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Higher Education
Regulatory State

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Printed and bound by Kube Digital, November 2006

Analysing the Higher Education Regulatory State

Roger King[*]

Abstract

This paper explores the notion of the higher education regulatory state and particularly the relationship, if any, between regulatory scholarship more widely and research on higher education governance. It suggests that the regulatory state in an age of governance requires both 'centred' and 'de-centred' analyses. It argues that there is no convincing case for regulatory exceptionalism for higher education in comparison with the study of other sectors and that a regulatory lens offers new insights for both regulatory and higher education researchers. The paper recognizes convergences in regulatory approaches in previously quite disparate national systems of higher education but suggests that key differences can be identified. The notion of 'regulatory intermediation' is introduced to describe critical groups at the interface of the regulator and the regulated in higher education, to link centred and decentred regulatory approaches, and to help understand how regulatory delivery is discharged and amended. A recent research project by the author on quality assurance auditors is used to explore the retention of tacit and peer traditions within more overtly formalized methods for external evaluation of universities. Finally, a brief comparison of the different worlds of the regulatory state as found in higher education, healthcare, legal services, and accountancy is undertaken, particularly to illustrate how the regulatory state plays out differently in various policy sectors.

Introduction

In recent years it has become commonplace to refer to the development of a 'regulatory state' in a number of advanced societies (Moran, 2002). It is a description used broadly to characterize the growth of regulatory agencies to discharge a public interest on behalf of government in economic and social affairs. Following the example of the United States since at least the 1930s, governments elsewhere, particularly in Britain, increasingly have delegated authority for market control, market enhancement and social protection to independent agencies rather than exercising such functions directly from government departments. (These agencies generally are not usually fully independent, although often possessing statutory rights and duties, but are appointed and accountable to legislatures through ministers – it is rather a form of independence within government). Regulatory agency governance for the public interest has generally become a more dominant or preferred mode than that articulated through public ownership of the commanding heights of national economies, or activist industrial policies, or top-down operational direction of public services by governments, features characteristic of the welfare state forms of the 1960s and 1970s found in many advanced societies outside the United States.

For the most part, analysts tend to see the regulatory state as part of the response by governments to the fiscal and 'overload' crises of the welfare state that were particularly acute in the 1970s and later in many advanced countries (Majone, 1994; Jessop, 2002; Offe, 1984). As well as a retreat from public ownership of key industrial sectors and the use of quasi-independent bodies for regulatory surveillance, the regulatory state is characterized by increased reliance on private forms of supply and organization, and the use of markets and competition for promoting consumer choice and efficiency in the public services. However, just as there are varieties of welfare state (Esping-Andersen, 1990), or capitalist state (Hall and Soskice, 2001), so there are varieties of regulatory state. The French state tradition, for example, has been much less accommodating to a delegating notion of the state associated with the dispersal of central power to authoritative regulatory agencies than found in the United Kingdom (Thatcher, 2003). In Germany, on the other hand, a federal political system has made it difficult, although not impossible, to undertake regulatory reform with the speed available to the core executives in Westminster systems (Muller, 2002). The US regulatory style of allowing regulatory agencies to act as 'mini-governments' with an accumulation of law-making, administering and sanctions-enforcing powers, is also much less possible in Britain with its highly developed system of parliamentary sovereignty (Eisner, 2000). In the United Kingdom, moreover, the modern regulatory state may also be described as not only a response to the particular problems of the welfare state but also as a reaction to older configurations of professional and similar forms of self-regulation. Its development may be seen as reflecting a belief that the persisting, informal, and 'clubbable' modes of governance constructed in the Victorian period throughout the long nineteenth century were outmoded, not democratically accountable, and were a likely cause of Britain's economic decline after the two world wars of the twentieth century (Moran, 2003).

Trans-nationally, within an era of growing multi-level governance, the European Union (EU) has also been described as 'a regulatory state' (Majone 1994) for its reliance on federal rule-based governance (rather than on the macro-economic or re-

distributive functions found alongside regulatory governance in the nation state, although the nation state is recognized as also increasingly placing less emphasis on these latter functions and as converging to 'regulatory state' forms). In some views, too, policy communities or sector networks have taken on wider governance or regulatory state characteristics. These are delegated from an increasingly enabling rather than directing national state that seeks to cope with increased complexity and trans-nationalism through devolved regulatory governance for particular policy sectors. This rather looser form of state coordination and the supplementation of formal state authority by the informal influence of more privately-characterized networks, has led to attempts to locate the regulatory state within wider notions of governance (Jordana and Levi-Faur, 2004). Governance refers to the process of steering networks by the state rather than it commanding, controlling, producing and delivering (Rhodes, 1997), and networks are regarded as a distinctive coordinating mechanism separate from markets and hierarchies. The regulatory state within a governance perspective thus predominantly tends to rule through the regulatory or coordinating activities of other groups.

'Governance' may not be the preferred mode of rule for the regulatory state, but in an age of governance, according to Rhodes, the state has been weakened from above (by a supra-national relocation of sovereignty), from below (by marketization and networks), and sideways (by the spread of executive and regulatory agencies). Moreover, the development of devolution in the United Kingdom in recent years also reinforces the regulatory state in an era of governance as a multi-level system, referring both to the increased interdependence of governments operating at different territorial levels, and to the growing interdependence between governments and non-governmental actors at these various levels (Bache and Flinders, 2004). Nonetheless, networks appear to be at least operating 'in the shadow of the state' (Jessop, 2002; Peters and Pierre, 2005), and the state undertakes broader strategic, legitimacy and democratic representative roles not available to networks. Levels of direct governmental intervention in regulatory and similar forms of policy-making and delivery are thus likely to vary between national systems, historical periods and policy sectors.

De-centred regulation

Some recent analyses of the regulatory state conceive of 'regulation' as reflecting, and as constitutive of, wider social practices and means of control than simply law or governmental command (Black, 2001, 2002; Scott, 2004). In this sense, the regulatory state, following Foucault (1982), is as much a function of changes in the governmental practices of the wider society, rather than these practices necessarily 'being caused' by the state as an institutional actor. The primary focus of analysis is more 'regulatory society', or even the 'post-regulatory state', than 'the regulatory state' (Scott, 2004).

For Foucault, power is found throughout society and is not confined to a single sovereign centre, and is productive of regulated and disciplined social relations. Knowledge, particularly that of the socio-psychological sciences and as constituted through 'discourse', is a key power resource for producing subservient individuals. The state is important but, in the notion of 'governmentality', Foucault sees 'the

conduct of conduct' operating in various social institutions and practices (Burchell et al. 1991).

Peculiarly, the self-regulatory and informal basis of the regulatory state in Britain until recent decades would appear to have reflected the primacy of broader social practices rather than state direction, and, as such, exhibited a distinctive Foucauldian 'governmental' and 'de-centred' characteristic. Despite the strongly regulative governments of Thatcher and Blair in recent years, which might imply a turn away from Foucauldian analyses, at least for Britain, de-centred analyses of the regulatory state continue to regard reliance on state law and hierarchy as highly problematical. In such approaches it is assumed that no one actor (such as the state or its regulatory agencies) has the knowledge necessary to deliver public policy and that all actors (including the regulated) act as constraints on the others. Explaining regulation 'in an age of governance' implies recognition of 'the dispersal of capacities and resources relevant to the exercise of power among a wide range of state, non-state and supranational actors' (Scott, 2004: 145).

De-centred approaches regard state regulatory success as always elusive, precarious and rarely as functioning smoothly, and as requiring sophisticated 'enrolment' of the regulated in the overall processes. The regulatory state is only likely to be effective when linked to other ordering mechanisms. In part, de-centred analyses by lawyers such as Black and Scott reflect the influence of what is sometimes described as the 'legal theory of autopoiesis' which stresses the difficulties of communication (and thus control) between the various and autonomous sub-systems of society, and is often associated with the work of Luhman (1992) and Teubner (1998). A key assumption is that stimuli (such as regulation) to a sub-system from its external environment, which occurs or is experienced as disturbance, are processed in the context of the sub-system's normative framework. Legal systems particularly operate according to norms (evidence, procedure) that are often experienced as inappropriate in other sub-systems and as deflecting from the sensitivities required for effective regulatory implementation. Such a focus leads quite quickly to the notion that the state, its law and its regulatory agencies, should rely as much as possible on self-regulatory processes – on 'proceduralizing (Black, 2002), steering, endorsing and 'meta-regulating' established social practices and internal control systems.

As we have noted, it is almost as if Foucauldian and similar 'de-centred' prescriptions for regulatory governance have had a remarkable (and retrospective) influence on the history of the British regulatory state. The focus in the nineteenth and early decades of the twentieth centuries was on the importance of self-regulation rather than state command. Yet a strongly regulative state has emerged in Britain in the last three decades that does not easily fit de-centred analysis. Moreover, it has been accompanied by a transformation in liberalism as a political practice, from a classical 'state free' interpretation to one where individuals are regarded as needing active state support to help themselves be free to operate as rational, self-interested actors. Regulating for competition, for example, became an instrument of public policy under Thatcher's administrations rather than being left to a natural emanation from individuals themselves (King and Kendall, 2004). In an age of governance, in the United Kingdom particularly, the regulatory state and regulatory society appear as constant polar magnetisms in a relationship that is as likely to produce oscillation and pendulum swings in policy and approach in the British regulatory state as it is to

produce unidirectional development. Our consideration of 'the higher education regulatory state' below illustrates such tensions.

The higher education regulatory state

The growth of the regulatory state has given rise to an increasingly sophisticated regulatory scholarship. Many sectors, including government itself, have been subject to detailed analysis. However, academic analyses of higher education governance rarely utilize the findings and interpretations of wider regulatory scholarship (King, 2007a), although there are exceptions (see, for example, Scott in Hood et. al., 2004). Yet higher education is regarded as increasingly important to governments for scientific innovation, creativity and an up-skilled workforce in order for a nation to be globally and economically competitive in a fast-developing knowledge-based world. Universities allocate a sizeable portion of society's resources and conflicts over this distribution, and increasingly its accountability are political. The state and higher education institutions are inextricably penetrated by each other, and by webs of rule-making, so that it is possible to talk of 'the higher education regulatory state'.

One reason why researchers of higher education tend not to use a regulatory lens could be that higher education academics and researchers are viscerally 'anti-regulatory'. That is, regulatory scholarship for higher education researchers is regarded as either empirically inapplicable or normatively suspect. There is much to support such an observation. The external quality regulation of teaching and research by the state is rarely achieved without controversy, opposition and backtracking. This is so particularly in countries with long-standing norms of professional and self-regulating autonomy within their university sectors, such as in the United Kingdom. Governments, too, in exercising accountability for the high levels of public resources expended on universities need to be careful to avoid excessive micro-regulation. They have to balance the requirement for accountability with the recognition that creativity, intellectual dynamism and scientific development are dependent upon quite high levels of institutional and academic autonomy. Professional 'individualism' in research and teaching also still predominates, despite the rise of more collective and team pedagogies, and is possibly encouraged in countries such as the United Kingdom by governmental policies of more selective research funding and competitive research assessment regimes. Academics, generally adhering to such norms, tend to react adversely to governmental regulatory forces.

Yet, there are balancing arguments to suggest that external state regulation does not always excite opposition in higher education sectors. In continental European systems the recent arrival of the regulatory higher education state, in replacing dominance by long-standing state micro- administration, is often regarded favourably and as less intrusive by institutions and academics than with what went before. State regulatory dominance has given way to something rather 'lighter touch'. This is in comparison with 'Anglo-Saxon' countries (such as the United Kingdom, Australia and New Zealand) where the trajectory has been the other way round, from autonomy and self- to more state-regulation via the regulatory state. In some east and central European states, state regulation is sometimes preferred by academics to over-bearing institutional or even professorial authority (Currie, J. et al., 2003; King, 2004a). We might also note that academics in the United Kingdom have never shied away from

playing parts as regulatory agents in operationalizing external quality assessments when invited by governments, in either teaching (as for the Quality Assurance Agency) or research (as in the Funding Councils' Research Assessment Exercises).

Nonetheless, regulators often appear wary of being labelled as regulators in higher education. The Quality Assurance Agency (QAA) in the United Kingdom, for example, in its newsletters and other publications, does not accept that it is a regulator, despite its increasing reliance on external codes, standards and frameworks. It argues that it assures the standards set by others – the institutions and their academics – rather than imposing its own. This is said to contrast with the standards-setting functions found in other regulatory systems. Yet, the growing embrace of an external 'standards infrastructure' by the QAA, and the adoption of 'meta-regulation' and a regulatory focus on universities' own quality systems in the institutional audit approaches used by the QAA (where a university's whole internal processes and procedures are turned 'inside-out' for external review), is similar to the drift of regulatory practices in other sectors (Parker, 2002). Moreover, although many quality assessment bodies in higher education may be formally independent of the state, as in the United Kingdom, they mostly rely on government finance, contracts and endorsement. Ministers, for example, generally require private institutions to be subject to quality agency evaluations for grant or degree-awarding powers' purposes. The QAA in the United Kingdom may be seen as generally following or anticipating government intentions for fear that a more interventionist approach may be introduced in the absence of acceptable regulatory actions by the sector. These factors generate a strong 'regulatory authority' for these higher education quality assurance bodies. And, as accreditation is introduced for such quality agencies under the processes of the Bologna Declaration, quality regulation is likely to become associated with even more formal guidelines than previously, which is a significant characteristic of contemporary regulatory systems.

Consequently, there would appear to be no universalistic 'anti-regulation' tendencies in higher education that differ overmuch from that found routinely in other domains. In many business sectors 'anti-regulation' rhetoric has been at least as persistently strong as in higher education. More extensive and formal external regulation of companies by state-endorsed agencies, such as in financial services and utilities, occurred well before that of universities in the United Kingdom (Moran, 2003). Regulation is Janus-faced and works both ways for those being regulated, and is therefore not always resisted, even in university systems. It has its uses for those in entrenched and powerful positions, not least as forms of market and social closure to rivals and competitors, such as traditional universities using quality regulation and accreditation to keep out new, for-profit and overseas institutions, as has been seen in US accreditation processes (King, 2004a).

These two faces of regulation can also be found in other external regulatory approaches to universities. Governments often appear to be caught on the horns of a dilemma between encouraging innovation and avoiding risk in their regulatory arrangements. On the one hand, politicians forever encourage universities and other public service organizations to replicate the characteristics of private sector bodies, not least in terms of their entrepreneurialism and risk-taking. On the other hand, though, they also appear to wish that universities should avoid danger to government through eliminating practices that appear to the media and others (including voters) to

be potentially scandalous and out-of-the-ordinary. Perhaps this is most apparent in areas of university commercialization, including the establishment of overseas ventures for enrolling higher fee-paying students. The encouragement for universities to diversify their income streams, especially from private sources, jostles uneasily with government concern to mitigate scandal and risk that arise through inadequate risk-management and the lack of precautionary or prudential internal organizational controls.

Varieties of the higher education regulatory state: South Africa and England

Broad- brush characterizations of regulatory approaches in higher education across countries, however, have a tendency to neglect or to play down significant national differences (King, 2007b). Nonetheless, it is possible to describe a general convergence towards patterns of similarity in higher education regulatory arrangements. There is more state and market regulation in countries with a strong self-regulatory tradition, such as the United Kingdom, while more market and self-regulatory processes (institutional autonomy) are now found increasingly in traditionally state-dominated systems, such as across continental Europe. We can also detect more federal and local state influence in long-standing market systems (such as the United States). Yet such patterns overlay key national regulatory varieties. For individual countries, historical background, governing structures, and position in the global division of labour are among factors that act against too strong a worldwide regulatory convergence of higher education systems. Stages in a country's socio-economic development are important factors in helping to shape particular forms of higher education governance.

In considering the emphasis on regulatory state or regulatory society (or centred and de-centred instruments) in governance arrangements for national higher education systems, it is clear that wider economic, social and political contexts play as much a role in the regulatory approach adopted as any careful weighing of the advantages and disadvantages of particular models. For example, despite moves away from command-and-control state models in European countries, and the embrace of more market-based strategies in the United Kingdom, the South African system of higher education indicates a strongly directive state approach. This variance with wider global tendencies is associated with the particular issues confronting post-apartheid South Africa and its governments.

South Africa

Current governmental policy in South Africa, and its regulatory stance, towards higher education is aimed to redress the inequalities and institutional racial differentiations of the apartheid era (which ended in 1994), while at the same time developing the overall capacities of universities in order for South Africa to compete competitively in the global economy. 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.

These two aims – social equity and global economic competitiveness – can be in tension. Some internal critics would prefer a stronger tilt in South African government higher education policy towards greater social equity and more funding support for the less well-advantaged (that is, 'historically Black') institutions. Others, however, favour ensuring that South Africa is able to develop at least a handful of world-class universities based on selective research excellence by concentrating resources on higher prestige ('historically White') universities. Despite symbolic adoption by the new state of the equity, anti-poverty and access agenda of the first approach, 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 priority (Subotzky, 2003).

These tensions are located in South Africa's 2001 National Plan for Higher Education, which is strongly interventionist and centrally-driven. It has a range of targets for enrolments, graduation rates, and staff and student equity, largely reflecting a social transformation and redistribution agenda. But its command-and-control regulatory 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 problems 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 private overseas providers (King, 2004a).

A feature of the strong state approach to regulation in the higher education system in South Africa is the emphasis on 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 regulated in the development of policy, which consequently tends to result in implementation failure (Subotzky, 2003). The approach is some way removed from the ideas of a 'light touch' steering state. South African regulatory policy towards its higher education system is characterized 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 centralized policy-making by the state, reflecting in part perhaps the governments' 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. Moreover, there is little sign that this command-and-control higher education state is being significantly 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 announcements of 'non-voluntary' mergers for higher education institutions, which are considerably reducing the number of universities in South Africa.

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).

A contrast with the higher education system in England is instructive. While the South African approach relies heavily on 'centred' regulation by the state, in England a much more, often uneasy, relationship occurs between regulatory state and regulatory society, or between centred and de-centred approaches. Again, wider social and related processes rather than calibration of regulatory instruments based on careful appraisal, provide much of the explanation.

England

In England, until the 1980s the regulatory model for what was then a much smaller and relatively homogenized higher education system compared to today, was more that of state-backed professional autonomy and self-regulation. Rather than government actions and market forces, the major driver of the institutional framework of rules and incentives was the tradition of collegial governance and academic autonomy, in which the collective actions designed to assure academic standards was professional self-regulation, as found, for example, in the external examining system (Dill, 2005).

However, at the university-state interface, we find 'self-regulation' with a peculiarly British twist. It was based more on close ties between institutional leaders and politicians – elite intimacy – than formal incorporation of a professional academic occupation, the basis of which was historically underdeveloped (Perkin, 1987). 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 ways for guaranteeing appropriate institutional governance of universities in the national interest (Halsey, 1992). Until after the mid-twentieth century the age was still one of oligarchy rather than democratic accountability and this was reflected in government-university relationships. Moreover, as chartered and mainly charitable bodies, universities 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 the 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 polytechnics as universities, helped to import the stronger governmental regulatory frameworks governing public sector higher education into the whole system. Greater accountability 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 and elite regulation and culture, to more transparent and numerical forms of public evaluation and democratic holding-to-account (Kogan and Hanney, 2000).

The regulation of higher education in England in recent years, however, is probably best characterized, not by simple unidirectional retreat from self-regulatory processes, but by oscillation and patchwork design. The regulatory pendulum has swung between versions of hierarchical and formalized controls, on the one hand, and continued reliance on self-regulation and normative professional codes on the other. The QAA, for example, has moved back from detailed forms of quality assessment, including of particular subjects, to a lighter touch, meta-regulatory approach where internal institutional procedures are made more externally available for public accountability and assessment. The Funding Council's Research Assessment Exercise, however, is moving gently towards greater hierarchism with disciplinary panels becoming more tightly supervised by multi-disciplinary overarching groups for the 2008 round. In another area, stronger regulatory formalism is more apparent: the establishment by the government, under higher education legislation permitting variable undergraduate tuition fees for full-time domestic (and EU) undergraduates, of an Office For Fair Access (OFFA) which is a statutory regulator with powers (not used yet) to fine institutions for not matching agreed social access plans (King, 2007a). Moreover, higher education regulatory multiplication is set to increase as universities are set to fall further within the regulatory compass of a reformed and statutory-based Charity Commission under new legislation.

These regulatory oscillations and divergences in part stem from the strong executive authority possessed by governing parties in the Westminster parliamentary system, which often leads to what Moran (2003) calls 'hyper-policy innovation' and retraction. The annual Letter from the government to the Funding Council regulator in England has become increasingly imbued with explicit targets and detailed initiatives under recent Labour administrations. These include curricula issues, such as foundation degrees, higher education courses in further education colleges, flexible programmes of study, two-year honours degrees, the skills agenda, and credit transfer systems. The 2003 White Paper is 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 (DfES, 2003). Thus, in England, higher education is part of the regulatory state. Although governments have sought to increase market competition, managerial authority and corporate identity for institutions, ministers have shown no real inclination to abdicate responsibility for the provision of higher education within their territory. Indeed, scientific and other knowledge created and disseminated by universities is increasingly regarded as essential for the nation's general prosperity.

Yet, as 'market' organizations, universities are also required to pursue policies that are aimed at securing their corporate interests rather than government-preferred higher education system attributes, and the recent introduction of differentiated undergraduate fees reinforces these drivers. This reduces the direct planning influence by the government over universities, which the state then struggles to re-introduce through strong and often very detailed ministerial 'guidance' to the Funding Council as its so-called buffer or intermediary body. Moreover, professional peer review has

been retained as part of state-backed external regulation and is a key methodology for establishing the legitimacy of the regulatory systems for higher education. The result is often regulatory ambiguity and oscillation in state-university relationships. Recent Treasury announcements by the UK government indicating a move to metrics and similar citation indexes, rather than peer review, for future Research Assessment Exercises, evidence a further likely lurch in official regulatory policy for the sector towards a more centred approach.

A recent example of the tension between state encouragement of the market and corporate characteristics of universities, and state efforts to maintain strategic and political direction over them, is government concern at the closure, or proposed closure, of chemistry and language departments by institutions, taken on strategic and market grounds by the universities but with outcomes that the government perceives as disadvantageous for the country as a whole (although arguably they could be considered as logical outcomes of governmental policies themselves, such as for research concentration and for institutional diversity and autonomy). That is, such departmental closures were perceived as against the national public interest, and government ordered the Funding Council to investigate a re-think. As Matthew Flinders (2006) has noted more generally of the boundaries of the British state, it is a rapidly evolving organism within which a severe tension exists between the centrifugal pressures of management reform (the 'New Public Management' and market policies designed to increase institutional autonomy, efficiency and effectiveness), and the centripetal logic of political control that aims to secure steerage capacity and accountability on behalf of national strategic goals.

Regulatory intermediation in the higher education regulatory state

The tensions in the higher education regulatory state are also expressed in processes of external quality assurance deployed by the QAA. At the Centre for Higher Education Research and Information at the Open University, we have recently conducted interviews with 55 QAA auditors, plus 12 senior and middle managers in universities, and a range of other interested parties at the national level. The aim is to examine how increasingly external and formal frameworks, benchmarks and codes (the QAA's 'academic or standards infrastructure') are reconciled – if they are – with longer-standing, generally less explicit, disciplinary and professional peer approaches (King et al., 2007c forthcoming).

The framework used was based on the notion of 'regulatory intermediation'. This is the idea that in the regulatory space between regulator and regulated key groups are positioned to play critical intermediary roles. These include the QAA part-time assessors or auditors drawn from the academic community (other 'regulatory intermediaries' for external quality regulation are senior institutional leaders and quality managers in universities and colleges). As regulatory intermediaries, QAA auditors look both 'upwards' to the regulator (in accepting regulatory functions) and 'downwards' to institutions (to secure reasonably legitimated delivery of regulatory objectives). We may define 'regulatory intermediation' as the process by which external regulatory authority is distributed and modified through local, organizational and professional perspectives by key groups that occupy the regulatory space between the regulator and the regulated. To date, however, it has not been clear how this

intermediary role has been discharged by these groups such as the QAA auditors in higher education or how potential conflicts within it are resolved.

The case of the quality auditors: research interviews and findings

The interviews with the QAA auditors sought to elicit how they coped with potentially competing objectives, predominantly in achieving support for peer sensitivity from the academic community while also avoiding governmental suspicions of 'capture' by the sector. Generally the auditors take on the governmental functions of regulatory distribution and evaluation in return for a relative autonomy for their knowledge, authority and expertise. They have to evaluate objectively and deliver regulatory aims without incurring charges of over-zealousness as 'state agents' from those being regulated. Potentially at least, this allows scope for regulatory modification and adaptation to professional and peer perspectives. This is a flexibility that may be an essential ingredient for external regulatory effectiveness. Significant variables in these processes may centre on such factors as levels of relational closeness or distance of the auditors to those being regulated. QAA's part-time auditors drawn from the ranks of those that are regulated clearly have greater relational closeness to (that is, they closely identify with, because they are largely drawn from) those being evaluated than, for example, permanent inspectors in regulatory bodies in other sectors. A further significant variable may be whether there is a sense of accountability to the regulator (QAA) and the requirement to apply strongly directive and explicit external codes, frameworks and standards, rather more than informal peer review.

Key findings
Broadly the following main outcomes were found (see King et al., 2007c forthcoming) for a fuller account).

(a) <u>Accountabilities</u>
Potential processes of regulatory intermediation undertaken by auditors are likely to be influenced by their sense of accountability to the QAA. The interviews were aimed at eliciting whether auditors exhibited a high level of primary accountability to the regulator and the extent to which this may be tempered by a wider sense of accountabilities to other stakeholders. These could include to the institution being audited, its students, the taxpayer, the sector as a whole, or to the government. Nearly all auditors referred to plural responsibilities and did not display a narrow or singular regulatory identity, which in part reflects their 'part-time' status and the relational closeness to those they audit.

(b) <u>Governmental authority and self-regulation</u>
The process of regulatory intermediation as undertaken by QAA auditors is influenced by whether auditors regard their task as governmental (and the QAA as a governmental agency), or as predominantly more self-regulatory, with the QAA envisioned more as an independent body. If the latter, it may be hypothesized that auditors could feel more scope for the exercise of traditional forms of peer evaluation. Governmental regulation, on the other hand, may be regarded as more constraining and as making more difficult the process of intermediation and the reconciliation of competing perspectives.

Nearly all claimed the peer review methodology as highly important, especially its requirement for a relational closeness of the auditors to those being regulated in comparison with inspectorial or regulatory authorities found in other sectors, and felt that this helps to moderate any malign governmental influence. Many auditors see the QAA as a relatively benign regulator and stress how important it is that it is not seen as a government body. The permanent staffing of the regulator, in contrast to the part-time status of the auditors, in the view of most respondents acts as a buffer to government and has 'a life of its own' in comparison to that of the auditors. Moreover, the final (published) QAA report from the institutional audit visit is regarded by most of the auditors as the key outcome for governmental or regulatory purposes. However, auditors felt that most value or benefit actually flows from the peer discussions with the institution during the visit itself. The bland 'civil service' language of the final reports (written or formatted at head office) is regarded as a sign that the QAA does not wish to get offside with government officials, or with Vice Chancellors, by invoking controversy in the media. Nonetheless, generally the auditors saw the QAA nowadays as more 'self-referential' than in its earlier life, so that outsiders (including government) have difficulty de-coding its processes and outcomes. Some auditors, however, distinguished the QAA Board and bureaucracy (as entities that lay 'outside the higher education system' and which formed the governmental regulatory characteristics of the organization) from the panel members of auditors on institutional visits, which are regarded as 'on the inside'. Interestingly, although the QAA used to have a practice of using auditors from outside the sector (such as from business), this rarely occurs now on the grounds that such auditors had difficulty understanding and coming to terms with the informal rules and processes of the QAA assessment process. There is clear difficulty in using information and assessments, drawn up and operated primarily to aid interpretative understanding by 'insiders' within the sector, in pursuit of wider goals, such as consumer and public knowledge and awareness, where such groups lack these tacit interpretations. Effectively, too, it was the audit team that 'trained' the individual auditors and helped to weed out mavericks, rather than regulatory training and feedback as such.

(c) Standards, regulatory formalism and tacit knowledge
The development of the 'academic infrastructure' by the QAA would appear to indicate a marked movement in the direction of establishing formal or prescribed standards for universities. It involves detailed codes, benchmarks, specifications and frameworks. An important issue, however, is the extent to which the QAA (and therefore the auditors) require institutions to display compliance with such standards – and, indeed, whether they are regarded as standards at all. 'Compliance' is a word that the QAA seeks to avoid, and interviews with the auditors suggest that, while on the whole they do regard the codes, benchmarks and frameworks of the academic infrastructure as like standards (as 'approximate standards' as one described them, or as more a range of 'professionally agreed aspirations' in the words of another), they interpret these notions quite widely and flexibly. Mostly, auditors report that these codes 'helped people to reflect', and while there needed to be compliance 'of a sort', 'it is not required in a box-ticking way, or 100 per cent'. But 'flagrant breaches' could not be tolerated, and some auditors felt that institutional leaders sometimes deliberately interpreted the QAA standards infrastructure 'in a rigidly rule-based way' and for their own internal and managerial reasons.

It is clear that institutional standing and stratification play a part in considering the issues of the academic infrastructure. A number of respondents who had been engaged on audits of high-reputation universities commented that these institutions were often falling quite short in their engagement with the formal codes and procedures of the academic infrastructure. Nonetheless, this was not allowed to divert a 'broad confidence' outcome (the top category), on the grounds that 'it all had to be seen in the round'. That is, such institutions with high reputations clearly have high quality staffing and excellently-qualified students exerting peer pressures on each other – 'how could one fail to have confidence in their quality', as one respondent put it? Clearly, even as regulatory formalism increases, more informal and 'insider' knowledge retains its importance in the institutional audit process. For many auditors, the ultimate test was the quality of the student experience rather than absolute conformity to the letter of the academic infrastructure.

(d) <u>Regulatory 'balance'</u>
In the interviews with the auditors it became clear that a conventional notion found in regulatory scholarship of the external regulator 'walking a tightrope' (Hancher and Moran, 1989), between the demands of regulation on the one hand and the sensitivities of the regulated on the other, is inappropriate here. The relationships are not perceived to be as sharp as this metaphor implies. Rather, relational closeness and a culture of peer review reduce potential friction in the audit process, although a professional distance is judged by the auditors also to apply. The relationships are regarded as peer-to-peer rather than regulator-to-regulated. And, as the permanent QAA official is not there until the end of the institutional visit (when auditors are interrogated by the official on the evidence for the judgements rather than the judgements themselves) the result, as one auditor described it, is that 'the team runs the show – we forget QAA when we are getting on with it'. (The QAA is punctilious in ensuring that the formal visit exchanges are left to the audit team, although this is not always the case in other countries, such as Australia, which has a similar national quality assurance system).

In conclusion it is clear that the external QAA system has developed a set of rules and languages that are only fully interpretable by insiders – those who understand the rules of the game. The general public and other outsiders, including politicians and media, are generally unversed in such rules and processes and are sometimes regarded by those operating the system as potentially disruptive flies-in-the-ointment. Consequently, final institutional reports are written in ways that help to protect both the institution and the regulator, who form a common interpretative rule community, by applying the protective jargons of the government bureaucrat.

The different worlds of the regulatory state

This paper suggests that higher education in the United Kingdom (and elsewhere) may be regarded as part of a new regulatory state. It is likely, too, that a number of the 'intermediary processes' and competing evaluative methodologies and perspectives that we have identified as operating in higher education will be found for other professional service sectors (see the analyses of the accountancy and related professions by Power, 1997; 2004, for example). However, the regulatory state is not monolithic and comprises 'different worlds' that equate to particular policy domains

(King, 2006). Governmental policies for different areas, although displaying commonalities, also exhibit significant variations in respect of market and regulatory instruments.

The characteristics of the regulatory state and their variability across policy domains in Britain may be identified through the construction of the following classification system:
- (a) a profession-state regulatory continuum, with movement generally from practitioner self-regulatory bodies to more state-backed, and often statutory, regulators;
- (b) a profession-industry continuum based on the extent to which commercial or practitioner interests predominate in a sector's organized economic arrangements, with 'industry' and 'market' characteristics becoming more common in previously highly professionalized domains;
- (c) supply-side and demand-side market policies, focused on whether seeking private entrants or private funding is the key governmental policy instrument for generating competition and choice; and
- (d) a global-local continuum, reflecting the impact of global relative to national regulatory influences in a domain, with increased movement to international standards-setting.

Thus, for example, the higher education regulatory state is characterized by the increasing movement from profession to state and industry as shown by the continuums in (a) and (b), while the introduction of market forces has been targeted primarily at the demand side and at increasing private funding (c, above). The supply-side, however, is largely unreformed. (There have been changes to allow more private institutions to operate, and with the prospect of degree-awarding powers and university title, but these changes have been largely permissive rather than supportive, not including, for example, student loan support for such students as found in the United States and Australia). In respect of (d) and the global-local dimension, most contemporary universities are creations of the nation state (Scott, 1998) but globalization, defined here as increased and rapid borderless transactions, is quickly altering their territorial rootedness. Globalization currently mostly influences higher education in the area of research and is incorporating institutions into a distributed knowledge production system based on increasing international collaboration. Teaching and learning, however, is increasingly transnational as universities seek to exploit the financial and knowledge advantages of recruiting high fee-paying students from abroad (King, 2004b). Yet, despite the influence of the recent European Bologna and subsequent Declarations to converge aspects of higher education systems, it is national governments that continue to regulate universities.

In healthcare for England, however, contrastingly, it is the supply-side that is marketized rather than the demand-side. The state in the United Kingdom funds the National Health Service (NHS) from general taxation to allow treatment free at the point of delivery, whilst in England currently it is radically privatizing the supply side. By 2010, for example, it is estimated that around 15 per cent of NHS procedures will be supplied by the private sector (Timmins, 2005). As with higher education, however, there is continued ambivalence in state accountability of the professions. Clinicians, like academics, remain the direct providers of services, with clinical autonomy ensuring that practitioners cannot be controlled directly by managers or

accountable to NHS authorities for individual clinical judgements. External governmental regulation, whilst introducing more formal and explicit frameworks for accountability, evaluation and improvement, nonetheless continues to rely upon self-regulation and clinical peer review (Ham, 2004: Walshe, 2003).

Global influences are increasing in healthcare in England as they are in other domains. The first wave of fast-track private treatment providers for the NHS all came from overseas. Increasingly 'global brand' products are available from the large multinational pharmaceutical suppliers and influence standards of clinical care. These companies are worldwide operators dealing in a wide range of national healthcare markets with an interest in securing wide acceptability for their medicines (Moran, 1999).

In accountancy, to take a further example, we again see professional self-regulation increasingly giving way to state-directed forms of accountability, predominantly in response to crises in audit and related practices. Massive accountancy frauds at companies such as Enron, Worldcom and Parmalat, where auditors failed to sound the alarm, although occurring outside Britain have eroded confidence in the accountancy profession worldwide (Power, 2004). The creation of the Public Company Accounting Oversight Board (PCAOB) in the United States, and the government-strengthened Financial Reporting Council (FRC) in the United Kingdom, has subjected accountants to a much closer formal scrutiny and inspection than previously. Moreover, the PCAOB operates abroad wherever foreign auditors have US-listed clients, relying on home-country regulators only where that body is independent of the profession. Generally, more strongly global processes are discernible on standards regulation than found in higher education and healthcare. There is a process of worldwide convergence of accountancy standards (not without tensions) based on harmonization – a rather stronger regulatory principle than that of mutual recognition, which generally characterizes transnational convergences in higher education.

Finally, in the case of the recent reform of legal services in Britain, the primary focus of regulatory state changes may be found in the interlinked processes of profession-state regulation, profession-industry movements, and global-local changes (DCA, 2005). Although we find many echoes of the regulatory changes that have been found in the other sectors that we have considered, a key difference, with higher education especially, is the creation of a super or hierarchical regulator (a Legal Services Board composed by a majority of non-lawyers and independent of the providers of legal services, unlike current regulatory arrangements) to control the traditional professional bodies. Moreover, the provision for alternative business structures to that of the traditional partnership, allowing outside investment and permitting solicitors to combine and practice with other professionals, moves the domain of legal services quite radically towards the 'industry' end of the profession-industry continuum. It is likely also that the development of alternative business structures for the supply of legal services will lead to increased global competition for investment and talent for City-based firms in London. Global market forces are forcing a re-evaluation of traditional partnering arrangements (such as all partners earning the same amount whatever the levels of individual achievement), and leading to increased performance-based earnings for partners, an approach more typical of the traditional robust commercial approaches found in global investment and similar companies.

This suggests that comparative research on the higher education regulatory state may benefit at least as much from intra-country comparison of policy sectors (which are likely to weaken claims of wide-scale 'national regulatory cultures'), and from wider regulatory scholarship, as from transnational comparison of higher education systems alone, an approach that still dominates among researchers of higher education systems.

Conclusion

We have argued that it is possible to identify and to analyse a higher education regulatory state, in the United Kingdom and elsewhere, although significant national variations may be observed. Particularly, we have introduced the notion of 'regulatory intermediation' and 'regulatory intermediaries' to describe key groups and processes at the interface of the regulator and the regulated in the field of the quality evaluation of university performances. We have suggested that both centred and de-centred approaches are necessary for such a task. We have compared the regulatory state in a number of policy domains, suggesting that it plays out both similarly and differently in key respects. Consequently, it is suggested that the study of the higher education regulatory state would benefit from a more concerted comparative analysis of different policy sectors within a regulatory lens, rather than the current comparative reliance on higher education systems alone.

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