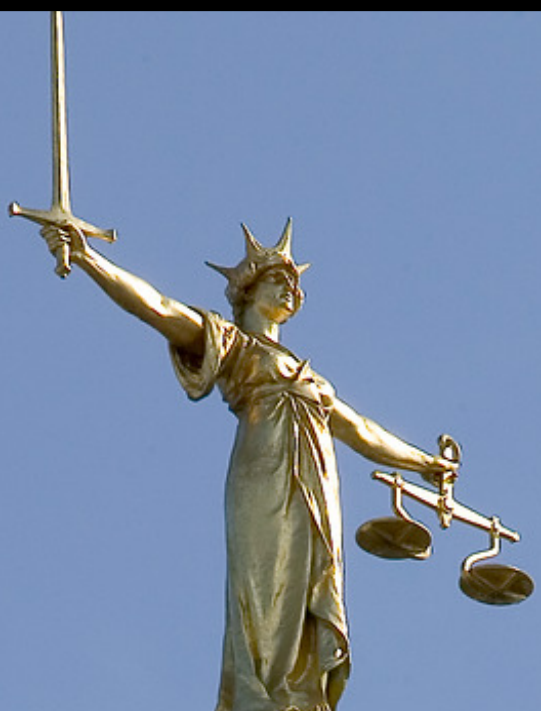
UCL CENTRE FOR ETHICS AND LAW
UCL FACULTY OF LAWS



INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

The Rationale for Legal Services Regulation

Working Paper LSR-1 | March 2020

Stephen Mayson

Centre for Ethics & Law
Faculty of Laws, University College London
Bentham House
4-8 Endsleigh Gardens
London WC1H 0EG

www.ucl.ac.uk/laws

INDEPENDENT REVIEW OF LEGAL SERVICES REGULATION

WORKING PAPER LSR-1 | March 2020

THE RATIONALE FOR LEGAL SERVICES REGULATION

Stephen Mayson[1]

1. Introduction

The Centre for Ethics & Law in the Faculty of Laws at University College London has undertaken a fundamental review of the current regulatory framework for legal services in England & Wales. Further details and the full terms of reference are available at https://www.ucl.ac.uk/ethics-law/news/2018/jul/ucl-centre-ethics-law-undertake-regulatory-framework-review.

The independent review has explored the longer-term and related issues raised by the Competition and Markets Authority (CMA) market study in 2016 and its recommendations, and therefore intended to assist government in its reflection and assessment of the current regulatory framework.

The Review's scope reflected the objectives and context set out in the terms of reference, and included: regulatory objectives; the scope of regulation and reserved legal activities; regulatory structure, governance and the independence of legal services regulators from both government and representative interests; the focus of regulation on one or more of activities, providers, entities or professions; and the extent to which the legitimate interests of government, judges, consumers, professions, and providers should or might be incorporated into the regulatory framework.

This project was undertaken independently and with no external funding.

This is the fourth of five Working Papers that address the issues and challenges raised by five fundamental questions for the Review:

(1) Why should we regulate legal services? (Rationale)
(2) What are the legal services that should be regulated? (Scope)
(3) Who should be regulated for the provision of legal services? (Focus)
(4) What are the tools of regulation? (Form)
(5) How should we regulate legal services? (Structure)

These Working Papers have been updated and reissued as the Review progressed.

The work of the Review has been helped by input from the members of an Advisory Panel[2]. Some of the published work and comments of Panel members are referred to and referenced in the working papers. However, the content of this working paper is the work of the author, and should not be taken to have been endorsed or approved by members of the Panel, individually or collectively.

1. The author has led the Independent Review, and is an honorary professor in the Faculty of Laws and the chairman of the regulators' Legislative Options Review submitted to the Ministry of Justice in 2015.
2. For details, see: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation.

2. Why should we regulate legal services?

Many goods and services available to the public are not subject to any specific regulation beyond the requirements of the general and consumer law. This suggests a prior question in relation to legal services: Is there something distinctive about legal services that requires sector-specific regulation?

The Competition and Markets Authority (CMA), in their legal services market study of 2016[3], summarise the 'baseline consumer protection regulation' (2016: paragraphs 2.8-2.14, and in more detail in Appendix E). This protection, which is all that would apply in the absence of sector-specific regulation, includes obligations on providers to provide certain information and to deal fairly with consumers, to supply services with reasonable care and skill, and to provide services at a reasonable price and within a reasonable time, while not misleading or being aggressive.

Remedies include unwinding a contract for services, and rights to damages, price reduction or repeat performance.

The CMA point out that these general consumer protections do not apply if the 'consumer' is seeking advice or representation in connection with a business. There are similar, but less extensive, provisions that apply in business-to-business services, and the main redress will be an award of damages.

The CMA's conclusion is that "baseline consumer law may be insufficient in certain circumstances" because (2016: paragraph 4.11):

> (a) First, consumers may not always be able to detect whether providers have failed to meet the standards established under baseline consumer law, because they either do not know their rights or find it hard to judge whether a professional has carried out an acceptable service. As a result, even where things do go wrong they may not enforce their rights by taking subsequent action against their provider.
>
> (b) Second, the mechanisms for redress provided under consumer law may not always be appropriate to resolve the detriment suffered by consumers following an instance of poor service by their provider.
>
> (c) Third, consumer law places no restrictions on who (whether an individual or entity) may provide legal services. As noted above, this may become an issue where the provision of high-quality legal services requires expert knowledge and skills.

In addition, the recent working group chaired by Lord Best on the regulation of property agents offered the following views about the relative merits of trading standards enforcement and sector-specific regulation (Best 2019: paragraph 16):

> the traditional approach … by passing laws and asking Trading Standards to enforce them will not, in our view, tackle the increasing number of complaints … and the pervasive lack of consumer trust. Trading Standards' role is reactive rather than proactive – they investigate after a problem has occurred. A regulator, on the other hand, could use tools such as a code of practice and mandatory qualification requirements to prevent the problem from arising in the first place. Trading Standards focus on individual cases of law-breaking and do not necessarily monitor or record more minor misdemeanours: this could mean [that those] who show a pattern of poor practice that falls short of clear illegality could go unnoticed. The engagement of Trading Standards teams also varies geographically due to limited resources in many areas. Finally, and perhaps most importantly, Trading Standards are rule-followers rather than rule-makers, and can tackle emerging issues in the sector only at the speed at which new regulations are brought into force.

3. See Competition and Markets Authority (2016).

In light of these assessments[4], the Review will proceed on the basis that general and consumer laws alone are not sufficient to protect consumers in their (often infrequent) purchase and experience of legal services and that sector-specific (or service-specific) regulation should therefore be considered at least in order to close any gap in protection.

In addition, legal services regulation can also address the issue of assuring the integrity[5] (and not just the technical knowledge and skills) of those who provide legal advice and representation, to which consumer law does not apply.

4. This conclusion was shared by the regulators in their Legislative Options Review (2015: paragraph 4.5), recorded in the quotation included at paragraph 4.2 below.
5. See also Arthur et al. (2014: page 8): "it is the actions and choices of individual lawyers that set the boundaries of their practice and, therefore, individual character and virtues matter".

3. The foundations of regulatory intervention

3.1 More than consumer protection

While insufficient consumer protection might justify additional and specific regulatory intervention in respect of legal services, previous work by the front-line legal services regulators in the Legislative Options Review[6] identified two principal reasons for sector-specific regulation (the public good and consumer protection). The CMA also acknowledged such wider reasons in their market study (2016: paragraph 2.4).

For the purposes of this Working Paper, the broader rationale is adopted. This is because the Legislative Options Review's formulation is founded on dimensions of the public interest, and the assumption here is that this must be the ultimate foundation of, and rationale for, legal services regulation.[7]

The proposition here is that the basis for regulatory intervention must provide the foundation for any framework, and that clarity about the justification for intervention is critical to assessing both current approaches and future options.

The starting point, then, is that 'the public interest' is offered as a reason (or a foundation on which) to support regulatory intervention in otherwise private activities. In short, public interest theory justifies regulation "as a corrective to perceived deficiencies in the operation of the market" (Ogus 2004: page 15).

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.

I am aware that there are alternative approaches to regulation, of which public interest theories are just one.[8] While not wishing to underestimate the value of the other approaches, I recognise that the public interest justification is accepted and adopted by the current principal stakeholders[9] (whether oversight or front-line regulators, or representative bodies).

It also strikes me as a sound foundation, given the pivotal roles of law and legal services in supporting the rule of law and the administration of justice. The Supreme Court of Washington State expressed it this way[10]:

> the basis of any regulatory scheme … must start and end with the public interest; and any regulatory scheme must be designed to ensure that those who provide legal and law related services have the education, knowledge, skills and abilities to do so. Protecting the monopoly status of attorneys in any practice area is not a legitimate objective.

Regulation typically results from an interplay of politics, law and economics.[11] Politicians generally decide that regulatory intervention is required; the legal system and lawyers give

---

6. See Legislative Options Review (2015).
7. I have previously explored the question of how to define and operationalise a concept of 'the public interest' in Mayson (2013). Much of what follows in this paragraph is taken from that paper, though the treatment here is not as full though perhaps now more nuanced.
8. Cf. Ogus (2004), chapters 3 and 4; Garoupa (2008); Baldwin, Cave & Lodge (2012), chapter 4; Lodge & Wegrich (2012), chapter 2; Stephen (2013), pages 12-20; Semple (2015), chapters 2 and 5.
9. Indeed, Semple observes (2015: 19, emphasis in original) that "legal services regulators in various developed common law countries generally provide *the same* set of explanations for why legal services need to be regulated".
10. See *In re Adoption of New APR 28 – Limited Practice Rule for Limited License Legal Technicians* (2012); available at: www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf .
11. Ogus writes (2004: 1): "We need to recognize that 'regulation' is fundamentally a politico-economic concept and, as such, can best be understood by reference to different systems of economic organization and the

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 variously interpreted by lawyers, economists and professional regulators to result in very different outcomes to those intended by the policy-makers.

3.2 Who constitutes 'the public'?

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, in turn, provide a real sense of how 'the public' must be conceived in any notion of 'the public interest'.

Further, on this view, it cannot be simply a majority of 'the public' to whom we refer (this would potentially exclude minority interests): ascertaining 'the public interest' is not merely 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[12].

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, perhaps, 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 requiring us to take into account the implications of our broader international interests.

3.3 Market failures

Regulatory theory suggests that intervention in the public interest is justified in order to remedy 'market failures' arising from otherwise private activities. Market theory assumes that consumers make informed choices on a more or less rational basis.[13] Market failure can therefore arise from the asymmetry of information as between a provider and the consumer. As a consequence, in the view of the CMA (2016: paragraph 3.9):

> consumers are unlikely to be able to judge the quality of the advice provided as part of legal service. The difficulty of observing quality directly can lead consumers to rely on

legal forms which maintain them." But there is a note of caution in Donelan (2012: 3): "Much of the modern literature on regulation is concerned with regulation in the public interest in relation to the functioning of markets. However, there is much more to regulation than the management of the economy."

12. 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: page 368). See also Lewis (2006: page 698).
13. However, the assessment of the current regulatory framework in LSR-0 (2020: paragraph 3) records how many consumers are not in a position to make a rational, informed choice for a variety of reasons that might include various types of vulnerability, not characterising their problem as 'legal', lacking information on which to base any choice, and deciding not to do anything or to handle the problem alone.

recommendations to choose a provider, rather than trying to research what the sector has to offer in order to find a provider themselves.

However, the increasing availability of information – whether about the law itself through the internet and other sources, or about lawyers and other providers of legal services, say, through comparison websites – might lead us to question whether information asymmetry is now as deep or as widespread as historical approaches to regulation have presumed.

The CMA's study also showed that solicitors and Citizens Advice were the most common sources of information (2016: paragraph 3.39). This often results in the same source both diagnosing and dealing with a legal issue, rather than consumers and small businesses first diagnosing the problem and then shopping around for a provider.

This is because "once they had invested time in explaining their issue to one legal services provider who had said that they could handle the issue, they were not likely to invest much more time in finding a different provider" (2016: paragraph 3.47). In some ways, this further perpetuates the information asymmetry and indirectly restricts competition.

A potential downside of information asymmetry is that if clients are not truly able to assess the quality and value of what they are buying, they might simply buy on price and force the market price ever lower – with an implicit response from providers that they will gradually lower their quality to reflect reducing economic returns (creating the so-called 'market for lemons').

Another possible outcome is that lawyers might provide services of lower quality (unseen and unrecognised by clients) at high prices, so creating a 'moral hazard' in the lawyer-client relationship.

These 'failures' are overtly *economic* considerations to justify the regulation in the public interest of private actions and property rights. 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: negative externalities[14] 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 demonstrated only too well).

As Feintuck puts it (2004: pages 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 concept of public interest … but, unfortunately, the citizenship-oriented account of the public interest has been far well less articulated than the economic version.

14 . In the language of economists, externalities are the effects of transactions on those who are not parties to them. They can be either negative or positive: negative externalities represent a cost to one or more third parties, while positive externalities represent a benefit to them. Externalities are discussed in Ogus (2004: pages 35-38), Stephen (2013: pages 15-16), Semple (2015: pages 27-33), and in detail in Mayson & Marley (2011: Appendix 2, paragraph 2.4).

This quotation encapsulates well the discomfort felt by many in the emphasis placed by the Department for Constitutional Affairs (2005) in its White Paper on legal services – 'putting consumers first'[15] – and has been an emphasis often repeated by some regulators.[16]

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: page 3).

Feintuck continues (2004: page 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 or to address market failures 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 necessarily 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.

As discussed in LSR-0 (2020), in the assessment of potentially conflicting regulatory objectives in paragraph 4.2, this tension between 'the public interest' and 'the interests of consumers' will lead to some difficult decisions. As emphasised in that Paper, in addressing those difficult decisions, we must be careful not to set up a dichotomy or false conflict between the public interest and consumer interests, since it will also be in the public interest that, for example, consumers should be well informed, and more regular and confident, users of legal services, and that the vulnerable should not be unfairly disadvantaged.[17]

The Legal Services Consumer Panel has helpfully elaborated on the concept of 'the consumer interest'[18]. The Panel certainly acknowledges that there are differences between the public and consumer interests (2014: pages 8-9): "we accept that the former should always have primacy. For example, someone guilty of a crime may wish to escape justice, or a corporate client might ask its lawyer to behave unethically".

But the Panel is also clear that if the concept of the consumer interest is properly conceived, there is no irreconcilable tension between it and 'professionalism', since it is more likely that the tension arises from "a perceived clash of values" and from "a misunderstanding of what motivates consumers and how they behave" (2014: page 9).

---

15. The Legal Services Act 2007, in section 1(1)(d), has "protecting and promoting the interests of consumers" as just one of eight regulatory objectives.
16. Cf. LSR-0 2020: paragraph 4.7.
17. Cf. Davies (2013); and the perceived lack of consumer information is a fundamental point arising out of the CMA's market study: see Competition and Markets Authority (2016).
18. See Legal Services Consumer Panel (2014): the Panel adopts seven principles or tests of where the consumer interest lies (those principles are set out in the Annex to this Paper).

In short, it is not necessary – or certainly not part of any proposition in this Paper – that the consumer interest should be downgraded or ignored in the regulation of legal services. It can be acknowledged as a significant and important part of conceiving the proper meaning of 'the public interest'.

Nevertheless, it is accepted that the public interest and the consumer interest are distinct and not coterminous, and that there might still be occasions on which they conflict. The resolution of any conflict lies in a judgement that one or other view should, in any given circumstance, prevail. It is the basis of that judgement that lies at the heart of this Working Paper.

3.4 A values-infused market?

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 it is nevertheless a value judgement.

The idea 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.

Part of the reform process instituted by Sir David Clementi[19] 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". On this view, allowing markets to determine behaviour (with regulatory approbation) would, without such a moral account, at best reflect values of amorality.

However, such an approach to the public interest would represent a rather partial[20] project – especially if, as Feintuck suggests, market behaviour might in some respects create the risk of damage to the fabric of society. Hopefully, a considered articulation of the public interest would not require society to take that risk.

Instead, it must be preferable that any value judgement made from a broader view of the public interest than simply endorsing market competition should suggest that any such damage to the fabric of society would not be tolerated.

Again, Feintuck highlights the nature of the contest (2004: page 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,…[21]) 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.

19. See Clementi (2004).
20. In both its 'biased' and 'incomplete' meanings.
21. We could, at this point, add 'access to justice or legal aid' to emphasise the same point in a legal context.

The 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. It must be right at least to question the potential dominance or influence that markets, competition or consumerism might otherwise have on the determination of the public interest in regulation.

But in posing the question, we should acknowledge that the values of consumers as citizens are also a valid consideration. Consumers are not entirely material, selfish, amoral or driven only by price in their choice and use of legal services providers[22], and so a values-based approach to the public interest should be capable of weighing those interests in the balance.

What this might amount to is a distinction between 'the public interest' and 'the interests of the public', and between the latter and 'the consumer interest'. The consumer interest arguably relates to the values and activities of the public *as* consumers, rather than to the values and attitudes of members of the public to *others'* consumption.

This is particularly so where what Feldman describes above as the "inequalities in the ability to enjoy expectations of citizenship" creates detriment for the vulnerable or to society as a whole.[23]

Adopting a notion of a 'moral compass'[24] 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.

It should also not tempt us to characterise all consumers as rational, economic actors, but to take a wider view that encompasses consumer values that are not inevitably at odds with the public interest – or even with the professional or other interests of providers.

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.

Indeed, one might question whether law (the rule of law, the institutions of law, the administration of justice, access to justice, and authorisation to practise) should have market factors as its principal objectives. If it should not, then 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 and the pursuit of consumer interests.

3.5 Underpinnings of 'the public interest'

Against this background, two key components emerge for any discussion about a broad meaning of 'the public interest': (i) the institutional fabric of society and the associated notion of 'citizenship', as well as (ii) the ability of citizens to exercise the rights and responsibilities inherent in participation in society.

In relation to the first, one might suggest that the interests of the public are engaged, but not the interests of the public *as* consumers. On the other hand, in relation to the second, both are engaged, because consumers will be concerned to secure their participation in society

22. Cf. Legal Services Consumer Panel (2014: page 9).
23. This distinction appears to be supported in the articulation of 'the consumer interest' in Legal Services Consumer Panel (2014): see, further, the Annex to this Paper.
24. In adopting this expression, I do not intend to import notions of morality into regulatory policy, still less to conflate them. The point is that some sense of broader societal values (and ethics) is needed to balance a policy judgement about what is right or wrong in that context.

through the exercise of their rights and responsibilities; and the public generally should have an interest in ensuring that all citizens with a legitimate expectation of such participation should be able to fulfil that expectation.

As Feintuck writes (2004: page 210): "By definition, citizenship … seems to imply membership of a political community[25], the continuation of which can be considered to be a value greater than and beyond the aggregated interests of individuals".

In addition, it (2004: page 214) "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: page 17) therefore 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 (2010: pages 100-102) that equal status is dependent on formal legal freedoms and a set of social entitlements (including education, health care, opportunities, rights, liberties, and physical security[26]).

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 might 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 current 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 (cf. paragraph 3.3 above). 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). Nevertheless, as suggested above, that should not prevent the interests of consumers informing and being taken into account in determining what is in the public interest.

3.6 The value of a primary objective

Where any conflict of regulatory objectives materialises, its resolution must presume that some interests prevail over others, even if only marginally. There is a strong argument that, in the context of the regulation of legal services, the prevailing interest must always be the public interest.

25. As Satz neatly puts it (2010: page 102): "the regulative idea of democracy is that citizens are equals engaged in a common cooperative project of governing themselves together".
26. This list refers to public goods (of the kind that will form part of a suggested articulation of 'the public interest' in paragraph 3.7 below, though it is arguable that 'opportunities' should be included, since they are a broad and nebulous idea): the rule of law and the administration of justice also seem to be implicit in Satz's description.

This is a principal reason why, despite ministerial reluctance to prioritise the regulatory objectives in the Act[27], one might argue that "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 moderate the amorality of markets or discourage the adoption of any other regulatory philosophy which fails to identify its underlying values.

As Feintuck says (2004: page 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 any 'overarching value system' from the policy considerations and framework for the regulation of legal services would be deeply disturbing. Where regulatory remit covers the very structure of society in terms of its legal and justice system, such an absence would run a very real risk of the 'democratic fabric of society' being damaged.

This suggests, therefore, 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 should guide the regulation of legal services beyond a narrow, atomistic, sectional, or entirely market-based, conception.

3.7 An articulation 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 (though it might still encompass them);
- 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.[28]

This Working Paper accordingly offers an articulation of 'the public interest' as follows[29]:

---

27. Cf. LSR-0 2020: paragraph 4.7.
28. Ogus (2004: page 29).
29. This conception of the issues has been helped by Bell (1993: page 34), Corning (2011: Chapter 5) and Leveson (2012). Baroness Deech of Cumnor has suggested (Deech, 2012) 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". A 'clear overall primary objective' is also key to more effective outcomes-focused regulation (Competition and Markets Authority, 2016: paragraph 6.55). It also reflects the duties and values associated with the four aspects of public interest suggested by Lewis (2006: page 694): democracy, mutuality, sustainability, and legacy.

> 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.

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 justice[30]; protection of the natural environment; effective government[31]; and a sound economy (including the free movement of people and capital).

Participation[32] is then secured and encouraged by personal and public health[33], education, and welfare (including shelter and nurturing of children and dependents); access to justice (including in this context access to legal advice and representation); the protection of physical safety, human rights, personal autonomy[34] and freedom of expression[35], and equality[36]; and reliable personal, public and commercial relationships[37].

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 majority. As Mates & Barton helpfully observe (2011: page 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.

These are all highly relevant factors in the nature of participation in and response to the legal issues that affect private citizens.

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.

---

30. On the basis that the administration of justice is necessary to maintaining the rule of law and securing access to justice, it should arguably be regarded as a public interest objective in its own right, and is separate from what might be regarded as a broader 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: page 70).
31. Cf. footnote 39 below for the implications of context and culture on government.
32. The Leveson report emphasises "the public interest in self-determination" (2012: page 70).
33. 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).
34. Meaning that "individuals must have a sphere in which they can exercise individual choices without interference from others (including the state)": Leveson, 2012: page 73.
35. 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: page 73).
36. 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 to their legitimate participation in society.
37. Leveson would also include confidentiality, and the protection of reputation and of intellectual and other property rights (2012: page 70).

Nevertheless, governments, judges and regulators are, conceivably, 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: page 65); it carries out a 'watchdog role'[38] 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 overriding values in the conception of the public interest suggested above 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 another.

The ability to take advantage could relate to an imbalance or asymmetry of power (including resources) or information (and be seen as a market distortion by economists, for example), or the forced participation of the other in circumstances over which they have little or no control or influence.

3.8 A singular public interest or several?

It is the notion of fairness that 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 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: page 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: page 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.

38. 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: page 66).

> 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 debate[39].

The Leveson report does not seek to define the meaning of 'public interest'. It accepts (as does this Working Paper) 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).

Arguably, therefore, it is not 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 the suggested conception in paragraph 3.7 above, if there is a conflict or tension between maintaining the fabric of society and securing the legitimate participation of citizens in it, this Working Paper would argue that the former should prevail.

This is suggested 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.

3.9 Conclusions

The notion of 'the public interest' is necessarily a complex and indeterminate one.[40] However, that should not prevent us from adopting it as an overriding guide for regulatory purposes or from trying to articulate more clearly what we mean by it.

This section has sought to test and justify its use as a primary objective for regulation, and to articulate it by reference to securing for the benefit of all the fabric of society itself and the legitimate participation of citizens in society.

As such, it can provide not merely a counterpoint to the otherwise unrestrained forces of markets, competition and consumerism, but also the basis for a 'moral compass' for regulation and regulatory decisions that recognises a proper role for those forces.

---

39. The appearance of 'democratic' and 'democracy' in this passage is interesting. Effective government is a key part of the conception of the public interest articulated in paragraph 3.7 above. 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 all societies or at all times. As such, 'democracy' will not necessarily always be a facet of the public interest, while 'effective government' will (or should).
40. I accept the view of Adams (2016: page 3) that "the term itself is ambiguous", that "conceptions of the public interest appear to vary across time and place", and that "the concept is variable, flexible, and complex". Lewis (2006: page 695) makes the point that: "To some degree, the breadth (and hence ambiguity) of the public interest concept underlies its power." It is these qualities that, for me, allow it to reflect the broad reach and necessary flexibility in fulfilling its role as a guiding principle: it is on this basis that emerging and changing risks can be assessed and *appropriate* regulatory action taken. As Adams puts it (2016: page 12), "regulatory change is actually linked to changing conceptualizations of the public interest".

4. The case for sector-specific regulation

4.1 Advancing the public interest

Applying the notion of the public interest articulated in paragraph 3.7 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 legal services, this would primarily involve supporting the constitutional principle of the rule of law (including the administration of justice)[41]; improving access to justice; and encouraging independent, strong and effective legal advice and representation. These are specifically 'legal' outcomes, and 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). On this basis, 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. This was emphasised in May 2011[42] by the then Secretary of State for Justice when he said:

> 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 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 be protected and promoted[43], 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: pages 3-4):

---

41. This is also emphasised by Gillers (2013: page 374) when he says that the justice system and the rule of law should prevail against the interests of clients and of the legal profession when considering any regulatory proposal.
42. The following quotations are taken from a Ministry of Justice press release of 16 May 2011 (UK cements position as 'centre of legal excellence').
43. This public (and government) policy is being continued through the 'Legal services are GREAT campaign': see https://www.gov.uk/government/news/legal-services-are-great-join-us, but there is some understandable uncertainty and difference of views about how the UK's (and London's position particularly) might be affected by the outcome of Brexit: see Thomson Reuters (2018).

> 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, who refer to the public interest as (2011: page 180)

> '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.

Such public policy considerations remain important – and are arguably even more important as we contemplate a post-Brexit world.

The case for sector-specific regulation, 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 and of 'UK plc'), and (2) to promote and secure the participation of individual citizens in society.

4.2 Regulatory intervention in the public interest

How regulatory intervention in the public interest might be framed in the context of legal services was considered in detail in 2014-15. As a result of cross-regulator discussions, the Legislative Options Review (2015) was submitted to Ministers in July 2015.[44] In it, the regulators articulated the case for sector-specific regulation in this way:

> 4.5 The primary rationale for sector-specific regulation of legal services is the public interest. This plays out in two primary ways:
>
> (1) There are **public good**[45] justifications relating to supporting the rule of law and the effective and efficient administration of justice. This includes public confidence in, and the positive externalities[46] of, the justice system (an example would be the benefit that

44. See Legislative Options Review (2015).
45. Public goods are usually defined by way of two distinguishing features: non-exclusiveness and non-rivalry. Non-exclusiveness means that it is not possible to prevent anyone from using the good or service. Non-rivalry means that use by one consumer does not prevent use by another, and therefore the marginal costs of that extra consumer are zero. As Ogus puts it (2004: page 22): "the benefit is shared by a group and it is impossible to exclude a member of that group from the benefit, classic examples being defence, and law and order". Further discussion of public goods can be found in Ogus (2004: pages 33-35), and in Mayson & Marley (2011: Appendix 2, paragraph 3).
46. Cf. footnote 14 above.

arises to the entire population from clarification and enforcement of existing laws), as well as the influence that a strong judicial framework has in encouraging and framing the resolution of disputes outside the formal legal process.

Similarly, sometimes there will be a need to guard against negative externalities where third parties experience detriment because of the actions of a provider but have no formal relationship with them (an example would be the children in a family dispute who are adversely affected by incompetent advocacy on behalf of one or both of their parents).

An additional public good argument relates to protecting and promoting the importance of English law and firms providing legal services to the UK's position in global markets and competition. English law as a governing law of choice in cross- border transactions (even where neither of the parties has any other connection with England and Wales) raises the profile and economic contribution to 'UK plc' of English and Welsh providers and practitioners. It also leads to the courts of England and Wales becoming the jurisdiction of choice for multinational dispute resolution and arbitration. The quality of judges, practitioners and providers, as well as the perceived and actual quality and independence of legal services regulation, is critical to maintaining this competitiveness in global commercial transactions and dispute resolution.

(2) There is also a strong **consumer protection** justification, with several different dimensions. Most importantly, some activities within the legal sector carry significant risk of detriment (for example, holding client money), scope for irreversible loss or harm, or (for example, in criminal law) forced participation in the justice system.

In addition, there are 'information asymmetries' inherent in the relationship between providers and consumers: the law is often complex in its content or process such that lay people need to turn to trained experts for advice[47], and might have very limited experience against which to judge the quality of the service they receive. If there is a dispute about the quality of service received, expert assessment will often be required to resolve it.

In light of these issues, general consumer protection regulation and remedies (such as relying on trading standards enforcement or resorting to formal legal action to resolve a contractual dispute) may be less adequate, satisfactory or timely than sector-specific protection.

4.6 Given the features of the legal services market outlined in the previous paragraph, sector-specific regulation could even be argued to enable that market to exist, by:

(i) giving consumers sufficient assurance in the justice system and in the regulation of legal advice and regulation that they have confidence to purchase services;

(ii) ensuring that rogue practitioners do not compromise the quality and credibility of legal services more generally; and

(iii) allowing practitioners to act ethically without putting their reputations or livelihoods at risk.

4.7 Accordingly, there appears to be strong justification for at least some sector-specific regulation to achieve the benefits, and to avoid or mitigate the mischiefs, identified above. If there were no sector-specific regulation in legal services, it is unlikely that generic consumer protection regulation and enforcement could adequately address public interest issues such as risks to the rule of law or problems with legal services such as poor quality of service.

This is a statement of the case for sector-specific regulatory intervention that is founded on, and consistent with, the description of 'the public interest' in paragraph 3.7 above, and that

47. Indeed, some of our most complex laws – such as those relating to social welfare, housing, and immigration – apply to some of the poorest and most vulnerable or disadvantaged members of society.

meets the objectives expressed at the beginning of paragraph 4.1 above. As such, it provides a public interest basis on which this Review can proceed.

4.3 Summary

In summary, therefore, the concept of 'the public interest' provides both the justification and the 'moral compass' for regulatory intervention in legal services. The public interest requires us to secure the fabric of society and the legitimate participation of citizens in it.

The public interest also suggests that sector-specific regulation is particularly justified to ensure that the public good of the rule of law, justice and the interests of UK plc are preserved and protected, and we should be careful not to lose sight of the value of these positive externalities of public benefit.

In addition, the public interest also requires us to secure the private benefit of appropriate consumer protection, particularly where incompetent or inadequate legal services could result in irreversible, or imperfectly remedied, harm to citizens.

5. How far might the public interest extend?

If, then, there is a justification for sector-specific regulation founded on public good and consumer protection dimensions of the public interest, those different dimensions might in turn provide scope in principle for a different approach to regulation in relation to each. The mere fact that the public interest is in some way engaged does not necessarily suggest a predetermined regulatory response.

For example, the central importance to the fabric of society of the rule of law and administration of justice requires judicial, public and consumer confidence in the competence of advocates. The regulatory response to this public interest might be to require before-the-event authorisation of anyone who wishes to represent another in court for reward.

On the other hand, securing the legitimate participation in society of citizens who wish to pursue their rights, but whose interests are compromised by a legal representative who, while technically competent, does not advance that client's best interests, is not necessarily achieved only by before-the-event authorisation[48]. Such consumer protection interests might equally well be secured through during-the-event standards of service that all providers are expected to offer or after-the-event redress.

While the remedies for lack of competence might well include withdrawal of authorisation and licence to practise, those for falling short of service standards need not (especially where compensation, a refund of fees or repeat performance could possibly address a detriment to the client).

However, where the consequences of not advancing the client's best interests result in the client being committed to prison, or losing citizenship or a home, purely economic redress is more than arguably insufficient to correct the shortcomings in advice or representation.

In terms of assessing the better regulatory response where the public interest is engaged, the nature or extent of any regulatory intervention could therefore depend on one or more of:

(1) the nature of the public interest (public good or consumer protection);

(2) the nature of the risk posed to either or both of the public good or consumer protection by the inadequacy of the advice or representation in question (in potentially undermining the democratic fabric of society or the legitimate participation of citizens in society); and

(3) the consequences of the inadequate advice or representation, either to society generally, the public at large, the parties to the transaction or dispute, or third parties particularly affected by that transaction or dispute (especially where an economic remedy would not be sufficient to rectify otherwise irreversible loss or harm).

These are the issues that are developed and explored in further Working Papers in this series (see LSR-2 (2020) on the scope of legal services regulation, LSR-3 (2020) on the focus of that regulation, and LSR-4 (2020) on its form).

48. The distinctions between before-the-event, during-the-event and after-the-event approaches to regulatory intervention are considered in LSR-4 (2020: paragraph 4) on the focus of legal services regulation.

6. Conclusions

In principle, encouraging markets and competition to play a more active role in legal services is not inherently misguided. Nevertheless, there are consequences. As a recent report put it (Arthur et al, 2014: page 24):

> Replacing 'client' with 'consumer' re-frames the expert-client relationship dependent on integrity and trust as an exchange relationship in the market. While competition can certainly aid accountability and contribute to professional standards, we are not persuaded that it is 'the most effective way to deliver all the regulatory objectives'.... We share Mark Carney's concern that markets and competition as an all-purpose solution means 'belief in the power of the market enters the realm of faith' (Carney, 2014: 3).

Further, not all legal services are simply a private transaction. Law is closely connected to the public interest and public goods such as the rule of law, the administration of justice and access to justice, as well as public judicial determinations[49].

Nor is law a 'perfect market'. The various imperfections mean that consumers do not have complete information on which to make their supposedly informed choices: to economists, these are all market failures that justify regulatory intervention. However, these 'failures' are arguably inevitable and unavoidable – possibly even desirable, given the very notion of a specialist – and that greater information and transparency will not necessarily resolve them.

Indeed, the language of failure is not necessarily helpful: in a specialist sector that provides expertise and experience to an often inevitably less well-informed clientele, information asymmetry is an inherent characteristic of the market rather than a 'failure' of it.

Given the inevitability (and possible desirability) of information asymmetry in the market for legal services, arguably another aspect of the market dynamics here must be that those who have the 'upper hand' in that asymmetry do not seek to turn one advantage into another, namely, an exploited imbalance in power.

This requires that those who offer legal advice and representation should not merely be technically competent, but that they should also have the integrity not to exploit the asymmetry and should therefore be trustworthy.

The usual market rules of 'letting the buyer beware' in profit-maximising transactions therefore need moderating. The expectation in legal services is that consumers might with justification trust that legal advisers would put any client's interest ahead of their own.

It is a moot point whether this can be achieved simply by a statutory obligation (as in the professional standards in section 1(3)(c) of the Legal Services Act), or is better achieved through a culture of integrity and adherence to a set of values.

Further possibilities arising from a market approach are that providers might prefer to choose the most profitable or rewarding areas of work ('cherry-picking'), or might exit from unprofitable or unattractive areas of law leaving some consumers without access to legal help (advice deserts). In both cases, there is a potential distortion in the provision of legal services that might not have arisen but for allowing market forces greater sway.

In all these senses, one can argue that a 'free market' approach could result in behaviour or outcomes that are not in the public or consumer interest. Markets clearly have limits, some of which challenge the broader fabric of society itself and others of which might undermine

49. Although a dispute might only be between two parties, the public determination by a judge and the enunciation of a decision – and the development of the common law – benefits third parties and society generally even though they do not directly pay for it. This is a 'positive externality', that is, a benefit that accrues to others who are not parties to the transaction: cf. footnote 14 above.

the ability of citizens to engage legitimately and positively in that society. It is in managing the risks arising from those limits that the need for some sector-specific regulation arises.

It is the concept of 'the public interest' that provides both the justification and the 'moral compass' for regulatory intervention in legal services. The public interest requires us to secure the fabric of society and the legitimate participation of citizens in it.

The public interest also suggests that sector-specific regulation is particularly justified to ensure that the public good of the rule of law, justice and the interests of UK plc are preserved and protected. In addition, it should also ensure appropriate consumer protection, at the very least where incompetent or inadequate legal services or other consumer detriment could result in irreversible, or imperfectly compensated, harm to citizens.

References

Adams, T.L. (2016) 'Professional self-regulation and the public interest in Canada', *Professions and Professionalism*, Vol. 6, No.3

Arthur et al. (2014) *Virtuous Character for the Practice of Law*; available at: http://www.jubileecentre.ac.uk/1553/projects/gratitude-britain/virtues-in-the-professions-law.

Baldwin, R., Cave, M. & Lodge, M. (2012) *Understanding Regulation: Theory, Strategy, and Practice*, 2nd ed. (Oxford, Oxford University Press)

Bell, J. (1993) 'Public interest: policy or principle?': in Brownsword (1993)

Best (2019) *Regulation of property agents working group: final report*; available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/818244/Regulation_of_Property_Agents_final_report.pdf

Blond, P. (2009) 'Let us put markets to the service of the good society', *Financial Times*, 14 April, page 11

Brownsword, R. (ed.) (1993) *Law and the Public Interest* (Stuttgart, Franz Steiner)

Burke, E. (1847/1999) *Works of Edmund Burke* (New York, Harper)

Carney, M. (2014) *Inclusive capitalism: creating a sense of the systemic*; available at: http://www.bankofengland.co.uk/publications/Documents/speeches/2014/speech731.pdf.

Clementi (2004) *Review of the regulatory framework for legal services in England and Wales*; available at: https://webarchive.nationalarchives.gov.uk/20060926084700/http://www.legal-services-review.org.uk/content/report/report-chap.pdf

Competition and Markets Authority (2016) *Legal services market study*; available at: https://www.gov.uk/cma-cases/legal-services-market-study

Corning, P. (2011) *The Fair Society* (London, University of Chicago Press)

Deech of Cumnor, Baroness (2012) 'Regulating the regulators', Gresham Lecture 23 May 2012; available at: http://www.gresham.ac.uk/lectures-and-events/regulating-the-regulators

Department for Constitutional Affairs (2005) *The Future of Legal Services: Putting Consumers First*, Cm 6679 (London, The Stationery Office)

Donelan, E. (2012) 'Improved regulatory management: a framework for improved governance and economic development' (OECD)

Feintuck, M. (2004) *'The Public Interest' in Regulation* (Oxford, Oxford University Press)

Garoupa, N. (2008) Providing a framework for reforming the legal profession: insights from the European experience', *European Business Organization Law Review*, Vol. 9, page 463

Genn, Professor Dame Hazel (2010) *Judging Civil Justice*, The Hamlyn Lectures 2008 (Cambridge, Cambridge University Press)

Gillers, S. (2013) 'How to make rules for lawyers: the professional responsibility of the legal profession', *Pepperdine Law Review*, Vol. 40, page 365

Legal Services Consumer Panel (2014) 'The consumer interest'; available at: http://www.legalservicesconsumerpanel.org.uk/ourwork/ConsumerEngagement/documents/UsingConsumerPrinciples2014.pdf

Legislative Options Review (2015), *The case for change: legislative options beyond the Legal Services Act 2007*; available at: https://lsbstaticwebsites.z33.web.core.windows.net/what_we_do/pdf/20150727_Annex_To_Submission_Legislative_Options_Beyond_LSA.pdf

Leveson, B. (2012) *An Inquiry into the Culture, Practices and Ethics of the Press,* Volume I (London, The Stationery Office); available at: http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp

Lewis, C. W. (2006) 'In pursuit of the public interest', *Public Administration Review*, Vol. 66, page 694

Lodge, M. & Wegrich, K. (2012) *Managing Regulation: Regulatory Analysis, Politics and Policy* (London, Palgrave Macmillan)

LSR-0 (2020) 'Assessment of the current regulatory framework'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

LSR-2 (2020) 'The scope of legal services regulation'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

LSR-3 (2020) 'The focus of legal services regulation'; IRLSR Working Paper available at: https://www.ucl.ac.uk/ethics-law/publications/2018/sep/independent-review-legal-services-regulation

Mates, P. & Barton, M. (2012) 'Public versus private interest – can the boundaries be legally defined?', *Czech Yearbook of International Law*, page 171

Mayson, S. (2013) 'Legal services regulation and 'the public interest''; available at: https://stephenmayson.files.wordpress.com/2013/08/mayson-2013-legal-services-regulation-and-the-public-interest.pdf

Mayson, S. & Marley, O. (2011) 'The regulation of legal services: what is the case for reservation?'; available at: https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2011-what-is-the-case-for-reservation.pdf

Morgan, B. (2003) *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Aldershot, Ashgate Publishing)

Ogus, A.I. (2004) *Regulation: Legal Form and Economic Theory* (Oxford, Hart Publishing)

Satz, D. (2010) *Why Some Things Should Not Be For Sale: The moral limits of markets* (Oxford, Oxford University Press)

Semple, N. (2015) *Legal Services Regulation at the Crossroads* (Cheltenham, Edward Elgar Publishing)

Sorauf, F. (1957) 'The public interest reconsidered', *The Journal of Politics*, Vol. 19, page 616

Stephen, F. H. (2013) *Lawyers, Markets and Regulation* (Cheltenham, Edward Elgar Publishing)

Thomson Reuters (2018) 'How Brexit will impact law firms'; available at: http://info.legalsolutions.thomsonreuters.co.uk/brexit-impact-law-firms

Annex: The Legal Services Consumer Panel's seven principles of 'the consumer interest'

In 2014, the Legal Services Consumer Panel confirmed and published seven principles or tests to help assess where 'the consumer interest' properly lies – and, therefore, to identify and analyse when something is not a consumer policy topic but rather a wider citizen or political issue[50].

The Panel emphasises that the consumer interest is wide-ranging and includes elements that "go far wider than the concerns over choice and price that are most usually associated with consumers" (2014: 9). In doing so, it encourages a conception of 'the consumer interest' that is not incompatible with, or in opposition to, 'the public interest' but that can (as in paragraphs 3.3-3.5 above) be seen as an important contributor to our articulation and use of the public interest for regulatory policy purposes.

The seven principles are:

Access

Consumers can access all the services they need. Different barriers to access in each situation and for each affected population group, and the underlying causes, are identified. There is an appropriate balance between competition and regulation. Regulation is not erecting unnecessary barriers to access.

Choice

Consumers have free choice. Consumers can choose from a range of services and providers. All entry barriers and restrictions facing providers are justified. Consumers can access reliable comparative information about providers in relation to price, quality and other characteristics. Consumers realise which services or providers are (un)regulated. Regulators understand how people make choices.

Quality

Consumers are getting good quality outcomes. Services are being widely delivered to high standards in each dimension of quality. Quality is being monitored effectively. Good quality assurance systems are in place to ensure the initial and ongoing competence of providers. Quality systems are proportionate to the risks. Consumers have access to information that will help them identify good quality providers. Proxies for quality, such as accreditation schemes, are reliable. Risk is being appropriately allocated between consumers and providers.

Information

Consumers' rights are simple to understand and easy to find. Regulatory data on the identity and performance of providers is available in suitable formats. Consumers have the right level and quality of information to make effective decisions at all stages of their matter. Any mandatory information requirements are adequate, complied with and working effectively. There are effective safeguards against the misuse of personal information.

50. In this sense, the Panel's principles would be consistent with the distinction suggested in paragraph 3.4 above between the interests of the public as consumers (the consumer interest) and the interests of the public in wider societal and political (public good) issues.

Fairness

'Risk factors' potentially creating consumer vulnerability are identified. Evidence of discriminatory or unfair practice targeted at specific population groups is compiled. Any cross-subsidisation across groups of consumers is justified. Consumer vulnerability is understood and given sufficient priority by decision-makers. Relevant special interest groups are adequately consulted. Unfair trading practices are being monitored and intelligence is shared. There is a business culture where providers put the interests of consumers first.

Representation

There are good mechanisms for consumers to have a say in how services are delivered. Intelligence provided by consumers is informing risk-based regulation. Regulators are listening to consumers through dialogue and research. Regulators seek the views of expert consumer representatives. Consumer organisations are adequately resourced and backed by strong powers. Regulators understand how to interpret the consumer interest. Regulators work openly and transparently so they can be held accountable for their performance.

Redress

Market rules protect consumers against the risks of poor practice they might face in the market. It is easy for consumers to understand their rights and routes to redress. Providers' internal complaints procedures are working well. Consumers can access independent and effective redress mechanisms. Providers have the right incentives to follow the rules. Regulators have an adequate range of sanctions at their disposal. Monitoring and enforcement data is publicly available. Good feedback loops are in place to extract the learning from complaints to deliver service improvements.