Building on the trust of management: overcoming the paradoxes of principles based regulation

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How Can Management Be Relied Upon to Comply with Rules, Principles and Procedures?

Paradoxes of Principles Based Regulation are considered to include the interpretative, communicative, compliance, supervisory and enforcement, internal management, ethical and trust paradoxes.[1] This paper will focus on how the paradoxes related to communication, interpretation and compliance could be overcome as a means of fostering trust between internal management. It is argued[2] that trust is not only required before principles based regulation can operate, but that it also constitutes the foundation of principles based regulation—an element which "it alone cannot create—though it can facilitate its development." The elements relating to communication, interpretation and compliance constitute the focus of study given the vital nature of their roles in facilitating the development of trust. Furthermore, the success of these components would also facilitate the effectiveness of supervision and the development of ethics and trust within the internal management. Even though trust is considered to be the "ultimate" paradox, it could also be argued that interpretative elements and communication could be placed on equal footing—although they could never assume a higher ranked status than trust. Where trust exists between management, could principles based regulation still operate where communication/interpretative difficulties exist? Interpretative and communication problems within internal management would only serve to undermine the trust which already exists between management. Whilst the pre-existence of trust is of fundamental importance, its development and sustenance are also equally important. For such reasons factors which would serve to undermine its development and sustenance, should be accorded utmost attention—and it is for this very purpose that the frequency of communication between management serves as a crucial means of overcoming problems related to interpretation, as well as fostering trust between management. Compliance also constitutes a focal point in the study since it serves as a medium through which trust can be fostered. The link between interpretation, communication and compliance is illustrated thus:

> "Compliance is meaningless, or rather has contested meanings, in the absence of some commonly accepted understanding of the way regulatory requirements should be interpreted and applied."[3]

The paper will also illustrate that too much information could result in over compliance—which could result in undesired outcomes. Within this context, the frequency of exchange of quality information is to be distinguished from the transmission of voluminous "irrelevant" or misleading information.

In illustrating why responsive and negotiating strategies are more effective than deterrence based strategies—where the facilitation of compliance with rules and principles are concerned, the first section of this paper will commence with a section which focuses on the role of moral judgement in the implementation of deterrence measures and responsive regulatory strategies. The second section then considers the role played by fairness and justice in the facilitation of compliance with the law. The third section analyses and elaborates on techniques which are employed in facilitating regulatory compliance whilst the need and reasons for a pro active approach to regulation is considered in section four. Section five highlights

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For in depth information on paradoxes of principles based regulation, see J Black, "Forms and Paradoxes of Principles based Regulation" LSE Working paper, LSE Law, Society and Economy Working Papers 13/2008. Also refer to the author's paper titled "International Framework for Liquidity Risk Measurement, Standards and Monitoring: Corporate Governance and Internal Controls".

how communication and interpretation problems which are associated with principles based regulation and meta-regulation could be resolved. In so doing, it addresses the main elements which are vital to ensuring that the "ultimate" paradox and element, namely trust, is not only sustained but also developed.

A. Deterrence Measures and Responsive Regulatory Strategies

Deterrence measures are exemplified by measures such as penalties and fines whilst responsive regulatory strategies are aimed at optimising a combination of cooperative and punitive strategies. It is argued[4] that the advantage which responsive regulatory strategies offer, in contrast to simple deterrence measures, lies in the fact that whilst simple deterrence frequently fails to induce the required commitment to comply with rules and procedures (owing to lack of consideration being accorded to moral issues/moral judgement), responsive regulatory strategies "leverage the deterrence impact of their enforcement strategies with moral judgement."[5] However, it is also argued that political support is required as a means of justifying the moral seriousness of the law which is to be enforced–otherwise a "compliance trap" would be created.[6]

Other forms of "compliance traps" which could occur even where regulators are not "actively seeking to improve business compliance"[7] include those related to over compliance–as illustrated where penalties or fines are simply raised as means of justifying the seriousness of certain crimes.

Principles serve as a means of introducing some degree of fairness and morality into the regulatory and standard setting process without contributing to the same level of "over compliance"–as that which arises where fines are imposed.

B. Facilitating Compliance Through Fairness and Justice

The important role played by fairness and justice in facilitating compliance with the law has been highlighted by various sources in the literature.

According to Haines and Gurney, "regulatory strategies aimed at encouraging organizational behaviour that extends beyond compliance must be underpinned by a rational enforcement strategy".[8] Furthermore, they argue that "a graduated approach to enforcement—which signals to the regulated that the regulator is fair but tough, is needed."

A number of intermediate categories are considered to exist on the "continuum between rules and discretion"—according to Schneider.[9] He also provides some examples of such intermediate categories by way of reference to policies and principles. A principle is defined as "a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[10]

Whilst principles are considered as a means of introducing fairness, the potential for discretion to generate injustice and abuse within the system is acknowledged by many authorities on the literature. Different perceptions attributed to discretion are highlighted by Hawkins through a reference to perspectives put forward by Handler and Davis.[11] Discretion is considered by Davis to be problematic where it is insufficiently governed by rules.[12] His perception of discretion as an individualistic activity[13] is quite significant in the sense that this would appear to suggest that greater accountability would be fostered as a result of the ability to trace the decision maker. However Davis' perception of discretion is considered (by Hawkins) to be less positive than that of Handler's more positive approach–even though Hawkins highlights the fact that both Davis and Handler acknowledge the potential for injustice within discretionary based systems.[14]

Where a decision is reached by a group of individuals—in contrast to an individual decision, should this infer a greater scope for accountability or fairness (in the sense that more people will be held accountable for the decision) and less scope for injustice (in arriving at that decision)? Baldwin argues that even if responsibility for mediation is clearly and uncontentionally allocated, serious issues of democratic legitimacy and accountability may still arise.[15] His concept of "thick proceduralisation", that is, "processes in which mediators can play an enabling role by translating the messages and logics of various systems or groups so that others can understand and so that communication can be facilitated across different systems and groups" was advanced in the hope that parties with differing views could effectively engage

in the deliberation process. [16] The penultimate section of this paper will address how frequent meetings and for a—whereby frequent exchange of views and ideas could be facilitated, could mitigate the doubts surrounding such a concept.

Techniques For Facilitating Regulatory Compliance

Techniques considered to maximize regulatory compliance include:[17]

- Outcome based regulations
- Pyramid approaches to enforcement
- Methods aimed at fostering a compliance culture (such as various forms of management systems which are designed to encourage regulatees to go "beyond compliance")

Outcome based regulations

"Principles provide the framework in which firms can organize their own processes to achieve the outcomes the regulator seeks—the regulator in turn, depends on firms to adopt an attitude to the regulatory regime (which is one which aims to go beyond minimal compliance with rules)."[18]

The contrast between "forward looking, economistic and rational choice models" which focus on outcomes and those outcomes which focus on the effects of the perceived fairness of the processes which lead to outcomes, has been highlighted.[19] Whilst the notion that a consideration of the fairness (of the processes experienced) might influence and impact future behaviour to a greater extent than looking forward to expected outcomes is controversial, the potential of subjective procedural justice to explain why people obey the law, is acknowledged.[20] Outcome standards are considered to contribute to uncertainties—which facilitate over compliance, as well as inhibiting compliance[21] with a particular or other areas of law.[22] Such weaknesses attributed to outcome based regulations still do not overrule the fact that the degree of over compliance which may arise would still not be as high as that generated through an outright imposition of fines or penalties.

Pyramid approaches to enforcement

Whilst the effectiveness of pyramid enforcement strategies which are most effective "when measures available at the top of the pyramid are truly feared" has been highlighted, the dangers of a fusion between "beyond compliance" and "over compliance" have also been illustrated.[23] As well as recent increased penalties which have contributed to the elevation of the height of the pyramid of enforcement strategies,[24] there has also been shift towards enhancing the deterrence impact of punitive measures through greater emphasis on the individual liability of directors and senior managers.[25]

"Scholarly evidence and regulatory best practice suggest that regulators should generally implement mixes of regulatory styles or strategies to improve compliance–rather than relying on deterrence alone."[26] Furthermore, in making reference to the proposal that enforcement strategies tend to be, and should be arranged in a regulatory pyramid (with more cooperative strategies deployed at the base of the pyramid and progressively more punitive approaches utilized where and when more cooperative strategies fail), Parker argues that the leading theory for explaining and prescribing such a regulatory mix relates to that of responsive regulation."[27]

Pyramidal approaches to enforcement are encouraged where non -adversarial, non–punitive enforcement measures aimed at building on trust between the regulator and the regulated are used in the first instance. These must inexorably resort to increased levels of punitive and intrusive measures–where persuasion and cooperation fail."[28] Moreover, "trust in the compliance activity of the regulator must be verified and where absent, stricter enforcement measures should follow."[29]

A determination of the optimal form and strategy of regulation not only depends on legal, constitutional and cultural features of an organisation, but also on its historical background. From such features, the degree of trust which should be accorded to an individual or collective management, in addition to an allocation of junior and senior responsibilities can be established. If a particular manager or management has garnered formidable reputation over the years, the level of trust accorded to such should, accordingly, be high.

Further, those employees who are "well informed and well intended"[30] could be delineated from the "ill intentioned and ill informed" based on their past performance and records at the company. The need for an evaluation of past records warrants greater levels of monitoring at any point in time–as this would provide

a more accurate picture of the level of trustworthiness to be accorded to such employees. Accordingly, the level and proportion of negotiating to punitive measures aimed at fostering compliance could be determined from such records.

D. The Need for a Pro active Approach to Regulation

"Pro active approaches to regulation are those which can be considered to demand "not merely that companies state their lines of accountability on regulatory matters", but approaches which compel that they are "called upon and induced" to provide regulators with: (i) an account of the procedures which have been taken to enlighten themselves about their commitments to compliance; (ii) ways in which policies on compliance are being developed and; (iii) measures which have been taken in response to ensuring that policies on compliance are being implemented."[31]

Meta regulation is considered by Parker to be more pro active than strategies such as "responsive regulation", "enforced self-regulation" and "smart regulation" to the extent that it, firstly, focuses on the "need for law, legal institutions and regulators to link the internal capacity for corporate self-regulation with the internal commitment to self-regulate"—as a means of fortifying companies' commitments to self regulation (as well as their ability to self-regulate).[32] The pro activeness of meta-regulation, as argued by Parker, is also dependent on the ability of the law and regulation to hold corporate self regulation accountable–through an association between the "private justice of internal management systems" and the "public justice of legal accountability, regulatory co-ordination and action, public debate and dialogue."[33]

Whilst responsive regulation and enforced self regulation are considered by Baldwin to be pro active–to the extent that they provide "a degree of stimulation to corporate self regulation", smart regulation is considered[34] to consolidate on this stance through its implementation and involvement of a diverse variety of measures and parties in regulation, and through its engagement of responsive regulation across a wide spectrum of regulatory instruments.[35]

Even though meta regulatory strategies are considered to be more proactive than other strategies such as smart regulation, responsive regulation and enforced self regulation, the limits of such pro activeness are highlighted by Baldwin who, through an analysis of corporate responses to punitive regulatory risks, argues that such analysis "not only exposes the limitations of punitive (or command or deterrence) regulatory strategies", but also brings to light, some of the difficulties involved in moving to the alternative, more proactive regulatory approaches that have been recently favoured by its proponents.[36]

Furthermore, Gray and Hamilton highlight the criticism which is specifically directed at meta regulatory strategies -which relates to the fact that it is "generally phrased and out-oriented"–not only raising questions relating to how best to comply with them, but also consequently, resulting in greater uncertainty in implementation for the regulated.[37]

In this respect, reference will also be made to Parker's distinction between "punitive" deterrent individual liability for regulatory risk and pro active approaches such as meta-regulation, which in Parker's opinion, should result in compliance within organisations.[38] Gray and Hamilton however highlight the fact that individual and organisational responsibility are more closely linked than suggested by Parker. This is illustrated by way of reference to Baldwin's distinction between corporate and individual regulatory risks, as well as reference to the FSA's continuing emphasis on the links between individual senior manager's own responsibilities and their responsibilities for organisational compliance.[39]

Whilst individual regulatory responsibility is considered to facilitate a lesser degree of compliance than organisational regulatory responsibility—owing to its more punitive and deterrent nature, it fosters greater accountability. In order to counter the "non-accountable effects" attributed to organisational regulatory responsibility, a "lead mediator" or "lead communicator", could be appointed–who would be held accountable for decisions taken by the group. The next section of the paper (section E) will elaborate more on this topic.

Based on their level of experience, senior management should have less interpretational difficulties with principles than junior and less experienced employees. Individual responsibility for company acts or omissions should naturally rest with senior management.

However, clear delegation of responsibilities should exist at all levels–be it at junior or senior levels. This would be best facilitated by bright line rules. Functions and responsibilities assigned to junior management should not be so strategic that acts or omissions committed by such junior management result in systemic failures of firms.

In relation to guidelines which could be used in determining the point at which there should be departure from the systematic application of rules—when these would result in the substance of transactions not being observed, such a point of departure should be determined by an objective representative body such as the board or a committee (comprised of independent experts–some of who are involved in managerial and supervisory functions) within the organisation which is assigned with the task of systems communication at all levels within the organisation. In cases where an immediate clarification of such a point of departure from application of "bright lines rules" is required, the responsible manager for the relevant department should take action as deemed appropriate.

A combination of bright line rules and high level principles would generally and respectively, be best applicable to junior and senior management. Hence senior management with good reputable background are likely to respond better (than junior management) to negotiative measures which are founded, to a greater extent, on principles–in matters related to compliance with such principles.

With the desired combination of bright lines rules and principles, we commence with an approach involving detailed rules—whose application commences from junior level and is discontinued at the point of unfeasibility in giving due consideration to the substance of the transactions. The point at which the application of such detailed rules is to be discontinued being the task of senior management. Senior management employs judgement and discretion in arriving at such a decision. At senior management level, a greater proportion of principles exist (than rules) since strategic decisions, to a greater extent, involve a significant degree of judgement and discretion. The second approach principally consists of principles—with a focus on the outcomes to be achieved rather than the incorporation of detailed rules. Under this approach, junior management undertakes greater responsibility for the interpretation of principles since less detailed rules constitute the focus–than is the case under the first approach.

The first approach (which commences with and involves more detailed rules), offers more advantages—not only because it facilitates greater accountability, but because it also provides more guidelines on how compliance with responsive or meta-regulatory strategies could be best achieved. Since both approaches (rules to principles and a focus on principles) eventually achieve the same desired outcomes, that which offers better guidelines on compliance, along with greater accountability, is naturally preferred.

E. Resolving Communication Problems Associated With Principles Based Regulation[40] and Meta Regulation

"Compliance is meaningless, or rather has contested meanings, in the absence of some commonly accepted understanding of the way regulatory requirements should be interpreted and applied."[41]

Two issues (which are largely attributed to the pro active nature of meta-regulation), are highlighted by Baldwin as presenting challenges to the advocates of meta-regulation.[42] The first involves the concerns raised by Luhmann and Teubner, who from a systems theory perspective, have illustrated the difficulties which social sub systems[43] are likely to encounter in effectively communicating—such communication problems owing to the fact that such sub systems are embedded in their own "self-referential" way of understanding the world.[44]

The second relates not only to the development of meta-regulation, but also to the stimulation of self-regulation in such a way which "produces coherence and harmony between corporate and social ends – rather than confusion and conflict."

Baldwin's concept of "thick proceduralisation", that is, "processes in which mediators can play an enabling role by translating the messages and logics of various systems or groups so that others can understand and so that communication can be facilitated across different systems and groups" was advanced in the hope that parties with differing views could effectively engage in the deliberation process.[45]

Challenges faced by the above concept include:[46]

1. Resolving the question relating to the choice of lead mediator and translator–Should it be the regulator, the corporation, a pressure group or other private/public body?
2. The fear of substituting "first order discussions" with mediation contests, confusions and fragmentations.
3. The contention that "clearly and uncontentiously allocated" responsibility for mediation will not necessarily resolve significant problems related to accountability and legitimacy.

Having drawn similar weaknesses attributed to Principles Based Regulation and Meta Regulation, namely, communication problems, how are such problems to be overcome? Furthermore, how is coherence and consistency in the interpretation of rules, effective communication of the results of such an interpretation to be facilitated between management?

In highlighting means whereby meta regulation could be harnessed effectively and permeated within an organisation, Parker not only refers to empirical evidence which corroborates such a need, but also draws attention to the fact that "self regulation systems are ineffectual unless they connect to corporate culture and seek to engage employee commitment, participation, values and identity."[47] Two principal ways through which, according to Parker, connection with employee values, cultures and self-identities in an organisation's management of compliance should be achieved, are as follows:[48]

- "Through the methodology and general approach that self regulation professionals and senior management take in designing and implementing self-regulatory systems (which also has implications for what the law and regulator require of corporate compliance systems) and
- Through the design and integration of compliance into employee discipline and reward systems–since this is the point at which the organisation most explicitly exercises its power over employees."

As already re-iterated earlier on in the paper, a combination of bright line rules should operate at lower level of management—whilst high level principles should operate at senior level. In addressing the above challenges faced by Baldwin's concept, each organisation (whether such organisation or body is a pressure group, private or public body) should be represented on a company or enterprises' board or constitute part of the supervisory committee. A representative/representatives of the regulator should also attend board meetings or ensure that they are well informed (as frequently and as feasible as possible) about developments within an enterprise, communication and results of meetings, enterprises' policies, procedures etc. Frequent meetings and timely communication should eliminate the fear of substituting "first order discussions" with media contests, confusions and fragmentations. The representatives should be able to select (through votes) the most appropriate person for the role of lead mediator and translator—having regards to circumstances which are prevailing at the time, circumstances governing the systems and daily operations within the enterprise, the level of competence, qualification and experience held by the candidates.

The existence of a lead mediator or translator, to a large extent, would resolve the problems attributed to lack of accountability–given that such a person would assume joint responsibility and liability (even though at a greater proportion than that attributable to other members of the group) for consequences arising as a result of the group's decisions. Given that such increased responsibility is accepted and given that other group members also assume and accept some form of contributory responsibility for possible consequential liabilities (which accords with proportionate increases in the level of fines imposed on each member), members within the group would also strive towards ensuring that decisions are taken with utmost level of due diligence and that members work on a more cooperative basis—rather than a culture of "passing on the buck" to the lead mediator/communicator. Where such conditions exist and operate, "clear and uncontentiously allocated" responsibilities should facilitate accountability and legitimacy.

In concluding this section, and with reference to the statement by Parker that "responsibility is internalised when the entire corporation is opened up to a broader deliberative democracy", three strategies highlighted by Parker, through which this could be achieved and through which compliance could be incorporated and permeated within management processes, are as follows: [49]

(i) The "bottom up" approach to self-regulation whereby "responsible corporate self-regulators use

employees' cultures, values and self-identities to build organizational integrity."

(ii) The "opening out" approach to self-regulation in which "stakeholder concerns and values have become an internal issue to be decisively addressed - and not an issue to be ignored."[50]

(iii) The systems approach to corporate responsibility which "emphasises the importance of internal discipline, justice, self-regulation and self-evaluation systems within the entire self-management of the organisation."

F. Conclusion

Having considered the merits of principles and negotiating approaches in maximising the potential to comply, the need for an incorporation of a degree of bright line rules also becomes evident. Bright line rules would not only facilitate greater accountability–particularly in respect of clear delegation and responsibilities, but would also reduce the possibilities of discretionary based decisions (and particularly group decisions), generating any abuse or injustice within the system and during the decision making process.

As highlighted and demonstrated in the paper, "Risk Monitoring Tools in Bank Regulation and Supervision: Developments Since the Collapse of Barings Plc", detailed rules could still operate within a system of principles based regulation. It was also re-iterated in this paper that in addressing the issues raised by principles based regulation, the extent to which such issues can be resolved, to a large extent, depends on adequate compliance with Basel Core Principle 17 (for effective banking supervision)–and particularly on the implementation, design and compliance with "clear arrangements for delegating authority and responsibility."

"Responsibility is internalised where an enterprise is subject to "deliberative democracy" through the consideration and incorporation of employee values—with which the enterprise can build organizational integrity.", through a consideration of "legitimate stakeholder perspectives and external values", and through the systems approach to corporate responsibility which re-iterates the importance of "internal discipline, justice, self-regulation and self-evaluation systems."

Furthermore, the key to successfully building trust in management, not only lies with the facilitation of compliance through fairness and justice, the techniques employed in achieving such an aim, but also the ability to arrive at some consensus in the understanding of how regulatory requirements are to be applied and interpreted–that is, effective communication.

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NOTES

1. J Black, "Forms and Paradoxes of Principles based Regulation" LSE Working paper, LSE Law, Society and Economy Working Papers 13/2008.
2. *See Ibid* at page 36.
3. *See* C Parker, "The Compliance Trap: The Moral Message in Regulatory Enforcement" (2006) 40 (3) Law and Society Review at page 609.
4. *See* C Parker, "The Compliance Trap: The Moral Message in Regulatory Enforcement" (2006) 40 (3) Law and Society Review at 591.
5. *Ibid.*
6. *Ibid*; "Such compliance trap occurs only when regulators are actively seeking to improve business compliance, and committment to compliance, through their enforcement activities; *see Ibid* at 593. In this sense Parker distinguishes those regulators "actively seeking to improve business compliance and commitment to compliance" and those who merely impose sanctions or are engaged in other enforcement activities for purposes which are unconnected to goals aimed at improving compliance. The latter category of regulators, according to Parker, do not fall within the class of those considered vulnerable to the "compliance trap".
7. *Ibid.*
8. F Haines and D Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" Paper presented at the Current Issues In Regulation: Enforcement and Compliance Conference at page 3; *also see* N Gunningham and R Johnstone, *Regulating Workplace Safety: Systems and Sanctions.* (1999) Oxford: Oxford University Press.
9. C E Schneider, "Discretion and Rules: A Lawyer's View" in K Hawkins *The Uses of Discretion* (eds) 1995 Oxford University Press at page 50.
10. Schneider in this context, refers to Professor Dworkin's works on the definitions of principle and policy. A policy is on the other hand, defined as a "kind of standard that sets out a goal to be achieved, generally an improvement in some economic, political, or social feature of the community." *See Ibid.*
11. *See* K Hawkins "The Use of Legal Discretion: Perspectives from Law and Social Science" in K Hawkins *The Uses of Discretion* (eds) 1995 Oxford University Press at page 17.
12. *Ibid.*
13. That is, "The discretion of individuals–rather than groups or organizations"; *Ibid.*
14. K Hawkins, "The Use of Legal Discretion: Perspectives from Law and Social Science" in K Hawkins *The Uses of Discretion* (eds) 1995 Oxford University Press at page 17.
15. *See* R Baldwin, "The New Punitive Regulation" May 2004 Volume 67 No 3 Modern Law Review at page 380.
16. *Ibid.*
17. F Haines and D Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" Paper presented at the Current Issues In Regulation: Enforcement and Compliance Conference at page 2.
18. *See* J Black, "Forms and Paradoxes of Principles Based Regulation" LSE Law, Society and Economy Working Papers 13/2008 (2008) at page 9 *http://www.lse.ac.uk/collections/law/wps/wps.htm* and *http://www.ssrn.com/abstract=1267722*
19. *See* T Makkai and J Braithwaite, "Procedural Justice and Regulatory Compliance" Law and Human Behaviour, Volume 20 No 1 1996 at page 83; The latter is considered to be favoured by procedural justice scholars
20. *Ibid.*
21. *See* J Black, "Forms and Paradoxes of Principles based Regulation" LSE Working paper, LSE Law, Society and Economy Working Papers 13/2008. Paradoxes of Principles Based Regulation as highlighted in the paper include the interpretative, communicative, compliance, supervisory and enforcement, internal management, ethical and trust paradoxes.
22. F Haines and D Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" Paper presented at the Current Issues In Regulation: Enforcement and Compliance Conference at page 8; Recent moves which are inclined towards rising dependence on criminal penalties are contributory to the problem of over compliance–this opinion being shared by Haines and Gurney.
23. *Ibid* at page 7; *also see* I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992) Oxford University Press
24. In Haines and Gurney's opinion, this has resulted in "increasing the shadow by which regulatees may see it in their interest not only to minimally comply but use their creativity to exceed mandated standards."
25. *Ibid* at page 3; *also see* A Hopkins, Making Safety Work: Getting Management Commitment to Occupational Health and Safety. (1995) Sydney: Allen & Unwin.
26. *See* C Parker, "The Compliance Trap: The Moral Message in Regulatory Enforcement" (2006) 40 (3) Law and Society Review at 591; *also see* N Gunningham and P Grabosky *Smart Regulation: Designing Environmental Policy* (1998) Oxford: Clarendon Press.

27. *Ibid* at page 592; According to Parker, the objective is that "firms and individuals will comply even without enforcement actions, through internalisation and institutionalisation of compliance norms, informal pressure and the indirect threat of the "benign big gun" at the top of the pyramid."
28. F Haines and D Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" Paper presented at the Current Issues In Regulation: Enforcement and Compliance Conference at page 3; *also see* I Ayres and J Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992) Oxford University Press; also refer to abstract of this paper.
29. F Haines and D Gurney, "The Shadows of the Law: Contemporary Approaches to Regulation and the Problem of Regulatory Conflict" at page 3.
30. *See* SL Schwarcz, "The Principles Paradox" (2009) European Business Organisation Law Review (10) at pages 175-184 and *see also* R Baldwin, Rules and Government (1995) Oxford: Clarendon Press.
31. R Baldwin, "The New Punitive Regulation" May 2004 Volume 67 No 3 Modern Law Review at page 375.
32. *Ibid*.
33. *Ibid*; A way in which such association could be achieved is proposed–namely, the provision of self regulation with "standards against which law can judge responsibility, through which companies can report, and through which shareholders can debate." This is considered necessary in facilitating the process whereby private management issues become matters of public judgement. *See Ibid*.
34. *See also* N Gunningham and P Grabosky, *Smart Regulation* (1998) Oxford: Clarendon Press 5-11, 38-50.
35. R Baldwin, *The New Punitive Regulation* May 2004 Volume 67 No 3 Modern Law Review at page 375.
36. *Ibid* at page 351; Even though Baldwin admits that weaknesses are also inherent in the "punitive" approach, he argues that a dependence on "pro activity" and the stimulation of self-regulatory capacities of corporations does not offer an easy means to resolving difficulties associated with regulating. He proposes, as a way forward, the encouragement of self-regulatory capacities–whilst developing strategies that expressly take into consideration the difficulties of reconciling the opinions and control systems of regulators and corporations." *Ibid*.
37. *See* J Gray and J Hamilton, *Implementing Financial Regulation* (2006) at page 245.
38. For more information on this, *see Ibid* at page 237.
39. *Ibid* at page 238.
40. *See* J Black, *Forms and Paradoxes of Principles based Regulation LSE Working paper*, LSE Law, Society and Economy Working Papers 13/2008.
41. *See* C Parker, *The Compliance Trap: The Moral Message in Regulatory Enforcement* (2006) 40 (3) Law and Society Review at page 609.
42. R Baldwin, "The New Punitive Regulation" May 2004 Volume 67 No 3 Modern Law Review at page 377.
43. Such as Economics, Law and Politics.
44. *Ibid*; *See also* N Luhmann, *The Self-Reproduction of Law and its Limits in G* Teubner (ed) *Dilemmas of Law in the Welfare State(1985)* Berlin: Walter de Gruyter ; *See also* N Luhmann, *Social Systems* (1995) California: Stanford University Press. According to Balwin, the fear expressed by Luhmann and Teubner relates to the differing views between business managers and regulators–such views differing to an extent which results in an exclusion of the possibility of effective dialogue. Systems theory in his opinion, highlights "the difficulties posed when communications are sought between the world of business persons, regulators, politicians, interest groups, lawyers, risk professionals etc." *Ibid* at page 380.
45. *See* R Baldwin, "The New Punitive Regulation" at page 380.
46. *Ibid*.
47. *See* C Parker, *The Open Corporation: Effective Self–Regulation and Democracy* 2002 Cambridge University Press at page 204.
48. *Ibid* at page 205.
49. *Ibid* at page 197.
50. Here she states that "Responsible corporate self-regulators find it is strategic to take legitimate stakeholder perspectives and external values into account, by reporting information about self-regulation processes and performance to stakeholders, by consulting with stakeholders, and by giving those affected by corporate power the ability to challenge corporate decisions and actions." *Ibid*.