

The Politics of Regulation in the UK

Between Tradition,
Contingency and Crisis

Daniel Fitzpatrick

UNDERSTANDING GOVERNANCE



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For Harvey

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PART I

Political and Regulatory Traditions

Introduction: The Politics of Tradition

INTRODUCTION

On 3 August 2015, former UBS and Citigroup trader Tom Hayes was sentenced to 14 years in HM Prison Wandsworth for his key role in the rigging of the London Interbank Offered Rate (Libor). Hayes was found guilty of eight counts of conspiracy to defraud with respect to the Libor fixing scandal. In sentencing him, Mr Justice Cooke said that the tariff imposed was designed to send a message:

to the world of banking [that] ... The conduct involved here must be marked out as dishonest and wrong ... The fact that others were doing the same as you is no excuse, nor is the fact that your immediate managers saw the benefit of what you were doing and condoned it and embraced it, if not encouraged it.

The prosecution of Hayes is an outlier in the normal operation of UK regulation. Historically, regulation in Britain has tended to emphasise informal ‘cooperation between insiders, rather than of open adversarial conflict’ (Moran 2003: 35). Regulators in Britain have traditionally shied away from the strict imposition of enforcement and sanctions, favouring strategies of persuasion and education instead (Vogel 1986). This culture of cooperation is premised on the Victorian ideal of the gentleman. This is the notion that ‘economic actors were gentlemen, with claims to a

particular style of treatment by regulators, and with claims to gentlemanly standards that could deliver effective regulation without adversarial controls' (Moran 2003: 43). This 'gentlemanly ideal' gave rise to a regulatory approach that emphasised conciliation and cooperation with powerful interests in industry, the City and the professions in the nineteenth century. The consolidation of the overarching approach and style of regulation came to form the British regulatory tradition.

In this context, the prosecution of Tom Hayes is notable for three reasons. The first is the relative novelty of someone receiving a criminal (let alone custodial conviction) for a corporate or financial crime. In the conventional view, the vast majority of corporate illegality is not considered to constitute 'real' crime (Tombs 2015). Indeed, Hayes himself admitted that during the initial investigation by the UK's Serious Fraud Office: 'I didn't think about innocence or guilt.' Second, the trial exposed the degree to which the game of financial capitalism is, in reality, rigged. The Libor serves an important benchmark standard that is relied upon as a reference for financial contracts, including mortgages and student loans, worth over \$300 trillion. The Libor fixing scandal contradicts the narrative that the maladies of the financial system are invariably due to high risk-taking behaviour of a few rogue traders, rather than systematic greed and malfeasance. According to this view, any emboldening of regulation or enforcement must be weighed up against the *costs* of 'stricter liability ... Discouraging risk-taking altogether, in short, can be counterproductive' (The Economist 2013). The Libor scandal (and the rigging of its Euro and Tokyo equivalents) demonstrated that, in practice, capital 'does not operate or seek to operate according to free market principles ... Despite paying lip-service ... to the virtues of competition, it is not a discipline that all but a few business are willing to accept' (Clarke 2000: 39).

At the same time, the scandal of Libor—a self-selected, self-policing committee of the world's largest banks—also evidenced the extent to which the financial system still operates according to the subjective judgement and tacit knowledge of insiders in private 'club worlds'. While these private domains are now transnational, the prevailing world-view of this contemporary elite would be familiar to an observer of nineteenth-century high finance. The prosecution of Hayes, therefore, highlights the anachronism of a regulatory system that remains largely predicated on a Victorian notion of gentlemanly capitalism. To what extent is this tradition of regulation still relevant in the current era of crisis?

The concept of tradition is at the core of this book. The term tradition, derived from the Latin verb *tradere*, means to ‘hand down’ (Young 1988: 95). Tradition denotes ‘crystallisations of the past which remain in the present’ via our forebears (Young 1988: 142; Shils 2006: 12; Finlayson 2003: 664). The different manifestations of tradition are abundant, encompassing both the material—such as physical artefacts, paintings, landscapes and buildings—and the ideational, pertaining to systems of beliefs and values. Traditions are realised and reproduced through human action, via the repetition, interpretation and elaboration of practices and institutions. The concept of tradition, therefore, does leave room for agency: only living and knowing human beings can enact, reproduce, and modify traditions (Shils 2006). It is not the ‘concrete actions’ of procedures and institutions that are transmitted but the ‘images of actions which they imply or present and the beliefs requiring, recommending, regulating, permitting, or prohibiting the re-enactment of those patterns’ (Shils 2006: 12).

The reproduction of tradition, however, can be unconscious as well as intentional: ‘Those who accept a tradition need not call it a tradition; its acceptability might be self-evident to them’ (Shils 2006: 13). Nor is it necessary to assume that actors adhere to a tradition on the basis that it has a longer lineage. Shils (2006: 13) argues that although this ‘quality of pastness’ is a common feature of tradition, some traditions are simply taken for granted and acquire what March and Olsen (2004) call the ‘logic of appropriateness’.

The concept of tradition is vital, therefore, to our understanding of change and continuity in the nature of politics and institutions. As Shils (2006: 328) points out: ‘The connection that binds a society to its past can never die out completely; it is inherent in the nature of society.’ Tradition is manifested in much practical continuity—such as the family, places, institutions, language—that are directly experienced in everyday life (Williams 1977: 116). In focusing on remnants of the past, tradition is often used interchangeably, in both everyday language and academic text, with both habit and custom. Hobsbawm and Ranger (2012: 2), however, point out that it is important not to conflate tradition with the notions of habit and custom. Tradition is distinguishable from habit, routine or convention because these are behaviours that have a personal quality, whereas tradition is always collective: ‘individuals can have their own rituals, but traditions as such are group properties’ (Giddens and Pierson 1998: 128). Custom, though referring to a pattern of repeated social behaviour, lacks