



Igiehon, Mark Osa. (2004). Law, economics, public interest and the theory of regulatory capture. *Mountbatten Journal of Legal Studies*, December 2004, 8 (2), pp. 2-19

Downloaded from <http://ssudl.solent.ac.uk/989/>

Usage Guidelines

Please refer to usage guidelines at <http://ssudl.solent.ac.uk/policies.html> or alternatively contact ir.admin@solent.ac.uk.

LAW, ECONOMICS, PUBLIC INTEREST AND THE THEORY OF REGULATORY CAPTURE

Mark Osa Igiehon

Introduction

The role of economic considerations in the law-making process does not appear to be an issue much discussed or explored at least within common-law jurisprudence. It was generally thought that the law, both as an imperative as well as a discipline, was paramount. However, that view of the law has been challenged by the law and economics school or movement, which argues that economic considerations have always played a significant role in the law-making process. This paper analyses the main postulations of the law and economics theorists as well as considers in some detail the theory of regulatory capture, which is a sub-set of the law and economics school.

The law and economics school

Though claiming older origins, the law and economics school, as a discrete school, is relatively new. The school postulates that most, if not all, aspects of the law (and the legal system) are explainable in economics terms, contrary to the traditional jurisprudential view. Whereas the traditional view is that the law (including the legal system) is in a sense the fulcrum upon which society stands, the law and economics movement considers that the law is not free-standing intrinsically but firmly rooted in, or motivated by, economic imperatives. This economic analysis of the law has been described as “the application of economic theory and econometric methods to examine the formation, structure, processes and impact of law and legal institutions.”¹ The law and economics school considers “legal institutions, not as given outside the economic system but, as variables within it,” and looks at the effects of changing one or more of them upon other elements of the system.

¹ Ejan Mackaay, “History of Law and Economics,” in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics* (Edward Edgar: Aldershot, 1999), p. 65.

In the economic analysis of law legal institutions are treated, “not as fixed outside the economic system, but as belonging to the choices to be explained.”² The law and economics school has itself spawned many sub-disciplines, of which public choice and constitutional political economy are particularly relevant to this analysis. The theory of regulatory capture is a sub-set of the public choice sub-discipline.

The law and economics movement, as may be expected, has met with serious challenge, particularly, from many lawyers³ who vigorously challenged the postulations and attempt to explain the law in economic terms. It was also perceived as a peculiarly American school of thought. In trying to stake their claim to legitimacy the proponents of the discipline, while admitting that the movement was extending “economics beyond its traditional boundaries – from market to non-market behaviour,”⁴ however, went on to vigorously claim that the discipline was only a progression of thought which was already prevalent in European thinking in the 18th and 19th centuries. Van den Hauwe stated that:

Among the various approaches to the new economic institutionalism, constitutional economics is probably the one that comes closest to what in Adam Smith’s time was called ‘moral philosophy’. It seeks to bring closer again the economic, social, political, philosophical and legal perspectives that were once part of the study of moral philosophy, and which the process of specialization in modern academia has fragmented into separate fields ... constitutional economics is the modern-day counterpart to what Smith called ‘the science of legislation.’⁵

In similar fashion Mackaay tried to show the link with older philosophy when, in tracing the origin of the new movement, he said:

² *Ibid.*

³ Some lawyers on the other hand became “converts” to the movement; one of them, Richard Posner, became one of the leading lights of the discipline.

⁴ Ludwig Van den Hauwe, “Public Choice, Constitutional Political Economy, and Law and Economics,” in *Encyclopedia of Law and Economics, ante*.

⁵ Van den Hauwe, *op cit.*

The current incarnation of law and economics originated in the United States in the late 1950s and found acceptance amongst the legal community from the 1970s onwards as a result, in particular, of the writings of Richard A. Posner. It has been presented at times as an altogether novel introduction of concepts and methods of a neighbouring science into law in that it addresses questions across the entire range of legal subject-matter, including much non-market behaviour.

This view may overstate the originality of the movement. Recent historical research has shown that already in nineteenth century Europe, there existed a broad scholarly movement whose ambition was to show how a better understanding of law could be gained by using economic concept and methods. Holmes's oft-cited exhortation to legal scholars, in 1897, to turn to economics and statistics: 'For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the matter of economics' may have pulled the American branch into the limelight.⁶

In similar fashion, Posner vigorously defended the discipline by suggesting that the law and economics discipline was not a novel body of thought, concluding:

The law and economics movement was for a long time regarded as an American movement. This was never completely correct. Its origins, certainly are international. British economists, Adam Smith and Jeremy Bentham, to begin with, and later A.C. Pigou and Ronald Coase (among others) played a founding role, as did Max Weber – himself both a lawyer and an economist. Friedrich Hayek and Bruno Leoni are other examples of scholars from outside the Anglo-American sphere whose thought has had an influence on the movement.⁷

Challenging the basis of the school

⁶ Mackaay, *op. cit.*, (n. 1).

⁷ Foreword to *Encyclopaedia of Law and Economics*, *ante*.

Despite the protestations of the proponents of the law and economics school, the structured body of thought, which postulates that, underpinning most aspects of the law, are economic considerations, is of relatively recent origin. To further suggest that the economic view of the law has its beginning two or three centuries ago presents difficulties.

From a jurisprudential perspective it is easy to see difficulties with the postulations of the law and economics discipline, for it challenges the primacy of the law and the legal system and views them in a way quite different from the traditional view of lawyers and jurists. It assumes that the law is no longer pre-eminent but rather that economic motivation, structure or system is paramount and that the law is but one aspect of the “economic” system. If one were to argue that, in contemporary terms, some aspects of the imperatives of the law and legal system are being influenced in an increasing way by economic considerations, there would be evidence to support such a conclusion. One can easily point to many national and international decisions where it is apparent that such decisions have been clearly influenced by economic considerations. However, to go so far as suggest that the basis of most, if not all, aspects of law and the legal system is now so overtaken by economic factors would appear to be going too far. Contemporary government and politics, particularly so in the United States (where the law and economics movement as a structured discipline started), would appear on an increasing scale to show a linkage between the actions of government and economic interests. But it was not always so.

The origins of law as a discipline

Tracing the development of the law right from ancient times, it is easy to see that the law, both as a quintessence of human society as well as a discipline, has been recognised as such from ancient times. The ancient Greek philosophers discussed the role of law in the creation of an ordered society. They were of the firm view that natural law, which was argued to be the imperative in the polity, was the *natural* foundation for society. A prominent roman jurist, Ulpian, described natural law as:

... that which nature has taught all animals. For it is peculiar to the human race but belongs to all animals. From this law comes the union of male and female, which we call marriage, and the begetting and

education of children ... all other animals are likewise governed by a knowledge of this law.⁸

Down the ages scholars and jurists continued to regard the vital place of law and government as the fulcrum of society although some of the perceived attributes have evolved and changed through the centuries. Thus, Jeremy Bentham, in defining law, described the same as “an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power...”⁹ It is easy to see the emphasis of the role of the sovereign which was not so pronounced in the works of the earlier and ancient jurists and philosophers. With the increased complexity and intricacy of government and the overshadowing role of sovereigns and their state apparatuses in Middle Ages Europe, it was only to be expected that, in defining the essence of the law and the legal system, the role of the sovereign would gain increasing prominence. Nevertheless, the ancient concept of divine or natural law as pre-eminent continued its currency. Thus, John Austin, in his seminal lectures on jurisprudence, described the issue in these terms:

The term *law* embraces the following objects: - Laws set by God to his human creatures, and the laws set by men to men. The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of nature as ambiguous and misleading, I name these laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God* ... Of the laws set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising

⁸ Quoted in John Austin, *The Province of Jurisprudence Determined*, W. Rumble (ed.), (Cambridge University Press, 1995), xxxix.

⁹ Jeremy Bentham, *Of Laws in General*, H.L.A. Hart (ed.), (University of London, 1970).

supreme and subordinate *government*, in independent nations, or independent political societies.¹⁰

Even in Adam Smith's contemplation of the law and jurisprudence, it was not overtly based on economics, as proffered by the law and economics school. Smith defined jurisprudence as "the theory of the rules by which civil governments ought to be directed. It attempts to show the foundation of the different systems of government in different countries and to show how far they are founded in reason."¹¹ It was only in going further to elucidate what ought to be the four main objects of every government that we find the first reference to economic considerations. Even then we find that in his view the first object of government was to maintain justice, in other words, to create an orderly society with its connotations of peace, order, exercise of individual rights and safety of personal property. Only when that object is secured, are governments to seek to promote "the opulence of the state" amongst other things.¹²

In contemporary society, perhaps more than previous ones, economic imperatives have arguably become more relevant, as evidenced, for example, in the ubiquitous roles now played by budgets and taxes. To that extent, the proposition of the law and economics discipline to explain the economic phenomena of law is useful in itself as well as useful to push the debate as to the role that economics should play in relation to the law and law-making process. There is no denying that economic considerations play a role in relation to the law. However, it is submitted that it is the extent of that role that is in dispute. Seeking to identify, understand, explain and possibly keep the economic impact in the right perspective is arguably the real value of the law and economics discipline. Clearly, therefore, though the economic imperative is important to government and, by extension, politics, it still is (as was apparent in Adam Smith's contemplation) subsidiary to that which was paramount, i.e., the maintenance of justice, "the first and chief design of every system of government."¹³ Contemplation of purely economic objects

¹⁰ John Austin, *op cit* at page 19.

¹¹ Adam Smith, *Lectures on Jurisprudence*, P.L. Meel et al (eds.), Clarendon Press, Oxford (1987) at page 5.

¹² *Ibid.*

¹³ *Ibid.*

should be subsequent to that. It arguably supports the response to the postulations of the law and economics discipline to the effect that the law and legal system are pre-eminent and that the imperatives of the economic system, though relevant to the law, are not paramount. There would be aspects of the law *qua* law, without any visible economic considerations. The criminal law system for example, with aspects flavoured by economic considerations like the protection of property rights, has its necessity and existence predicated primarily upon the imperative for law and order and protection of individuals.

Following the point that the law and economics postulations can be useful in understanding and “moderating” the influence of economic factors on law and the law-making process, it will be useful to consider in some detail the law and economics sub-disciplines of constitutional political economy and public choice, which incorporates the theory of regulatory capture.

Public Choice and Regulatory Capture

The early origin and development of the theory of regulatory capture stands quite apart from the development of the law and economics school generally. While regulatory capture as a theory is perhaps directly attributable to Marver Bernstein in his 1955 work, *Regulating Business by Independent Commission*,¹⁴ the naissence of the theory could be traced further back to J. Toulmin Smith, who, in his 1849 seminal work, *Government by Commissions Illegal and Pernicious*,¹⁵ wrote a scholarly denunciation of Crown Commissions, a trend prevalent in his day as well as many other practices of government that he saw as designed, not for the public good or interest but, for private, vested interests or the good of the then Whig Government and their friends. He saw the Crown Commissions as playing no other role than an avenue for the executive to achieve purposes and interests personal to them and their friends:

Putting aside, as unwillingly accepted incidents, those never-failing results of patronage and place and systematic jobbing which are the necessary accompaniments of all these Commissions, it will be found

¹⁴ Princeton University Press: Princeton , 1955.

¹⁵ S. Sweet, London , 1849.

that a Commission, - always picked and packed for the purpose *ex parte*, - is had recourse to whenever anything is wanted to be done which ought not to be done at all; whenever any crotchet or new experiment is sought to be enforced on the land by which that shall be done in an irregular and jobbing way which there are recognized and legal means of doing in a regular and open way; whenever a false expression of public opinion is desired to be vamped up on any matter; whenever it is desired effectually to *shelve* any important question to which attention has been called; whenever it is desired to conceal any flagrant job or blunder; whenever it is desired to shift responsibility from those to whom it rightly belongs; whenever there are needy men, hangers-on of the Whig party, who happen to be out of a situation, and who are in want of a comfortable plant in the breeches-pocket of the people.

None of these Commissions could, in any form, ever have had existence had the public interest and the development of the energies of the community been the objects sought.¹⁶

Toulmin Smith also analysed the manner of passing some laws in his day and concluded that:

It is self-evident that the requirement that all laws shall be passed and moneys obtained with the consent of the nation, through the parliament, implies a reality, but not an empty form. But a practice has grown up of flagrantly violating this first principle of our fundamental laws by bringing in, at the close of a session, a number of bills and hurrying them through the forms of parliament, when there is no possible time for them to be well-considered, either by parliament-men or people, and when, moreover, the greater number of members have left town.

The policy of the Government and the Commissioners is to hurry their bills through with such rapidity, that very little time is given to those who suffer them for consideration and remonstrance, and we must be prepared for the worst beforehand ... The consequence is, that important bills are hurried through without the public being in the least degree aware of it, and without the possibility of any discussion of their merits either in the house or out of it; that important alterations are surreptitiously introduced without the public having the least

¹⁶ *Ibid*, pp. 22 and 254.

knowledge of the fact; and that enormous money votes are passed, - not only not by the 'common consent of all the realm,' but without the realm knowing anything about the matter, and for purposes to which the realm, if it knew them, would never assent. Thus the executive, in fact, makes laws to suit its own purposes and to cover the reach of justice transactions.

Bernstein, on his part, after studying the regulation of industry in the United States by commissions, concluded that, though initially sceptical of regulation by commissions, industry had learned to prefer such commissions "in the belief that commissions treat them more favourably."¹⁷ Thus the impression or charge began to widen that commissions showed favouritism to the regulated industry and that they (commissions and regulators) had a "narrow view of the public interest"¹⁸ and, thus, that regulated industry tended to "capture" the regulator.

The Public Choice Theory in its present structure in the main involves debate around two propositions. The first holds that the end and purpose of most of the actions of politicians and legislators in making choices for society is the greater good of society (or for the "public interest").¹⁹ The other proposition (the capture or special interests theory) holds that "government is pretty much run by a few big interests looking out for themselves."²⁰ The debate suggests in part that initially scholars (particularly in America) were agreed that, generally speaking, people in government acted for the good of society. However, cynicism later developed when, with the increasing influence of big business with government, the impression of some scholars began to gain ground. They postulated that, contrary to the impression that government was for the public good, the reality was that all political systems "were subject to pressures from special interest groups that try to use influence to enhance their welfare"²¹ and that over time government has

¹⁷ M. Bernstein, *op.cit.*, p. 5.

¹⁸ *Ibid.*, p. 7.

¹⁹ In other words, that government "is run for the benefit of all the people." See Farber and Frickey, *infra*.

²⁰ Farber and P. Frickey, "The Independence of Public Choice", (1987) *Texas Law Review*, vol. 65, 873-927, at p. 873.

²¹ G. Becker, "A theory of competition among pressure groups for political influence" (1983) *Quarterly Jnl. of Economics*, 311-400, at p. 375.

ceased to be directed at the public good and had become tilted towards the maximisation of individual or sectional interests rather than the public good. The apparent shift in perception has been described thus:

Implicit in the neoclassical model underlying the mainstream law and economics is the view that government's role is to correct market failure. It is consonant with the broadly held public interest view of government: the government acts as the impartial umpire of social relationships, stepping into the fray to correct whatever has gone astray in the workings of markets and other social forces.

Public choice casts doubt on this view. Its proponents question the underlying assumption that actors presumed selfish in private dealings would behave selflessly upon assuming public office. Public choice proposes a private view of politics, a world in which actors in political roles act to maximise something of direct interest to them, but defined in ways particular to their roles: politicians are assumed to maximise their chances of re-election; bureaucrats, the size and mandate of their bureaux ... voters, the benefits they draw from government programmes and interest groups, the programmes conferring benefits upon their members.²²

This perception of regulation and, by extension, government as being captured by private interests was later expanded from the arena of politics to explain the actions of political actors as well as the law-making process (hence "legislative capture"). Indeed, this area of the law and economics discipline (public choice theory) was to gain such prominence that one of its

²² E. Macksaay, in *Encyclopedia of Economics and Law*, p. 88. Micheal Levine, in G. Becker, "A theory of competition among pressure groups for political for political influence", (1983) *Quarterly Jnl. of Economics*, 311 – 400, at p. 375, put the change in perception thus: "From the progressive Era through the 1950's, we thought we understood regulation. It was generated, we knew, by problems with laissez-faire. These problems came to be known as 'market failures'. Regulation operated to cure market failures by substituting the expert planning decisions of an administrative agency for the defective allocations of the failed market. Regulators sifted facts, rendered and explained their judgements, and generally did a creditable, if flawed job, or so we thought. This view of the origins and operation of the process came to be known as the "public interest" theory of regulation. By the late 1950s, this view of the process began to change. An outpouring of scholarly work continuing through the 1960's and into the 1970's suggested that regulation did not work very well. As scholars examined the record of regulated industries, they found prices, which were too high or too low, distorted allocations, mercantile protection, suppression of innovation, extension of regulation beyond the bounds of any known market failure, and protection of entrenched interests, corporate or geographic, from any change at all costs. In the face of these discoveries, the public interest theory did not survive. The scholarly view of the regulatory process changed from one of control of private behaviour for the public benefit to one of use of governmental powers for private or sectional gain."

leading proponents, James M. Buchanan Jr., was awarded the 1986 Nobel Prize for Economics by the Royal Swedish Academy for his work on the “Synthesis of the Theories of Political and Economic Decision-Making (Public Choice)”.²³ He was recognised for his unique contribution in transferring “the concept of gain derived from mutual exchange between individuals to the realm of political decision-making,” the political process thus becoming “a means of co-operation aimed at achieving reciprocal advantages.”²⁴

The theory of regulatory capture, like its parent law and economics school, is open to criticism and has been met with challenge from scholars with legal background, who felt particularly concerned that economists had purported “to extend the reach of economic analysis far beyond the area where it is useful – in the analysis of the economy - into areas where the marketplace paradigm is inapposite and pernicious.”²⁵

It would appear rather short-sighted to postulate that in every polity those in government invariably act to further their own personal interests or the interests of some section of the society which has the most influence over it, purely for pecuniary reasons, discounting altogether the fact that there exists something known as “public interest or good”. Definitely there is a concept known as “public interest” though it is difficult to define. Indeed, it may well be that the theory of capture gained legitimacy and ascendancy for the simple reason that there is no acceptable definition of “public interest” and “the good of society.” Every government and political institution have several choices, for example, to expend significant sums in one sector but spend as little as possible in another or to achieve a medium by spending fairly reasonable sums on both competing interests. Any one of the three

²³ From the Press Release issued by The Royal Swedish Academy of Sciences, 16 October 1986, titled “This Year’s Economics Prize awarded for a Synthesis of the Theories of Political and Economic Decision-Making (Public Choice)”. The formal announcement set out the essence of the theory thus: “For a long-time, traditional economics lacked an independent theory of political decision-making. Modern welfare theory often relied on the premise that public authorities could apply relatively mechanical methods to correct different types of so-called market failures. Stabilization policy theory - regardless of whether Keynesian or monetarist - appeared to assume that political authorities endeavoured to achieve certain macroeconomic or socioeconomic goals regarding employment, inflation or growth rates. Buchanan and others in the public choice school have not accepted this simplified view of political life. Instead they have sought explanations for political behavior that resemble those used to analyze behaviour on markets. Individuals who behave selfishly on markets can hardly behave wholly altruistically in political life.”

²⁴ *Ibid.*

²⁵ Steven Kelman, “Public Choice”, (1987) *Public Interest*, vol. 87, pp. 80-94, at p. 80.

options could be in the “public interest”. In such ways governments usually face many options over any one particular issue. Of course, the decision or choice made will differ from one leader to the other and from one government to the other. The factors that will affect the choice made by any one government will no doubt include the ideological inclination of the particular government or even its economic policy. For example, one government would consider it more important to increase growth and trade by supporting private enterprises at any costs while another would believe that the environment ought to be preserved for the next generation, at any cost. Any choice made could yet still be consistent with “public interest”; therefore, “public interest” must be subjective to a considerable extent.

Necessarily, one must recognize that on some occasions the choice made by a particular government is motivated by a desire to further the interests of some small segment of society, which has some influence over the leaders or members of that government (for example, its party members, those whose support was crucial to bringing it to power or special interest lobbyists). In such event it may or may not be evident that sectional, rather than public, interests are the motivation. The instances of blatant sectional interests being the motivation for decisions of governments must, it is suggested, be fewer. Some scholars would appear to see those cases, where decisions have been made which are consistent with the positions propounded by particular sections of society, as always instances of the government kowtowing to special interests. One ought to allow room for the possibility that, even in such circumstances, a government, in agreeing to the proposals put forward or supported by a special interest lobby, for example, sincerely believes (even if mistaken) that its decision is in the best interests of the state or society as a whole. Such decisions would in many cases be subjective. One government could make a decision, thinking it is in furtherance of the public good, while others may consider the same decision as neither the best choice for the public good nor a choice that would serve any public good whatsoever. The fact that a particular government makes a decision, which is contrary to a commentator’s view of what would be best in the public interest, does not make such decision any less than for the “public good”. Also, even where a government appears to be adopting the policy or choice put forward by a special group or interest, the decision does not necessarily become any less than for the “public good.” The difficulty, however, is that, if a government appears to adopt the proposals of some

special interests or group without more, such action tends to support the view that, on the particular occasion, special interests “captured” the legislation or decision of the government.

Whether one agrees or disagrees with the public choice school, there are some minutiae of the capture theory literature which are most relevant to, and which might be useful in resolving, the apparent tendency of special interests to capture legislation. One of the postulations of capture theorists is that the manner or process, by which the alternatives or options, open to Government decision-makers in respect of any matter, are brought to their attention for consideration, constitutes “crucial, if less visible, determinants of public policy”.²⁶ In other words, the very process of defining the agenda or the contents of a particular issue for decision-makers could be fundamental to the choice that any government or legal or political institution would eventually make. The process of attracting the attention of decision-makers to make public policy favourable to one’s position or viewpoint is indeed common to every society or polity, the only difference being the manner in which the individual, or sections of the society, seeking such favourable determination, go about achieving the same.²⁷ To the extent to which some capture theory scholars have studied those methods and their shortcomings, aspects of that theory are of direct relevance here. It has been noted, for example, that issues that eventually come before decision makers:

typically arise in small groups. These groups are always concerned with expanding awareness of the issue, either because they want to promote expansion or because they want to prevent it ... Given different resource bases, groups work to get an issue on the agenda in different ways.²⁸

Cobb, Ross and Ross then went further to postulate three methods, by which the attention and favourable decision of decision-makers is obtained

²⁶ Cobb, Ross and Ross, “Agenda Building as a Comparative Political Process”, (1976) *Political Science Review*, vol. 70, 126-138, at p. 126.

²⁷ Some sections of contemporary society and polity have of course become very determined and sophisticated in pushing their cause to the fore for the attention of public policy makers and the public to a lesser extent, hence the proliferation of organised interest and pressure groups and lobby firms.

²⁸ Cobb, Ross and Ross, *op. cit.*, p. 127.

for the agenda of individuals or groups in society. The three methods each consist of four stages or components, namely, initiation, specification, expansion and entrance.²⁹ The three methods or models have been accounted for as follows:

The first, the *outside initiative* model, accounts for the process through which issues arise in non-governmental groups and are then expanded sufficiently to reach, first, the public agenda and, finally, the formal agenda. The second, the *mobilization* model, considers issues which are initiated inside government and consequently achieve formal agenda status almost automatically. Successful implementation of these issues often requires, however, that they be placed on a public agenda as well. The mobilization model accounts for the ways decision makers attempt to implement a policy by expanding an issue from the formal to the public agenda. The third, the *inside initiative* model, describes issues which arise within the governmental sphere and whose supporters do not try to expand them to the mass public. Instead these supporters base their hopes of success on their own ability to apply sufficient pressure to assure formal agenda status, a favourable decision and successful implementation. In this model, initiating groups often specifically wish to prevent an issue from expanding to the mass public; they do not want it on the public agenda.³⁰

The inside initiative model has been described thus:

It is easiest to be successful in achieving formal agenda status and implementation of the proposed policy with the fewest changes. In this model policy originates within a governmental agency, or within a group which has easy and frequent access to political decision makers. As in the mobilisation model, the issue reaches the formal agenda relatively easily because of the position of the initiating group. The group articulating the policy does not seek to expand the issue to the public agenda – i.e., it does not try to force decision makers to place it on the formal agenda (as in the outside initiative model) or to build

²⁹ *Ibid.*

³⁰ *Ibid.*, pp. 127 – 128.

support for its implementation (as in the mobilization model). Instead expansion is aimed at particular influential groups which can be important in the passage and implementation of the policy, while at the same time, the initiators try to limit issue expansion to the public because they do not want the issue on the public agenda. Instead they seek a more “private” decision within the government, and generally stand to be defeated when the issue is sufficiently expanded to include public groups which might be opposed to it. Bureaucrats are also often afraid that the public will misunderstand a technical problem if it becomes a matter for public debate ... They suggest that the public does not (and cannot) understand the technical issues involved.³¹

Relevant also are the views of Toulmin Smith. Though he wrote about a specific subject of his day, his views are apposite on the necessity to expand relevant issues to the public domain in order to secure a true “national will” on that issue. According to him:

The very fact of the appointment of such Commissions is, however, conclusive evidence, unless an almost inconceivable ignorance be, in charity, presumed, that simple truth-seeking is not their object. Straight-forward simple means are already provided, of the *fullest, completest, and most efficient* character, by the laws and institutions of the land, for getting, in a regular, legal and open course, at all and any information which can ever be needed or useful. The very fact of the appointment of such Commissions, avoiding those legal and regular tribunals and means, and with the characters which have been seen to mark them, is demonstrative evidence of the consciousness of the necessity for a one-sided and irregular proceedings in order to gain some end. This consciousness may, and no doubt oftentimes does, disguise itself under various specious forms. It may be unrecognised in its nakedness. But it is, of necessity, always really present. The man who is conscious of *truth*, and feels the strength which that consciousness must always give, will never have recourse to other

³¹ *Ibid.*, p. 135. See also M. Bernstein, *op.cit.*, p. 73, where it is stated: “As Paul Appley has suggested, ‘taking things out of politics’ means ‘taking things out of popular control.’ This is a frequent device of special-interest groups to effect the transfer of governmental power away from the large public to the special-interest small public.”

weapons than those of argument and example to illustrate it. He will know that no truth can ever be propagated by fraud or force, or by the concealment of any facts, or letting only a one-sided view of them be taken.

That which is not the truth may, of course, at any time, by this unnatural means, be made to seem to be the truth, and so impose upon many not accustomed to logical inquiry. The end will, however, always be that the actual truth is, for a time longer, hidden and buried, until sad experience shows the evils of the spurious article foisted on the public in its place.

There is no truth, be it great or small, which, when once earnestly seen by one man, and with earnestness and moral courage preached by man, will not work its own way, by sure steps, into the public mind. It is clearly only when any truth has thus *worked its own way* into the public mind that any true *idea* can grow up from it, which, really felt and earnestly uttered, constitute a national will, - and, so, while it gives sanction to any law, will ensure to that law obedience and respect.³²

It has been postulated that agitators, who use the inside access model, wish to restrict their “operations” to:

a relatively private setting as the attentive public may be only dimly aware that the issue is being considered at all, and the mass public is totally unaware of its existence. The supporters of the proposal feel that selective pressure from groups close to the decisions-makers is preferable to public pressure, which may create a situation in which they lose control over the issue.

The postulation above could not have been truer of the campaign to establish a less-than-complete removal rule.

Conclusion

³² J. Toulmin Smith, *op. cit.*, pp. 170-171.

Whether one agrees or disagrees with the postulations of the law and economics school and its theory on public choice and regulatory capture, the issues propounded by the school are quite relevant and useful. In the first place, with the increasing role of economics in government and society, the postulations of the law and economics school are useful to encourage or stimulate a discussion of the role and scope that economic considerations ought to play in the law and the law-making process. It is also useful that there is continuous debate of the role of law in society. From ancient times, philosophers and commentators regarded law as pre-eminent in society, though for a long time seen in its manifestation as divine or natural law. That pre-eminent view of the law was largely carried through to the thinking or jurisprudence of Middle Ages Europe though the law's manifestation had changed such that it was characterised more as proceeding from the sovereign rather than proceeding from God, while the sovereigns proclaimed themselves to rule or reign by divine appointment. The question that now arises is whether the law still retains its pre-eminent place in contemporary society and world. If law does retain its pre-eminent status as the fulcrum of society, the next issue is as to its present manifestation. While it is perhaps erroneous to claim, as the law and economics school does, that the law is in contemporary times nearly or completely explainable in economic terms, the fact remains that, even if still pre-eminent, it is worth exploring the manifestations of the law in present society and world. To that extent, the debate engendered by the law and economics school is most useful.

The public choice debate and the regulatory capture theory are useful also, if nothing else, as caution to policy and decision-makers as well as to regulators, to highlight the controversy of what constitutes "the public good or public interest" and the necessity to handle the views and influence of special interests and groups appropriately. That calls for proper consideration and fine balancing of all aspects and views on a particular subject or issue in order to arrive at a decision or policy which best captures the public good or interest. The minutiae of writings of the public choice school, dealing with how special interests force their issues into formal agenda, are quite useful for those involved in the process of making laws and policy so that they can better and properly recognise, take account of and balance the interests and positions of special interests. Regulators, particularly, need to exercise caution in their relationships with the industry or group that they seek to

regulate in order to ensure they retain their “independence” and are not disproportionately influenced by the “regulatees” or special interest lobby.

One important issue, for which the work of the public choice theorists and the law and economics school have failed to provide a definitive and conclusive answer, is the issue as to what amounts to the “public good” or “public interests”. Perhaps, as suggested in this analysis, it is the inherent difficulty of providing such a conclusive definition that has, in part, provided the opportunity for the law and economics movement.

Dr. Mark Osa Igiehon
Legal Counsel, Shell (Nigeria)