Brooklyn Journal of International Law

Volume 28
Issue 2
SYMPOSIUM: Do Financial Supermarkets Need Super Regulators?

Article 3

2003

Panel 1 Discussion Transcript

PANEL I (PART 1): DISCUSSION TRANSCRIPT

PROFESSOR BERMAN: Now for our final speaker on the panel, Professor Fanto.

PROFESSOR FANTO: I'm not really a speaker. I'm just a commentator. And being an organizer of the program, I'm acutely aware of the time. So I want to keep the conference on schedule. So I'm just going to offer a few remarks and then maybe a few people from the audience will and our main speakers can respond to them, because I'm trying to slate a break in about ten minutes. So really what I'm going to do is just offer a few comments on really both the papers.

First comment would be, I think both of the speakers emphasized the highly contextual nature of the U.K. change. And I think implicit there is the highly contextual historical nature of financial regulation there and here. And I think that's an important point. We have to keep that in mind from a policy-maker's perspective, how we like the change, how much are we unable to change, or what are the real cultural political constraints inhibiting our change. So I think both speakers emphasized that. Dr. Ferran in her paper, she just mentioned it, but it really comes out, the [highly contextual nature].

Nevertheless, countries do change. And I don't think we can be too sanguine about how financial regulation . . . happens to change. I think from a policy point of view we have to realize that it's likely not to happen due to our actions. And I think Dr. Ferran makes that very clear. It's almost fortuitous that the change comes about.

I'm kind of a partisan of more a behavioral approach, which is that change will happen when there's a crisis in the system. Now, maybe she shares that position too. . . . [W]hen she outlines the various problems with U.K. regulation that push the system to the point where people are willing to change, it's the common behavioral position that we all know because we all follow it. We don't really move off the status quo willingly. And we do it reluctantly and only when we're forced to do so.

So I think one of the messages that tell us — we're not really policy makers, but we're people who try to talk to policy makers, as Professor Jackson does — is that you try to wait for the right moment, and if that right moment comes upon you, you offer your policies. But those moments come. We see it now in the United States with respect to corporate governance. I mean, some people may disagree, well, we don't really need to change. But it's a moment when change is possible and happens.

So that I think is one set of arguments, which is to recognize how you're bound into a position. But it doesn't seem to me that that should keep you from making normative arguments. And it seems to me that in the two papers I found a bit of a reluctance to make a normative argument about, well, in the simple sense, well, what's the best model to have. Again, we have to be careful scholars and recognize that change comes about fortuitously. But nonetheless one might draw some inferences from the data or simply stake out a theoretical position that one model is better than the other or that it seems more convincing.

Now, I think that may be implicit there. I mean, it may be implicit in Professor Jackson's — I mean, he's a careful scholar and if you know his work, he likes to look at a lot of data, both theoretical and empirical, and say, well, look, I'm going through these regulatory costs and I may come to some conclusions down the line. But it seems to me that maybe I'd push them more to stake out a theoretical position. I mean, Dr. Ferran, you're very careful, but one could see one there. One could just look at the U.S. system and . . . take a normative position that systems, despite the goals they try to accomplish, they get so needlessly complex that one feels that you just simply have to rearrange them. And even though you recognize it, it probably can't be done short of a crisis. It seems to me that . . . implicit in Dr. Ferran's talk, there's probably a normative position that having multiple regulators is simply too complex.

Now, I don't know what Howell Jackson . . . feel[s] about that, but maybe you'd want to talk about that. But that's a central comment — and I'm trying to keep this brief for the time — that I have about both papers. So maybe in a minute you would want to talk about that.

Secondly — this you both could talk about too — I think it's very interesting . . . what Professor Jackson has already done in his other work — lay out the regulatory goals and contrast the regulatory goals of the two systems. In reading through that, it seemed to me convincing, even though somewhat surprising. It seems to me sometimes some of those goals — for example, the financial innovation goal [was] certainly a goal for the FSA but was a prominent goal for Gramm-Leach-Bliley as well.

So to talk about financial innovation as being peculiar to the U.K. — and I don't mean to overstate your position or to push the position of the city — I think we could say the same thing here, the concern of the Congress and the federal regulators when they were pushing Gramm-Leach-Bliley is something of the same sort. So sometimes although you could get a different order of priority, it may well be that all the goals really are there.

The one that I found curious is this — and you might find that interesting, too — is . . . our emphasis on redistribution, consumer protection sort of thing. When you think of Community Reinvestment Act, you started by talking about how it's so odd that those economists at Harvard lumped together the U.S. and the U.K., even though U.S. and U.K. are very different. But then — and maybe I'm stating it too strongly — then when you say we have this emphasis on banking regulation, on redistribution and the U.K. at least doesn't, at least not nominally, or less so, I don't know. It just strikes me as curious because it would seem to me that on some of the data from *The Economist* they would suggest that the U.K. is a little bit more social democratic than we are. So I'm wondering, is that kind of protection of consumers just somewhere else, maybe not in the FSA and its enabling regulation. So maybe you want to talk about that a bit.

The argument about cost — and I think you do it systematically Dr. Ferran, anecdotally, and you're both doing it in a preliminary way and I think that's all we can take it [for]. I think you articulate elsewhere in your work, Professor Jackson, that it's hard to quantify cost and so also it's hard to quantify benefits. I mean, that's implicit. So I think we need the data, and it's good for people to take the data but one maybe overall question is then how do we quantify the benefits. How do you quantify a benefit such as consumer confidence or confidence in the financial system. I think that's part of what Congress has struggled with in the recent legislation. So you've over-regulated having CEO's and CFO's certify financial statements and do all these silly things. But, you know, they're struggling with this notion of addressing confidence in a cost-benefit, that's a hard problem to deal with in a cost-benefit way.

So those are a few brief comments. Maybe you could talk about them, then we could take some questions from the floor.

PROFESSOR JACKSON: Well, let me jump into the normative breach for a second. I do have a normative angle. But it's more U.S.-oriented.

The reason I got into this project was my sense that people are not aware of the costs of our regulatory structure. And when an argument is made about separation of authority or federalist arguments . . . the costs are not always apparent. And I think from the United States perspective, one of the things that's very interesting about this study is how much more we're spending on financial services regulation than other countries are. Now, maybe we want to, maybe we don't. But I think it's very important to be explicit about what the costs are, and then, of course, proponents can make the case for the benefits outweighing it. But I think at least having this on the table — it's not generally on the table — is valuable.

So here the FSA and I have this sort of happy marriage. When they do the cost-benefit analysis, they're looking for a jurisdiction that's more costly than them that makes them look cost efficient. And we are their jurisdiction. We make them look good. The Europeans don't make them look good because they don't regulate that much. And then they'd say, well, but they're not really doing it. So they need us in their tables. But I think we need them in our tables too. Because I think a little bit the burden is on the American political system to explain why we're spending so much more on any normalized basis, particularly for banking, but also for securities.

So I do have a normative angle. And that's it. I think it's valuable even though it's methodologically really complex to make inter-jurisdiction comparisons. It's also very valuable, and the reason I actually got into this initially, was [because] developing countries need to have base lines to know how much they should spend on regulation. And it's nice for them to have benchmarks to make some comparisons to know whether they are up to some sort of snuff. Complicated to do, but valuable as well.

As to the question of whether the British are more socialist than we are, I think this is really complex. Go to National Health. Yes, they're more socialist than we are. Go to banking regulation, we're more socialist than they are. You go to regulation in general and I would say that we're more intensive financial regulators than anyone else in the world, even though we're common law and even though we're the Wild West. When you actually get down to the nitty-gritty, we're more. You know, the world is more complex than my economic colleagues often recognize. And thank goodness.

DR. FERRAN: On the normative agenda point, I think my own perspective would be that in terms of the familiar arguments about the benefits of the single regulator efficiency, effectiveness, accountability, I do find the arguments quite finely balanced. And I do feel it's too early to say in terms of the U.K. whether we have evidence to support a claim to superiority.

What I do think, though, and I didn't have time to develop this, is that in terms of European financial regulation more generally, there are clear advantages in individual member states of the European Union, simplifying and reducing the number of their regulatory agencies so as to facilitate more ease of relationships at the European level. And I think that is an infinitely preferable way to develop European regulation generally as opposed to the development, say, of a Euro SEC or even a Euro FSA.

PROFESSOR BERMAN: Five minutes? Let's try to get a couple questions from the floor. The gentlemen in the back there.

QUESTION FROM AUDIENCE: [Unintelligible]

PROFESSOR JACKSON: To use the framework that Dr. Ferran offered about the pros and cons. If you just said a consolidated supervisor, if we did what the U.K. did and got an institution with roughly 50,000 employees and a budget of $4.5 billion doing consolidated supervision in the United States, I personally think that would be a bad idea. I think the problems of inefficiencies of scope, I think the massive political concerns about getting everybody in the same place would really be paramount. And in that way I just think the United States system is really quite different.

It's not totally clear to me whether we should be comparing ourselves with the U.K. or the E.U. as the right method of comparison. We're doing this country to country thing because that's what we've traditionally done. But in fact it's complicated. And if you look at the E.U. you'll see this two level system, much lighter touch at the top, very thin in terms of personnel and strong national system. But that is another model.

I think that if we were going to go, if you'd ask my druthers, I would have more consolidation at the federal level, bringing some insurance stuff up. There's a whole bunch of things that one might do. But I have to say, the politics make me despair so much that I quickly move to second best, which is coordination strategies as opposed to consolidation strategies. Which is what we've done in the SWAPS area, task forces that coordinate, and other kinds of memoranda of understanding. I think that's the practical route for us in the near term.

QUESTION FROM AUDIENCE: Professor Jackson, one thing which struck me about your $4.5 billion was how little it is. I mean, I assume that the people at Enron and WorldCom probably stole more than that [laughter] isn't it fair to conclude that what we do is tiny and what France and Germany will do is zero.

PROFESSOR JACKSON: Right.

QUESTION FROM AUDIENCE: So why are we so concerned about cost. The cost is nothing. What's $4.5 billion in this country?

PROFESSOR JACKSON: I like the way you think. But that's the question. I mean, the suggestion of the data that I put out is that someone's got it wrong. France and Germany are the cases. And the FSA is an intermediate case. And I guess what I would say back to you is, what's so bad about France and Germany? What are we getting that they're not getting? We got Enron. They didn't. So what do we buy exactly –

[CROSS-TALK]

PROFESSOR JACKSON: I think this is a great point to debate. But I also agree — compared to our economy, $4.5 billion is not what it used to be.

QUESTION FROM AUDIENCE: Professor Jackson, have you done anything to divide that $4.5 billion at the federal level and the state level? . . .

PROFESSOR JACKSON: Right. That's a good question. To get the $4.5 billion we had to start with the states. But I have not done that kind of analysis. But what I've given you here is just a little piece of a bigger or longer term project. That's something we will definitely look at and I haven't done yet.

PROFESSOR BERMAN: I think we're going to wrap it up here. The only thing I'd like to add as a final word is that the most recent exercise in governmental regulatory consolidation in the United States, the creation of the Department of Homeland Security, has not exactly been a model of anything. And gives one pause as to whether, for a variety of political and structural reasons, this could be done in as coherent a fashion in the United States as it was done in Britain.