Risk&Regulation

Magazine of the ESRC Centre for Analysis of Risk and Regulation

No 8 Winter 2004

Regulatory Creep

E·S·R·C ECONOMIC & SOCIAL RESEARCH COUNCIL

LSE

Risk&Regulation: CARR Review
No 8 Winter 2004

Editor: **Robert Kaye**
Assistant Editor: **Sabrina Fernandez**
Enquiries should be addressed to: Centre Manager
ESRC Centre for Analysis of Risk and Regulation
The London School of Economics and Political Science
Houghton Street, London WC2A 2AE
United Kingdom

Tel: +44 (0)20 7955 6577 Fax: +44 (0)20 7955 6578
Website: www.lse.ac.uk/Depts/carr/
Email: risk@lse.ac.uk

Published by the
ESRC Centre for Analysis of Risk and Regulation
The London School of Economics and Political Science
Houghton Street, London WC2A 2AE

Design and Art Direction: **LSE Design Unit**
Photography (unless stated):
CARR and **LSE Photography**
Printed by: BSC Print Ltd
ISSN 1473-6004
Online ISSN 1473-6012

Front cover photography: www.imageafter.com

Contents

carr
centre for analysis
of risk and regulation

www.lse.ac.uk/Depts/carr/

The **Risk Industry**

There is little doubt that risk ideas and risk management are more prominent and more extensive than they used to be. And it could be said that CARR contributes to, and is part of, this general phenomenon. A risk industry has taken off and new connections between hitherto separate worlds are being made – IT security, business continuity, health and safety, financial solvency and so on. This process of connection involves the generation and formalisation of abstract levels of risk management thinking, a new risk management characterised by a variety of generic standards – beginning in 1995 with the document produced jointly by the Australian and New Zealand standards organisations and ending most recently with the publication of the final version of the COSO guidance on enterprise risk management in September 2004.

As organisational sociologists like John Meyer at Stanford remind us, this process of abstraction and standardisation supports the rapid diffusion of models of management practice which come to have the status of global blueprints. On this view, nation states and their regulatory organisations are adopters, rather than originators, of management knowledge. This seems particularly true in the case of risk management. As Michael Power argues in his recent publication by the UK think tank Demos, this 'genericisation' of risk management thinking enables the extension of its reach across more and more organisations and into more and more areas.* Indeed, the effect is that risk management and ideas of good governance are no longer clearly distinguishable; both are part of the social construction of a specific conception of the organisation as an actor.

Power also argues that this growth in the volume and scope of risk management is characterised by something else which is distinctive, namely the rise of *secondary* or reputational risk management. If more and more areas of practice can be regarded as having potential risks for an organisation's reputation, then the rise of secondary risk management equates with the risk management of nearly everything. Organisations are becoming more preoccupied with how they appear, both to defend themselves in highly competitive markets and also in the face of potential complaint and litigation.

In recent years in the UK, there has been much interest and concern about the so-called compensation culture or litigation society, and how it might drive highly defensive and distracting risk management strategies for large corporations and public sector organisations. Complex internal processes may be documented less for reasons of operational efficiency and more for justificatory purposes. Actual litigation probably matters little in these settings; as the article by Francis Cairncross shows (p4), in the field of health and safety public organisations may prepare for the worst because sub-units and insurers have an interest in playing up the risks, a situation which results in daily absurdities. It is as if a growth in safety warnings in public places has less to do with protecting the public and more to do with protecting the organisation.

In other settings, multiple heavyweight regulatory initiatives – the Sarbanes Oxley Act, International Accounting Standards, Basel 2 – also reinforce the perception of a risky regulatory environment, and create considerable direct and indirect costs. However, as Clive Jones also suggests (p6), 'regulatory creep' may be self-inflicted by organisations.

All this raises the essential critical point of the risk management of everything: organisations may get safer because they simply transfer risk to those least able to transfer it themselves, namely the general public. This explains why there is no evidence to date, nor is there likely to be, that public trust in corporations is improved by the industry of certifications and disclosures they currently produce. The general public is smart and knows that this is all secondary risk management.

This general point applies particularly well to the predicament of professions and professionals at the current time. Founded on a principle of state support for the exercise of expert judgement with a strong public interest dimension, it is now almost impossible to get teachers, doctors and accountants to say anything sensible without lengthy and barely intelligible disclaimers in small print. These people know more than they can publicly say because honest mistakes are heavily punished. Consequently, society is denying itself a source of valuable expertise.

The critical problem of the risk management of everything is not therefore in the domain of a technical fix, of finding a new technique or organisational structure. It reaches into the macro-societal sphere, into the institutional environment in which organisations and experts operate. Even regulatory organisations operate in an environment of considerable political risk. The prescriptive challenge therefore has nothing to do with modifying guidelines, like COSO 2004; it can only be conducted at the level of a political and legal culture which supports the idea of an 'honest mistake' and which truly accepts and internalises the idea that risk implies: that things do go wrong sometimes, and no-one is to blame.

Bridget Hutter and **Michael Power**
CARR Co-Directors

** The Risk Management of Everything is available at www.demos.co.uk*

Messing about on the water

Frances Cairncross is Rector of Exeter College, Oxford, and chairs the Economic and Social Research Council (ESRC). She was formerly a senior editor on *The Economist* with special responsibility for management issues.

For the past few years, a couple of times a week, I have begun my day with a swim in Highgate Ladies' Pond. This lovely corner of Hampstead Heath is open all year, although as autumn progresses, the number of early morning swimmers declines until only a small group of hardy souls remains, swimming through the winter. Mad though it might sound, there is nothing more thrilling than plunging into icy water in the earliest light of dawn, while frost drifts from the trees. Nearby, the Men's Pond has an equally devoted group of swimmers.

Last year, the Corporation of London, which administers the pond, told winter swimmers that they could no longer swim when there was ice on the water and must wait until the sun was up to have their dip. The Corporation cited legal advice: if a lifeguard were to drown in the process of rescuing a swimmer, the Health and Safety Executive (HSE) might prosecute them. The swimmers were angry. Why should intelligent adults not be free to judge for themselves the level of risk they will accept?

Open-air swimmers are caught by two separate restrictions – legislation to protect the safety of people (such as lifeguards) at work, and occupiers' liability, which makes landowners partly responsible for injuries sustained on their land. So often is 'health and safety' used as a reason to stop people swimming that the River and Lake Swimming Association has several exasperated pages devoted to the subject on its website. But increasingly, 'health and safety' has become the excuse for all sorts of changes that constrict freedom (and often add to costs).

On the face of it, this is odd. After all, very large risks such as the Flixborough disaster have become much less common; and accidents at work have also fallen dramatically, partly because it is more easy to sustain an injury from a piece of moving machinery than from a PC. Some of the health risks that now concern the HSE, the quango that administers the Health and Safety at Work Act, would once have seemed frivolous – such as stress at work.

The HSE is acutely aware of the tension between ensuring public safety and protecting people at work on the one hand, and allowing people to take reasonable risks on the other. On 12 October it held an open meeting in London, to try to launch a public debate on the issues. But there are several dilemmas. First, it is difficult to define what is an acceptable level of risk, and even harder to persuade the public to accept the concept. Most people, deep down, still think that zero risk is a worthwhile goal. Ordinary folk often find hard to accept the economist's approach, that the elimination of risk comes only in exchange for costs that rise ever faster, the nearer 'zero' approaches. Second, the public may object to nannying one moment – but then insist on pinning blame or demanding compensation in situations that would once have been regarded as acts of fate – a rail crash, say, or the death of a soldier on duty in Iraq.

The courts, on the whole, have taken quite a tough line on the development of a 'compensation culture' – much tougher than American courts. For example, the House of Lords last year threw out a claim from John Tomlinson, a young man seriously injured when he dived into a lake on public land. In a triumph for common sense, Lord Hoffman observed, 'I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair.'

So why are so many companies and public bodies still eager to remove potential risks? The reason, argues the HSE, is that people are more likely today to make claims for compensation when they suffer accidents, and insurers may be more willing to offer out-of-court settlements rather than undergo the uncertainty of a court case. If so, part of the burden may lie with insurers: perhaps they should be more willing to allow some people seeking compensation for risks to take the consequences. As long as there is perceived to be money in demanding compensation for accidents, people will claim it – and those who want to take more risks will suffer.

The Risk Management of Everything

In June, **Mike Power** gave the final lecture in the P D Leake Trust Series on 'The risk management of everything'. Mike examined the expansion of risk management since the mid-1990s, its centrality to agendas for corporate governance and regulation, and its emergence as a generic model of rational organisation which is increasingly formal and systematic.

The lecture was based on his Demos pamphlet published the same day (see editorial) and attracted an audience of over 200 at the Chartered Accountants' Hall, London.

Further information on this lecture, held in association with the Institute of Chartered Accountants in England and Wales, can be found at:
www.icaew.co.uk/index.cfm?AUB=TB2I_66701,MNXI_66701

Roundtable on Regulatory Creep

The notion of regulation going beyond its original source of authority or intention was explored in this stakeholder forum, organised by **Bridget Hutter** and **Clive Jones** from CARR and the Better Regulation Task Force, in July. The high level discussion received contributions from the worlds of business, regulation, academia, consumer groups and the civil service, and contributed directly to a recent BRTF report. For more on this topic see page 6.

CARR in the Community

The Charity Law Association sought advice from **Julia Black** on the regulatory powers proposed in the Charity Bill for the Charity Commission, comparing them against selected UK regulators and the proposed charities regulator in Scotland. The paper formed part of the Charity Law Association's submission to the Joint Committee scrutinising the draft Charity Bill in July.

Bridget Hutter led a discussion on 'Can Regulation be a Social Good?' at the World Economic Forum Finance Industry Agenda Meeting 2004 in London. The meeting included senior industry representatives from Europe, USA and the Middle East. Bridget has also become a member of the Social Market Foundation Risk Commision.

Mike Power was invited by a joint working group of the Financial Reporting Council and the Institute of Chartered Accountants in England and Wales to advise on the process to review the Turnbull Report. He also advised the ICAEW on its recently published report on Sustainability.

Research alliance launched

CARR members took part in the 'Test Society' workshop in May at the Centre de Sociologie de l'Innovation in Paris, an event that launched a collaboration among researchers interested in the role of testing in modern society. Researchers from CARR, BIOS, the Saïd Business School, the CSI, the Institut National de la Recherche Agronomique and the CNRS discussed the role of testing and experimentation in their respective areas – genetics, medical imaging, financial markets, food control, focus group research, terrorism and policing, among others. For more information on the 'Test Society' group, contact **Javier Lezaun** or **Yuval Millo**.

PHOTOS SUPPLIED BY CORBIS AND FREEIMAGES.CO.UK

International events

In August **Javier Lezaun** (far left) and **Yuval Millo** (left) gave papers at the joint annual meeting of the Society for the Social Studies of Science (4S) and the European Association for Study of Science and Technology (EASST). In addition, along with Dr Fabian Muniesa (Ecole de Mines, Paris), they arranged a series of conference panels on: 'Economic Experiments'.

Robert Kaye presented a paper in Trento, Italy entitled 'Bribery, Conflict of Interest and Beyond' at a major conference of international scholars organised by the University of California, Berkeley on conflicts of interest in public life.

Mark Thatcher spoke on independent regulatory agencies at the New York University Centre for European Studies and at Columbia University in September. He also presented a talk on 'New regulatory institutions for markets' at the World Bank, Washington.

In December **Colin Scott** presented invited plenary papers on his research 'Governance Beyond the Regulatory State' at the Regulatory Institutions Network Annual International Conference (Canberra) and on 'The Regulatory State of Tomorrow' at the Institute of Public Administration Canada Workshop (Toronto).

Staff News

CARR welcomes **William Jennings** who joins us as ESRC/BP Postdoctoral Research Fellow. Will's research interests predominantly focus upon the regulation of government by public opinion (public policy and public opinion); blame avoidance; theories and analysis of policy implementation; and the politics and administration of governmental policies of public celebration.

Our congratulations go to **Michael Barzelay**, CARR Research Associate, who was awarded the Brownlow Book Award in November by the US National Academy of Public Administration for his book *Preparing for the Future: strategic planning in the US Air Force*. The award is given in recognition of outstanding contributions to public administration literature.

CARR has also been privileged to welcome two leading scholars as research visitors to the Centre: **Dr Reimund Schwarze**, Research Associate, German Institute for Economic Research (DIW) Berlin and **Professor Anthony Heyes**, Royal Holloway, University of London.

We extend our gratitude and appreciation to **Joan O' Mahony** for her hard work on *Risk&Regulation* over the last year. Congratulation also to Joan on the birth of her new baby. We welcome the new editor, **Robert Kaye**.

Have you moved or changed jobs recently? Please keep us informed of any changes in your contact details so you can continue receiving *Risk&Regulation*. **Email: risk@lse.ac.uk or Tel: +44 (0)20 7955 6577**

Regulatory Creep: Myths and Misunderstandings

Clive Jones asks whether regulatory creep is just another urban legend.

Have you heard the one about the factory owner who wanted to build a two-storey extension onto his factory to cater for 50 new employees, with a panoramic window on the second floor overlooking the river? The planning officer signed it off, the health and safety officer signed it off, but the fire officer said he had to lower the bottom of the window by three bricks. He did this, and fitted a new window with a new frame, but then the health and safety officer said he contravened another regulation. The owner wrote to the three officers and explained his situation and asked them to just tell him what to do. They each wrote back saying if you break this subsection of these regulations then we will prosecute.

This story, told by the CBI Director-General Digby Jones, bears all the hallmarks of the typical urban myth – plausible enough to be true and attributed to some unknown but credible second-hand source. It has just enough detail to sound authoritative, but not quite enough for its veracity to be checked. And like the typical urban myth, variants of the story are retold wherever people of business come together – each time with differences that, taken together, should lead one to doubt whether the story was ever true. Forbes magazine even quoted an American business woman who claimed that each of her London bagel cafes required ten licences, including one 'authorizing a certain type of window'.

Complaining about regulation has become the business equivalent of complaining about the weather. To further complicate the myths and legends a discourse of imprecision is evolving where aspects of the UK regulatory environment are described through a form of quasi-business jargon. One such term which is gaining in prominence is 'regulatory creep'. The range of contexts in which this term appears to be used are very different, unconnected and several are certainly 'old wine in a new bottle'. However it is the mythical and 'expert' contexts which are most important.

The origins of the term regulatory creep seem to lie in military or project management terminology such as mission creep and scope creep. A quick Google reveals that the term started to appear in the mid-late 1990s in the USA but has occurred in the UK with increasing frequency in the last four years. What is striking about regulatory creep is not that it may be true but that knowledgeable and experienced people are prepared to believe that it is true. What explains the popularity of such myths? The notion of regulatory creep chimes with a public expectation that common sense has nothing to do with regulation. This in turn makes it a useful outlet for political protest, especially, anti-Europeanism. But in addition, paid consultants thrive on uncertainty, fear of blame and ignorance. They are certainly not above exaggerating imagined threats for their own gain.

Widespread confusion exists within the lay publics as to who regulates what and where. Expert publics are not beyond confusion either. For example how many of those who work in the financial services industry could name all the legacy regulators of the Financial Services Authority? Myths and whispers may take hold where confusion is the norm. Lay publics may view any new regulation at all as regulatory creep. However 'experts' see regulatory creep as something entirely different such as legislation that state enforcers have interpreted differently from that interpretation which a legislature intended.

In its recent report 'Avoiding Regulatory Creep' the government's own Better Regulation Task Force further widens the definition of regulatory creep by stating that it is the process by which regulation is developed or enforced in a less than transparent fashion and not in accordance with their five principles of good regulation: proportionality, accountability, consistency, transparency and targeting.

These definitions rely upon four assumptions:

- that the state is the only source of regulation – consequently businesses may fail to distinguish between what 'the law' requires and restrictions imposed by voluntary associations, informal codes of conduct, best practice and professional norms and standards;
- that which is understood as being regulation is regulation – for instance, contractual requirements are often mistakenly believed by businesses to be regulatory requirements; in addition, a business's excessively cautious risk managers may demand higher internal standards than regulators themselves require;
- that regulatory creep should only be viewed from the perspective of the regulated – that is, usually, business;
- that regulatory creep has only negative qualities.

However, there is a positive aspect to creep. Formal responsibilities may leave gaps in enforcement. Shifting priorities and creative interpretation of a regulator's brief may be necessary to tackle newly emergent issues. A regulator should not be bound by a previous failure to enforce existing regulations adequately.

The business community is not a homogeneous community – varying levels of management sophistication exist within it. When faced with a regulation most comply. Some over-comply. Some almost comply and some have no intention of complying. However, with severe short-term demands on managers for profitability, it is understandable that extra requirements – regulations – may not be looked upon favourably. Competition in many business sectors is intense, so that in search of extra revenue business is right up against the limits of what is correct and occasionally what is legal or moral. It may be that for some otherwise legitimate businesses the only means by which a profit margin is achieved is by occasional non-compliance.

The quality of the debate must improve if the techniques used to manage and regulate risk in the UK are to evolve and continue to be some of the best in the developed world (OECD, 2002). An overly simplistic approach fixated on 'an inspector' does not serve the business sector or consumers particularly well. Since the 1980s the 'deregulation' argument has moved on through several lifecycles, apparently without some high-profile business and political figures noticing.

Clive Jones is a research assistant at CARR.

Modernising Public Services and the Management of Risk

The government's plans for modernising the NHS envisage new flexibilities and cooperation for healthcare providers. But it also requires new techniques in accounting and risk management, argue **Peter Miller and Liisa Kurunmäki**.

'Modernisation' is the battle-cry for the current government in its attempts to encourage a further stage in the reform of public services. Few would question such a noble objective. Indeed, who could be against cooperation, flexibility and innovation, terms that form a central part of this new political lexicon? But, as researchers we need to look beyond the rhetoric. We need to examine the ways in which such dreams and schemes are put to work. We are interested in how they are given substance. We are interested in what helps them work as intended, and what hinders them. And we are particularly interested in the ways in which accounting and risk management practices are given a central role in the organisation of innovative forms of service delivery.

In a recent CARR discussion paper, we look at how the terms modernisation and partnership have been put to work in the context of the 'Modernising Government' programme, and at the juncture of healthcare and social services. This programme was outlined in the White Paper *Modern Public Services for Britain* (1998), and in more detail in the *Modernising Government* White Paper (1999). A core part of its philosophy was the claim that public services could be improved by promoting innovative and 'joined-up' working between agencies and experts that provide complementary services to citizens. For the fields of health and social care, this impetus to erode the boundaries between service providers, and to build services 'around the needs of those who use them', was reflected in two White Papers: *New NHS: Modern, Dependable* (1997) and *Modernising Social Services* (1998).

The abstract notions of modernisation and partnership were given concrete form and substance in the *Health Act 1999,* which proposed ways of making operable the modernising government agenda. Section 31 of this Act encouraged voluntary and innovative, yet formal, inter-agency and inter-professional cooperation through three new mechanisms, or 'flexibilities': *pooled budgets* allowed service providers to bring together resources into a joint budget; *lead commissioning* allowed one authority – either healthcare or social services – to commission services on behalf of the other; and *integrated provision* allowed provision of services in one setting rather than many.

Accounting practices were central to the transformation sought by the modernising government programme. That is the case for many of the initiatives directed at the public sector across the past quarter century under both Conservative and Labour administrations. But, in linking accounting practices to an injunction to cooperate, the Health Act 1999 was novel. Cooperation, for instance bringing resources into a single pooled budget for the care of a specific client group, depended on joint planning and management of resources. Similarly, experimentation with the 'flexibilities' required a commitment to establish systems for performance measurement that would provide an account of the improved performance of the arrangement. Finally, accountability for the use of pooled resources was to be secured both by more traditional audits and inspections, and by joined-up audits and inspections between multiple auditors and inspectorates.

If accounting practices were called upon to play a central role in the modernising government agenda, so too were technologies for the management of risks. The innovative forms of cooperation proposed in the Health Act 1999 were held to bring with them risks that needed to be identified, assessed and managed. 'Risk taking' was encouraged by government, but only in so far as it was 'well managed'. In the case of partnership working, the possible risks were seen to be multiple and novel. Instead of risks understood as pertaining to an individual organisation, as is typically the case in the private sector, or a particular policy-domain, as has traditionally been the case in the public sector, risks were held to exist at multiple levels and across organisations. Risk management was thus accorded a key role in the modernising government agenda, linking the twin ideals of cooperation and innovation.

Research conducted in five sites experimenting with Health Act 1999 'flexibilities' showed considerable informal cooperation already existing at local levels, and significant enthusiasm for further developments. But it also showed relatively little progress towards the more ambitious forms of partnership working such as pooled budgets. In addition, progress had been slow in the development of formal governance mechanisms, such as performance measurement and risk management tools. Different governance regimes for central and local government, distinct professional cultures for issues such as care needs assessments, and blunt issues such as control of resources and the need to build trust between the 'partners' were cited as some of the main reasons for slow progress.

Despite tensions and obstacles, those responsible for managing and delivering services were busy devising practices that would align the ideal of cooperation with existing governance practices and professional cultures, and in ways that secured benefits for users while avoiding the most obvious risks. While formalised practices for measuring the benefits and managing the risks of partnership working often remained to be developed, the imperative to cooperate had become firmly established. Prediction is difficult, but one thing that seems certain is that formalised practices for the management of risk will come to assume greater importance in areas where inter-agency working is the norm. Whether this results in improvements in the quality and performance of public service delivery remains to be seen.

Peter Miller is a member of CARR and Professor of Management Accounting. Liisa Kurunmäki is a Lecturer in Accounting and Finance.
Modernisation, Partnerships and the Management of Risk by Liisa Kurunmäki and Peter Miller, CARR Discussion Paper 31, is available at: www.lse.ac.uk/collections/CARR/documents/discussionPapers.htm

Catastrophe Risk, Insurance and Terrorism

Richard Ericson argues that while the insurance industry successfully responded to the attacks of September 11, the possibility of catastrophic terrorist activity creates new uncertainties and vulnerabilities for an embattled industry.

Analyses of risk and regulation reveal the limits of knowledge and extent of uncertainty. Many perceived dangers are not readily calculable with respect to frequency of occurrence and severity of loss. Scholars such as Ulrich Beck even contend that we live in a post-risk-calculation society in which some sources of catastrophe cannot be controlled through scientific knowledge of risk. In this respect we live not so much in a risk society as an uncertain society. The uncertain society is characterized by frantic and often misplaced efforts at risk management, and by a new politics of pre-emption, precaution and vigilance regarding imagined sources of catastrophe.

The insurance industry is an instructive locus for understanding the uncertain society. Insurance is an institution and technology for converting uncertainty into risk. Insurers engage in risk analysis to ascertain whether they should underwrite a risk, and if so, how they should regulate the risk including those admitted to the insurance pool. Where insurers face troubling uncertainties in risk analysis and regulation, they may still insure by ignoring the uncertainties and substituting insurance logics of capital risk taking and distribution. Through mechanisms such as charging the highest premiums the market will bear, making substantial investment returns on those premiums, spreading risk through reinsurance, and controlling losses through insurance limits and stringent claims procedures, insurers are willing to take risks in highly uncertain circumstances. Thus many fields characterized by limited knowledge and potential for huge catastrophic losses – for example, those pertaining to nuclear, biological and chemical production and use – are insured. Catastrophe risk and insurance meet where the insatiable appetite for financial protection from danger intersects with the insatiable appetite for profiting from uncertainty.

Terrorism of the type experienced on September 11, 2001 (9/11) is especially revealing of how insurance functions in the uncertain society. Terrorism is intentional catastrophe. Terrorists are in the business of uncertainty, playing on randomness to keep whole populations in fear, anticipation and disestablishment. The terrorist power of uncertainty is especially strong because we live in a culture dominated by the desire to tame chance and effect security, and by institutions increasingly organized around risk analysis and regulation. Terrorism strikes at the foundation of this culture because it is a stark reminder of the limits of risk analysis and regulation. It hits home the potential ungovernability of modern societies, how those with little power can work cheaply and efficiently against powerful institutions to destroy.

Prior to 9/11 insurers made terrorism coverage widely available across different insurance lines – property, business interruption, workers' compensation, life, health, various liabilities – pertaining to commercial properties such as the World Trade Centre (WTC). They did so with the realization that terrorism was a known but unpredictable risk. The WTC was attacked by al-Qaeda in 1993, as were other American targets abroad in subsequent years. Journalists, law enforcement officials and terrorism experts pointed to the continuing al-Qaeda objective of total destruction of the WTC. Following the 1993 WTC attack, a leading reinsurance company produced a document urging the industry to restructure terrorism insurance underwriting practices. This advice was not taken up.

Terrorism insurance coverage remained widely available for several reasons. First, the catastrophic imagination of insurers and their clients did not extend to total loss of large commercial properties such as the WTC: the prevailing probable maximum loss estimate for such structures was two floors. Second, while some insurers acknowledged the potential for total loss, catastrophic terrorism in the United States was displaced from the radar screen by pressing concerns about other sources of potential catastrophic loss. Third, there were insurance industry conventions and legal restrictions on excluding terrorism coverage in some lines of insurance: for example, workers' compensation insurance was compulsory and covered anything that happened at work, including terrorist activity; property insurance policies required compensation of losses from fires however caused, including terrorist activity. Fourth, commercial insurance markets were soft in the 1990s, making it impractical to sell stringent insurance contracts that excluded terrorism coverage or required the insured to take costly measures to prevent terrorism.

Insurance markets after 9/11 exemplified what industry insiders call 'the insurance

curse.' Catastrophes that are unimaginable before a loss have two impacts after the loss. First, there is the cost of unexpected indemnity payments, estimated in this case at up to $55 billion. Second, in the effort to learn about the new catastrophe risk, uncertainty magnifies. Insurers experienced new problems with geographic risk spreading (terrorism insurance is difficult to limit geographically because terrorist activity can occur anywhere, anytime, repeatedly); aggregation risk (concentration of risk in commercial high-rise buildings, which were previously among the best insurance risks, but now became seen as high risk using total loss scenarios); correlation risks (correlation of exposure across several lines of insurance arising from the same event in ways not appreciated previously); and, enterprise risks (9/11 insurance exposure interacted with the capital markets downturn and low interest rate environment at the time to provide new understanding of how underwriting, investment and credit risks correlate in an actual case). Insurers made frantic efforts to devise models of terrorism risk and to form expert panels of experienced industry executives and former FBI and CIA counter-terrorism operatives. However, as one industry executive commented at the time, 'This is very speculative, it requires a level of insight into what terrorists are thinking that right now is not there.'

Facing uncertainty, insurers' instinct was to hop on the 'pass the exposure express'. Reinsurers scrambled to get rid of terrorism coverage in their contracts with primary insurers, or to change contracts dramatically with respect to conditions and price. With inadequate reinsurance, primary insurers scurried to do the same to their commercial clients, many of whom were left with no terrorism coverage or coverage that was too pricey. Left vulnerable, the insured pressured government for regulatory interventions that would force insurers to continue coverage and even augment it in face of perceived terrorism risk.

At the same time many insurers were eager to capitalize on the uncertainty of terrorism. As a reinsurance executive observed during an industry conference addressing 9/11, 'I think of risk not so much as frequency and severity, but rather threat and opportunity.' In the six months following 9/11, an estimated $30 billion of new capital flowed into catastrophe underwriting. This was venture capital seeking profits from the terrorism scare. Aided by hardening insurance markets, insurers were able to increase premiums sharply and to write more stringent contracts that placed preventive security requirements on the insured.

The US federal government slowed down the 'pass the exposure express' through three measures. The *Terrorism Risk Insurance Act* required primary insurers to provide terrorism coverage to commercial clients, and in return the government became a participant in reinsurance arrangements for acts of terrorism. The *Airline Transportation Safety and System Stabilization Act* provided immediate compensation and insurance coverage to save the airline industry. It also established the Victims Claims Fund which allowed 9/11 victims to seek compensation through government as an alternative to lawsuits that would cripple the airline industry. While these measures were designed to help the insurance industry address the severity side of the terrorism threat, the *Patriot Act* and other legislation for vigilance, as well as exceptional police and military expenditures, were intended to address the frequency side.

The insurance system worked reasonably well on this occasion. At the same time the limitations of insurance became evident. The new terrorism is another catastrophe risk that threatens global insurance capacity: how many such losses can the industry absorb? Insurance is a limited form of compensation: it protects against loss of capital, but not loss of loved ones, treasured environments or treasured personal effects. Driven by profits and capital risk taking, insurers speculate on uncertainty in ways that can generate crises in insurance availability and perpetuate new patterns of inequality and exclusion. While the insurance industry is an important bulwark against uncertainty, it can also foster it, and much still depends on government as the ultimate risk manager.

Richard Ericson is Professor of Criminology at the University of Toronto and co-author of *Insurance as Governance* and *Uncertain Business: Risk, Insurance and the Limits of Knowledge*, both published by University of Toronto Press.

Changing Trains

This summer the Government launched its White Paper on the Future of Rail. CARR's **Terry Gourvish** and **Martin Lodge** met with **John Dodgson** of NERA Economic Consulting to ask: are we on the right tracks?

CARR: Why do the railways remain controversial?

Terry Gourvish: That's a good question. We seem to have an obsession about the railways that is out of proportion to the importance in the transport system that they have.

John Dodgson: There's a certain amount of nostalgia among the British for their railways. Dr Beeching has never been forgiven for his axe, which was wielded very sensibly.

Martin Lodge: It's not only a British phenomenon that the railways are special. It is everywhere. Politicians regard it as a prestige status subject to have the railway line and it is also often seen as important for economic development.

TG: The crucial element is that they don't make money in Europe. The extent to which they fail to do so is an important element in discussing organisational solutions.

CARR: One of the main aspects of the White Paper is having a single regulator to take over the functions of the Office of the Rail Regulator and the Strategic Rail Authority.

TG: I think the difficulty with government regulation of the railways is that after the nationalisation it tended to be short term, influenced by party politics very often, and contradictory. In the 1980s we were reaching towards a more arm's length system, where you set goals, financial goals, economic goals and then tried to let the industry respond. And the number of trains procured, say, between 1983 and 1989 by British Rail per annum is about the same as the number of trains procured by the privatised industry, which is allegedly one of privatisation's great benefits.

JD: One of the things that BR had got right was using the capacity efficiently, in terms of the number of trains, so where you then got into an environment where the marginal track access cost was very low, there was an incentive for operators to run more trains. Which they did. Initially the government said 'here's a success we've got an increase in train miles'. But it messes up your capacity because you have three-car trains running through very congested parts of the network like Birmingham, which is a cause of the problem in terms of reliability.

Of course the previous government's aim was to have pretty much the same railways as at present but for less money.

TG: The difficulty was that a privatised railway was supposed to result in a reduced subsidy, year on year, which is what the Treasury wanted to happen. The private sector hasn't delivered on some of its contracts, particularly the franchises. It hasn't operated the railways with reduced subsidies. And because it hasn't happened, there've had to be bail outs and revised and re-let franchises, and the economic regulator has piled on the cash.

ML: In Germany we have exactly the same pattern. Private, often municipal, companies coming in, often politically driven, saying, 'We're going to show the DeutscheBahn'. In two years they were more or less bankrupt, and then the DeutscheBahn has to step in again. So in that sense you've got a similar pattern, so you could say that franchising, with all its optimism bias, is quite dangerous for a service which politically you have to run.

TG: But doesn't this happen in project management as a whole, private or public? The same trends seem to apply – optimism, cost overruns, delays, and somebody picking up the bill somewhere.

ML: Maybe we just need fifty years more rail franchising, and this would never happen again. We could build up knowledge about the cost base and then we would know what is credible and what is not. When people fail, is that not exactly what we would like? People fail, they learn their lessons, they go out of the market, those who succeed will be going strongly.

CARR: So is the review about streamlining regulation or reasserting state control?

JD: What the railway review was about was about the government reasserting control over the budget.

TG: Since it pays for a large segment!

JD: You have a principle of independent regulators, but governments won't be comfortable with independent regulators who are too independent. And I don't think they'll be caught again.

TG: It depends what the numbers are.

JD: Tom Winsor [the Rail Regulator] could have been as independent as he liked and come up with small numbers for public support for the railways and the Government would have been perfectly happy!

TG: I don't think anybody thought that Winsor would be in the position he would be in. He didn't think he would be presiding over an agent that had lost control of its business, and didn't really know what state its assets were in. I have some sympathy with Railtrack in the way it was privatised, but even so, it was shareholder driven and certain things were sacrificed.

JD: It was put into a genuine monopoly situation, where it didn't have to worry about its customers. It was fairly notorious for the way it treated its customers.

CARR: And the new regulator will also oversee health and safety...

JD: You might suppose that an economic regulator would be more concerned to compare costs and benefits.

TG: I think that in the industry there was a lot of disquiet about the Health and Safety Executive (HSE). There was certainly a fear more broadly that the HSE was imposing higher costs in terms of safety requirements.

JD: Such as making railway accident sites crime scenes. The time it took to clear up has been a big issue.

TG: It's helpful if practitioners have a say in the safety systems that are in place. If they have them imposed from above from a complete non-railway person there is a danger that they might not understand the operational realities of running a railway. As far as the health and safety authorities are concerned, railways are lumped together with nuclear power and oil installations as elements which required a considerable amount of regulation.

CARR: Why is safety such a big deal? Surely railways are the safest form of land transport?

TG: Safety is interesting. When you're in a car it's assumed you are the controlling hand, and in railways you entrust that control to an agent. That's why the safety element tends to be gold-plated.

JD: The figures show a big improvement in rail safety since privatisation. I think the general public as a whole might disbelieve that.

ML: But isn't the problem the high visibility of events, even with low fatalities? You have a reform that has generated a lot of hostility, and therefore any little event causes an uproar regardless of broader trends.

JD: You have a railway accident in which six people are killed in this country that would be headline news. You have a pile up on the motorway in which six people are killed and that will feature in the news, but not very heavily.

ML: Looking at Germany we also had high-level incidents and again there was a slight hint at a criticism: this is about cost-cutting, this is DeutscheBahn. This didn't lead to a fundamental questioning of privatisation as an event as such.

JD: There were crashes which might have been said to be related to privatisation, the broken rail at Hatfield and the driver who went through the red signal at Paddington with disastrous consequences. Great Heck was a bad accident but it didn't have the same impact on the public view as Hatfield or Ladbroke Grove. It was almost a random event.

TG: To quote David Hare, "stuff happens", so when the accident happens you say 'these things do happen, we can learn from them, find the cause and move on'. Compared with other forms of transport, it's a safe industry.

TG: I think the argument relates to the art of the possible, and then its cost. We can make railways very, very safe – they're pretty safe now – we can make them even safer, My puzzlement is with the roads. We could make roads a hell of a lot safer, it would cost a lot of money. It's this issue of cost. We could make roads very safe. We could segregate the lanes, we could have limiters on speed, we could do a heck of a lot.

ML: It brings us back to the contestability of the current structure. Is the current system attackable, so an incident can be used to question the legitimacy of the system? It's not so much whether four people die, its the feeling 'this is the fault of…'. As we found with London Underground, one trains derails and you've got everyone jumping forward with 'this is because of privatisation'.

CARR: Is the proposed system less vulnerable to this sort of criticism?

ML: Do we think this is a stable arrangement? If we claim that Railtrack was all on the wrong incentives, lightly monitored, profit seeking, and the franchisees didn't deliver, have we now entered an age, with the White Paper, where there's more stability?

TG: It's a disappointing document. We never tried a privatisation system that was simpler, quite frankly, that had fewer players in it. We don't know what would have happened with a Swedish model or a Japanese model applied to the British system

JD: The devil is in the detail and that's still to be determined, such as the relationships between organisations. There's a lot of hand-waving in the White Paper about how companies will work together better than in the past. There's a lot of hope, I think, but not a clear indication of how it will work.

TG: But where you have private operators with rights to run trains, it's the regulator's role to ensure their requirements are met. And there isn't an ultimate arbiter in the chairman of British Rail. You could make the government the regulator, which de facto you had historically.

JD: But would you get private sector investment if you had?

TG: I doubt it.

JD: And there is the question of incentives for Network Rail which is a very peculiar structure. There was a lot of talk by John Armitt [Network Rail's chairman] about the objective being engineering excellence. Economists view that type of talk with some suspicion!

TG: That takes us full circle to the allegation that was levelled at the engineers in the 1950s and 60s, that were pursuing engineering excellence at the expense of costs at British Rail, and they were gold-plating the network, which always puzzled me because one didn't see much evidence of it.

John Dodgson is Director of the Transport team at NERA Economic Consulting. Terry Gourvish is Director of the Business History Unit and was adviser to the House of Commons' Select Committee on Transport. Martin Lodge is a CARR member and Lecturer in Political Science and Public Policy.

Controlling Modern Government: Beyond Stereotypes

As part of CARR's 'public sector governance' focus, a three-year study involving some 17 scholars compared how public services were controlled in eight different countries, and how those controls had changed over time. It looked at what was common and different about the control of three public service domains – prisons, higher education and the conduct of senior civil servants – in those eight countries and how those controls changed in each case over a generation. The eight countries are Australia, France, Germany, Japan, the Netherlands, Norway, the UK and USA.

To explore different styles of control the study focused on four ways of controlling individuals operating in public institutions and organisations, building on earlier work by CARR members. Those four ways were

- **mutuality**, control of individuals by formal or informal group processes,
- **competition**, control of individuals in the public sector by processes of rivalry,
- **contrived randomness**, control of individuals by more or less deliberately making their lives unpredictable in some way,
- **oversight**, control of individuals by scrutiny and steering from some point of authority.

This approach can be used at different levels of aggregation to make successively finer distinctions to track movement in control systems, rather like the way micro-facial movements can be analysed with modern digital-picture techniques. And by using the approach systematically across time, policy domains and countries, this study reaches at least three non-obvious conclusions.

First, it casts a critical light on the popular idea that oversight and audit activity of various kinds over public services has exploded everywhere over the last two decades or so, representing a new 'age of inspection'. There are cases and places that undoubtedly fitted that pattern. But such developments do not seem to have been uniform across countries and policy sectors. For instance, the much-discussed explosion of government-sponsored audit and inspection systems over higher education is notable by its absence in the USA, and in none of our cases were prisons exposed to a massive expansion in formal oversight. In many cases, little dramatic change has taken place in prison oversight over fifty years or more – indeed, nearly a hundred years in the Japanese case. In fact, there were numerous cases where only a low level of expansion of oversight took place and several in which oversight actually declined, as in the Netherlands, where the prison inspectorate was actually abolished in an apparently rather absent-minded way in the 1980s. But such cases tend to receive less attention than the dramatic cases of oversight expansion, even though expansion appears to be the exception rather than the rule.

Second, this analysis also calls into question the common stereotype of an 'Anglo-American approach' to the governance of public services that is sharply distinguishable from the Continental European one. Viewed in terms of the four-part analysis of control across three public services, this putative 'Anglo-American' style turns out to be all too like Giovanni Sartori's famous 'cat-dog' – a creature that does not actually exist. From this analytic perspective, the UK style of controlling public services across the three policy domains is at least as different from the US style as either style is different from the classical Continental European state forms of France or Germany.

Third, the study shows that during the recent era of government reform none of the four types of control disappeared from view, though in many cases they were re-shaped and some new hybrids developed. Where oversight was reformed, it often developed in new hybrid forms, particularly in competition-oversight and competition-mutuality mixes, or even the three-part hybrid of competition, mutual peer-group evaluation and oversight that features in many control systems applying to universities. And while mutuality by no means disappeared as a form of control over public services over this era (contrary to the claims of some critics of modern 'managerialism'), it was in many cases reshaped to include different players, for instance in replacing traditional Humboldt-ian structures of professorial governance in Germany and Norway by departmental and faculty governance, plus a reshaping of traditional university senates, and separate evaluation of teaching and research. Similarly, the death of randomness as a control style in modern government seems to have been much exaggerated, as has the idea that competition in public services is a new development or a steadily rising influence. For example, an important element of competition might be said to have weakened during the long boom of the decades after World War II, as the declining attractiveness of public bureaucracy as a secure and respected career meant that the best and the brightest were less inclined to compete for traditional government work in many states.

Indeed, one of the advantages of applying the four-part analysis to control over government activities is that it cuts across conventional clichés about state systems. Going beyond the stereotypes means being able to pin down what is common and what is variable, how different or similar the various 'state traditions' are when it comes to their control architecture, and what are the counter-currents or compensating tendencies to some of the much-discussed changes in control over government.

Christopher Hood

Controlling Modern Government: Variety, Commonality and Change. Edited by Christopher Hood, Oliver James, Guy Peters and Colin Scott, Cheltenham: Edward Elgar, 2004. To order a copy: www.e-elgar.co.uk

Regulating Law: a clash of mentalities

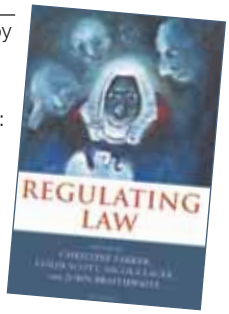
Regulation and law are intimately bound up with one another. If regulation can be conceived of as the processes through which conduct is sought to be controlled through systematic oversight by reference to rules then, within many regimes, law supplies both the substantive rules and the procedural rules governing monitoring and enforcement. Much regulation research has been concerned to address the role of law in regulation, for example seeking to explain or justify the observable gap between the law as it is written and the way that it is enforced by agencies and others on the ground. The question of what regulation looks like to those involved in the investigation and characterisation of contemporary law has less often been explored. In *Regulating Law* CARR researchers have collaborated with legal academics at LSE and associated with the Regulatory Institutions Network at the Australian National University in an attempt to fill this gap by viewing contemporary regulation through the lens of law. The project was inspired by the work of LSE Law Professor Hugh Collins, whose book *Regulating Contracts* highlighted the tensions between thinking about regulation and law.

Over twelve chapters the contributors to *Regulating Law* investigate three main sets of questions concerning law and regulation as they apply within particular areas of law. Some of the chapters are organised around areas of legal doctrine such as contract, tort, property, criminal and administrative law. Others focus on fields of activity which law is drawn into regulating, including 'work', 'families' and 'corporate governance'. The first set of questions involves the nature of the intersection between law and regulation. The discussions highlight the limited application of regulatory theory to substantive fields of legal activity and begin to remedy the deficiency. The second set of issues investigated concerns the question how law regulates. Whereas it is common to assume that regulation is, by definition, intentional and directed towards securing particular outcomes, classical law is conceived of as a backward looking normative structure more concerned with the universality of its rules than their effects. These two 'mentalities' are often in collision with each other, as where strict enforcement of a rule within a regulatory regime is inhibited by the strict application of the general procedural norms associated with criminal law. Many of the contributors to this book seek to evaluate whether the collision of norms is productive or disintegrative either for law or for the activities to be regulated. The third question concerns how law is itself regulated. What is the role of wider social and economic activities in steering law? The chapters in this book do not show any agreement, and in particular offer variety in their understanding of the extent to which modern law is autonomous from other social and economic phenomena.

In their concluding chapter John Braithwaite and Christine Parker assess the implications of the diverse chapters for law and regulation. A central conclusion is that a regulatory analysis of law is supportive of moves within regulation scholarship to conceive of regulation in a more pluralistic way. Specifically the analysis encourages us to move beyond images of regulation oriented towards law (often referred to in terms of 'command and control') and think of other mechanisms through which control is achieved in regulatory and other settings. This analysis has particular application to the mechanisms through which norms of constitutional and international law are made effective. But the analysis also bears on the world of corporate governance where, it is suggested, policy makers may be wrong to rely increasingly on law to promote good behaviour in the face of financial and other scandals. Self-regulation and the regulation of self-regulation (or meta-regulation) do, in practice, play a key role in corporate governance and we should learn more about making them effective. Parker and Braithwaite reject both the view that law is dominant in regulation and the view that law is unimportant. They conclude that development of the idea of meta-regulation, the regulation of regulation, might provide a way to work through the dilemmas associated with placing too much or too little emphasis on law in regulation. Such an approach accommodates the pluralism that is observable at play in many regulatory settings while not denying that law is often a significant steering mechanism. The conclusion is tentative because its vindication would require further empirical investigation on the role of law in steering and, more particularly, on the way in which law is itself regulated.

Colin Scott

Regulating Law. Edited by Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite, Oxford: Oxford University Press, 2004. To order a copy: www.oup.co.uk/isbn/0-19-926407-4



CARR Books and Special Journal Editions

Preparing for the Future: Strategic Planning in the U.S. Air Force
Michael Barzelay and Colin Campbell

Business and Politics in Europe, 1900 – 1970: essays in honour of Alice Teichova
Terry Gourvish, ed

On Different Tracks: designing railway regulation in Britain and Germany
Martin Lodge
Greenwood Press 2002

British Rail 1974-97: from integration to privatisation
Terence Gourvish
Oxford University Press 2002

The Labyrinths of Information – Challenging the Wisdom of Systems
Claudio Ciborra, Oxford University Press 2002
'a series of highly literate jewel-like essays that are intellectually fascinating but could also change the life of any practitioner.'
Shoshana Zuboff, Harvard Business School

Environmental Policy in Europe: assessing the costs of compliance
Andrew Gouldson and Evan Williams (Eds)
European Environment 12 (5) 2002

The Politics of Delegation: non-majoritarian institutions in Europe
Mark Thatcher and Alec Stone Sweet (Eds)
West European Politics 25 (1) 2002

Biotechnology 1996-2000: the years of controversy
George Gaskell and Martin Bauer
London: Science Museum Press and Michigan State University Press 2001

From Control to Drift: the dynamics of corporate information infrastructures
Claudio Ciborra and associates
Oxford University Press 2001

Rational Analysis for a Problematic World Revisited: problem structuring methods for complexity, uncertainty and conflict (2nd ed.)
Jonathan Rosenhead and John Mingers (eds.)
Wiley 2001

The Government of Risk: understanding risk regulation regimes
Christopher Hood, Henry Rothstein and Robert Baldwin
Oxford University Press 2001
'...a significant contribution to the existing literature on risk regulation.'
West European Politics

www.lse.ac.uk/CARR/documents/books.htm

Full abstracts and details of seminars can be found on the CARR website: www.lse.ac.uk/Depts/carr

Science: a puzzling profession?

Professor Robert Dingwall
University of Nottingham
9 November 2004

This seminar explored the need to give greater weight to the supply of professional regulation and the particular relationships between this and cultural and social uncertainty. Prof Dingwall looked at the implications of current thinking in the sociology of organisations on isomorphism and the extent to which professions are susceptible to pressures (DiMaggio and Powell). He argued that who does science and under what conditions are important precursors to the interesting and often neglected issues about how to regulate science and make it socially accountable without destroying the essence of innovation and uncertainty involved. He suggested that science, as an organisation, has more in common with medieval guilds, where membership follows recognition by the masters of the craft rather than the public processes that we are used to.

Whistleblowing: A Theory with Application to Environmental Regulation

Professor Anthony Heyes
Royal Holloway College, University of London
26 October 2004

'Whistleblowing' is a common feature of our regulatory landscape, yet there is no formal economic model of it. Prof Heyes proposed such a model and used it to explore how regulatory institutions should be designed to accommodate it. Sociological and psychological research in the area points to three alternative theories as to why individuals might disclose, even when such action is not in their (apparent) self-interest: conscience cleansing, altruism, or punishment-motivation. The policy problem is to decide how frequently to pursue disclosures made by whistleblowers, how much protection to offer them, and how substantially to fine firms whose plans for wrongdoing are detected in this way. Not surprisingly, optimal policy depends upon the motives attributed to whistleblowers, but is not in general characterised by maximal penalties nor routine pursuit of complaints, even when pursuit is costless.

New Social Risks in Europe

Professor Peter Taylor-Gooby
University of Kent
12 October 2004

European welfare states developed through the 'old social risks' that confronted citizens in ideal typical industrial society. As a result of the post-industrial transition, affecting labour markets, family life and the scope for government policy making, new social risks have emerged onto the agenda. These concern integrating marginal groups into paid work, 'activation', family restructuring, and mechanisms for balancing domestic and employment responsibilities. The EU is seeking leadership for the new risk agenda and this paper reviews recognition of, and responses to, new risks in a number of European countries and the implications for the politics of welfare. It is based on data from a recent EU FPV project: 'Welfare Reform and the Management of Societal Change'.

Catastrophic Risk, Insurance and Terrorism

Professor Richard Ericson
University of Oxford
22 June 2004

See page 8

The Uncertain Promise of Risk

Professor Pat O'Malley
Carleton University
16 June 2004

Conventional debates over risk in criminal justice tend to fall into several traps. These include the assumption that diverse configurations of risk can be collapsed into a single category, to be contrasted en bloc with other approaches to government. However, by attending to the diversity of forms of risk we can begin to develop certain principles that could be put forward as tools for thinking about the promise and limitations of ways of governing by risk. Through contrasting actuarial justice with a number of other configurations of risk-centred government, such relevant issues emerge as whether specific techniques or risks are inclusive or exclusionary, whether they set up a zero-sum game between victims and offenders, and whether they polarise risk and uncertainty. While this is promising, Prof O'Malley also concluded that a democratic politics of security may provide more promise than a politics of risk per se.

Attitudes to the Risks and Benefits of Agricultural Biotechnology in Britain: the role of ambivalence

Professor Nick Pidgeon
University of East Anglia
8 June 2004

Prof Pidgeon reported findings from a major national GB survey of public attitudes to the risks and benefits of GM food and crops conducted directly after the end of the *GMNation? Public Debate* on the commercialisation of agricultural biotechnology in Great Britain. Although many traditional quantitative studies construe 'attitudes' in bipolar terms, previous qualitative work on the discourses surrounding GM agriculture highlights the important role of 'ambivalence'. This paper developed a classification of four ideal-type attitudinal positions towards GM food and crops: *positive, negative, ambivalent and indifferent*. Using quantitative risk and benefit measures it found that the greatest proportion of respondents are ambivalent about GM food and crops, simultaneously endorsing risks and some benefits of this technology. Accordingly, the research concluded that at the time of *GM Nation?* ambivalence dominated UK public attitudes, with, additionally, a significant skew towards the negative pole.

The Good, the Bad and the Notorious: risk differentiation in German third party motor insurance

Dr Reimund Schwarze
Deutsches Institut fur Wirtscharftsforschung, Berlin
1 June 2004

This seminar discussed recent developments in third party liability insurance for motor vehicles. Specifically, Dr Schwarze evaluated the preventive effects at the firm level of a variety of risk classification measures such as vehicle age, single driver bonus, garage holding, etc. These new tariff criteria had been introduced in Germany in 1994 following the European third motor vehicle insurance directive. Based on ten years' observation little improvement can be found. This talk also considered the potential of using performance-related tariff criteria such as penalty points to improve the preventive effects of risk classification in this field.

FORTHCOMING **LUNCHTIME** SEMINARS

18 January 2005 **Corporate Governance, Labour Regulation and Legal Origin**
Simon Deakin, University of Cambridge

1 February 2005 **Securities Analysts as Frame-Makers**
Daniel Beunza, Universitat Pompeu Fabra

15 February 2005 **Risk Transformation: a new era for chemicals regulation in the US and Europe?**
Arthur Daemmrich, Chemical Heritage Foundation

1 March 2005 **What is Law in the EU? The Implementation of the EU Directive on Integrated Pollution Prevention and Control**
Bettina Lange, European University Institute

15 March 2005 **European Financial Regulation and National Regulators**
Marie-Anne Frison-Roche, Sciences Po, Paris

To receive the latest news on forthcoming CARR events sign up to our e-mail alert service:
www.lse.ac.uk/collections/CARR/emailSignUpForm.htm

The law of the land

In the first of a new series highlighting the work of CARR's research students, **Tola Amodu** examines how negotiated contracts have long played a regulatory role in Britain's planning system

When examining the myriad practices and stratagems adopted by governments to regulate activity, one is struck by a peculiar sense of *déjà vu*. Some practices seen as a new way of control prove, on deeper investigation, to be far from innovative. One example of this is the use of contracting as a method of regulation. The Eighties wave of privatisation, heavily reliant upon contractual practices as instruments of regulation was often sold as a new regulatory approach. Looking at land-use planning, however, it is possible to discern a number of recursive themes, which challenge this assumption.

Negotiated quasi-contractual strategies figure as a consistent trend within land-use planning, and agreements have been used for almost a century to secure efficient land allocation, so as to satisfy both individual and community needs. In land-use planning the idea of 'regulation' emerges early in the 20th century, and is a product of post-Industrial Revolution effects. The rapid social and economic changes of the age meant that successive governments had to meet the challenge of how to contain and minimise adverse consequences whilst still allowing for progress. Contracting became a way of negotiating effective solutions where, for those regulating, either information deficits or other asymmetries existed. As in many regulatory arenas, the capacity to regulate by command is severely limited where government does not control the subject matter. In the case of land, the sanctity given to land ownership meant it would never be easy to mould individuated interests or concerns to the collective will. In the cooperative environment that contracting promoted it was possible to anticipate the implications of change and accommodate this fundamental dilemma. Contractual practices furthered a more subtle and incremental regulatory progression, through a process of ostensible collaboration. Initially, agreements were used to secure public rights to private land, or to protect areas of natural beauty in circumstances where no comprehensive regulatory frame existed, or a 'light hand' was required. The contracting strategy was subsequently adopted when the problems common in the creation of a comprehensive system became apparent.

Over the period agreements have been used consistently to secure community facilities, in circumstances where the public actors could not dictate to private landowners. Although initially they were used to compensate for knowledge deficits associated with the regulation of new or emerging situations, they were subsequently used as a supplement to a comprehensive land-use planning regime, and now are used to provide all manner of benefits that cannot be secured through the imposition of planning conditions. Looking at the history of negotiated solutions to planning dilemmas, the same regulatory instrument – in this case the legal construct broadly defined as a contract – has been crafted or manipulated to suit the various demands or agendas of public and private actors alike. As with so much regulation, future activity was governed by accepted standards of the past. This was in part a process of negotiating and defining acceptable limits and partly a process of resolving how these limits on acceptable conduct were to be secured. The solution was found in 'regulatory planning' – an incremental if modest approach by government to harness the activities of others. The use of negotiated agreements was a key instrument whereby government relied on other actors to restrict their conduct whilst profiting from the beneficial effects. Regulation in this form was seen as the antithesis of comprehensive state-driven control, and contracting an integral part of government's limited ambition.

The advent of a centralised planning system after World War II, did not stop the use of agreements. Regulation was equated with 'heavy-handed' state intervention and the grand ambition of comprehensive intervention with regulatory planning becoming the regulation of planning. Although often posited as the antithesis of welfarist regulatory strategies, empirical data shows that agreements continued to coexist with conventional command-based instruments. The negotiated solution became a necessary adjunct to the comprehensive planning system, perhaps by retaining an element of flexibility to the rigidity of the system. By the late 1990s it was estimated that just under 20 per cent of all large-scale developments permitted also included an agreement, despite further changes in successive governments' attitudes towards regulation. While the shape of both central and local government has changed significantly during this long period, the quasi-contractual tool continues to be used. This suggests that despite economic and social shifts some practices either remain somewhat insulated from or resistant to the changing context of regulation, or are sufficiently malleable to accommodate diverse and evolving agendas from limited governance through to comprehensive intervention and back again.

It is clear from the historical evidence that the use of contracts as regulatory instruments is not new. There may be regulatory domains where they are an innovation but land-use planning would appear not to be one of them. Furthermore, in the context of planning, any understanding that use of quasi-contractual mechanisms is to be associated with the minimal state is also open to question. Interrogating the historical foundations of current trends can often lead to surprising results. Perhaps a dose of healthy scepticism is needed when thinking about current regulatory practices, and sometimes that can come from taking a historical perspective.

Tola Amodu is completing her PhD in the LSE's Law Department, and is a CARR affiliated research student.

CARR sponsors risk and regulation conferences at LSE and at universities throughout the UK.

Joint One Day CARR/SCORE Workshop

CARR, LSE, June 2004

Colleagues from the Stockholm Centre for Organizational Research (SCORE) visited CARR for a one day workshop and exchange of ideas in the summer. SCORE is very much a sister research centre to CARR with a special focus on governance issues in the public sector and on regulation and standardisation. Julia Black (CARR) opened proceedings with an account of the work of the regulatory innovation group. Göran Ahrne and Nils Brunsson (SCORE) presented a paper on meta-organisations (organisations whose members are themselves organisations) and argued that such entities have increased in size and significance for regulatory processes. Javier Lezaun (CARR) spoke on experimentalism in regulatory organisations, specifically in the context of GM foodstuffs. Finally, Ulrika Mörth (SCORE) discussed the role of so-called 'soft law' and modes of regulation in EU. The event resonated with common interests across the two groups and it was hoped that this meeting would help to strengthen links for the future.

Risk and Regulation Research Student Conference 2004

CARR, LSE, September 2004

CARR hosted its third annual international research student conference in September. The conference has rapidly become established as a major risk and regulation event for research students from across the world. This year the conference attracted 100 participants from Europe, North America, Africa, Australia and Israel, with over 50 presentations on subjects as diverse as independent regulators, GMOs, utility regulation, bird flu and money laundering.

The two day event provided a unique opportunity for students to develop and present their own ideas, consider problems through different pairs of theoretical spectacles, to get an insiders perspective on regulation in a keynote speech from Howard Davies (LSE Director and past chairman of the Financial Services Authority) and attend sessions on getting into print and masterclasses on risk and regulation. The hugely positive feedback from the participants shows that the conference is truly helping define the boundaries of this important new research field for the next generation of scholars across the world.

Food Risk and Regulation

BRASS, Cardiff University, October 2004

In collaboration with the ESRC Centre for Business Relationships, Accountability, Sustainability and Society (BRASS), CARR held a conference on food risks and their regulation. The event brought together academic researchers, industry representatives and other stakeholders, to discuss current issues and experiences in the governance of food. Three major themes were addressed: communication and public attitudes, governance and reform (in the UK and Europe), and new forms of management for the supply chain. Speakers included Sue Dibb, from the National Consumer Council, Christine Majewski, from the European Food Safety Agency, Anna Jung, from the European Food Information Council, as well as researchers from CARR, BRASS, City University, Exeter, Cambridge and Amsterdam. The presentations are available on the CARR and BRASS websites.

Are Risk Managers Dangerous?

Joint public debate with *The Economist*
CARR, LSE, October 2004

Opening the debate, Mike Power of CARR portrayed risk managers as 'cosmetic, legalistic and concerned with appearances'. In contrast, Reg Hinckley of BP thought the overall effect of risk managers was, on balance, positive. They had contributed to the quantification of risk, and had at least prompted the 'right sort' of boardroom discussions.

Avinash Persaud put the case differently: risk management wasn't working. Risk management should ensure that risks are distributed according to the ability to carry risks. In practice, risks are being transferred from those, such as banks, who can afford to take risks, to members of the public who cannot. Likewise, a 'one size fits all' mentality among risk managers had the perverse effect of destroying the diversity which successful risk management values, and increasing volatility.

A somewhat equivocal response was provided by Thierry Van Santen of Group Danone: the problem was the failure to distinguish between compliance and risk management. The job of the latter is to identify good and bad risks – since the company which takes no risks has no future.

A hand count of the audience suggested that the proponents had succeeding in convincing a majority that risk managers – the minority, perhaps? – were indeed dangerous.

Global Governance and the Role of Non-State Actors

Conference in conjunction with the Social Science Center, Berlin and the Alfred Herrhausen Society for International Dialogue
CARR, LSE, November 2004

Non-State Actors (NSAs) are now established as integral players in the architecture of global governance. With the globalisation of many contemporary policy issues, transcending national boundaries – from the environment to terrorism, from financial risk to local conflict – global governance is increasingly a contested process, opening up new space for political action by state and non-state actors. This makes processes of global governance both highly salient, as well as problematic. The conference examined how the regulatory capacity of non-state actors is a resource increasingly drawn upon by the state in policy domains where it is either unwilling – or unable – to act itself.

The event included contributions from David Held (LSE), Michael Zurn (WZB/Hertie School of Governance), and Bill Emmott (Editor-in-Chief, *The Economist*). The capacity of non-state actors to provide policy solutions to the problems of global governance is confronted with a new wave of demands for improved representation, transparency, and accountability. In this regard, the conference considered if the rise of the non-state actor is resulting in a legitimacy crisis for global governance – or alternatively if it offers the solution as well as the problem. For future research, this raised the problem of whether new 'democratic' forms of global governance should be unilaterally imposed upon civil society.

Dr Wolfgang Nowak (Alfred Herrhausen Society) and Professor David Held (LSE)

More information on CARR events can be found on CARR's website, www.lse.ac.uk/Depts/carr

CARR Discussion Papers

COMING SOON

DP31 Modernisation, Partnerships and the Management of Risk
Liisa Kurunmäki and Peter Miller

DP30 Regulatory Experiments
Yuval Millo and Javier Lezaun

DP29 From Risks to Second-order dangers in Financial Markets: Unintended consequences of risk management systems
Boris Holzer and Yuval Millo

DP28 Decentralisation of Economic Law – An Oxymoron
Myriam Senn

RECENTLY PUBLISHED

DP27 Digital Technologies and the Duality of Risk
Claudio Ciborra

DP26 Risk Regulation and Interest Accommodation: Pharmaceuticals' licensing in the European Community
Jürgen Feick

DP25 The Role of Civil Society Organisations in Regulating Business Change
Bridget M Hutter and Joan O'Mahony

DP24 The Battle for Hearts and Minds? Evolutions in organisational approaches to environmental risk communication
Andy Gouldson, Rolf Lidskog and Misse Wester-Herber

DP23 Creation of a market network: the regulatory approval of Chicago Board Options Exchange (CBOE)
Yuval Millo

DP22 Corporate-NGO Partnerships as a Form of Civil Regulation: lessons from the Energy Biodiversity Initiative
Stephen Tully

DP21 Access to Justice Within the Sustainable Self-Governance Model
Stephen Tully

A complete list of our discussion papers can be found at:
www.lse.ac.uk/collections/CARR/documents/discussionPapers.htm

Selected Recent Publications

Competency, Bureaucracy and the Orthodoxies of Public Management Reform: a comparative analysis
Christopher Hood and Martin Lodge
Governance 17 (3) 2004: 313-333

Risk Management and Governance
Bridget Hutter
In P Eliadis, MM Hill and M Howlett (eds). *Designing Government: From Instruments to Governance*
McGill-Queen's University Press 2004

The Risk Management of Everything: rethinking the politics of uncertainty
Michael Power
Demos, 2004
Available online:
www.demos.co.uk/catalogue/riskmanagementofeverythingcatalogue/

Regulatory Innovation and the Online Consumer
Colin Scott
Law and Policy 26 (3-4) 2004: 477-506

Varieties of capitalism in an internationalised world: domestic institutional change in European telecommunications
Mark Thatcher
Comparative Political Studies 37 (7) 2004: 1-30

Risk&Regulation **Online**

Readers can now browse through *Risk&Regulation* in an improved, easy-to-access online format. You will find the latest articles and news from CARR, with the advantage of increased interactivity featuring links to other relevant items, events and publications produced by CARR.

We hope that the new format will allow readers to easily forward articles to colleagues and increase awareness of available CARR resources such as the Research Directory and Discussion Papers.

Back issues are also available from the new wesbite.
To find out more go to: www.lse.ac.uk/Depts/carr
or email regulation@lse.ac.uk

CARR research staff

Tim Besley

Director of Suntory and Toyota International Centres for Economics and Related Disciplines (STICERD)

Professor of Economics

Public economics; Development economics; Political economy.

Julia Black

Reader in Law

Regulatory techniques and processes; Interpretive and discourse based approaches to regulation; Rule making; Financial services regulation.

Christopher Hood

CARR Programme Director: Regulation of Government and Governance

Gladstone Professor of Government and Fellow of All Souls College, University of Oxford

Regulation of public-sector bodies; Institutional factors shaping regulation; Transparency and public sector governance.

Bridget Hutter

CARR Co-Director

Peacock Professor of Risk Management

Sociology of regulation and risk management; Regulation of economic life; Corporate responses to state and non-state forms of regulation.

William Jennings

ESRC/BP Postdoctoral Research Fellow

Regulation of government by public opinion; Blame avoidance; Policy implementation; Politics and administration of governmental policies of public celebration.

Clive Jones

Research Assistant

Corporate responses to regulation and risk; Reputation risk management.

Robert Kaye

ESRC Research Officer

Self-regulation and ethics regulation; Regulation inside parliaments and political institutions; Regulatory bodies in the professions.

Javier Lezaun

ESRC Research Officer

Biotechnology politics and regulations; Traceability and food control; Marketing and market infrastructures; Science and Technology Studies.

Martin Lodge

CARR Deputy Programme Director: Regulation of Government and Governance

Lecturer in Political Science and Public Policy

Comparative regulation and public administration; Government and politics of the EU and of Germany; Railway regulation in Britain and Germany; Regulatory reform in the Caribbean.

Peter Miller

Professor of Management Accounting

Accounting and advanced manufacturing systems; Investment appraisal and capital budgeting; Accounting and the public sector; Social and institutional aspects of accounting.

Yuval Millo

ESRC Research Officer

Economic sociology; Financial regulation; Derivatives markets; Financial risk management.

Joan O'Mahony

Leverhulme Special Research Fellow

Business regulation and civil society; Role of non-state sources in risk management; Political sociology.

Michael Power

CARR Co-Director and Programme Director: Organisations and Risk Management

Professor of Accounting

Internal and external auditing; risk management and corporate governance; Financial accounting and auditing regulation.

Henry Rothstein

ESRC Research Fellow

Comparative analysis of risk regulation regimes; Risk regulation and public opinion, the media, interest groups and regulatory professionals; Transparency and accountability.

Colin Scott

Reader in Law

Regulation of government, communications regulation and regulation of consumer markets; New dimensions of regulation of the public sector and regulatory innovation.

Mark Thatcher

Senior Lecturer in Public Administration and Public Policy

Comparative European regulation and public policy; Telecommunications and other utilities; delegation to non-majoritarian institutions and institutional design; Independent regulatory agencies.

CARR research associates

Michael Barzelay

Reader in Public Management, LSE

George Gaskell

Professor of Social Psychology, LSE

Terence Gourvish

Director, Business History Unit, LSE

Andrew Gouldson

Lecturer in Environmental Policy, LSE

Carol Harlow

Professor of Public Law, LSE

Michael Huber

Research Associate

Donald Mackenzie

Professor of Sociology, University of Edinburgh

Edward Page

Sidney and Beatrice Webb Professor of Public Policy, LSE

Tony Prosser

Professor of Public Law, Bristol University

Judith Rees

Deputy Director, LSE; Professor of Environmental and Resource Management, LSE

Lindsay Stirton

Lecturer in Law, University of East Anglia

Peter Taylor-Gooby

Professor of Social Policy, Sociology and Social Science, University of Kent at Canterbury

Brian Wynne

Professor of Science Studies, Lancaster University

CARR administrative team

Amy Eldon

Administration and Events Officer

Sabrina Fernandez

Events and Publications Administrator

Louise Newton-Clare

Centre Manager (Finance, Research and Special Projects)

Anna Pili

Centre Manager (Administration, Events and Communications)

www.lse.ac.uk/Depts/carr

carr
centre for analysis
of risk and regulation

LSE

ESRC Centre for Analysis of Risk and Regulation
The London School of Economics
and Political Science
Houghton Street
London WC2A 2AE
United Kingdom

Tel: +44 (0)20 7955 6577
Fax: +44 (0)20 7955 6578
Website: www.lse.ac.uk/Depts/carr/
Email: risk@lse.ac.uk