Class 2.2 Readings

Parker and Evans

Self-Regulation: Professional Community and Social Trustee Professionalism

Barristers and the history of professional moral community

- Historically, the legal profession regulated itself – 15C English barristers were self-regulated by the strict hierarchies of Inns of court
    - Idea of self-regulation justified still justified to some extent – ideal of the legal profession as a coherent moral community that socialises its members into appropriate and ethical behaviour as it teaches and maintains the craft of lawyering
    - Legal profession as a community that is responsible for ensuring lawyers are adversarial advocates and responsible lawyers with the important social function of establishing/maintaining rule of law
- This distinguishes lawyers and their regulation from the chaos/self-interest of businesses competing in the market and bureaucracy of government organisations
- Self-regulation of ethics necessary because we cannot trust market forces or state regulation
- Conceptualises professionalism as a concept that cultivates ethical responsibility and autonomy in a way that capitalist, commercial, bureaucratic and hierarchical business modes of organising work cannot do

Social Bargain: social trustee professionalism

- Solicitors organised into professional associations in 18C to emulate success of Inns of Court in acquiring political influence and in inculcating common standards of professional conduct and ethics through a self-regulatory community
- Formation of NSW Law Society had the purpose of pursuing ethical self-regulation – Law Society of NSW first acquired statutory powers of regulation as in 1935
- At the pinnacle of self-regulation, these professional associations enforced standards of conduct, investigated complaints, provided tribunals to hear charges, decided qualifications for admission
    - Rationale for this self-regulation – legal profession is entering into a bargain with the state and community who allow it to self-regulate because of its obscure but expert knowledge and its superior institutions of socialisation and social control
    - Lawyers seen as different from other members of society/occupations because they are "integrated with, a distinctive part of our cultural tradition, having a fiduciary responsibility for its maintenance, development and implementation" of the Rule of Law
- This social bargain is characterised by trust – legal professional community society and clients trust them and protect them from interference, supervision and competition in return for legal professionals specially regulating itself
    - Failure to discipline would mean both a loss of prestige in the society, and a loss of community autonomy – therefore, profession is motivated to organise, regulate and socialise individual lawyers to serve and not exploit clients
- There are three main justifications for a continuing self-regulatory bargain proposed by the social trustee view of professionalism – each draws on the twin roles of lawyers as adversarial advocates and responsible lawyers
    - It is assumed that only lawyers are knowledgeable enough about the law to set standards for their own practice
    - The state should not be involved in regulating lawyers – it is necessary that lawyers are independent of gov't so they could defend individuals and society against the state where necessary (adversarial advocates), defend the rule of law etc.
    - The profession should not be thrown open to the competitive forces of the market – might corrupt Rule of Law with self-interest

Traditional Self-Regulation

- Traditional self-regulation focused on strict admission requirements – based on academic legal qualifications, practical training and 'good fame and character'
    - Ongoing regulation focused on maintaining standards of character, not competence e.g. dishonesty, breach of trust account rules or other fiduciary duties
    - Assumed that competence would be maintained through increasing experience
- Main sanctions available as the outcome of disciplinary action are expulsion or suspension from practice, monetary fines, reprimands, restrictions on practising certificates
    - Purpose of these sanctions are to protect public from untrustworthy professionals, protect the reputation and privileges of the whole profession
    - Assumption in this system is that unethical conduct is the result of dishonest behaviour by individual lawyers of bad character

The character of a member of a self-regulating profession: suitability for admission and renewal of practising certificates

- Admission to the profession largely controlled by Supreme Courts
- Only those who have the required knowledge (law degree), have completed PLT, proficiency in English and are "fit and proper" to be admitted can be admitted
    - Fit and proper – must show they are of 'good fame and character'; absence of criminal history, indication of dishonesty, disregard for political and social norms of the era etc.
    - Suggests that one of the implicit intentions of admission requires is to ensure that they are conservative in political allegiance, unlikely to ridicule/cause embarrassment ot the rest of the profession

<u>Co-Regulation and Independent Regulation of the legal profession today: complaints handling and discipline</u>

Legal profession as a conspiracy against the laity

- In contrast to traditional image of legal professional as a self-regulating moral community, since the early 1980s gov't policy in Australia has been to see the profession as a business that must be regulated in a way that ensures competition and a consumer service orientation
- The Trade Practices Commission (now ACCC) published the Hilmer Report in 1993 into gaps in implementation of competition policy reform in Australia identified the legal profession as a problem area
- Competition reforms see the legal profession as a cartel which managed in the 20C to achieve monopoly rents and privileges by exploiting self-regulation
    - Justified by Freidman's theory that special regulation always becomes a "tool in the hands of a special producer group to obtain a monopoly position at the expense of the rest of the public"
- Magali Sarfatti Larson: described "professional project" as to the use of claims to special knowledge and skills to strive both for market control (economic power) through monopolisation, and social status (social power) through a collective mobility project
    - This sees traditional self-regulation an its justifications as nothing more than support for the self-interested professional project
    - Claims of disinterested public service and social bargain mandating self-regulation obscure the social structural inequalities caused by professionalism
- On this view, the legal profession is an autonomous collective organisation organised to secure economic and social self-interest through control of entry, competition and internal regulation
    - Profession is a "conspiracy against the laity" , inherently unworthy of trust

<u>Regulation of the Legal Profession as a Business</u>

- Ironic that much of the criticism of professionalism by radicals seems to advance the implicit alternative of the individualistic free market that underlies capitalism

    - But policy consequence of accepting market control theory of the profession is to 'reform' lawyers by breaking down professional organisation and self-regulation, forcing more competition and treating law more like a business
- Richard Abel "the lawyer today…is an entrepreneur selling his services to an increasingly competitive market…although the ideal of professionalism undoubtedly will linger on as an ever more anachronistic warrant of legitimacy, as an economic, social and political institution the profession is moribound"
- How the three classic arguments for self-regulation fail:
    - Self-regulation not necessary to defend individuals and society from the power of the state – can be independently regulated
    - The legal profession has effectively failed to regulate itself properly
    - The argument that professions have always been self-governing is circular – "self-regulating professions" are really just those occupations that have succeeded in establishing a monopoly they control
- Burden of self-regulation more onerous than any of its advantages
- Charles Sampford: need a positive morality (morality actually accepted/shared by a group, as opposed to some ideal standard)
- Question is not necessarily who should be regulating the profession, but what values should be represented in the regulation of the profession, and how well that regulation connects with everyday practices to help lawyers be ethical
- Jim Spigelman has argued that essential public protections that are bound up in the current concerns of legal regulation may be abandoned to the market in competition regulation

<u>National Regulation</u>

- Nationally agreed regulatory structure for the legal profession is gradually evolving
- Model Laws initiative shepherded by LCA to partial success – Legal Profession Uniform Law Application Act 2014 (NSW) (NSW Application Act)
- In NSW and Victoria, the two state-based Legal Services Commissioners are at the coalface of investigation and prosecution in their respective states, but are supervised b and defer to the Commissioner for the Uniform Legal Services Regulation in Sydney on aspects of overarching Uniform Law Policy
- Uniform Law does little to change lawyers' traditional preference to manage their own complaint handling – in NSW, Law Society and Bar Council can investigate and decide whether a lawyer is prosecuted for misconduct, subject *only* to the remote supervision of the Commissioner for Uniform Legal Services Regulation