

Regulation, Public Law and Better Regulation

Ciara BROWN and Colin SCOTT*

In response to concerns about regulatory growth, and anxieties about the efficiency and effectiveness of regulatory policies, most industrialised countries have, with the blessing of the OECD, developed policies on better regulation. The technical nature of these policies has engendered a degree of dissonance between policy practices on the one hand and research on regulatory regimes in Europe from the perspectives of public law and regulation on the other. A core conception of Better Regulation as being concerned with impact assessment of regulatory rules has emerged notwithstanding the fact that many official documents at both national and supranational level give considerable prominence to consideration of alternatives to regulation alongside impact assessment in rolling out Better Regulation programmes. The squeezing out of alternatives to regulation by a technical focus on regulatory impact assessment (RIA) has driven Better Regulation policies into a silo, substantially isolated from the main research concerns of regulation and public law scholarship. We suggest that both the scholarly and policy fields would benefit from a degree of reintegration. Such a reorientation should speak to the central concerns of scholarship both in regulation and public law. For the former it raises the prospect of working better with the grain of social and economic activity and actors in regulated fields, a central theme of contemporary regulation scholarship. For the latter it offers the promise of enhanced oversight over rule making processes and a more democratic form of decision making over the development and adoption of regulatory norms, rooted in theories of reflexive law, albeit linked to participatory rather than parliamentary democracy.

* UCD Centre for Regulation & Governance. Contact: colin.scott@ucd.ie. This article draws on research undertaken within the research programme, Reflexive Governance in the Public Interest (REFGOV ^ CIT3-CT-2005-513420), funded by the European Commission under the Sixth Framework Programme - <http://refgov.cpd.r.ucl.ac.be/>. Earlier versions of this paper were presented at workshops on reflexive governance held in Dublin in April 2009 and 'Legal Implications of Better Regulation', held at Antwerp University, February 2010. We are grateful to participants at both events, and in particular, to Claudio Radaelli, for comments on this earlier draft. As part of the research we carried out a documentary analysis of better regulation processes and personal interviews, undertaken by Ciara Brown alone, with senior civil servants in Government Departments, with independent regulatory agencies and with key stakeholders such as employers' groups and trade union officials. 16 interviews were carried out in Ireland, 14 in the United Kingdom and 17 in Australia between November 2008 and February 2009.

As a slogan ‘Better Regulation’ invites neither contradiction nor even debate. Who would promote ‘Worse Regulation?’¹

INTRODUCTION

Regulation has proved attractive as an instrument of public policy over the last forty years in most member states of the OECD. Regulation uses governmental authority, as an alternative to the resource intensive policies of the welfare state, to steer social and economic behaviour.² However, a perceived proliferation of regulatory rules was targeted by reform processes under the rubric of deregulation, initially by the administrations of Ronald Reagan and Margaret Thatcher in the United States and the UK.³ As neo-liberal critiques of state intervention have diminished so regulatory reform processes have recognised the legitimacy of state interventions and progressively been reoriented towards better, and more recently, smart regulation, encouraged by the deliberations of the OECD, and mirrored in practices developed by the EU over its own legislative processes.⁴

Better Regulation (BR) practices generally have targeted the perceived growth in regulatory burdens on businesses. They seek to apply oversight to new (and sometimes current) regulatory rules through forms of cost-benefit or regulatory impact analysis (RIA) and by seeking to steer rule-makers towards less burdensome mechanisms of steering (such as the use of market mechanisms or self-regulation). Whilst some form of RIA has been developed and embedded within most of the EU members states the commitment to, and effectiveness of, stated policies of Better Regulation which promote strategies to seek alternatives to regulation has been more patchy.

The squeezing out of alternatives to regulation by a technical focus on RIA (and the narrowing of its focus to specific impacts, not the broader range of impacts that may have been originally envisaged when BR policies were developed) has driven BR policies into a silo, substantially isolated from the main research concerns of public law and regulation scholarship. This dissonance should be of concern, because both fields of scholarship have much to say about Better Regulation in a wider sense.

¹ S Weatherill, 'The Challenge of Better Regulation' in S Weatherill (ed) *Better Regulation* (Hart Publishing, Oxford 2007).

² G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77-101; D Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of the American Academy of Political and Social Science* 12-32

³ G Majone (ed), *Deregulation or Reregulation? Regulatory Reform in Europe and the United States* (Pinter, London 1990).

⁴ Weatherill; European Commission, 'Smart Regulation in the European Union' (European Commission, Brussels 2010).

For public law scholarship there is evidently a concern to promote compliance with principles of constitutional and administrative law at both national and international level which stimulate transparency and participation in decision making with a quest for fairer and more democratic outcomes. Regulation scholarship has long been concerned to move beyond rules-based regulation, identifying examples of regimes which use a mixture of instruments and actors to seek desired outcomes and to overcome limits to state capacity. A relatively small cohort of public policy analysts and other scholars have examined in detail the policy making component of BR strategies. The consequences of this policy focus and the neglect by regulation scholars more generally is that there has been little analysis of the effects of BR policies on implementation. Where implementation studies have been undertaken they have paid little or no attention to any linkage with BR policies.

We argue that better engagement from public law and regulatory scholarship has the potential to transform BR policies. The analysis is supported by our research in Ireland, the UK and Australia which finds the emergence of a range of mechanisms for better considering both the nature of the problem to be addressed and the range of alternatives to classical regulation. Such processes, often parallel to, rather than part of, better regulation policies, have the potential to stimulate mutual learning between the variety of actors engaged within particular regulatory regimes. For public law this approach offers the promise of a more democratic form of decision making over the development of regulatory regimes, rooted in theories of reflexive law, albeit linked to participatory rather than parliamentary democracy. For regulation scholarship such an approach raises the prospect of working better with the grain of social and economic activity and actors in regulated fields, central themes in the field.

BETTER REGULATION AND ALTERNATIVES TO RULES

The origins of BR policies in concerns to reduce burdens on business partially explain the widespread published commitment to promoting alternatives to traditional regulation by rules. The influential OECD Guiding Principles for Regulatory Quality and Performance, for example, state in a section on assessing impacts and reviewing regulation, immediately after setting down the principle of regulatory review, that governments should:

[c]onsider alternatives to regulation where appropriate and possible, including self-regulation, that give greater scope to citizens and firms; when analysing such alternatives, consideration must take account

of their costs, benefits, distributional effects, impact on competition and market openness, and administrative requirements.⁵

In the EU the commitment to enhancing competitiveness within the 2000 Lisbon agenda includes an embrace of better law making and Better Regulation.⁶ A report for the European Commission by the Mandelkern Group on Better Regulation required the Commission to draw up ‘general guidelines on the use of alternatives to regulation for the pursuit of European policies’.⁷ The alternatives to new regulation identified by the Mandelkern Group included: doing nothing; incentives-based regulation; self-regulation; use of contracts for regulation; mechanisms to ensure assumption of responsibility (eg insurance); mutual recognition; improving existing regulation (eg implementation measures such as the development of more responsive regulatory enforcement).⁸ Two forms of co-regulation, involving government in working with self-regulation, were identified in the report. These involved first, the delegation of regulatory tasks to self-regulatory regimes and the second, the recognition or validation by government of rules originating in self-regulatory regimes.⁹ The Group recommended that Regulatory Impact Analysis should focus on the nature of the problem to be addressed and options for addressing the problem, rather than on proposed rules.¹⁰ In other words, RIA should be conducted before a preference for new rules has crystallized to make it possible to deploy alternatives to rules where appropriate.

The EU institutions acted on the Mandelkern Report with an inter-institutional agreement on better law-making, published in 2003. The politics of EU lawmaking require the institutions to reaffirm a commitment both to the Community method and to democratic lawmaking. Accordingly the document locates the potential for alternative methods of regulation, including co-regulation and self-regulation, as applications of the principles of subsidiary and proportionality.¹¹ However it is a key aspect of the Agreement that ‘[t]hese mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all

⁵ OECD, *OECD Guidelines for Regulatory Quality and Performance* (OECD, Paris 2005): 4.

⁶ I Lynch-Fannon, 'Legislative Policy, Law and Competitiveness: A Mysterious and Difficult Relationship in the EU' (2009) 15 *European Law Journal* 98-120.

⁷ Mandelkern Group on Better Regulation, *Final Report* (European Commission, Brussels 2001): v.

⁸ *Ibid.*: 15-16.

⁹ *Ibid.*: 17.

¹⁰ *Ibid.*: 20.

¹¹ European Parliament, European Council and European Commission, 'Inter-Institutional Agreement on Better Law-Making' (Brussels 2003): para 16.

Member States.¹² Critically the methods of impact analysis and consultative requirements set down in the Agreement, departing from Mandelkern, are to apply to legislative processes, rather than the broader processes of analysing a problem to see whether legislation or other responses are appropriate.¹³ By restricting the application of impact analysis to the legislative process and by arguing for the limited scope of application of self-regulation and co-regulation, the Agreement significantly restricts the scope for alternatives to traditional regulation by rules. This restrictive approach is apparently at odds with embrace by the institutions of alternatives to what was formerly known as the classic community method of legislation in the Lisbon agenda.¹⁴

The impact assessment processes set out by the European Commission in 2002 was more in tune with the broader approach recommended by Mandelkern than the inter-institutional agreement would suggest. In particular the frequently revised guidelines require consideration of the definition of the problem, the policy objectives and the policy options, rather than a focus exclusively on the legislative process.¹⁵ Policy options to be considered should include the 'no policy change' baseline scenario; 'no EU action' (e.g. discontinuing existing EU action); where legislation already exists, improved implementation/ enforcement, perhaps with additional guidance; self- and co-regulation; international standards where these exist.¹⁶

National BR policies similarly indicate a broad approach to the variety of available instruments. In the UK the first statement of Principles of Better Regulation (1998) included a requirement of proportionality - regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimized.¹⁷ The industry-led Better Regulation Task Force (BRTF) followed up on this principle with a number of studies of alternatives to rule-based regulation.¹⁸ Further steps have been taken by the British government to reduce dependence both on command and control regulation¹⁹ and on

¹² Ibid.(: para 17).

¹³ Ibid.(: paras 25-29).

¹⁴ J Scott and D Trubek, "'Mind the Gap": Law and New Approaches to Governance in the European Union' (2002) 8 European Law Journal 1-18.

¹⁵ European Commission, 'Impact Assessment Guidelines' (European Commission, Brussels 2009): 21-30.

¹⁶ Ibid.: 29

¹⁷ Better Regulation Task Force, 'Principles of Good Regulation' (Cabinet Office, London 1998).

¹⁸ Better Regulation Task Force, 'Alternatives to State Regulation' (Cabinet Office, London 2000) Better Regulation Task Force, 'Less is More: Reducing Burdens, Improving Outcomes' (Cabinet Office, London 2005).

¹⁹ P Hampton, 'Reducing Administrative Burdens: Effective Inspection and Enforcement' (HM Treasury, London 2005).

criminal law in the enforcement of regulation.²⁰ Whilst significant structural reforms have been made to regulatory regimes in the UK on the back of reports, their effectiveness depends in part on how they are received within the culture of regulatory implementation. Australian government policies on regulatory reform have mirrored those of the UK. Guidelines issued in the mid-1990s, emphasised the need to for regulatory impact statements (RIS) to identify the problem to be addressed, the objectives of government action, and the possible options in terms of regulatory instruments.²¹ More recent guidance amplifies this approach and provides a checklist of alternative options.²²

Similarly the Irish Government committed itself in 2004 to a Regulatory Impact Analysis which included

- ‘quantification of impacts;
- structured consultation with stakeholders;
- evaluation of alternatives to regulation and alternative types of regulation;
- and full consideration of downstream compliance and enforcement issues’.²³

Notwithstanding the broad ambitions and instruments within BR policies, the practices of Better Regulation are dominated by RIA processes. RIA, though exhibiting considerable variety across different jurisdictions, is characterized by a relatively technical evaluation of proposed regulatory instruments by reference to costs and effects. Such an approach offers relatively little scope for either a political or a technical engagement with the way that problems and potential solutions are conceived. The main mechanism for considering problems and alternative solutions is consultation but, when linked to regulatory impact assessment, consultations tend to be narrowly drawn around proposed rules, often coming too late in the process for a more critical engagement. Whilst RIA processes may be structured to highlight alternatives to oversight regulation in practice such effects have been limited.²⁴

²⁰ R Macrory, 'Regulatory Justice: Making Sanctions Effective' (Cabinet Office, London 2006); J Black, 'Tensions in the Regulatory State' (2007) [2007] Public Law 58-73.

²¹ Office of Regulation Review, 'Guide to Regulation, 2nd ed.' (Productivity Commission, Canberra 1999): B2-4.

²² Office of Best Practice Regulation, *Best Practice Regulation Handbook* (Canberra 2007): 95.

²³ Department of the Taoiseach, *Regulating Better: A Government White Paper Setting out the Six Principles of Better Regulation* (Department of the Taoiseach, Dublin 2004): 23.

²⁴ R Baldwin, 'Better Regulation: Tensions Aboard the Enterprise' in S Weatherill (ed) *Better Regulation* (Hart Publishing, Oxford 2007): 32-38.

The European Commission's Impact Assessment Board, for example, highlights a need for further analysis of compliance with principles of proportionality and subsidiarity,²⁵ suggesting that there is insufficient justification of a preference for legislation in some impact assessments. This criticism echoes the findings of an independent study of EU impact assessments which suggests that there is limited analysis of alternatives to rule making, though with some evidence of improvements over time in such matters as quantifying costs (though less frequently benefits) associated with alternative instruments.²⁶ An unexpected source of critique in the UK has been the central government audit body, the National Audit Office.²⁷ It was, for example, a 2004 National Audit Office report that revealed that a majority of RIAs considered no options for regulatory approaches other than that preferred by the Department putting forward the measure.²⁸ A subsequent NAO report suggested that a cultural change in the practices of departments would be required to make RIAs a more effective tool in managing the decision making process in such a way as to implement effectively the government policy on Better Regulation.²⁹ Subsequently the National Audit Office has noted with approval greater success at reorienting the implementation of regulatory regimes around the concept of risk analysis.³⁰

How can the preference for oversight of costs and benefits of rules be explained, given the widespread acknowledgement in policy circles of the potential for deploying alternatives? This may in part be a product of the interplay of interests. When conceived of as a bilateral matter between government and business, an emphasis on reducing the burdens of regulatory rules brings benefits to businesses without disrupting often long-established regulatory relationships. Early research on the implementation of UK policies suggested that businesses were enthusiastic to demonstrate the costs they faced in meeting regulatory requirements as part of the argument for reducing red tape.³¹ At the level of the EU there is a political imperative to demonstrate controls over the proliferation of legislative proposals from the

²⁵ Impact Assessment Board, 'Impact Assessment Board Report for 2009' (European Commission, Brussels 2010): 9.

²⁶ C Cecot and others, 'An Evaluation of the Quality of Impact Assessment in the European Union: Lessons for the US and the EU' (2008) 2 *Regulation & Governance* 405.

²⁷ E Humpherson, 'Auditing Regulatory Impact Assessment: UK Experience' in C Kirkpatrick and D Parker (eds), *Regulatory Impact Assessment: Towards Better Regulation* (Edward Elgar, Cheltenham 2007).

²⁸ Baldwin: 41.

²⁹ *Ibid.*: 43; Humpherson: 142

³⁰ E Humpherson, 'Auditing Regulatory Reform' in D Oliver, T Prosser and R Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, Oxford 2010): 280-1.

³¹ J Froud, R Boden and A Ogus, *Controlling the Regulators* (Macmillan, London 1998).

Commission.³² But the preference may also be a product of limited ideas within the centre of government decision making about the appropriate scope and ambition of BR policies. Though decision makers are aware of alternatives their working knowledge is largely focused on regulatory rules. It has been suggested that a preference for proceduralization in RIA avoids some of the hard questions which would require addressing with a more substantive reform agenda.³³

PUBLIC LAW, REGULATION, PUBLIC POLICY AND BETTER REGULATION

As we note at the beginning of this article, Better Regulation as a slogan is something that few could argue with. Indeed it appears that the idea has been so little contested that few scholars in the fields of public law or regulation find anything interesting to investigate. However, if we conceive of Better Regulation in a broader sense, as comprising the aggregate of activities geared towards promoting appropriate choices of instruments and enforcement strategies, together with mechanisms of oversight and accountability, it is rather clear that these two disciplinary fields are centrally concerned with the bigger picture of Better Regulation. It is the particular policy field that has been neglected and not the larger questions to which BR policies provide part of the response.

The field of public law is centrally concerned with the allocation and exercise of governmental powers whether referring to the legislative process or the application of legislative powers in administrative decisions. Classical public law concerns with the oversight of such power have tended to emphasise more formal legal processes for application of public law values of legality, fairness and transparency such as constitutional and administrative review.³⁴ A small literature has emerged in the common law world concerned with less formal mechanisms of accountability for both legislative³⁵ and administrative activity.³⁶ Another tradition of public law scholarship focuses on the role of law in facilitating and structuring governmental activity, law as a green light rather than a red

³² C Radaelli, 'Evidence-Based Policy and Political Control: What Does Regulatory Impact Assessment Tell Us?' (European Consortium for Political Research - Joint Sessions of Workshops 2008) .

³³ A Meuwese and C Radaelli, 'Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU' (2010) 33 West European Politics 136-153

³⁴ W Kahl, 'What Is 'New' about the 'New Administrative Law Science' in Germany?' (2010) 16 European Public Law 105-121.

³⁵ T Daintith and A Page, *The Executive in the Constitution* (Oxford University Press, Oxford 1999) M Tushnet, 'Non-Judicial Review' in T Campbell, J Goldsworthy and A Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford 2003).

³⁶ P Birkinshaw, *Grievances, Remedies and the State* (2nd edn Modern Legal Studies, Sweet & Maxwell London 1994) C Hood and others, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleaze-Busters* (Oxford University Press, Oxford 1999).

light.³⁷ The role of government departments in determining legislative agendas has only rarely been analysed.³⁸ Perhaps the most successful integration of the concerns of public law and governance research has been within research on regulation and new governance in the EU.³⁹

Some policy initiatives at EU and national level have sought to put in place a more principled, juristic basis for regulation. In the EU this development has occurred under the rubric of Better Law Making.⁴⁰ The Inter-Institutional Agreement on Better Law-Making, noted above, adopted values of stronger coordination in legislative processes and better transparency and, crucially, linked these principles to the quest for alternatives to legislative regulation in the EU rooted in the application of principles of proportionality and subsidiarity. This approach offers a juridical underpinning to self-regulation and co-regulation as alternatives to classical regulation. In Ireland the government's BR policy has embraced legislative reform, assigning proposals for a very significant culling of redundant and obsolete legislation, together with processes of restatement of diffuse legislative instruments, to the Law Reform Commission (LRC).⁴¹ This institutional linkage between Better Regulation and law reform has stimulated some consideration within the LRC about the development and application of principles of better law making, although responsibility for implementing and overseeing the application of such principles substantially falls outside the LRC's remit.

Alongside the policy boom in regulation in the OECD has emerged a distinctive field of regulation scholarship. Within regulation scholarship it has become fairly orthodox to conceive of regulation as occurring in regimes which comprise rule making or standard setting, together with institutions for monitoring and mechanisms of enforcement.⁴² It is fair to say that scholarship within the field has paid much more attention to enforcement and compliance with regulatory norms than to their making. Even where there is an interest in regulatory rule making this has frequently been at the level of regulatory or self-regulatory bodies, at one remove from the legislative bodies to which BR policies are largely addressed.

³⁷ C Harlow and R Rawlings, *Law & Administration* (3rd edition edn Cambridge University Press, Cambridge 2009).

³⁸ EC Page, 'The Civil Servant as Legislator: Law Making in British Administration' (2003) 81 *Public Administration* 651-679.

³⁹ K Armstrong, *Regulation, Deregulation, Reregulation* (Kagan Page, London 2000) CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271-327; Scott and Trubek.

⁴⁰ L Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law - Where do they Meet?' (2005) 9 *Electronic Journal of Comparative Law*.

⁴¹ Law Reform Commission, *Statute Law Restatement LRC 91-2008* (Law Reform Commission, Dublin 2008).

⁴² C Hood, H Rothstein and R Baldwin, *The Government of Risk* (Oxford University Press, Oxford 2001).

Nevertheless there has been considerable interest in the institutional design of regulation, and in particular a concern with the appropriate relationship between different kinds of instruments and techniques, for example within theories of responsive regulation⁴³ and smart regulation.⁴⁴

It has long been noted by regulation scholars that there is a degree of dissonance between the centrality of the state and regulatory impact assessment within BR policies, on the one hand, and a concern to draw in the de-centred capacities for regulation beyond the state within the regulation scholarship on the other.⁴⁵ The latter softer policy mixes are virtually impossible to put through RIA because of the difficulty of calculating costs and benefits associated with measures that are intended to increase commitment to regimes.⁴⁶ Furthermore RIA is poorly adapted to consider implementation strategies and enforcement techniques which, though they are critical to the effectiveness of a regime, are not necessarily specified in regulatory rule making.⁴⁷ There is also liable to be a degree of distrust of the wide range of non-state actors on whose capacity an alternative regime might be dependent.⁴⁸

Scholarship which has addressed the emergence of BR policies and their application and effects on regulatory rules has, consequently come largely from the general field of public policy and, to some extent law, rather than from the interdisciplinary field of regulation scholarship.⁴⁹ The primary focus of the analysis has been the interplay between politics and bureaucracy and bureaucratic processes linked to regulation. The origins of BR studies in the analysis of public policy and bureaucracies generally may explain the interest in rule making and oversight of rulemaking. The collection of data and the formulation of rules

⁴³ I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, Oxford 1992).

⁴⁴ N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, Oxford 1998).

⁴⁵ J Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) [2001] *Current Legal Problems* 103-146 ; C Scott, 'Regulation in Age of Governance: The Rise of the Post-Regulatory State' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation* (Edward Elgar, Cheltenham 2004).

⁴⁶ R Baldwin, 'Better Regulation in Troubled Times' (2006) *Health Economics, Policy & Law* 203-207: 204-5.

⁴⁷ Baldwin, 'Better Regulation: Tensions Aboard the Enterprise': 36.

⁴⁸ *Ibid.*: 37; European Commission, 'Self-Regulation in the EU Advertising Sector: A Report of Some Discussion Among Interested Parties' (European Commission, Brussels 2006): 8-10.

⁴⁹ J Froud, R Boden and A Ogus, *Controlling the Regulators* (Macmillan, London 1998); Meuwese and Radaelli B Morgan, *Social Citizenship in the Shadow of Competition: the Bureaucratic Politics of Regulatory Justification* (Ashgate, Aldershot 2003); C Radaelli, 'The Diffusion of Regulatory Impact Analysis - Best Practice or Lesson-Drawing' (2004) 43 *Eur. J. Polit. Res.* 723-747; C Radaelli, 'Getting to Grips with Quality in the Diffusion of Regulatory Impact Assessment in Europe' (2004) 24 *Public Money and Management* 271-276; J Torriti, 'Impact Assessment in the EU: A Tool for Better Regulation, Less Regulation or Less Bad Regulation?' (2007) 10 *Journal of Risk Research* 239-276; Weatherill.

is the default mode of public sector bureaucracies. The development of RIA represents a technical response to the weaknesses associated with traditional regulation (cost and ineffectiveness) and fits most comfortably with a view of regulatory regimes which focus on the centrality of public power. To some extent this preference also reflects political involvement in seeking to control activities of units with powers to initiate rule making.⁵⁰

The focus on oversight processes, such as RIA, as the principal mode both for regulating and reforming regulation generates two sets of risks. First there is a concern that rule-based regulation is limited in its effectiveness. Various forms of this argument have been advanced concerning the limited capacity for communicating behavioural requirements through externally set rules⁵¹ and the potential that creative compliance is liable to undermine the meeting of objectives.⁵² A second set of concerns addresses the fragile legitimacy of regulatory governance which is dominated by technical expertise and far removed from democratic governance structures. It is often argued that the legitimacy of regulatory regimes should be gauged by reference to outputs rather than inputs (processes).⁵³ From this perspective there are good reasons for creating a degree of insulation between regulatory activity and political systems based both in a concern for more expert regulation and a functional requirement to demonstrate the credible commitment of regulatory regimes to stability in their settings, relatively free from political interference.⁵⁴ Although the US model of independent regulation conforms fairly well to this non-majoritarian governance model it is arguable that European countries have been rather less successful in separating regulation from politics.⁵⁵

The scholarly fields of public law and regulation are well equipped to contribute to tackle both these issues – the limited effectiveness of rules and concerns about the legitimacy of non-majoritarian governance. In the next section of this article we examine evidence of the emergence of processes for developing regulatory policy which engage in a broader consideration of both the problems and potential solutions within regulatory regimes, typically alongside rather than as part of BR programmes.

⁵⁰ Radaelli, 'Evidence-Based Policy and Political Control: What Does Regulatory Impact Assessment Tell Us?' .

⁵¹ G Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in R Baldwin, C Scott and C Hood (eds), *Socio-Legal Reader on Regulation* (Oxford University Press, Oxford 1998 (orig. pub 1987)).

⁵² D McBarnet and C Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *Modern Law Review* 848-873.

⁵³ M Everson and G Majone, 'Institutional Reform: Independent Agencies, Oversight, Coordination and Procedural Control' in O de Schutter, N Lebessis and J Paterson (eds), *Governance in the European Union* (Office for Official Publications of the European Communities, Brussels 2001).

⁵⁴ M Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25 *West European Politics* 125-147.

⁵⁵ F Gilardi, *Delegation in the Regulatory State* (Edward Elgar, Cheltenham 2008).

BETTER REGULATION AND MORE REFLEXIVE GOVERNANCE

In our investigation of BR regimes in three countries, Australia, the United Kingdom and Ireland we found that, notwithstanding a stated commitment to deploying alternatives to regulation, BR programmes generally have focused substantially in implementing and improving various forms of RIA.⁵⁶ This narrow focus may explain why public law and regulatory studies have taken little interest in techniques of BR.

However, if Better Regulation is conceived of somewhat more broadly, indeed consistent with the stated ambitions of most of the BR policies we have analysed (above), then public law and BR scholarship each have something significant to offer. For public law scholarship there is an overarching concern with protecting the sphere of democratic governance, holding governmental bodies within constitutional limits and ensuring compliance by administrative bodies with their legal mandates and broader doctrines of good administration. Arguably excessively technical conceptions of regulation and Better Regulation threaten such a governance vision since they tend to isolate regulation from democratic input. To the extent that public norm laws engage with regulation, the application of a principle of proportionality may support the legitimacy of limited governmental regulation. However, the alternative to this limited governmental regulation approach within the EU, and notably stronger support for self- and co-regulation, is possibly more threatening to public law values because they are not so obviously subject to standard constitutional safeguards.

In contrast to public law approaches, regulatory scholarship is substantially oriented around instrumental concerns with achieving specified goals.⁵⁷ Policies with differential impact on different sections of society, at the level of rule making (for example applying rules to a narrow sub-section of society only) or enforcement (for example enforcing rules responsively and thus with differing intensity dependent on the characteristics and motivations of the regulatee) might each draw criticism from those within the public law approach committed to the rule of law.⁵⁸

Notwithstanding the very different orientations of public law and regulation scholarship there is some potential for reconciling the two perspectives in the field of regulatory reform by investigating regulatory processes which, on the one hand emphasise

⁵⁶ C Brown and C Scott, 'Reflexive Governance in Better Regulation: Evidence from Three Countries' (Reflexive Governance Programme, Louvain-la-Neuve 2009).

⁵⁷ C Parker and others (eds), *Regulating Law* (Oxford University Press, Oxford 2004).

⁵⁸ J Freigang, 'Is Responsive Regulation Compatible with the Rule of Law?' (2002) 8 *European Public Law* 463-472.

the smart mixes of instruments (following the instrumental concerns of regulation scholarship) while at the same time respecting the meta-principles of autonomy and self-determination which underpin democratic principles associated with the rule of law.

In our research on Better Regulation we observed the deployment of a wide range of alternatives to classical rule-based models of regulation, though these processes were generally running parallel to rather than part of BR programmes. One way to capture the nature of these alternatives to classical regulation is to think of them bringing in a degree of reflexivity to regulatory governance. Reflexive governance processes involve engagement with those affected by a regime, sometimes targeted at collecting the views of those affected, and sometimes oriented towards a more radical ambition to engage participants in thinking not only about solutions to pre-defined problems, but also about the nature of the problems faced.⁵⁹ We suggest that reflexive processes may provide part of the key to reconceptualising Better Regulation and to giving better purchase to public law and regulatory scholarship over its ambitions and processes.

A virtue of reflexive governance processes is that they may offer not only technically better solutions, but also that the process itself may promote the commitment of those involved to make the regime work for them, with the potential for revisiting and revising both goals and instruments in the light of experience.⁶⁰ Accordingly regimes would be evaluated by reference to the quality of engagement of those affected and the capacity for learning about problems within a regime and how to address them.⁶¹ Such an analysis can be located within a broader reconceptualization of democratic governance which emphasises the scope for reflexive learning amongst stakeholders working to resolve policy problems.⁶² Such an approach might also have the virtue of paying close attention to existing regimes with the potential to identify and implement incremental changes rather than new rules or structures, to effect desired reforms.⁶³

⁵⁹ C Scott, 'Reflexive Governance', Regulation and Meta-Regulation: Control or Learning?' in O de Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. (Hart, Oxford 2010).

⁶⁰ C Parker, *The Open Corporation: Self-Regulation and Democracy* (Cambridge University Press, Melbourne 2002).

⁶¹ S Gilad, 'It Runs in the Family: Meta-Regulation and its Siblings' (2010) 4 *Regulation & Governance* 485-506.

⁶² J Lenoble and M Maesschalck, 'Renewing the Theory of Public Interest: The Quest for a Reflexive and a Learning-Based Approach to Governance' in O de Schutter and J Lenoble (eds), *Reflexive Governance: Redefining the Public Interest in a Pluralistic World* (Hart Publishing, Oxford 2010).

⁶³ Baldwin, 'Better Regulation: Tensions Aboard the Enterprise': 44.

4.1 CONSULTATION AND THIN REFLEXIVITY

Consultation processes offer one form of reflexivity within BR policies. Within most BR policies there is evident a commitment to consulting relevant stakeholders concerning policy initiatives to address what are perceived as regulatory problems and to fully consider the range of options available to address a policy problem, ranging between doing nothing and introducing new regulatory instruments or regimes. The practical weakness appears to be locating the means to deliver these commitments within processes of regulatory impact analysis which tend to be too narrowly drawn to engage either in a fuller form of dialogue of problems and possible solutions, or over the range of alternatives for addressing problems identified. The role of dialogue and the search for alternatives to traditional regulation are closely linked. The main dialogic mechanism within BR policies is consultation. There are thick and thin versions. The thin version of consultation is concerned with gathering the views of affected stakeholders, typically about costs and benefits associated with proposed or existing regulatory regimes. Within such processes dialogue is not itself a mechanism for changing the behaviour or preferences of the stakeholders, but rather an information-gathering vehicle relevant to any proposed regulatory action.

The fostering of dialogue is about the engagement of policy makers with stakeholders in sectors affected by regulation. Conversations do occur within the formal structure of RIA. Broader and less formal discussions frequently take place prior to the making of a full proposal. Notwithstanding considerable development and formalization of consultation procedures evidence from the UK, Ireland and Australia suggests that such processes are frequently not very open and, linked to this, the requirement to consider alternatives to traditional regulation is frequently not given full or equal consideration. Indeed, working from instances where approaches to problem solving did yield innovative solutions, we are as likely to find the innovation came from within the policy making unit as from public consultation processes. A case in point is the successful plastic bag levy policy in Ireland, which has all but eliminated the taking of plastic bags by customers in supermarkets and other shops. There was a consultation with stakeholders around this idea, an outright ban on plastic bags having been ruled out as illiberal, but in the end this successful and popular tax was imposed by government as stakeholders were unable to advance a better idea to address the problem.⁶⁴

⁶⁴F Convery, S McDonnell and S Ferreira, 'The Most Popular Tax in Europe? Lessons from the Irish Plastic Bag Levy' (2007) 38 *Environmental and Resource Economics* 1-11: 5-6.

Requirements on policy makers to engage in consultation are formalized in consultation codes published in the UK, Ireland and Australia, somewhat distinct from, but linked to impact assessment processes. The UK Code on Consultation was originally published in 2000 and has been revised on a number of occasions.⁶⁵ The first principle of the revised UK code is that consultation should take place when there is scope to influence the policy outcome. A minimum period of 12 weeks for consultations is recommended and is indicative of a degree of prioritization of consultation over timely decision making. Whilst there is a clear emphasis on learning within the UK principles – requiring officials to give feedback to participants and to share what they have learned from the experience of consultation exercises with others - the guidelines are limited in their assumption that the normal model for consultation is the publication of a consultation document and the receipt of written feedback. Lower priority is given to such events as discussion forums and public meetings. Public, formal consultation is often as much or more about transparency as it is about solution-finding. To the extent that policy makers comply with the code minimally it may discourage them from the broader dialogues being engaged in by some regulatory agencies such as The Office of Communications Regulation (OfCOM) and the Office of the Gas and Electricity Markets (OfGem) in the UK and the Environmental Protection Agency in Ireland (discussed below).

The main emphasis of the Irish Guidelines on Consultation⁶⁶ is on fostering transparency and accountability rather than dialogue, though there is mention in the Guidelines of the benefits associated with developing a ‘shared understanding of issues’ and working towards ‘agreed solutions’. An official review was critical of an endemic reluctance to publish RIA documents.⁶⁷ An official review in Australia found that consultation practices amongst federal regulatory agencies were weak, with only 25 per cent of those organisations having consulted with the public when developing regulations.⁶⁸ Consultation with business is required and the federal government has mandated the use of an online Business Consultation portal.

In addition to general provision for consultation a number of UK agencies and departments have introduced considerably more developed consultation procedures. The

⁶⁵ Department of Business Enterprise and Regulatory Reform, *Code of Practice on Consultation* (2008).

⁶⁶ Department of the Taoiseach, 'Reaching Out - Guidelines on Consultation of Public Sector Bodies' (Department of the Taoiseach, Dublin).

⁶⁷ I Goggin and G Lander, 'Review of the Operation of Regulatory Impact Analysis' (Department of An Taoiseach, Dublin 2008): 69, 72.

⁶⁸ Regulation Taskforce, 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business' (Productivity Commission, Canberra 2006).

Department of Health, for example, is developing a model of patient and public involvement (PPI) that goes beyond consultation with the ambition to capture a wider range of knowledge and experience relevant to the problem under consideration.⁶⁹ OFCOM and the OfGem have also developed extensive processes for dialogue over what are often quite contentious issues of policy and implementation. The purposes of these processes extend well beyond dialogue and take on characteristics of common problem solving and rethinking of purposes behind particular aspects of the regime. Such processes enable regulators not only to test their own ideas, but also to have the knowledge and ideas of others tested in a public forum. It is telling that OFCOM officials do not necessarily regard such extensive processes as part of a BR programme. Indeed one respondent expressed a view that the RIA processes were too rigid and that they had developed other processes to facilitate ‘learning and reflexivity’.

4.2 THICKER FORMS OF REFLEXIVE GOVERNANCE

Thicker forms of reflexive governance envision the kind of dialogue in which stakeholders, including those in government, are encouraged to learn about their preferences and those of others with the possibility of shaping regulation so as to harness their varied capacities and possibly change those preferences.⁷⁰ This dialogic approach implies that not only the implementation but also perhaps the objectives of the regime may be set through interaction between the affected parties, with a basis in mutual learning and a concomitant ‘decentring’ of the role of government.⁷¹

One mechanism through which to encourage such thicker reflexivity is through the establishment of standing groups of stakeholder representatives, so that they are able to offer views of a regime not just in response to particular consultations but in a sustained manner. A degree of formalization in stakeholder engagement has occurred in Ireland through the establishment of standing panels to represent stakeholder interests in a number of sectors. These panels are typically associated with advising regulators rather than ministers and have been established in both the communications and financial sectors, and in some ministries. The Financial Regulator, for example, is subject to oversight and engagement requirements with standing Industry and Consumer Panels, appointed by the minister. In the UK Department of Business, Enterprise and Regulatory Reform established a Ministerial Challenge Panel comprising industry, union and consumer representatives to challenge the

⁶⁹ P Vincent-Jones, D Hughes and C Mullen, 'New Labour's PPI Reforms: Patient *and* Public Involvement in Healthcare Governance?' (2009) 72 *Modern Law Review* 247-271.

⁷⁰ J Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597-614; J Black, 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33-58.

⁷¹ Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World'.

department's policy agenda.⁷² Such a model has potential for steering government towards more innovative thinking at early stages of policy. The development of panels of this kind address a key weakness in developing more dialogic modes of policy development – that those from whom policy makers wish to learn lack the resources and commitment to sustain their engagement. Such panels do not always have the impact that might be anticipated. The UK Financial Services Consumer Panel has been repeatedly ignored by the Financial Services Authority (FSA) in respect of its view that the emphasis given by the FSA to consumer empowerment and education, as opposed to more protective measures, has been excessive.⁷³

Some agencies have institutionalised consultation processes to a greater extent than required by consultation codes. The Environmental Protection Agency (EPA) in Ireland places strong emphasis on highly transparent consultation processes and to this end publishes all of the submissions which it receives as part of its consultation. The EPA's orientation to transparency may partly be explained by the contentious nature of some of the issues in which it is involved in decision-making. More generally environmental protection is a field that appears to have yielded more than its fair share of innovative regulatory instruments as a response to demonstrable weaknesses in command and control regulation in defining and achieving regulatory objectives, particularly in respect of complex issues.⁷⁴ The capacity of the EPA for policy openness is limited by the fact that policy and legislation is determined by ministers and consultation can only occur over implementation. The EPA also faces the problem that key responsibilities in the environmental area are allocated to other agencies. In the area of enforcement of illegal landfills, the primary responsibility lies with local authorities. Noting that enforcement appeared to be poor, the EPA established an Environmental Enforcement Network which engaged directors of services responsible for waste in every local authority in discussion of problems and issues.⁷⁵ Gardai (police) were involved in training in gathering of evidence and preparation of court cases. In this way the

⁷² National Audit Office, *Lost in Translation: Responding to the Challenges of European Law* (Stationery Office, London 2005): .

⁷³ T Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services' (2007) 29 Law & Policy 226-256: fn11.

⁷⁴ N Gunningham, 'Regulatory Reform and Reflexive Regulation: Beyond Command and Control' (Centre for Philosophy of Law, Louvain-la-Neuve 2009).

⁷⁵ JD Lynott, 'The Detection and Prosecution of Environmental Crime' (2008) [2008] Judicial Studies Institute Journal 185-208: 188-189.

EPA has used a network approach to extend its influence and capacity into a variety of activities in which it has a limited statutory role.⁷⁶

The Irish EPA's Victorian counterpart is equally committed to open dialogue with stakeholders and delivering regulatory innovations. A key example is the development of Environmental Improvement Plans (EIP) within the Victorian regime. An EIP is a document drawn up by a business offering a commitment to improve environmental performance. Firms demonstrating a high level of achievement and commitment to improving environmental performance were offered reductions in prescriptive environmental controls.⁷⁷ A key aspect of the development of EIPs is the creation of Community Liaison Committees, which typically include the businesses involved, community residents, local government representatives and the EPA jointly identifying and addressing problems of environmental performance with outcomes of the process reflected in the EIP.⁷⁸ The process requires firms to think about what they do and how they do it and engages in communities both in problem identification and resolution. The innovation extends beyond standard-setting to enforcement – breaches of the plan require firms to explain their conduct at town hall meetings. An EPA official told us the EIPs were 'close to the best thing we've ever done.' The EIP regime has been evaluated positively by academic commentators – as a key example of 'smart regulation', though reservations have been reported amongst both EPA field officers and community representatives.⁷⁹ Unsurprisingly their effects are perceived as more beneficial in firms with senior management commitment and sufficient management capacity to ensure they are effectively implemented through the organisation.⁸⁰ Other areas of Victorian EPA practice also indicate the commitment to dialogue. In renewing waste regulations the EPA engaged stakeholders in workshops concerning the problems and solutions of the existing regulations prior to committing any proposals to writing. An informant told us 'we are happy to let business come up with the optimal implementation mechanisms and not constrain them too much. We are focused on getting the outcome, on realising the environmental objective.'

It is noteworthy that these examples of developments in collaborative problem-solving, dialogue and reflexive governance – which might be conceived of as a form of participatory democracy – have not arisen as part of, or because of BR imperatives, but in

⁷⁶ National Economic and Social Council, 'Re-finding Success in Europe: The Challenge for Irish Institutions and Policy' (NESC, Dublin 2010): 127.

⁷⁷ N Gunningham and D Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Greenleaf Publishing, Sheffield 2002): 157-8.

⁷⁸ *Ibid.*: 157: 160.

⁷⁹ Gunningham and Grabosky, *Smart Regulation: Designing Environmental Policy*: 207.

⁸⁰ Gunningham and Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation*: 166-167.

parallel. Yet, one might have expected such developments to flow naturally from implementation of BR programmes, – given Better Regulation’s concern at least in principle with the consideration of alternatives and on wider impact assessment. The dissonance is explained by the flaws inherent in how Better Regulation is actually being practised and the narrowing of its focus on to RIA, itself by and large a rigid tool.

As noted above, BR programmes in Australia, the UK and Ireland each contain commitments to consider and deploy alternatives to traditional regulation. It is questionable whether alternatives are always or necessarily given proper consideration in the BR process, since the undertaking of a RIA is triggered by the proposal for new rules and at this stage there may be already a commitment to traditional regulation. Respondents did however give us examples of circumstances where consultation occurred with stakeholders of policy problems at an early stage and alternatives to regulation were developed as solutions. In Ireland the Department of the Environment engaged in discussions with the banks over littering at ATM machines. The banks offered to invest further in their technology to give customers the choice of printing a receipt or not, rather than printing one automatically for each transaction.⁸¹ This change appears to have provided a technological solution to the problem and no regulation has been introduced.

In other areas open dialogue over policy problems may be backed by the clear threat of legislation should non-legislative solutions not be found. Addressing problems surrounding the sales of alcohol the Irish Department of Justice initiated dialogue with industry groups and accepted proposals for a Code of Practice from industry representatives which would address some areas of concern – for example the separation of alcohol from other items in stores, ending the window advertising of alcohol and the development of staff training.⁸² Within this context the government legislated in the Intoxicating Liquor Act 2008 for a more limited range of issues, for example restricting the hours during which alcohol could be sold for consumption off the premises.

The establishment of regulatory agencies to undertake tasks previously undertaken by ministries and by public sector undertakings has been a hallmark of the rise of the regulatory state and formalises oversight in many instances.⁸³ We might expect the move of regulatory functions out of government ministries to reduce the degree to which the regulatory function

⁸¹ Department of the Environment Heritage and Local Government, 'Minister Roche and Banking Sector Agree New Anti-litter Protocol' (Department of the Environment, Heritage and Local Government Dublin 2007).

⁸² <http://www.rrai.ie/>.

⁸³ Levi-Faur, .

is part of the broad networks within which ministries participate. We might also expect agencies to be more formal in their relations with stakeholders – having regard to their statutory mandates and enforcement powers. Whilst it is clear that statutory mandates do restrict the scope for broad policy innovation (as with the case of the Irish EPA above) there is some evidence from all three jurisdictions that regulatory agencies may compensate for limited powers through more expansive and open processes of dialogue with stakeholders. Officials in the UK NAO, for example, found that network regulators have been quite open in setting down policy problems over which extensive stakeholder dialogue is organised to work through the variety of potential solutions. With a number of agencies we were told that core objectives are set down in legislation and are not negotiable, but the modes of implementation are often opened to extensive dialogue. For example, in addition to public consultations the UK Office of Communications (OFCOM) uses citizens' juries as deliberative fora on particular issues. OFCOM's commitment to broad consultation is targeted not only at making better decisions, but also bolstering its legitimacy as a transparent and responsive regulatory agency.

CONCLUSIONS

Following the path set out in this article, Better Regulation may be reconceptualised as comprising a range of mechanisms for considering the nature of problems for response and the range of possible ways for addressing identified problems. The management of Better Regulation need not be restricted to central government departments, but be seen also a responsibility for agencies, firms and representative groups of those affected by regulatory regimes. Such an approach should appeal to the concerns of public law for the structuring of decision making to permit those affected by decisions to be heard, and more generally to a participatory ideal of governance. Additionally it has considerable resonance with theories of regulatory governance geared both to securing more effective outcomes and to more effectively harnessing the capacity of non-state actors in designing and implementing regulatory regimes. In this article we have highlighted the aspirations within BR programmes for developing alternatives to classical regulation, but the very limited delivery on such commitments. We have focused on the potential for more deliberative forms of regulatory policy making to underpin a wider range of regulatory techniques.

Such an approach redefines the role of government in addressing problems and steering affected actors, including government departments and agencies, towards appropriate solutions. Such solutions will often include regulatory rule making and an analysis of the

projected outcomes of such activities. Such an analysis need not be a one-off regulatory impact analysis, but rather might constitute a continuing process of review, commencing before problems are fully defined and continuing after the implementation of solutions in order to evaluate whether further changes to the regime are appropriate. Routine provision of sunset clauses for legislative regimes engenders a degree of competition for legislative time requiring a degree of prioritization concerning regulatory requirements. More broadly governments may make more transparent their roles in observing and steering self-regulatory capacity.

For developing acceptable modes of ordering, classical regulatory options are likely to be judged necessary where direct coercion provides a proportionate mechanism to achieve public objectives. Attempts to enrich regulatory reform processes, drawing on experiences which are frequently parallel to, but not part of, BR programmes, are not unproblematic. If such processes are to correspond to ideal types of deliberative democracy or reflexive governance then the issue of who participates is as important as how they participate. Even the question how participants are selected does not yield an obvious answer and may involve a relaxation of ideas of centralised control in favour of observations on processes to check whether they broadly correspond with some acceptable model of decision making in terms of inclusiveness and process, whether led by public agencies, firms or NGOs. A richer collection of documented examples of domains whose processes broadly correspond to this kind of model would be valuable.

The examples discussed in this article are indicative of a number of different ways in which structures for supporting enhanced regulatory reform processes may be institutionalised. Independent scrutiny, whether through free-standing regulatory oversight bodies, as in Australia and the EU, or from more general oversight organisations such as public sector auditors, has significantly enhanced understanding of the limits of impact assessment. In both instances these bodies have displayed forms of policy entrepreneurship in seeking to highlight commitments to enhanced regulatory reform processes. Independent regulatory agencies, though they may be limited in their capacity for policy innovation, have demonstrated commitments to more inclusive and transparent processes of consultation and learning than are common with government ministries. Whilst such processes might, at first glance, worry public lawyers concerned that agencies exceed their mandates when they make as well as implement policies, they may underpin an alternative form of self-determination under which the parties affected participate in steering the regulatory activity directly rather than through the indirect means of democratic politics. The Environmental Improvement

Plans pioneered in Australia stand out as an instrument in which community discussion around both the nature of problems and possible solutions has yielded imaginative outcomes, satisfactory to key stakeholders, with limited state involvement. They offer a novel version of local democratic decision making.