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Regulating Everything

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Regulating Everything[1]

1. Introduction

The inauguration of the chair in EU Regulation and Governance at UCD School of Law, provides an occasion to evaluate developments both in public policy and academic worlds in which regulatory governance has been a growing preoccupation.

My topic is regulating everything and my starting point is the observation of the exponential growth in regulatory agencies, not just in Ireland, but throughout the industralized world. Regulation today is a solution searching for policy problems. There is a sense in which governments have delegated powers to independent and relatively unaccountable bodies and to that extent they are 'regulating everything' - a matter that has attracted considerable adverse comment. It is an image I sometimes refer to as 'mega-regulation'.[2]

I am going to argue that there is more to regulation than agencies and rules. To do that I am going to introduce the concept of a regulatory regime. Regulatory regimes are focused on particular domains and issues. Thus there is a regime regulating safety of food, another for smoking in public places, and a third for the quality of teaching and research within universities. Though each of these regimes has at least one form of regulatory agency associated with it in Ireland there are in each case other organisations with significant regulatory capacity –

[1] This title was suggested to me by the work of two of my former LSE colleagues. Mike Power's *The Risk Management of Everything Power, Michael. 2004. "The Risk Management of Everything." London: Demos.* describes and evaluates the effect of displacing a variety of professional disciplines by risk management, first in private, and then in public sector organizations. Hugh Collins' *Regulating Contracts* offers a highly original analysis of the law of contract through the lens of regulation which finds contracts to be simultaneously instruments of and subjects of regulation.

[2] I am endebted to John Braithwaite for the story of a senior public servant who told him how enthusiastically the public service was embracing Braithwaite's idea as to how regulation might better be achieved through more sensitive and measured interventions. The same public servant then went on to introduce Braithwaite's talk as being about 'mega-regulation' when the theme of the day, and of Braithwaite's research, was actually meta-regulation (see below).

and not simply the obvious ministries. Furthermore, to a greater or lesser degree, behaviour of those regulated in those regimes is shaped only partly by legal rules, but also by other forms of control.

I will argue that the fragmentation in terms of organisations and forms of control within regulatory regimes creates a problem involving regulatory agencies NOT of too much power and too little accountability, but rather the converse – too little power and too much accountability. Agencies rarely have uninhibited power to engage in what is sometimes called 'command and control'. Our expectations of what regulatory agencies can achieve are likely to be excessive. And whilst their accountability to the Oireachtas (or Parliament for visitors) may be different, the interdependence with others within regulatory regimes creates a different, extended form of accountability (Scott 2000). And, my solution to this is NOT to give agencies more power and less accountability, but rather to recognise and work with the various organisations, capacities and forms of control within particular regulatory regimes to promote learning about how regimes work so to secure better understanding not only of policy solutions, but also of policy problems.

So, in this lecture I am first going to examine the evidence of the proliferation of regulatory agencies, and the evidence is clear. Secondly I am going to discuss the nature of regulation and regulatory regimes. Then I will examine the variety of organisations and individuals involved within regulatory regimes and follow. This is closely linked to variety in the forms of control. I will conclude with an assessment of the implications of my reconceptualization of regulation. I will argue that policy processes of regulatory design and reform should be adapted to accommodate and exploit the potential of many organisations and variety in control. I will share a little of what I think the contribution of my current research might be to addressing some of the issues involved.

The reconceptualization of regulation which I offer in this lecture is centrally concerned with recognising the impossibility of 'megaregulation' – command and control by regulatory agencies - and substituting a way of thinking about regulatory regimes which recognises and works with the diverse capacities for control within them. If we really want to be 'regulating everything' then this way of thinking, which I call 'metaregulation', offers a more fruitful way forward.

2. The Growth of Regulatory Agencies

The growth of regulatory agencies has, of course, been an important trend in the governance of most OECD member states over the past thirty years – distinctive indicator of the rise of the regulatory state (Majone 1994), and of the establishment and global diffusion of 'regulatory capitalism' (Levi-Faur 2005). The pattern of growth is linked to a number of distinct trends. Privatization and /or liberalization of state owned enterprises has frequently been accompanied by the creation of regulatory agencies, to maintain elements of public control, and to provide reassurance of independence from government in creating a level-playing field for new entrants (Scott 1993). In Ireland the imperative for the establishment of regulatory agencies to accompany liberalizing measures substantially derived from membership of the EU. More recently the Irish government has become enamoured of the agency form and used it in domains where EU measures do not require it. Disenchantment with self-regulation has led to the displacement of self-regulatory regimes by statutory regimes (Moran 2003). Financial services is a key example and the legal profession may be next in Ireland. The rise of agencies may also be explained by reference to processes of policy diffusion as European governments copy from each other and from longstanding American experience (Levi-Faur 2005). I will mention one other factor. When governments are short of cash or unwilling to spend it, the creation of regulatory agencies provides a low cost symbolic commitment to action (Loughlin and Scott 1997). Rules, after all, are cheap when compared to welfare

programmes. Recent research has quantified the global trend towards agencification.

The video shown in the lecture, demonstrates the emergence of agencies in fifteen key economic and social domains since 1965 in 19 Latin American Countries, the EU fifteen as they were in 2002, more recent accession states, US and Canada, the four Asian members of the OECD – Korea, Japan, Australia and New Zealand, and Iceland and Turkey. At the beginning the United States is clearly the leader in agency creation. By 2002, as my colleague David Levi-Faur from the Hebrew University of Jerusalem, who kindly made this video available to me, put it, Ireland is the world champion for creation of agencies, surpassing even the United States, with agencies in 14 of the fifteen policy domains.

I am participating in a research project, led by Dr Niamh Hardiman, funded by IRCHSS and located within the Geary Institute, which is investigating the development of central state bodies in Ireland since 1922 and developing hypotheses about patterns of change observed. The Mapping the Irish State Project offers more detailed time series data for Ireland, taking all state owned agencies exercising regulatory functions and very much confirms this view of proliferation, with continuing growth past the Annus Mirabilis of 2001 in which nine new agencies were created. Sixteen new ones have emerged even since then, shown in figure 1.

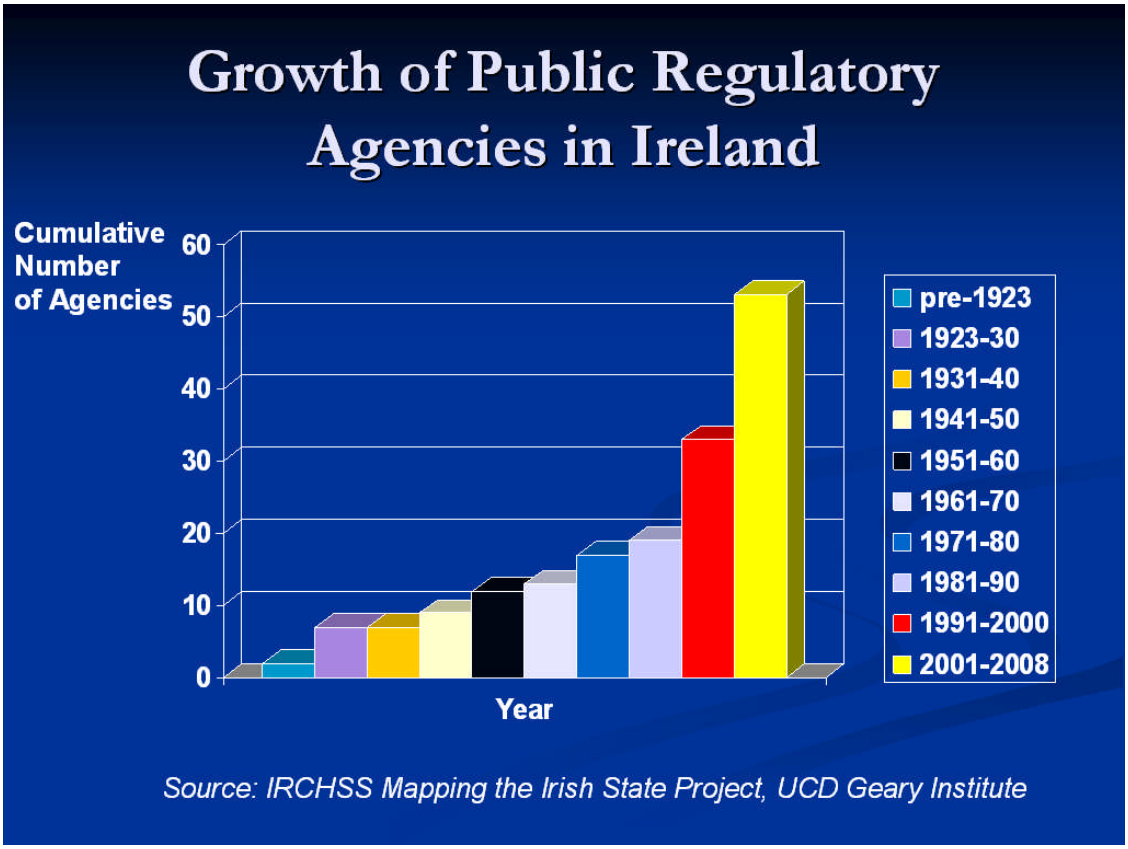

Figure 1 Growth of Public Regulatory Agencies in Ireland

This graph does not include non-state bodies which exercise regulatory power nor does it include ombudsman schemes or local authorities (both local government and fisheries commissioners and harbour boards) – if it did there would be more. A recent study by the thinktank TASC concluded that there were over 450 state agencies in Ireland. An official report published last year identified 215 bodies in Ireland exercising statutory regulatory powers – rule-making or rule enforcement. This list included not only local government bodies, but also government ministries. In the Mapping project we have found these two studies extremely helpful and have built on them as we have sought to clarify some matters of definition as we have explored the full range of government agencies in Ireland.

A significant effect of the proliferation of regulatory agencies has been growth within the universities of an interdisciplinary field of research and teaching in the institutions and processes of regulation. Whereas the field is long-established in the United States, its emergence in the UK has been dated back only to the late 1970s (Daintith 1989). Arguably the field crystallized in the 1990s with the publication of a wide range of textbooks (Baldwin and Cave 1999; Baldwin, Scott and Hood 1998; Ogus 1994) and the establishment at LSE in 1995 of the interdisciplinary MSc Programme in Regulation run between Law, Sociology, Government and Economics Departments. Whilst numbers of academics working in the field continue to grow, as do journal article numbers, further stages of development are indicated by the establishment of the Collaborative Research Network in Regulation and Governance of the Law and Society Association in 2001 and the Standing Group of the European Consortium on Political Research on Regulation and Governance in 2005, of chairs in regulation at Sciences Po in Paris in 2002, and Kings College London, the University of Manchester and UCD in 2006, and a new interdisciplinary journal, *Regulation and Governance* in 2007.

Whilst the problem of the growth of regulatory agencies is often presented as involving delegation of over-extensive powers without proper control and accountability (Hennessy 2007), my own view is that the phenomenon presents a more fundamental and opposite problem. In brief the creation of regulatory agencies creates expectations which, in most cases, they cannot possibly be expected to fulfil. The paradox of regulatory agencies is that they frequently possess too much power outside the normal structures of ministerial responsibility to be legitimate, but too little power to secure the outcomes sought. The allocation of regulatory power to agencies is accompanied by the fragmentation of regulatory power in most regimes (Black 2007). Let me explain my claim that the emergence of agencies involves a fragmentation rather than a concentration of regulatory power.

3. Regulatory Regimes: Fragmented Participants and Variety in Control

Governments do not and cannot regulate everything. Even within the total regimes associated with prisons we have seen recent evidence the control efforts of prison governors are subverted by the alternative regimes that permit drugs, mobile phones and birds to be kept by prisoners. Regulating everything occurs not through discrete agencies applying rules, but rather within regimes. A regulatory regime is the aggregation of the activities of those whose actions shape behaviour within a particular set of activities. We may not be able to define with precision all the organisations and individuals within a regime. What is important to a regulatory regime is seek an understanding of how regulation – control – occurs.

A regulatory regime comprises three elements common to systems of control generally (whether biological, social or economic):

(i) norms, standards or rules,

(ii) mechanisms for monitoring or feedback,

(iii) ways of correcting behaviour which deviates from the norms. (Hood, Rothstein and Baldwin 2001)

In the human body there is a norm for body temperature of 37 degrees centigrade (or 98.4 degrees farenheit in old money). There is a series of feedback or monitoring mechanisms which detect deviations from the norm. There is then a series of mechanisms for correcting deviations – sweating when rising above 37, and various responses if temperature falls below, the most obvious of which is shivering. This is a regulatory regime.

Whereas in the human body the functions of the norm-setting, feedback and correction are all found in a single organization – the human body – in the world of social and economic regulation these functions are commonly fragmented. Fragmentation within regulatory regimes is pervasive even with the classical

agency model comprising legal rules, monitoring powers and application of formal sanctions (Scott 2001). Rule making is frequently reserved to legislature or government ministers under delegated legislation, monitoring assigned by ministries or agencies, and formal sanctions available only on application to a court. The United States is exceptional in routinely assigning each of the three powers - to make rules, to monitor and formally enforce - to independent agencies. In the UK there have been significant moves in recent years to give competition and financial services regulators greater power of direct regulatory enforcement (Black 2007). The best example in Ireland of such direct empowerment to enforce is in the powers to apply sanctions given to the Financial Regulator Central Bank and Financial Services Authority of Ireland in 2004 (s33 AQ, Central Bank Act 1943).[3] As a brief aside I used to tell people that there was no mystery to understanding legislation. Having examined the complexities of the Central Bank Act 1942 and its various amending instruments I am no longer so confident in that view.

It is significant that where agencies do have powers to apply or seek formal sanctions research in a wide range of jurisdictions suggests that such powers are used sparingly. Agencies, in the words of Grabosky and Braithwaite, authors of the leading Australian enforcement study, are 'of manners gentle' (Grabosky and Braithwaite 1986). The resistance to using legal enforcement powers is largely a matter of pragmatism, combining a sense of the limited resources and the potential for eking these out by seeking to educate and advise all but the most blatant offenders. Where, as is common in Ireland, infractions constitute criminal offences there is likely to be something of a tension between the orientation of agencies towards instrumental outcomes, and the orientation of judges towards the integrity of the legal system. These tensions are well understood by regulatory agencies which tend to reserve prosecution for a class of cases that are likely to be approved of by criminal courts. Enforcement steps falling short of

[3] Comreg has more limited direct power to issue notices relating to prosecution of summary offences. If undertakings remedy the matter giving rise to the offence and pay €1500 within 21 days no prosecution will take place. (s.44 Communications Regulation Act 2002, as amended).

prosecution have the advantage, from an agency perspective, that as compared with litigation it enables the enforcement agency to maintain an element of control over outcomes. Such a sense of control is limited where others have powers to enforce, as where adversely affected competitors, disappointed consumers or, as with some EC consumer protection legislation, representative bodies, such as consumer groups, are entitled to enforce legislation without reference to the agency. Patterns found in many enforcement agencies are summarised in the famous enforcement pyramid - a key component of the highly influential model of 'responsive regulation'(Ayres and Braithwaite 1992) (figure 2) – within which the main enforcement emphasis is at the base of the pyramid, with a credible capacity to escalate sanctions if education and advice do not result in compliance.

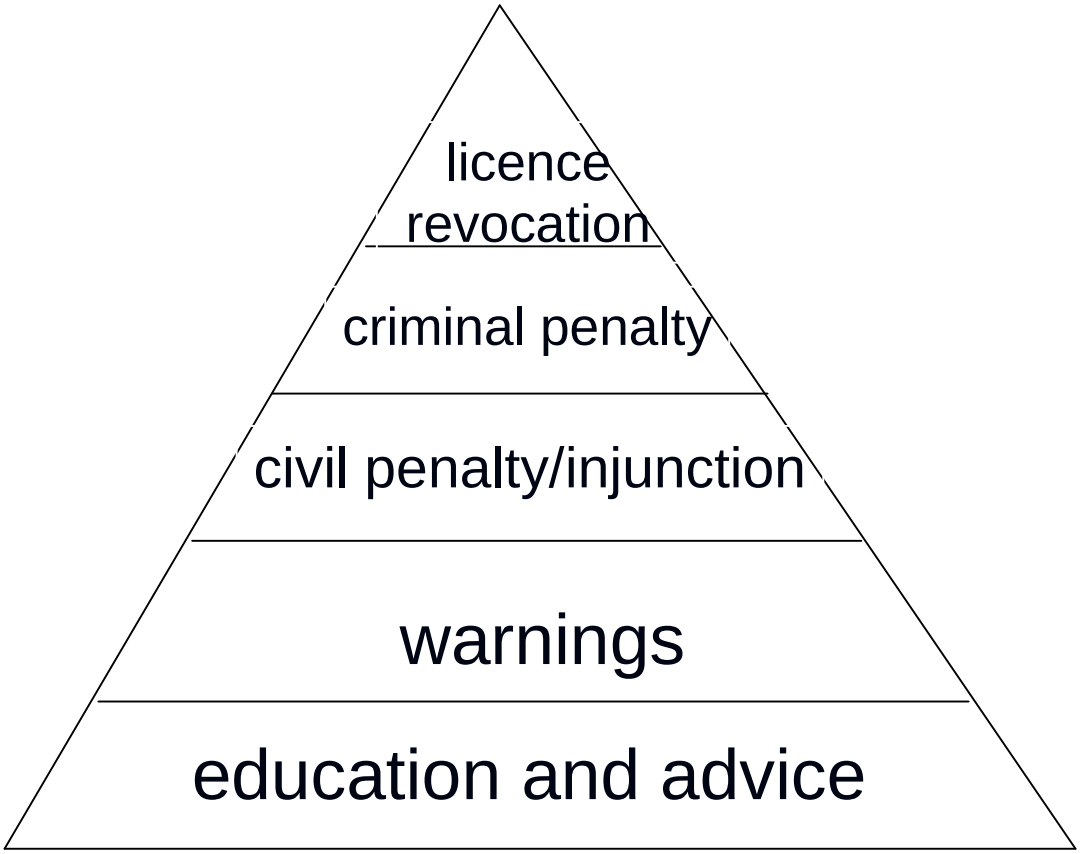

Figure 2 Example of an Enforcement Pyramid
Adapted from Ayres and Braithwaite 1992

Variety in enforcement practice is explained not only by reference to the functional imperative of maximizing compliance. Donald Black famously hypothesised that the stringency with which legal rules were enforced might be linked to the 'relational distance' between enforcer and enforce (Black 1976). The basic idea is that where these two parties have similar educational and professional backgrounds, perhaps high frequency of contact and shared sense of purpose then enforcement is likely to be less stringent than where that 'relational distance' is greater. In other words membership of communities may sometimes trump hierarchy. Grabosky and Braithwaite found evidence to support the hypothesis in business regulation in Australia (Grabosky and Braithwaite 1986) and a team in which I was involved similarly found support for the

hypotheses in empirical research on regulation of public sector bureaucracies in the UK (Hood et al. 1999). The hypothesis provides some support for the intuition that white collar criminals are treated in fundamentally different ways from those detected committing more ordinary crimes, and is suggestive of a solution within which relational distance is increased, for example by recruiting regulators from different walks of life than those they are regulating. The appointment of judges to inspect prisons is an example of relatively high relational distance underpinning a regime where, although enforcement powers are fairly minimal, stringency in naming and shaming those responsible for poor prison standards (both in the UK and Ireland) has been quite impressive.

It is only comparatively recently that governments have been thought of as objects of regulation. In research conducted by an LSE team on 'Regulation Inside Government' we found exponential growth in the armies of auditors, grievance handlers, inspectors and others charged with overseeing public sector activity in the UK (Hood et al. 1999). It is apparent that there are similar trends in Ireland, with introduction or expansion in recent years of public regimes for regulating the public sector in respect of such matters as appointments, value for money, transparency and domains such as provision of healthcare, education and prisons. There is, of course, also the economic regulation of commercial state enterprises such as An Post, currently subject to and EU-driven policy of liberalization.

This fragmentation is wider than simply mirroring the separation of powers between legislature, executive and judiciary. Legislative powers are today frequently exercised by supranational bodies, including but not limited to the key case of the EU legislature. Whilst there is a temptation to think of supranational or international regulatory regimes in a manner analogous to classical domestic models, in fact such regimes are even more prone to fragmentation. In a majority of regimes with a substantial supranational element, that involvement does not extend beyond the setting of norms. Even within the most developed of

supranational regulatory regimes, those associated with the European Union, the EU element to most regimes involves only the setting of standards which are then subject to mechanisms of oversight, monitoring and enforcement through national institutions. In such regimes, of course, the European Commission is itself a meta-regulator since it has a key role in ensuring national governments fulfil their obligations to transpose and implement directives. The Commission has been inventive in bolstering its formal capacity to apply sanctions to member states for non-compliance with over governance techniques, for example using competition in the form of a scoreboard showing implementation compliance for single market measures (Mendrinou 1996).

The more direct regulatory role of the Commission is exceptional, perhaps most strongly represented in the competition policy area (Majone 1996). Even here recent modernization reforms introduce a greater element of national competition authorities in enforcing EU competition rules. Whilst there are hierarchical mechanisms for coercing members to comply with their Community obligations, in this and other domains where the Commission is dependent on national authorities for implementation, there has been an increasing emphasis on the more community-based methods of steering associated with the development of networks of national and EU authorities. Such networks have been very prominent in competition, telecommunications and energy fields. They are part a wider shift identifiable in EU governance from hierarchical to more community-based governance, exemplified by the development of the Open Method of Coordination. I can say no more on this without trespassing on the field of expertise, and, indeed the inaugural lecture, of my colleague, the Sutherland Professor of European Law, Imelda Maher (Maher 2002).

The partial nature of EU regulatory regimes is demonstrated by the rather limited functions of the much-discussed European agencies. The European Commission currently has 24 Community agencies on its list. (http://europa.eu/agencies/community_agencies/index_en.htm - last visited 19

February 2008). The European Foundation for the Improvement of Living and Working Conditions, based in Dublin is one of these agencies, as is the European Medicines Evaluation Agency based in London. The European Food Safety Authority, based in Parma, is chaired by Professor Patrick Wall of UCD. What is striking about these agencies is how little regulatory power they possess. Thus EFSA is primarily an advisory body, charged with advising the Commission on the exercise of powers to make and implement legislation. Even the European Environment Agency (Copenhagen), is chiefly concerned with collecting information and giving advice. Two agencies, the Community Plant Variety Office (Angers) and the Office for Harmonisation in the Internal Market (Alicante), do have legal powers to hand out intellectual property rights. In a geographical sense these agencies do represent decentralization – and there may be some in Irish government envious of the track record of the European Commission on this. However, in governance terms the fact that so little power is given to the agencies means that they are instruments of consolidation for the central power of the European Commission (Scott 2005a)

An intriguing development is the introduction of more complete supranational regulatory regimes based on non-state rather than intergovernmental activity. Private legislation in the field of technical standards has long been recognized as important and dates back at least as far as the creation of private national standards organizations in the UK, Germany, France and the US in the first quarter of the twentieth century. It is perhaps indicative of the limited industrialization in twentieth century Ireland, and the concomitant stronger role for the state in development that the National Standards Authority of Ireland, established 1996, is a statutory corporation rather than a private body and it develops standards for matters as diverse as security for cash-in-transit to the safety of sporting goalposts. Supranational standards institutions have also been in existence for many decades, of both general character, such as ISO, and more specific, such as the IEEE, which sets many electrical standards (Hallström 2004). These international bodies are mirrored by non-governmental standard

setting institutions in the EU, such as the general standards organization, CEN, the electrical standards body CENELEC, and the European Telecommunications Standards Institute (ETSI).

Key examples of the more complete regimes, which involve not only the setting of norms, but also the generation of mechanisms for monitoring and enforcement are found in fields such as environmental conservation in logging (the Forest Stewardship Council) and Fair Trade (Cashore 2002). Donal Casey is currently working towards a PhD under my supervision investigating the emergence and legitimacy of the private regime of food standards known as the Global Alliance for Good Agricultural Practice – GlobalGap. This is no farmers group – it is dominated by major supermarket chains such as Tesco, Coop, Aldi, Morrisons, Albert Hiejn and our own Musgraves. The organization sets more stringent standards than governments as a condition of purchasing contracts and has systems for verification of compliance.

Distinctly from private standard-setting, the relationships between business and government in many sectors are such that the meaning of regulatory regimes is negotiated between them in many instances, rather than determined by the adjudication of any tribunal or court. Such relationships point to the contingency of legal rules on bargaining. It has long been recognized in welfare economics that there are frequently information asymmetries between regulators and those they are charged with regulating. My ethnographic research on the operation of the UK telecommunications regime in the mid-1990s observed that dominant incumbent operator British Telecom shaped both the norms and operation of the regulatory regime through its overwhelming organisational and informational resources (Hall, Scott and Hood 2000). Going beyond asymmetries of information is not so unusual for public regulators to be dependent on firms they notionally regulate for their view of what is appropriate and feasible, such that the formal legal power is held by the regulator, but the operation and outcomes within the regime are determined, often implicitly, by leading firms. This is the

problem of ‘epistemic dependence’ (Hardwig 1985). There are some domains where uncertainty is pervasive, and decision making modes based on assumptions that full information is possible are unsuitable. Nanotechnology regulation provides a pressing example. I have working with me, on her PhD, Mary Dobbs who is researching the application of the precautionary principle to the development of genetically modified organisms. She is particularly interested in the challenge to Weberian ideal type of rational legal decision making presented by conditions of uncertainty and the possibility and legitimacy of institutionalizing an alternative approach based on precaution rather than knowledge.

Many businesses have powers to regulate the conduct of others, often through contracts, for example specifying the necessary quality of products to be supplied. Contracts have become a central instrument through which producers and retailers seek to enforce ethical norms relating to employment rights and environmental protection in fields as diverse as the production of footballs and logging of wood. Insurance companies have substantial regulatory capacity over businesses, individuals and governments in seeking to curb their risky behaviour (Ericson, Doyle and Barry 2003). The use of window locks and burglar alarms has grown largely in response to incentives and requirements set by insurance companies. More broadly there is a wide range of businesses which have the capacity but not necessarily the incentive, to regulate or inhibit certain forms of conduct. A case that has long interested me is that of internet gambling. Governments and regulatory agencies in the US have struggled to enforce legislation that makes it an offence to offer internet gambling services from anywhere in the world to persons located, for example, in New York State. The then New York State Attorney General Eliot Spitzer observed that some form of financial intermediation was required for internet gambling transactions and most intermediaries, in contrast with the service providers, were established in New York State or at least within the territory of the US. He also observed that internet gaming transactions were coded both as internet and gambling, and that the

financial intermediaries had the capacity to block them. Citibank and Paypal were amongst the first to accede to requests to block all such transactions in the face of threats of creative enforcement actions by the State(Scott 2005b). Airlines, of course, have long been the gatekeeper and enforcer in respect of immigration laws. Airlines, as private organisations, can do things which might constitute breaches of treaty obligations were they done by governments or their agencies (Gilboy 1997).

In some spheres businesses have become de facto regulators of the public sector. I am intrigued by this inversion of traditional relationships and, having set out my theoretical position on this in a paper published in the *Journal of Law and Society* in 2002 (Scott 2002). I am now engaged in empirical research investigating one dimension of this – the regulation of local authorities by insurance companies The scary newspaper headlines which inform this aspect of the research are of the kind 'Insurer requires authority to close playground'. Earlier this month it was reported that Cathedral City of Ripon in the UK had this year abandoned its annual Shrove Tuesday pancake race following a risk assessment required by its insurance company (*The Guardian* 5 February 2008). Our research, sadly, relates directly neither to playgrounds or pancakes, but rather the provision and maintenance of roads by local authorities in Ireland Scotland. My collaborators on this project are Professor Simon Halliday of the University of Strathclyde School of Law and Mary Shayne, a political scientist, who is working with us at UCD. It is one of the first projects to be co-funded by UK and Irish research councils under a bilateral agreement. One aspect of interest here is that authorities have within their control the intensity of the relationship with their insurers. Many smaller authorities are fully insured for public liability with an insurance company. Many larger authorities have considerable excesses for both single events and aggregate claims in a single year, to the extent that they do not expect to claim in any given year, unless some catastrophe strikes. These larger authorities tend to engage in proactive risk management, whereas the fully insureds are more prone to direct regulation

of their risky activities by the insurer. In this research we are interested not only in the effects of contractual relationships, but also tort liability in steering the conduct of local authorities. Legal research on civil liability has largely focused on the corrective and redistributive aspects of the tort system. We are investigating the under-explored regulatory role of negligence liability in respect of local authorities.

Even central government is far from immune from private regulation. The activities of credit rating agencies in monitoring sovereign debt are regarded with increasing importance in finance ministries aware that adverse ratings decisions will increase their costs of capital. It is telling that soon after the reform of its fiscal policies in 2001 the Irish government was admonished by the Economic and Financial Affairs Council of the EU for breaching guidelines within the stability and growth pact with an expansionary budget, but at the same time Standard and Poors raised Ireland's credit rating to AAA and the OECD praised the overall strategy. Caught between conflicting regulatory regimes the Irish government implicitly opted to comply with the norms of the private regulator (competition) and the community of governments within the OECD (Scott 2002).

So, to summarise so far, regulatory regimes involve lots of different kinds of organisations and individuals. I turn now to the question of how control is exercised within such regimes.

Just as the ancient Greeks distinguished the governance of the forum, the marketplace and hearth so contemporary theories of social ordering suggest that the traditional hierarchical form of governance is one of three essential types – the other two being variants on competition and community. In the pioneering works of what is today referred to as social theory the significance of each of these forms of has an associated theorist: Hierarchy – Government - Hobbes; Competition – Markets - Smith and Community –Civil Society Rousseau. I am going to discuss examples of all three modalities of control, and the possibility of

a fourth, based in design. Key elements and examples of these modalities are shown in table 1.

Table 1

	Norms	Feedback	Behavioural Modification	Example	Variant
Hierarchical	Legal Rules	Monitoring Powers/Duties	Legal Sanctions	Classical Agency Model	Contractual Rule-Making and Enforcement
Competition	Price/Quality Ratio	Outcomes of Competition	Striving to Perform Better	Markets	Promotions Systems
Community	Social Norms	Social Observation	Social Sanctions – eg Ostracization	Villages, Clubs	Professional Ordering
Design	Fixed within Architecture	Lack of Response	Physical inhibition	Parking Bollards	Software Code

Table Modalities of Control Source – Adapted from (Lessig 2006); (Hood 1998); (Murray and Scott 2002)]

In this discussion I am going to work from simple examples drawn from the world of driver behaviour regulation. Antisocial and dangerous practices in motor vehicles have been a key target of government regulation of many years – for example drink-driving, use of hand held mobile phones while driving, parking on pavements and in cycle lanes.

Criminalization and the application of hierarchy is a key mechanism of controlling behaviour of drivers.

Photo 1 Mandatory Cycle Track

Photo 1 shows a mandatory cycle track – it is an offence to cross the white line or to park in it (Road Traffic (Traffic and Parking) Regulations 1997 SI no 182/1997 reg 14). It is also an offence to park on the pavement (reg 13). Hierarchy does not appear to be effective on Roebuck Road. Indeed, empirical observation of the non-enforcement of law is suggestive of customary law trumping official law – a matter which is difficult to accommodate with jurisprudential legal theory, but which is much discussed within legal anthropology, and now adapted to understanding regulatory regimes, particularly in a transnational context (Snyder 2002; Teubner 2004).

A different approach is offered by some. A press release from Dun Laoghaire-Rathdown Co Co dated 1 January 2006 appeals to motorists ‘to show fairness, courtesy and respect by not parking illegally’. Even though the campaign is supported by the local Garda station there is no mention of hierarchical enforcement. This is an appeal to community, an attempt to change the social norms governing the use of motor vehicles. Within communities norms are set informally, members of the community are involved in monitoring and have available informal sanctions such as showing disapproval and ostracizing those

who deviate from the norms. Such practices are not limited to what we ordinarily think of as community settings, such as villages, but also workplaces and also amongst firms. Within the Whitehall village of senior civil servants in the UK it has long been observed that regulation has occurred through informal monitoring and such community sanctions (Heclo and Wildavsky 1974), although this has been disrupted by bringing outsiders in. We may hypothesise that within the Dublin village of senior civil servants and politicians control is exercised at least as much through such implicit mechanisms as through hierarchical regulation. One of the most important forms of such community based control is in the form of self-regulation. Self-regulation, though based in communities of professionals and firms, is frequently institutionalized. There has long been statutory delegation of powers to professional bodies to act as self-regulators in Ireland. Such regimes typically combine elements of community control with more formal and institutionalized structures, more redolent of hierarchy.

Though guilds as private regulators of their members date back to the middle ages, trade association models are more recent (Braudel 1982). The Advertising industry in Ireland is substantially regulated through the self-regulatory codes and enforcement processes of the Advertising Standards Authority of Ireland and a similar model was introduced earlier this year for the press, with the establishment of the Press Council of Ireland and the Press Ombudsman. This new self-regulatory regime is, of course, overlaid on the long established community-based regulation based on the Code of Conduct of the National Union of Journalists. Critically, as one of my students observed in class the other day, the Press Council regime was established 'in the shadow of hierarchy' – the Minister of Justice was and still is threatening legislation if the regime is not judged effective.

In other contexts parking is controlled through the application of market forces – applying charges up to the point where the parking spaces available are at or close to full, but new arrivals can get a space. Actually this technique combines

market forces with hierarchy. In other contexts an auction might be used to get a more accurate sense of the value of parking spaces – as it was each term at the London School of Economics where, in contrast with UCD, there were just a handful of parking spaces for the whole central London campus.[4]

Leaving aside markets, as traditionally conceived, competition also exerts a steering influence over states, public sector bodies, employees, etc, as they jockey for position in respect of performance, presentation, etc. The biennial Public Service Excellence Awards in Ireland is an example of using competition to promote better public services. An eight page supplement was published in the Irish Times at the time of last awards in April 2006 to maximise their impact. Turning to parochial concerns, the regulation of performance in Universities, for so long dependent on community based structures of peer review, approval and disapproval, have increasingly been subjected to new pressures to compete, in particular, for resources, but also for standing. International competition is reflected in the generation of league tables of which those produced by the Shanghai Jiao Tong University and the Times Higher Education Supplement are only the most prominent. There is, of course, widespread criticism of this trends and its effects, and a search for more subtle bases of comparison (Marginson and Wende 2007).

Domestically the National Development Plan, the first iteration of which started life in 2000, has included massive growth in investment in university research, not only in the sciences, but also in the humanities and social sciences. This investment is being used to steer universities towards higher quality and higher impact research through competition for the limited resources available – gradually reducing block grant while increasing the proportion of funds which must be bid for. Competition is combined with community in the form of peer review. A somewhat disapproving study of these trends in the United States

[4] The auction mechanism was widely used for the allocation of third generation mobile licenses. Noone in the UK Treasury could have guessed that the market value of the five UK licenses allocated might be over £22B.

describes the reorientation of universities towards Academic Capitalism defined as ‘the pursuit of market and marketlike activities to generate external revenues’ (Slaughter and Rhoades 2004: 11). Here at UCD, the Vice President for Research is using competition for fairly modest research funds to engage ever larger numbers of academic staff in pursuing high quality research and giving them the experience of applying for and holding grants in a way calculated to significantly enhance UCD’s overall research performance. This is not hierarchical control. Noone is required to apply for these grants. Community regulation comes in here too since it involves peer review and in many, though perhaps not all, schools warm messages of approval flow to those who are successful.

What of the situations where hierarchy, competition and community, separately or together, are deemed inadequate to achieve objectives. Here is a fourth possibility.

The use of design as an instrument for inhibiting undesirable behaviour has a long heritage. Bentham saw its potential in his design for the panopticon prison – with its central tower from which a small number of warders could see and therefore control large numbers of prisoners in the irradiating wings. The layout of the Paris boulevards was designed in such a way as to inhibit the mob from gathering (Scott 1998). If UCD central administration area and lake area were designed in conformity with this idea during a period of student unrest– and I could not comment – then it is not the first University I have worked in to exhibit this form of control through design.

The idea of control through design has considerable prominence in Lawrence Lessig’s much cited book Code and Other Laws of Cyberspace (Lessig 1999) and its successor, written by many hands using a wiki Code: Version 2.0 (Lessig 2006). Lessig famously asserts that (software) ‘code is law’ because of the effect code has in controlling behaviour, often without the controllee knowing they are

being controlled. In recent research with my law school colleague TJ McIntyre, he, with me trailing behind, identified the myriad of ways in which internet filtering may be used to inhibit internet use, and in ways that the enforcement is automatic and the presence of the control is opaque, with the result that all responsibility is removed from the user. I admit to indecisiveness on the issue whether design constitutes a separate fourth modality of control. My current reservations emerge from engagement with Roger Brownsword's critique of the lack of choice associated with design-based control, and a related absence of accountability for such mechanisms. (Brownsword 2005).

Photo 2 – Parking Bollards

The parking bollards in photo 2 are a little less dramatic in their implications. They are visible. If we think about it when looking to park a vehicle, we know our behaviour is being inhibited, and, short of driving a Sherman tank there is not much to be done. Arguably this form of parking control is over-inclusive, since it stops people parking even at times where it might not create a hazard, and does not permit exceptions, for example for emergency vehicles.

Photo 3 Belt and Braces Approach

Sometime a ‘belt and braces’ or hybrid approach is taken. In photo 3 the hierarchical authority of law is deployed to prohibit all but cyclists from entering the road. To make sure, the entry of cars is made a physical impossibility. This photo is illustrative of a wider argument that these different forms of regulation – through hierarchy, community, competition and design – frequently operate together within a regulatory regime rather than in isolation. Businesses subject to hierarchical regulatory enforcement can also expect to have reputations damaged with adverse effects for both market performance and community standing.

The exploration of such hybrid modalities at play reveals that not all regulatory regimes have hierarchical elements. Internet shoppers are familiar with the risk that payments will be made and no goods or unsatisfactory goods will be delivered. One solution is to stick to trusted high profile sellers, placing dependence on their legal conscientiousness and concerns to protect brand reputation. Ebay offers a different solution. My guess is that buyers are not able to depend on either of these factors in most e-bay transactions. Rather they use the system for rating sellers for each of their transactions.

There is both a community and competition element to the system. The system is dependent on community members taking the time to review sellers (and not

taking a free ride) out of a sense of responsibility. The competition element means it is not impossible to sell with no track record or with poor ratings, but rather the pool of buyers is smaller, since such sellers will be avoided by the risk averse buyers, and even the risk lovers will only be willing to pay less, all other things being equal, than they would with a seller with a stronger track record.

4. What Can We Learn for Design and Reform of Regulation?

I have asked you to reconceptualize regulation – 'regulating everything' - as something that happens within regimes, involving many organisations and individuals, and a variety of forms of control, sometimes operating alone, but more commonly in hybrid patterns.

What use is this insight, partly informed by empirical observation, and partly by theoretical re-classification? Perhaps the most important policy implication is to suggest that wherever governments are considering a policy problem – be it unsafe food, passive smoking or poor quality university research – what they are considering is an existing regime which cannot be swept away and replaced by a regulatory agency. A more fruitful approach would be to seek to understand where the capacities lie within the existing regimes, and perhaps to strengthen those which appear to pull in the right direction and seek to inhibit those that pull the wrong way. In this way the regulatory reform agenda has the potential to address issues of regulatory fragmentation in a manner that recognizes both the limits of governmental capacity and the potential of reconceptualizing regulation in other ways, for example that invoke non-state actors and alternative mechanisms to hierarchy.

Regulatory reform has become a major activity for governments, encouraged by both the OECD and the European Union. Many governments have been caught between a choice of trying to make classical regulation better – more targeted,

more consistent, more transparent through regulatory impact analysis – and a more radical programme which gives fuller consideration to the alternatives to agencies and rules. The UK Better Regulation Task Force was explicit in guidance it issued in 2000 that facing a public policy problem decision makers should first consider doing nothing, and then consider self-regulation of some kind and, only if less costly alternatives were not viable, plan a more hierarchical form of intervention (Better Regulation Task Force 2000).

The Irish government's 'Better Regulation' programme scores pretty well both in its sensitivity to alternatives to regulation and its institutionalisation of alternative rules and processes within its Regulatory Impact Analysis strategy. Indeed it has received praise for its 'multi-instrument, multi-stakeholder' approach (Radaelli 2007). However the orientation to rules and agencies is difficult to change. The relatively narrow definition of regulation in the White Paper - primary and secondary legislation or such rules plus the public authorities responsible for the regime (p.6) - is, I think, a hindrance to thinking more creatively. Since the publication in the 2004 White Paper of the self-denying ordinance:

'The Government will create new sectoral regulators only if the case for a new regulatory can be clearly demonstrated in light of existing structures.' (p2).

Thirteen new regulatory agencies have been established, although one of these, the National Consumer Agency, was a replacement. Ensuring that units involved in sponsoring regulatory development implement RIA well presents its own challenges (Radaelli 2004).

Regulatory reform programmes have nowhere led to a substantial reduction in governmental activity in regulation, nor more importantly, a qualitative change in the character of regulatory governance. This is because the problem they tackle is limited to a sense that regulation imposes burdens rather than tackling more fundamental issues of the limits to the governance capacity of government. The

analysis I have offered today calls for a more reflexive approach to better regulation. I suggest that a valuable way to conceive of this, as an overarching conception, is found in the idea of meta-regulation.

The core idea of meta-regulation is that all social and economic spheres in which governments or others might have an interest in controlling already have within them mechanisms of steering – whether through hierarchy, competition, community, design or some combination thereof. Meta-regulation is sometimes referred to as the regulation of self-regulation (Parker 2002). I mentioned earlier a somewhat wider application of the concept to the European Commission in its role of overseeing implementation of Community law by member states. The first challenge is to observe and identify, to some approximation, the variety of mechanisms of regulation at play. The second challenge is to work out ways to key into those mechanisms to steer them, to the extent they are not already securing desired outcomes.

In conceiving of meta-regulation as a solution to policy problems my analysis extends beyond that of Christine Parker and others who see hierarchy as the main basis for steering the self-regulatory capacity of others. Consistent with my more general position on modalities of control, the reasons for applying self-regulatory capacity in particular directions within businesses, within government, within NGOs, might be because of the hierarchical impositions placed on them by others, such as governments and legislatures. But just as hierarchy can be strong in steering in behaviour, so with community and competition. I have been working in a small way with Martin Dumas, a PhD student at LSE, who has been engaging both empirically and theoretically with the regime for ensuring that children are not engaged in the process of manufacturing rugs in India. The Rugmark scheme, as Martin presents its, is driven by the preferences of some consumers for reassurance that the production of rugs does not involve exploitation. This ‘preference for processes’ (Kysar 2004) requires not only rules,

but also a regime of inspection and certification of compliance. Accordingly it involves hierarchy, but is driven by the market.

This extended conception of meta-regulation argues for a more modest conception of hierarchy and is suggestive of regulatory regimes which may emerge and have effects, but in which no-one is in charge. I acknowledge that this could be scariest aspect of my discussion for governments, and perhaps for others. We need to understand better why it is so difficult for governments to engage in or observe metaregulation. When crises strike it often feels better to offer a megaregulatory response – this is what happened with the BSE crisis, Enron and, what may happen with regulation of the solicitors' profession. It is interesting to note that in response to a crisis in the medical profession and widespread concern about self-regulation of the legal profession, the UK government responded in each case with the establishment of meta-regulatory bodies to oversee self-regulation – The Council for the Regulation of Health Care Professionals established by the National Health Service Reform and Health Care Professions Act 2002 and the Legal Services Board established under the Legal Services Act 2007 To understand that meta may be more effective than mega-regulation is challenging.

A suggestive conceptualization which neatly brings together some of the strands of this discussion is that of nodal governance elaborate by Clifford Shearing with various research partners (Shearing and Wood 2003). This conception of regulation does not deny the objectives and instrumental orientation of the key players, but rather indicates the distributed or decentred character of much regulatory governance (Black 2001). Better regulation should not be about regulation and alternatives to regulation, but rather about different forms of regulation. Everything is regulated, perhaps, but not everything is regulated by agencies and through rules.

5. Conclusions

Research in regulation and governance at UCD will contribute to understanding of both the problems and solutions which I have outlined. Research being conducted by my team on liability and risk management in roads authorities will offer insight into one mechanism through which public authorities are regulated. It will examine the strengths and weaknesses of civil liability as an instrument of regulation – a key theme in certain strands of law and economics scholarship (Shavell 1993) and will address both the empirical and normative challenges associated with having non-state organisations – insurance companies- so centrally involved in steering the behaviour of public authorities.

In gathering data on the changes in the organisational characteristics of the Irish central state in the collaborative Mapping project we have been particularly careful to include not only core public institutions – publicly owned, empowered by statute and publicly funded. We are already engaging scholars in other jurisdictions in our attempts to extend the ambit of analysis of public agencies engaged in regulation to give greater recognition of non-state actors – such as standards and self-regulatory bodies and those with gate keeping capacity.

At the level of policy the reconceptualization of regulatory governance as something fragmented, both in terms of actors and modalities of governance, informs my research on reflexive governance in better regulation processes both supranationally in the EU and the OECD and nationally – in Australia and the UK, and also in Ireland. There is clearly further theoretical work to be done on the implications of embedding non-state actors and alternatives to hierarchy within policies of regulatory reform.

At least two kinds of networks are central to the success of such research projects. First it is vital to embed this kind of research into international networks of scholars addressing similar issues from both theoretical and empirical

perspectives in other jurisdictions. The annual Law & Society Association meetings, usually held in North America, typically have eighty or more panels on regulation and Simon Halliday and I have developed a sub-network specifically tackling the regulatory effects of civil liability involving US, UK scholars and ourselves. Early hypotheses from the Mapping project have been presented within the European Network 'Connecting Excellence on European Governance' and will also appear within the European Consortium on Political Research standing group on Regulation and Governance, meeting in Utrecht later this year (which is of a similar scale to the LSA collaborative network on Regulation and Governance). It is equally important to work with the policy makers and practitioners to elicit their views on what are the important issues, to test developing hypotheses and get feedback on research findings. We are holding a stakeholder event in the Mapping project next month to discuss our classification of public agencies and analysis of trends in growth with representatives from many parts of the Irish central state. In the roads project we are building a stakeholder group to include local authorities, insurers, and groups representing local authority managers, lawyers and risk managers.

I have today argued that if 'regulating everything' is to be understood as a trend towards more agencies and rules governing wider areas of social and economic life, then it may fairly be criticised, not for generating an excess of unaccountable regulatory power, but rather because it overstates the possibility of governing through regulatory agencies and law. I have tried to demonstrate that meta-regulation – the regulation of self-regulation - provides a better conceptualization of how governments, but also communities and processes of competition might steer social and economic activities, and argued that developing the capacity for better reflection and learning within and outside government would promote the development of a viable way to conceive of 'regulating everything'.

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