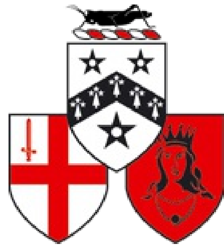

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Regulating the Regulators
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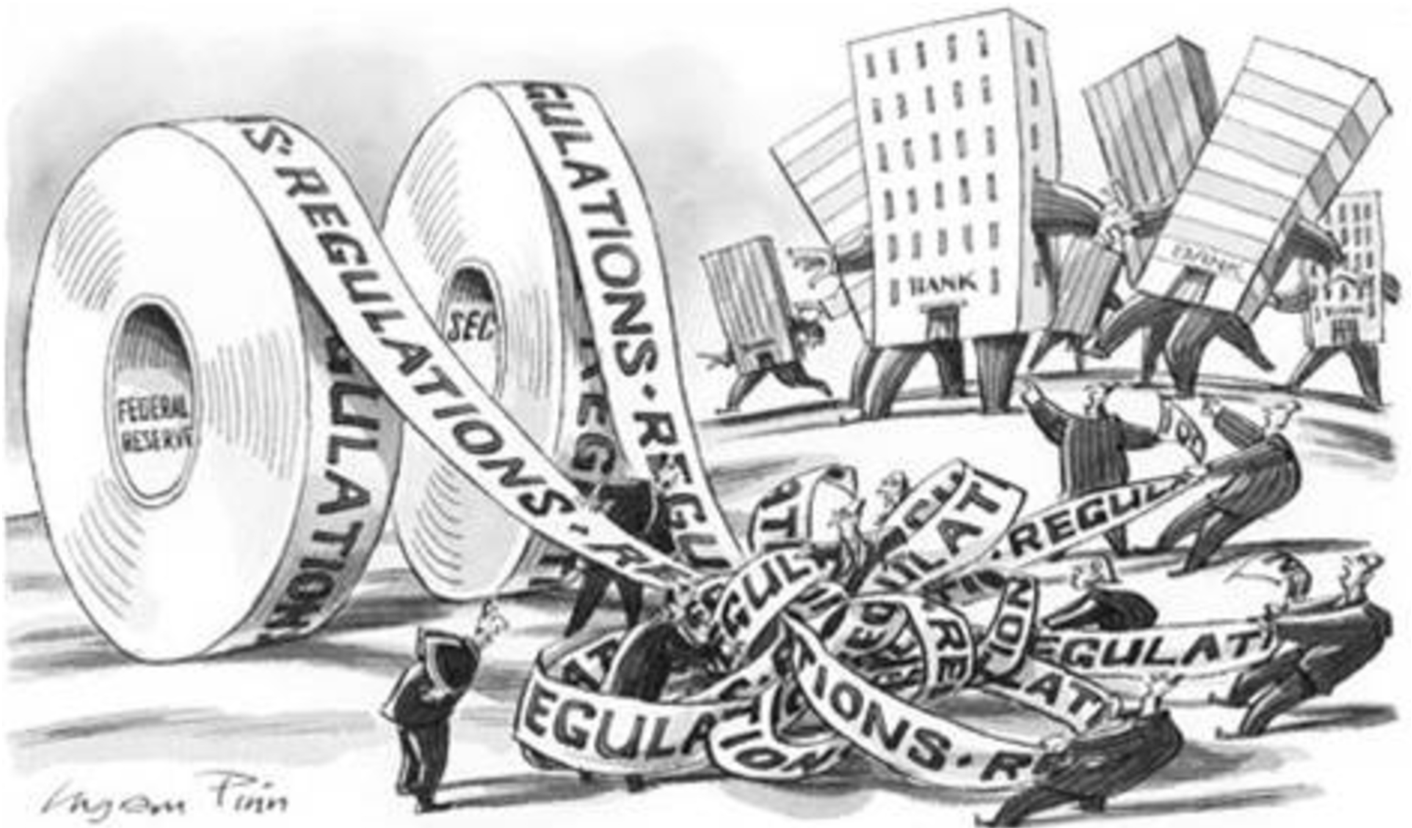

23 May 2012

Regulating the Regulators

The Baroness Deech of Cumnor

On the day I wrote this lecture I had spent a great deal of time trying to give away an old but very nice sofa to one of the local charities. They all told me that there is a great demand for them, but that they cannot accept mine because it was built before the coming into force of current fire regulations for furniture and it does not have the requisite fire safety label (Furniture and Furnishings (Fire)(Safety) Regulations 1988 extended from 1993 to second hand furniture.) So a perfectly nice sofa, much better built than modern ones and probably no more likely to burst into flame than the foam filled ones, will go to waste. Of course, fire safety is important, and one should not get rid of fire hazardous furniture to charities: but the downside of waste of good material is considerable. So now we come to consider regulation in general, after the specific examples I have given you in my previous five lectures.

Regulation is not new. There were building controls in this country from as early as the 13th century. The Great Fire of London in 1666 led to the London Building Act 1667, the first to provide for surveyors to enforce its regulations. In the 19th century business became subject to regulation: there was a growth in insurance, company and patent law and regulatory agencies. Modern regulation was given a boost by the privatisation of modern services of the utmost significance which, it was felt, could not be left to the mercies of private providers when it came to public safety – that was telecommunications in 1984, natural gas 1986, airports 1987, water 1989, the electricity supply 1990 and rail in 1993-6. Regulation replaced the nationalisation element in these basic services.

How does one define regulation? It is the supervision of a private or professional activity in the interests of the public as a whole, their welfare, their rights and their future, where those elements would be at risk were there no regulation. After that uncontentious statement, there come the subdivisions and principles of regulatory activity, which are the subject of much academic writing and business interest, often adversarial in nature.

For many centuries, professions such as medicine and law were trusted to self regulate and indeed, their professional pride was, and is, such that the strictest regulators are often one's own peers in a profession or business, because there is self interest in maintaining standards and entry. The long history of the famous livery guilds is actually one of regulation – the Drapers, the Merchant Taylors, the Skinners and so on. Only when they relaxed their regulatory powers, or had them taken away from them, did they become the largely ceremonial and charity organisations that they are today. The four Inns of Court, which bear certain historic similarities, fortunately still have a certain regulatory function in respect of barristers, which keeps the Inns alive and creative.

More recently self regulation has been under attack because of failings within the professions. The Shipman Inquiry into the deaths caused by the doctor Shipman was a response to public loss of confidence in the medical profession over that issue; then the Clementi review of legal regulation, largely as a result of poor complaints handling and bad practice by solicitors' firms in relation to miners' claims, where the lawyers took more than the miners; self regulation of the press is under examination after the phone hacking scandal of 2011. The modern requirement seems to be that there should be a representative branch of a profession (e.g. the BMA, or the Law Society) and a separate regulatory branch (e.g. the GMC and the SRA). Ofcom is required to promote self regulation which is, after all, cheaper, whatever else may be said about it. On the one hand the National Consumer Council, now Consumer Focus, has campaigned for up to 75% consumer representation on regulatory boards; on the other hand self regulation is coming back into fashion and was recently espoused by the OFT for consumer issues - http://www.oft.gov.uk/shared_oft/reports/consumer-policy/oft1115.pdf. Whilst transformation is now in sight for the Press Complaints Commission, which the Prime Minister branded as ineffectual during the phone hacking scandal, the Advertising Standards Authority seems to work well as a self regulator.

At the other end of the watchdog scale there are now super-regulators and regulators built on mergers of other smaller regulators, which have become national bodies in their own right and given rise to a body of law and theory about regulation. For example, the Financial Services Authority (FSA), an amalgamation of individual regulators over banks, insurance, financial advisers and mortgage businesses. In favour of super-regulators are the economies of scale, the fact that the boundaries between different types of financial activity have become blurred; they can achieve clear objectives across the field and result in only one body to deal with. Likewise OFCOM, reflecting the convergence of internet, broadcasting and telecommunication; Ofgem for gas and electricity, the Environment Agency and the Food Standards Authority. Super-regulators won the praise of the Hampton report, a very influential one (P. Hampton, *Reducing Administrative Burdens* HM Treasure 2005). He recommended more consolidation, such as the Equality and Human Rights Commission, which has now brought together all the equality and diversity bodies that used to exist, Ofsted, the Audit Commission, the Care Quality Commission, all mergers. This was of course before the financial meltdown of a few years ago, with lessons to be learned from that, and before the weakness of the CQC in preventing abuse in care homes was exposed in 2011. The risks of consolidation of smaller regulators are the cost of actually bringing them together in one office, and the loss of specialisation and focus. There may be too much for one organisation to do. Ofcom's

weakness was shown in relation to the quiz call and faked TV issues, and there is confusion over how jurisdiction over complaints is shared between it and the BBC. It was for those reasons, namely, loss of specialisation and the disruption that would ensue, that up until 2011 the HFEA and the HTA avoided merger and had their separate natures confirmed in the HFE Act 2008.

Ironically, given the problems with the euro, the EU would like to see a continent-wide super-regulator for the financial sector, which could act as a whistle blower on banks and insurance if they are acting in a way that threatens continental financial security. One would have thought that they would have learned a lesson from the FSA.

So not only as there conflicting tugs towards self regulation on the one hand and super regulation on the other, there are also many different types of regulation depending on what is being regulated, and how. A basic division is between regulating a profession, setting disciplinary standards, procedures, education and training, as in the law, or on the other hand, commercial activities, such as airlines, taxis, where we all expect the driver to have done the knowledge and have a safe cab. Then there are the requirements of safety, for example, hospitals, food supplies and gas installations, where the institutions and personnel must observe proper standards in order to safeguard the public from physical and economic harm. An example is the Gangmasters Licensing Act to regulate labour in shellfish collection after the tragedy of the deaths of 21 Chinese cocklepickers who drowned at Morecombe Bay in 2004. All of the constraints may be taken too far. The fear of complaints and litigation is widespread, leading to what has become known as the tickbox culture in health and safety; professional regulation may be subject to political pressures, for example in the case of teachers or social workers; institutions may become overburdened with social requirements relating to parental leave, diversity and so on. (Sir John Laws, *Who will regulate the regulators?* Inner Temple Yearbook 2009-10.)

Then there is the question of how far the government should get involved in regulation itself. Although one expects the government to be in the business of assurance, at the same time it may be government action itself that is the root cause of failures in regulated activities, and the government might not want to call attention to its own failings in this regard. There could be a conflict of interest and therefore it is better for the government to enable regulation at arm’s length, through independent quangos, which in turn ought to avoid being funded by the government so that they are truly independent. This is why many regulators are funded by fees and licences raised from the regulated community rather than by tax revenue.

There are different categories of regulation. There is inspection with official mandate, licensing activities; there is quality regulation, designed to assure the public by adjudication, inspection and information about the activity, for example, universities and the OIA and HEFCE, the HFEA and IVF clinics. There is economic regulation, concerned with price setting, fair competition, value for money and monitoring (the BBC and HEFCE), and there is public audit to make sure public money is properly spent.

Cutting across all of these are the various principles on which regulation might best work. *Risk based* regulation focuses on avoiding the worst outcomes that can be predicted; *principled* regulation sets high level principles and makes activities illegal that might contravene them (the FSA operates by way of laying down principles); there is *rule based* regulation, such as the barristers are used to, where a code lays down details of how they should behave at every stage. This tends to give good results but is inflexible and voluminous. There is the latest fad, *outcomes focused regulation* (OFR), although that seems now to have had its day too. It supposes regulation of a business or profession by looking at the outcomes, not detailed prescription. It is not clear, however, how to measure the outcome, which will have happened, possibly with bad results, by the time anyone looks at how things went wrong; it is not obvious what should be done by way of supervision or enforcement if the desired outcome, whatever that is, is not achieved. (Black, Hopper & Band, “Making a success of principles based regulation”, vol. 1, *Law and Financial Markets Review,* no.3, 2007).

The latest theories of regulation are “really responsive regulation” and “right touch” regulation. The former requires that regulators regulate in response to the regulated firms’ behaviour, attitude and culture, the institutional environment, interactions of regulatory controls, regulatory performance and change. (Black & Baldwin, “Really Responsive Risk-based Regulation” 32 *Law & Policy* 181, 2010). I think this means that regulators should spend more time assessing their own performance and failures and the imperatives of the people and institutions that they oversee. And “right touch” regulation means always asking what risk the regulator is trying to regulate, being proportionate and targeted in regulating that risk or finding ways other than regulation to promote good practice, using regulation only when necessary and checking for unintended consequences (CHRE policy.) My own experience of the swings of the pendulum in what is expected of regulators came when I was chair of the HFEA. We were exhorted to carry out light touch regulation and target inspections on clinics and laboratories that were risky; but as soon as anything went wrong, especially if it was widely reported (for example, a mix up in embryos), government chastised us and urged more and more in depth regulation of the clinics, even though there was a limit, in my view, at which human error could not be avoided. Now it is the revamped FSA that is encouraged to move from light touch regulation to intensive regulation.

All that is difficult, but it is clear what bad regulation is. It is regulation that does not achieve its ends, is overly expensive, intrusive, resented and rigid, and lacking in understanding of the objectives of the overseen. This can arise because of a failure to understand the public interest in carrying out regulation and focusing solely on

economic or political objectives, a subject to which I will return shortly.

There are certainly plenty of known failures of regulation, not to mention the ones we do not know about. Examples are the Fukushima nuclear disaster, the Deepwater accident in the Mexico Gulf and the subprime lending meltdown and its consequences, Baby P, railway accidents and water system pollution and floods. Regulation is supposed to protect ordinary people and prevent catastrophes, at the very least. Part of the trouble may be the confusion of the different types of regulation, business, professional etc., which I have roughly outlined. Where regulation was introduced to control monopolies and set standards, arguably its success should have led to its own winding up as no longer necessary. So sometimes regulation should fade away. In other situations, failure leads to more regulation, which in turn is regarded as burdensome and may fail. Failure on the part of the FSA presumably contributed to the financial crisis and economic recession. Indeed the FSA conceded that Northern Rock was inadequately regulated and that it had failed to focus on the large systemic risks in the banking system (http://news.bbc.co.uk/1/hi/scotland/7672632.stm). Nevertheless, Mr Sants, its CEO, has gone on to head the new Prudential Regulation Authority, part of the carve up and demise of the FSA. The other part will be the Financial Conduct Authority, responsible for supervising the way financial firms treat their customers, while the PRA will be responsible for supervising banks, building societies and credit unions and insurance firms. It is to have a more intensive brief in preventing damage to the financial system. The cost of this reconfiguration has been estimated at £90-175m. (HM Treasury, *A New Approach to Financial Regulation: Building a Stronger System* Cm 8012 (2011) Annex B, p.10). The sceptical observer might think that the more attention paid by regulators to models of regulatory practice, the less successful at foreseeing disasters; internal scrutiny seems to blind regulators to external threats. The House of Commons Regulatory Reform Committee report *Themes and Trends in Regulatory Reform* HC329-1 2009 called for a move away from concentration on a particular model of regulation and more focus, instead, on looking at the whole system rather than individual problem areas, challenging prevailing wisdoms and political pressure; not to rely too much on ideology and procedures and to be intrusive and or light touch as required, ie flexible.

The cost of all of this is considerable. The British Chamber of Commerce calculated that the net cost of new regulation since 1999 amounted to £90bn, and the Better Regulation Taskforce estimated the cost at 12% GDP. The Institute of Directors claims that directors spend 13 hours a month on regulation compliance and would have to work from 1 January to 4 February to complete annual administration, while the workforce spend 73 hours a month on it, and that the burden of regulation is equivalent to the UK losing the entire output of the East Midlands. Among the most expensive regulations to apply are the Working Time Regulations 1999, the Data Protection Act and the Vehicle Excise Duty reduced pollution regulations. 68% of the regulation is attributed to European law. *Open Europe* calculated the cost of European regulation requirements as £124bn since 1998, and that there were 11,000 pages of new European legislation in 2007.
http://www.openeurope.org.uk/research/outofcontrol.pdf

What are the regulatory bodies we are talking about? Here is a list of some of the non-professional ones:

Animal Health, the CQC, CEFAS, the Charity Commission, Civil Aviation Authority, Companies House, Competition Commission, Drinking Water Inspectorate, Driving Standards Agency, DVLA, Employment Agency Standards Inspectorate, Environment Agency, EHRC, Financial Reporting Council, FSA, Food & Environment Research Agency, Food Standards Agency, Football Licensing Authority, Forestry Commission, Gambling Commission, Gangmasters Licensing Authority, HSE, HFEA, HTA, Information Commissioner's Office, Insolvency Service, Marine and Fisheries Agency, Maritime and Coastguard Agency, MHRA, National Lottery Commission, National Measurement Office, Natural England, Ofcom, OFT, Office of Rail Regulation, Office of the Immigration Services Commissioner, Ofgem, Ofqual, Ofsted, Ofwat, Pensions Regulator, Postcomm, Renewable Fuels Agency, Rural Payments Agency, Standards for England, Security Industry Authority, Vehicle Certification Agency, Veterinary Medicines Directorate, and Vehicle and Operator Services Agency. The Public Bodies Bill, the coalition government's brave attempt to drastically prune the number, was introduced in the House of Lords in 2011 with a list of approximately 230 quangos listed as liable to be merged, abolished or reformed. By the time it left the Lords for the Commons the list was down to 92. There was enormous resistance to almost every proposed removal, either from vested interests or genuine public anxiety, e.g. over the Forestry Commission. The forest of quangos remains as thick as ever.

So many bodies, so much to do – on what principles? Having researched this, I had to draw a line after a while, for the principles are manifold and every few years more are added, some go out of fashion and others enter. Regulation theory is a curious academic world, where the results and the public good seem to count for less than the perfection and symmetry of the principles that regulators should be applying in their task. Widely accepted, or at least most often quoted, are the Hampton report-inspired better regulation principles. Regulation should be transparent, accountable, proportionate, consistent and targeted. (In fact the Hampton principles were more detailed than that and the five guiding principles came from government.) One can quickly see that the questions lurking behind these principles may be hard to answer. Accountable to whom? Proportionate by what standards? Targeted at what? Transparent, by the way, does not carry the dictionary definition of clear, or easily seen through, artless, frank, free from affectation or disguise. It means giving an explanation or putting the information guiding the regulators up on their website. Clear talk and simple language are elements largely missing from the world of regulation, whose documents are replete with the self congratulatory phrases of business school – robust, stakeholders, partnership, KPIs, going forward, drilling down, delivery and so on.

Sanctions in regulation are governed by the Macrory report, *Regulatory Justice: Making Sanctions Effective* 2006, the recommendations of which were enacted in the Regulators Enforcement and Sanctions Act 2008. This increased the range of sanctions for regulators with the guidance of the following principles – that the purpose of regulatory sanction is not to punish as such but to get the business affected back into compliance, and make sure that no financial profit is made from non-compliance; also that financial penalties should not be received by the regulators so that they cannot be accused of profiteering from enforcement.

The Audit Commission report, *The Future of Regulation in the Public Sector* (2006), called for first order principles, that regulation should take place within a stable framework determined by government; that government must be clear about the role it wants to play; that the scope and scale is a matter for government, changes to the framework should be minimised and regulators must be operationally independent. Some of these principles might trouble those who believe that government should stay as far away from regulation as possible, because of the potential conflicts of interest I mentioned earlier where the government itself is at fault. Indeed the Audit Commission's own emphasis in this document on independence sits uneasily with its implied expectation of heavy intervention by government.

The influential Hampton principles in detail are:

- That regulators should use comprehensive risk assessment to concentrate resources on the areas that need them most
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take
- No inspection should take place without a reason
- Businesses should not have to give unnecessary information, nor give the same piece of information twice
- Those who break the regulations should be identified quickly and face proportionate sanctions
- Regulators should provide authoritative, accessible advice easily and cheaply
- Regulators should be of the right size and scope, and no new one should be created where an existing one can do the work
  Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only intervene where there is a clear case for protection

One can see that these have been broken many times and pre-date the financial crisis of recent years; also that they are very business oriented with no hint in them of how they might apply to the regulation of the professions, or say, higher education.

In fact, when it came to regulating the legal professions, the government adopted an entirely different approach, and laid down in the Legal Services Act 2007, a different set of principles and objectives. S.1 lists the regulatory objectives as

- Protecting and promoting the public interest
- Supporting the constitutional principle of the rule of law
- Improving access to justice
- Protecting and promoting the interests of consumers
- Promoting competition in the provision of services
- Encouraging an independent, strong, diverse and effective legal profession
- Increasing public understanding of the citizen's legal rights and duties
- Promoting and maintaining adherence to the professional principles, which are later defined for lawyers as
- Acting with independence and integrity
- Maintaining proper standards of work
- Acting in the best interests of their clients
- For those that appear in court, complying with their duty to the court to act with independence in the interests of justice
- Keeping clients' affairs confidential

Again, one can see contradictions and dilemmas and that there is no order of precedence. The Legal Services Board, the regulator, is itself charged under the Act with acting according to the Hampton principles and also "any other principle appearing to it to represent the best regulatory practice." (s.3(3)(b). This certainly leaves the field wide open for discretionary decisions about how to achieve aims. The LSB has tended to put the consumer first in order of objectives. It has been said in relation to multiple objectives that the financial crisis "provided compelling evidence that proponents of the integrated model underestimated the challenges involved in the management of multiple regulatory objectives and in resolving conflicts between them". (Ferran, "The Break-up of the FSA", *Oxford Journal of Legal Studies* 2011, p.1). On the other hand naturally too many regulators pursuing their own separate objectives in relation to one activity will be just as problematic. The biggest city solicitors' firms have *de facto* set up a regulatory system for themselves within the SRA regime.

Every few years there is another set of principles advanced as the best in the regulatory field. Looming over all of them however, now, is the economic recession and an announced change of policy by the coalition government, which has attempted to cut every quango that it can in the Public Bodies Act 2012. Targets and performance monitoring, especially in health service regulation, are now perceived to stifle innovation and hold back the better performers. There are renewed calls for more self-regulation and market mechanisms to ensure

high quality services.

The history of government initiatives to curb and streamline regulation and regulators is impressively long, but wayward. The government has tried repeatedly to reduce the burden, but there are always big issues demanding special protection in their view, such as employment, diversity and climate change, which prevent a wholesale clearout, not to mention the demands of the EU. Ruth Lea in her 2011 study, *Perspectives*,for the Arbuthnot Banking Group, listed the attempts to cut them http://www.arbuthnotgroup.com/uploads/22.2.2011.pdf. In brief, first there was the Deregulation Unit of the DTI, 1986, subsequently moved to the Cabinet Office. It was then relaunched as the Better Regulation Unit, (Labour taking up "better regulation" as a slogan rather than deregulation), and the Better Regulation Task Force came up with the five principles which are often ascribed to Hampton but are not his, namely, proportionality, accountability, consistency, transparency and targeting. In 1999 the Better Regulation Unit was renamed the Regulatory Impact Unit, and there were also set up Departmental Regulatory Impact Units. The Better Regulation Executive replaced the RIU in 2005 under the influence of the Hampton Review, the recommendations of which have been applied to a number of regulators to see if they are acting as required. For example, the Human Tissue Authority was pronounced a good example of Hampton compliance, and it is ironic that it is now slated for merger or abolition under the Public Bodies Act. The Chancellor launched the Better Regulation Action Plan in 2005, and the Macrory Report was published. In 2006 the Better Regulation Commission replaced the Better Regulation Task Force. In 2007 the Department of Business, Enterprise and Regulatory Reform took over from the DTI and the Better Regulation Executive, and in turn that department became the Department of Business, Innovation and Skills in 2009. In 2008 the Better Regulation Commission was replaced by the Risk and Regulatory Advisory Council, and the Local Better Regulation Office was set up, only to close in 2010. The Risk and Regulatory Advisory Council came to an end in 2009 and was replaced by the Regulatory Policy Committee. In 2010 the Better Regulation Executive established the Better Regulation Strategy Group in its place, and also the Reducing Regulation Committee and Challenge Group in the Cabinet Office. An innovation is the requirement of regulatory impact assessments for each new regulation.

The Macrory report, whose six penalties principles I have already mentioned, tried to make more of this work through sanctions. He studied 56 national regulators and 468 local authorities, who between them carry out 2.8m inspections a year, issue 400,000 warning letters, 25,000 prosecutions and 145,000 statutory notices. He recommended seven characteristics for regulators in enforcement.

A recent, depressing, report is the BRE one, *Lightening the Load: the Regulatory Impact on the UK's smallest businesses,* (2010, Department of Business, Innovation and Skills.) They studied 500 small businesses, who reported that they were working one or two days a week on regulation issues, as distinct from their core business, and felt frustration, experienced complexity and misunderstanding and suffered with the tax system. The report concluded that the burden was excessive, that principles based regulations can be difficult to interpret for small businesses, that they perceived no simplification and were at a disadvantage compared with bigger businesses in handling regulation. Note the focus on business, not on services.

Complexity and misunderstanding are terms that are appropriate to apply in dealing with this long list of initiatives to reduce or change regulation, not to mention the regulations themselves, and the principles on which they are based and enforced. The latest attempt to cut the Gordian knot is by Lord Young of Graffham, *Common Sense Common Safety* (2010), an outspoken attempt to bring reason to what is going on. His report focused on health and safety and the "compensation culture", for he believes that litigation is at the heart of the problems besetting health and safety. In 2009 there were 800,000 compensation claims made in the UK. Businesses, he said, feared being sued for minor accidents and it was easier to settle than fight. Claims companies who advertise for victims, and the "no win no fee" arrangements fuelled the litigation torrent. The philosophy of "if there's a blame there's a claim" has generated fear, he said, which extends to the way that schools and fetes, voluntary work, sports and cultural activities have to defend and protect themselves against liability to an excessive level. He pointed out the employment this has given to claims management companies, insurance companies and safety consultants. He recommended banning referral fees, whereby, for example, an estate agent who refers a buyer to one solicitor, or a claims management company tied to a solicitor, are able to get a kickback from the lawyer for each case referred. He recommended simplifying and easing the process applying to schools that take children on trips, and relieving police and fire officers of liability under health and safety if they put their lives at risk to rescue someone, *inter alia.*

While Lord Young's recommendations have not so far been implemented, his straightforward approach to the risks and burdens of regulation have had the effect of highlighting what is missing in all the bodies, principles, objectives, reports and regulatory bodies that I have described so far. It is the public interest, or the broader picture. It is the need to get away from the obsession with internal governance and tickboxing within the regulatory bodies themselves in order to lift their eyes and look around them and look to the future.

This is often called the "public interest", but then one asks, where should the responsibility lie for defining the public interest? It is of note that government statutes and reports have usually listed many principles and objectives, in no particular order, and have not given regulators, let alone individual regulators, a single goal to pursue. The best attempt at this I have come across, albeit focusing on legal regulation, is that of Stephen Mayson, *Legal Services Regulation and the Public Interest* (Legal Services Institute, 2011). Rejecting, quite rightly, the formula that market forces and competition are everything, he defines the public interest, in his discussion of

law, as “objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and wellbeing, and to their legitimate participation in society.” The public interest has two principal dimensions, he goes on to say: the fabric of society including defence and security, public order, the rule of law and the administration of justice, protection of the environment, effective government and a sound economy. Then participation is ensured by health, education and welfare, access to justice, human rights and equality, and reliable personal, public and commercial relationships. The value of having a definition and sense of the good that services and professions are meant to uphold, is that one can argue against a hijacking of the phrase “public interest” by narrower interest groups – in the case of law these could be politicians, consumers, clients, the professionals, media, the courts, judges, unions, defendants – and one can also dismiss the notion that economic regulation is the major, or only form of regulation.

Economic-style regulation, which has already harmed the legal profession by pressure for new working practices and undermining professional pride and standards, has no eye for future generations’ inheritance. The belief that market economy is a good thing, that profit and competition should be maximised because they will benefit “consumers”, is not only inappropriate as a dominating factor in legal regulation, but has been shown to contain the seeds of its own downfall when the markets go wrong. Consumer protection and consumer choice were shown to be uneasy bedfellows in our recent financial crisis; and equally difficult is balancing the building of consumer trust as the same time as encouraging consumer personal responsibility (Ferran, *op cit* at p25.*)* Legal regulation in recent years has tended to try to limit behaviour that is likely to interfere with competition, and to encourage symmetry of information. But the marketisation of everything is not good – witness the riots of 2011 and the financial crisis (Sandel, BBC Reith Lectures, *A New Citizenship)*. Private economic interests, “putting the consumer first”, is not the right answer when it overrides the demands of citizenship or the democratic view. Moral values must enter in, says Mayson, and since the riots of 2011 and the MPs’ expenses scandal it has become acceptable once again to speak of morals in public life. Competition and consumerism have downsides that may damage the present and future public interest, and both the Clementi report and the LSA 2007 failed to see this. (Feintuck, *The Public Interest in Regulation* OUP 2004.) Cheaper and more widespread and outsourced legal services and advice may be good for some but may harm others and the fabric of the democratic society. One should not conflate the consumer and the public interest. Legal regulation should not be concerned with the cheapness of the here and now, but ensuring all the time that the law is reliable and stable, administered by those trained to the highest standards, and that it is preserving resources for the future.

There is an international dimension to all this as well, as Mayson points out. English law is copied and used internationally and any perceived state intervention with the independence and quality of our lawyers will cause Britain to lose business and punch below her weight internationally. Confidence in the English legal system is critical to our social stability, global competitiveness, and economic success. At the heart of this is the centuries old way in which existing lawyers have ensured that the qualifications and performance of the next generation is up to standard.

In conclusion therefore, to improve the regulatory scene I would recommend that a definition of the public interest, with those elements, dominate the thinking of regulators. I would also recommend that
1. Regulators get the right balance between independence and expertise on boards. Too many are dominated by appointments of persons from outside the profession or service who might bring no more than generalities to bear on the issues.
2. There should be post-implementation review of legislation and regulation. Too often a regulatory statute is passed and never revisited to see if it is working, and working in the public interest. 2012 marks five years since the passage of the LSA and that would be ripe for scrutiny. Departments have not routinely evaluated the impact on business of regulation once it has come into effect, let alone on services and the professions. (NAO, *Delivering Regulatory Reform,* HC 758, 2011). The NAO is critical of departments and of the better regulatory scrutiny bodies themselves, for failing to appreciate the total scale of regulatory burden.

I give the last word to my old friend Professor Richard Epstein, (New York University), one of the most influential US legal thinkers and an advocate of minimal legal regulation. “Complex rules necessarily confer a large measure of discretion upon those who enforce and interpret the law, thereby increasing the level of uncertainty and error when the rule is honestly applied, and the level of abuse when it is dishonestly or incompetently applied.” In sum, too much discretionary law making power is delegated to unelected administrators who have their own agenda, and who are left free to apply to the professions, to business and services, whatever regulatory principle they feel expedient, such as consumerism, without being there to suffer the consequences.

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