Governing Universities: Varieties of National Regulation

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1. Introduction

The theme of 'public-private dynamics' for the analysis of higher education – the key coordinating focus for the chapters of this book – is nowhere better illustrated than in an account of higher education regulation. At first sight, this statement appears perverse. After all, public rule-setting and compliance seem at odds with the notion of a 'private space' where non-governmental social and market actions predominate. Yet increasingly markets are constituted and enhanced by law and policy, such as the enforcement of property and contract rights, for example, and are also moderated socially to enable such desirable outcomes as customer protection and accountability. Indeed, contract law may be regarded as the most private and delegated form of government regulation. In recent years, the marketisation of higher education has occurred as a consequence of public policy decisions, rather than 'naturally' or 'privately', and has resulted in more, not less, or in different forms of, regulation in many systems. Moreover, as we shall see, the notion of 'regulation' in higher education and in other sectors, is increasingly 'de-centred' as a concept, to take account of the 'networking governance' of public and private actors in public decision-making in contemporary democracy, in contrast to more traditional, hierarchical, and state-dominated notions of regulation (Pierre and Peters 2000).

In this chapter we seek to explore these public-private dynamics as they are manifested in different higher education systems. We start by exploring the notion of 'regulatory space' in higher education and sug-

gest that regulatory systems tend to contain quite messy combinations of state, market and self-regulatory instruments. Rather than approximating to particular ideal typical forms, regulatory systems in particular countries contain often quite overlapping elements, and these constructions vary in different jurisdictions. Moreover, rather than globalisation leading to regulatory convergence in higher education, it is proposed, from an analysis of the USA, South Africa and England, than national variety in regulatory styles remain, and that these are at least to some extent explained by distinctive historical and structural factors, by country position in the global division of labour, and by explicit public policy purposes.

Broad-brush characterisations of regulatory approaches in higher education across countries have a tendency to neglect or to play down significant national differences. Although it is possible to describe a general convergence towards patterns of similarity in higher education regulatory arrangements – more state and market regulation in countries with a strong self-regulatory tradition, such as the UK; more market and self-regulatory processes (institutional autonomy) in traditionally state-dominated systems, such as found across Continental Europe; and more federal state influence in long-standing market systems (such as the USA) – such patterns nonetheless overlay key national regulatory varieties. Particularly we need to 'fine-tune' our notions of 'regulation; and we need to understand the particularities that flow from countries' political histories and structures, and from differential positions in the global division of labour.

Regulation (simply stated) is a form of rulemaking that usually comprises the functions of standards setting, information gathering, and behaviour modification (Baldwin and Cave, 1999). It is often, but not always, associated with government. External or state forms of regulation, whatever the force of traditional command-and-control modes, and whatever the sector under consideration, rely on others for effective implementation. Regulators are always at one step removed from those they influence, lacking the direct bureaucratic hierarchy over regulatees generally available to leaders within organisations. This 'gap' raises a fundamental and persisting dilemma for regulators on how to enrol 'partners' in their regulatory enterprise. A wide body of literature on governance, and the operations of publicly constituted markets, points to such persisting issues as principal-agent problems, and the necessity for governments to be involved in a range of public-private networking and other relationships for effective state rule (Kjaer 2004; Teixeira et al. 2004).

'De-centred' interpretations of regulation take this issue of 'social enrolment' further and challenge state-centred definitions of regulation. They focus more on the notion of 'regulatory society' than 'regulatory state'. Rather than government having a monopoly on the exercise of authority and control within a jurisdiction, power and influence are regarded as dispersed between social actors, of which government is one (Black 2002; Scott 2004). Private groups of all kinds, such as media, voluntary associations and other non-governmental or civil organisations, are not simply the targets of regulation but help to constitute and secure it. De-centred approaches raise the issue of how best regulation is to be exercised, and particularly the use of non-state instruments, such as the market, or professional forms of self-regulation, or even the media.

De-centred analyses strongly suggest that government-backed regulators should work with the self-regulatory capacities and associations of social actors. Consequently, governmental command-and-control regulatory instruments have often been criticised as ineffective and rigid, and as less likely to secure legitimacy with regulatees, than forms of self-regulation in which the state operates more as a steering, licensing or endorsing mechanism (Ayres and Braithwaite 1992; Gunningham et al. 1998).

2. Regulatory Space

The regulation of higher education at national or systems' levels has commonly been regarded as approximating to one of three broad types: *state regulation*, with governmental and legal rules exercised hierarchically over institutions, and generally involving high levels of formal codification, external evaluation, and explicit sanctions; *self-regulation*, in which institutions and their member associations seek to construct and operate rules and controls over themselves, particularly through individual normative internalisation of appropriate standards and behaviour, and where the focus often is on member rather than client protection; and *market regulation*, in which orderliness, responsiveness and quality in systems are assured through the mechanisms of competition, choice and consumerism. The famous Clark (1983) 'triangle' at its three points broadly incorporates these 'ideal' forms, although others have extended the confines of regulatory space to include four (Becher and Kogan 1992) and six (Marginson and Rhoades 2002) dimensions.

It is rare, however, to find a regulatory system that does not combine often very messy combinations of elements from at least two of the models. Self-regulation, for example, rarely, if ever, lives up to its de-

scription. Such systems generally are dependent on some level of state agreement in order to be legitimised and to be effective. State involvement in shaping self-regulatory systems can leave a strong imprint (Ogus 1994). Similarly, the extension in higher education systems of market or 'quasi-market' forms of coordination usually have ensued from, and continue to be dependent upon, determined government action in reforming traditional or welfare-state institutions to make them more efficient and externally responsive. And, conversely, even state regulation in the form of government-introduced statutory frameworks for university accountability is often dependent on self-regulatory processes, such as peer-driven academic judgements and rankings.

Apart from descriptive concerns, analyses of higher education regulation that, inevitably, confront comparative national variety soon raise questions about regulatory trajectories and their global inevitability. That is, for individual countries, historical background, governing structures, and position in the global division of labour are among factors that act against worldwide regulatory convergence of higher education systems. Stages in a country's social-economic development are important factors in helping to shape particular forms of higher education governance. Although we will examine the case of South Africa more closely later in the chapter, we can refer at this point to South Africa's current 'command-and-control' approach to the reorganisation and direction of its higher education system as an example that reflects both a strong social transformational agenda and a determination that universities will help the country respond to global economic competitiveness as part of national development (Subotzky 2003). The higher education system is a key focus for the reconstruction of post-apartheid society, following the historic stratification of institutions by racial purposes under the previous regime. Higher education is subject to strong regulatory state intervention that is regarded as necessary for introducing social equity, market-based competition, goals-oriented funding policies, and institutional capacity- building towards the best international standards.

In East Asia, too, strong governmental intervention in higher education in countries such as Singapore and Malaysia is asserted on grounds of economic necessity and relevance. For nearly 40 years Malaysian governments have required admissions, curricula and the language of instruction in public universities to reflect ethnic quotas and the cultural development requirements of the Bumiputras (Tan 2004; Lee 2004). Elsewhere, strongly directive forms of higher education regulation may be found in other transforming societies, such as in some of the countries of central and eastern Europe (King 2004a). Once 'matured' devel-

opmentally, a key issue is whether forms of higher education governance will also change in such countries.

Higher education regulation in England, however, as we shall see, displays a greater mix of self- and state- driven features, and considerable instrumental oscillations and divergences. Here, there is a long-standing sense of institutional autonomy – although somewhat atrophied by governmental intervention in recent years, and which also was never exported as a model to its colonies where full university operation and freedom were regarded as potentially subversive (Altbach 2004).

The USA, our third case discussed below, contrastingly offers multi-dimensional and overlapping forms of regulation, involving both sector self-regulation (accreditation) and external governmental review at local state and federal level. However, unlike the English case, there is no history of strong governmental regulatory action at the centre in the USA, although there are signs that this may be changing. Recently there appears also to be convergence of governmental and non-governmental regulatory approaches in seeking to combine external performance evaluation with greater freedom for institutions in determining the means for achieving results (Kezar and El-Khawas 2003). As a world economic and higher education leader, the USA also exerts a strong influence for trade-in-services regulatory modelling internationally through WTO-GATS and through more bilateral trade processes (Braithwaite and Drahos 2000).

Marginson (2003, p. 134) suggests that in higher education "a new policy globalism", dating from around the mid-1980s, "had its roots in the de-regulation and re-alignment of national financial systems and the associated tendency to convergence in all economic policies". He goes on to remark that it reflected "the dominance of neo-liberalism in economic and social policy, and the emergence of techniques associated with that approach, such as simulated markets in the public sector". Sporn (2003, p. 129) also argues that de-regulatory convergences are occurring across Europe, based on greater institutional autonomy, entrepreneurialism, and external performance evaluation.

Yet 'policy transference' through increasingly global public/private epistemic communities of experts and decision-makers is no smooth and unidirectional affair. Often it runs up against national conditions, contexts and global positioning which influence local receptivity to such ideas originating elsewhere. We shall see that this is particularly the case in South Africa, where, as in many transitional countries, there is the need for strong interventionist government to offset the adverse effects of market-driven globalisation (Subotzky 2003, p. 173).

Notions of national regulatory variety, rather than assumptions of policy convergence in worldwide higher education systems, additionally help to challenge a further and related orthodoxy in state theory and public policy analysis. This convention is based on the notion of the 'overloaded' state in advanced societies as having retreated in recent decades from many of its previous responsibilities so that it becomes simply one partner with others operating looser networks of influence and authority (King and Kendall 2004). The image is that of governance without sovereignty (Pierre and Peters 2000). Internationally, too, it has been argued that the nation state is being reduced to only one part of a globalised network containing many participants, and that, "in the future, the close ties that, in many cases, still exist between higher education and the nation state will dissolve. The state will be a partner – albeit an important one – instead of a major actor defining much of higher education's scope and possibilities" (De Wit 2003, p. 175).

Yet there are signs that governments have more modernist, executive and hierarchical ambitions than is indicated by this portrait. In the UK, for example, across a range of policy domains, and increasingly including higher education, reliance on older, intimate, oligarchic, pre-democratic and secretive forms of self-regulation have been succeeded in the final decades of the twentieth century by what may be termed policy hyper-innovation undertaken by the state (Moran 2003). The private character of the most important parts of self-regulatory systems have been transformed and replaced by tighter state controls. New regulatory institutions based on hierarchy, formal codification, transparency and juridification have been introduced.

High modernist state ambition and intervention are also apparent outside the UK. In Singapore, and other parts of Asia, the state maintains a dominant presence in higher education decision-making and planning. Even in the USA, with its tradition of generally weak central government and strong self-regulatory accreditation processes, governmental regulatory interventionism has become more apparent in recent years. At local state level, but also recently at Federal level as indicated by the Re-Authorisations of the Higher Education Act, governmental accountability ambitions for universities and colleges have become quite marked, not least through the application of student outcomes- based performance indicators.

So far we have suggested that, for national systems at least, we need to be careful in assuming convergence to similar patterns of state-university regulation. Global and local factors help produce variety within countries. Moreover, the view that a more quiescent state is giving way to softer forms of public-private networking coordination – ef-

fectively that regulatory power is becoming dispersed and diffused as a system product rather than exercised in a sovereign way by states – is not necessarily supported by analysis of regulatory systems for higher education in a number of countries. These include those in England and the USA, where arguably, on the basis of strong liberal cultures, it could most be expected.

There is a further reason for being doubtful about theories that posit regulatory convergence among countries towards a common 'post-nation state' outcome, and towards one that is felt to be especially appropriate for the globalised, neo-liberal circumstances of the early twenty-first century. Regulatory approaches are not merely technical arrangements in order to achieve efficiency, effectiveness and overall rationality in the face of perversity and disorder. They reflect values and are based on particular 'world views'. As such they are essentially contestable. Libertarians recoil from state rules; hierarchists prefer law and bureaucracy to self-sufficiency and markets (Hood 1998). An intricate balance to reflect all such ideals in regulatory modelling is probably impossible. Regulatory systems consequentially are unstable. We must expect controversy, change and resistance whatever the arrangement – not a journey to an agreed final destination suitable for all. Moreover, in advanced capitalism, innovation and destruction are dominant features in the constant creation of value and profitability (Schumpeter 1942). This means that in all sectors governments face continual challenges as to what needs regulating, and by whom.

3. Regulatory models

There are various reasons for governmental regulatory intervention in sectors: market failure; democratic accountability; cost reduction and value-for-money; the influence of 'public opinion', sometimes through a 'scandalised' media; the result of pressure from interest groups; and the 'inner life' and ambitions of regulatory agencies and their personnel themselves (Baldwin and Cave 1999; Scott 2004). Even the introduction of competitive or de-regulatory pro-market policies may require new rules to prevent subversion by incumbent and dominant interests. Supporters of regulation (such as social democratic governments, including New Labour in the UK) see it as a means to correct over-large market power, and, particularly where large amounts of public expenditure are involved, to ensure accountability in the public interest. Others (neo-liberal political parties and thinkers, for example), contrastingly, regard state regulation as prone to legalism and ineffectiveness, or to capture by

dominant interests, including by those purportedly being regulated. As a result, in this latter view, regulation by government is best avoided or kept to a minimum wherever possible. Preferring the self-regulatory capacities of markets and organisations, such proponents view regulation at best as only being used to 'hold the fort' until competition arrives. Rather than being concerned, as the 'regulationists' are, with market failure, advocates of 'de-regulation' and increased choice regard governmental failure as the greatest danger.

Issues of regulation in national higher education systems have attracted wider public attention recently in a number of countries. Policy commitments by governments in seeking value-for-public-money, to assuring quality, to meeting social objectives of equity and opportunity, and to generating informed choice and diversity for students and other university consumers, has resulted in policy-makers seeking either greater, or at least different forms of, regulation of universities in order to achieve these goals.

Yet, concomitantly, governments also recognise – and in some countries, such as the USA, this is a longstanding view – that enterprise, knowledge-creation, and entrepreneurialism within universities also require corporate and academic freedom from the state. Too much regulation is likely to dampen creativity and innovation. Moreover, 'anti-bureaucracy' is a common ideological theme with powerful electoral resonance in many liberal democracies, and also in many post-communist central and eastern European states, and this can help to restrain too excessive levels of intervention by states in higher education as well as in other policy areas. The dilemmas that confront higher education decision-makers in both government and the institutions lies in finding the balance between regulation and autonomy that allows these various and sometime conflicting policy aims to be achieved.

We now consider the primary regulatory instruments available to governments, and their applicability in higher education systems, with these dilemmas in mind.

3.1 Command-and-control

A commonly employed regulatory instrument that can be found in many sectors, especially so historically in the USA, has been termed 'command-and-control'. 'Command' refers to the prescriptive nature of the regulation laid down by government or legally-sanctioned agency, and 'control' refers to the command being supported by negative sanctions, such as being fined for not meeting standards or targets. The thrust of command-and-control regulation is rather negative. It is often regarded

as particularly inappropriate for professional employees such as academics and, more generally, as being out-of-kilter with the social and economic complexities and expectations of the modern age. Criticism of such an approach, most apparent in the USA, focuses on its excessive legalism, its incipient hostility to regulatees, and its inflexibility. In the fast-moving world of borderless and technology-supported provision in a range of commodities and services, including higher education, it can be slow to take account of new circumstances and new players, acting as a barrier to market entry and competition. Moreover, 'command-and-control', it is argued, encourages compliance with minimum standards rather than providing incentives for going beyond the norm or for innovation. When seeking to control a social area that covers many sectors, such as health and safety at work, or environmental protection, rather than simply a particular sector, command-and-control regulation is often regarded as lacking local knowledge to be operationally effective, or as having to resort to overly detailed and burdensome applications of general laws, which often are not appropriate for the distinctiveness of most sectoral conditions (Baldwin and Cave 1999; Gunningham et al. 1998). Despite its drawbacks, 'command-and-control' regulation nonetheless has benefits of transparency, simplicity and reliability.

However, it has to be recognised that there has been a turn away in much of the regulatory literature from 'command-and-control' models towards what are regarded as 'smarter' forms of regulation based on at least a substantial element of self-regulation (Gunningham et al. 1998). The professions particularly, it is thought, are best regulated in such ways.

3.2 Self-Regulation

Generally professionalisation is regarded as a means of controlling working conditions through 'self-regulation'. Professional control over work has usually been associated with the creation of specialised, or knowledgeable, products or commodities (as in medicine or education) that are increasingly regarded as socially necessary by the public, and whose production is protected through the activities of a member association, particularly in controls over training, entry, competition and discipline.

It is this characteristic of 'closure' that has attracted criticism of self-regulation as self-serving and inefficient by those preferring coordination through the competitive market (economic liberalism), or as demanding state regulation to combat biased class interests (Marxism) or to address professionalism's perceived citizen unresponsiveness ('Third

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Way' social democracy). Interestingly, all critics, including Thatcher governments in the UK, have not been averse to a strong state as a primary instrument for achieving their objectives. Unsurprisingly, given the strength of these criticisms in a number of countries, self-regulation for a while fell into disrepute in the latter stages of the twentieth century, reinforced by media coverage of professional disputes and scandal in areas such as health, and a sense of self-regulation's inadequate accountability in a democratic age. In the UK, particularly, self-regulation had been formed predominantly in a pre-democratic era, and its informality, behavioural congeniality, and secrecy were cultural modes used by the economic and political elite to avoid wider public scrutiny (Moran 2003).

These accounts sit oddly with the notion of a 'retreating state', one that was alleged to be creeping away from the centre of the governance stage in the 1980s and 1990s. In England, an ambitious modernising political elite, including those from both the major political parties, has for two decades or more been engaged in hyper-active institutional reform in a number of sectors, including higher education, based on the introduction of much more formal state evaluation and 'quasi-markets'. In the USA, local states have also sought to introduce greater formal performance accountability and evaluation of their public services, including universities and colleges (Dill 1997).

The attractions of self-regulation are that it aims to improve regulatory effectiveness (through incorporating local knowledge, for example, which is increasingly a capacity of employees rather than owners in modern, knowledge-focused learning organisations). It is also regarded as enhancing the moral basis of regulatory authority. That is, self-regulation works with the grain of occupational culture and therefore has a greater chance of becoming accepted as legitimate, and avoiding opportunistic evasion, resistance or surly or 'creative' compliance (Braithwaite 2002).

Self-regulation, however, is not without difficulties. For example, it can be used to serve the private interests of a sector and, without a strong external hand, standards atrophy, become un-policed, and are rarely sanctioned. Nor are self-regulatory processes particularly transparent, essentially being confined to 'insiders'. However, self-regulation may work effectively when competitive and other pressures result in all organisations within a sector as likely to suffer from 'maverick' or unethical conduct coming from any one of them, which may result in regulatory leadership coming to be exercised by the bigger entities. A key issue for higher education systems is whether increased marketisation and institutional stratification is diminishing shared 'communities of fate'

between universities in national sectors. Are notions of the 'self' in university 'self-regulation' fragmenting into less sector-wide elements, leading to more exclusive university pressure groups based on reputational alignment, and with a consequent debilitation of overall systemic self-regulatory capacities?

3.3 Market regulation

State- and self-regulatory modes are regarded by some as less satisfactory a form of coordination than the spontaneous order of the competitive market place. Broadly, synoptic state surveillance is regarded as impossible to achieve in the face of the widespread tacit knowledge possessed by non-state actors (Hayek 1979). Competition, choice and informed consumer decision-making provide better webs of regulatory control than laws and peer-group constraints. An increasing regulatory approach to higher education in a number of countries is to introduce wider institutional competition, such as through selective funding processes, user-pays models for the consumption of services, and more de-regulated tuition fee structures. The production and dissemination of institutional performance evaluations and other data is also aimed to provide more informed consumer choice and to iron out some of the imperfections in university student markets. In some cases, administrative appeals arbitrations ('ombudsmen'), and sometimes allowing recourse to private law remedies (torts), are extended to students, now objectified as consumers with rights rather than as simply welfare recipients.

Yet two points illustrate that state regulation does not necessarily 'soften' with marketisation but often retains its strength. First, maintaining the conditions for increased competitiveness or 'quasi-markets' often involves more state rules and intervention than previously, not least in areas of quality assurance and consumer protection. Second, marketisation measures in higher education generally have been limited and controlled, and de-regulation has not been full-blown or easily allowed the entry of new private providers.

The next section examines a number of the above regulatory issues in three countries: the USA, England, and South Africa. These are countries that exhibit variety in levels of economic development, locations in the global division of labour, and political cultures and structures. As such they help to provide illustration of some of the themes outlined above. The USA is included as an example of a market-based regulatory system but also as one with increasing levels of governmental regulation. The case of England exemplifies a regulatory system moving from self- to more state- and market-based regulation, but which is also char-

acterised by state hyper-innovation, governmental ambition and regulatory oscillation. South Africa is included, rather than say a Continental European country, because its strong state 'shaping' of the higher education sector highlights in a fairly explicit form an example of increasing command-and-control in its regulatory approach, whereas European countries are generally moving in the other direction. In part, South Africa's regulatory developments are a consequence of distinct historical and globalisation processes.

4. Three countries

The USA

The USA system provides an example of multiple and often overlapping authorities. There is a widespread international sense that higher education in the USA is either largely self- or de-regulated, at least when compared with the increasing national state controls over universities in more centralised countries. Yet the USA was the first modern 'regulatory state', expanding particularly in the mid-decades of the twentieth century under Roosevelt's New Deal, with many of its institutional structures, rules and agencies providing inspiration elsewhere, including for the EU. It is not clear why its higher education system necessarily should be regarded as inevitably more 'de-regulated' than other countries.

Admittedly, evidence for a de-regulated higher education system in the USA may be drawn from the long-standing system of degree-awarding accreditation for universities and colleges by the six regional accreditation entities. Although accreditation bodies are compelled to be judged for their quality by being officially 'recognised', either by the Council for Higher Education Accreditation (CHEA), a private, non-governmental national coordinating body, or more directly by the Federal Government, accreditation of institutions is a peer-driven, self-regulatory and formally voluntary process. Nonetheless, accreditation in practice is hardly an optional extra: institutions need accreditation to gain access to Federal student financial aid and research funds.

Self-regulation through accreditation has faced periodic challenge from Congress and the White House in the last decade, usually at the point when the Federal Higher Education Act requires 'Re-Authorisation' (around every six years) and which offers the opportunity for politicians to reconsider whether self-regulating accreditation serves the interests of the various higher education stakeholders (employers, students, parents and government). Since the 1992 Re-Authorisation,

standards for Federal scrutiny of accrediting organisations have been built into the Act, and accreditation has been required to fulfil new regulatory responsibilities centred on institution and program compliance with student financial aid requirements, as well as its continuing responsibilities for assuring academic quality. During the current Re-Authorisation Act process (2004, but extended to 2005) Congress appears determined to add further obligations for institutions and accrediting organisations that are focused on improving the public accountability of higher education. The stated goals and objectives of the Federal Department of Education similarly is to regard accreditation as a means for promoting a greater emphasis on achieving results, improving student achievement, and ensuring accountability for taxpayer funds (USDE 2004).

Self-regulation appears sufficiently threatened by political action in the current Re-Authorisation process for CHEA to publish documents headed "Is the Era of Self-Regulation Over?" (5 January, 2004) and "Is Accreditation Accountable?" (2003). CHEA sees the federal government as aiming – "as a principal focus of legislative proposals" – to shift more of the responsibility for academic quality to the federal level and away from self-regulation (CHEA 2004). As part of the current Re-Authorisation hearings in Senate committee (prior to formal introduction of the Bill) it has been suggested by politicians that higher education needs to assure the general public and employers that students are adequately prepared for the world of work, and that accreditation is transparent to the public so that students and parents not only understand the process of accreditation, but also what the process reveals about the quality of institutions. Some Senators and others cite "runaway grade inflation", "curricular disintegration", and "political correctness" as evidence that standards in institutions are falling under the watch of the current accreditation regime, and that the "cartel" arrangements of accrediting organisations make internal reform difficult (CHEA 2004).

In CHEA's view, Congress and the USDE are seeking to take over judgements for academic quality that have long been the responsibility of colleges and universities. It cites, as examples, such issues as the determination of conditions for the transfer of credit, deciding what counts for quality in distance learning, and prescribing acceptable student outcomes (CHEA 2004). Prior to 1992 there was 'tacit agreement' that accountability in the accreditation process was discharged if accrediting organisations carried out their procedures responsibly. However, federal officials now want additional evidence on institutional and program performance, including student outcomes. There is discussion about establishing national standards of performance and outcomes for all institu-

tions and programs. In some cases this has extended to consideration of comparative ranking systems as a basis for judgements on, for example, awarding federal funds.

Regulation at the level of the states has shown similar tendencies for more explicit accountability and intervention (Heller 2004, p. 52). Dill (1997) notes that by 1990 over two-thirds of states had passed regulations encouraging public institutions of higher education to implement various forms of 'student assessment' programs with the aim of boosting greater institutional focus on student learning and its outcomes. Although changes in the political complexion of Congress in the mid-1990s stalled proposals for even greater state regulation of universities and colleges, states have nonetheless moved forward with performance indicators and regular external review for higher education institutions, with outcomes sometimes linked to budgetary allocations. Often local legislators have cited in support of such moves similar reasons to those regularly advanced in parts of Congress for instilling greater focus in accreditation on student outcomes. Rises in institutional tuition fees have also raised legislative concerns at state level about institutional accountability. However, while some states have responded by considering greater regulatory controls over institutions, in the face of severe budgetary difficulties others are reportedly considering 'setting their colleges free' from the state system altogether and allowing them the independence to set their tuition fees in return for giving up on state appropriations. In some cases, however, there is a requirement that greater funding autonomy is accompanied by the extension of specific performance goals, such as for graduation rates (Kelderman 2004)

At the turn into the new millennium there seems to have been a significant step-change towards greater degrees of government involvement in academic matters at local and federal levels in the name of democratic accountability. This contrasts with earlier periods when institutions had the trust of state officials and benefited from the general belief that they worked most effectively when enjoying high levels of autonomy (Zumeta, 2001). Nowadays states concern themselves with credit transfer arrangements, improving graduate rates and scores, and teachers' workloads. Both states and accreditors increasingly seek to introduce performance accountability into their processes – there is a common and "explicit focus on goals and results, and the conviction that external bodies can properly set those goals" (Kezar and El-Khawas 2003, p. 95).

South Africa

Current government policy in South Africa, and its regulatory stance, towards higher education is aimed to redress the inequalities and institu-

tional racial differentiations of the apartheid era, while at the same time developing the overall capacities of universities in order for South Africa to compete competitively in the global economy. These two aims can be in tension; some critics would prefer a stronger tilt in government higher education policy towards greater social equity and greater funding support for the less well-advantaged institutions, while others favour ensuring that South Africa is able to develop at least a handful of world-class universities based on selective research excellence. Subotzky (2003) describes these two opposing policy drivers as "transformative-redistributive" and "global market-driven" respectively. Despite symbolic adoption by the new state of the equity, anti-poverty and access agenda of the former, which was an ideological necessity in the early post-apartheid years to conduce consensus and generate national purpose, it is the "global market-driven" agenda that increasingly has taken policy priority.

South Africa's 2001 National Plan for higher education is strongly interventionist and centrally driven, with a range of targets for enrolments, graduation rates, and staff and student equity. Its command-and-control features have helped to make progress on delivery uneven and patchy. The focus on symbolic aspirations, without detailed implementation procedures or resourcing plans, has produced capacity difficulties at both the centre and in the institutions. This is compounded by constant regulatory and policy initiatives, not always clearly linked to the National Plan. Moreover, following a 'regulatory vacuum' for private higher education, which led to the rapid growth of many 'fly-by-night' and other operators in the late 1990s, since 2001 regulation of these institutions has been highly prescriptive, leading to a steep fall in commercial overseas providers.

A feature of the regulatory approach in South Africa to the higher education system is its combination of strong state action and the introduction of market processes. It has been described as an example of a 'top down' model in which an authoritative centre distributes policies through the system in a linear, hierarchical process. There is little real attempt at enrolling the regulatees in the development of policy, which consequently tends to result in implementation failure (Subotzky 2003). The approach is some way removed from ideas of a 'light touch steering' state. South African regulatory policy towards its higher education system is characterised by 'high modernist' rationalism, based on 'big bang' systemic transformation that is to achieve change 'at once' (Cloete et al. 2002).

The approach makes favourable assumptions about the efficacy of strong centralised policy-making by the state, reflecting in part perhaps

the government's Marxist influences from the anti-apartheid struggles. It is an approach that not only tends to produce resistance, but also governmental responses based on viewing opposition as seeking to protect privileged interests. This in turn leads to further top-down policy generation by leaders to overcome such opposition. Consequently, the higher education policy and legislative framework in South Africa "has become fairly strongly regulative in character" (Subotzky 2003, p. 188).

There is little sign that this 'regulatory higher education state' is being moderated. Increasing powers for the Minister in recent legislation indicates the continuance of a strong top-down regulative role. This has been further displayed in current announcements of 'non-voluntary mergers', which are considerably reducing the number of higher education institutions in South Africa and also creating new types of 'comprehensive university' and 'universities of technology' involving the *technikons* (non-university colleges). Changing the size and shape of the overall structure of the system is regarded by the government as a key means of demonstrating observable reform in the absence of major reductions in institutional stratification and equity, and as an important signal of seeking to enable at least some universities to compete successfully for world-class standing. The difficulty, given the predominance of the command-and-control mode adopted, is whether policy intentions will be matched by achievements, or whether dislocation, resistance, and rising costs might eventuate instead, in part as a consequence of inadequate participatory or self-regulatory processes built into the regulatory architecture. The South African University Vice Chancellors Association (SAUVCA), for example, complains of consultations taking place at too late a stage in the policy formulation process and as involving "a vast amount of work" (SAUVCA 2003).

It is not clear whether the doubts about governmental capacity for effective policy implementation follow from the intrinsic nature of command-and-control regulation, or whether the South African case indicates inadequate experience, expertise, and planning capacity. Higher education institutions are complex organisations consisting of many non-corporate disciplinary and other identities. They are comprised of loose-coupled parts and it is not clear to what extent they will be capable of handling the large-scale change that is now coming their way or of achieving unity of institutional purpose in the light of the many amalgamations being implemented. It may also be difficult for the government to fully fathom and respond to regulatory failure or defects if or when these occur.

England

With the recent national devolution of a number of UK governmental powers, including education, it is appropriate to consider English higher education as a distinctive entity within the UK. Nonetheless, certain policy domains, such as research assessment and teaching quality assurance, tend to operate UK-wide. A feature of the English university system is its centralisation. Partly this is governmental, with policies and resource planning formulated by a national education Department and a higher education Funding Council, and within a political structure that provides considerable executive power to the Cabinet formed from the ruling political party. But in part it also reflects the reputational dominance of leading research-intensive universities, especially Oxford and Cambridge, who for long have contributed a major share of personnel for occupational elite positions and who regularly top various "league tables" of university performance (King 2004b).

Although before the Second World War university development in England and the rest of the UK was beginning to be part of a clear national framework with central controls (epitomised by the University Grants Committee, a body formed in 1919 to formulate a public expenditure requirement to its sponsoring department – the Treasury – and which allocated the subsequent block grant), the model was that of state-backed professional autonomy and self-regulation. We should be clear, however, that 'self-regulation' had a peculiarly British twist. It was based more on close ties between institutional leaders and politicians – elite intimacy – than what we might describe as organised formal incorporation of a professional academic occupation, the basis of which was historically underdeveloped (Halsey 1992; Perkin 1990). Rather than formal and extensive systems of public accountability or policy interventionism, gentlemanly and informal ideals of elite behaviour were seen as the most effective means for guaranteeing appropriate institutional governance of universities in the national interest. Until after the mid-twentieth century the age was one still of oligarchy rather than democratic accountability and this was reflected in government-university relationships. Moreover, universities, as chartered bodies, were formally independent of government in a way not always found, for example, in Continental Europe.

The growth of an alternative form of higher education in the polytechnics and colleges in the 1960s and 1970s that was 'owned' and developed by the state – described as public sector higher education – and the accompanying 'binary line' distinguishing it from the traditional universities, had significant regulatory implications. The eventual unification of the system in the early 1990s, with the designation of the poly-

technics as universities, helped to 'import' the stronger governmental regulatory frameworks governing public sector higher education into the whole system. Greater accountability to the government on behalf of students, taxpayers and other users of university services was inevitable in the political climate of the 1980s and 1990s when there was a turn away generally from reliance on professional, or rather elite, self-regulation and culture, to more transparent and numerical forms of public evaluation and democratic holding-to-account.

The introduction of a body of higher education law during these years helped reduce the formal autonomy of the universities (although, arguably, it increased the freedoms of the former local authority 'maintained' ex-polytechnics). Statutory provisions created a prescriptive instrument for higher education funding, gave greater means of direction and influence to ministers, and provided for the formal assessment of the quality of the university output. The longstanding discretions allowed to universities and their academics have been systematically whittled away by new accountability procedures, although they have not entirely disappeared. Consequently, relationships between universities and the state have become increasingly formalised, replacing previous 'regulation' which operated through clubbality, mutual elite respect, similarity of social and educational origins, and intimacy. Now the relationship is characterised by greater wariness, formality and transparency (King 2004b).

The regulation of higher education in England in recent years, however, is probably best characterised, not by a simple unidirectional retreat from self-regulatory processes, but by oscillation and patchwork design. The regulatory pendulum has swung between versions of hierarchical and formalised controls, on the one hand, and continued reliance on self-regulation and normative professional codes on the other. This can be identified both in the operation of varying regulatory approaches between the different regulatory institutions, and in changes in regulatory policy within such bodies. For learning and teaching, for instance, the current methodology of the Quality Assurance Agency (QAA) is moving back from detailed and burdensome forms of quality assessment to approaches aimed at auditing institutions' own processes, and where the purpose is as much for the benefit of the institutions' developments internally as for external consumer appraisal. This suggests that 'responsive', 'self-regulatory' or 'light touch' regulation may be appropriate for forms of external quality assessment in higher education, but that, for financial accountability for example, more intrusive or 'externally expert' governance may be justified.

Although the QAA, established in 1997, is legally independent – as a private company limited by guarantee and as a registered charity – it is

clearly strongly influenced by the attitude of government, which is the ultimate main paymaster for the sector. In 2000-1 a concerted campaign, involving particularly the leading research universities, successfully pressed to have reduced the degree of detailed scrutiny in the evaluations carried out by QAA – for it to use a 'lighter touch'. The Minister subsequently announced that the QAA would be changing its approach, although it was not clear that he had the authority to do so (Lewis 2004).

In comparison with the QAA's previous methods, the objective now appears more to work with the grain of institutional autonomy, and with self-regulatory and professional practice. In research assessment, however, the regulatory tendencies seem to be moving from an opposite starting point, based strongly on peer review, to more codification and formality. It is possible to distinguish, in plans for future Research Assessment Exercises (RAE), undertaken by the UK funding agencies, a movement – still gentle – towards greater hierarchism. Although self-regulatory peer review remains at the heart of the system for the next 'round' in 2008, increasingly the work and decisions of the 70 or so disciplinary panels will be subject to the supervision and decisions of around 15 multi-disciplinary overarching groups, a tightening of previous arrangements. It will be interesting to see whether future Exercises will be able to resist gradually increasing formalism and hierarchy. For the immediate future an essentially self-regulatory arrangement remains, but with a few signs of formalism and hierarchy beginning to appear.

In another area, stronger regulatory formalism and hierarchy are more apparent: the establishment by the government, under higher education legislation permitting variable undergraduate tuition fees for full-time domestic undergraduates, of an Office For Fair Access (OFFA). OFFA will operate as a statutory regulator, within a legal and policy framework that maps out for it a widening participation strategy under four headings: attainment, aspiration, application and admissions. OFFA directly covers aspiration and application, as admissions is regarded as a matter for universities directly, while attainment is a matter of improving performance in schools. Institutions that wish to charge variable fees above the standard fee will be required to enter an agreement for widening participation with OFFA for a five-year period. Universities, however, will propose their own access targets and have responsibility for measuring their progress. OFFA will have the power to reject undemanding proposals and, in extreme circumstances, it will be able to direct the English Funding Council to withdraw operating grant. OFFA will report to parliament every five years and the regulator will submit an annual report to the parliamentary committee for Education and Skills (DFES 2004).

It could be argued that OFFA may become a rather toothless regulator, and that its establishment was part of a 'fig leaf' political strategy by the Labour government to satisfy its own 'backbench' critics of variable tuition fees in order to secure passage of the legislation. Undoubtedly some Labour members of parliament have argued for much stronger access regulation for the universities, claiming that OFFA should have powers to define and set targets for social access by institutions, including for admissions, rather than OFFA simply judging institutions' own proposals. The government, however, with an eye on universities' claims of unwarranted interference with their autonomy and academic freedom, argues that OFFA provides an example of 'light touch' regulation. Nonetheless, OFFA presents a further regulatory institution for higher education and is capable of having additional powers conferred on it in future, including the ability to set standards for access. If universities, particularly those traditional elite institutions with few students from poorer backgrounds, for commercial, financial, independence, or other reasons, do not meet OFFA's widening access objectives, it is not difficult to conclude that government has an instrument in OFFA that could be substantially strengthened.

The regulatory oscillation and divergences that we have just described in English higher education in part stems from the strong executive authority possessed by governing parties in the Westminster parliamentary system. There is considerable and relatively unrestrained freedom for governments to experiment with policies. This has contributed to what we may describe as 'hyper-policy' and constant change by the state, initially as part of strategies to halt economic decline and then to enhance global economic competitiveness, in which the introduction of ill-informed policy reform results in negative or perverse feedbacks and unintended consequences. This, in turn, leads to even more unstable and increasingly formalised regulation, generally without an adequate level of support from those being regulated.

The increased direct regulatory role of the state in English higher education is marked by the requirement for higher education institutions to deliver against national priorities and political policies. Since 1981-2 the Secretary of State for Education has issued letters of 'guidance' to the Funding Council making explicit the terms on which universities are to receive funding. By the end of the 1980s this had translated into government creating a funding body that was based on statute and clearly took orders from Ministers. It was based on the notion of the state as an investor in and procurer of higher education services for which institutions competed to supply. The annual letter from government to the Funding Council under the New Labour administration has become in-

creasingly imbued with explicit targets and detailed initiatives, including on curricular issues, such as foundation degrees; higher education in further education colleges; innovative and flexible programmes of study; two year honours degree courses; the skills agenda; and credit transfer systems. Its 2003 White Paper was equally fine- grained and reads more like an operational than a strategic document, specifying, for example, that there will be 70 centres of teaching excellence and up to 50 teaching fellowships allocated annually (Taggart 2004). Moreover, although the White Paper was subject to normal consultation processes, there is little sign of their impact, and it was not preceded by a wide series of discussion papers as found in recent Australian higher education reform (see the "Crossroads" publications by the Australian government in 2003).

In part, micro-management by the state reflects a level of frustration with achieving higher education modernisation. Regulatory see- sawing in England also stems from a form of in-built regulatory 'capture' in higher education regulatory designs. It is academics that confer substantial legitimacy and prestige on the RAE, for example, and who are incorporated into the formal peer reviews of colleagues and their work that are required by government policies, and which have major funding consequences for universities. Similarly, the QAA could not function without the participation and judgements of academics on the quality of learning and teaching throughout the sector. The outcome is systemic regulatory turbulence and variety stemming from the constant government need to find the right balance between the judgements and support of the 'invisible college of academics', to use the telling description from Kogan and Hanney (2002), and external accountabilities and democratic oversight.

5. Conclusion

The above analysis points to the persistence of national variety in regulatory modes in higher education rather than to convergence towards a particular global or neo-liberal form. Nonetheless, it also has been possible to point to quite strong tendencies towards the inclusion of the principles of greater transparency, formality and hierarchy in many regulatory arrangements. Consequently, we cast doubt on notions of the 'retreating state' that have been found in higher education research and public policy analysis more generally. National states are not being consumed within a range of public-private networks but remain ambitious and modernist, and this continues to be reflected in regulatory processes. However, higher education regulation, for its effectiveness, relies in-

creasingly on the state (public) mobilising self-regulatory and market (private) processes, but not necessarily in ways that delegate territorial jurisdiction and sovereignty to un-elected decision-makers.

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