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DE-LEGALISATION IN BRITAIN IN THE 1980S

by

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We have chosen to address the issue of 'de-legalisation'[1] by breaking up some common understandings and by reconstituting the argument concerning more or less 'law' as matters of constitutionality. We shall adopt the view that most debates about regulation, de-regulation, privatisation and the like are theoretically inadequate and that instead we should address and synthesise problems of legitimation, legal theory and systems building for the better conduct of rational discourse. Whether this design makes sense for the other countries of Western Europe we pass over at this juncture but have no doubt that in Britain this is the agenda which ought to recommend itself to the contemporary public lawyer.

We have long taken the view that law is a series of socially necessary tasks to be performed in any given organisational framework (Llewellyn 1940, Lewis 1981). Procedures for the resolution of grievances, for planning and monitoring, for describing the legitimate anatomy of groups (their constitutions) are necessary conditions of social intercourse. On that level then, to talk about 'more or less' law is to contradict oneself and to engage in riddles. This is sometimes obscured by the practice of sanctifying one particular historical form of law, 'the high bourgeois' or gesellschaft form, and relegating all others.

It is at this point that the question of legitimation arises. Which procedures for performing these necessary tasks are collectively acceptable and which not? This is the problem of constitutionality which is so characteristically ignored in Britain by lawyers and political scientists alike. Because Britain has no 'foundation document', no 'ark of the covenant' the tendency has grown up of identifying "the constitution" with a descriptive series of pragmatic working practices

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[1] 'De-legalisation' was the theme for a seminar series at the European University Institute where an earlier version of this paper was presented in March 1984.

which habit of mind and tendency do the practitioners of this art no intellectual credit whatsoever. More recently some scholars have implicitly attacked this practice for its tendency to obscure the realities of operational public power (see e.g. Daintith 1984, Middlemas 1979). However, even the work of Daintith, much more perceptive than that of most British public lawyers, has so far failed to pursue its own internal theoretical logic. Thus, if it is both useful and legitimate to trace the intricate webs of government through 'dominium' as he describes it (the power of the purse, the contracts, the concessions, the franchise etc) then we must be told why. It is the issue of legitimacy which lies at the heart of this problem for, like Daintith, we shall wish accurately to explain the workings of our constitution which cannot be a matter of subjective preference (pace Jennings 1959, 37). In doing so we shall ex necessitate be describing legitimate public power (or identifying non-constitutional or illegitimate behaviour) and it is difficult to see how legitimate public power can be identified, defended or even constructed without public debate. Raw public power is of course a different matter but the very concept of legitimation imports a public discussion of parameters, even if the discussion marks off some behaviour as no-go areas. But it is the discussion which will justify the exceptions. We regard this claim as having application to all legitimation debates but in Britain the particular claims relating to representative democracy, to the common law and to non-arbitrariness locks exposure and openness into the very notion of public life. They are locked into the notion of public power and therefore into the constitution. And what is the handmaiden of openness unless it be some form of accountability? Why should we want to know what is happening unless it

be that we should observe to see if in some sense the public activity passes muster? Here we are at the heart of the dilemmas which suffuse any serious debate about the British Constitution.

In a forthcoming book (Lewis and Harden 1985) we argue that to expose our constitution adequately we must turn our cultural claims (e.g. the rule of law) in on themselves and draw out their implications, thereby exposing immanent categories. This "immanent critique" we argue reveals a constitution based on the twin premises of openness and accountability. Any other treatment which affects to describe the British Constitution is likely to be operating on an agenda of hidden values and will fail to carry either consensual or philosophical conviction.

The modern British State (see e.g. Jessop 1982) is a typically complex modern welfare state where socio-economic processes are extraordinarily dense and where government is no longer simply concerned with facilitating the market and protecting property rights.

> "The economic activities of private entities are regulated to varying degrees; the extent and visibility of the socialization of their formerly "private" conduct depends upon the regulatory mechanism employed. Moreover the state has gone into the business of supplying primary goods and services (including protection against market risks) to its citizens.
>
> Given that the state has become in significant respects both the regulator and the competitor of private economic concerns, the interesting questions are who or what controls its expanded activities and by what power or authority does he do so" (Austin 1982, 153).

To paraphrase Habermas, we need therefore now to be concerned with which organisational structures and which discussion and decision mechanisms can produce legitimate outcomes (Habermas 1979). We agree that, once having established the "base" principles of the constitution,

we should be concerned to produce procedurally legitimate outcomes which depend upon concrete social and political conditions, on information and informed and rational debate involving a hard look at policy alternatives. We have argued elsewhere (Lewis and Harden 1984) that in Britain the traditional parliamentary claims for overall legitimation fail to carry any real weight or conviction; that to borrow a phrase from an American source, the electorate "buys representation in bulk-form" (Choper 1980). We have argued, in agreeing with a former Permanent Secretary to the Treasury, that traditional assumptions concerning Cabinet government are now no longer sustainable and that the major locus of public power in Britain is focussed around a federation of the great departments of state in conjunction with their client groups (Ashford 1981). Given that Britain has no federal constitution nor developed principles of public law constituting a rechsstaat (Dyson 1980) we are desparately short on mechanisms which are directed to produce legitimate outcomes through rational political choice and discourse.

The separation of law and politics

Part of the difficulty in encouraging constitutional lawyers in Britain to engage in institution-building through law in order to assist in delivering on constitutional claims and expectations is that the "rule of law" paradigm irrationally separates out law from politics. This "virtual obsession" was largely, though by no means exclusively, a product of nineteenth century history.

> "By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be dangerous and unstable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem of the "tyranny of the majority". Just as nineteenth-century political economy elevated the market to the status of the paramount institution for distributing rewards on a

supposedly neutral and apolitical basis, so too private law came to be understood as a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights. The hostility to statutes expressed by nineteenth century judges and legal thinkers reflected the view that state regulation of private relations was a dangerous and unnatural public intrusion into a system based on private rights" (Horwitz 1982, 130).

Given that the thrust of this paper is towards arguing for a reasoned decision-making process through a revised concept of law, then the barriers which define the spheres of influence of law, administration and politics must be broken down lest we hinder the deployment of resources necessary for rational and efficient policy-making. We agree with K. C. Davis that "the danger of tyranny or injustice lurks in unchecked power, not in blended power" (1958, 30), though we must reiterate our commitment to the broader Llewellynesque, socially necessary concept of law. This locks the legal and political processes into each other without actually erasing the boundaries between them. Legal institutions, reformed and redesigned, can act, indeed should act, in the absence of other legitimation devices, to increase the competence of policy-making processes, to assist the business of collective cognition and learning (Unger 1983). We are happy to employ this paraphrase of a well-respected statement:

"As a political actor [government] assumes responsibility for deciding what ends are to be pursued and what resources it is prepared to commit in dealing with problems such as pollution control or discrimination in employment... But government must then proceed, as a <u>legal</u> actor, to establish the agencies and mechanisms by which

public ends will be furthered. In principle, ... these institutions [should be] designed to bring maximum objectivity to the elaboration of public policy ..." (Nonet and Selznick 1979, 112).

In other words we are not seeking to replace politics by law but to harness legal institutions to the exploration and facilitation of policy-making so that the optimum conditions for political choice are created. These conditions for political choice are ultimately constitutional matters of a high order. They also impinge upon the nature and legitimate extent of public action so that we shall have to relate these problems of constitutionality or legitimacy to the vital question of the public/private divide, first in general terms and then in terms specifically related to our immanent critique of the British Constitution.

Constitutionality: the public/private divide

Constitutionality, the legitimate atmosphere for public action, naturally poses questions concerning the existence and/or desirability of marking out the boundaries between the public and private spheres. Whatever constitutes the public sphere, it is clear that action within it should accord with settled constitutional principles, specifically in relation to procedural matters. As to the substantive behaviour that, unless one adopts some version of natural law thinking, (Beyleveld and Brownsword 1983) is very much a "local" or contingent issue. The public sphere's relation to private behaviour, varying over time and space, time and place, must, we would urge, be equally characterised by the same settled principles. Given that these, in Britain certainly and most compellingly in the U.S.A., must be constituted by canons of openness and accountability we ought to be able to map out the relationships, the tensions between the boundary fences, and the degree of compenetration occurring between 'state' and 'society' at any given time (Poggi 1978).

This has never been systematically attempted by British constitutional lawyers thereby ensuring that much essentially public behaviour has gone unscrutinised, at least in an overt institutional sense. For present purposes we are prepared to pass over what ought to be characterised as the irreducible core of 'private' action (though on this point see Gewirth 1978) and to marginalise the civil liberties component of an 'immanent' set of British constitutional claims in favour of our central constitutional axiom or convention; viz. parliamentary omnicompetence. This axiom is now in effect reduced to the realpolitik of executive omnicompetence so that in constitutional theory at least, ministers may make private business public business. There is no area of social life where the public writ cannot 'constitutionally' run. Now from moment to moment the sociological progress of the public writ could and should be traced to gauge the compenetration of public and private and to provide an evaluation of that state of affairs. We argue that legal institutions in particular are defective in failing to bring the relationships to light, and would identify in particular the general failure to expose the informal relationships between ministers and 'private' actors, a constant theme of this paper. However, above and beyond this failure we can trace a more general intellectual concealment of the symbiosis between public and private interests.

In the classic liberal state the clear distinction between public and private was crucial to its legitimacy. The private sphere was supreme while the public was primarily charged with facilitating the activities of the private sphere.

> "The public sphere was ostensibly operated according to democratic principles; the hierarchy and dominations that characterized the private sphere were explained by the market" (Austin 1982, 1517 and see Habermas 1979).

The corollary was that legal thought was concerned to create a clear separation between constitutional, criminal and regulatory law - public law - and the law of private transactions - torts, contracts, property and commercial law (Horwitz 1982, Atiyah 1979). What is not always appreciated, however, is that this development was historically specific and by no means characterised English law over a long historical period. This according to Sir William Holdsworth was in no small measure due to a legislative surrender to the economic proposals of Adam Smith and his successors. Holdsworth has reminded us that a very detailed regulatory regime characterised much of British commerce and industry during the early part of the eighteenth century; regulations regarding the treatment of apprentices, the payment of wages, for the settlement of disputes between masters and servants in a wide variety of trades, and so on. Only gradually was this regimen dissolved with inevitable implications for the nascent trade union movement whose relationship with government was to cause further confounding of the state/society divide in its turn and indeed to continue so to do up to the present day (Holdsworth 1938, Vol.XI, 518). However the "immutable laws of capital" seemed to make it necessary for regulation to be kept at a minimum (Carson 1982, 302), even though when occasion demanded the public and private streams commingled as witness the injection of private capital into 'public' utilities with the state guaranteeing limited liability (Davies 1983, 33; Horwitz 1977, 110-114). Indeed it now seems clear that private power began to become increasingly indistinguishable from public power precisely at the moment, late in the nineteenth century when large-scale concentration became the norm. These very concentrations became to a large extent the cause of government intervention and a major impetus to the emergence of the welfare state.

As has often been remarked, the state has over the course of much of this century imposed upon itself the solving of market failures. According to this analysis its very legitimacy depends upon curbing abuses of the market while guaranteeing the formal conditions for market behaviour.

> "This dual and precarious legitimacy of the modern welfare state leads to a dual role of the law; law still serves to organise markets in order to keep them running and efficient. It also takes over purposive functions by making markets instruments for fulfilling government-proclaimed rights. There is an inherent dualism in modern law which in the Weberian tradition was described as coexistence of formal and substantive law, of conditional and purpose programming, the latter always being at odds with and structurally weaker than the former" (Reich 1983).

A different perspective on the issue of compenetration is provided by viewing "the public interest" in terms of interest - group pluralism. In this interpretation legitimacy is afforded by some version of law as providing the conditions for a market version of the public interest but with organised interest groups as the competitors and the political process as the "market" (Horwitz 1982, Stewart 1976). Although this has become heavily institutionalised in the United States it is, as we have argued (Lewis and Harden 1984) "networked" in the British political process in a largely informal way. Whether interest groups can actively contribute to supplementing the formal conditions of democracy in the liberal welfare state is another matter (Dahl and Lindblom 1976).

It has to be said that although in Britain institutional machinery for moderating competition between interests which seek to capture or privatise part of the state machinery is very underdeveloped, the phenomenon itself is not. The exploration of North Sea Oil is a case in point for it has been cogently argued that forces pushing for the

co-option of offshore safety into the broader generic machinery of onshore safety administration found themselves in competition with the Department of Energy itself which was being pushed by national and international oil interests to give higher priority to the requirements of commercial production (Carson 1982, 297). Much the same set of tensions have traditionally operated in relation to television broadcasting and much more recently in relation to the proposals for cable, a matter to which we shall revert. However, to add terminological confusions to those of substance it is interesting to note that the Hunt Committee in its Report on the development of cable systems constantly refers to the "public service" domain, in which it includes not only the BBC but the independent, commercial, channels currently transmitting broadcast programmes.

The overall failure to examine the finer details of public/private intercourse is also in evidence in relation to the general debate on regulation. As we have argued elsewhere, (Lewis and Harden 1983) regulation can and does occur in the public sector as the private, while in both "domains" regulation, especially in Britain, can be formal or informal. The relationship of British Airways and the Civil Aviation Authority clearly makes this point while the other commercial nationalised industries have been subject both to the very occasional formal ministerial direction and to extreme pressure of the less formal variety, most recently in the shape of cash limits which have had important effects on both medium and long term planning and on concrete programme goals. We argued at the time that ownership and regulation are conceptually distinct and that at least four combinations are possible; viz. private ownership with or without regulation and public ownership with or without regulation. When de-legalisation is discussed however, private ownership without regulation seems to be the model generally assumed. We take the

view that this is of itself misleading for a number of reasons, just a few of which we shall outline shortly. Briefly, however, we would argue that various informal processes may link public and private decision-making even in the absence of formal regulatory mechanisms. Even so, given that the state sees its role in part as being to create conditions for markets to flourish then it is thereby and immediately involved in private ordering, while we know for example that favourable conditions of a highly preferential kind are as capable of being offered by the public sector to the private as by the public sector to another part of the public sector. Recent concern over the links between British Oxygen, (BOC) a publicly quoted company, and the National Health Service (NHS), a formal part of British Central government, fired by a large growth in BOC's profits taken from health care makes the point neatly. (The Guardian, January 16 1984.) We shall develop this later. However there remains much to say in relation to the increasing compenetration of state and society.

We shall speak to the Gower Report on Investor Protection shortly but here we wish to extract a general point. Self-regulation or self-governance, taking account as it often must, of general considerations of importance to the public is in reality a delegation of public functions to private control insofar as it is acknowledged that direct government regulation is likely to represent the alternative. This is clearly true of important aspects of the work of the City of London, of trade unions and many other commercial undertakings. As far as Lloyds and the Stock Exchange are concerned, this is clearly spelt out in the Gower Report itself.

We believe it is worth re-stating a matter which we have expressed elsewhere. Where a constitution is "hidden", as is the British, it is difficult to tell whether or not fundamental change in the complex interrelationship of public and private is really taking place, and

especially whether market ideology is capable of becoming so dominant as not only to legitimate both privatisation and de-regulation but also the irrationalities introduced into public sector decision-making by such as a system of cash limits and general restraints on borrowing. We not only lack an adequate conceptualisation of byzantine relations between "public" and "private" but we lack the institutional arrangements through law which would allow us to consider the nature and balance of those relations vis-a-vis the overarching legitimation issues.

Networks: the British passion

A much discussed issue of network linkage in modern government in recent times has been the issue of corporatism, whereby government purposes are sought to be effected through representative groups who then, for the benefits which they can bargain with government, seek to deliver government policies through their constituencies. This is not the place to pursue well-worn arguments surrounding these developments save to say that corporatist tendencies not only create another dimension on the public/private plane but for the most part operate only subject to informal mechanisms which are not in any regular sense "accountable". They allow government to proceed "by other means" and as such are simply an example of performing law-jobs covertly without regard to the underlying principles of legitimation which we insist inform the true British Constitution (see Lewis and Wiles 1984). Recent work, however, has detected a variant of this genre which its authors label "Welfare Corporatism" and whose essential features are those of privileged access for, e.g., house builders, building societies and other private financial institutions and the common cause made by managers, professional and skilled workers to support social policies which exclude, especially, the poor. The convergence produces a "private" welfare system which weakens support for universal and direct forms of provision by the state. These

welfare arrangements depend upon state sanction but political battles over their injustice can be avoided if the state appears not to be involved. Welfare corporatism, it is argued, creates a useful illusion since many policies which benefit the privileged do not appear on the agenda of open politics. Despite "fiscal crisis", indirect state support has continued or increased, at the same time as the less privileged have faced a diminishing of resources. This transformation of welfare, the argument runs, has been hidden while the beneficiaries of these developments are convinced that their advantages accrue from the operation of the market or from private household virtues, rather than from government (Harrison 1984, Gower 1984). We have argued that the real importance of the debate surrounding various versions of corporatist thought lies in exposing another part of the working of the processes of British Government, of identifying private/public linkages and of highlighting problems of accountability and constitutionality. In this respect corporatist ebbs and flows are of a piece with the thrust of our general arguments concerning the need to legitimise the processes of public action through our informing set of immanent expectations. That public institution-building is called for to take the informal legal and para-legal processes out of the shadows. This issue is evaded by speaking of such developments as "de-legalisation", the contraction of the state and the like.

In discussing the bewildering array of networks which conceal the nature of public/private relations we touched upon the British Oxygen affair. It is worth drawing this out a little though we would not wish to suggest that the problems surrounding the public interest in this matter are anything other than symptomatic of the difficulties in lending constitutional credibility to government/private sector commercial relationships. In early 1984 the House of Commons Public Accounts

Committee decided to examine an exclusive contract which the Department of Health and Social Security has given to BOC and which would allow the Company to extend its monopoly in supplying medical gases and equipment to the National Health Service. A joint non-government investigation by the Guardian Newspaper and the College of Health, a body set up in 1983 to protect health service consumers, was the occasion for the heightened public interest. The report draws attention to the confidential nature of price negotiations between the DHSS and BOC, to the existence of an exclusive contract for which other contractors were not allowed to bid and, inter alia, to the fact that some thirty per cent of the group's £150 million operating profit in the preceding financial year came from its health care business. Less than ten years ago it constituted less than 10 per cent. It is nearly 30 years since the monopolies and restrictive practices legislation was used to examine these matters and the undertakings which the Monopolies and Mergers Commission (MMC) extracted would now need to be considerably re-vamped if they were to be properly policed by the Office of Fair Trading. (College of Health 1984.)

Just one more illustration of the difficulties of untangling public and private relationships will be offered before attempting to speak more broadly about the problems of networks, of "village life" (Heclo and Wildavsky 1981, 3) and the institutionalisation of these relations through law towards constitutional acceptability. Re-legalisation then, rather than de-legalisation.

Networks and re-legalisation

We have referred constantly to the networks of power in Britain and we now need to say a little more on this level before we can bring the preceding strands of our argument together. Reiterating that public power in Britain resides essentially in the great Departments of State together

with their client groups it needs to be heavily stressed that the institutional forms assumed for the exercise of public power are heterogeneous to say the least. In a range of areas, governmental power is mediated through formal quasi-government and quasi-non-government agencies (see Barker 1982, Lewis 1985). However, it is safe to say that with the possible exception of the Civil Aviation Authority most of these bodies exercise their power without any very stringent form of public law control; no rule-making procedures, grievance procedures - the Government White Paper after the Hunt Report on Cable untypically pointed to the need for such procedures in a limited set of circumstances surrounding disputes over pay-as-you-view problems, (HMSO 1983, para 115) - independent appeal mechanisms or the like. Although in many ways we would favour an expansion in number of such bodies, the way they currently operate in Britain tends to obfuscate decision-making to a considerable degree. The reason for this is that they often operate with a veneer of independence which disguises the strong pressure exerted by Whitehall for which it is prepared to accept little responsibility; indeed even the extent of that pressure is clouded beneath blankets of sophisticated and tutored forms of secrecy (Lewis and Harden 1982).

It goes without saying that absent such intermediate bodies other government/client relationships are likely to be even more obscured. We have spoken elsewhere (Lewis and Harden 1984) about the understated influence of lobbies in Britain in circumstances where public lawyers have had very little to say about devices for prohibiting ex parte contacts and for putting discussion on the record. The position has been well summarised by an "outsider";

> "British administration mastered the principles of cooperation and mutual self interest long before the "corporate state" became a political science buzzword" (Ashford 1981, 57).

The British Oxygen Case highlights some of the peculiarly British culture surrounding problems of the "contract state" and it is worth adding perhaps that in terms of government contracts at large public law forms are lamentably more absent that say in the United States (Lewis 1975).

Informally bargained outcomes, the decisions and nondecisions accommodated through networks of civility and conviviality represent very substantially the operation of the 'law jobs' of planning and monitoring and resolving grievances, (albeit ordinarily in an atmosphere of organised non-disclosure). Given what we have argued about the compenetration of the public and private spheres and given our concept of law it becomes then something of a nonsense to talk about de-legalisation in its ordinary meaning. If we argue that the immanent underlying principles informing British constitutional expectations are openness and some form of accountability then our task becomes that of re-legalisation through institution-building based on these legitimating principles. We would not of course argue that the legitimation foundations of the British state are explained or exhausted simply by appeal to these principles but we do argue that they are central to an internal re-examination of the concept of legitimacy which may well be a dialectical process (see Trubek 1977). Within that framework then let us attempt to introduce some conceptual formulations both of the problems and possible emergent institutional responses. We shall, in a later section, point to discrete areas of recent activity in Britain which exemplify the need to address ourselves to these large constitutional questions but in introducing some issues of a conceptual nature we shall turn briefly to the problems of the nationalised industries and to the matter of restrictive trade practices.

It has been recently argued that "anti-trust" regulation both in Britain, the USA and the EEC is to a large extent regulation by bargaining (Boyer 1983). Although the British Nationalised Industries are now

subject to the jurisdiction of the MMC, these remarks were directed to the private sector. However, long before the Competition Act 1980, regulation through bargaining and informal processes characterised the way successive governments handled their dealings with those industries. Government intervention over pricing, borrowing, pay negotiations and investment in the interests, variously, of counter-inflation policy, industrial policy and macro economic policy had taken place through informal and unaccountable processes which by-passed the formal legal authority to give directions to those industries. (NEDO 1976. Redwood and Hatch 1982.) Some of the same problems emerge in relation to the operation of competition policy. Although the machinery adopted is much more formal and public than is the case across much of British Government considerable leverage is still employed by the Secretary of State himself without engaging the machinery as such. Preliminary responsibility for defending the public interest rests with the Director-General of Fair Trading who decides whether to initiate further action after his own investigations have been conducted. Behind him, so to speak, lies the Secretary of State for Trade and Industry. Until the 1980 Act only through action by him could general investigations be undertaken by the MMC. The Secretary of State retains power to order investigations of monopoly situations and anticompetitive practices and he also has veto power over any investigation ordered by the Director-General and is entitled to guide the D-G in setting standards for referring monopoly situations to the MMC. We have no doubt that these rather complex institutional arrangements have the potential to deliver an open and public examination of these matters even if considerable improvement in this respect currently needs to be effected. Indeed a reformed set of procedures such as these could well have considerable analogical potential. Nonetheless the Secretary of State's role seems to us still to be insufficiently structured and institutionalised for us to

be satisfied that a sufficient degree of openness is secured. Unsurprisingly perhaps, the British courts have also ensured that his discretion will rarely be supervised (R v Secretary of State for Trade ex parte Anderson Strathclyde (1983) 2 All ER 233). Even the official government position is that "decisions on merger references are taken on a case by case basis rather than by applying a rigid set of rules" (HMSO 1978b).

There have in recent times been some complaints from industrialists that they have been offered little guidance on the government's thinking relating to the criteria for the acceptability of mergers. In a typically British way they have been confronted with the problem of how "to understand the coded signals with which most ... ministers impart information on subjects they prefer not to talk about directly". Furthermore in recent years there has been a number of complaints from industrialists that the Trade Department has been taking somewhat arbitrary decisions, a matter also not to the taste apparently of the Director-General of Fair Trading himself (Financial Times 18 March 1983). Following the 1978 White Paper no full-scale [public] review of merger policy has been undertaken. Thus although in many ways the institutional arrangements for examining the area of "competition" policy are much more developed than is the case in a number of other areas subject to the Whitehall writ, public law controls could yet make substantial contributions towards opening up the process to a more thorough-going dialogue (Korah 1982, Green 1983). Attempts have been made in the United States to deal with not dissimilar problems as witness the Antitrust Procedures and Penalties Act 1974. Although in the view of some commentators this Act has not been particularly effective, it never-

theless, in the usual pattern of American Administrative law, addresses itself to one of the most vexed problems of modern public government; viz.ex parte communications (Boyer 1983).

Government action, inaction and constitutionality

We argue elsewhere (Lewis and Harden 1985) that in Britain the underlying expectations of openness and accountability mean that the activities of all public actors and their agents are the proper subject of public scrutiny unless a strong case to the contrary can be made out, that case in its turn having to run the gauntlet of public and reasoned scrutiny. Given that we have made out a case, even in the course of this paper, that public actors have extensive links, formal and informal with private ordering and given that it is in Britain a constitutional axiom that Parliament can exercise omnicompetent power within its subject territories then it follows that the relationship of public actors to private concentrations of power is a matter of constitutional vitality too. This in turn poses questions about the instrumentalities and institutions for illuminating this relationship, a matter to which we have already adverted. We shall have more to say on this issue shortly. However, baldly stated, these propositions fail to identify an important element which we have only hinted at in our remarks concerning competition policy in particular and ex parte contacts more generally.

It ought to be commonplace that public actors these days operate as much through legally conferred discretionary powers as through legal duties. Indeed the literature on discretion is now too voluminous to need more than a passing nod. However, very little distinctly constitutional attention has been directed to this matter, at least in the United Kingdom. Interest in rule-making procedures, for example, has been substantially confined to circumstances where the executive either proposes to act or has already acted without a sufficient degree of

openness to satisfy the critics. But as K. C. Davis pointed out some little time ago (1971) the non-exercise of power is really quite often as interesting as its formal exercise. Especially, we might add, where it is the result of network conviviality, bargained outcomes and the deliberations of the cosy embrace. In other words, not least in the practices of British Government. We believe that the circumstances in which and the procedures adopted for decisions not to engage in legitimate action are an important referrent in any constitutional description. This means that "government in the sunshine" and putting major government non-decisions on the record needs to be worked at. There are numerous ways in which procedures could be devised for exposing the thinking processes of Ministers when they decide not to refer a merger to the MMC or not to press ahead with a piece of legislation originally favoured, or indeed why it had rejected some policy options in favour of others. A growing literature surrounding the issue of inaction or non-decision-making is beginning to appear in the United States and has, we believe, considerable significance for Britain which is much more in need of institutionalising its constitutional practices. We take this stand since we hope to have shown that the extraordinary compenetration of state/society, of public/private in Britain means that legitimation requires the exposure of the networked relationships, whether resulting in "positive" action or not and the building of institutions to ensure that the outcomes of the relationships are the deployment of resources necessary for rational and efficient conduct. Let us speak briefly to some of the American literature.

> "Administrative inaction occurs at least as often as administrative action. Its effects can be just as influential. When the will of Congress is not properly implemented, people lose benefit of legislative action and faith in the ability of government to

> effectuate social change. Judicial review of agency non-implementation of a statute is both necessary and proper to give effect to the congressional intent and to assure the legitimacy of the administrative system" (Lehner 1983).

Some movement has occurred towards the development of a court-enforced duty for agencies to speak to the non-implementation of programmes (Stewart and Sunstein 1982) and thereby to fill an accountability gap by forcing agencies to listen to the claims of the electorate. All this has to be seen in the context of the Freedom of Information Act, the Government in the Sunshine Act and various executive orders which together demand that the agency accumulate a fairly complete record of subjects that have become the object of agency consideration. Combine this with the requirement to produce contemporaneous records sufficient to show the public and the court its data, methodology and reasoning and they are on notice to keep an up-to-date record of anything that may be of concern to the public.

> Overall, this increase in documentation and congressional direction gives precision even to non-implementation and thus discounts a concern that these actions are too indefinite for judicial review" (Lehner 1983, 635).

Problems surrounding non-discursive public behaviour then are common enough though their solutions will have to be conceptualised after empirical mapping no doubt according to local conditions. In Britain the problem is identified periodically by lightning but never by constitutional arclight. Thus, to take but one example, in relation to the powers of consumer councils of the nationalised industries suggestions have been made for formalising the relationship between the councils after

making published recommendations to the industry and the failure of the industries to respond or to disclose required information (HMSO 1978a, 32; and Department of Trade, 1982, 45, 46).

We can find many such examples and will be pointing to a number of troublesome areas. However, the task as we see it is to engage in empirical work within the British governmental machine in and around the areas of corporatism, bargained outcomes, networks, regulation, privatisation and the like; work which is directed to building conceptual categories to bridge the gap between raw empirical observations and constitutionality. In other words, where the constitutional concerns expressed here are set in a series of discrete analyses, not only should we hope to target a number of institutional forms for advancing the twin ends of discourse and learning, but simultaneously we should begin to identify patterns of common policy problems and potential solutions (Teubner 1983, 264). In doing so we hope to provide a particularly British perspective on the problems of reflexivity and soft and other law forms. Given the enlarged concept of law which we adopt this represents a natural development.

In concluding this section we would add one item. Though adopting the position that this level of institution-building is demanded at the normative constitutional level we would add the rider that the demands of "effeciency" point in the same direction. Though not wishing to engage a refined dialogue about the nature and forms of efficiency we would rest here on one contemporary-sounding argument; that of rationality crises in times of increased organizational complexity and the corresponding need to "ground" rationality in learning processes.

In general terms let it be said that modernity tends to be accompanied by economic crisis management, confusion in the face of complex socio-economic processes and cognitive limits of mechanisms of

political-legal control (Teubner 1983, 268). This is one of the reasons why broad delegations of power have been acceptable for the American administrative agencies and why the development of cable in Britain ought, it is said, to be conducted through general as opposed to detailed regulation. The industry, it is urged, is likely to grow in ways which are currently impossible to forecast (Hunt 13). In the world of banking we have been told that an era of financial innovation and institutional change though observable is not easily susceptible to quantitative study (Fforde 1983). More broadly we are constantly told that the system cannot keep its own promises whether in terms of social regulation, macro-economic policies or in relation to non-market interventions. This has been well documented in Britain though it has been seen to be a more broadly-based problem suffused with difficulties surrounding inadequate programme formulation, information or implementation capacities (Reich 1983, 8, 35; Ashford passim).

Re-legalisation then is the urgent and pressing need for Britain in the 1980s. It is a conception which must be based upon open and accountable procedures across a wide range of issues given the extraordinary defects of our dignified constitution. We have long been persuaded that, for the most part, (and without prejudice to the protection of substantive human rights) the primary task of reconstituted legal machinery in Britain is to ensure that a "hard look" is taken at countervailing arguments concerning the formulation of major policy issues. The quality of political life depends crucially on the institutional atmosphere in which it takes place and that is the context for all other rights and importantly shapes the nature of the state (c.p. Parker 1981).

Now this vein of thinking does not incline us to offer a detailed constitutional blueprint and we accept that a mix of types of law will be necessary to ensure the efficient conduct of the state for the foreseeable future. We do not expect the abandonment of detailed regulation in all areas but we do believe that in relation to many matters which are high on the agenda of public affairs, political choice should take place within an institutional framework which encourages rational discourse and sets the standards of the terms of debate without predicating particular outcomes. In this regard there are important lessons to be learned from recent experience in the United States.

A States-side excursus

We believe that the history of regulation in the USA points up a number of key issues that any re-examination of the relationship between the governors and the governed in Britain ought to take on board. First it is clear to us that in developing the "hard look doctrine" the Federal Courts were right in insisting on a rejection of the crystal-ball approach to the resolution of tough questions. (Natural Resources Defense Council v Morton 458 F.2d 827, 837 (D.C. Cir. 1972).) On the other hand there has been a clear move away from the rigid constraints of formal rule-making on the record in recent years with both Congress and the Courts fighting shy of it. Rather there has been a move towards flexibility dependent however on producing a "substantial enquiry" and a "thorough, probing, in-depth review" (Citizens to Preserve Overton Park v Volpe 401 U.S. 402, 415 (1971)). The search then has been to avoid formal adjudicative procedures, whilst going beyond the arbitrary and capricious test. The latter, known as "soft" judicial review, sometimes less charitably as the "lunacy" test has been strongly evident in Britain when judicial review has been available at all. (Associated Picture Houses Ltd v Wednesbury Corporation [1948] 1 K.B. 223.) The "unsolved problem of

regulatory reform is to perfect an interest-representation model which will import political checks into the administrative arena"(Boyer,B. 1983). The search elsewhere has been called that of "creating an independent model of administrative decisionmaking" (Verkuil 1974, 187), and has clearly been influenced by the belief that ex parte contacts are in danger of undermining the fairness of the whole administrative process (Pierce and Shapiro 1981).

The flexibility of "hard look" then has been generally welcomed in that participation can take the form of conferences, consultation with industry committees, mixes of written and oral comments all directed at avoiding the unsatisfactory nature of the trial-type process. What is vital is to provide "recorded agency reaction to crucial submissions" which is basic to effective judicial review (Verkuil 1974, 239). This can be seen to demand different levels of detail in differing contexts and whereas environmental impact statements and regulatory impact analyses (Lewis and Harden 1983, 219) might be thought necessary on some occasions, less rigorous methods of producing discourse will serve on others. Interestingly however, cost-benefit analysis techniques are very rarely publicly employed in Britain for the purposes which we are advocating; techniques which, for all their defects, are capable of enfranchising interests which might otherwise be overlooked. Greater attention to such analysis could also help to avoid allegations that participative procedures might be captured by 'concerned publics'.

> "It may be claimed that any objective attempt to measure the significance of these 'missing' interests, however suspect its details may be, is a useful contribution towards assessing the totality of public requirements." (Self 1972, 289.)

In the USA there now seems general accord that regulatory procedure requires a new flexibility which respects traditional concerns for accuracy, fairness and acceptability, but which meets the need for more efficient administration. The strength of informal hard-look rulemaking resides in its unique combination of flexibility, expedition and fairness. The ability to "go outside the record" makes it much like the political process itself (ABA, 1979; Verkuil 1974). Change is clearly in the air to ensure that flexible models are developed which provide comprehensive and rational standards. The Regulatory Reform Bill of the 97th Congress (Lewis and Harden 1983), which had Democratic and Republican support is evidence of a continuation of this conviction while elsewhere 'rigour with flexibility' has taken the form of proposals for negotiated regulation which would involve engaging a convenor to discuss issues with interested parties and to propose regulations as an arbitrator suggests compromises. The role of the agency would essentially be to provide expertise and support (Harter 1982). Although this particular idea seems to embrace most of the weaknesses of the "concerned publics" syndrome its aura is contemporary in that it marries concerns about rationality crises and cognitive difficulties with a call for fully developed information being placed before the various protagonists. Underneath all these proposals lies a cri de coeur about democratic societies in general;

> "It is necessary for democratic institutions to adapt their workings so as to meet the necessities of modern governmental agendas. Should this fail to occur, democracies may fail to sustain acceptable standards of executive performance, or alternatively power will sweep away to hidden bureaucracies, or to some type of 'business government', leaving political institutions increasingly formalistic" (Self 1972).

In Britain, these concerns are especially pointed. For largely fortuitous reasons there is the occasional breakthrough whereby the zero-sum, "all-or-nothing" nature of judicial review of executive behaviour is dented. Thus, warts and all, the role afforded to the Social Security Advisory Committee under the 1980 Social Security Act to cause the Secretary of State to take a "hard look" at objections to proposed regulations relating to the supplementary benefit scheme is to be welcomed. (See for example s.10(4) Social Security Act 1980 and HMSO 1982 Appendix 3 and 1983c Chapter 3.) Elsewhere the Civil Aviation Authority has been praised for breaking the mould of administrative law in Britain.

> "... the CAA had developed longer term policies and standards by analysis and researching regulatory problems by not restricting itself to a court-like role, by mixing regulatory strategies and by withstanding departmental interference. The agency's expertise has allowed it to deal with complex or 'polycentric' problems by exercising judgment against against a background of published policy statements" (Baldwin 1983).

These, however, are isolated developments. In general, procedures for major policy initatives in Britain are defective in terms of both democratic conventions and the efficient absorption of the contributions of broad-based "publics".

Developments in Britain in the 1980s

It should be clear from the foregoing that important questions of legitimation through law, of constitutionality have been substantially suppressed for some little time past. The last two decades have, it is true, seen an upsurge of interest in administrative and public law controls which at the time of writing seems to have 'peaked' in the shape of the recently established pressure group, the Freedom of Information campaign. However, there can be little doubt that events since 1979 have

quickened the pace of unaccountable government and consequently have quickened the pulses of some constitution-watchers (see Lewis and Wiles 1984; Lewis and Harden 1983). Quite apart from significant changes in the machinery of government itself there has been a commitment to some measure of de-regulation and a large measure of privatisation. Absent the machinery for examining these developments which have lain at the heart of this paper, it has been easier to make a clean break in the public/private arenas than might have been the case elsewhere. In other words, major changes in the British state have been put in train without anything resembling a great debate. The party/presidential system of government in Britain has undoubtedly smoothed over developments which would have ruffled many feathers in other governmental systems. It is to a large extent the pressure of these events that has caused us to argue for re-legalisation in Britain in the 1980s.

We argued in our 1983 paper that for all the defects of American law, sudden changes of direction were often accompanied by legal safeguards quite absent in the British experience. We would now add to that argument the Supreme Court decision in Motor Vehicle Manufacturers Association of the United States, Inc., et al v State Farm Mutual Automobile Insurance Co. et al 51 U.S.L.W. 4953 where, in complex circumstances, the Court held that de-regulation may require adherence to rule-making procedures and that rescission of a rule must be subject to thorough, probing, in-depth review lest the Congressional will be ignored. Issues of far greater significance are treated in a much more cavalier way in Britain. Consider the examination of cable systems;

> "The three members of the inquiry were appointed on 6 April and a three page "consultation document" was issued the following day. The report was submitted less than six months later on 28 September 1982. Evidence was received from a number of organisations and individuals,

but such evidence had to be produced within eight weeks of the publication of the consultative document. That document itself consisted of little more than a series of questions on which views and comments were invited. Whilst such procedure was roughly analogous to the bare statutory requirements of the notice-and-comment rulemaking provisions of the American Administrative Procedure Act, it contained nothing whatsoever comparable to the "hybrid" devices developed in recognition of the fact that bare notice-and-comment is an inadequate source of legitimation" (Lewis and Harden 1983, 224).

On all manner of issues it is clear that machinery to examine major public issues in settings which encourage cognitive development and the monitoring of approved programmes does not exist or is inadequate for the task. This is true not only on the level of innovation but on that of quality control. For instance, it took a string of scandals on the Lloyds insurance market to effect changes, not the least of which was the appointment of an outside chief executive with the specific job of cleaning the Augean stables. Elsewhere the balance to be struck between the detailed regulation of specific practices and the need for general and effective public oversight of self-regulation or self-governance will require constant adjustment. We have committed ourselves to the view that a mix of types of legal framework will be required for the optimum ordering of public affairs but in Britain at the moment we have no confidence that the means for securing that optimum ordering are available. Indeed the culture of British politics, giving as it does, the gold, silver and bronze medals to the incumbent politicians who have most recently converted the general public to a belief in their overall competence, is of itself antagonistic to institutional re-ordering. Thus the need for constitutional rather than political readjustment.

Let us now turn to discrete areas to make out the case for a "hard look" at providing optimum procedural solutions for the resolution of current dilemmas. There is no doubt that certain forms of de-regulation can be positively harmful if the result is to allow the market to reproduce the negative externalities which caused the regulation to be established in the first place. The state, after all, has an obligation "to keep dysfunctional side effects within acceptable limits" (Habermas 1979, 196). The problem becomes how best to secure that end. For example in the USA, the Securities and Exchange Commission has, in recent years, engaged in a substantial programme of de-regulation having satisfied itself that self-regulation has been significantly improved (Gower 1984, 18). This will not always be possible and in Britain in 1984 the biggest private hospital group called upon the Government to re-instate the Health Services Board which formerly regulated and supervised the relationship between private medicine and the National Health Service but which had recently been disbanded (see The Guardian, 15 February 1984).

If what is required generally throughout the Western world is a conceptual system oriented towards social policy which would permit one to compare the consequences of different solutions to problems, to accumulate critical experience etc. (Teubner 1983, 264) then Britain is in deep trouble. Thus, until the beginning of 1984 the sale of public assets undertaken since 1979 was reported to have provided large speculative gains for investors given that the selling price was in aggregate some £400 millions less than current share prices. Moreover it was achieved by selling off primarily to pension funds and thereby exchanging one unaccountable set of bureaucrats in the West End for another in the City of London (The Guardian 12 January 1984). Many of these decisions are being taken, it needs to be added, without any [public] discussion of what regulation, if any, will need to be emplaced specifically on account of

the decisions to sell off being taken. The same problem, somewhat exacerbated, applies to the selling off of the Royal Ordnance Factories which has been estimated to cost the taxpayer £100 millions at least in the short term. The Government believes that in the longer term the move will prove beneficial though the opportunity to compare the consequences of different courses of action is, unfortunately, denied.

The sale of the Gleneagles Hotel, one of British Rail's prime assets, is another case in point. By the beginning of 1984 its value had doubled since being sold to the private sector which may or may not say something about the anticipated performance of private versus public management but given that timing is vital when selling assets one wonders whether selling less on commercial principles than on the basis of the latest Treasury estimate of the Public Sector Borrowing Requirement is necessarily an intelligible decision.

The examples could be multiplied but let us look briefly at coach and rail competition in a deregulated market. The 1980 Transport Act removed, inter alia, licensing constraints on long-distance coach services. The change took place after 50 years of stability and was bound therefore to have aroused considerable interest. There have been some surprising consequences of this decision but we will restrict ourselves to one issue alone. The major growth for coach passenger travel has been on routes where British Rail already provide not only a high frequency of service, but in most cases their best services. British Rail estimate that the financial loss from coach competition was £12 million in 1981 and £15 million in 1982 which of course represents a loss to the taxpayer. This has clearly added impetus to BR's determination to amend its pricing structure in favour of 'cheap deals', which a government-sponsored report has doubted is in the long-term interests of the industry (HMSO 1983b,

para. 5.4). The hard-look at this issue is, more often than not, exhausted by debates in the House of Commons and in Committee, the standard British forum for the scrutiny of matters of major moment.

We have touched upon the relatively superior constitutionally accountable performance of the Civil Aviation Authority already. We need here to add that it has also been involved in subjecting at least some important aspects of the decision to privatise British Airways to scrutiny. In December 1983 the Secretary of State for Transport requested that the CAA review the implications of privatisation and this it did through extensive consultations with industry and consumer interests. Its report, which contained recommendations affecting the future competitive balance of British aviation, stands out in splendid isolation as an institutional attempt to produce rational discourse in this matter of acute sensitivity and controversy (CAA 1984). It should hastily be added, however, that not everyone has been enamoured with the quality of the report (see The Guardian, 10 September 1984).

All of this naturally locks into the general unaccountability of the Nationalised Industries. Institutions can be created to help overcome the impotence in not being able to set and monitor objectives through public law techniques as was shown by the admirable study of UK Nationalised Industries in 1976 (NEDO 1976 and Lewis, 1985) but until now the political will has been largely missing. Elsewhere performance has been patchy but a number of recent developments suggest some interesting possibilities for 'soft' and 'responsive' law techniques which may or may not be appropriate more generally.

Cable

We have already regretted the lack of detailed public discussion before the Government committed itself to a 'slim-regulation' cable development. Some interesting features of the proposed system will be

examined but we doubt if the regimen adopted will operate at the 'optimum' level since cable interests already seem to have captured the government departments responsible. The government's economic policies seem very much committed to a rapid development of cable while the commercial interests affected seemed to have convinced government that detailed regulation would deter the necessary capital from being sunk in the exercise. Thus the unseemly rush which represented the Hunt Report.

The Hunt Report has been largely accepted uncritically by the Government, (HMSO 1983) and so in describing the outline of the proposals we shall conflate the Report and the Government response. We shall say nothing here of the decision to licence 11 cable experiments as a pilot scheme outside the proposed regulatory framework save that a largely unregulated beginning is likely to have important bearings on the shape of the eventual regulatory framework. Basically the Government's strategy can be summarised as follows; cable investment should be privately financed and market led. Regulation should be as light as possible and the regulatory framework flexible so that it can adapt as technology constantly changes what is practicable and economic. A small number of key safeguards will be needed with a new cable authority having the central role of promoting and overseeing the development of cable systems. The process of franchising cable operators will stand at the heart of the Authority's activity and flowing from it will be the Authority's responsibility for monitoring the performance of cable operators.

It is too early to speculate on the likely performance of either the Cable Authority or the new cable industry at large but some warning bells need to be sounded. The White Paper says that most of the detailed procedures for the franchising exercise will be for the Authority to determine and it will decide to what extent it wishes applicants for franchises to enlarge on their proposals in public rather than in private.

Given the somewhat unsatisfactory history of the Independent Broadcasting Authority (Lewis 1975) this is an unpromising beginning. We think that there is a great deal to be said for the government not insisting on detailed regulations for the new cable system if for no other reason than that flexibility is part of a necessary learning process. However, we should like to be satisfied that the new Authority would operate publicly and through published standards and policies and that both its own performance and that of the franchise-holders should be subjected to guarantees that periodic monitoring of performance took place through some version of the "hard look" doctrine ultimately enforceable in the courts. Statutory authority for cable programme services is skimpily provided by sections 56-59 of the Telecommunications Act 1984 which gives no clue as to overall governmental regulatory intentions.

Telecom

Most of our reservations in relation to cable can be repeated in relation to the reorganising of the British telecommunications system under the Telecommunications Act of 1984. We now know enough to suggest that our brightest hopes are unlikely to be fulfilled. The following is as accurate a statement now as the time when it was first uttered;

> "We are treated to an extraordinary melange [of an Act] which effectively sets up a new "Quango" in the form of the Director-General for Telecommunications whose office is, perhaps curiously, to be subject to the jurisdiction of the Parliamentary Commissioner for Administration. A whole series of "notice and comment" type provisions is littered around [the Act] which contains a Telecommunications Code (itself primary legislation), extremely limited provision for licensing hearings and a long-stop of recourse to the courts. The latter is on the basis of ultra vires determinations, thereby implicitly rejecting the idea of formal administrative

hearings representing the more acceptable forum for engaging opposing arguments of a technical and/or policy-oriented nature. It is a curious blend of market-mindedness along with the acceptance of some necessary regulation and licensing, more dictated, one would imagine, by international treaty obligations than an inner sense of conviction" (Lewis and Harden 1983, 229).

The regulation of banking

We could develop a number of the preceding themes and illustrate the haphazard and disorganised nature of control or regulation over the insurance industry or the building society movement. We would thereby be able to show how incoherent government policy has been over generations to responsibility for the the "private" sector and how substantially it has failed to embed constitutional expectations of openness and accountability. The exercise would be easy to construct but instead we shall say just a little about regulation and banking in the belief that these few remarks will subsume what could be said about some of the other financial services before we turn to the Gower Report.

In spite of the vicissitudes of informal governmental pressures there has, until recently, been little external regulation of the banking sector which has traditionally been dominated by a handful of major institutions. Self-regulation by the banks, supported by the customary authority of the Bank of England, was sufficient at least to maintain adequate standards of liquidity and to preserve the quality of banking business. Nevertheless, within the context of general autonomy there have been variations with the early 1970s as a period of very substantial freedom from interference.

However, during the 1970s prudential standards outside the primary banking sector were undermined by competitive pressures and by demands for credit from borrowers, particularly in the field of commercial property, who lacked ready access to finance from the established sources. New

lending institutions grew up in the secondary sector and by 1974 something of a crisis had ensued. Apart from the building societies there was no comprehensive legislation governing the activity of deposit-taking and no single supervisory authority. A number of ad hoc statutory provisions emerged but it became clear that a new and more comprehensive framework was needed while impetus for reform came from the EEC with the First Banking Directive in 1977 which required the establishment of formal arrangements for licensing deposit-takers. The result was the Banking Act 1979, the central provision of which is that of general prohibition of deposits without specific authorisation from the Bank of England. The Act contains broad criteria relating to the conduct of banking business but leaves a wide measure of discretion to the bank of England. The criteria have been described as raising "complex questions involving subjective decisions" (Cooper 1984, 256).

There is much talk these days of financial supermarkets growing or of para-banking activities emerging which are difficult to predict with any precision given the current state of money markets and of technology.

> "Innovation of this kind underlines the need for a parallel response from the supervisor, keeping under review both the legislative basis for supervision and the appropriate form of supervision, to ensure that new techniques of banking are both properly conducted and supervised" (Fforde 1983, 368)

These remarks seem to us to be eminently in keeping with the concerns which we have expressed throughout this paper but we are bound to say that there is nothing in the Banking Act itself which impels anyone to keep this counsel and certainly nothing of an institutional sort to facilitate the exercises envisaged. In the British setting, this is likely to mean that any reviews undertaken will be to a greater or lesser extent 'private' affairs. At the time of writing considerable ferment is

detectable while the shape and nature of supervisory patterns remains uncertain, though with a preference for a 'pragmatic' approach strongly evident in relation to financial services generally (Bank of England 1984).

Investor Protection

Leaving the clearing banks to one side, the most interesting developments in terms of money markets in Britain in recent years have related to the matter of investor protection in general and the City of London in particular. Many of the issues which we have touched upon in this paper have been raised during the course of these developments and they have culminated, in our sense at least, in the Gower Report.

Now the Stock Exchange, the futures and commodity markets and the like are clearly very centrally within the remit of the public lawyer's concerns given what we have been at pains to argue throughout this paper. The articulation between government proper and 'markets' as important as these would need little stressing at the best of times. Given a government which is wedded to controlling the money supply and to relying upon the City for raising money for substantial projects within the general ambit of its programmes, this becomes particularly acute. Not only are we talking about a very large commitment to privatisation but also to projects such as cable, the funding of the European Airbus and the like. Gower, coming in the slipstream of these events, poses fascinating questions in relation to degrees and types of regulation thought desirable in the money markets at large. To this we now briefly turn.

In 1981 the Secretary of Trade asked Professor Gower to examine the protection available to investors in securities and to recommend legislative reform in the light of his findings. Professor Gower's brief of course extended beyond examining the Stock Exchange, but not only did the latter figure prominently in his deliberations but a number of matters

supervened before his Report could be written. The Exchange had, in the last few years, twice been forced to defend itself before the Monopolies Commission and was, during 1983, doing so before the Restrictive Practices Court where its rule-book was under attack from the Director General of Fair Trading. Just before Gower reported, the issue was informally settled out of court on the basis of an understanding between the Council of the Exchange and the Department of Trade and Industry. (See statement by the Secretary of State, H.C. Debs. 27 July 1983 Cols.1194, 1195.) It seems clear that the compromise was one produced by a combination of substantial change in the world's money markets, considerable foreign, especially American competition, three EEC Directives on listed securities, and the Gower investigation itself. The development was not the result of any self-regulating mechanism as such though perhaps in the future the new arrangements will prove more satisfactory in this respect.

We shall not here detail the nature of the accords between the Council of the Stock Exchange and the DTI save to say that they involve the introduction of lay members on to the Council itself, the establishment of a body independent of Council members to hear appeals against a refusal to admit to membership and the reform of the existing Appeals Committee which attends to disciplinary matters. The implementation of these measures is to be monitored by the DTI and the Bank of England to ensure the evolution and development of the Stock Exchange as an efficient, competitive and suitably regulated central market which affords proper protection to investors. Gower himself regards this as a considerable advance and one which "completes the conversion of the Stock Exchange from a private club to a recognised self-regulatory agency within a statutory framework of control" (1984, 5.06). We make no comment on this judgement and would

only remark that whatever is happening in the Square Mile, it is not de-legalisation but re-legalisation, the legitimacy of which will be much debated in the months and years to come.

Gower pins his colours very clearly to the mast of self-regulation, subject, we hasten to add, to effective oversight backed by limited regulation. He clearly regards the financial markets as being over-regulated in some areas if by that we mean the regulation of fine detail. His position can be best summarised as being that the scandals which have so beset the City of London in recent times are less the result of self-regulation than of the fact that such self-policing has not always been subject to effective surveillance (1984, 1.10). It is then by this standard that his recommendations have to be judged and we are bound to say at the outset that we are less than overwhelmed by the likelihood of this being achieved under his schema. However, in some respects this is a mere aside.

To a very large extent Gower has bowed to City pressure that the new regime should have at its centre a web of self-regulating bodies, based very largely on trade and professional rather than functional groupings. The Lloyd's scandals of 1979-80 have not deflected him from this belief and he adopts the attendant view that the reconstituted arrangements provide an adequate framework for the protection of the public. The stark outline of the Gower scheme is as follows;

a) A new Investor Protection Act administered by either the DTI or a self-standing Commission.

b) Investment business to be carried on only through a process of registration conducted either by the Department (or Commission) or one of the self-regulatory bodies.

c) The Act to constitute a broad-based regulatory framework within which self-regulation would represent the norm.

d) That self-regulatory bodies would be responsible for the conduct of their members and in turn would be afforded certain privileges.

In many ways the crunch issue is "the DTI or a self-standing Commission". Gower, originally a proponent of the American SEC has apparently moved in favour of vesting powers in the Department, arguing that when the SEC was originally set up in the United States it was in a context where nothing comparable to the self-regulatory structure which we have now begun successfully to adopt, existed. We entertain considerable doubts about the role of the Department not least on account of the cogent reasons put forward by Professor Gower himself when rehearsing the pros and cons of the argument. We feel particularly doubtful in relation to the growing internationalisation of investment business where a Commission might be better equipped to establish links with agencies in other countries and to tackle general problems flowing from an increasing internationalisation of financial markets (Gower 1984, 3.19).

Within the Gower framework the Bank of England would continue to act on behalf of the Treasury in relation to the surveillance of the commodity and financial exchanges even though ultimately the Government (or Commission) would have responsibility for the regulation of the markets. The other point of major institutional significance perhaps is that the Council for the Securities Industry (CSI) should retain its role as the umbrella and coordinating body of self-regulatory agencies and associations. With a full-time Director-General and a larger support staff than it currently possesses it should be able to effect general supervision of self-regulating agencies. Even after Gower had gone to bed the CSI continued to have problems in establishing its authority over its constituents but Professor Gower may be right that the new legislative framework might just turn the trick.

Gower is suggesting then that for a very important sector of British power and influence, self-regulation with effective oversight is the way forward. That detailed regulation is not the most effective way of delivering on the public interest. In this respect he is no doubt moving with the times and is in fact echoing a sentiment which found expression in the field of Health and Safety in Britain as far back as 1972 (Robens). The health and safety experience is in fact somewhat mixed but this is not to gainsay Gower's arguments. What is crucial, and what Gower himself accepts is crucial, is the effectiveness of the oversight. In this respect we believe that DTI oversight in the culture of British politics is likely to be less effective than a self-standing commission, provided always that its constitution was to be informed by principles of openness and accountability of a sort currently lacking for most Quangos (see Lewis 1985). We shall return to this theme at the end of our remarks but we regard the kind of framework suggested by Gower as being one kind of means of re-legalising an important area of public concern. Effective self-regulation, effective oversight, effective ombudsmen and grievance mechanisms (all of which find some support in Gower) seem more likely to produce rational discourse and an evolving learning process than does a strict regulatory regime whose inflexibility and fierceness can easily cause it to fall into relative desuetude.

Conclusions

We have argued that an analysis of Britain's working constitution is long overdue; that public power and its relationship with private configurations is inadequately charted in the constitutional literature and that this in substantial measure relates to a failure to examine the legitimation foundations of the British compact which to an important degree are expected to be characterised by notions of openness and accountability. Over many years, public power (in the widest sense) has

been exercised in a largely covert manner through networks of conviviality which obscure the workings of the British state. Law-jobs, social processes, get done then only in small degree under the public gaze and if our constitutional expectations are to be enfranchised and encashed then legal processes need to be re-examined and re-legitimated.

In this belief we hold no especial brief for "gesellschaft" forms of law and, indeed, for the most part regard them as less relevant to the problems of the late twentieth century British state than a "revised model" of administrative or public law much more dependent upon procedural devices directed at producing "hard look" and rational discourse. In contemporary Britain however, much remains to be done before pledges will be honoured.

We have argued very staunchly (Lewis and Harden 1984) that reforms to the model of British Government, helpful though many of them might be, will ultimately do little to produce accountability and rationality in the policy-making process. The power of Party and elite consensus will see to that. Only alternative bodies empowered, inter alia through Freedom of Information and properly equipped, can provide alternative modes of discourse for rational choices to be made. Given that we adopt this position then we clearly have no objection in principle to self-regulation, loosely supervised, characterising much of our public law in the years to come.

We have objected to the unseemly haste of the Hunt Report but nevertheless are prepared to accept that general oversight as opposed to detailed regulation can provide the opportunity to respond flexibly as the industry develops in ways which are difficult to forecast at any given time. We are sympathetic to the idea of a light regulatory touch and the adoption of a reactive rather than a proactive style (Hunt 1982, 13; HMSO 1983a, 143). But our belief is based upon a conviction that such

complexity requires a public learning process and not upon any ignorant version of marketism. A responsive law, to use the argot of Nonet and Selznick, perceives social discourse in such settings as "sources of knowledge and opportunities for self-correction" (1978, 77). To put it another way, such legal processes "can arrange patterns in which societal agents can discursively advance their goals and objectives" (Reich 1983, 30).

Thus with new learning situations especially, it is less than sensible to prescribe from the centre, a disease to which the British are particularly prone. But if we are serious about such claims then effective sources of knowledge must depend to a considerable degree on public participation of varying kinds simply to ensure the cognitive competence of the organisation concerned, quite apart from any larger notions of consent. Freedom of Information, which we espouse vigorously (Lewis and Harden 1984) is probably a pre-requisite but it is only that, and considerable expertise in planning and evaluation through cost benefit and other techniques will need to come in train if justice is to be done to any effective decision-making process. This version of the legal process will need to sunder the connections with a number of Anglo-Saxon legal traditions, not least in the administrative law sphere. Doctrines of standing are a positive impediment to the processes we are here outlining when what is needed is the release of a system's capacity to inform itself. The sharp distinction between law and politics, never, as we have argued, terribly convincing must give way not only to law as "surrogate political process" (Stewart 1976, 1761) but law as institution-building for the better identification and construction and implementation of policy goals. Its relationship with "full-fledged social policy analysis" (Teubner 1983, 280) will need to be re-evaluated.

Little of this is really new. The public interest lawyers in the USA in the 1970s were making very similar points, except that their focus was the capture of decision-making referents. Now clearly learning is less likely to be unalloyed if it is informed only by sectarian constituencies so that it was and remains wise to entertain "suspicion of corporate power, or more precisely, suspicion of corporate subversion of government power" (Lazarus 1974, 2). Most of the important developments in British public administration in recent times have taken place without the kind of guarantees of which we are speaking. Indeed, we repeat the alarm with which we view the absence of constitutional discussion concerning the ex parte problem.

Although exposing ex parte communications is notoriously difficult to guarantee through law it seems to us vital to make the effort, most particularly in a system which is riddled with institutional veins of familiarity. It is worth reminding British lawyers that the American Administrative Procedure Act obliges members of agencies to place on the record written communications, memoranda of oral submissions and other responses oral and written received from one party to the proceeding only. Much administrative law reform since 1946 has represented an attempt to catch new variations of informal and improper pressures. It is surely time for British lawyers to address their minds to such matters within the heart of the governmental process.

Where then are we led? The central policy dilemmas confronting the British state need, in the light of expectations underlying our polity, to take place in an atmosphere characterised by the best information available from all interested parties. Our system does not currently encourage this. On the contrary, it discourages it. To inform thinking in this area it would be valuable if our constitutional lawyers had enough

faith in the tools of their trade and enough energy to chart movements in the nature of public and private power so that discourse through law became a fashionable creed.

We need to examine experiments in the field of 'loose' and 'soft' regulation and to monitor the effectiveness of oversight in the public interest. We need also to think about institutions which will be able to scrutinise the costs and benefits of alternative policies and programmes, not least to ask when self-regulatory techniques are worth pursuing and when not. All of this means institutionalising a "hard look" at tough choices. We are prepared to offer a variation of Sir Douglas Wass's standing Royal Commission as a beginning. A British Administrative Conference with teeth could start to chew on such a programme (Lewis and Harden 1984).

Much of the literature concerning legitimation and rationality crises, of the need for grounded or bounded rationality and institutional learning processes finds us an eager public. However, its theoretical attractions apart, the particular problems of the British State (see Ashford 1981 especially) with its extraordinary concentrations of executive power, make it required and persistent reading. That it should focus on the empirical circumstances of current public dilemmas with a view to suggesting conceptual categories for legal institutions in the 1980s and beyond is our passionate belief.

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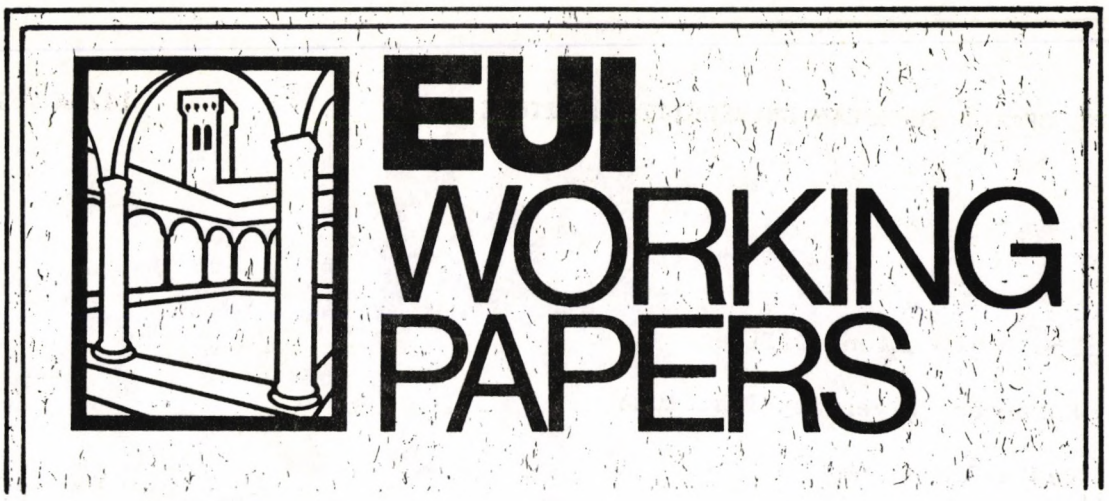

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