



Legal Services Institute

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LEGAL SERVICES REGULATION AND ‘THE PUBLIC INTEREST’

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1. Introduction

The Legal Services Act 2007, in section 1(1)(a), sets out a regulatory objective of “protecting and promoting the public interest”. In the Institute’s first paper on the reserved legal activities, we acknowledged the central importance of the public interest in regulation and quoted with approval a number of statements suggesting that regulation must be justified primarily in the public interest¹. The second paper elaborates on this and explores a broader basis for the regulation of legal services, and in particular a contemporary approach to reservation in the public interest in the light of the Legal Services Board’s powers under the Legal Services Act 2007 to recommend the addition or removal of legal services as reserved activities². This paper looks in more detail at the concept of ‘the public interest’³ and its influence on the regulation of legal services.

2. The focus of regulation

Using ‘the public interest’ as an objective or justification for action or regulation is common, and at one level difficult to argue against. But it does beg a fundamental question: what exactly do (or should) we mean by ‘the public interest’? Is it some form of Benthamite greatest good for the greatest number, where majority views prevail? Is it some inchoate notion of what is in society’s ‘best’ interests, for ‘the common good’ or even for ‘the good of all’? In the absence of any clear sense of its meaning, emphasis and parameters, the concept might well be hijacked by narrower interests in a justification for the promotion of those interests. In any decisions or actions (including those relating to regulation), someone’s interests are likely to be more influential. Contenders in the

¹ LSI (2010), para 5.7.

² See LSI (2011).

³ I have been greatly helped in this by the work of Feintuck (2004), Satz (2010), and Corning (2011).

regulation of legal services will include the State (as represented by the Government), politicians, consumers, clients, the professions, providers of services, the media, and the regulators themselves. None of these (or even all of them), to my mind, is necessarily synonymous with 'the public interest'.

In many senses, therefore, we recognise the importance and power of 'the public interest', but we nevertheless struggle to articulate clearly its meaning, who represents it, and the values it promotes. We are able to adopt the phrase, and use it to support an argument or conclusion, but yet not be sure that we have all understood it to mean the same thing or to have the same implications. This is potentially an unsound basis on which to justify regulatory intervention. Indeed, we need to be careful not to give force to Sorauf's observation of more than 50 years ago that the vagueness of the concept of the public interest (reflected in so many different views of its meaning) in practice renders it unusable⁴.

In the context of regulating legal services, a number of statements can be found which offer a definition. For example, Lord Hunt in his final report on regulation in legal services⁵ referred to "an aggregation of the individual and corporate interests of everyone within a given territory within which it must be the role of government and its agencies to arbitrate as and when those interests conflict or collide". The Legal Services Board (LSB), in its statement of the meaning of the regulatory objectives in section 1 of the Act, states that the public interest "includes our collective stake as citizens in the rule of law and in society achieving the appropriate balance of rights and responsibilities"⁶. Perhaps not surprisingly, the Board's view is shaped in terms of legal services.

In my view, 'the public interest' is necessarily a broad concept, and even in the context of regulating legal services must not be narrowly confined to any sectional interests or to apparently more relevant (that is, legal) territory. In other words, even in the context of regulating legal services, we should not limit our conception to a notion of the public interest that supports or justifies that regulation, but should instead look at the way in which the regulation of legal services can protect and promote the public interest. After all, section 1 of the Act is not expressed as justifications *for* regulation but rather as objectives *of* regulation.

3. The public interest and regulation

Notwithstanding the broader expression of the regulatory objectives, one of the central issues here (and in the context of regulation generally) is that 'the public interest' is used as a reason (or a foundation on which) to justify regulatory intervention in otherwise private activities. In other words, the ability of individuals or organisations to do as they wish is constrained in some way to achieve broader objectives valued by society. We ought therefore to be clear about the basis on which that intervention takes place.

It is naturally tempting to portray the public interest in contrast to narrower sectional interests (such as consumers or providers, or – in the case of legal services – perhaps clients, lawyers, or judges). Clearly, the public interest requires a collective or aggregate notion that takes us beyond sectional interests. But how is that collective best expressed: 'the public', 'society', 'the community'? Debate in recent years about the use, purpose and efficacy of super-injunctions, and about press regulation, has arguably served to demonstrate that the public interest cannot simply be equated with matters in which 'the public' show an interest.

⁴ Cf. Sorauf (1957: 638): "Its willingness to serve all parties makes it useful to none".

⁵ Hunt (2009), p. 32.

⁶ Legal Services Board (2010), p. 3.

Regulation also typically results from an interplay of politics, law and economics. Politicians generally decide that regulatory intervention is required; the legal system and lawyers give effect to the political intention; and increasingly economics has provided the lens through which regulators justify their actions. It is not clear, however, that each of these disciplines understands the need, intention or consequence of regulation in exactly the same way. Indeed, the 'democratic' intention of politicians might well be misinterpreted by lawyers, economists and professional regulators to result in very different outcomes to those intended by the policy-makers.

Nevertheless, it seems to me that the interplay of politics and law provides a helpful starting point. Politicians in a democracy require an electorate, and law is confined to a jurisdiction. In both cases, there is an element of territorial belonging. There must be a 'society' which gives politicians a mandate to act on its behalf, and over whose members the law can claim jurisdiction. This must, surely, provide a real sense of who 'the public' must be conceived to be in any notion of the public interest. Further, on this view it cannot be simply a majority of 'the public' to whom we refer (thus potentially excluding minority interests): ascertaining 'the public interest' is not a head-counting exercise. Nor should it refer only to those currently within the society, but must somehow take account of those who will or might join at some point in the future (for instance, from later generations, or from different societies)⁷.

There must, then, be some sense of a collective or society to which we can attach the idea of 'the public interest'. This is not without difficulty. The remit of the regulatory application in question will presumably clarify the extent of the community to which we must attach 'the public interest'. We cannot refer only to local communities in the context of national regulation (say, of utilities or legal services), though we might do so in relation to the regulation of footpaths or refuse collection. Considering the meaning of 'the public interest' in relation to EU Directives or international treaties adds a further dimension to decision-making that might well transcend even national considerations of the term.

As the Legal Services Institute's second paper on reserved activities explains⁸, much regulation is aimed at addressing 'market failures'. These are overtly *economic* considerations to justify the regulation of private actions and property rights in the public interest. Thus, the underlying belief of market economies is that competition is a good thing and will lead to profit-maximising behaviour, which will in turn increase utility for consumers and wealth for producers. This often results in regulation to prevent or restrict behaviour that is likely to interfere with effective markets and competition: externalities and monopolistic actions are discouraged; transparency and symmetry of information are encouraged.

But self-interested profit-maximising behaviour, while good for some, might not be inherently good for all. Even regulated economic activity is quite capable of undermining or damaging the institutional fabric and well-being of society (as the global financial crisis has demonstrated only too well). As Feintuck puts it (2004: 15 and 17):

If the activities of private entities in practice result in damage to the democratic fabric of society, by restricting the ability of others to act as citizens, they should expect such activities to be challenged or indeed curtailed, and economic forces should not remain unconstrained.... In so far as corporate activity and other exercises of private property rights cut across the fundamental democratic expectation of equality of citizenship, the legitimacy of the exercise of such power becomes highly questionable, and the need for regulatory intervention justified.... There is no pressing reason why ... private economic interests should be allowed to override automatically a democratically grounded

⁷ This is a reflection of Edmund Burke's view of society as "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society" (Burke (1999), p. 368).

⁸ See LSI (2011), App. 2.

concept of public interest ... but, unfortunately, the citizenship-oriented account of the public interest has been far well less articulated than the economic version.

This quotation encapsulates well the discomfort felt by many in the emphasis placed by the Department for Constitutional Affairs in its White Paper on legal services – ‘putting consumers first’⁹ – and (regrettably, in my view) is an emphasis often repeated by the LSB. To put consumers or the private economic interests of consumers first could lead, in Feintuck’s terms, to the economic view overriding the citizenship or democratic view. Indeed, it also runs the unfortunate further risk of translating “the language of need, vulnerability or harm into the language of market failures or market distortion” (Morgan, 2003: 3). Feintuck continues (2004: 18):

The challenge now ... is to move beyond a model of ‘socially ignorant markets’ to a situation where social responsibility finds a position in the marketplace as a non-commodity value with a standing equal to other more readily quantifiable economic or monetary values.... This ... must imply the existence of a set of moral values and principles underpinning the polity, which look beyond the calculation of private interests, and assumes the existence of a legitimate public sphere of activity ... [and establishes] the institutions of the state, as opposed to the institutions of the market, as the legitimate forum in which conflicting claims and interests are to be resolved in the interest of the community.

In other words, regulatory intervention on economic grounds to encourage competition is legitimate; but so is intervention to control competitive behaviour which undermines the fabric of society. To encourage the latter is to expect a values-based or moral foundation for intervention alongside – or even to supersede – a strictly economic one. On this view, there would be ‘a’ public interest in protecting and promoting the interests of consumers but not at the expense of protecting and promoting ‘the’ public interest in citizenship and the democratic fabric of society. There is a public interest in competition and consumerism, but these might lead to behaviours or outcomes that are not ultimately *in* the public interest.

A value judgement might therefore conclude that regulation to protect or promote ‘the’ public interest is required even though such regulation prohibits or curtails certain economic or competitive activities. Equally, a value judgement might conclude that it is a legitimate promotion of the public interest to allow those activities to continue. But a value (or moral) judgement it is.

4. The public interest and a moral compass

The issue of the public interest being underpinned by a set of values is therefore important. The challenge is perhaps not so much that the public interest cannot be conceived without an understanding of the values that underpin it, but that it is too often prayed in aid without any attempt to articulate exactly and explicitly what those values are. It seems to me that this points to a real dilemma in the regulation of legal services. Part of the reform process instituted by Sir David Clementi and the Legal Services Act was intended to give greater sway to market forces in the delivery of legal services. We should therefore understand whether, in the context of legal services, the values that underpin those forces contribute positively or not to the broader public interest.

In 2009, Blond noted: “Since markets are essentially amoral, it follows that they should be directed by a moral account of what we want them to achieve”¹⁰. On this view, allowing markets to

⁹ The Legal Services Act, in s. 1(1)(d), has “protecting and promoting the interests of consumers” as just one of eight regulatory objectives. On the ‘hierarchy’ of these objectives, see LSI (2011), para 1.10, and para 4 below.

¹⁰ Satz suggests a different view (2010: 65, emphasis in original): “some people think that the great strength of a market is *moral*: the way that it holds people responsible for their own lives and choices. On the moral view, the market holds each of us responsible for our market choices, while at the same time ensuring that the benefits we obtain from these choices depend on the costs and benefits of those choices to others”.

determine behaviour (with regulatory approbation) would, without that moral account, at best reflect values of amorality. However, it would seem to me that such an approach to the public interest would represent a rather partial¹¹ project – especially if, as Feintuck suggests, market behaviour might in some respects damage the fabric of society. I should like to think that there would be no considered articulation of the public interest that required us to take that risk. Rather, I would advocate that any moral judgement made from a broader view of the public interest than simply endorsing market competition would undoubtedly suggest that any such damage to the fabric of society should not be tolerated.

Again, Feintuck highlights the nature of the contest (2004: 61):

In the present era, it is a virtually unquestioned belief that market forces are the best way to deliver goods and services. That said ..., the manner in which markets operate will, by their nature, tend to produce results more favourable to those who are able to exert most power in the marketplace. Thus, in an era in which market principles are increasingly adopted in the supply of services which relate intimately to the ability to act as a citizen (for example health care, education,...¹²) it will be necessary to ensure that the operation of such markets, or quasi-markets, does not tend to reproduce or exaggerate inequalities in the ability to enjoy expectations of citizenship.

The previous familiar (and widely accepted) underpinnings of rationality and the efficient markets hypothesis have been shown to be fundamentally flawed by the work of behavioural economists and the experience of the global financial crisis. I believe, therefore, that it is right to question the potential dominance or influence that markets, competition or consumerism might otherwise have on the determination of the public interest in regulation. Adopting a notion of a 'moral compass' should require us to take a broader view than the merely economic, particularly if the amoral effect of those market forces might result in damage to the wider fabric of society. This view is consistent with Satz's belief that (2010: 34-35):

we must expand our evaluation of markets, along with the concept of market failure, to include the effects of such markets on the structure of our relationships with one another, on our democracy, and on human motivation.

Satz makes the point that markets typically reflect the virtues of allocative efficiency and individual freedom of choice (2010: 17). However (2010: 16, emphases in original):

markets ... are socially sustained; *all* markets depend for their operation on background property rules and a complex of social, cultural, and legal institutions. For exchanges to constitute the structure of a market many elements have to be in place: property rights need to be defined and protected, rules for making contracts and agreements need to be specified and enforced, information needs to flow smoothly, people need to be induced through internal and external mechanisms to behave in a trustworthy manner, and monopolies need to be curtailed....

For this reason it is mistaken to consider *state* and *market* to be opposite terms; the state necessarily shapes and supports the process of market transacting.... The fact that laws and institutions underwrite market transactions also means that such transactions are, at least in principle, not *private* capitalist acts between consenting adults ... but instead a *public* concern of all citizens whether or not they directly participate in them.

Satz concludes that "in order to understand and fully appreciate the diverse moral dimensions of markets, we need to focus on the specific nature of particular markets and not on the market system" (2010: 17). However, Corning encourages us to look beyond markets, and to consider that "reciprocity, a sense of fairness, and even some degree of altruism are bedrock human values that also shape our economic and social behaviour.... Indeed, some of what we do routinely – like aiding

¹¹ In both its 'biased' and 'incomplete' meanings.

¹² We could, at this point, add "access to justice or legal aid" to emphasise the same point in a legal context.

others in need – could be considered highly irrational from a conventional economist's perspective" (2011: xi).

Corning (2011: 153) offers an attractive view about the 'deep purpose' of a fair society, which takes us further along the journey of seeking a moral compass (or, at least, a societal one)¹³:

The deep purpose of a human society is not, after all, about achieving growth, or wealth, or material affluence, or power, or social equality, or even about the pursuit of happiness.... It is about how to further the purpose of the collective survival enterprise¹⁴. It ... requires us to give priority to the overriding importance of social cooperation without denying the contingent benefits of competition. However, it is also important to recognize differences in merit and to reward them accordingly¹⁵. Finally, there must also be reciprocity, an unequivocal commitment from all of us to help support the survival enterprise, for no society can long exist on a diet of altruism. Altruism is a means to a larger end, not an end in itself, as some of our theologians and moral philosophers would have us believe. It is the emotional and normative basis of our safety net.

These lines of thinking lead inevitably to the inference that we should not regard market forces, competition, or consumer interests as complete encapsulations of the public interest – even in areas of activity where those factors might be thought to be the principal objectives. I do not believe that law (the rule of law, the institutions of law, the administration of justice, access to justice, and authorisation to practise) can have those market factors as their principal objectives; if I am right in this, the pursuit of 'the public interest' in law and legal services must seek a broader foundation – *even if* some elements of the fabric of society might be improved by the effects of competition.

For me, the institutional fabric of society and the notion of 'citizenship', as well as the ability of citizens to exercise the rights and responsibilities inherent in participation in society, emerge as key components of any discussion about a broad meaning of 'the public interest'. As Feintuck writes (2004: 210): "By definition, citizenship ... seems to imply membership of a political community¹⁶, the continuation of which can be considered to be a value greater than and beyond the aggregated interests of individuals"; and (2004: 214) it "might properly be characterized as 'the right to have rights': not an end in itself but rather a compact whereby the individual, in return for acknowledging responsibilities towards the collectivity that is society, can claim civil, political and social freedoms and powers to serve their own best interests".

Feintuck (2004: 17, see paragraph 3 above) regards equality of citizenship as a fundamental democratic expectation. The ability of citizens to interact as equals is also important to Satz's conception of markets. She writes that equal status is dependent on formal legal freedoms and a set of social rights (including health care and education), and says (2010: 100-102):

Citizenship gives to all within its ambit a single set of rights, irrespective of their wealth or family origin. While markets can be supportive of equal citizenship understood in this sense, whether or not they are so depends on the background circumstances, property rights, and regulations within which they operate....

¹³ Others have also written and spoken about the (moral) limits of markets: see, for example, Kuttner (1996), Sandel (2012) and Plant (2012).

¹⁴ To be clear, Corning also intends this to include a shared biological objective of survival and reproduction (2011: 153).

¹⁵ In a later passage that would have some resonance in discussions about bankers' and executive pay, Corning writes (2011: 157, emphasis supplied): "merit, like the term fairness itself, has an elusive quality: it does not denote some absolute standard. It is relational and context-specific, subject to all manner of cultural norms and practices. In general, it implies that the rewards a person receives should be proportionate to effort, or investment, or contribution.... Indeed, in the economic sphere merit is not simply a matter of what the recipient thinks is fair treatment but reflects what is socially acceptable. As with fairness in general, merit very often has to split the difference. *When you are asking others to reward you for your efforts, they are entitled to be stakeholders in the decision*".

¹⁶ As Satz neatly puts it (2010: 102): "the regulative idea of democracy is that citizens are equals engaged in a common cooperative project of governing themselves together".

If our concern is with avoiding outcomes that undermine the conditions for citizens to interact as equals, then there is a powerful argument for guaranteeing access to a certain level of goods – education, health care, opportunities, rights, liberties, and physical security¹⁷ – even if some citizens would prefer to trade and sell these goods, or the opportunity to access these goods, to the highest bidder.

Advancing competition and consumer interests might therefore unleash market forces that achieve some 'public interest' benefits (such as easier and more widespread access to better, perhaps cheaper, legal services). But if those benefits are achieved at the expense of other public interest objectives (such as the democratic fabric of society where some citizens are excluded from participation, or are denied access to services because of greater imbalances of power and resources resulting from competition), then one should arguably conclude that those 'public interest' benefits are not, in fact, *in* 'the public interest'.

The potential conflict between market forces and other guiding principles can only be resolved by a very clear sense of what 'the public interest' is seeking to protect, preserve or promote. It might be argued that the regulatory objectives in section 1 of the Legal Services Act are, in their various expressions, all aspects of 'the public interest' to be advanced by regulators and others in the implementation of the Act. However, there is also a potential for conflict among those objectives. Indeed, the separate articulation of a public interest objective and a consumer interest objective inevitably suggests that the two are not coterminous, and that the public interest is not entirely represented by the consumer interest (or vice versa).

Where any conflict of regulatory objectives materialises, its resolution must presume that some interests prevail over others. There can be no doubt in my mind that the prevailing interest must always be the public interest. This is why, in the second paper on reserved legal activities, the Institute expresses the view¹⁸ that, despite ministerial reluctance to prioritise the regulatory objectives in the Act, "protecting and promoting the public interest" in section 1(1)(a) should be the predominant objective to which all others are subordinate.

The prioritising of objectives is not merely a theoretical exercise, but very much one of setting the 'moral compass' of the regulatory framework to avoid the amorality of markets or the adoption of any other regulatory philosophy which fails to identify its underlying values. As Feintuck says (2004: 23):

The extent to which some ... factors are prioritized over others will determine the objectives for regulation, though it is possible that the original justification, or more likely combination of justifications for regulatory intervention, may be only a hazy memory by the time regulatory objectives and strategies are determined and implemented. In the absence of some prominent overarching value system, there is a significant risk that regulatory intervention will become subjective and unpredictable.

The absence of an 'overarching value system' from the policy deliberations of an oversight regulator (in the case of legal services, the LSB) would be deeply disturbing. Where the regulator's remit covers the very structure of society in terms of its legal and justice system, such an absence runs a very real risk of the 'democratic fabric of society' being damaged. Indeed, Feintuck goes so far as to suggest that (2004: 27): "Where public or private policy conflicts with fundamental democratic interests, then it may meaningfully be said to run counter to the public interest".

It seems to me, therefore, that to prioritise 'the interests of consumers' in regulatory philosophy and policy is (at least in relation to legal services) wrongly to conflate consumer and public interests, and

¹⁷ This list refers to public goods (of the kind that will form part of my own definition of 'the public interest' in para 5 below, though I disagree that 'opportunities' should be included, since they are a broad and nebulous idea): I would argue that the rule of law and the administration of justice are implicit in Satz's view here.

¹⁸ See LSI (2011), para 1.10.

therefore to risk not fully protecting or promoting the public interest. This, in turn, begs a further question about how far and in what respects the public interest extends beyond the consumer interest. The question is important because it seems to me that it is in an understanding and articulation of the overarching value system encapsulated by the expression 'the public interest' that we must find the moral compass that guides regulation of legal services beyond a narrow, atomistic, sectional, or market-based, conception.

5. The meaning of 'the public interest'

In order to develop a broad notion of the public interest, then, it would seem that it should:

- represent interests that are collective rather than merely sectional;
- be connected in some way to the 'fabric' of society as well as to citizenship and participation within it;
- promote objectives and values that extend beyond those which are principally economic, competitive or market-based;
- necessarily be contextually bound by geography, constituency and culture; and
- take account of the interests of all (including future) citizens.

It is also important to acknowledge that, as a consequence of these factors, the nature and content of the public interest will change with, and over, time. In fact, it is important to recognise this 'conditionality' in the concept, given that it will reflect a current set of values and preferences. As Mates & Barton express it (2011: 187):

When considering the issue of public interest, there will also be a subconscious tussle between egoism and altruism, between individualism and collectivism, and on a political level between a liberal and social (or patriotic) approach, between rightist and leftist values, and between a conservative and liberal approach to human rights. Assessments of the content of the concept of 'public interest' are thus inextricably bound up with the assessor's¹⁹ inner preferences.

Against this background (and recognising the influence of my own inner preferences²⁰), my articulation or definition of 'the public interest' would be as follows²¹:

The public interest concerns 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 well-being²², and to their legitimate participation in society.

On this definition, the public interest has two principal dimensions: the fabric of society itself; and the participation of citizens in society. The fabric of society is maintained by fundamental issues such as national defence and security; public order, the rule of law, and the administration of justice²³; protection of the natural environment; effective government²⁴; and a sound economy

¹⁹ See further their views in paragraph 6 below of the critical role played by an independent judiciary in making such assessments.

²⁰ I also stop short of Mates & Barton's conclusion that "An exact definition of 'public interest', reached purely by formal legal procedures, is evidently impossible" (2011: 187).

²¹ This conception of the issues has been helped by Bell (1993: 34), Corning (2011: ch. 5) and Leveson (2012). The 2011 issue of this paper has been cited by Baroness Deech of Cumnor as "the best attempt at [filling the gap left by statute and regulatory reviews in not giving regulators a single goal to pursue] I have come across" (Deech, 2012). She also suggests that "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 ... and one can also dismiss the notion that economic regulation is the major, or only form of regulation".

²² There must be a public interest in ensuring that the basic needs of all citizens are satisfied.

²³ In my view, the administration of justice is necessary to maintaining the rule of law and securing access to justice. It is therefore a public interest objective in its own right, and is separate from what might be regarded as a broader

(including the free movement of people and capital). Participation²⁵ is then secured and encouraged by personal and public health²⁶, education, and welfare (including shelter and nurturing of children and dependents); access to justice²⁷; the protection of physical safety, human rights, personal autonomy²⁸ and freedom of expression²⁹, and equality³⁰; and reliable personal, public and commercial relationships³¹. Just as the public interest should take account of future citizens, so participation must protect minority or weaker interests as well as promoting the activities of the majority³².

The view taken by citizens of what is regarded by them as fundamental will change over time; and of course whether something is for the collective benefit or good of society (in the sense of a continuing political community) is itself a matter of judgement. Indeed, it is entirely possible that no one person or institution will be fully aware, at any given time, of all the factors that contribute to the fundamentals of society and citizens' participation in it. Nevertheless, governments, judges and regulators are, arguably, elected or appointed as the transitory arbiters of that judgement – provided that they are taking a sufficiently broad and balanced view of their remit, as elaborated here. And provided also that they are sufficiently accountable for their judgements and actions.

The Leveson report, quite rightly, emphasises the role of the media in both dimensions of the public interest. A 'free press' is important in "acting as a check on political and other holders of power" (2012: 65); it carries out a 'watchdog role'³³ in securing greater transparency and accountability, and so plays a part in maintaining the integrity and the fabric of society. It also plays a role in informing and educating the public, to improve their understanding and decision-making, and so improves the nature and quality of citizens' participation in society.

The 'elevation' or primacy of human rights in recent years is an interesting dimension to the public interest. In principle, I suspect that few would argue that the conception of human rights reflects a welcome and proper recognition of certain basic needs. What is problematic is not the statement or achievement of these rights, but their presumed status as natural or absolute rights. Corning expresses the point in this way (2011: 154-155):

consumer interest in *cost-efficient* administration. The Leveson report also helpfully refers in this context to "the proper independence and accountability of law enforcement agencies" (2012: 70).

²⁴ Cf. footnote 36 below for the implications of context and culture on government.

²⁵ The Leveson report emphasises to "the public interest in self-determination" (2012: 70).

²⁶ This includes physical and mental health; sleep; reproduction; water; respiration and clean air; waste elimination and disposal; nutrition; and thermoregulation (i.e. the ability to maintain body temperature).

²⁷ On access to justice, see LSI (2012).

²⁸ Meaning that "individuals must have a sphere in which they can exercise individual choices without interference from others (including the state)": Leveson, 2012: 73.

²⁹ The Leveson report refers to freedom of expression as "an aspect of a broader public interest in the autonomy, integrity and dignity of individuals [which] is a dimension to the public interest which has a very ancient history in the UK and a special place in public imagination. It underlies the iconic status of *habeus corpus* as an early guarantee of personal liberty, and it underlies the special importance of freedom from interference in home life: 'an Englishman's home is his castle'." (2012: 73).

³⁰ The Leveson report would probably add privacy, including the protection of personal data. As Lord Nicholls of Birkenhead said in *Campbell v. MGN Ltd* [2004] 2 AC 457, HL: "A proper degree of privacy is essential for the wellbeing and development of an individual", and therefore (I would add) to their legitimate participation in society.

³¹ Leveson would also include confidentiality, and the protection of reputation and of intellectual and other property rights (2012: 70).

³² Mates & Barton suggest (2011: 183): "Although there are no universally accepted criteria, reasons for which one party might be described as weaker include the economic circumstances of the contracting parties, their professional skills, and the fact that one party has no choice but to enter into the contract".

³³ It is very important, however, to recognise that even this role is carried out within the broader objective of the rule of law, which protects the public from the exercise of arbitrary power: "All who have the privileges and responsibilities of holding power to account, including police, politicians and press, must themselves champion and uphold the accountabilities they proclaim for others. The rule of law, in other words, 'guards the guardians' and is a guarantor of the freedom of the press, not an exception to it" (Leveson, 2012: 66).

our basic needs are not a matter of free choice. A failure to provide for these needs inevitably causes 'harm.' If there is 'a right to life,' ... it does not end at birth: it extends throughout our lives. Life is prior to liberty, and prior to property.... Life comes first, and we cannot be free if our basic needs are not satisfied. We therefore have a sacred obligation to provide for the basic needs of all members of our society.

Should a moral claim on behalf of our basic needs be considered a natural right?.... As many critics have pointed out, any claims for natural rights are, in reality, only social constructs – norms or codified laws that are socially accepted. So if we agree to accept the principle that there is a mutual obligation to ensure that the basic needs of all our people must be satisfied and that we will do so collectively for those who are unable, for whatever reason, to provide for their own needs, then it can rightly be treated as a social rather than a natural right.

The implications of this are that human rights and other basic needs are not absolute and immutable but are, like other areas of the public interest, context-specific, and dependent on prevailing culture and values that give rise to social acceptance. These can change with time and circumstances.

The overriding values in my conception of the public interest lie in the preservation of society and natural resources for the future benefit of all, and in belief in the rule of law, equality of citizenship and opportunity, and full participation in society based on fairness and a balance in relationships such that one cannot inherently take advantage of another³⁴. It is a conception that is consistent with Corning's notion that a 'fair society' is underpinned by *equality* in the meeting of basic needs, *equity* (based on merit³⁵) in the distribution of any surplus resources beyond those required to meet the basic needs of all, and *reciprocity* in the proportionate contribution by citizens to society in accordance with their abilities (2011: 154).

Indeed, it is the notion of fairness (encapsulated in the achievement of equality, equity and reciprocity) which might be most needed when different aspects of the public interest are in conflict: this is the basis of the moral or societal compass referred to in paragraph 4 above. But this perhaps begs a related question: should we speak of 'the public interest' or a number of 'public interests'? The Leveson report is quite clear in referring to 'competing public interests' (2012: 69):

The 'public interest' is therefore not a monolithic concept.... It will often be a matter of balancing a number of outcomes which would be for the common good, but which cannot all be achieved simultaneously. In a democracy, this is principally a role for Government that is, for example, used to grappling with a balance between the public interests in public spending and in low taxes, in liberty and in security, in high accountability and low bureaucracy.

The report is, however, at pains to emphasise that the public interest in a free press does not subordinate all other expressions of the public interest to the assessment of the media – in other words, that the totality of 'the public interest' cannot be determined and represented only by the judgement of the media. For example (2012: 71):

The democratic rationale for freedom of expression in relation to individuals is also different from the democratic interest in a free press. It encompasses the individual's right to receive information, impart his or her own views and participate in democracy on an informed basis. Democracy benefits from a free press where the press, taken as a whole (a sum of partisan parts), communicate a plurality of views and provide a platform for public debate³⁶.

³⁴ The ability to take advantage could relate to an imbalance or asymmetry of power or information (seen as a market distortion by economists, for example). Equally, "a free debate cannot happen if some participants simply drown out others and prevent them from speaking" (Leveson, 2012: 72).

³⁵ Cf. footnote 15 above.

³⁶ The appearance of 'democratic' and 'democracy' in this passage is interesting. Effective government is a key part of my conception of the public interest. However, it is important to emphasise the point made above about the context-specific nature of the public interest, as well as the effects of culture and time on it. Thus, while in 21st century Britain, we might regard democracy as the most effective form of government, democracy is not inevitably regarded as such by

The Leveson report does not seek to define the meaning of 'public interest'. It accepts (as I do) that it is a multi-faceted concept and that elements of it might sometimes be in conflict or tension with each other. Part of the balancing that would be required to determine which aspect of the public interest should prevail in any given conflict would still result in an expression of 'the public interest' (including the public interest that a particular element should prevail). I am not therefore persuaded that it is necessary to distinguish between 'the public interest' (with one or more elements that might at different times and in different circumstances prevail over other elements) and multiple 'public interests' one of which might similarly prevail.

That said, in my own conception, if there is a conflict or tension between maintaining the fabric of society and securing the legitimate participation of citizens in it, the former should prevail on the basis that without the fabric of society participation is less meaningful and secure. In simple terms, therefore, interests in freedom of expression and personal autonomy must be subordinate to national security, public order and the administration of justice. Where there are conflicts within elements of the public interest, then it seems to me that Corning's notions of equality, equity and reciprocity might provide a basis for resolution.

6. Legal services regulation and the public interest

Applying the notion of the public interest articulated in paragraph 5 above, the regulation of legal services would be protecting and promoting the public interest when it:

- (1) positively upholds those elements that protect, preserve or promote the democratic fabric of society; and
- (2) protects or enhances, or removes or reduces impediments to, the ability of citizens, on an equal basis, to exercise their claims to civil, political or social freedoms and participation.

In the context of the regulatory objectives in the Legal Services Act, this would primarily involve supporting the constitutional principle of the rule of law (including the administration of justice); improving access to justice; and encouraging independent, strong and effective legal advice and representation. These are specifically 'legal' outcomes of the regulatory objectives. They are founded on a view of the law as an abstract set of rules and a system for upholding them.

However, beyond this, society also needs to encourage reliability and stability in social relationships (which are central to good social order and commerce). I would therefore go further and suggest that the public interest should also extend to promoting and protecting the UK and its justice system as a legal forum, as well as to advancing the commercial interests of 'UK plc'.

There is much evidence that, in the global marketplace, the UK is regarded as a 'safe' place to do business, and English law is often the governing law of choice in multinational commercial transactions. That this is the case was emphasised in May 2011 by the Secretary of State for Justice when he said³⁷:

There are few areas where Britain is stronger than in the law. Whether it's in the provision of legal services, the use of our courts for the resolution of disputes, or the application of English law for contracting, the UK is truly a global centre of excellence. People turn to us because they know they will find world class, highly specialised practitioners and expert judges in the specialist courts. They

all societies or at all times. As such, 'democracy' will not necessarily always be a facet of the public interest, while 'effective government' will.

³⁷ The quotations in this and the following paragraph are taken from a Ministry of Justice press release of 16 May 2011 (UK cements position as 'centre of legal excellence').

understand that a decision from a court in the UK carries a global guarantee of impartiality, integrity and enforceability.

This was also emphasised at the same time by the Minister for Trade and Investment, who said: "The UK's stable legal and regulatory environment is one of the main reasons that so many overseas firms choose to invest here. It is an area in which we truly are world-leading." The Minister also spoke of the need to ensure that the legal professions "remain at the core of the UK offer and that we highlight the key role they have to play in our future economic growth".

There can therefore be no doubt that public policy requires that the legal system is protected and promoted, and that accordingly the public interest would insist that the underpinnings of this system are preserved from market and other forces that might undermine them. Genn expresses this point very well in the following paragraph (2010: 3-4):

the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies. Bargains between strangers are possible because rights and responsibilities are determined by a settled legal framework and are enforceable by the courts if promises are not kept.

Confidence in the English legal system is therefore critical to our continuing social stability, global competitiveness, economic success and tax revenues. In part, this confidence stems from the UK's adherence to the rule of law, as well as from its reputation for an independent and impartial judiciary and the standing of the professional qualifications and performance of its lawyers. This underpinning of independence and impartiality is well expressed by Mates & Barton (2011: 180), who refer to the public interest as

'higher objective values' which are protected for the benefit of society (the public), even though this benefit may currently be different from the mere sum of the individual interests of the members of society. This is a concept that makes it possible to modify the view of the democratically elected majority in the interest of 'higher goals'. Yet these 'higher goals' do not correspond with the current sum of goals of individuals; they must be distinguished and defended by an authority independent of the momentary sum of individual interests.... A key role in the protection of this concept of 'public interest' will therefore be played by the judiciary, particularly in the protection of fundamental rights; a necessary condition for this role is the principle of judicial independence and the non-removability of judges by other branches of state power.

My belief, therefore, is that regulatory intervention in the public interest is justified (1) to secure an outcome for the benefit of society as a whole (expressed in terms of building, protecting or maintaining the 'fabric' of society or of 'UK plc'), and (2) to promote and secure the participation of individual citizens in society. How this intervention might be framed in the context of legal services – and particularly in relation to the reserved legal activities – is considered in detail in the Institute's second paper on reservation (LSI, 2011).

As well as regulatory interventions intended explicitly to further the two types of objectives identified above, we should also expect to see intervention which is intended to avoid or address what Satz (2010: 94-98) describes as 'noxious markets'. This would mean markets which:

- (1) produce outcomes which are extremely harmful or detrimental either for the participants themselves or for third parties (such as removing or inhibiting the ability of citizens to pursue their rights);

- (2) are extremely harmful to society, by undermining the social framework needed for citizens to interact as equals or by undermining the capacities that individuals need to claim rights or participate in society (such as putting access to justice beyond the reach of all but the very rich);
- (3) are characterised by very weak or highly asymmetric knowledge and agency (some asymmetry of information and power is often associated with professional services markets: cf. LSI (2011), Appendix 2, paragraph 2.2.1): what would make the market noxious is such a degree of asymmetry that leaves the consumer with no meaningful bargaining power); and
- (4) reflect the underlying extreme vulnerabilities of one of the transacting parties (perhaps by providing access to legal services only to the literate or those with technological capacity).

Importantly, Satz writes (2010: 99):

markets raise questions of political philosophy as well as of economics. Markets can damage important relationships people have with one another by allowing people to segment and opt out of a common condition. A central feature of most noxious markets on my approach has to do with their effects on the relationships between people, particularly the horizontal relationship of equal status. For two people to have equal status they need to see each other as legitimate sources of independent claims and they need to each have the capacity to press their claims without needing the other's permission to do so. This requires that each have rights and liberties of certain kinds as well as very specific resources.

There are presently many examples in legal services of significant imbalances of knowledge, power, and resources. Part of the debate at the interface of politics, law and economics needs to address the value judgement that these imbalances are, or might become, the outcome of noxious or simply amoral markets that require regulatory intervention. In this way, regulation in the public interest might be able to redress the balance and restore equality of relationships, equity in the resolution of conflict and disputes, and the proper participation of citizens in society (founded on reciprocity) and in their democratic rights, and the fundamental fabric and well-being of society.

7. Conclusion

The public interest is, inevitably, a multi-faceted concept. The view advanced in this paper is that it must be connected to a 'society', transcend sectional interests, and be explicitly underpinned by an overarching value system. The value system that I adopt here (based on the quest of a 'fair society' for equality, equity and reciprocity) is not one that is driven by the sectional interests of consumers, and does not privilege a philosophy of economics, market competition or consumerism to the detriment of society as a whole. Rather, it is one which upholds those elements of collective endeavour that protect, preserve or promote the democratic fabric of society, and which seeks to protect or enhance, or remove or reduce impediments to, the ability of citizens to exercise their legitimate claims to civil, political or social freedoms and participation.

The definition which is offered here is that:

The public interest concerns 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 well-being, and to their legitimate participation in society.

Regulatory intervention to protect and promote the public interest is then justified if it secures the fabric of society as well as the participation of individual citizens in it.

Following the line of thinking advocated in this paper does not mean that there will never be any argument about how regulation to protect or promote the public interest might best be achieved, or that it will be impossible for opposing sides of a regulatory proposition to claim that the public interest supports their (mutually inconsistent) conclusions. However, it should encourage better articulation of the basis for the conclusion and the moral values that underpin it, and so enable more informed testing of the assertion made. This is surely preferable to a broad-brush assertion that any given proposition is or is not 'in the public interest'.

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