

# How to Escape the Vicious Circle: The Challenges of the Risk Regulation Reflex

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*In modern Western societies the societal emphasis on risk and the minimization of it frequently leads to a call for increasing risk regulation. This mechanism is referred to as the vicious circle of risk regulation, and might cause a variety of problems such as overregulation and breaches of individual privacy. Different solutions have been put forward to break the vicious circle: a greater emphasis on individual citizens' responsibility, a more rational approach in which governments calculate the greatest safety yield for a given budget and greater democracy: citizen participation in risk and safety related decision making processes. As each approach involves serious disadvantages the authors argue that a well-considered, unhurried approach might be the best way forward. Leadership is largely about timing and with regard to risk management after critical events taking one's time seems crucial indeed.*

## I. The risk regulation reflex

Unpleasant things happen from time to time. A river dyke gives way. People are infected with Legionnaires' disease after visiting a flower exhibition. Residents at a nursing home suffer from salmonella poisoning probably as a result of the chicken soup at lunch. Fire breaks out in a pub full of young people. Some lose their lives and others bear scars for life. And so on.

The incident receives wide newspaper coverage. Popular TV current affairs programmes cover the story. The public vent their anger on various internet forums. Opposition members in parliament or

the municipal council say they have always said that river dykes should be reinforced, that supervision of nursing homes should be tightened, that fire prevention regulations required stricter enforcement and that we should pay more attention to water supplies of all buildings and institutions accessible to the public. The relevant executive councillors, secretaries of state and ministers are pressed for answers. Some defend their policy by saying that things can always go wrong: 'You can't make an omelette without breaking eggs', 'It's unfortunate but there's no such thing as one hundred percent safety'. But most politicians acquiesce.<sup>2</sup> They promise to have new rules drawn up, to introduce stricter checks and to do all they can to prevent a repetition of the incident. This is called the risk regulation reflex.

After supervision schedules have been revised or new rules have been implemented, two things can happen. Either a new incident occurs regardless, which results in a call for even stricter regulation or enforcement, or no further incident takes place and people start to complain about the glut of rules. 'Can't they relax the ridiculous rules concerning the showers in the football club changing rooms? They're always being closed off when the tests apparently show a risk of the legionella bacteria.' 'You can't even put candles on a birthday cake because of the crazy

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<sup>2</sup> USBO Advies, Universiteit Utrecht, Margo Trappenburg, Marie-Jeanne Schiffelers, Gerolf Pikker and Lieke van de Camp, *De risico-regelreflex vanuit politiek perspectief: Verkennend onderzoek naar de meningen van Kamerleden over risico's en verantwoordelijkheden* [A political perspective on the risk regulation reflex. Exploratory inquiry into the opinions of Members of Parliament on risks and responsibilities, report commissioned by the Home Office], Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, February 2012.

fire regulations they drew up after the fire in the pub incident.<sup>7</sup>

It can be discussed to what extent the risk regulation reflex is indeed causing problems of overregulation. Researchers have also pointed out that incidents offer valuable windows of opportunity to learn and improve the policy process or to break a bulwark of vested (corporate) interests, which puts the risk regulation reflex in a much more positive light.<sup>3</sup> It is furthermore debatable whether the whole risk regulation reflex actually exists. Up until now there is little systematic empirical evidence available. Remco Roos selected eighty incidents in the Netherlands portrayed in the media and subsequently studied the follow up after these incidents to determine whether a full blown risk regulation reflex had actually taken place. He concluded that out of these eighty incidents which might have led to a disproportionate reaction, twelve had indeed led to a political reaction, and in 4 out of these 12 cases, measures were taken that were considered disproportionate in retrospect. Roos's research shows that the first reaction of politicians and media after an incident is indeed to ask for additional rules and regulations. However, most plans were never effectuated.<sup>4</sup>

Despite the fact that hard empirical evidence is limited, the mechanism and possible effects of the risk regulation reflex are widely described in many publications<sup>5</sup> and are recognized by different players in the field.<sup>6</sup> Breyer for example gives a comprehensive description of the mechanism in his book *Breaking the Vicious Circle: Towards Effective Risk Regulation*.<sup>7</sup> According to Breyer, the public perception of a certain risk influences the politicians' action and reaction to it, due to the fact that politicians are presumed to be highly responsive to public opinion. The other way round politicians help to shape the public perception through the media.

But both the public and politicians are unlikely to understand the complexity of the matter. Contemporary culture encourages people to confuse an association (e.g. autism appearing around the time of an MMR immunization) with causation (MMR causes autism).<sup>8</sup> This lack of comprehension in addition to the inherent uncertainties of risks may lead them to overemphasize the actual risks, as is extensively described by Furedi in his book *The Culture of Fear*<sup>9</sup> and by Gardner in *The Science of Fear*.<sup>10</sup> And the higher the perceived risk, the higher the public's and politicians' demand for additional or more stringent regulations.

Löfstedt et al. describe the same mechanism as the post trust vicious circle of risk aversion.<sup>11</sup> Their 6 step model starts with regulatory failure leading to loss of trust, followed by media hypes, public scares, a runaway from risk and finally risk regulation reactions. The spiral is aggravated by the logic of blame aversion which according to Hood et al. can lead to protocolization and risk assessment inflation to establish procedural alibis as a form of bureaucratic insurance.<sup>12</sup> Several sad examples of this were described in a recent article in the Dutch newspaper *Volkscrant* about the apparent British obsession with risk prevention and the perverse effects of the subsequent protocolization on the functioning of officials like policemen and fire fighters. The article mentioned fire fighters who were not allowed to rescue a man from an ordinary paddling pool because no safety

3 Cf. e.g. Arjen Boin, Paul 't Hart, Eric Stern, and Bengt Sudelius, *The Politics of Crisis Management. Public Leadership under Pressure*, (Cambridge, Cambridge University Press 2005, pp. 115 et sqq.

4 Remco Roos, "Reflexen of reflectie?: Een onderzoek naar de omvang van de risico-regelreflex" [Reflexes or reflection? An inquiry into the size of the phenomenon of the risk regulation reflex (MA thesis on file at Utrecht University, 2011).

5 Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, (London: Harvard University Press 1993); Christopher Hood, Henry Rothstein, and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes*, (New York: Oxford University Press 2001), at p. 179; Frank Furedi, *Culture of Fear: Risk-taking and the Morality of Low Expectations*, Revisited Edition, (London/New York: Continuum 2005); Raad voor het openbaar bestuur, *Burgers, bestuur en veiligheid: Over de rol van burgers en de verwachtingen die zij hebben van de overheid* (Civilians, government and safety: on the role of civilians and their expectations of the Government) January 2011, < [http://www.rob-rfv.nl/default.aspx?skin=Rob&inc=detail&id=1096&dossier\\_id=&type=publicatie](http://www.rob-rfv.nl/default.aspx?skin=Rob&inc=detail&id=1096&dossier_id=&type=publicatie) > (last accessed on 06 August 2012); Donald Macrae, "Standards for Risk Assessment of Standards: How the International Community is Starting to Address the Risk of the Wrong Standards", 14(8) *Journal of Risk Research* (2011), pp. 933; Ragnar Löfstedt, Frederic Boudier, Jamie Wardman, and Sweta Chakraborty, "The Changing Nature of Communication and Regulation of Risk in Europe", 14(4) *Journal of Risk Research* (2011), pp. 409 et sqq., at p. 413; Remco Roos, "Reflexen of reflectie?", supra note 4; USBO Advies, Universiteit Utrecht, Margo Trappenburg et al. "De risico-regelreflex vanuit politiek perspectief", supra note 2.

6 See for example a research conducted under Dutch Members of Parliament by Trappenburg et al (supra note 2) which showed that all MP respondents recognized the risk regulation phenomenon although many respondents did not perceive it as problematic.

7 Breyer, *Breaking the vicious circle*, supra note 5.

8 Furedi, *Culture of Fear*, supra note 5, at p. xi.

9 Furedi, *Culture of Fear*, supra note 5.

10 Daniel Gardner, *The Science of Fear: How the Culture of Fear Manipulates Your Brain*, (London: a Plume book 2009).

11 Löfstedt et al. "The Changing Nature of Communication and Regulation of Risk in Europe", supra note 5, at p. 411.

12 Hood et al., *The Government of Risk*, supra note 5, at p. 179.

report had been made up previously and because the firemen had not yet received special training.<sup>13</sup>

The risk regulation reflex can have a variety of negative effects. It may compromise other values like individual privacy,<sup>14</sup> lead to overregulation and put unnecessary constraints on the market.<sup>15</sup> Moreover, it can make new policies very expensive<sup>16</sup>, or block innovation altogether.<sup>17</sup>

To avoid the problem of the risk regulation reflex three solutions have been put forward:

The first solution is **greater personal responsibility**. Things can go wrong and the public should accept responsibility for the consequences rather than blame the government.

The second solution is to **adopt a more rational approach**. There is no such thing as one hundred percent safety, simply because funds are needed for other things as well. Effort should really go into ways of maximising the effects of a given safety budget. How many lives could be saved if half that budget were to be earmarked for more inspection in health care? How many lives could be saved if the same amount went toward checking fire and safety regulations in the hotel and catering industry, sports clubs and theme parks? Or funding more police on the streets? Or modernising the railway infrastructure? All the options should be laid side by side and within a given budget politicians should choose the one which produces the greatest safety yield.

The third solution is **greater democracy**. Safety policy is always a question of making choices and prioritising. The public needs to be involved in this. Would they like to see more roadside breathalyser

checks? Or would they prefer stricter enforcement of fire regulations? More inspections of factories which produce pollutive substances? If the public is drawn into these discussions, people will more readily accept the choices and associated consequences. They were after all involved in the decision making.

All three solutions to break the vicious circle sound reasonable. However, complaints about the risk regulation reflex have not subsided. Apparently putting the solutions to work is not as easy as it seems. Perhaps there is something wrong with the suggested solutions or with the way they relate to the problem of risk regulation. The present paper examines this question. We will first take a closer look at two underlying assumptions of the risk regulation reflex (section 2) and then discuss the solutions (section 3). In section 4 we will summarize our exposé and draw attention to a somewhat neglected fourth solution for the risk regulation reflex.

## II. Underlying assumptions

### 1. The public is not a big spoiled child

The first assumption underlying the risk regulation reflex is that we, the public, tend to blame the government for every incident which occurs. This was neatly illustrated in a cartoon in the Dutch newspaper *Trouw*: ‘Rain at the weekend? I won’t stand for that. I’m going to vote for the populist party.’ If we think a little further about this portrayal of today’s citizen, we soon see the exaggeration. Most people do not blame the government for rain on holiday, for their divorce, for a car breakdown, for their father’s drinking problem or their son’s difficulties at school. In fact, when it comes to our health we increasingly tend to blame ourselves. Type 2 diabetes is strongly associated with being overweight and excess weight results from too much food and too little exercise. Coronary heart disease is often linked to smoking. As is lung cancer. And liver disease is linked to alcohol abuse.

The traditional governmental task of crime prevention has also seen a shift toward people tending to blame themselves when things go wrong. If our car radio or navigation system is stolen from the car then it’s our own fault. We should have put them out of sight or taken them with us. If our mobile is stolen while playing football it’s our own fault. We should have put it in a locker, given it to the trainer or left it

13 Patrick van IJzendoorn, “Britse obsessie om burgers te beschermen loopt spuigaten uit” [British obsession to protect citizens is going too far], *De Volkskrant*, 27 February 2012, at p. 5.

14 Michel van Eeten, “De diva en het noodlot. Kan de keizer worden behaagd met fatalisme?” [The diva and fate. Can we please the emperor with fatalism?], in Jan van Tol, Ira Helsloot and Ferdinand Mertens (eds), *Veiligheid boven alles? Essays over oorzaken en gevolgen van de risico-regelreflex* [Safety above all? Essays on the causes and consequences of the risk regulation reflex] (Den Haag: Boom Lemma uitgevers 2011), pp. 73 et seq., at p. 74.

15 Macrae, “Standards for Risk Assessment of Standards”, *supra* note 5, at p. 933.

16 Ira Helsloot, “Over een mooi kerstdiner, kalkoenen en andere wetmatigheden” [On Christmas dinners, turkeys and other social laws], in Jan van Tol, Ira Helsloot and Ferdinand Mertens (eds), *Veiligheid boven alles? Essays over oorzaken en gevolgen van de risico-regelreflex* [Safety above all? Essays on the causes and consequences of the risk regulation reflex] (Den Haag: Boom Lemma uitgevers 2011), pp. 101 et seq., at p. 109.

17 Hood et al., *The Government of Risk*, *supra* note 5; Furedi, *Culture of Fear*, *supra* note 5.

at home. You never know who's wandering around. We should lock our office door at work, lock away our belongings at school, keep our purse at the bottom of the bag when shopping and secure the bicycle to a wall or post before leaving it. Many people do not see themselves as spoiled children who blame the parent (= government) at the drop of a hat, holding them ultimately responsible. There is far more to it than that.

To appreciate the way the public reacts to risks it is important to make a distinction between different types of risks. Slovic et al. divide risks of techniques/products into four main categories.<sup>18</sup> From risks that are perceived to be a: controllable, not dreadful, not global catastrophic, not fatal, individual and voluntary to risks that are b: uncontrollable, dreadful, global catastrophic, collective and involuntary. And from risks that are perceived to be c: non-observable, unknown to those exposed, new and with delayed effect to risks that are d: observable, known to those exposed, old, known to science and with an immediate effect. The risk perception is related to the position of the risk within the matrix, with the dread factor being the most important trigger. The higher the dread factor (category b), the higher the perceived risk and the louder the call for government interventions and risk regulation will be.<sup>19</sup> For example toxic substances belong to the risk categories b and/or c. The general public is aware of the potential risk of such substances but is unable to judge the actual effects of being exposed to them. Furthermore the public often does not directly benefit from these substances. As a result the public is likely to look at the government to regulate the risks connected to such a risk category. The other way round higher risks are tolerated from activities seen as highly beneficial. The public will be likely to accept higher levels of responsibility for risks which can be categorized under a and partly under d.

## 2. The risk regulation reflex stems from our best character traits

A further assumption is that the risk regulation reflex is generated by negative cultural characteristics: an exaggerated craving for certainty and safety. According to Gardner "...sociologists...have come to a broad consensus that those of us living in modern countries worry more than previous generations" leading to a culture of fear.<sup>20</sup> This is said to result in a high level of risk aversion or even in an irra-

tional and potentially dangerous 'no more incidents' attitude. This final assumption is debatable, since fear is also a constructive emotion "When we worry about a risk, we pay more attention to it and take action where warranted."<sup>21</sup> One can even purport that the risk regulation reflex is one of our culture's most valuable assets.

In her book, *Nomad* Ayaan Hirsi Ali compares the Islamic nomad culture in which she grew up with the contrasting cultures in the United States and Western Europe. One of the most important differences she describes is the diverse attitudes toward all possible forms of misery and misfortune. The nomadic culture of the author's Somali clans embraces a fatalistic view of misfortune. It is seen as Allah's wish and is therefore accepted. Drought, heat, disease, hunger, poverty. A vast contrast to Western culture<sup>22</sup> or at least, a vast contrast to contemporary Western culture. In the Middle Ages fatalism was probably much more prevalent in Europe; making it much more similar to Hirsi Ali's Africa. But here and now, in the Western world we tend to believe that hunger, disease, poverty and scarcity are natural or social **problems** which we, as a society, can solve. We construct dykes, build roads, organise health care, dig canals and create systems of social insurance. When an incident occurs for which we truly cannot blame ourselves (so, clearly not divorce, stolen bicycles, lung cancer, or type 2 diabetes), our primary response is to act. We want to help, offer support to the victims and make sure it doesn't happen again. For many people, simply resorting to tears or mourning is an inadequate response to excessive grief. They want to act and make atonement.

### Intermezzo: The blind spot mirror

Twenty-seven year old Margit Widlund was killed by a truck which was turning right while cycling across Dam square in Amsterdam Her mother,

18 Paul Slovic, Baruch Fischhoff and Sarah Lichtenstein, "Behavioural Decision Theory Perspectives on Risk and Safety", 56 *Acta Psychologica* (1984), pp. 183 et seqq.

19 Slovic et al., "Behavioural Decision Theory Perspectives on Risk and Safety", *supra* note 18, at p. 189.

20 Gardner, *The Science of Fear*, *supra* note 10, at p. 6.

21 Gardner, *The Science of Fear*, *supra* note 10, at p. 6.

22 Ayaan Hirsi Ali, *Nomade* [Nomad: From Islam to America: A Personal Journey Through the Clash of Civilizations], (Amsterdam: Augustus 2010).

writer Anna Enquist, was interviewed two years after the incident.

*Enquist:* Immediately after it happened I wrote to the mayor of Amsterdam asking why, as it was known that truck drivers couldn't see properly without a blind spot mirror, there weren't two sets of traffic lights; one for traffic going straight ahead and one for traffic turning right. In my opinion the municipality should do something about a situation like that.

*Interviewer:* When such dreadful things happen in people's lives, they often begin special groups or activities. As if trying to ensure that the accident wasn't in vain.

*Enquist:* That's actually what I'm doing. I keep trying to focus attention on the issue. Until something's done, there'll be parents going through what we did probably every week. Of course there are lots of things which can't be prevented. When people get cancer or other diseases, and die... well, there's nothing anyone can do. But something can be done about this, and yet no one does anything!<sup>23</sup>

It will be no easy feat to change our cultural reflex to want to 'do' something following a disaster or in times of sorrow (clearly a commendable response to which our culture owes a great deal) even if we choose to do so. What should happen instead?

In their seminal work *Cultural Theory* Thompson, Ellis and Wildavsky argue that there are four ways of life to deal with all sorts of societal issues. There is hierarchy, characterized by a belief in good governance and proper regulation, necessary to control risks. There is egalitarianism which is also about good governance and regulation, although much more equality based and democratically legitimized. These two

ways of life seem to dominate life and governance in Western Europe. On the other side of the Thompson, Ellis and Wildavsky quadrant we find the fatalistic way of life, as portrayed by Hirschi and Gottman, and individualism, largely characterized by the belief that we need less government and can leave many matters in the hands of citizens.<sup>24</sup> Indeed these two alternatives seem to be advocated by those who believe there is too much risk management going round.

Michel van Eeten argues that we should give fatalistic acceptance a much more positive reading than we usually do.<sup>25</sup> However, so far – to our knowledge – this call has not been taken up by governments. Instead liberal-conservative Western European governments (think of the tory-liberal coalition in the UK) often advocate a shift of responsibility to citizens and private initiatives. With regard to risk regulation such a cultural change would lead to citizens and organizations determining for themselves and each other who should be held accountable for what. This might lead to an American approach: extensive contracts stipulating the conditions of responsibility and many litigation issues. This deflects the risk regulation reflex but begs the question as to whether an American-style claim culture is preferable. We are all familiar with the hilarious examples of American manufacturers protecting themselves against damage claims 'Do not place your wet pet in the microwave' and American doctors paying exorbitant insurance premiums to shield themselves against liability for medical errors.

Given the intricacies of the cultural characteristics that are said to cause the turn toward overregulation – on the one hand an alleged tendency to blame the government which can only partially be substantiated; on the other hand a laudable inclination to turn one's grief into something useful for society – it seems unlikely that the risk regulation reflex may be solved at the drop of a hat by appealing, common sense solutions. In the next session we will scrutinize the solutions at issue.

### III. The three solutions

#### 1. Greater responsibility for the individual: do politicians really want it?

The first solution to the risk regulation reflex is greater responsibility for the individual.<sup>26</sup> As pointed out in the previous section, in the terms of *Cultural Theory*,

23 Pauline Sinnema, "Interview with Anna Enquist", *Het Parool*, 9 May 2003 (edited fragment).

24 Michael Thompson, Richard Ellis and Aaron Wildavsky, *Cultural Theory*, (Boulder: Political Cultures Series, Westview Press 1990).

25 Van Eeten proposes coupling this fatalism with a generous promise from the government to pay all costs. This renders fatalism a more attractive option but does not solve everything. Many risks cannot be compensated by money (human lives, damage to health). Van Eeten, "De diva en het noodlot", *supra* note 14. Cf. also Van Eeten's contribution to this issue of *EJRR*.

26 Ira Helsloot, Roel Pieterman and Jaap C. Hanekamp, *Risico's en redelijkheid. Verkenning van een rijksbreed beoordelingskader voor de toelaatbaarheid van risico's* [Risks and reason. Considerations on a central government assessment framework for risk acceptability] (The Hague: Boom Juridische Uitgevers 2010) at p.45.

this would entail a shift toward individualism which might indeed do away with a lot of government regulation but would lead to a range of other problems instead. However, before evaluating the pros and cons of individualism we should take a closer look at the choice for greater responsibility as advocated by governments. We think that in many cases government does not really wish to transfer responsibility to citizens; government wants to transfer responsibility only in so far as citizens subsequently behave as the government feels that they should. The transfer of responsibility is riddled with ambivalence. Two examples to illustrate this point.

Government has already shifted considerable responsibility to citizens in two policy areas: health care and crime prevention. In both areas, citizens may weigh up their own risks. Personal choice in these matters, however, is governed by strict boundaries. Since 2006 Dutch citizens can choose a health care package with varying degrees of luxury and contracted care, and opt for a level of own risk which suits them best. However, alongside this clear shift of responsibility with regard to insurance, hospital care and medication the government has adopted a much more paternalistic approach with regard to prevention. Clearly citizens are not supposed to freely choose an unhealthy lifestyle and subsequently bear the costs themselves. Citizens are admonished to refrain from smoking and alcohol, to practice safe sex and to exercise regularly. Government supervision with regard to children has increased during the last couple of years.<sup>27</sup>

In the area of crime prevention, the public is fairly autonomous but again the message is double edged. People are expected to try and secure their homes against burglary, install peepholes in the front door and never leave their luggage unattended. It is not, however, every government's favourite idea that women carry pepper spray in their handbags as a means of self protection during an evening out. Shop staff is not supposed to hide a baseball bat under the counter in case anyone decides to rob the till (compare the Burgernet example described as Intermezzo below). Carrying a shot gun or having one stored in your house is forbidden in most European countries and European governments take a dim view of vigilante justice; they tend to see a state monopoly on violence as a hallmark of justice.<sup>28</sup> It seems a risky strategy to advocate citizen responsibility if the plea is beset with qualifications that may easily be taken as inconsistencies.

### **Intermezzo: Responsible for your own safety**

Expectations are high in regard to the Dutch 'Burgernet' (citizen network). This is a form of co-operation in which citizens and police are in direct contact. Individuals who register to participate are occasionally asked to operate as the eyes and ears of the police.

Citizen participation has a downside, however. People sometimes go too far in their role as 'crime busters'. In many cities, citizens independently carry out surveillance after being informed by the central control room about, for example, a missing child. They don't hesitate to approach patrolling police officers and ask if any progress has been made.

Citizens go a step further when they search for their stolen bicycle on the Internet and then arrange to meet the thief. 'This is going too far', says Inspector Teun Vet who is responsible for the citizen network in the province of Friesland's police service. 'Safety should remain of paramount importance.' He warns, 'Everyone who takes the law into their own hands is brought in for questioning'.

The former minister of Justice, Ernst Hirsch Ballin, made a distinction between citizen participation and citizen investigation. He feared that if everyone starts playing detective, legal requirements pertaining to investigations could be overlooked. He gave examples of prior consent from the examining judge and the obligation of accurate reporting. Hirsch Ballin: 'We don't want to live in a police state, but certainly not in an amateur police state.'<sup>29</sup>

27 Margo Trappenburg, "De drie rijken van de zorg" [Three empires in the world of health care], in Jan Willem Duyvendak et al (eds), *De sociale kaart van Nederland* [A sociological map of the Netherlands], forthcoming 2012.

28 Max Weber, "The Profession and Vocation of Politics", in Peter Lassman and Ronald Speirs (eds.), *Weber Political Writings*, (Cambridge: Cambridge University Press 1994 [first published in 1919]), pp.309 et sqq., at p. 310-311; Thomas Hobbes, *Leviathan*. Edited with an Introduction by C.B. Macpherson (Harmondsworth: Penguin Books 1984 [first published in 1651]).

29 Noël van Bommel, "Spreek eerst de dader aan en bel daarna de politie" [First approach the offender and then phone the police], *De Volkskrant*, 21 April 2010 (edited fragment)

## 2. A more rational approach: the problem of comparing dissimilar risks

The second solution to the risk regulation reflex is a more rational approach.<sup>30</sup> We should not invest indiscriminately in preventive measures after every incident. It makes more sense to consider rationally and carefully how to achieve the greatest safety yield for the least amount of money. This solution hinges on the assumption that the public and government are capable of carrying out so-called interpersonal comparisons of utility, which we are not. Not really.

Take this hypothetical example: a current affairs TV programme on the eve of municipal elections. The presenter holds up a bag of money -say one hundred thousand euros-. The question is how that money should be spent. The presenter gives three possibilities. Firstly, it could go on extra lighting of an unsafe car park where two young women were raped the previous year. Secondly, the money could be spent on improving the ventilation at a primary school where the air quality is known to be lacking. Research shows that air quality at primary schools affects children's concentration and learning ability. Thirdly, the money could be earmarked for salaries for two additional workers at the municipal cleaning services department who will be set to work in a deprived area. Research also shows that streets which are not kept clean gradually become less safe. Citizens and candidate councillors are then asked which option they would choose and why. There will almost certainly be citizens and politicians who dare to make a choice which they could back up with arguments, but their choice would not be based on common denominators. Citizens and politicians are not in the habit of expressing the risk of rape in units

of utility, and subsequently translating the learning ability of the pupils in primary schools and safety in a deprived area into common units of utility. In such cases, citizens and politicians make a political choice: they say that the well-being of citizens in deprived areas is more important than the learning ability of the children, or vice versa. They regard safety on the streets as a basic, perhaps even the most important, task of the government, more so even than education, or vice versa. It is an illusion to think that political choices can be replaced by scientific and rational utility calculations.

A purely rational approach is only suitable for simple, undisputed risks. In most cases such an approach does not suffice as is underlined by Van Asselt and Renn who argue that risks regulation cannot solely rely on calculations.<sup>31</sup> Regulatory models that do build on such calculative suppositions might even become an obstacle to an adequate way of dealing with risk.<sup>32</sup>

## 3. Greater democracy is by no means always the solution

The third solution was greater democracy. Scientific evidence being scant, risk governance has increasingly turned to democratic support and public participation.<sup>33</sup> This solution allows civilians to see that not everything can be done at the same time, and lets them make their own choices. Somewhat like the television programme described earlier; and where greater democracy might indeed be the answer. But in very many instances it may result in inconsistencies due to variances in the interests of different actors,<sup>34</sup> for example as a result of what may be called the 'villain's logic' and 'not in my back yard' problems. Here are examples of both.

### *How villain's logic can thwart democratic decision making*

Safety policy is often synonymous with enforcement policy. There are numerous rules in such areas as road safety, hygiene in the hotel and catering industry and in care institutions, fire prevention in public buildings, safety in public areas thanks to more policemen on the streets, safety in the home thanks to police surveillance, and so on and so forth. We can of course ask citizens what they find more important. We can hold a broad political and social debate which would result in the choice for one at the expense of

30 Compare Margo Trappenburg, "Wegen en meten" [Weighing and measuring], NRC column 7 July 2006. Available on the Internet at < www.margotrappenburg.nl > (last accessed on 06 August 2012).

31 Marjolein Van Asselt and Ortwin Renn, "Risk Governance", 14(4) *Journal of Risk Research* (2011), pp. 431 et seq., at p. 432.

32 Mary Douglas and Aaron Wildavsky, *Risk and Culture, An Essay on the Selection of Technical and Environmental Dangers*, (Berkeley: University of California Press 1983).

33 Hervé Corvellec, "Even Beyond Humanity – a Comment on 'Change and Commitment: Beyond Risk and Responsibility' by Silvio Fun-towitz and Roger Strand", 14 (8) *Journal of Risk Research* (2011) pp. 1005 et seq., at p. 1005.

34 Fabrizio Cantelli, Naonori Kodate and Kristian Krieger, "Towards Democratic Governance of Uncertainty? Contesting Notions of Participation, Control and Accountability", 14 (8) *Journal of Risk Research* (2011) pp. 919 et seq., at p. 925.

the other. We would then be departing from the unsustainable idea that government can be everywhere at once and do everything at the same time, and rather make a well-founded decision which will enjoy public support. And what would happen then?

We can see it now. The publican would be relieved that her premises weren't going to be inspected that year for fire safety and would decide there was no hurry to replace the faulty oven. The chief officer at a nursing home would conclude that the cleaning schedule could be relaxed because the inspector would not be along that year. The motorist is delighted to hear an end to the quibbling about maximum speeds and says that fortunately they no longer do speed checks in his area. And the burglar takes advantage of reduced police surveillance in certain neighbourhoods.

Prioritising may be a necessary part of enforcement but it is inadvisable to carry out the process in a democratic 'public' manner as it will play into the hands of potential offenders.

#### *NIMBY versus democracy*

In many other cases, safety policy is linked to choices for locations. For example, within any democratic body (the Dutch Lower House, the Provincial Council, the municipal council), a decision is taken that there should be more nature reserves in the Netherlands. That same democratic body then stipulates the precise location, say the village of Nederhorst den Berg.<sup>35</sup> Polder land is to be converted into a marshland nature reserve. Village residents have been told by experts of the considerable risk of subsidence of their properties when land is submerged under water and are understandably angry and concerned. In this context, what would be meant by democratic decision making? Would the village residents have a right of veto? Similar decisions might be taken with regard to nuclear plants, petrol factories and other polluting industries and many other risky enterprises.

A right of veto sounds generous and democratic but it should be taken into account that many a plan will not see the light of day as people will understandably not want it in their own backyard. ('Let the minister have the petrol factory or the nuclear plant in her own village if she thinks this is perfectly safe'). Even if full compensation were offered, people would still object. Repairs to subsided properties cannot be calculated only in monetary terms but also in time and energy. Damage to health involves more than medical bills. Permanent respiratory problems can-

not be compensated with higher sums of money. If democratic decision making takes place at a higher level (municipality, provincial or central government who have taken account of interest groups in Nederhorst den Berg in the example mentioned above), the question remains as to whether the process is fair and democratic for the residents who run the risks.

Apart from the villain's logic and NIMBY problems, more general problems with regard to democratic decision making also play out in risk-related policy making. Kinney and Leschine point out that inclusion of stakeholders does not necessarily make the decisions to take suitable measures any easier nor does it automatically lead to more widely accepted decisions.<sup>36</sup> Moreover public participation holds the risk of the agenda being hijacked by highly involved stakeholders who do not necessarily represent a broader majority of the public.<sup>37</sup> Making decisions more democratic will not put an end to the dilemmas involved in risk regulation.

#### IV. No miracle cures

The risk regulation reflex is seen as a problem by many policy makers, but it is not merely a problem. It is a multifaceted issue. Politicians and policy makers who listen to public fears and concerns when incidents happen are not just spineless characters lured into ineffective policies by over zealous journalists. They are also, simultaneously, responsive policy makers who do not turn a blind eye to the cares and worries of citizens. They resemble their citizens in their eagerness to turn grief and sorrow into something more useful, so citizens will not have died or suffered in vain and the chances of further incidents get reduced. This means that the risk regulation reflex cannot simply be defined as an undesirable mechanism. There are many instances in which

35 Arjen Schreuder, "Staatsgreep en wachthuisjes tegen 'groene leugen'; Provincie, Natuurmonumenten en waterschap willen van 300 hectare Horstermeerpolder natte natuur maken", [Arjen Schreuder, Coup and guards against 'a green lie'; the province, Natuurmonument conservation organisation and waterboard want to turn 300 hectares of the Hostermeer polder into marshland], *NRC Handelsblad*, 9 March 2010.

36 Aimee Kinney and Thomas Leschine, "A Procedural Evaluation of an Analytic-Deliberative Process: The Colombia River Comprehensive Impact Assessment", 22(1) *Risk Analysis*, pp. 83 *et seq.*

37 Löfstedt et al. "The Changing Nature of Communication and Regulation of Risk in Europe", *supra* note 5, at p. 413.



incidents offer a window of opportunity to solve an existing problem.

In those cases where overregulation does occur there are no miracle cures for the risk regulation reflex. Transferring responsibility to citizens is a partial solution at best, because many policy makers do not wholeheartedly embrace the creative solutions citizens come up with, once left to their own devices. Taking recourse to a more rational approach, by finding out how to get the maximum amount of safety for a given budget belies the widely felt notion that one type of risk does not equal another. Some risks are common and thereby acceptable whereas others are rare, and much scarier. Felt truths like this cannot be wished away by recounting the risks in common denominators. Lastly, more democracy is also a solution fraught with difficulties, because there are limits to the amount of transparency a safety policy can survive (the villain's logic) and because safety policies often include a choice of location, which makes the NIMBY problem very prominent.

Perhaps the only thing politicians and policy makers could be advised to do when facing risks is taking time. After an incident has occurred, time should be taken to consider what has happened. Measures should not immediately be taken; neither should policy be immediately defined nor should supervision be stepped up. It must be remembered that any change in policy is accompanied by pros and cons and negative effects have to be examined carefully in advance. This is underlined by Boin and 't Hart who argue that successful reform leaders are the ones

who take time to include the different perspectives of the stakeholders that will play a relevant role in the implementation phase.<sup>38</sup> So before taking any decisions, time should be reserved to thoroughly examine the pros and cons from an implementation perspective. What are for example the consequences of stricter hygiene requirements in a care institution? The chance of residents and patients sustaining bacterial infections is reduced, which is clearly an advantage. But what about the downside? Will freeze dried food be introduced on a large scale? Will residents still be able to help out in the kitchen if they want to? Will management decide to contract all catering services to specialist firms resulting in less flexibility and fewer opportunities for social activities?

Stricter safety regulations often lead to greater bureaucracy; perhaps not the most desirable spinoff given the administrative burden currently experienced by the public, institutions and businesses. This would be a negative consequence of stricter safety requirements which deserves serious consideration. New policies or stricter enforcement almost always cost money. A new policy thus generally results in increased burdens on the public. This disadvantage should be given much consideration. Or as Boin puts it: Incidents pose challenges for policymakers; they require "deep thinking".<sup>39</sup>

Taking time to deliberate, choosing an unhurried well-considered approach is no miracle cure either, if only because discussing advantages and disadvantages offers no answer to the question how they should be weighed against one another. On the other hand buying time is something politicians and policy makers are usually good at. It does not require a changed mindset or unusual statesmanship. Simply allowing policy makers some latitude to consider pros and cons might prevent jumping to solutions that will prove ineffective, expensive or counterproductive. It might just dampen the risk regulation reflex.

38 Arjen Boin and Paul 't Hart, "Public Leadership in Times of Crisis: Mission Impossible?", 63 (5) *Public Administration Review* (2003), pp. 544 et seq. at p. 551.

39 Arjen Boin, "The New World of Crises and Crisis Management: Implications for Policymaking and Research", 26 (4) *Review of Policy Research* (2009), pp. 367 et seq. at p. 370.