Regulators – order of the court or disorder of the town council?

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Are economic regulators, such as Ofgem, more like a court or a town council? Both are `independent' of central government, but the extent and character of that independence is quite different. Or, to put the question in a slightly more sophisticated and jargon-laden manner – should we think of regulatory agencies as a kind of `dependent judiciary', as Richard Posner (1977: 480) asserts. Detaching such a characterisation from the interest group framework that Posner develops, we can see a model of regulatory agencies as a `creature of Congress' (in the language of US politics), with less independence perhaps than the federal courts in which Posner serves, but nonetheless making reasoned, right- and fact-based determinations on disputes between parties, between rival providers, say, or between the interests of providers and consumers.Or should we, as Tony Prosser (1997: 34) has argued, think of regulators as `governments in miniature', dealing with complex, multi-faceted questions in a more deliberative, consensus-seeking way?

Such questions are at the heart of Vibert's analysis of regulatory agencies (especially in the field of economic regulation), and in the Littlechild tradition in particular. In fact, Vibert's brief review of regulatory practice in the UK, suggests that regulatory agencies may be seen as both court and council, with the latter role acquiring greater significance over time as experience of post-privatisation economic regulation accumulated. Thus, following Vibert's analysis, as the role of economic regulation broadened to one of constituting markets as understanding of `the consumer' grew more complex and as systemic concerns grew in salience, the idea of an adjudicative, judge-like role has lost traction and the town council model has perhaps gained greater acceptance. Why would these two things – changing views of the regulatory task and changing views of appropriate agency characteristics – seem to track one another?

From the point of view of legal theory, these things are not at all surprising. A seminal contribution is Lon L. Fuller's (1978) magisterial (yet unfinished) article 'The forms and limits of adjudication' first circulated around 1957–58. For Fuller, adjudication was a distinctive form of social ordering, characterised by the presentation of proofs and reasoned arguments. This, even more than authoritative determination from a judge is what defines adjudication, and distinguishes it from other ways of making decisions. 'Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs' (Fuller 1978: 366).

This understanding goes well beyond some interpretations of what it is to be court-like, and intentionally catches inquisitorial as well as adversarial juristic traditions, as well as the broader range of functions that judges are too rarely understood to undertake (Bell 1987). It is at this level that the comparison between courts and regulatory agencies is to be at all plausible or analytically useful.

Hand in hand with Fuller's analysis of the *forms* of adjudication was an emphasis on the *limits* of this form of social ordering. Certain types of problems of decisions, he argued, were unsuited to adjudication, because it was impossible to preserve the character of the affected party's participation through proofs and reasoned arguments. Fuller had in mind what he called *polycentric* problems – multi-dimensional problems which yield multiple solutions, because the way that one dimension of the problem is disposed, in turn, has implications for all the others.

In fact, Fuller saw the problems of regulation and administrative law (in the North American sense) as classic polycentric problems. 'It is in the field of administrative law that the issues dealt with in this paper become most acute', he argued (Fuller 1978: 355), adding that it was regrettable that no one, 'seems inclined to take up the line of thought suggested by a remark of James M. Landis to the effect that the CAB [The Civil Aeronautics Board] is charged with what is essentially a managerial job, unsuited to adjudicative determination or to judicial review' (ibid.)[1]

If the kind of decisions regulators are charged with is less amenable to proofs and reasoned arguments, does this mean that rationality has little part to play within this broader understanding of the regulatory task? Do we have to trade order in court for the rumpus of some of the more disorderly town council meetings? Not necessarily. The contrast presented at the outset of this comment leaves room for a more deliberative model of decision making, in which rationality plays a role, not so much in the presentation of proofs and reasoned arguments, but in the requirement that judgements that are presented as being right 'all things considered' or defended 'in the public interest' are subjected to rational scrutiny and must be defended as such in the face of rigorous questioning. This is arguably the most public aspect of what Jon Elster (1998) has called the 'civilizing force of hypocrisy': the requirement that decisions must be defended in public in front of an audience means that 'the language of reason' replaces the 'language of interest', not exactly eliminating self interest, but forcing those who would advocate a particular decision or course of action to come up with arguments that withstand critical scrutiny.

To return, then, to the question posed at the outset of the discussion: the more complex

[1] It should be obvious from the context that Fuller's critique is intended beyond the often repeated criticism of the cumbersome procedure that US administrative agencies often took to rate setting or other regulatory decisions.

the regulatory task environment becomes, the more we might expect that regulatory agencies approach Prosser's 'governments in minature' rather than Posner's 'dependent judiciary'. That has been the direction of development since Littlechild's original proposal for BT to be regulated by a body, similar to the (now defunct) Office of Fair Trading, headed by an individual of similar standing to a High Court judge.[2] But while such a direction of development may be unsurprising, that does not mean that the court-like understanding of regulatory agencies has been rejected with any degree of finality. Regulation, like other areas of policy, is not necessarily immune to the politics of austerity that have seen the reduction or elimination of the social obligations of government in other areas. It may be that the kind of broader agendas that have forced regulators into the mould of governments in miniature are themselves subject to such retrenchment that the higher ambitions of accommodating multiple objectives are abandoned. Conversely, it may be that under greater pressure, yet more complex trade-offs assert themselves. Either outcome is plausible.

As Vibert suggests, independent arm's length bodies continue to have significant advantages in terms of 'better structuring' the decision setting, and serve the needs of both politicians and the officials who staff them. To better understand the continuing if evolving role of independent agencies, one has to go beyond one-dimensional characterisations of 'independence'. In drawing on a venerable tradition in organisation theory, Vibert contributes to an emerging and potentially interdisciplinary research agenda. Here, I would argue that legal theory has a contribution to make. To the catalogue of 'badly structured' decisions which Vibert draws from organisation theory, we could add 'the polycentric'. But while Vibert seems to be arguing that independent agencies have a contribution to make in (essentially) bringing structure to problems, Fuller's analysis of polycentricity perhaps suggests that the precise contribution of independent agencies (on the model of governments in miniature rather than a dependent judiciary) is finding solutions despite an absence of logical or rational structure.

References

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[2] Interestingly, the 'government in minature' view may have been baked into the original institutional design, in which Oftel was established as a non-ministerial government department.

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