Austria. So, I take it that you really have doubts that it could be BAT. This is, ahem, would be an answer to question number two, but the question number number one, should we then even describe it as a

[100] This is the number of members of the Technical Working Group for the Iron and Steel sector which appears on the EIPPC Bureau's website at http://eippcb.jrc.es. (site last visited 5.12.04).
[101] Present at the meeting were also one member of staff from the Directorate General Enterprise and one member from the Directorate General Environment of the EU Commission.
[102] English is not the native language for a number of people who speak during this extract. This explains some speakers' unusual grammar and style constructions.

candidate. Maybe the conclusion then is, that it is not BAT, it is just a candidate.

[Bureau co-ordinator]:
Mr. [name of industry delegate] please.

Mr. [name of industry delegate]:
Now, to reduce the content of hydrocarbons there exists other techniques. We also reduce it, we have very low input of hydrocarbons in our sinterplant. So we have to get rid of the hydrocarbons elsewhere in an integrated steel plant. So, that is not, there is no necessity to introduce this technique.

[Bureau co-ordinator]:
Mr. [name of industry delegate] please.

[Bureau co-ordinator]:
With the microphone, Mr. [name of industry delegate] please.

[Industry delegate]:
I just have a general question. How many installations do we need to have to call it BAT? One, two, three, four, is there a cut-off value to accept the techniques as BAT or not? Just a general question.

[Bureau co-ordinator]:
I will give you a general answer. And again this was coming from the debate we had last week and I am sure we will have it next week. Ahem, I would remind you of the words in the Directive, which simply says that, ahem, it is something capable of being implemented in a sector, so you could say, it does not have to be implemented, it is developed to a scale which is capable of being or allows implementation. So, I don't think there is any cut-off, indeed I believe actually, you could if the group were to agree as such the concept that something is BAT, even though it is not yet implemented in a sector. Otherwise, how on earth do you introduce a new technology? [First name of industry delegate], please.

[Industry delegate]:
Do you talk about candidate BAT or BAT?

[Bureau co-ordinator]:
Now there I am talking about the (*hesitation*) definition in the Directive.

[Industry delegate]:
Now, in the Directive I quote, wait a moment, best available techniques shall mean the most effective and advanced stage in the development of activities and their methods of operation which indicate the practical suitability of particular techniques for providing in principle the basis for emission limit values. And in that case, I think, if there is only one situation in the world where a certain technique is used, it is almost by definition is not BAT.

[Bureau co-ordinator]:
Actually, I am also quoting from the Directive in terms of the definition of available, which says, it shall mean those developed on a scale which allows implementation in the relevant industrial sector. And of course the debate is, is it working in another sector. And it is clearly a case of technology transfer from one sector to another

sector. And then can you associate any particular emission level with it. There seems to be a clear opportunity there to transfer technology, in this case techniques, from one sector to another sector, if it is considered that it has been developed to a stage that it allows implementation in the new sector.

[Industry delegate]:
Alright, but if we, for instance, name a certain sector and there is SCR [103] implemented over there as a rule and they reach emission values of, ahem, 20 mg Nox. Does not necessarily mean that if you have got another plant that you can use SCR for it and have an emission limit value of 20 mg. That is what EUROFER [104] is afraid of will happen if you use this references.

[Bureau co-ordinator]:
I would, ahem, accept what you say quite readily. It is one thing saying it is an available technology because it has been developed elsewhere and can be transferred, quite often the associated emission limit, or emission value would be different for good reason. If you talk about particulates, you got resistivity of the dust, you got the chemicals of the dust, you got the particle size and with SCR you got similar technical considerations. And I think the door is open, at least, to start considering. You may not gonna say what it will achieve. That is clear, I think.

[Industry delegate]:
So, do I understand it right that, for instance, SCR in the Iron and Steel industry is considered as BAT but there are no concentrations connected to it. In that case I can agree.

[Bureau co-ordinator]:
Ahem, I have not got anywhere near, to the concept of looking at, [first name of BREF author], that SCR is BAT, I thought that was a later stage. If that were the case, that the group said, we think SCR is applicable in this case. We just don't know what it will achieve, that may be the result, that people think, yeah, there is no technical or economic reason why it should not work. We don't know quite how it will work. [First name of Member State delegate], were you...please.

[Member State delegate]:
I do not want to interfere in this discussion, because I thought this was already solved elsewhere, to put it again into this point, well, my impression was, that what is applied today, yeah, on an industrial scale, is potentially BAT candidate. And the number of plants is not of importance. Of importance is the industrial scale, where that is really industrial scale and proven technology and its only one plant that is as good as 10. That is not the question of the number of plants. But, certainly, we could continue this discussion, but I wanted to come back to the issue here, and when we were seeing this on the

[103] This is the abbreviation for selective catalytic reduction. It helps to abate NOx and N2 emissions through NH3 and a catalyst at temperatures of about 300-400 degree Celsius. It is used, for instance, for NOx emissions abatement in coal-fired power stations and waste incinerators.
[104] This is the abbreviation for the European Confederation of Iron and Steel Industries which lobbies on behalf of the European steel industry the EU institutions and international organizations (http://www.eurofer.org/organization/index.htm - site last visited 1.12.04).

list of issues, we were wondering about data about this top layer sintering. There are no data available and I wonder now whether we can decide whether or not this is a BAT candidate without having any data. Will there be data provided for the technique?

[BREF author]:
There is one publication available. I have this publication from this company which can potentially provide this system and who has developed this kind of technology in one plant at [company name] in [location name]. So, thank you for coming back to this topic. I think, if you can provide a full BAT candidate within reasonable time, that means for me within two weeks, we could implement it, even I have personally also doubts, that it could end up in the conclusion that it is BAT, because no new installation, I think, would adapt to a top layer sintering because it is a very special case for this plant, as far as I know because of the oily residues and to manage them and of course we have other possibilities to reduce the oil content in the residues. So, that means I will leave it with you, because you have submitted this proposal. O.K.

[Bureau co-ordinator]:
You seem to be concluding there, [BREF author's first name], that top layer sintering is a particular technique which could in a particular instance here solve a problem and be therefore BAT. Does anyone wish to speak for or against that? [Industry delegate first name] would and then [Member State delegate first name] please.

[Industry delegate]:
I interpreted a different conclusion. I thought what Herr [BREF author's name] was saying was in this specific circumstance this technique is being applied so we must consider it as a candidate BAT, but in general it was unlikely, in his view anyway, to be BAT.

[BREF author]:
This is my feeling so far, yes.

[Bureau co-ordinator]:
O.K. [first name of Member State delegate] please.

[Member State delegate]:
I don't know details of the process, but I think there is, the Directive does require a certain hierarchy to be applied. And if my understanding of what has been said about this process, ahem, it is an end of pipe approach. What we should be looking at is, preventing rather than minimising. So, if this process were to be applied at a new plant and it is applying an end of pipe approach, rather than looking at alternative process modifications then it would not be BAT.

[Bureau co-ordinator]:
You seem to have two things there...

[BREF author]:
We have already concluded already. If it will be provided it will be considered as a candidate and as far as I take it even, also from this round it seems to be we cannot consider it as BAT. So we can come to the next.

An introductory analysis of the data extract

First, I identify key themes in this extract, such as "procedure." On the one hand, BAT determinations are seen to be the outcome of an open, deliberative, reasoned discussion process [105], while, on the other hand, BAT seems to be determined by external factors, partly beyond the control of the TWG, such as time constraints. Upon closer analysis it appears that there are even two procedures here for determining BAT. Firstly, there is a discussion - mainly between the EIPPC Bureau co-ordinator and industry delegates - which seeks to define BAT in general and abstract terms. It discusses, for instance, how widely a technique needs to be applied in order to be considered as BAT. A key resource for this debate is interpretation of specific terms in the text of the IPPC Directive. BAT seems to derive from a prescriptive principle: [106] technology transfer from one industrial sector to another. Assent by the TWG, rather than a detailed technical discussion, is the key decision criterion for BAT here. Group consensus is achieved through power brokerage, such as the compromise not to specify associated emission levels with SCR, rather than through persuasion based on technical arguments. Hence, what appears to the EIPPC Bureau co-ordinator as a surprisingly quick agreement is achieved, by dispensing with a time-consuming data gathering, scrutiny and discussion process,

But there is also a second procedure for BAT determinations invoked in this extract. This focuses on the more specific question, whether top layer sintering can be described as BAT for the iron and steel sector. This debate is conducted mainly between the delegate from a Member State regulatory authority and the BREF author. Very specific technical 'data,' in fact one publication from an equipment supplier, are considered as crucial for determining BAT. The detailed description of an existing technology, rather than an abstract, prescriptive principle, such as "technology transfer," is the starting point here for a BAT determination.

Themes, such as "procedure," can be further broken down into sub-themes, such as 'social relations.' Various aspects of the procedure for determining BAT establish and structure social relations between the EIPPC Bureau co-ordinator and the BREF author, as well as between the EIPPC Bureau and TWG members. For instance, different degrees of social distance are indicated through the use of formal addresses or first names for speakers by the EIPPC Bureau co-ordinator.

In the next step of the analysis I ask about the functions of the talk which has been categorized into various themes. For instance, talk about the procedure negotiates an organizational structure for BAT determinations which complements the formal, but rudimentary structure set up by the IPPC Directive and DG Environment. This organizational structure provides roles for its various members. For instance, the IPPC Bureau co-ordinator asks TWG members for "answers,"

[105] For instance, the EIPPC Bureau co-ordinator invites TWG members to speak 'for or against' the proposal that top layer sintering is BAT.

[106] See, for example, the statement by a TWG member that '[…] there is SCR implemented over there *as a rule*' (emphasis added).

but they decline the role of providers of answers and instead opt for the role of questioner. Establishing organizational structures and allocating roles is part and parcel of the exercise of power by the participants in the BAT determination process. This extract seems to suggest that BAT determinations are the outcome of a subtle balance of power between BREF author and EIPPC Bureau co-ordinator on the one hand, and the TWG on the other hand. The BREF author determines the procedure by putting a sequence of questions to the TWG and by finally setting a deadline which will decide whether top layer sintering will be considered as BAT. In contrast to this, some of the TWG members cast themselves in the role of participants who "just ask questions." This appears to be less directive than the BREF author's and IPPC Bureau co-ordinator's steering, but it still allows TWG members to exercise power by holding to account those who are being asked questions. Most importantly, however, talk about procedure can by itself produce BAT determinations. For instance, reference to time restraints for the provision of information about top layer sintering may displace substantive criteria for the BAT determination.

In the second stage of the analysis I ask in more detail through what discursive techniques BAT determinations are achieved. Four discursive techniques seem to matter here. First, the participants in the debate frequently resort to interpretation of text, like the IPPC Directive and oral speech, such as their contributions to the debate. Interpretations are mobilised in order to attempt to close down the discourse to a specific meaning of BAT. By its very nature, however, this interpretative process reopens the debate by drawing attention to various different meanings which can be attributed to statements about what BAT is.

Secondly, speakers attempt to fix the meaning of BAT by drawing distinctions between various terms. In Foucauldian terminology this is a process of normalization through which power is exercised. [107] Distinctions are drawn, for instance, between "BAT" and "candidate BAT" as well as between "new" and "existing plants." Given the fact that these key terms are not clearly defined, distinguishing these terms from each other becomes especially important for constructing their meaning.

Thirdly, the BAT determination in this extract is facilitated through a discourse which is not a unified narrative, but works through parallel stories and ruptures. This is illustrated through the two unconnected debates about what constitutes BAT for the iron and steel sector. These refer, on the one hand, to SCR and, on the other hand, to top layer sintering, on the other hand, as BAT for the iron and steel sector. Furthermore, some elements of the BAT discourse, such as the suggestion that end-of-pipe approaches can not be considered as BAT, remain isolated and are not picked up in the discussion and some questions asked by TWG

[107] Carabine, Jean, op. cit. no. 60, at 277.

members are not answered, but receive an evasive reply. [108]

Fourthly, the EIPPC Bureau co-ordinator, the BREF author and some TWG members refer to "we," "us" and "the group" in their statements. This discursive technique can furnish the BAT determination process with a greater claim to democratic legitimacy. It gives the impression that a unified and significant number of members of the technical working group are involved here in BAT determinations, while in actual fact - apart from the BREF author and the EIPPC Bureau co-ordinator - 6 out of 46 TWG members speak in this extract.

Conclusion

To conclude, this paper has suggested that the methods we choose in order to analyse the regulatory state shape how we understand it and how we think about visions for the regulatory state of tomorrow. Programmatic statements about the regulatory state and principles of legal regulation need to take into account how we know what we think we know about regulation.

Through combining a qualitative and a discourse analytical perspective insights should be generated which could not be obtained by focusing on either one of these two perspectives. The approach discussed in this paper aims to transcend postmodernist – modernist methodological dichotomies. The qualitative approach captures a first layer of the discourse – the meaning of the words – as well as non-discursive factors – social actors' behaviour beyond the words – which shape the construction of the discourse. The qualitative approach sees BAT determinations through the eyes of the participants and focuses on the meaning which the participants construct in their discussions. This first layer of analysis, however, needs to be complemented by an examination of the discursive techniques through which BAT is established in order to develop further a critical investigation of how BAT discourse constructs the microphysics of power which inform EU regulatory law in action.

[108] When an industry delegate asks the EIPPC Bureau co-ordinator whether he talks about 'BAT or candidate BAT', the EIPPC Bureau co-ordinator replies that he is talking about 'the definition in the Directive'. The text of the Directive, however, does not refer to the term 'candidate BAT'.

Speaking of Regulation: Three Discourses

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I started out to write a paper about regulatory reform. Specifically I wanted to advance a proposition that the real trade-offs inherent in various proposals for reform arises from the different conceptions of the public role of regulation. I have just completed a similar paper, looking at the public-ness of public inquiries, and I was curious to see whether the model I had developed to understand inquiries could be applied to regulation.

I was waylaid in the actual writing of this paper. Reforming regulation is not a new idea. Indeed, it seems to have been in circulation for about twenty-five years. Surely, if it were a straightforward task, the big questions would have been asked and answered by now. Clearly they are not, and there must be a reason. Despite many similarities between inquiries and regulation (some entities we think of as regulators are in fact functioning as inquiries), I was unable to move onto the task I had originally set myself. I was stuck puzzling out the reason why so much good thought has gone into the issue of regulatory reform, and yet there seems to be no emerging consensus, no satisfaction of the critics, and no resolution to the regulatory debate. In the paper I have actually now written, I locate what I think is the reason. I locate it in the discourse – actually several distinct discourses – surrounding regulation. Unpacking these discourses seems necessary even at this late stage, if progress in regulatory reform, in terms of theory and practice alike, is to be possible.

This paper now begins with an identification of three regulatory debates, each quite different from the others in terms not only of subject matter and style, but also by their level of abstraction. I then take each debate in turn, and explore the problems that bedevil its participants – unpacking their discourse, so to speak. I conclude by suggesting that (l) much of the failure to progress can be located in the confusion amongst these three debates, the fact that they are co-mingled in both scholarly and everyday conversation. And (2), this co-mingling of regulatory debates has obscured the key question affecting regulatory reformers, the question of how to trade-off the costs and benefits of each approach to regulatory reform. The paper offers no solutions, not even really any new conceptual formulation of the problem of regulation. It really is about clearing the air so that a more productive assessment can take place.

A. The three debates called "regulation"

I can recall a time, perhaps twenty-five years ago, when regulation attracted little attention

from either academics or policy makers. There was a small coterie of scholars who thought that this form of delegated responsibility for governance was especially interesting. I was part of this group because of my interest in one particular agency, the Canadian Radio Television Commission (CRTC). Its mandate was especially broad and public-spirited, and its methods of operation permitted all kinds of innovations. At the time, I was promoting aboriginal and community broadcasting, and I witnessed how the CRTC made both into full-fledged elements of the Canadian broadcasting system. I knew enough, even then, to realize how unusual this was. It would have been all but inconceivable in other countries with their different approaches to broadcasting regulation.

I also recall the moments when everything seemed to change, the moments when "regulation" became a hot topic for political and academic discourse, and when significant funding became available for policy and academically-oriented research on regulation. I was working with the Science Council at the time, and involved in the preparation of a small booklet called "Regulating the Regulators," which was, as far as I can determine, the Science Council's first foray into a discussion of regulation. More or less at the same time, the Economic Council of Canada launched its multi-study examination of regulation. The perspective reflected in the Science Council initiative fed into an emerging literature on how best to control potentially harmful effects of development or products, while the Economic Council's studies turned out to be a harbinger of a world-wide preoccupation with questions about the desirability, efficiency and accountability of regulation. Meanwhile, something else was happening, a truly differently oriented tack on regulation. Here, writers, mainly from Europe initially, took "regulation" as a moniker for a (actually several) new conceptual framework for understanding the social relations underpinning capitalism.

This two paragraph history of my encounters with "regulation" is all that is needed to identify three separate debates that have been, and still are today, playing out around the idea of regulation.

Debate One: The specificity of regulation

Let me pick up my theme of the CRTC first. It has always been true that regulation is not one thing, but many profoundly different modes of governance. Partly this is a matter of national styles and legal institutions. The history of the regulators in Britain is very different from that in the United States, and so on. But even within one country, say Canada, the similarities between the National Energy Board, for example, and the Canadian Radio Television Commission could not be more pronounced. The Canadian Radio Television Commission has a mandate to further and implement broad policy guidelines, and little legal authority to deal with imperfections in the market, while the National Energy Board has conformed more or less to the conventional wisdom about the purposes and methods of regulation. Were I to add to this picture the situation of pesticide regulation in Canada, the differences in the modes of governance that are

conventionally called "regulation" would become even more stark.

Of course it is true that, in the last two decades, regulators across the spectrum have developed more of a family resemblance. What we cannot know is how much this convergence of "regulation" into a single describable phenomenon was inevitable, a product of regulators finding their feet on common ground. Or, alternatively, how much was this convergence of "regulation" was simply the result of an emerging new discourse about regulation, a discourse that presumed that there was one mode of regulation only, and that regulation was, by its very nature, inefficient, unaccountable in market economy terms?

Convergence notwithstanding, even today, there remains significant differences between one regulator and the next, or more properly, amongst regulatory regimes. This easily observable fact demands that each regulator/regulatory regime needs to be examined in its own right. My preoccupation with the CRTC tells me little about environmental regulation (which I also study) and even less about the Canadian Transportation Commission.

The first so called "regulatory debate" lies here, in a discussion of each and every one of these issue-centered modes of governance in their own right, without significant attention being paid to whatever they might have in common. The first regulatory debate produces a literature about broadcasting regulation in Canada between the years 1970 and today, or a debate within the literature about the influence of the juniors in then mining industry on the policies emerging from Environment Canada and the Ministry of Environment in Ontario. At the end of the day, it becomes a debate, rather than discrete studies, when the various detailed studies are grouped together (not just in an edited volume with a short introduction, but in a properly comparative study).

Any concept is an artificial construction, a drawing together of various differentiated entities under the ambit of a word that purports to capture the essence of all. "Regulation" is a concept like any other in this regard: it has served some very useful purposes, even given the specificity of governance commonly described as "regulation." That said, the concept of "regulation" is only a heuristic device for scholars and politicians. When it fails to serve its heuristic purpose, because it masks what it should be drawing attention to, it is time for analysts and politicians alike to put it aside, at least temporarily so the underlying diversity of phenomena can be identified. The fact that the "regulators" may be, in some instances, officials in the line departments of government departments or quasi-independent agencies, or full fledged tribunals with most of the powers of a court must be factored into the comparison that sustains the first regulatory debate. The fact that some "regulators" make decisions, while others only issue recommendations, is germane. Big, small, co-management or independent agency (or some combination of the two), policy making or rule-issuing, prescriptive or performance-

oriented, permit granting or not – these are all also germane too. Some regulators are part of an appeal process and others make the decisions that might later be appealed. Some regulators are judicially oriented and others are arbitration-minded. Some are subject to legislative and/or judicial review and others are not. The first regulatory debate is about the impact of all these choices that have resulted in the richness of the mode of governance we commonly call regulation.

The second regulatory debate: operational issues and institutional innovation

Now, I'll address the Science and Economic Councils' early interests in regulation. These two Councils foreshadowed two distinct strains of literature about regulation. Call one, for lack of a better term, the Science Council approach. In "Regulating the Regulators," the Science Council sought to increase the scope of regulation, to bring more aspects of potentially dangerous products and activities under the ambit of regulation. While it too was concerned with accountability (hence the title "Regulating the Regulators") the Science Council never presumed that accountability would be achieved by substituting market forces for government control. Market forces were something to be taken into account, but they were never the central issue to be determined. Regulation was quintessentially about the role of governments in protecting the health and well being of their citizens. By contrast, the Economic Council studies called for a re-examination of the justification for regulation, any regulation. The implicit (and sometimes explicit) presumption of virtually all of the Economic Council studies was "regulation if necessary, but not necessarily regulation." While the ultimate goal of some of the authors (not all, by any means) remained centered on health and well being of citizens, this was hardly the motivation for the Economic Council to take up the issue of regulation in the first place. The basic premise of the Economic Council studies was taken up later by many economists. They see market relations, *inter alia*, as the only defensible method of delivering the kind of services traditionally delivered by and subject to regulation.

So differently oriented were the Science and Economic Councils' approaches that it is hard to imagine their main protagonists ever engaging in a conversation with each other, and indeed today, as I said, there are still two different literatures that barely connect at all. But a conversation has taken place in at least two venues: One venue is inside agencies like the CRTC. Despite the fact that there have been no significant changes to its legislated mandate in over ten years (and the previous changes were insignificant in this regard), the CRTC has changed its approach to regulation dramatically. Over the course of the last decade or more, it has moved from what I just called a Science Council approach to an Economic Council approach, ditching elements of its pro-active public service mandate in favour of significant deregulation of large aspects of the policy field that it is supposed to supervise and regulate, and in favour of preoccupation with competition issues.

The second venue is best exemplified by the phrase "smart regulation." Many of the "smart regulation" writers (but not all) who focus on health and well being issues seem to accept at least a few of the premises of the Economic Council approach, specifically about the inefficient and unaccountable nature of government-based regulation. They accept these premises even when they are in favour of more stringent regulation. They offer up voluntary compliance, standards and codes, stakeholder negotiations and other similar proposals as substitutes for conventional government-based regulation. They have moved, if I may be pardoned for caricaturing a diverse and interesting group of writers, away from the slogan "regulation if necessary, but not necessarily regulation" to "regulation as necessary, but not necessarily government-based regulation." They have stripped the state of its central role, to render this mode of governance relatively autonomous of government in their proposals for reform.

I want to put aside the larger issue about the centrality of the state in delivering the goals associated with regulation, because most of these writers do. They do not entangle themselves in the debate about the role of the state, but rather accept the premises of some of its protagonists as their starting point, for example, about the putative inefficient or unaccountable nature of government-based regulation. I want to come back to their presumptions about governments in a minute, when I speak about the third regulatory debate, which is all about values and political philosophies Suffice to say now that little progress is possible on the more pragmatic questions of regulatory reform if one focuses only on the major theoretical concerns that attend to the centrality of the state. These writers have made a pragmatic and defensible, in my view, decision to put aside the grand theory so as to make progress on regulatory reform. Even those who seek to bring the Science and Economic Councils' approaches to regulation together look mainly at the operational constraints and institutional design issues. Regulation can be made “smart,” these writers say, when all the basic critiques of the Economic Council approach are taken into account, and when new arrangements are put into place that alter, complement or replace conventional regulatory institutions.

My point here is not to argue that the CRTC was or is now wrong-headed, nor even to take sides between the two approaches to regulation epitomized by the Science and Economic Councils so long ago. I am certainly not launching a critique of "smart regulation," because I think there is much merit in many of the innovations. I simply want to point out two things: (l) for two decades at least, there have been two fundamentally different approaches to regulation manifest in the literature, and (2) the policy makers and academics who sought to bring these two approaches together have done so, by and large, by adopting the underlying premises of the Economic Council approach, and applying them to the manifest goals (health and well being) of the Science Council approach. To make this convergence of different approaches possible, these writers tend to focus on the

operational realities of regulation, and attempt to design institutional solutions that bridge the two approaches. This preoccupation with the structure and operation of regulation is the second regulatory debate.

The third debate: a matter of philosophy and values

But recall that I noted a third development in the early stages of the "regulatory debate," that is, the emergence of a strain of theory called "the regulation school." The people who write in the regulation school have nothing whatsoever to say about an agency like the CRTC, not even about the changes underway in how the CRTC conceives of and executes its mandate. They also have little or nothing to say about the differences between the Science and Economic Councils' approaches, even though, by the time the "regulation school" was flourishing outside Europe, these differences had given rise to the two discernable strains in the academic literature on regulation. "Regulation" in this third literature, does not refer to agencies, tribunals or indeed any specific institutions. It also does not refer to the ways that governments might (or might not) step into the marketplace or act otherwise to protect the health and well being of their citizens. "Regulation" in this third approach reflects a highly abstracted conception of social and economic relations, indeed, *the* social and economic relations underpinning capitalism as a whole. "Regulation" means the inculcating of these relations into everyday life, such that these relations can be, and are, taken for granted as natural and ordinary, unchallenged because they are considered to be unchallengeable.

Truth be told, the theorists of the regulation school were not the only writers working at such a high level of abstraction, or dealing with the conceptual underpinnings of whole political systems, nor were they the only academics with a political agenda. Much of the literature following the Economic Council approach is no less philosophically – and prescriptively – oriented than that of the regulation school. Arguments have been advanced in this "Economic Council" literature that there is, and should be, no role for the state in achieving public goals, not just because state-sponsored regulation might be inefficient or insufficiently accountable, but because the state has no business setting such goals, let alone developing governing instruments to deliver them.

It is interesting to note that the theorists of the regulatory school and the more radical followers of the Economic Council approach both call themselves political economists. The followers of the Economic Council approach speak about economics almost exclusively, but from a prescriptive point of view, they focus on political solutions. They propose a necessary disconnection of the state from any notion of the public or public interest. Indeed, many would go so far as to suggest that the "public interest" should lie outside the ambit of the state. The regulation school theorists take the opposite tack. Their underlying preoccupation is with economic relations, but the state is factored in at every turn.

As different as these two political economy literatures are, they are united by one thing. Their writers work at the highest levels of generality. They display almost no interest in the mechanics of regulation, "smart" or otherwise, or in the actual instances of regulation, such as the differences one might locate between the CRTC and the National Energy Board. For them, "regulation" is proxy terminology. "Regulation" is a shorthand way of discussing the nature and role of the polity and its relationship to economic relations. It is about matters of political philosophy mixed with social prescription. It is, first and foremost, a debate about values and their translation into policy.

I want to avoid stepping into this philosophical debate, as much as it is ever possible to do so. My point is an altogether different one: this last "regulatory debate" spawns a different kind of discussion than I mentioned about the CRTC, and a different kind of discussion than is reflected in the one about innovation about regulatory design.

Let me sum up the argument so far: The so called "regulatory debate" operates on three separate planes. It is three different debates, each distinct and conceptually independent of the others. The first regulatory debate is exemplified in my comments about the CRTC. It revolves around the study of specific regulatory regimes, identifying why each is one unique in significant ways. It is, in essence, about insights that can be drawn from a comparison of different modes of governance. The second regulatory debate is exemplified by my contrast of the Science and Economic Council approaches. In this second regulatory debate, regulation has come to be dealt with mainly in operational terms. That is, this second debate is about finding the best design for regulation. The third regulatory debate is all about philosophy and values. It is about the nature of the polity, the nature of economic relations and the many possible interconnections between the two.

I will argue later that the three debates have been co-mingled, perhaps irretrievably so. I will suggest that it would be very helpful if we could keep these three regulatory debates separate, at least as an intellectual exercise. Doing so would allow us to see more clearly where the barriers to progress in regulatory reform actually lie. Taking up my own challenge, I want to look at each of these debates in turn. My goal, as I stated at the outset, is to see why so little progress has been made in the so-called regulatory debate: and to to explore the reason why I did not, could not, write the paper I intended to write.

B. The First Debate: *The specificity of regulation*

This mini-paper is surely not the proper place to do a thorough examination of the CRTC. That said, such an examination is called for inasmuch as there has been a change in the discourse of regulation about broadcasting in Canada, with very significant consequences for all concerned. Suffice to say, whatever such an examination will show, it would have very little to contribute to the examination of environmental regulation, even though it too has changed over the past two

decades or more.

There is a huge literature that takes the specificity of regulatory regimes as its starting point. Much of this consists of case studies, or arguments for restructuring one particular law or agency or another. There is a much smaller literature that carefully compares these "apples and oranges" to see what, if anything, they have in common. Despite the abundance of case studies and regime specific analysis, this first debate about the actual contours and possible commonality among regulatory regimes seems barely begun. Attention has been diverted elsewhere, away from the rich body of data awaiting those who would systematically conduct the meta-study required, or draw from the obvious differences amongst regimes some much needed lessons for public policy. The first debate about regulation seems to be truncated.

C. The Third Debate: *a matter of philosophy and values.*

I have already suggested that regulation is a proxy term. By proxy term, I mean a term that lacks a specific definition, but instead stands in for whole philosophies and value commitments. The phrase "proxy term" is my own, but the idea underpinning my analysis is not. Connolly laid out the problem of proxy terms when writing about the essentially contested concepts that confound political discourse (Connolly 1993). His discussion is important if we want to understand the regulatory debate as a debate about philosophies and values.

Connolly's point is as follows: some words, such as *democracy*, can no longer serve as ordinary words, closely tied to their dictionary definitions with widely shared understandings of their meaning. These words are instead elevated to a different plane of language, where they serve as proxies for the political philosophies that underlie political discourse. This would not be a problem but for the fact that the same words are used by groups with diametrically different political philosophies. Such words become emblematic of their very different theoretical assumptions, radical agendas and practical advice. Recall that East Germany was once called the German *Democratic* Republic, even as the cold war was being waged by the west under the banner of *democracy*. Democracy is undoubtedly an essentially contested concept. I suspect that *regulation* emerged as an essentially contested concept shortly after the Science and Economic Councils first put regulation on their agendas, and that it remains one today.

Connolly says that essentially contested concepts are fundamentally open-ended with respect to the characteristics that can be added and subtracted from their definitions. For example, virtually anything can be said to be *the* defining characteristic of *democracy*. Recall C.B. Macpherson's now classic study of *The Real World of Democracy*, where Macpherson attempted to argue (successfully for its time) that the emerging one-party states of post-colonial Africa had as much claim to being democratic as the multi-party states of the western industrialized countries (1966). Macpherson also argued the countries of the then Soviet bloc

were democratic too, albeit using a different conception of democracy. Each political system, Macpherson suggested, grounded its conception of democracy in its own political philosophy, and thus used the term not capriciously or merely rhetorically but as an integral part of a coherent conceptual framework. For Macpherson, words like *democracy* play a pivotal role in politics, and they cannot be disconnected from the philosophies or conceptual frameworks that give them meaning. There is no solid ground to be found for any common definition of *democracy,* or indeed for any other essentially contested concept such as *regulation.*

That said those who use essentially contested concepts like *democracy* are so deeply attached to their own conceptions that these words cannot simply be discarded. This is Connolly's point too. These words are somewhat like a flag or logo. They stand for, and act as a symbol of the whole. The German Democratic Republic distinguished itself precisely because it was *democratic* in a way that western market democracies could never be. The one party states were *democratic* in a way that captured for their leaders of the time what it meant to break away from colonialism. These leaders would say: democracy was worth nothing if it was not indigenous to, and shaped by, the communities in which it took root. What is really at stake, for Macpherson and Connolly alike, are conflicting conceptions of democracy. The terminology masks a struggle over philosophy, but the struggle is played out as if it is a conflict over words or, more specifically, over the right to control the definition of emblematic words. Because the terminology is emblematic, the political philosophies that churn up the label *democratic* would be lost without their *democratic* moniker.

Essentially contested concepts are not just essential and contested, in the sense I have just described, Connolly argues, but also serve another function. They lay the foundation for moral judgments, even about seemingly unrelated matters. As such, they are the lynchpins of the value debates that permeate all political discourse, the bearers of moral judgments about all kinds of things, in all kinds of circumstances. These terms set standards, against which all behavior (state behavior, company behavior and even individual behavior) can be judged. To be *democratic* is good, regardless of what democracy means in practice. To be successful in attaching the label *democracy* to ones' actions or beliefs is to bless all one's beliefs regardless of any connection they may have to democracy, however it might be defined. But not all essentially contested concepts spawn positive moral judgments. *Regulation* has the opposite effect. Its use immediately conjures up something vaguely evil, or at least unsettling about the state of affairs and affairs of state. It conjures images of compulsion, even oppression.

It must be emphasized that neither Connolly nor Macpherson was disparaging the use of the essentially contested concepts in political discourse, and neither am I. They were not saying that essentially contested concepts rendered politics meaningless, nor was either

writer railing against the drift of modern media-soaked politics. Essentially contested concepts are the way that differences in values and philosophies were factored into political discourse, and philosophical differences are telegraphed from one group to another, each argued. These short-cut words are necessary for making sense of political debate. They are abbreviations for the deep-seated issues and values that divide countries, blocs and political opponents. Political struggles about the proper definition of words like *democracy* or *regulation* are never really about these words or their definition. That said, conflicts embedded in such words are a useful substitute for war or civil disruption.

Language has enormous power, even if words are lighter than air and much more open to manipulation. Not for nothing was the phrase "language wars" coined. Proxy words, to return to my terminology, foster continuing conflict. Definitional struggles have torn apart the feminist movement and environmental advocate groups. I suspect that conservatives have also learned the hard lesson that language wars are not just irresolvable (because they involve essentially contested concepts) but also destructive of their political influence.

When the regulatory debate is conducted as a debate about philosophies and values, it is not about to be settled amicably. The issues in contention cannot really be addressed by concrete proposals for one kind of reform or another. None of the protagonists is likely to be satisfied by even the "smartest" of regulatory reform. Some of them would say that even the most innovative proposals miss the whole point of having regulation in the first place, or that these innovative reforms misrepresent the public dimension of government. Others would say that "smart regulation" is still regulation, and thus to be avoided at all costs.

Now let me add another layer to my brief discussion of this third regulatory debate, the one about values and philosophy, this time drawing from Raymond Williams' book on keywords (1983). *Regulation* is, as Williams would say, a keyword as well as an essentially contested concept. That is, it is a word whose presence (as opposed to definition) symbolizes what political systems stand for and against at any moment in history. Keywords do describe political systems as a whole, Williams argues, but they do so only temporarily. They orient political discourse at one time, but not at others. Particular keywords ebb and flow in political discourse. Their salience changes over time in ways that signify the preoccupations and ethos of the era in which they are used.

Recall my earlier observation that regulation was not even a topic in the literature a scant two and a half decades ago. Note also that keywords not only emerge at particular moments in time, but disappear too. They also lose their "carrying capacity" in political discourse. They become irrelevant, rhetoric without rhetorical power.

I cannot offer much evidence, but my instinct is that *regulation* as a keyword has passed its moment in the spotlight, and that it has ceased

(or is rapidly ceasing) to have much resonance in today's political discourse. Would this be a bad thing? This is not intended as a mischievous question for a collection of essays on regulation. Remember that I have just argued, in this third regulatory debate, that regulation serves as a proxy term (and an essentially contested concept) and, as such, that it defies definition or specificity. I have suggested that "regulation" refers instead to a bundle of contradictory (often inchoate) notions about philosophy and values. I might now add the observation that value debates are never easily resolved, certainly not by reasoned discussion.

Value debates may be irresolvable by reasoned discussion, but they are often resolved by political power. The consequence of the third regulatory debate, conceived as a debate about values, has been the dismantling of much that served to protect health and well being of citizens (whatever other benefits it may have been delivered). The record keeping function previously associated with regulation has all but disappeared. Truth be told, it may be impossible to gauge what has been won and lost as a result of the value debate associated with regulation, simply because no one now keeps enough data to answer the question.

I think that it is a positive development that this third regulatory debate, based on values, can now safely be regarded as spent. To be sure, the conflicts in values and philosophy, so recently reflected in the third regulatory debate, have not subsided, and the costs associated with the political resolution of this third regulatory debate remain high. However, the action seems to have moved elsewhere, away from regulation and into other political spheres. This can only be a good thing if the goal is to address the specific problems of regulation, its operational constraints and to offer proposals for institutional innovation. The fact that *regulation* has been, for about two decades, an essentially contested concept, allied with values debates, has created a lot of noise. The noise has made it difficult to get down to the real business of thinking about regulatory regimes: how might they best be structured, in response to what concerns; and underwritten by which notions of the public interest. It has done more than distract attention, as I shall discuss in the next section.

D. The Second Debate: *operational constraints and institutional innovation.*

Both the Science and the Economic Council studies were about regulatory reform, and many quite specific proposals for regulatory reform were advanced at the time. They were written more than twenty years ago. A voluminous literature on regulatory reform has emerged in the interim. It is surprising that we still have anything left to talk about. Surely by now there has been enough time, enough analysis and sufficient innovation and experiments for everyone to know how to do "smart" regulation. But here we are, more than twenty years after, and nothing seems yet to be settled about how to achieve it. What is the problem?

I suspect that it lies in the fact that the first debate, about the specificity of regulatory regimes, has been more or less silenced, despite

the existence of a vast body of regime specific studies on virtually every instance of what we might call "regulation." In the effort to capture the essence of the whole, "regulation," a myriad of details relating to the parts has been lost to view. This might not matter if the concept of regulation was sufficiently nuanced to allow for the variation, but this is hardly the case. Most of the time, the concept of "regulation" refers to government-based regulation conducted by a more or less independent tribunal, surely not the only or even the most common form of "regulation" in all countries. Even in discussions about self-regulation, voluntary compliance, co-management etc. the government-based independent tribunal serves as the point of reference for a comparison between the old and the new. It is as if voluntary compliance, codes and standards, self- and modified self-regulation, regulation by "recommendation" and co-management were new, that is, as if they were innovations. If nothing else, factoring in the specificity of regulation, studied historically, would serve as an antidote to this patently false notion of how regulation has developed and operated in the past.

The silencing of the first debate has had serious consequences. It has allowed analysts and policy makers alike to produce a profoundly *a*historical picture of regulation, one that fits neatly into the current political discourse about the role of the state in governance, but is otherwise unenlightening. It has allowed them to talk about a golden era of regulation, contrasting this era with today's golden era of deregulation, as if this caricature of history properly described the "then and now" and as if the struggle between regulation/deregulation were all that need be said.

I suspect that the problem also lies in the fact that the third debate has created so much noise, drawn so much attention, that it has all but swamped the other regulatory debates. Its terms of reference have become the terms of reference for any and all discussion about regulation. The preoccupations of its main protagonists have become the preoccupations of everyone. Even proponents of more stringent regulation have either adopted the jargon of the Economic Council approach or become bashful about their view of the rightful role of the state. They too seem to assume that the critics of government-based regulation were right, or if they were wrong in the details, these proponents of stringent regulation assume that the Economic Council approach to regulation should nonetheless be factored into any of their recommendation for reform. They have accepted the basic premise of the Economic Council approach, which is that there is a fundamental dichotomy between the public interest and the state. Rather than speak about how the state can live up to its public moniker by becoming more publicly interested, they have sought alternatives to the state in civil society organizations, as if these were somehow more authentically "public" than any state.

In short, the discourse of the third regulatory debate has become *the* discourse of regulation. Everything has been turned into a discussion of values, the sharply contrasting values and

philosophies at play in the third regulatory debate. But recall that value debates are peppered with essentially contested concepts, and that they are notoriously impervious to resolution by reasoned discussion. The result of emphasizing values and philosophy – the third regulatory debate to the exclusion of others – may well prove more than a distraction from the issues raised in the other two regulatory debates. It may ensure that there is and can be no breakthroughs possible in any debate about regulation, no meaningful discussion of how specific regimes operate, or of institutional reforms.

I have no doubt whatsoever that progress can be made in the second debate about regulation, the one about organizational constraints and institutional innovation. But I also think that this progress will not be made when the first debate, about the specificity of regulation, fails to attract the attention it deserves, and when the third debate, about philosophy and values, overtakes the discourse. To get to the heart of the matter in the second debate will take a good deal of effort. It is important that analysts not be sidetracked into the other debates, or they will never muster the time and intellectual resources that the second debate demands in its own right. In the confusing array of issues connected to regulation, it will be hard to keep the focus on organizational and institutional matters, to discover which kinds of regulatory arrangements work best under what conditions and when.

Concluding remarks

Back when I was taking philosophy as a student, I learned not to casually mix levels of abstraction, and not to move from the particular to the general and back again, without careful consideration of all the steps necessary to link the two. Yet here we are, two or more decades into the so-called regulatory debate, often being seduced into thinking of it as a single debate, as '*the* regulatory debate." My comments in this paper are a pleading for conceptual clarity, for keeping the three regulatory debates distinct. It should be clear when we are talking about the specificities of particular regulatory regimes, so that we do not over-generalize the phenomenon of regulation, losing sight of important differences from one regulatory regime to the next. It should be clear when the focus is on the operational constraints of the many regimes we choose to call "regulation," when we have chosen to combine the two approaches (the Science and Economic Council approaches) and why we might not choose to do so. And it should be clear when we are engaged in a debate about basic values and our own theoretical presumptions. The three regulatory debates have been confused, one with another, and co-mingled. It will pay handsome rewards to keep them conceptually separated.

I suspect there are no solutions across the board for regulatory reform. The first regulatory debate – about the specificity of each regulatory regime – needs to be taken seriously. What will work in one case will have deleterious effects in another. The third regulatory debate, about values and philosophy will not be resolved by regulatory reform either, even if some writers seek to bridge the gap between what I have called the Science and Economic Council

approaches. In the end, the proponents in this debate really do disagree about the most fundamental things, so any appearance of agreement is more strategic or tactical than real. But what about the second regulatory debate, the one that does pertain to the operational constraints that do need to be addressed by regulatory reform and institutional innovations that constitutes the essence of those reforms? Is there a solution waiting to happen, assuming the first regulatory debate could provide good data, and the noise of the third regulatory debate could be silenced?

There is no space in this paper to address this second regulatory debate properly, in its own terms. It might be useful for me to suggest an avenue of approach, however. I mentioned an earlier paper that I thought was going to be the prelude to this one, a paper on the public component of public inquiries. In this earlier paper, it was easy to show how different inquiries were animated by quite different notions of what they thought it meant to be a *public* inquiry: Some inquiries thought of their deliberations as a sort of public opinion poll. Others worked with an interest group negotiation notion of what they thought they should be doing. Some thought of the public as external to their deliberations, and of the members of this public as either having expertise or in need of education. Other inquiries thought of the public as a value they ought to be pursuing: these were public inquiries to the extent that they fostered dialogue about what was in the public interest, what would serve "the good of all" (Dewey 197) These different conceptions of the public meant they did different things; they structured their deliberations differently; they welcomed some kinds of participants and not others, and they reached for different goals. This earlier paper concluded by saying the obvious: these were not clear-cut choices and none of them offered a panacea to the problems of inquiries. This earlier paper also suggested that those who commission inquiries might pay much closer attention to the choices they make, and the trade-offs involved in adopting one or other notion of the public. I suspect the same is true for regulation: that regulation is by definition a public function, but that very different notions of what it means to be public drive the proposals for reform. I will leave this thought for another day and another paper.

Regulatory Fragmentation

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Introduction

In North America there is, of course, a long tradition of the deliberate use of regulation as an instrument of public policy (Eisner 2000). Regulation in this sense is characterized by the development of legal rules and monitoring and enforcement carried out by a dedicated and somewhat independent governmental agency. The last twenty-five years have seen a policy boom in regulation in other countries within the OECD and beyond. It is claimed that in Europe we have experience "the rise of the regulatory state," (Majone 1994) whilst wider claims suggest there is a near-global movement towards systems of "regulatory capitalism" in which much of the steering machinery which make capitalist organisation of economic and social relations viable is supplied through regulatory instruments and institutions (Levi-Faur 2005).

It is difficult to contest these observations about the growth in the importance of regulatory ideas, discourse and institutions in contemporary public policy. However, it is more questionable whether the conception of regulation which underpins claims about the regulatory state and regulatory capitalism is helpful in understanding what has been happening or in delivery on public policy outcomes. The central argument of this chapter is that the image of independent regulatory agencies, capable of making technically expert and correct decisions, isolated from politics and from the courts, is illusory. Contemporary regulatory governance, I suggest, is characterized by fragmentation of power, rather than its concentration in independent agencies (Black 2001; Scott 2001). This observation substantially undermines many of the claimed virtues of regulation as a public policy instrument. Indeed it provides some explanation for widespread observations in regulatory governance of phenomena various described as "fatal remedies," (Sieber 1981) "counterproductive regulation" (Grabosky 1995) and "policy fiascos." (Moran 2003).

Fragmentation

The archetypal model of regulation involves a decision to legislate for the establishment of an independent regulatory agency with capacity to appoint expert staff, to make regulatory rules, to monitor, examine and inspect industry actors, and to apply formal sanctions for breach of the rules. This model derives from experience in the United States with the early federal regulatory agencies, the Interstate Commerce Commission, established in the late nineteenth century, and the variety of new deal agencies in such fields as communications, securities and aviation (Eisner 2000). The Canadian federal government made

similar institutional developments in a somewhat later period (Doern and Schultz 1998).

When the British government of Margaret Thatcher set about privatizing key state owned enterprises in the utilities sectors (Telecommunications, 1984; gas, 1986; electricity, water, 1990; railways 1993) the *quid pro quo* for privatization was the establishment of independent agencies to oversee the industries, essentially taking on functions which had previously been exercised by the firms themselves in respect of such matters as pricing and quality of service (Prosser 1997; Feigenbaum, Henig et al. 1999). These new British agencies were, however, nothing like as independent as the US model which had inspired them. In fact the more immediate model for the UK Office of Telecommunications (OFTEL, established 1984) was the consumer and competition agency, the Office of Fair Trading (established 1973). Under the Telecommunications Act 1984 the power to make rules was reserved to Parliament and to ministers. For OFTEL to make changes to the regime required amendment to the licences issued by the minister to operators which, in turn, required either the consent of the licensee or the approval of another agency, now called the Competition Commission. Formal enforcement of the rules required application to the court (Hall, Scott et al. 2000).

I suggest that within parliamentary systems of government this model of fragmentation of regulatory power is fairly typical. It is culturally problematic for ministers to delegate powers to make rules, or for the capacity to apply formal sanctions to be located within any other institution than a court. The effect of this intra-state fragmentation of power (Daintith 1997) is, of course, to make other non-state actors, relatively more powerful because of their capacity to arbitrage the formal powers through appeal to other state actors. Thus, a firm disappointed with the decision of an agency can push the matter to a court, which might be expected to have a rather different way of reaching a view on the matter. Unhappy consumer groups can take matters to ministers, knowing that ministers have powers to intervene which, with enough pressure, they may be inclined to exercise.

Fragmentation of regulatory power is not restricted to the diffusion of formal powers amongst state actors. Formal authority is not all that is required to regulate. Other key resources include information, organisational capacity, wealth and the capacity to bestow legitimacy (Hood 1984; Daintith 1997). It has long been observed by economists that information asymmetry creates something of a headache for regulators faced with firms that know much more about the industry, its costs, and its potential than agencies. But regulated firms, especially in highly concentrated industries, may also have more wealth and organizational capacity such that they can outgun agencies in processes for making and interpreting regulatory rules. The question of who can make a regime legitimate is difficult to answer in the abstract. In some settings it may be government or agencies, in

others firms, and in others consumer groups or other NGOs such as environmental groups.

National governments increasingly recognise their limited capacities, explicitly or implicitly delegating power to regulate both to non-state actors within the state, in the form of self-regulatory or associational regimes, and to supranational inter-governmental organizations (such as the European Union and the World Trade Organization) and non-governmental organizations (such as standardization bodies).

Taken together these various aspects of regulatory fragmentation make the independent agency model look somewhat exceptional in most countries of the OECD. Fragmentation appears to be the norm, and this has important implications for our expectations of what can be achieved within regulatory regimes. I characterize some of the implications of fragmentation as "challenges to instrumentalism" in the next section of this chapter.

Challenges to Instrumentalism

Regulation as in instrument of government is said to exemplify a form of "high modernism," under which state agencies are able to identify and target economic and social problems, of which various forms of market failure are the key examples (Moran 2003). I refer to this aspect of regulation as instrumentalism – the belief that regulation can be effectively targeted at particular problems.

A central argument in favour of the use of independent agencies for regulatory governance lies in their capacity to act in ways that are more instrumental than might be true for ministers or for courts (Majone and Everson 2001). Two particular aspects of delegation to independent regulatory agencies, or non-majoritarian institutions are of particular importance (Thatcher 2002). First there is the relative insulation of such agencies from politics and second the capacity to develop and apply expertise in decision-making. Whereas the first is a comparative advantage over government ministries as regulators, the capacity for expert decision-making is said to be an advantage over both ministries and over courts and tribunals. Thus agencies exemplify a form of bureaucratic rationality that emphasizes the search for the most efficient ways to get things done.

An important alternative narrative about the growth of regulation, particularly in the United States, suggests that regulatory regimes are frequently established to further not the public interest, but rather some sectional interests such as those of major regulated firms. This form of critique of regulation is found not only in the economic theory of regulation of Stigler (1971) and Peltzman (1976;1989),but also in the Marxist history of Kolko (1965). I suggest that these revisionist accounts, and their emphasis on forms of corruption and capture of regulatory regimes, are also premised upon the plausibility of a form of instrumentalism, albeit one directed towards the pursuit of private interests rather than some version of the public interest.

More recently new forms of instrumentalism have emerged that attempt to "transcend the

deregulation debate," in the phrase of Ayres and Braithwaite (1992) by showing that regulatory techniques can be re-engineered to take account of certain vulnerabilities, particularly in regulatory enforcement. Thus Ayres and Braithwaite themselves combine sociological investigation of regulatory enforcement with game theory to suggest "pyramidal" strategies of regulatory enforcement within which regulators give to firms every incentive to comply on the basis of education and advice in the knowledge that repeated, or perhaps willful infractions will result in more stringent enforcement.

Whatever form of instrumentalism is preferred, observations about fragmentation in regulatory governance provide a challenge for any justification for regulatory activities which is premised upon some reasonably centralised and monolithic regulatory institution capable of instrumental action. Fragmentation in regulatory governance is the source of two related critiques of the possibility of instrumentalism.

The first critique starts with the observation that actors exercising power within regulatory regimes are likely to have different priorities and different ways of viewing the world. We can think of this in terms of different types of actors having different and often competing rationalities. If we think first of the intra-state fragmentation between ministers, agencies and courts it is clear that competing rationalities are likely to be in play. A key priority of elected politicians is securing re-election. This causes them to seek speedy and high profile responses to perceptions of problems and crises that have high political salience but to pay less attention to problems that have less probability of entering media or public consciousness. Quick fixes and symbolic actions are likely to be among the requirements of their actions.

With courts it has often been observed that they prioritize the reproduction of the values of the legal system, concerned with fairness and legality. This bias is liable to cause judges to prioritize the pursuit of demonstrably fair procedures over any evaluation of the outcomes of regulatory activity.

Agencies are constituted to pursue particular instrumental objectives, but, as with bureaucratic organizations generally, are liable to use their resources for other ends too, such as building the legitimacy and perhaps the size of the organization. It is reported in recent empirical work by Keith Hawkins that occupational health and safety agency decisions on prosecutions for detected infractions are often shaped by a desire to invoke the "expressive function of law" (for example by labelling conduct as morally wrong) rather than to maximize compliance (Hawkins 2002). Agencies can also become the site for the interplay of professional rivalries, for example between lawyers and economists. If each of these three institutional forms has a role to play in the actions within any particular regulatory regime, then it immediately becomes clear that competing rationalities are likely to come into play.

Supranational intergovernmental authorities are likely to exhibit different rationalities again. The

European Union institutions, and particularly the Commission and the European Court of Justice, tend to prioritize objectives linked to integration of European markets over other regulatory objectives. It is said of the Court that it applies teleological reasoning which works back from such integrative objectives to determine the appropriate result in cases brought forward, in marked contrast the more principled reasoning processes of national courts in many countries.

The second and related aspect to the critique derives from the observation that fragmentation in regulatory governance, between and beyond state organizations, creates marked interdependencies between key actors (Scott 2001). We have noted already that in many regimes agencies are likely to be dependent on ministers and/or legislatures for the supply of new regulatory rules, on courts for the capacity to apply formal sanctions, to regulated firms for information, and, sometimes to other groups for legitimacy.

The impact of the intra-state interdependence is illustrated by attempts to impose strict liability on businesses for regulatory criminal offences in fields such as occupational health and safety and consumer protection in the UK. Enforcement agencies have little control over or input into the framing of such rules and are responsible for enforcing rules which, for example, make the giving of misleading trade descriptions or misleading price indications criminal offences of strict liability. In practice the courts have demonstrated considerable ambivalence about holding firms strictly liable in circumstances where they may not have known an offence was being committed or where they could not be said to have been at fault. Even though the intention of the legislation is to make it easier to secure convictions and thereby encourage better business behaviour, the ambivalence of judges, perhaps more concerned with the integrity and values of the criminal law than with the instrumental objectives of the legislature, causes enforcement officers to be extremely careful in choosing cases where fault is palpable to take to prosecution. The effect is to greatly reduce the impact of the imposition of strict liability in attempting to steer businesses towards more compliant behaviour.

Beyond these intra-state interdependencies the resources of firms, NGOs and others also constrain the capacity of agencies for instrumental action. We have noted already the classic case of information asymmetry, particularly significant in highly concentrated sectors such as utilities and communications. But agencies are not dependent on large firms simply for information. There is also a tendency towards "epistemic dependence" of agencies on firms, in the sense that agencies may rely on firms to shape their world view on key issues such as the desirability of competition, the appropriate degree of consumer protection in light of market conditions, and so on.

The Future of Regulation

In light of the observation of competing rationalities and interdependencies within fragmented regulatory regimes it is likely that

outcomes will be the product not of the capacity of a single actor, such as an agency, to steer behaviour, but rather of a more dialectical process of interplay between the various actors. This is not to say that we should view these actors as lacking an instrumental orientation, but rather recognize the limits of their capacities to act alone, or in isolation from others.

What are the implications of this analysis? Should we give up on the capacity of the state to establish and operate effective regulatory regimes? One possibility is to recognize that if fragmentation in regulatory governance is a problem then certain forms of regime exhibit less of it than others. For example, within many self-regulatory regimes the powers to make rules and to monitor and enforce can be concentrated within a single firm or trade association (Scott 2002). Accordingly the regime may be one that is relatively immune from the impact of competing rationalities and thus can be more focused towards whatever may be conceived of as the regime objectives. However, we must recognize that for some this advantage is more than outweighed by the risks that this concentrated regulatory power will be used to advance the interests of regulated firms rather than those of what we may refer to as the protected class.

A second possibility is to recognize that firms and trade associations have good knowledge and a variety of other resources which might make them effective regulators, and to seek ways to harness that capacity for public ends through mandating or monitoring self-regulatory activities through public agencies. This way of organizing through "indirect governance" or "governance at a distance" is sometimes referred to as "meta-regulation." (Parker and Braithwaite 2003) A particular version of this kind of thinking, the "smart regulation" position developed by (Gunningham and Grabosky 1998), explicitly attempts to reengineer responsive regulation in recognition of the diffusion of regulatory capacity among state, market and community actors, so as to use pluralism in values and techniques to develop more effective regulatory regimes.

It may be helpful to think of regulatory mechanisms that combine non-state and state capacity as a potential source for enhancing regulation and addressing the problems of fragmentation. However, it appears just as likely to me that the resources of firms and of others such as NGOs will be deployed to steer the behaviour of state agencies as the other way round. And I do not think it right to think of this as some sinister form of "capture" but rather we should recognise that it is inevitable that actors in policy processes will use their resources in pursuit of their own ends. It is equally inevitable that the fragmentation of those resources will likely lead to compromises and few actors securing their ideal outcomes. We can view these tensions as being productive, reducing the risks that any one group or section of society is able to impose its view or its interests on other sections of society. We might also add that there are widely recognized deficiencies in governing practices of states, as there are in governance through markets and communities. It is possible

to see the fostering and development of each as a potential means to check behaviour in each of the other governance structures.

We might then want to follow the logic of recent analyses of diffusion in governance generally and recognize the interpenetration of state, market and community (Kooiman 2003). A key question is to what extent the capacities for control and accountability in each of these locations of power can be balanced such that each is able to have some effectiveness but not to the exclusion of the others.

Conclusion

In the conclusion we return to the question about the possibility of instrumentalism in regulation. It is a good start to recognize that regulatory resources are widely dispersed and the harnessing of the capacity of others may often be a better option than the direct application of one's own (limited) capacity. In turn this suggests the need for a certain modesty in developing the institutions and ambitions of regulatory regimes. In many and perhaps most domains it appears implausible to think of state agencies controlling what happens. Indeed, in most cases this would be undesirable. Rather we may conceive of departmental and agencies activities as offering one aspect of a more complex pattern in which markets and communities are also likely to be important. Regulators can identify deficiencies and attempt to steer behaviour towards meeting them. But equally community and market actors may similarly attempt to steer the state actors towards more desirable behaviour. Thinking of regulatory fragmentation in this way appears to offer a better way of understanding the complex relationships within regulatory regimes, and to provide the basis for policy proposals that are more sensitive to the relatively limited capacity of state agencies.

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