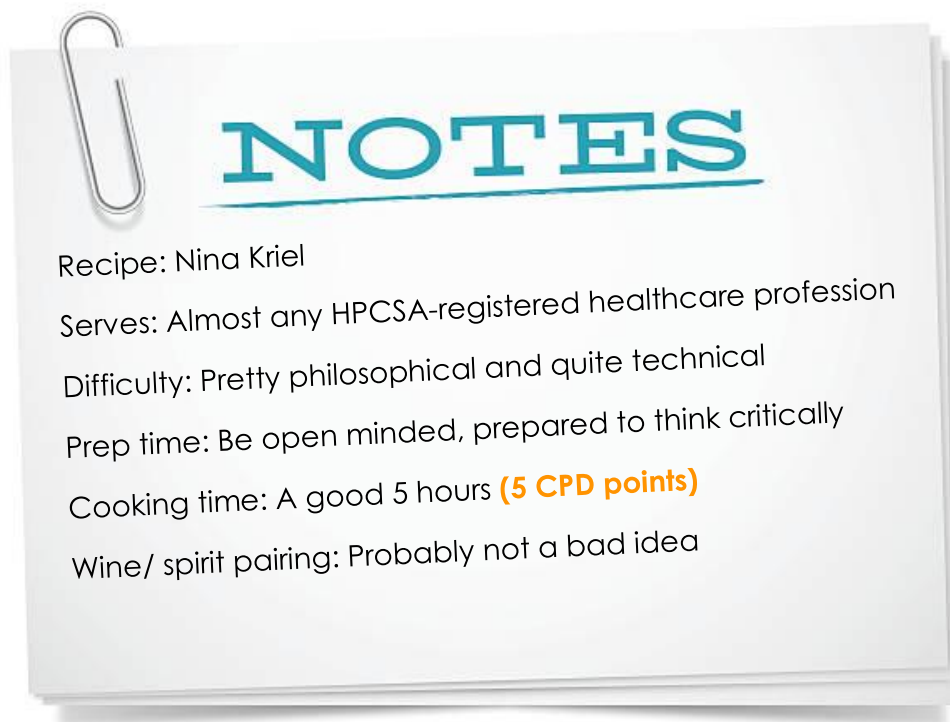


Can regulators be trusted?

Or, is regulation generally a good idea?

Nina Kriel

If you've searched for a recipe online, you will be familiar with the format that gives an indication of the time required, the level of complexity, the dietary considerations etc. I feel like this article may need one.



Let's get started.

I know the focus has moved on to other, more pressing geopolitical crises, but cast your mind back to 2023 and the implosion of the [Oceangate Titan](#) submarine. Remember that? I'm not fan of water or closed spaces, so the whole incident was the stuff of nightmares, but I was fascinated by reactions to the event. Amongst many other things, people were blaming lack of regulation for the disaster. Could regulations have prevented the deaths of the 5 passengers? And ['is regulation generally a good idea?'](#) This is a question that I frequently grapple with, as I believe we all should, since we are regulated professionals. We are not the only ones wondering.

I'm going to quote extensively from a keynote address by [Andrei Shleifer](#), the Whipple V. N. Jones Professor of Economics at Harvard University, to an EFMA (European Financial Management Association) meeting. As you read this, remember he's not South African, nor is he referring to healthcare. He is an American economist, referring to financial regulation, but I think we can find lessons in the principles that extend to all regulated industries/ sectors/ professions. (I have his quotes in italics throughout this article, with hyperlinks.)

'American and European societies are much richer today than they were 100 years ago, yet they are also vastly more regulated,' he says. People live in houses built by a construction sector with regulated plans, materials and safety. The food industry is regulated from the fertilisers and hormones used to the *'food processing done in heavily regulated factories with publicly monitored technologies, and sold in heavily regulated outlets with elaborate labels and warnings.'* He continues: *'Our means of transport, including cars, buses, and airplanes, are made, sold, driven, and maintained under heavy government regulation. Our children attend schools that teach heavily regulated curriculae, visit doctors following heavily regulated procedures...'*

'The extraordinary pervasiveness of government regulation in our lives raises a number of questions.

1 *Is regulation generally a good idea, as the positive correlation between its growth and the growth of income seems to indicate, or has it been an obstacle to economic and social progress? ...*

2 *How much regulation of a particular activity is appropriate?*

3 *Does the nature of the activity being regulated, or the characteristics of a country, influence the optimal choice?*

4 *Is the level of regulation we observe in fact an outcome of efficient social choice, or are other factors as, or more important?'*

Let's look for answers to these questions:

1 **Is regulation generally a good idea?**

[Shleifer](#) explains that there are **2** theories in support of regulation:

The first relates to the **protection of the public and its welfare**. 'According to this theory, governments control prices so that natural monopolies do not overcharge, impose safety standards to prevent accidents such as fires or mass poisonings, regulate jobs to counter the employer's **monopsony** power over the employee, regulate security issuances so investors are not cheated, and so on.'

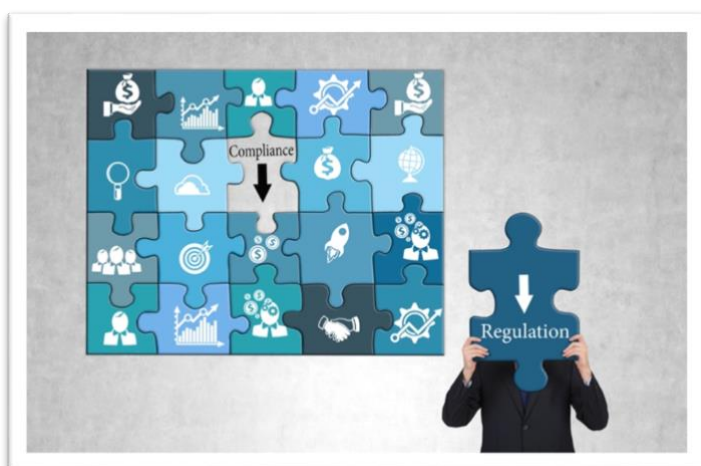
What is [monopsony](#), or monopsony power? 'In economics, a monopsony is a market structure in which a **single buyer** substantially controls the market as the major purchaser of goods and services offered by many would-be sellers.' It differs from a monopoly, where there is effectively only **one seller/ provider**. A public healthcare system, therefore, is a monopsony.

'This [public protection] theory of regulation has become the cornerstone of modern public economics, as well as the bible of socialist and other left-leaning politicians. It has been used to justify much of the growth of public ownership and regulation over the twentieth century.'

The public protection theory assumes 2 things, says [Shleifer](#).

1. That unhindered activity is bound to fail, and
2. that governments are benign and capable of correcting such failures through regulation.

But what if we're wrong about protecting the public, he says? What if the risk and extent of failure in markets (or other regulated fields, for that matter) is exaggerated, and what if citizens are perfectly capable of dealing with such failures themselves without any government intervention?



Examples:

Competition for labour may assure that employers provide safe and acceptable working conditions for their employees. If an employer failed to do so, their competitors would offer better packages, attracting their better workers.

An unregulated private market could assure the safety of its products and services - say chemicals, trains, buildings or cars. Providers who fail to deliver

high levels of safety simply *'lose market share to competitors who run safer trains, build safer houses, or produce safer cars... Industries form associations that guarantee quality, and penalise cheaters among themselves to assure that, in the long run, customers continue their patronage.'*

Proponents of regulation underestimate the ability of parties, committed to the goal and the process, to resolve conflict amongst themselves. However, in the few cases where free market dynamics are not successful, he says, private litigation can address conflicts or problems that may arise. If courts award appropriate damages to harmed plaintiffs, it would encourage others to take appropriate precautions, with no need for regulation. In such an environment employers could contractually bind themselves to providing a safe working environment, for example, and any failure would be a breach of contract which could be

- enforced by an impartial court and/ or
- delictual liability can be assigned if there has been financial loss or damage

The purpose of the [delictual action](#) is loss allocation and reparation for harm suffered, typically by payment of compensation. In South African law, a delict has 5 elements:

- Conduct (an act or omission)
- Wrongfulness
- A causal connection
- Fault or blameworthiness
- Damage

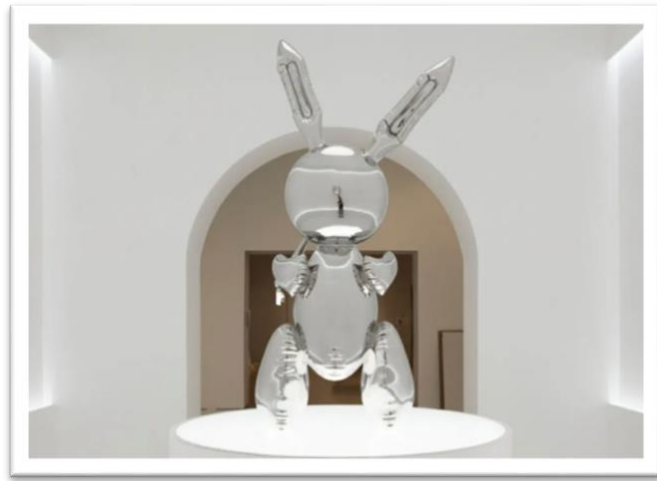
Although there is fault and wrongfulness, delicts are not necessarily crimes. In fact, an accident such as a shanked golf ball going through a neighbour's window could become the basis for a delictual claim, if fault can be proven. Accidentally breaking a window is not a crime, but there is a financial implication and the delictual action aims to replace the window, or its cost. Some of the elements of delicts are value-based, particularly wrongfulness and fault. It is an inherently flexible action which can consider circumstances and embody changing social principles and policies. It would be impractical and unreasonable if liability arose out of every act of carelessness. In our example, a reasonable neighbour would contact the home owner and they would come to an agreement in terms of the compensation.

That was a bit of a detour, so let's get back to [Shleifer](#) questioning the 2 assumptions made by proponents of the welfare, or public interest theory. We've covered the first, that unhindered activity is bound to fail. We've seen that market forces may be enough to ensure order, and where losses do occur, that contractual or delictual liability may be a simple path to financial compensation.

The second assumption he questions is that governments are benign and capable of correcting any failures in natural laws through regulation. Shleifer says that involved parties are more likely to be committed to the best outcome than a third party government regulator. Our example showed that civil neighbours can agree on how to split the costs of, for example, a broken window. Shleifer worries that regulators may be *'incompetent, corrupt, and captured, so regulation would make things even worse... First, the political process of regulation is typically captured by the industry. Regulation not only fails to counter monopoly pricing, but is, to the contrary, used to sustain it through state intervention.'* Regulation, at least in the case of healthcare practitioners, effectively creates a monopoly by limiting access.

During my time on our Prelim Committee (which is made up of both healthcare professionals and legal experts) we often had cause to discuss complaints that may appear to be based on personal competition between practitioners. Normally, competition is healthy, but once a profession is regulated, it's no longer possible, or even advisable to leave things to work themselves out naturally. Constant involvement is necessary. As Shleifer puts it: *'The scope for government regulation is minimal at best, and such intervention is futile and dangerous even in the rare cases where there is scope.'* He describes *'evidence of pervasive regulatory failure'* and I'm sure we could all contribute examples of our own. Still, critics of the public interest theory probably have too much confidence in private orderings, which can degenerate into the anarchy of private enforcement where the strong and not the just win the day. Think of the drug cartels, the Mafia, jungle justice... And, although we would like to be *'relying on [courts] as unbiased, informed, and incorruptible promoters of social welfare. Much evidence... shows that courts around the world are more often than not highly inefficient, politically motivated, slow, and even corrupt.'* A [US judge](#), for example, only a few months into her tenure, was recently found texting and scrolling on social media while presiding over a murder trial.

And, even if private systems or courts function optimally, prevention is better than cure. We've already covered how delicts aim to financially compensate for any loss, and for a broken window or medical costs, it's simple to find a number. But what if the broken item is a priceless work of art, or even a copy of one, worth \$42 000 like the [Jeff Koons Baloon Dog](#) recently accidentally destroyed by a guest at an art exhibition. Koons is perhaps most famous for his [Rabbit](#), which sold for \$91 million a few years ago, to date the highest price for an artwork by a living artist.



Apparently there is interest in buying the broken pieces of the blue Balloon Dog, and otherwise the 'cure' will be financial compensation. I'm all for 'prevention.' As an anxious flyer, for example, I find more comfort in believing that someone is ensuring that pilots, air traffic controllers and maintenance staff are competent, rather than in savouring the thought of the fortune my loved ones may collect in the event of my death in a fiery crash.

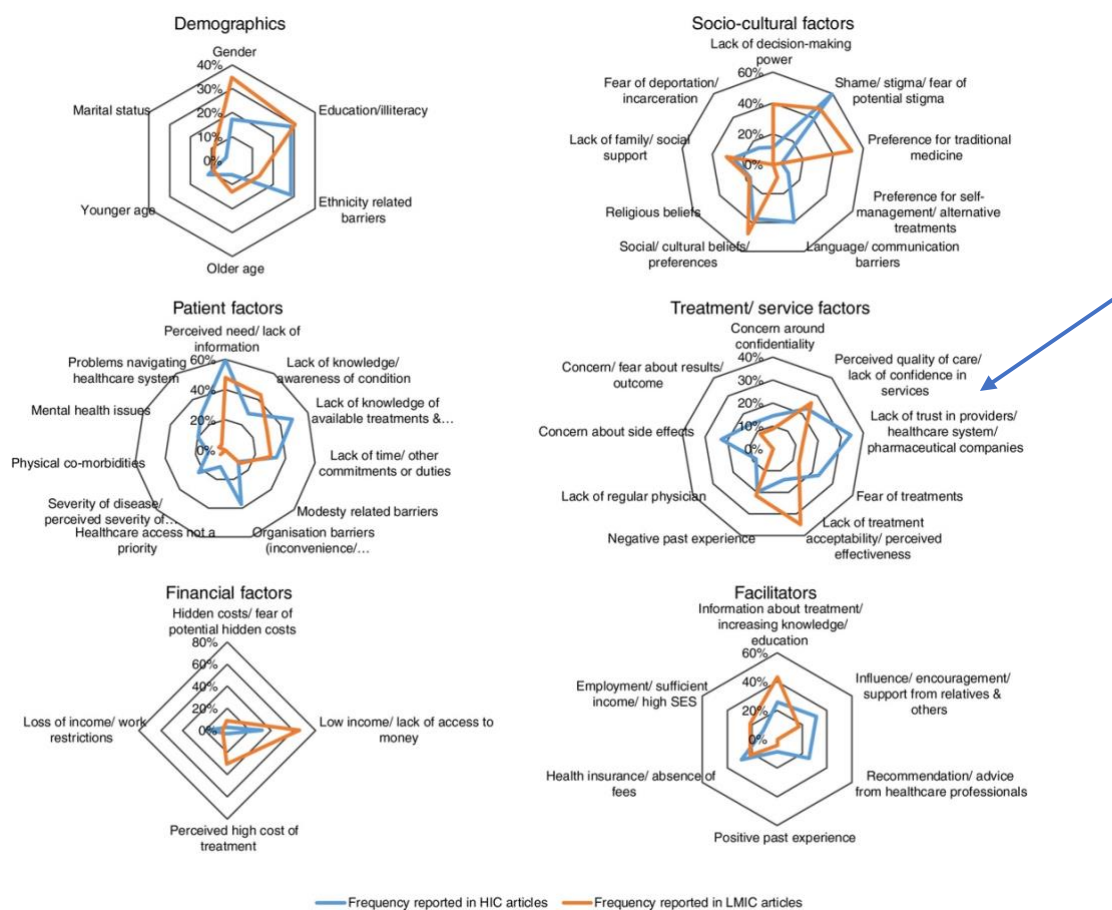
Even in the financial sector – since we are talking about economic and financial regulation – one could assume that the promise of financial restitution would be enough for investors to act and trade with confidence. Not so! *'Investors prefer a level-playing, regulated field to the prospect of loss recovery through litigation. Indeed... there is strong evidence that regulation is beneficial for the development of financial markets and to public participation in them.'*

This is a critical point since we **are** trying to apply these principles to healthcare. Just like economists, we want to encourage responsible participation in our system – healthcare. We've all been frustrated when a patient presents too late: That glaucoma case that could have been identified and saved a truck driver's job, or the dyslexic child only presenting in matric because the parents are concerned about the stigma that still clings to such a diagnosis. Difficulty getting exam concessions at such a late stage simply reinforces their opinion that there is little benefit in seeking care.

[Dawkins et al](#), investigated why patients delay their decision to access healthcare. Despite lack of trust featuring prominently in the grey literature, their meta-analysis found that for low and middle income countries (the orange lines in the image below) the top 2 treatment and service barriers to timeous healthcare uptake are

1. Lack of treatment acceptability/ perceived effectiveness
2. Perceived quality of care/ lack of confidence in services

For me, it's difficult to separate these 2 factors from lack of trust. Still, for high income countries (the blue lines), lack of trust is specifically identified as reason for delayed uptake. The study authors explain that in the USA, this mainly relates to mistrust of pharmaceutical companies.



If financial regulation is beneficial to the development of financial markets and to public participation in them, does healthcare regulation achieve the same in our environment? What more can we do to improve patients' confidence and perceptions of effectiveness of our treatments?

This brings us to Shleifer's second question.

2

How much control is enough, and how much is too much?

Djankov et al. in [Shleifer](#), describe four distinct strategies ranked by a growing degree of public control over economic activity:

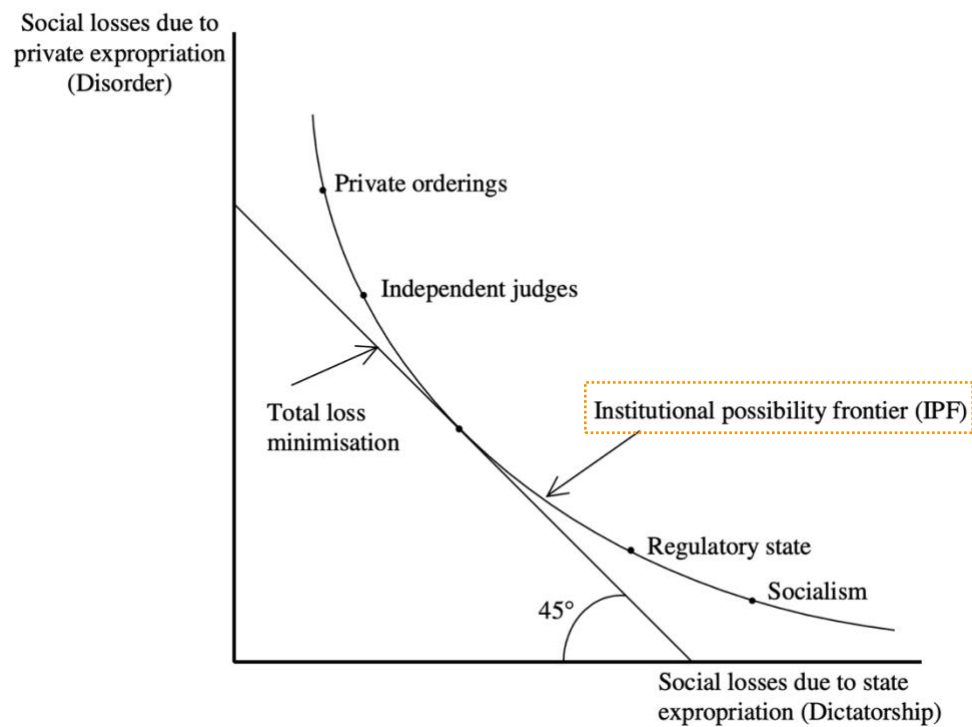
1. Market discipline
2. Private litigation
3. Public enforcement through regulation, and
4. State ownership.

We've already seen that with *'competition and private orderings, there is basically no public involvement at all. With courts, there is a role for impartial judges enforcing rules of good behaviour. These rules do not need to come from legislation, but may instead derive from custom or from judge-made common law and precedents. Even so, there is a public agent, the judge, who has at least some decision-making authority.'* If we introduce regulators, *'control by the state increases sharply. The state now writes the rules, inspects the product before it is sold, and possibly penalises sellers for delivering a bad product. Both the scope of government activity, and its centralisation, are greatly increased relative to private litigation. Finally, with state ownership, the government takes complete control over an activity.'*

These four strategies for social control are not mutually exclusive. Competition and regulation can operate in the same market, as can private litigation and public regulation.

You'll remember that the first theory in support of regulation is to **protect the public and its welfare**. The basic premise of the second, the **enforcement theory** of regulation is that all of these strategies for social control of business are imperfect, and that optimal institutional design needs to find a balance between them, somewhere on the spectrum of disorder, on the one end, and dictatorship on the other. Shleifer clarifies some concepts: *'Disorder refers to the ability of private agents to harm others – to steal, overcharge, injure, cheat, impose external costs, etc. Dictatorship refers to the ability of the*

government and its officials to impose such costs on private agents. As we move from private orderings to private litigation to regulation to public ownership, the powers of the government rise, and those of private agents fall.' Somewhere, there's a perfect balance on this line, a line that Djankov et al. call the Institutional Possibility Frontier.



The biggest benefit when private orderings or internal market discipline (step1) succeeds at enforcing good conduct, is that it is *'free of politicisation of rules of conduct, of corruption, of costly and delayed enforcement of rules, of random or compromised choice of one competitor over another.'* As the graph indicates, this step has the lowest social cost of dictatorship.

However, if market discipline fails to deliver quality products, or ensure safe workplaces, or prevent fraud, or economic bullying by rivals using predatory and monopolistic practices, then most of us are likely to accept that some form of public intervention is needed.



Wait, surely failure to deliver quality products would be almost immediately recognised and penalised by users/ customers? Yes, this is true for a familiar and frequently-used service/ product, e.g. coffee, but it can take years for a substandard part to fail, or a pyramid scheme to be exposed, or a missed medical diagnosis to result in irreversible damage. The Titan submarine did not implode on its maiden voyage.

So we may willingly step away from private expropriation on the one end of the spectrum towards state expropriation, for our own protection and particularly where the products and services are unfamiliar and may result in significant/ irreversible damage/ loss. As we know, the next step is private litigation. An injured employee can sue their employer for damages or investors can sue underwriters for damages, provided there has been misrepresentation. Ideally, a judge would recognise quickly whether investors have been misled, and award damages to compensate them for their losses, resolving the dispute apolitically. Of course there's a 'but'. The same forces that undermine the effectiveness of private solutions may influence the courts as well. This includes perfectly legal actions such as hiring superior legal talent. We can see that the *'rich and the politically connected have more resources to influence the path of justice, [so] private litigation cannot be always counted on as an effective mechanism of enforcing socially desirable conduct.'*

Here are some examples and scenarios:

- Remember your rental re-negotiations opened by *force majeure* during our COVID restrictions? Did you directly negotiate with your landlord, without needing to resort to a legal process? Or did you need to seek power in numbers, approaching larger landlords as a group or an association? Or did you need to go to the second level, and approach a court? It's not just tenants that had trouble enforcing their rights. One of the pharmacy chains were taken to court by their landlords for refusing to pay their [rental](#) during the first, strict lockdown

despite remaining open and continuing brisk trade in essential products.

- Could a defrauded investor prevail in court against a larger, more connected and better represented underwriter?
- Or a client against a large insurer/ medical aid/ airline?

I think it's apparent that we need to pass this step (courts and litigation) as we proceed along the line on the graph, heading from disorder towards dictatorship, seeking more accessible mechanisms for social control. Here we arrive at the third step: Public regulation. The principal argument for regulation, says [Shleifer](#), is that *'unlike judges, public regulators can be expert and motivated to pursue social objectives in specific areas... A regulator can establish some expertise, for example, as to what constitutes a material omission from a prospectus, present market participants with specific rules, and then use its resources to make sure that these rules are followed by imposing its own sanctions or by convincing courts to rely on its rules.'*

To summarise [Shleifer](#), a regulator can

- establish some expertise,
- present market participants with specific rules, and then
- use its resources to make sure that these rules are followed by imposing its own sanctions or by convincing courts to rely on its rules.

'Public regulation is not without its problems, and the key problem is the risk of public abuse of market participants by an official who is either pursuing his own political interests or is captured by a particular group, including the regulated industry itself. Politicisation and over-enforcement are a particular problem in societies with few checks and balances: the executive can selectively turn its regulators against its enemies rather than violators of rules. ... regulation can be subverted by competitors who want to use it to deter entry or to maintain cartels.' Can you think of ways that this could (or does) happen in healthcare regulation?

3 So under what circumstances is regulation the best strategy to enforce good conduct?

We've discussed that regulation is the natural next resort when the private ordering fails, and the courts fail to enforce standards. But does the nature of the activity matter? Or the characteristics of the structures that exist within a particular country? Regulation, says Shleifer, is more likely to be successful when *'public abuse of the private sector can be restrained. This prediction suggests that regulation – relative to doing nothing – is a more attractive option in richer countries, where the checks on the government are stronger. In contrast, regulation is a particularly poor idea in undemocratic countries and in countries with extremely powerful executives, where the risks of abuse are the greatest.'*

For me, this was completely counterintuitive. Surely the more organised, structured countries have less use or need for regulation, while countries with weaker (perhaps less trusted) governance need additional protective systems? I've struggled to get my head around this. How about you? But we'll come back to this research. First, more Shleifer:

'Finally, in some situations, nothing short of government ownership can address the problem of disorder. If monopolies cannot be restrained through regulation, if quality cannot be assured except with full state control, if public safety is jeopardised – then one can make a case for state ownership.' He gives the example of prisons, which are best publicly owned because the risk that private jailers may mistreat inmates, who have limited rights and cannot count on the market or regulation to protect them, is too high. State ownership, of course, carries the risk of public abuse and dictatorship...

'Because the government uses its control to pursue political ends, the performance record of state enterprises around the world has been dismal, and the benefits of privatisation large.'



Before we set off on a detour, let's review the 4 steps on the institutional possibility frontier (IPF) line. We know that they develop in a sequential manner, each step being triggered by the failure of the previous one.

1. Market discipline
2. Private litigation
3. Public enforcement through regulation, and
4. State ownership.

When a new product comes to market, internal market discipline is the only force at play. Should this succeed, the benefit is a market *'free of politicisation of rules of conduct, of corruption, of costly and delayed enforcement of rules, of random or compromised choice of one competitor over another.'* Only if this fails, will we advance to private litigation, and then on to regulation and state ownership. This step-wise process is usually slow, and subject to various influences.

4 Now for that detour. [Shleifer](#) mentions a further potential contributor to inefficiency in institutional choices (as described by La Porta et al. 1997, 1998): Colonial legal transplantation. Stick with me, it will lead us to the answer of his 4th and final question, which was: *'Is the level of regulation we observe in fact an outcome of efficient social choice, or are other factors as, or more important?'*

He explains colonial legal transplantation: *'The legal and regulatory regimes of most countries are not indigenous, but rather shaped by their colonial heritage. When the English, the French, the Spaniards, the Dutch, the Germans, and the Portuguese colonised much of the world (including the USA), they brought with them some of their institutions.'* This has resulted in systematic variation between original and transplanted institutions, shaped by changing local needs over the last centuries. *'England developed a common law tradition, characterised by the independent judges and juries, relatively lower importance of statutory laws, and the preference for private litigation as a means of addressing social problems. France, in contrast, following the Romans, developed a civil law tradition, characterised by state-employed judges, great importance of legal and procedural codes, and a preference for state regulation over private litigation. Germany developed its own civil law tradition, also based in Roman law... Napoleon exported the*

French legal system through his conquests to Spain, Portugal, and Holland, and through his and their own colonial conquests, it was transplanted to all of Latin America, large parts of Europe, North and West Africa, parts of the Caribbean, and parts of Asia. The common law tradition was transplanted by England to the USA, Canada, Australia, New Zealand, East Africa, large parts of Asia (including India), and parts of the Caribbean. The German legal system was voluntarily adopted in Japan, and through it Japan influenced the legal systems of Korea, Taiwan, and China.' Some of these systems were imposed after conquest or during colonisation, some were enthusiastically embraced because they were considered prestigious, while others were adopted for reasons of efficiency e.g. English mercantile law in South Africa.

Our current legal system reflects Dutch law (which was largely based on Roman law) and English law, with local changes made during South Africa's independence, both pre- and post 1994, where indigenous law has come to the fore. This patchwork past has contributed to laws and institutions that are not the product of development towards efficiency, nor do they reflect domestic political choice. South African matrimonial law, for example, is presently being updated to align and combine the sometimes conflicting laws that govern traditional, Muslim and polygamous unions, as well as long term partnerships of couples that are not legally married.

So 'colonial transplantation, rather than local conditions, exerts a profound influence on national modes of social control of business, including both state ownership and regulation... A legal and regulatory system perfectly suitable for France might yield inefficiently high levels of regulation and state ownership when transplanted to countries with fewer checks on the government. Likewise, a system of independent courts that works in Australia or the USA might fail in Malaysia or Zimbabwe. Indeed, the evidence on the consequences of regulation shows that it is often excessive, especially in poor countries. Higher levels of regulation of entry are associated with larger unofficial economies and no measurable benefits for the quality of products (Djankov et al., 2002).'

What is the relationship between government and institutions such as regulators in South Africa? According to the website of the [Constitutional Court of South Africa](#), the separation of powers is a crucial aspect of our Constitution and indeed, of the classic features of a democracy. But what does it mean? Separation of powers is the division of state power among the three arms, or three pillars of government:

- Legislature (parliament, the provincial legislatures and local councils) which makes laws and monitors the executive,
- Executive (president, deputy president and ministers) who make policy, propose laws and implement laws passed by the legislature, and the
- Judiciary (courts and police) which tries cases and administers justice.

'It's not easy to keep these in balance. Often the challenge is to ensure that the executive does not wield its authority without being [contained](#) by the other branches,' says the Constitutional Court website. According to the Zondo commission report, this balance was not consistently maintained in the period under their investigation.

But we were talking about regulators.

Regulators are typically created by an Act of Parliament. So in our case the [Health Professions Act](#) created the HPCSA, which reports to and advises the Minister of Health ([section 3\(d\) –\(e\)](#)). The HPCSA has the right to sanction practitioners in carrying out their mandate ([section 4\(f\) and 4\(a\)](#)), which is to protect the public and guide the professions. Because the HPCSA is empowered (within parameters) to create its own rules and to enforce them, there is no separation of powers within a regulator.

One of the benefits of creating a healthcare regulator is that clinical and legal expertise can be included. The internal 'judiciary process,' from the early stages of investigation all the way through to sanction, includes the voices of both legal experts and our fellow practitioners, who contribute their insight and understanding of our clinical protocols and standards to proceedings. As a regulated professional, is this clinical/ legal combination a

benefit? Could we be more effectively regulated by experts in business, or experts outside of healthcare, perhaps offering a fresh approach? Or do you have more trust in a regulator that includes healthcare experts? Do you think the public trusts our regulating bodies? As a member of the public, what are your thoughts on other regulating bodies; the [National Treasury](#), the [SA Reserve Bank](#) and the [South African Health Products Regulatory Authority](#) for example?

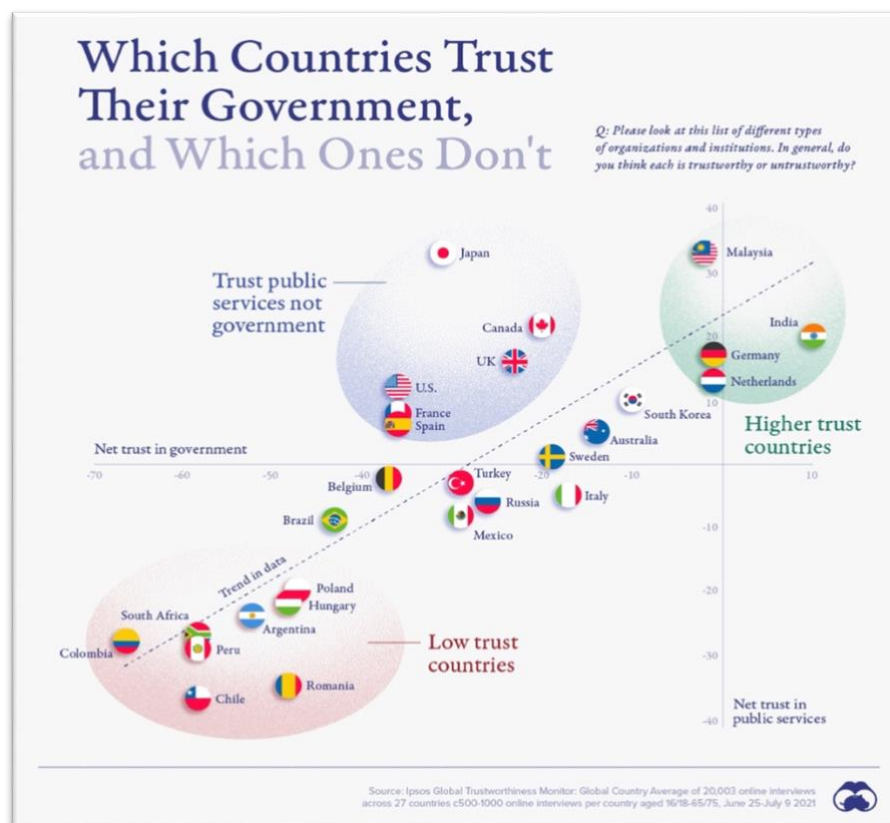
In [Chapter 13](#) of the *Constitution*, the [National Treasury](#) is mandated to ensure transparency, accountability and sound financial controls in the management of public finances. Independent of the government of the day, prioritising efficient and sustainable public financial management is fundamental to the promotion of economic development, good governance, social progress and a rising standard of living for all South Africans. For this reason, the Treasury has a 10-year plan in place, i.e. longer than the current election cycle because its mandate is derived not from Government, but by the Constitution.

The same chapter of the Constitution ([section 224](#)) mandates the SA Reserve Bank to 'protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.' It must 'perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.'

[SAHPRA](#) is another example of a South African regulator. Replacing the previous MCC (Medicines Control Council), it is 'an entity of the National Department of Health, created by the South African government to ensure that the health and well-being of human and animal health are at its core.'

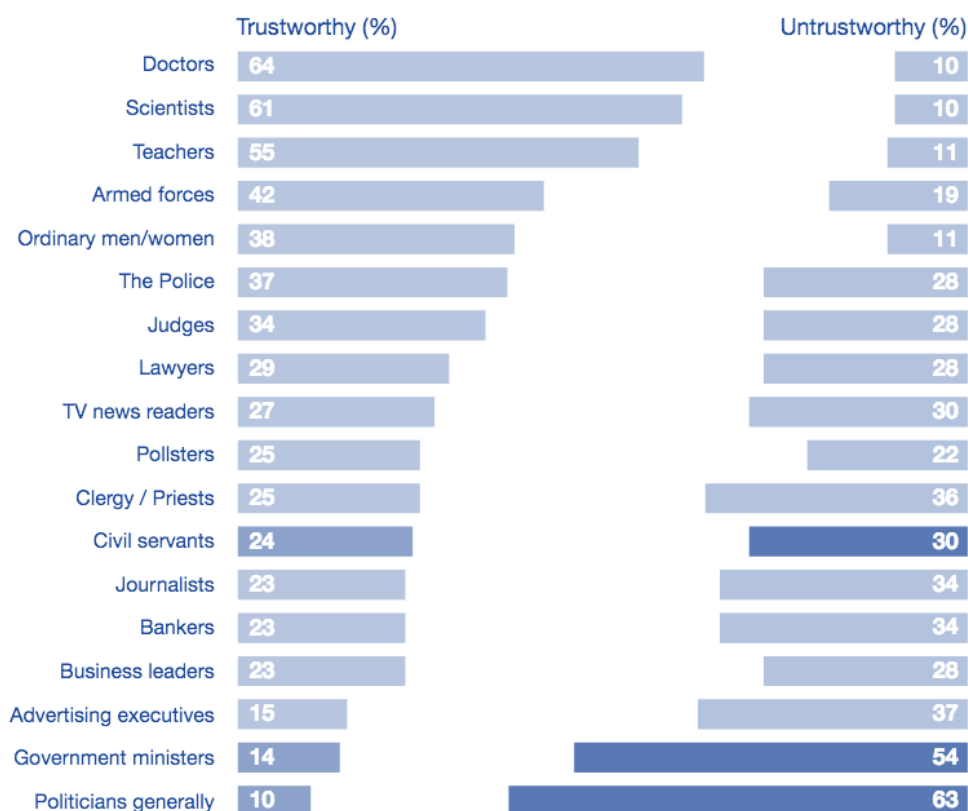
What is your opinion of these institutions? Do you trust that the Reserve Bank is protecting the value of the currency in the interest of balanced and sustainable economic growth? How about the government? Is your level of faith in the government the same? How independent do you perceive them to be?

South Africa belongs to a group of countries where we tend to trust neither our government nor our public institutions – see the red cloud in the [VisualCapitalist](#) image below. The group of countries in the blue cloud, including the UK, US and Canada, trust their public service systems more than the government. This group probably also corresponds to [Shleifer's](#) countries where the government is subject to strong checks and balances, i.e. where regulation is more effective. And, since [Tweeters are more likely to be American](#), probably the reason for so many tweets about how the submarine crisis could have been averted with regulation.



Still, trust in the continued success of the US systems is not universal. There are fears that a competence crisis threatens the complex systems trusted by so many. [Robertson](#) describes a series of apparently unrelated American disasters, and no, the submarine doesn't even feature. 'In a span of fewer than six months in 2017, three U.S. Naval warships experienced three separate collisions resulting in 17 deaths. A year later, powerlines owned by PG&E [[Pacific Gas & Electricity](#)] started a wildfire that killed 85 people. The pipeline carrying almost half of the East Coast's gasoline shut down due to a ransomware attack. Almost half a million intermodal containers sat on cargo ships unable to dock at Los Angeles ports. A train carrying thousands of tons

of hazardous and flammable chemicals derailed near East Palestine, Ohio. Air Traffic Control cleared a FedEx plane to land on a runway occupied by a Southwest plane preparing to take off. Eye drops contaminated with antibiotic-resistant bacteria killed four and blinded fourteen. While disasters like these are often front-page news, the broader connection between the disasters barely elicits any mention. America must be understood as a system of interwoven systems; the healthcare system sends a bill to a patient using the postal system, and that patient uses the mobile phone system to pay the bill with a credit card issued by the banking system. All these systems must be assumed to work for anyone to make even simple decisions. But the failure of one system has cascading consequences for all of the adjacent systems. As a consequence of escalating rates of failure, America's complex systems are slowly collapsing.' If you are no longer drinking your tap water, and you are reading this thanks to your inverter, you already know that maintaining safe and stable systems is not a uniquely American problem. At present, US doctors, scientists and teachers remain generally trusted (see image below), but [Robertson](#) is concerned that this will change as entrance to studying and exit standards drop for critical careers such as medicine, law enforcement, aviation and air traffic control, agriculture, education, banking/ finance and the military. Morale and competency inside U.S. organizations are declining, he says. Would regulation help?



Q: Please look at this list of different types of people. In general, do you think each is trustworthy or untrustworthy in your country?

Source: Ipsos Global Trustworthiness Monitor 2021 – 19,570 participants across 28 countries, interviewed online 23 April – 7 May 2021

To find the answer, Shleifer would have us sequentially explore the four levels of control along the continuum from disorder to dictatorship; market discipline, private litigation, public enforcement through regulation, and state ownership. Let's do that with a case study in electricity supply.

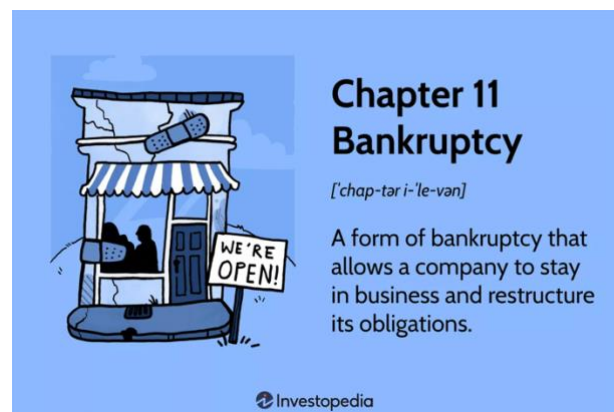
Some background

The US national government [deregulated electricity provision](#) in 1992. Electricity generation and distribution are completely deregulated, while the companies and organizations that own the transmission network are obliged to provide indiscriminate access to various suppliers to promote competition. About 80% of the electricity in the U.S. is generated by private utility companies, some of them listed. PG&E is one of the biggest private electricity producers, and is listed on the NYSE. The remaining 20% of electricity is produced by government agencies. While the national government has allowed deregulation, approaches and regulations vary from state to state.

In February 2021, cold weather in [Texas](#) caused shutdowns at unwinterized natural gas power plants, resulting 246 deaths. [Some](#) were scathing in their criticism of the 'irresponsible' decisions that had led to the catastrophe.

This year (2023), Texas has had sustained record-setting summer temperatures, and yet the state has managed to avoid rolling electricity blackouts (load shedding) by increasing its battery capacity and doubling the state's supply of solar power. Texas electricity supply is perhaps the most deregulated of all states, 'a decision made to avoid federal [regulation](#)'. The disadvantage is that the state can rely on very little power from other states or the federal government, but the upside is that it is also empowered (pun intended) to make its own decisions about how best to provide services, and implement decisions swiftly.

Compare the Texas response with PG&E's after the deadly fires that it was held responsible for: 'PG&E fired its CEO, filed Chapter 11, and restructured. The system's response has been to [turn off](#) the electricity [during times of fire risk] and [raise wildfire insurance](#) premiums...'



Because of its inability to mitigate risk, the power company now simply withdraws its services at times of higher risk and passes the cost of the risk on to the end user. Does that sound familiar? And does it seem fair? I find myself rooting for Texas, for getting the job done, and feeling unimpressed with PG&E who did some window dressing for their stock holders while avoiding their creditors. Suitors said that the [2017 fires](#) could have been prevented had PG&E cut off power sooner, and the 2018 fire was caused by the company's failure to inspect and maintain its aging equipment and infrastructure.

In Shleifer's 4 stages along the continuum from disorder to dictatorship, we see that Texas consumers opted for deregulation, with poor results initially. I'm not sure whether it's the same provider, having learned from their mistakes and delivered, or whether an alternate provider has been appointed. Either

way, consumers have not needed to approach the courts or the federal government to intervene. Being unregulated has worked out well for them.

For the PG&E-related disasters, there has been private litigation by a Trust created for this purpose. This year wildfires destroyed Lahaina, Maui. Maui County is [suing](#) the electricity company, saying they should have turned the electricity off in the dry conditions and strong winds. Hawaiian Electric could face \$4 billion in damages if found [liable](#). The utility is a listed company and has reached its lowest stock value since 1984, but is bouncing back after denying liability for the losses, saying it had turned the electricity off by the time the uncontrollable fires started. Again, it is private litigation at work to try and compensate those who have suffered losses, and ensure safer electricity in the future. As long as it works, electricity supply need not be regulated

Conclusion

Professions or sectors are typically regulated for 2 reasons: To **protect the public and its welfare** or because it has been found necessary to **ensure optimal order**. We started with Shleifer's 4 questions relating to economic regulation, and hoped that they may offer a useful perspective on healthcare regulation.

- 1** *Is regulation generally a good idea...or has it been an obstacle to economic and social progress?*
- 2** *How much regulation of a particular activity is appropriate?*
- 3** *Does the nature of the activity being regulated, or the characteristics of a country, influence the optimal choice?*
- 4** *Is the level of regulation we observe in fact an outcome of efficient social choice...?'*

What do you think? For healthcare in particular, I'm going with:

1. Possibly, and possibly
2. Hard to tell
3. Absolutely
4. Very likely

I hope to have brought you to the end of this article with more questions than when you started. Do we understand the privileges, benefits, costs and liabilities of being regulated professions? Does our regulation achieve the protection that we hope it does? Are we optimally balanced on the Institutional Possibility Frontier line? I think it's healthy to frequently interrogate what we consider to be ethical professional behaviour, and I believe that the HPCSA wanted the same when they required us to include ethics in our CPD.

CPD Questions

Please [click here](#) to answer

1. According to the article, what are the two theories in support of regulation?
 - a) Public protection theory and economic growth theory
 - b) Market discipline theory and private enforcement theory
 - c) Public interest theory and enforcement theory
2. The public protection theory of regulation is primarily concerned with:
 - a) Maximizing profits for private companies
 - b) Ensuring government control over all industries
 - c) Protecting the public's welfare and safety
3. Which assumption does the public protection theory of regulation make?
 - a) Governments are incapable of correcting market failures
 - b) Unhindered activity is bound to succeed in markets
 - c) Governments are competent and capable of correcting market failures

4. What is the argument against the public protection theory of regulation?
 - a) It leads to excessive government intervention
 - b) It disregards the safety of the public
 - c) It assumes that citizens cannot handle market failures themselves
5. According to the article, what is an example of how market forces could ensure safety in workplaces?
 - a) Employers would regulate themselves voluntarily
 - b) Employers would be penalized by the government
 - c) Competition for labour would encourage safe conditions
6. In cases where free market dynamics fail, what is proposed as an alternative to government regulation?
 - a) Private litigation and court-enforced compensation
 - b) International economic sanctions
 - c) Complete government control over the industry
7. Shleifer questions the assumption that governments are benign and capable of correcting failures. What concerns does he raise about regulators?
 - a) They are unbiased and motivated by social welfare
 - b) They may be incompetent, corrupt, or captured by industries
 - c) They are always efficient and capable of enforcing rules
8. Which factor is NOT mentioned as influencing the success of regulation?
 - a) Government control over industries
 - b) Checks and balances on government power
 - c) Nature of the activity being regulated
9. What is the Institutional Possibility Frontier?
 - a) The point of maximum government control over industries
 - b) The ideal balance between private orderings and state ownership
 - c) A concept unrelated to regulatory strategies
10. Which of the following is NOT identified as a strategy for social control of an industry?
 - a) Market discipline

- b) Private ownership
 - c) Public enforcement through regulation
11. What does the article suggest about trust in various institutions in South Africa?
- a) Trust in the government is higher than trust in regulators
 - b) Trust in healthcare regulators is lower than trust in other bodies
 - c) Trust in both government and institutions is generally low
12. What does the separation of powers refer to?
- a) The division of power between different branches of government
 - b) The collaboration between government and private institutions
 - c) The allocation of power between individual citizens and the state
13. Which statement is FALSE regarding possible benefits of market discipline in enforcing good conduct?
- a) It is less expensive than public regulation
 - b) It is probably free from corruption and politicization
 - c) It allows for government intervention as needed
14. In the case study of electricity supply, what is a disadvantage of Texas' deregulated system?
- a) It relies heavily on power from other states
 - b) It faces federal government interference
 - c) It has minimal access to power from other states and suppliers during shortages
15. How does private litigation function in response to disasters caused by corporations?
- a) It seeks to penalize the government for lack of regulation
 - b) It aims to hold companies accountable and compensate victims
 - c) It focuses on advocating for increased government control
16. Which statement best describes the role of private litigation in the case of Maui's wildfires?
- a) Private litigation aims to make profits from the wildfires
 - b) Private litigation seeks to prevent all future wildfires
 - c) Private litigation holds the electricity company accountable for damages

17. What is the role of the Health Professions Council of South Africa (HPCSA)?
- a) To create rules and regulations for healthcare practitioners
 - b) To provide medical treatment to the public
 - c) To oversee the development of pharmaceuticals
18. According to the article, which of the following is a risk associated with state ownership of enterprises?
- a) Lack of public trust in the government's decision-making
 - b) Inability to efficiently address market failures
 - c) Decreased control and power for government officials
19. What is the relationship between trust in government and trust in institutions?
- a) Trust in government and institutions are inversely related
 - b) Trust in government and institutions are always equal
 - c) Trust in government and institutions varies based on various factors
20. What is the main argument against excessive regulation?
- a) It undermines government control over industries
 - b) It leads to financial instability in the market
 - c) It can result in inefficiency and abuse of power