# *Beyond 'Light Touch' Regulation of British Banks after the Financial Crisis*

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## A. Introduction

We have reached a turning point in our efforts to regulate banks and financial institutions by resort to current risk-based models and regulatory structures. As is evident from failures during the world financial crisis that burst upon the scene in later 2007, the use of these risk based and self regulatory models has been seen by many to be seriously flawed. This failure may be attributed to many causes, such as flawed assumptions of rating agencies, the limits of model building as an exercise, and the ease with which such efforts have been compromised by behavioural and political factors that influence markets. These behavioural factors include the power of market euphoria and the influence of perverse incentives which have driven excessive risk taking.[1] Political factors have included the uncritical commitment to self-regulation and the capacity of markets to regulate themselves.[2]

Whilst risk is an inherent feature of modern times, the question that arises here is the degree to which banking regulation should depend exclusively upon the use of narrow (an inevitably imperfect) mathematical risk models[3] and the extent to which these need to be supplemented by the application of legal rules as well as other regulatory techniques that have emerged from the study of corporations and professionals.[4] However, the limits of law as a mechanism for social ordering should

[1] See further, RJ Shiller, *Irrational Exuberance, Second Edition* (New York, Currency Doubleday, 2007); and H Shefrin, *Beyond Greed and Fear – Understanding Behavioral Finance and the Psychology of Investing* (Oxford, Oxford University Press, 2007).

[2] JC Coffee, 'What went wrong ? An initial inquiry into the causes of the 2008 Financial Crisis' (2009) 9 *Journal of Corporate Law Studies* 1; Also see generally: RA Posner, *A Failure of Capitalism – The Crisis of '08 and the Descent into Depression*, (Harvard, Harvard University Press, 2009). In regard to the effect of other human factors see generally, P Augur, *Chasing Alpha – How Reckless Growth and Unchecked Ambition Ruined the City's Golden Decad*e, (London, The Bodley Head, 2009); and G Tett, *Fool's Gold – How Unrestrained Greed Corrupted a Dream, Shattered Global markets and Unleashed a Catastrophe*, (London, Little, Brown 2009).

[3] An excellent overview of efforts to understand risk is provided by PL Bernstein, *Against the Gods – The Remarkable Story of Risk* (New York, John Wiley & Sons, 1998).

[4] Some useful scholarly studies of this area include those by: DW Arner, *Economic Stability, Economic Growth and the Role of Law* (Cambridge, Cambridge University Press, 2007); A Campbell and P Cartwright, *Banks in Crisis – The Legal Response* (Aldershot, Ashgate Publishing Limited, 2002); and BE Gup (ed), *Corporate*

also not be over-estimated.[5] Other factors, such as the existence of mutual trust and an appreciation of wider stakeholder interests are also important ingredients of any effective regulatory system. This has led to calls for more responsive forms of regulation, although little of this work has focussed much upon the banking and finance sectors.[6]

It is interesting to note that the economic historian Eric Hobsbawn recently expressed the view that the current economic crisis is 'the end of the era in the development of the global capitalist system.' He added that, just as centrally planned communist economies were doomed to failure, so too was the organisation of the global economy on an 'effectively unregulated basis'.[7]

The Deputy Governor of the Bank of England, Charles Bean, also recently pointed to the magnitude of the credit crisis by observing that '[t]his is a once in a lifetime crisis, and possibly the largest financial crisis of its kind in human history'.[8] Other key former US finance officials, such Hank Paulson, the former Secretary of the Treasury, and Alan Greenspan, the former Chairman of the Federal Reserve, also frequently referred to the magnitude of the current crisis.

The lack of rigorous regulation of financial markets in the UK may be attributed to the retention of features of the older gentlemanly system of self regulation that had prevailed in the City of London prior to the internationalisation of the financial sector after London's 'big bang'.[9] The establishment of the FSA and the enactment of the Financial Services and Markets Act 2000 were intended to resolve this weakness by creating a single stronger regulator.[10] But, the regulatory objectives of this new scheme were soon seen as being very weak or 'woolly', as AE Goodhart had noted in 2000.[11]

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*Governance in Banking: A Global Perspective*, ( Edward Elgar, 2007). Also see generally, E Ferran, and AE Goodhart, *Regulating Financial Services and Markets in the 21st Century*, (Oxford, Hart Publishing, 2002).

[5] See generally, D McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability' in D McBarnet, A Voiculescu and T Campbell (eds), *The New Corporate Accountability – Corporate Social Responsibility and the Law*, (Cambridge, Cambridge University Press, 2007).

[6] See generally, R Baldwin and J Black, 'Really Responsive Regulation', (2008) 71(1) *Modern Law Review* 59. Also see: J Gray and J Hamilton, *Implementing financial regulation*, (Chichester, John Wiley & Sons Ltd 2006).

[7] See further 'Will the bail-out work?', 9 October 2008, vox pop, guardian.co.uk, at http://www.guardian.co.uk/commentisfree/2008/oct/09/economy.creditcrunch ; also see A Bruce interview with E Hobsbawm, 3 November 2008 at: http://money.uk.msn.com/investing/articles/morecommentary/article.aspx?cp-documentid=10465208.

[8] Reuters, 'Bank's Bean says crisis may be worst in history', *International Herald Tribune*, 24 October 2008 at http://www.iht.com/articles/reuters/2008/10/24/business/OUKBS-UK-BRITAIN-BANK-BEAN.php.

[9] See further, P Augar, *The Death of Gentlemanly Capi*talism, (London, Penguin Books, 2000).

[10] E Ferran, 'The liberalisation of financial markets: the regulatory response in the United Kingdom', in R Grote and T Marauhn (eds), *The Regulation of International Financial Markets – Perspectives for Reform*, (Cambridge, Cambridge University Press, 2006) at 59-62.

[11] Referred to by Ferran, ibid at 65. Professor Ferran also noted (at 75) that the FSA faced enormous challenges after it was established as it was given heavy responsibilities, but been provided with a small number of staff and an inadequate funding base. See further, AE Goodhart, 'Regulating the Regulator: An Economist's Perspective on Accountability and Control', in Ferran and Goodhart (eds), *Regulating Financial Services and Markets in the Twenty-First Century* ( Oxford, Richard Hart, 2001).

Goodhart's assessment proved to be accurate if we reflect upon what occurred during the current financial crisis, and it also suggests that we should now be looking for more sophisticated models of regulation to deal with the new environment that we now find ourselves in. For example, the strong adherence in the UK to a large number of regulatory rules and private codes in regard to financial services when compared to other countries such as Australia and the United States might need to be reassessed.[12] Also, as has been officially recognised, current government regulatory structures in this area are in need of a major overhaul or replacement. The passage of the Banking Act in 2009 was but the first of many efforts that will be required to be made to refashion existing regulatory arrangements.[13]

### B. In Search of Risk Models for Banks

Acknowledgement of this comprehensive systemic failure has come from some of those who tried most vocally to support efforts to develop reliable risk models.[14] One of those who have acknowledged the limits modelling was Alan Greenspan, the former Federal Reserve Chairman; Greenspan, had for some time been pointing to the fact that markets were driven by what he described as 'irrational exuberance' and that 'we will never have a perfect model of risk' as the market models that had been used to describe market forces did not fully capture irrational 'innate human responses.' These arguments served merely to avoid directly confronting more fundamental problems.[15]

Interestingly, others, such as the Bank of England's Director for Financial Stability, have also pointed out that the cause of the current crisis can be found in unrealistic risk models which were based on very short-term views of the past, usually only

[12] See generally, J Black, 'Law and Regulation: The Case of Finance' in C Parker, et al, (eds), *Regulating Law*, (Oxford, Oxford University Press, 2005) at 45.
[13] See further R Tomasic, 'Creating a Template for Banking Insolvency Reform After the Collapse of Northern Rock', (2009) 22 *Insolvency Intelligence* 65 and 81 (Parts 1 and Parts 2).
[14] The Chief Executive of Goldman Sacks, Lloyd Blankfein, has for example, provided a reasoned defence of the need to preserve opportunities for risk taking; Blankfein calls for a separation of risk control and business functions in banks and the need to take into account the full implications of off-balance sheet exposures: L Blankfein, 'Do not destroy the essential catalyst of risk', *Financial Times*, (London 9 February 2009) 13.

[15] A Greenspan, 'We will never have a perfect model of risk', *The Financial Times*, (London 16 March 2008). Similar arguments had been made by behavioural economists such as RJ Shiller, *The New Financial Risk in the 21st Century Order*, (Princeton, Princeton University Press, 2003); RJ Shiller, *Irrational Exuberance, Second Edition*, New York, Currency Doubleday, 2005); RJ Shiller, *The Subprime Solution- How Today's Global Financial Crisis Happened, and what to do about it*, (Princeton, Princeton University Press, 2008); and GA Alerlof and RJ Shiller, *Animal Spirits – How Human Psychology Drives the Economy and why it Matters for Global Capitalism*, (Princeton, Princeton University Press, 2009).

based on economic events from the previous decade.[16] As is now widely acknowledged, risk models need to draw upon a much longer data set to be reliable.

Writing in April 2008, Greenspan remained largely confident that government regulation of financial markets was as effective as it was capable of being and that 'free competitive markets are the unrivalled way to organise economies.'[17] Implicit here was a reluctance to accept suggestions that there was a place for government in the market; adherence to this view was however to fail several months later .[18] Confidence in the self regulatory capacities of markets was to suffer considerably after the collapse of Lehman Brothers with its filing for bankruptcy in September 2008. In late October 2008 Greenspan appeared before the Congressional Committee on Oversight and Government Reform in Washington DC and in questioning he noted that the credit crisis had been precipitated by 'the failure to properly price...risky assets.' Greenspan added that he had been 'partially' wrong in his opposition to stronger government regulation of markets. [19]

The selfish conduct of banks in failing to support each other during the current financial crisis came as a shock to Greenspan, as was evident when he admitted before a US Congressional Committee in October 2008 that he had at least been wrong in placing complete faith in the self regulatory powers of financial markets. Greenspan pointed to the extraordinary nature of current events and told the Congress that we were experiencing a 'once in a century credit tsunami.' In discussing the failure of banks to provide credit to each other, Greenspan admitted: '[t]hose of us who have looked to the self-interest of lending institutions to protect shareholders' equity, myself included, are in a state of shocked disbelief'. Committee Chairman Henry A Waxman asked Mr Greenspan: '[d]o you feel that your ideology pushed you to make decisions that you wish you had not made?' In reply, Greenspan conceded, 'Yes, I've found a flaw. I don't know how significant or permanent it is. But I've been very distressed by that fact.' [20]

The notion that government should not intervene in markets has led to an almost blind faith in the power of the 'invisible hand' to ensure that markets are self-correcting. It also traumatised governments and regulatory agencies and prevented them from assuming greater responsibilities in the face of excessive risk taking

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[16] N Cohen, 'Financial meltdown blamed on risk models', *Financial Times*, (London 14/15 February 2009). More extensive statements of similar arguments have been made by others: see for example, NN Taleb, *The Black Swan – The Impact of the Highly Improbable*, (London, Penguin,2007); BB Mandlebrot and RL Hudson, *The (Mis)Behaviour of Markets – A Fractal View of Risk, Ruin and Reward*, (London, Profile Books, 2008).

[17] A Greenspan, 'The fed is blameless on the property bubble', *The Financial Times*, (London 7 April 2009).

[18] A Greenspan, 'The world must repel calls to contain competitive markets', *The Financial Times*, (London 5 August 2008) 11. This approach has not gone without criticism; see for example, J Kay, 'Greenspan could have found a cure at the pharmacy', *Financial Times*, (London 25 February 2009) 13.

[19] T Bawden, 'Alan Greenspan admits some mistakes', *Times Online*, (London 23 October 2008), available at: http://business.timesonline.co.uk/tol/business/economics/article5003610.ece?print=ye.

[20] Quoted by EL Andrews, 'Greenspan Concedes Error on Regulation', *The New York Times*, (New York 23 October 2008); see at http://www.nytimes.com/2008/10/24/business/economy/24panel.html?_r=1&hp.

behaviour in the market. The failure of banks to support each other by providing credit seemed to imply a more fundamental instability in financial markets than Greenspan had been prepared to acknowledge. In this regard, it is interesting to note that economists such as Joseph Schumpeter had long pointed to the self destructive features of capitalism (which he famously saw as a process of creative destruction).[21] Later Hyman Minsky was to elaborate upon this theme when he pointed out that '[f]inancial instability is a deep-seated characteristic of a capitalist economy with a sophisticated financial system.' He then argued that an institutional framework needed to be created to seek to '...attenuate if not eliminate the economy's thrust towards instability.' [22]

For Minsky, big government was both a blessing and a curse. This was in contrast to those, such as Milton Friedman, whose confidence in the power of markets was such as the lead them to argue that market processes will create a full-employment equilibrium.[23] Friedman's trust in the capacity of markets to achieve equilibrium, parallels Greenspan's faith in the self-correcting power of financial markets, something that has been shown to have collapsed in the current crisis. The ideological adherence to Friedmanite ideas in the United Kingdom has done much to undermine the role of government as a stabilising and supportive institution in relation to markets. A system that has also stressed shareholder value at the expense of other considerations,[24] has been vulnerable to short sighted and narrow conceptions of corporate objectives; this 'short-termism' was as applicable to banks as it is to other companies in a society in which financialisation has become the dominant feature of the economy.[25] It was therefore interesting to note that the former CEO of General Electric, Jack Welch, once regarded as the champion of the shareholder value orthodoxy, pointed out that this short term approach was 'the dumbest idea in the world' as 'shareholder value' should be seen as a result and not as a strategy: 'Your main constituencies are your employees, your customers and your products.'[26]

Before the crisis, the Bank of England had adopted an approach to banking regulation that seemed to have been heavily influenced by Greenspan's market based approach. An illustration of the enthusiasm for these ideas is reflected in the

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[21] See further JA Schumpeter, *Capitalism, Socialism and Democracy*, (New York, Harper & Row, 1976).
[22] HP Minsky, *Stabilizing an Unstable Economy*, (New York, McGraw Hill, 2008) at 315.
[23] Referred to by Minsky ibid at 196.
[24] Not surprisingly, neo-liberal ideas of this kind are also found in the ideas of FA Hayek who had argued that in a system that assumes the primacy of shareholder value, wider considerations are difficult to justify; see generally Ch 15 in FA Hayek, *Law, legislation and Liberty, Volume 3*, (Chicago, University of Chicago Press, 1979) and especially at 82; also see D Harvey, *A Brief History of Neoliberalism*, (Oxford, Oxford University Press, 2007). These kinds of ideas dominated Thatcherist policies and continued to have influence until recent times in regard to financial markets, despite efforts to adopt a broader stakeholder approach to corporate governance in reforms now found in the Companies Act 2006.
[25] See generally, J Froud et al, *Financialization and Strategy*, (London, Routledge, 2006).
[26] Quoted by F Guerrera, 'Future of Capitalism: A need to reconnect' in Financial Times, *The Future of Capitalism: The big debate*, supplement (London, The Financial Times, 12 May 2009) 33 and available at www.ft.com.capitalism .

fact that the United Kingdom awarded Alan Greenspan an honorary knighthood in 2002 '...in recognition of his outstanding contribution to global economic stability and the benefit that the UK has received from the wisdom and skill with which he has led the US Federal Reserve board'.[27] According to Sir John Gieve, the former Deputy Governor of the Bank, this kind of approach meant that markets should be allowed to have their effect and that government should only get involved to 'mop-up' after a bubble has burst.[28] This restraint is in part attributable to economists' obsession with the moral hazard which may be caused by government intervention. That idea seems to have suffered a major blow after repeated government efforts to bail out heavily indebted banks. Gieve went on to point out that 'one lesson we have learnt from the crisis is that we cannot leave risk management to the banks.'[29]

But, as Satyajit Das pointed out in his very readable book on derivatives trading, risk management has a clear purpose for banks as they 'must take risks in order to make money. Increasingly, banks have to take more and more risks as client business just doesn't pay.'[30] Of the four types of risk that Das identified (market risk, credit risk, liquidity risk and operational risk), banks often do not focus upon the risks that affect them most. As Das explained,

> In banks, the biggest risk by a significant margin is credit risk, and liquidity and operational risk are probably next. Market risk is the smallest. Perversely, banks have, until recently, spent much of their efforts in quantifying and managing market risk, which may be because it lends itself to quantification. The precision is mostly false.[31]

Das also pointed to the 'illusion of precision' in risk management and notes that risk models are usually only well understood by those with advanced mathematical skills and adds that '[m]ost bank managers, directors and regulators didn't have the requisite skills' and that '[m]ost of the inputs required were either unavailable or difficult to verify.'[32] This makes problematic adequate risk management by senior executives and directors in banks.

Within financial institutions, those professional risk managers who speak out about perceived risks are also in danger of being silenced during market bubbles (as we saw with the dismissal Paul Moore at HBOS).[33] Moreover, as risk managers usually

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[27] *The Daily Telegraph*, (London 7 August 2002).
[28] C Giles, 'Gieve challenges many bank orthodoxies', *Financial Times*, (London 20 February 2009) 2.
[29] Quoted by N Pratley, 'Viewpoint – Past failings catch up with FSA', *The Guardian*, 26 February 2009 at 27.
[30] S Das, *Traders, Guns & Money – Known and unknowns in the dazzling world of derivatives*, (Harlow, Prentice Hall, 2006) at 178. Also see generally, E Avgouleas, 'The global financial crisis, behavioural finance and financial regulation: In search of a new orthodoxy', (2009) 9 *Journal of Corporate Law Studies* 23.
[31] Das ibid at 158.
[32] Das, above at 159-160.
[33] See further the P Moore Memo at http://ftalphaville.ft.com ; Also see: A Cox, ' "Confident" Moore stands by his claims', *Financial Times*, (London 12 February 2009) 2; J Croft, 'Evidence triggered Crosby's departure', *Financial Times*, (London 12 February 2009) 3; J Eagleman and J Hughes, 'Opposition queries PM's judgment', *Financial Times*, (London 12 February 2009) 2.

enjoy much less prestige than front line traders in banks, risk concerns are easily articulated in an organisation that is overwhelmed by market euphoria. [34] As a result, as Taleb and Triana[35] point out, it has been commonplace for risk managers to simply act as silent bystanders, even though they knew the limits of risk models that continued to be in use, and even though similar models were known to have clearly failed, such as in the collapse of Long Term Capital Management a decade earlier. [36] On the other hand, excessive risk taking has been tolerated as it has been linked to bankers' compensation packages that, as Henry Kaufman has argued 'often favour aggressive risk-taking.'[37] This unbalanced incentives structure tended to foster 'short-termism' and perverse motivations and rewards within banks. A recent OECD report pointed to the need to match risk management and the incentives structure of a company and noted that in the current crisis '[t]here appears to have been in many cases a severe mismatch between the incentive system, risk management and internal control systems.' [38]

### C. Beyond Exclusive Reliance upon Self Regulation in Financial Markets

Until the bursting of the credit bubble in late August and early September 2007 at the time of the collapse of Northern Rock, there was almost universal agreement that markets could be allowed to regulate themselves and that industry actors would see it as being in their self interest to ensure that markets continued to operate effectively. In the United States these hopes were not completely dashed until the collapse of Lehman Brothers a year later. These market assumptions have now been shown to be false and have seen an unprecedented surge of public money being poured into failed banks and financial institutions in an effort to prop them up so as to preserve systemic stability.

The fashioning of new dimensions of a regulatory order to deal with banks, and other financial institutions that have been seen as comprising a 'shadow banking' system, has now become a broadly based endeavour.[39] Even Prime Minister Gordon Brown, one of the architects of London's growth as a financial centre, has begun to see the need to 'bring the shadow banking system and tax havens into the regulatory

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[34] See further OECD Steering Group on Corporate Governance, *Corporate Governance Lessons from the Financial Crisis*, (Paris, OECD, 2009) at 11.
[35] NN Taleb and P Triana, 'Bystanders to this financial crime were many', *Financial Times*, 8 December 2008.
[36] R Lowenstein, *When Genius Failed - The Rise and Fall of Long-Term Capital Management*, (London, Fourth Estate 2002).
[37] H Kaufman, 'Finance's upper tier needs closer scrutiny', *The Financial Times*, (London 21 April 2008) 15.
[38] OECD Steering Group on Corporate Governance, *Corporate Governance Lessons from the Financial Crisis*, (Paris, OECD, 2009) at 6.
[39] See generally, N Roubini, 'The shadow banking system is unravelling', *The Financial Times*, (London 21 September 2008).

net.'[40] In contrast to views espoused by other influential economists like Greenspan, others such as Professor Willem Buiter have pointed to the over-expansion of the banking sector that occurred in both the UK and the USA and, in looking for an explanation, argued that:

> Financial stability was undermined by thoughtless financial liberalisation, especially in the US and the UK. Light-touch (really soft-touch) regulation permitted an explosion of opaque instruments often held by non-transparent 'shadow banking' institutions. The UK was revealed to have no functioning deposit insurance scheme, no functioning lender of last resort arrangements and no special resolution regime for insolvent or badly impaired banks. In the balkanised regulation and supervision regime of the US, no one was in charge; few were even aware of the dysfunctional developments that were taking place.[41]

Nevertheless, many former bankers continued to be in a state of denial in regard to their responsibility for events and continue to resist efforts to build a new regulatory structure which moved beyond the current system which has largely lacked effective external and internal regulation.[42] This applies especially to hedge funds which have lacked transparency.[43] This state of denial also extends to a reluctance to change internal governance practices[44] and uncritical attitudes to the desirability of rewarding bank employees with extravagant bonuses and retirement packages. The publicity regarding these matters surrounding the Royal Bank of Scotland and other failed banks has well highlighted this problem.[45] Nevertheless, there has been criticism in the United States from conservative think tanks, such as the American

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[40] Reuters, 'Brown urges G20 to crack down on bank bonuses', (London 6 March 2008) available at: http://uk.reuters.com/article/businessNews/idUKTRE5253QZ20090306.

[41] W Buiter, 'Welcome to a world of diminished expectations', *Financial Times*, (London 6 August 2008) 11.

[42] See generally, C Giles, R Atkins and J Wilson, 'Bankers act to head off tighter regulation', *The Financial Times*, (London 10 April 2008); Leader, 'The regulators are coming', *Economist*, (London 29 March 2008) 17. Also see: PT Larsen and G Tett, 'Political interference 'is biggest risk' for banks', *Financial Times*, (London 31 January- 1 February 2009) 7.

[43] See further: P Davis, 'Hedge funds prepare for legal crackdown', *Financial Times*, *FTfm*, (London 26 January 2009) 7; J Mackintosh, 'Hedge funds move to limit rules burden', *Financial Times*, (London 19 January 2009) 19.

[44] One much publicised example of such denial was the statement by Vikram Pandit, the Citigroup CEO that, despite a virtual nationalisation of the bank, there would not be any changes made to the 'strategy, operations or governance' of the bank; see further, F Guerrera and A Beatte, 'US government to take biggest stake in Citigroup', *Financial Times*, (London 28 February/1 March 2009) 1; F Guerrera, 'Rivals are poised to take advantage of ownership limbo', *Financial Times* (London 28 February/1 March 2009) 16; J Kay, 'How competent bankers can be assisted', *Financial Times*, (London 4 March 2009) 25.

[45] PT Larsen, 'Goodwin's undoing – RBS and the crisis', *Financial Times*, (London 25 February 2009) 11; P Wintour, 'Bank executive bonuses maybe clawed back, warns Brown', (London *The Guardian*, 13 February 2009) 6-7; J Treanor, 'RBS chief 'empathises' with public anger on bonuses', *The Guardian*, 12 February 2009 at 7; J Eaglesham, 'Goodwin action could start 'in weeks'', *Financial Times*, (London 4 March 2009) 2; J Oliver et al, 'Payback time for culture of greed', *Sunday Times*, (London 1 March 2009) 14-15.

Enterprise Institute, of efforts to impose regulatory rules over products that have been found to create systemic risks, such as credit default swaps.[46]

### D. Improving the Quality of Banking and Financial Regulation

Parliamentary inquiries in both the UK and the USA have sought to ask searching questions of bankers about some of the major risks that they have taken in recent years.[47] Apart from gaps in the current regulatory structure, a key issue here must concern the quality of regulation itself. This has been found to be very poor and recently led to bodies such as the FSA announcing that they would enhance their supervisory activity[48] and the SEC began to follow up on serious market abuses such the Madoff[49] and Stanford[50] ponzi schemes. In the US, the SEC seemed to have been caught on the back foot by the credit crisis (such as the collapse of Bear Stearns[51]) which meant that leading roles were instead taken by the US Treasury and the Federal Reserve. There was also much room for improvement in the UK given the FSA's acknowledged lack of a deep understanding of some of the banks it was supposed to regulate, such as Northern Rock and the Royal Bank of Scotland.[52]

Not surprisingly, shortly after commencing in his new position, the current chairman of the FSA sought to 'wipe the slate clean' as he foreshadowed that the regulator would be seeking to develop more effective strategies for dealing with

46 J Grant and N Tait, 'Plea for caution on re-regulating financial sector', *Financial Times*, (London 4 February 2009) 6.

47 For the UK see J Treanor and P Wintour, 'Bankers admit they got it wrong as RBS announces 2,300 job cuts', (London *The Guardian*, 11 February 2009) 6-7; PT Larsen, 'Cuts and bruises but no fatal blow', *Financial Times*, (London 11 February 2009) 3; For the USA, see: A Clark, 'Do or die for banks as knives are sharpened on Capitol Hill', *The Guardian*, (London 13 February 2009) 28-29.

48 J Hughes, 'FSA to step up its supervisory role', *Financial Times*, (London 1 December 2008) 3.

49 See further, J Chung, P Hollinger and S Pignal, 'SEC 'illiteracy' to blame for Madoff failings', *Financial Times*, (London 5 February 2009) 21; A Rappeport, and J Chung, 'Madoff records put more pressure on SEC', *Financial Times*, (London 21/22 February 2009) 16; J Treanor and A Clark, ''It was all one big lie' : $50bn black hole engulfs global funds', *The Guardian Weekly*, (London 19 December 2008) 3; The Economist, 'The Madoff affair, Con of the century', *The Economist*, (London 20 December 2008) 119; M Goldstein, 'The Humbling of Hedge Funds', *BusinessWeek*, (New York 29 December 2008 - 5 January 2009) 26; B Masters, 'Off the fairway – Behind the Madoff scandal', *Financial Times*, (London 27 January 2009) 11.

50 See further: SM Ishmael and J Chung, 'Stanford charged with fraud by SEC', *Financial Times*, (London 18 February 2009) 1; SM Ishmael, 'Twenty20 hindsight: The Stanford scandal', (London *Financial Times*, 21/22 February 2009) 9; A Clark, 'Stanford scandal – Alarm bells sounded in 1995 – but regulators did not listen', *The Guardian*, (London 20 February 2009 at 6-7; J Chung, T Alloway and J Lemer, 'The Stanford Scandal – Why were red flags ignored?', *Financial Times*, (London 19 February 2009) 22; M Peel, 'The Stanford scandal – An empire long on claims and short on data', *Financial Times*, (London 20 February 2009) 20.

51 The Economist, 'The wreck and rescue of America's fifth-biggest Wall Street bank', *The Economist*, (London 22 March 2008) 94-95

52 See further, R Tomasic, 'Corporate rescue, governance and risk-taking in Northern Rock,' (2008) 29 *The Company Lawyer* 297; and (2008) 29(11) *The Company Lawyer* 330-337.

banking failures, because, as Lord Adair Turner added, '...we have been doing supervision on the cheap.'[53]

The history of recent failures upon the part of UK corporate regulation, which has included the FSA's acknowledged poor handling of the collapse of Northern Rock and the FSAs and DTI's much criticised handling of the Equitable Life saga[54], suggests that despite the positive intentions of Lord Turner, there was a case for more fundamental reform. This could even include replacing the FSA entirely and refashioning the system of Tripartite regulation into a different shape.

Some have even suggested that this might, for example, involve a dual structure which has one body concerned only with prudential regulation and another concerned only with consumer issues, with protocols for co-operation between them. Such a dual regulatory model is found in other parts of the world, such as in Australia, Canada and the Netherlands, having been developed out of an earlier banking crisis in the 1990s. Interestingly, the former Secretary to the US Treasury, Hank Paulson is said to have favoured this dual model, and the value of this approach has also been recognised recently in the UK in a report written for the Conservatives by former Treasury official James Sassoon.[55] The failure of the FSA to deal adequately with corporate fraud may also need to be dealt with structurally, although corporate prosecutions are a notoriously difficult area to deal with and need adequate funding and specialised enforcement staff with a commitment to the enforcement of legal rules and not mere light touch regulation.[56]

Concurrently with Lord Turner's announcement of a clean slate, the FSA set aside years of modelling of financial risks by forcing banks to recapitalise. In his first major interview as the FSAs new chairman, Lord Turner observed that:

> We are going to have to return to a rule driven approach and ideally that should be an international set of rules. And we are just going to have to see how rapidly the world can get back to an agreed set of rules.[57]

Up until recently, the FSA also seemed unable to move beyond the use of failed regulatory models, despite criticism of its approach in the US; as one analyst of the

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[53] See further, PT Larsen, 'Banking regulator calls for clean slate', *Financial Times*, (London 17 October 2008) 1.

[54] The UK Government has been severely criticised by the Parliamentary Ombudsman for the failure of government regulators to intervene in the long established insurance company Equitable Life, even though evidence of this failure was plain to see. The Ombudsman pointed to 'passive, reactive and complacent' regulators in the form of the Department of Trade and Industry (DTI), the Government Actuary's Department and the FSA which the Ombudsman accused of being guilty of 'comprehensive failure': see Y. Essen, 'Equitable sank as regulators stood by', *The Daily Telegraph*, (London 31 October 2008) B1.

[55] J Sassoon, 'Britain deserves a better system of financial regulation', *Financial Times*, (London 9 March 2009) 15; and J Eaglesham, 'Overhaul of FSA needed, says review', *Financial Times*, (London 9 March 2009) 3.

[56] On the problems of using criminal sanctions in area that are dominated by a civil law culture see further: R Tomasic, 'Corporate Crime in a Civil Law Culture', (1994) 5 *Current Issues in Criminal Justice 244*.

[57] PT Larsen, 'Turner rises to the challenge of calming financial markets', *Financial Times*, (London 17 October 2008) 17.

FSAs commodities regulation practices has noted, for example, the FSA 'is frank about not being enforcement-driven. It prefers a system of 'credible deterrence', which requires senior management at firms to show they have 'good systems and control' to prevent misconduct – or fact sanction.'[58]

Contemporaneously, the UK Government has been severely criticised by the Parliamentary Ombudsman for the failure of government regulators to intervene in the affairs of the long established insurance company Equitable Life, even though evidence of its failure was plain to see. The Ombudsman pointed to 'passive, reactive and complacent' regulators in the form of the Department of Trade and Industry (DTI), the Government Actuary's Department and the FSA which the Ombudsman accused of being guilty of 'comprehensive failure'. [59] If this is yet another illustration of the UK's much vaunted light handed regulation, it has had extraordinary consequences. As with Northern Rock, it also suggests some bureaucratic conflict between the relevant regulatory bodies, which may simply allow for an avoidance of regulatory responsibilities.

The collapse of Northern Rock was also followed by a staggering internal audit of the FSA which highlighted the failure of risk-based light handed regulation[60] . This kind of attitude prevailed up until after the collapse of Northern Rock. In some ways, the financial crisis facing the UK has been more severe that elsewhere because of the 'success' which the UK has had in building up its financial services industry as a proportion of the overall business sector; arguably, this means that when this sector failed, the damage would be much greater than would otherwise have been the case.[61]

The FSA's Chief Executive, Hector Sants, also acknowledged that the FSA failed to adequately understand the companies that it was charged with regulating and that it would need to develop better mechanisms for overseeing these companies. In announcing a move to appoint more qualified personnel to the agency, he observed that '[w]e do want to have a somewhat more intrusive approach to regulation'. In an unusually strident tone, Sants added, '[w]hat we absolutely should be doing is delivering an effective supervisory regime' and admitted that '[w]e are acknowledging that we could have challenged those business models more before they went into the downturn.'[62] However, the forces of resistance to such re-regulation are not going to be easy to deal with, having been so much a part of the boom years of the credit bubble.

[58] J Grant, ''London loophole' leaves US at odds with FSA', *Financial Times*, (London 7 July 2008) 21.
[59] See Y. Essen, 'Equitable sank as regulators stood by', *The Daily Telegraph*, (London 31 October 2008) B1.
[60] See further at http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2008/nr.shtml.
[61] See further A Shipman, 'UK financial sector size, and vulnerability, questioned from within', *Finance Week*, (London 5 November 2007) available at http://www.financeweek.co.uk/item/5683.
[62] Quoted by J Hughes, 'FSA to step up its supervisory role', *The Financial Times*, (London 1 December 2008) 3.

Writing in July 2008, Lawrence Summers, now chairman of the US President's National Economic Council, outlined some of the key features of a new regulatory order. These key features of any new system included the avoidance of competition between regulatory agencies[63]; assuming that institutions and regulators will be unable to predict market conditions with much more confidence; and ensuring that the risks that arise from the 'parallel' or shadow banking system are properly monitored. Like many others, Summers also noted that: 'it should be recognised that to a substantial extent self-regulation is deregulation. Allowing institutions to determine capital levels based on risk models of their own design is tantamount to letting them set their own capital levels.'[64]

The much touted claims of the superiority of the United Kingdom's light touch and principles based system of market regulation has been shown to be a hollow as, at the end of the day, this has merely amounted to a lack of regulation. Of course, successive UK Governments have sought to attract foreign companies to set up operations in London on the grounds of its superior light-handed regulatory approach. This created what has been described by Martin Wolf [65] as the problem of 'regulatory arbitrage' or what might also be described as a kind of 'race to the bottom.'

The problems created by the lack of (or minimal) regulation have been accentuated by the massive growth of the financial centre in London and the tendency that London's low levels of regulation have had to attract even more risky financial products, such the credit default swaps offered, for example, by AIG's London office.[66] On one estimate, the collapse of AIG is likely to cost US taxpayers up to $250bn.[67] In any event, the existence of regulatory arbitrage undermines efforts to build a global regulatory approach to what is probably one of the most globalised industries.

Shortly after being appointed as FSA Chairman, Lord Turner, promised a revolution in the FSAs regulatory practices with more bank like rules for hedge funds and further probing whether senior bankers are 'fit and proper' for their jobs.[68] This was to be more fully articulated with the publication in March 2009 of *The Turner Review* which signalled a new regulatory approach. The review into the regulatory response

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[63] This is something that has undercut the effectiveness of the UK's Tripartite authorities in dealing with the crisis, as the Treasury Committee of the House of Commons found in its inquiry into the collapse of Northern Rock. Similar criticisms have been made in the US by Timothy Geithner about the need to streamline the regulatory infrastructure: T Geithner, 'We can reduce risk in the financial system', *Financial Times*, (London 9 June 2008) 11; Also see: G Tett, et al, 'Multi-layered patchwork will be tough to unpick', *Financial Times*, (London 24 April 2008) 13.

[64] L Summers, L, 'Six principles for a new regulatory order', *The Financial Times*, (London 2 June 2008) 12.

[65] M Wolf, 'Seven habits that finance regulators must acquire', *The Financial Times*, (London 7 May 2008) 15. See further, M Wolf, *Fixing Global Finance – How to curb financial crises in the 21st century*, (New Haven, *Yale University Press*, 2009).

[66] A Clark, 'Mayfair's $600bn house of horrors', *The Guardian*, (London 7 March 2009) 37.

[67] Clark, ibid, quoting D Vickery, founder of the US research firm Gradient Analytics.

[68] J Hughes, 'FSA head promised regulation revolution', *Financial Times*, (London 26 February 2009) 1.

to the global banking crisis examined the causes of the crisis and went on to make a call for a systemic approach to regulation rather than an approach that merely focussed upon the risk profile of individual banks.[69]

The release of the Turner Review was also accompanied by an extraordinary refocussing of the FSAs new regulatory stance by its CEO, Hector Sants. Up until that time, the dominant ethos of light handed regulation had been accompanied by the idea of principles-based regulation, which sought to avoid an overly legalistic approach to regulation of the kind often associated with the US Sarbanes-Oxley Act. It should be emphasised that these were two different approaches to regulation. The principles-based approach had often been seen as reflecting a major difference between the regulatory approaches found in the USA and the UK. On 12 March 2009 Sants told an audience that the 'principles-based' approach had been flawed to the extent that it provided the sole basis for regulation. As he explained:

> Historically, the FSA characterised its approach as evidence-based, risk based and principles-based. We remain, and must remain, evidence- and risk-based but the phrase "principles-based" has, I think, been misunderstood. To suggest that we can operate on principles alone is illusory particularly because the policy making framework does not allow it...

Sants went on to call for the use of more intensive supervision of markets as:

> ...the limitations of a pure principles-based regime have to recognised. I continue to believe the majority of market participants are decent people; however, a principles-based approach does not work with individuals who have no principles.[70]

Sants was concerned that the FSA's credibility was not being taken seriously enough and warned that people '...should be very frightened of the FSA.'[71] This suggested the adoption of a more proactive regulatory stance, especially in regard to those persons who might be seen as acting in an unprincipled manner. This conceptualisation focussed attention upon the impact or effectiveness of legal regulation in regard to market actors.

It is interesting to contrast this approach with the conceptualisation of law developed by the American lawyer and judge Oliver Wendal Holmes who had used a similar metaphor or persons 'who have no principles' and he called this person the 'bad man'. In an influential argument Holmes defined law as a reflection of legal outcomes and not legal principles when he said:

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[69] Financial Services Authority, *The Turner Review – A regulatory response to the global banking crisis*, (London, Financial Services Authority, 2009) Chapter 2.
[70] H Sants, 'Delivering intensive supervision and credible deterrence', (Speech on 12 March 2009 at Reuters Newsmakers Event); available at: http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312_hs.shtml .
[71] Sants, ibid.

> 'If we take the view of...the bad man we shall find that he does not care two straws for the axioms of deductions, but that he does want to know what Massachusetts or English courts are likely to do in fact.'[72]

In other words, the real meaning of the law or of legal regulation is to be found in the law in action or in what courts and regulatory bodies do. If the regulation of financial markets is to be effective, Sants created a new sense of market credibility for the FSA by adopting a more outcomes based approach. It is too soon to know how effective this more assertive approach will be.[73]

## E. Improving the quality of regulation through enhanced corporate governance[74]

Another approach to enhancing the performance of financial institutions is to focus more effectively upon internal regulation within these firms; this might be called improved corporate governance. Corporate rescue and insolvency often arise where there are poor corporate governance standards, although this is not always so, as excellently governed companies may also fail for other reasons. Indeed, it could be argued that corporate insolvency and good corporate governance are often the opposite side of the same coin. Government responses to the current financial crisis have once again placed a focus upon corporate governance issues; especially where government has become a major stakeholder in high street banks and other entities that have been seeking and have received taxpayer support.

Many have argued that, as a significant stakeholder in these companies, government should place pressure on boards to make them act in a more socially responsible way. This has seen mixed responses from banks; some banks, like the government supported Royal Bank of Scotland, have in recent times been more receptive to these pressures, whilst others, such as Barclays, have sought to avoid receipt of public funds due to a fear of unwanted external pressures being placed upon them.

Early recognition of the central place of corporate governance in the ensuring financial stability of banks is to be found in an insightful 2001 study that emerged out of earlier Nordic financial crises of the early 1990s.[75] Taking a broader

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[72] OW Holmes, 'The Path of the Law', (1897) 10 Harvard Law Review 457. See further the discussion of this concept by W Twining, *Globalisation & Legal Theory*, (London, Butterworths, 2000) 108- 127.

[73] See further the FSA consultation paper on enforcement: FSA, *A regulatory response to the global banking crisis – Discussion Paper 09/2*, (London, Financial Services Authority, 2009).

[74] Some of the material in this and the next section of this paper is drawn from R Tomasic, 'Raising Corporate Governance Standards in Response to Corporate Rescue and Insolvency', (2009) 2 *Corporate Rescue and Insolvency* 5.

[75] This crisis followed a deregulation of financial market, an economic boom and a subsequent asset market bubble. The effect of the shock when this bubble collapsed was especially severe in Finland because of the collapse of the Soviet Union; see further J-C Rochet, *Why are there so many banking crises ? The politics and*

stakeholder approach to corporate governance Mayes, Halme and Liuksila argued that '[g]ood corporate governance is a key element in a satisfactory framework for financial supervision' and argue that 'good corporate governance as being a precondition for the successful operation of financial supervision.'[76] Mayes et al sought to map the features of good corporate governance that are likely to facilitate financial stability. In a somewhat prescient observation that is applicable to the current crisis, they noted that:

> The banking crises of recent decades have highlighted the importance of a well functioning legal, regulatory and supervisory framework in ex ante prevention of massive banking crises and the reduction of the resulting pain. The crises have clearly demonstrated that there can be serious negative outcomes in situations where the incentives influencing the behaviour of legislators, regulators, supervisors or banks (management, board, shareholders) are inappropriate.[77]

These Finnish authors also noted that focussing merely upon shareholder value causes biased decision-making so that management needs to 'internalise the welfare of all stakeholders, not just shareholders.'[78] They argued persuasively that a system of incentives-based rules and regulations is likely to create the most effective corporate governance arrangements.[79] These insights have been echoed in subsequent reports and studies. A recent report by the International Corporate Governance Network (ICGN) has, for example, found that poor corporate governance has been a significant cause of the current financial crisis as company boards 'failed to understand and manage risk and tolerated perverse incentives'.[80]

A 2009 report prepared by the OECD Steering Group on Corporate Governance also pointed to the close relationship between risk management and corporate governance; this report noted that recent research had found that 'risk governance was a key responsibility of bank boards' but that only one third of banks that had been involved in a study 'were confident that their strategy and planning functions had a detailed understanding of their companies' risk management methodology.'[81] The OECD Group concluded that the failure to more deeply embed risk management into the organisation was 'a clear corporate governance weakness.'[82] On top of this there is a need to have adequate numbers of board members with

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*policy of bank regulation*, (Princeton, Princeton University Press, 2008); J Tirole, *Financial Crises, liquidity and the International Monetary System*, (Princeton, Princeton University Press, 2002).

[76] DG Mayes, L Halme and A Liuksila, *Improving banking supervision*, (Houndmills, Palgrave, 2001) 91.

[77] Mayes, Halme and Liuksila, ibid at 93.

[78] Mayes, Halme and Liuksila, above at 93.

[79] Mayes, Halme and Liuksila, above at 95.

[80] quoted by P Skypala, 'Time to reward good corporate governance', *The Financial Times*, FTfm (London 17 November 2008) 6.

[81] OECD Steering Group on Corporate Governance, *Corporate Governance Lessons from the Financial Crisis*, (Paris, OECD, 2009) 17, referring to a 2008 study by Nestor Advisers.

[82] OECD ibid at 17.

some substantial financial competence; but, as the OECD Group noted, prior banking experience alone is not enough.[83] As the OECD Group concluded:

> ...the financial crisis can be to an extent attributed to failures and weaknesses in corporate governance arrangements. When they were put to a test, corporate governance routines did not serve their purpose to safeguard against excessive risk taking in a number of financial services companies [banks]. A number of weaknesses have been apparent. The risk management systems have failed in many cases due to corporate governance procedures rather than the inadequacy of computer models alone: information about exposures in a number of cases did not reach the board and even senior levels of management, while risk management was often activity rather than enterprise-based.[84]

It is clear that regulatory and legal efforts needs to be directed to ensuring that more effective systems of checks and balances are embedded within financial institutions to ensure that corporate governance is more meaningful than it has been in companies such as Northern Rock, HBOS and the Royal Bank of Scotland. This calls for more effective checks and balances within financial institutions so as to deal with over-bearing bank chief executives, ineffective non-executive directors, complacent shareholders and weak internal compliance and risk assessment mechanisms. This is important as external regulatory processes by bodies such as the FSA will inevitably only provide a partial solution to the problems encountered by financial institutions during the current financial crisis.

## F. Improving corporate governance in UK banks

In the UK, many of the above failures have been evident, for example, in the collapse of Northern Rock, and have caused controversy in other banks such as HBOS and RBS.[85] In this context, it is interesting to note that the UK City Minister, Lord Myners, has long championed better corporate governance on bank boards, although this has not had enormous success. Myners recently pointed to the complexity of introducing better corporate governance when he said:

> I think regulation is one aspect of enhancing confidence in financial institutions. Others include self-healing through improved governance, more effective boards, more considered analysis of incentive plans and the behaviours they will produce, and stronger capital. There isn't a single silver bullet here, regulation in itself without support of those other features will

[83] OECD above at 19-20.
[84] OECD above at 3.
[85] See further: House of Commons, Treasury Committee, *The run on the Rock: Fifth Report of Session 2007-08, Volume* 1, (London, The Stationary Office Limited, 2008); R Tomasic, 'Corporate rescue, governance and risk-taking in Northern Rock,' (2008) 29 *The Company Lawyer* 297; and (2008) 29 *The Company Lawyer* 330.

> lead to a potential frustration of innovation and probably higher cost of funding.[86]

Regrettably, progress has been slow in adopting some of the recommendations made by Myners, such as those found in his 2001 HM Treasury initiated report into the corporate governance roles of institutional investors; for example, efforts to urge institutional investors to be more proactive in regard to corporate governance matters have not been very successful.

We are currently witnessing a conflict between the prevailing ideology that promotes the superiority of unregulated markets (where 'principles-based' and 'light touch' forms of regulation have been favoured) and a more rigorous approach to handling issues of corporate governance within the banking sector and other financial institutions. How this conflict will be resolved will be vital for the future health of financial markets and of the corporate sector as a whole.

During the credit boom little regard seems to have been given to corporate governance issues encountered by banks and other leading financial institutions, despite the potential significance of better corporate governance to moderate reckless risk-taking. Thus, regardless of whether one adopts a director primacy model of the modern corporation or whether one leaves more room for stakeholder arguments to operate, duly elected boards should be free to manage the company as they alone see as being in the best interests of the company.

But, this does not preclude shareholders, whether they are individuals, institutional investors or government agencies, from making inputs through the normal institutional structures of the corporation, and being listened to seriously. For example, if a shareholder has a sufficient number of shares in a company, she should be able to use these rights to appoint directors to the board to work with the board in settling policies and making major policy decisions for the company. These two ideas can and do co-exist, although they conflict with assumptions built into a director primacy model that has dominated corporate governance in many companies.[87]

Regrettably, for a number of reasons, most institutions have been somewhat timid as investors in British companies (whether they are banks or other types of companies) and as a result company boards in the UK have felt free to manage companies without much concern for shareholder opinions. For example, we have seen this in regard to decisions of the board in Marks & Spencer to persist in retaining a chairman who was also its CEO, despite prevailing corporate governance principles which suggested that these key roles should be held by different persons; also, the

[86] Interview with A Davidson, 'Paul Myners, the City's middle man', *The Sunday Times*, (London 12 October 2008).

[87] See further, SM Bainbridge, *The New Corporate Governance in Theory and Practice*, (Oxford, Oxford University Press, 2008).

actions of the board of Barclays Bank to seek over £7 billion in equity capital directly from a sovereign wealth fund and a wealthy member of the Abu Dhabi royal family, rather than to acknowledge pre-emptive rights of its existing shareholders, might be seen as another illustration of boards being prepared to act without regard for the views (and the rights) of their shareholders. The Association of British Insurers was so concerned about this action that it issued a rare 'red top' alert to its members.[88]

This reflects a broader failure of corporate governance ideas to be properly embedded within the financial and corporate sectors in the United Kingdom. Despite the enactment of new statutory duties of directors which emphasise the importance of looking more broadly at stakeholder interests in the corporation, this pattern of conduct calls for a more thorough-going re-evaluation of judicial and regulatory attitudes to corporate governance. Whilst 'conditionality' was a key feature of efforts by the International Monetary Fund to rescue banks and other key institutions during the Asian Financial Crisis, and saw efforts to impose often quite onerous western market ideas, such as deregulation and modern business laws, upon Asian countries, the 'new conditionality' is more focussed upon issues of corporate social responsibility.[89]

However, it should also be noted that this is not a good time to be a shareholders of a bank, insurance company or a financial institution, especially in the context of nationalisations which effectively destroys shareholder equity.[90] One commentator has emphasised this point in the context of recent US government bank actions:

> By deciding essentially to wipe out shareholders in Fannie Mae and Freddie Mac and acting even more harshly to the shareholders of Lehman Brothers this weekend, Mr. Paulson has sent the clearest possible message to investors around the world: do not buy shares in any bank or insurance company that could, under any conceivable circumstances, run short of capital and need to ask for government help; if this happens, the shareholders will be obliterated and will not be allowed to participate in any potential gains should the bank later recover.[91]

Of course, we need look no further than the nationalization of Northern Rock for expressions of similar concern. This makes corporate governance problematic and suggests that the only shareholder that counts is government itself.

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[88] See further, K Burgess and PT Larsen, 'Barclays practises appeasement', *The Financial Times*, (London 19 November 2008) 21.

[89] See J Eaglesham and J Croft, 'Darling to set out bank rescue terms', *The Financial Times*, (London 18 November 2008) 2; and A Barker, 'Brown rethinks legislation priorities', *The Financial Times*, (London 1 December 2008) 2.

[90] See further the High Court decision in regard to former shareholders in Northern Rock: *R. (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWHC 227 and [2009] BCC 251. Also see the National Audit Office report into the nationalisation of Northern Rock: National Audit Office, *HM Treasury The nationalisation of Northern Rock*, (London, The Stationery Office, 2009).

[91] A Kaletsky, 'Hank Paulson has turned a drama into a crisis', *The Times*, (London 16 September 2008).

A succession of industry sponsored efforts to legitimise and improve prevailing corporate governance practices in the United Kingdom has seen the development of the Combined Code on Corporate Governance. This was based on recommendations drawn from industry initiated inquiries; these include the Cadbury Committee in 1992, the Greenbury Committee (1995), the Hampel Committee (1998) and the Turnbull Committee (1999). To a large degree these industry inspired efforts seem to have been taken because of the fear that government would intervene and introduce more stringent requirements if industry did not seek to set down some self regulatory rules.

During the 1990s the UK government was committed to the idea of industry self regulation and minimal government interference. The promise of corporate governance, as echoed in these privately sponsored committee reports, as a means of achieving greater corporate accountability has so far failed to eventuate.[92] Inquiries such as those undertaken by Cadbury were often stimulated by the occurrence of some significant market scandal; for example, the appointment of the Cadbury Committee followed the BCCI and Maxwell scandals. Scandals have long been the engines of corporate law reform. Sometimes, governments themselves are prompted to take the leading role as a result of such scandals, as we saw in the United States with the passage of the Sarbanes-Oxley Act following the collapse of Enron. But in the United Kingdom, governments have been slow to act unilaterally.

The establishment of the Financial Services Authority in 1997 (taking the place of the old Securities and Investments Board) was aimed at bringing together previous disparate regulatory bodies in the light of regulatory failures such as the collapse of Barings and BCCI in 1995 and pension mis-selling scandal. The collapse of Northern Rock produced an equally severe legislative response in the form of the Banking (Special Provisions) Act 2008. These rapid reactions have not developed well articulated and broadly-based corporate governance rules. Overall, there has been timidity in the United Kingdom upon the part of government, regulators and the courts in fashioning more intrusive and more effective governance rules for the finance sector, even if industry might be prepared to readily accommodate such higher standards.

The regulatory response to crises that have precipitated these modest legal changes has been tempered for a variety of reasons. One of these was the desire to protect and preserve London's position as a financial centre. For example, after BCCI collapsed, the former head of banking supervision at the Bank of England allegedly argued that 'that 'overzealous' regulation of the fraud-ridden bank BCCI and other

[92] For one explanation of this see further J Froud et al, *Financialization and Strategy*, (London, Routledge, 2006) 49-64.

banks would have damaged London's standing as a major financial centre'.[93] This concern has continued to be a prevailing factor in government policy responses, with massive negative consequences for the British taxpayer.

### G. The modest role of UK courts in enhancing corporate governance

It is interesting to briefly reflect upon the haphazard manner in which corporate governance rules have been developed by British courts since the mid-nineteenth century. If the collapse of Northern Rock plc stands out as a landmark in the current crisis, the collapse of another bank, Overend, Gurney & Co in 1866, also stands as a landmark of sorts. Like the collapse of Northern Rock, it too lead to a bank run, but unlike Northern Rock, the (then private) Bank of England decided not to organise a rescue of this once proud bank.[94] The failure of subsequent litigation against the directors of Overend, Gurney & Co was to cast a shadow over the way in which courts were to deal with issues of corporate governance and define the duties of directors.

In the famous 1925 decision of Romer J in *Re City Equitable*, his Honour traced principles regarding the duties of directors through earlier cases back to *Overend & Gurney Co v Gibb*.[95] Although the basis of those principles was already being questioned at that time, Romer J followed Lord McNaughten's approach in *Dovey v Cory*[96], namely, that it was not for the courts, but for Parliament, to lay down more precise rules for directors in the conduct of their business affairs. This judicial self restraint is curious, especially when leading business commentators in the 1870s had urged that higher standards would actually be appropriate. It was clearly not seen as acceptable for the courts to take judicial notice of changing commercial attitudes in this area. This timidity effectively froze the development of this area of law; in other countries (e.g. the USA and Australia) the courts have been more active in developing the law to align it with community standards.

As is well known, Romer J reviewed the earlier cases and noted that the authorities did not provide clear answers as to the degree of care and skill expected of a director : 'It has been laid down that so long as a director acts honestly he cannot be made responsible for damages unless guilty of gross or culpable negligence in a business sense...' His Honour went on to state some well known 'general propositions' derived from the reported cases:

> (1) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience... [and] (2) A director is not bound to give

[93] J Kollowe, 'Supervisory chief defends Bank over BCCI collapse', *The Independent*, (London 27 September 2005).
[94] See generally, G Elliott, *The Mystery of Overend & Gurney*, (London, Methuen 2006).
[95] [1872] LR 5 HL 480, 486.
[96] [1901] AC 477.

> continuous attention to the affairs of the company. His duties are of an intermittent nature...

Romer J added:

> Whether or not the directors exceeded the powers entrusted to them, or whether they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that <u>no man with an ordinary degree of prudence acting on their own behalf</u> would have entered into such a transaction as they entered into.. (emphasis added)[97]

This decision set a fairly low standard of care for directors and clearly raised some interesting questions of proof. But should directors of banks be treated like this or should we expect a higher standard from them? The case law has not developed greatly in the United Kingdom since this old decision, although there have been some suggestions that this older standard is wanting. However, by way of contrast, it is interesting to refer to the higher standard that has been adopted in the United States where the business judgement rule is dominant. In the 1981 New Jersey case of *Francis v United Jersey Bank* it was said of directors by Pollock J that:

> The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect…Directorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies…A director is not an ornament, but an essential component of corporate governance… [98]

This approach was adopted by the New South Wales Court of Appeal in *Daniels v Anderson*[99] and in the course of adopting a higher and more objective standard, the court departed from the subjective standard set by Romer J in *Re City Equi*table. Some British commentators have suggested UK law is currently moving in the direction of adopting this higher standard.[100]

The slowness of UK Chancery courts in developing this area of law is surprising, especially if one notes that as early as 1873, Walter Bagehot, a leading authority on British banking and financial markets, had urged a higher standard than the courts in cases such as re City Equitable have adopted. In some way, Bagehot can be compared with the position of Sir Adrian Cadbury in more recent times.

In his classic work on banking, *Lombard Street – A Description of the Money Market*, first published in 1873, Walter Bagehot reflected upon what had happened in the

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[97] [1925] Ch 407
[98] 432 A 2d 814 (1981)
[99] (1995) 16 ACSR 607.
[100] See discussion in P Davies, *Principles of Modern Company Law*, 8th Edition, (London, Thomson, 2008) 490-494.

management of Overend, Gurney & Co and observed that '... the business of a great bank requires a great deal of ability, and an even rarer degree of trained and sober judgment.' This suggests that much greater skills were required to manage larger banking institutions than smaller one. Bagehot went on to argue that:

> Till now private banks have been small; small as we now reckon banks. For their exigencies a moderate degree of ability and an anxious caution will suffice. But if the size of the banks is augmented and greater ability is required, the constant difficulty of an hereditary government will begin to be felt. (emphasis added)[101]

The difficulty Bagehot was referring to arose at the time that Overend, Gurney & Co was under the control of family elders that had built this company; subsequently, younger members of the family had risked the company by engaging in questionable ventures. In some ways this reminds us of UK banks that have been building societies and have since become banks. In the case of Northern Rock, for example, the board's skills base changed little from the time when it was a building society to when it became a FTSE 100 company. Bagehot had warned against this over 130 years earlier, but this seems to have had little effect on corporate governance practices, although Bagehot is still often cited for his advice on best practice in bank risk management.

As Professor Paul Davies has also argued, the best practice guidelines that can be found in the UK Combined Code on Corporate Governance and in industry reports, such as the Higgs review, could also serve as a similar expression of appropriate business standards for directors, and that courts could take judicial notice of these standards in developing the duties of directors. Indeed, as Davies also notes, courts seem to have begun to do this in some areas, such as in regard to the disqualification of directors, as is evident in the 2000 decision in *Re Barings Plc (No 5)*.[102] Whether judges will do this in duty of care cases under the Companies Act remains unclear.

Romer J was probably not referred by counsel to the relevant statements by Walter Bagehot when he decided *Re City Equitable*. He was obviously resistant to straying too far from previous cases and, as we have seen, in any event saw innovation as a matter for Parliament. Subsequent cases have begun to suggest that a more objective standard of care should be applied to directors, as we saw in the 1989 decision Hoffman J in *Dorchester Finance Co v Stebbing*.[103]

Hoffman J in his judgment drew upon the more objective standards applicable to directors of companies facing insolvency found in s 214(4) of the *Insolvency Act* 1984.

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[101] W Bagehot, Lombard *Street – A description of the money mark*et, (New York, John Wiley & Sons , 1873 and 1999) 274.
[102] [2000] 1 BCLC 523; also see Davies, above, 492-4.
[103] [1989] BCLC 498.

In his 1991 decision in *Norman v Theodore Goddard*[104], Hoffman J found that the objective standard in s 214 correctly reflected the common law duty of directors. A similar view was expressed by Hoffman J in *Re D'Jan of London.* [105] Professor Andrew Keay has noted that Hoffman's decisions in reality 'did not depart significantly from that put forward by Romer J in re City Equitable.'[106] Keay went on to observe that UK judicial decisions in this area during the 1980s and 1990s 'saw a change in the approach of the courts rather than an essential change in the law.'[107] Chancery courts in the UK have been reluctant to interfere in decisions made by directors, tending to see them as akin to trustees.[108] In this context, Keay has also recently observed that UK judges 'have consistently refrained from reviewing business judgments made by directors.'[109]

This standard has now been repeated in s 174 of the Companies Act 2006, although s 170(4) presents a difficulty in developing a more objective standard as it states that the 'general duties shall be interpreted and applied in the same way as common law or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general rules.' Some, such as Davies, have suggested that courts should be cautious about using the older common law authorities given legal developments that have occurred in other parts of the Commonwealth.[110]

However, the government appointed management of Northern Rock plc recently announced that, after some inquiry, they would not take legal action again the bank's former directors. Thus, the company announced that:

> A review of the conduct of the previous board in respect of funding and liquidity has been undertaken with the assistance of external advisers, (lawyers) Freshfields and (accountants) KPMG Forensic. The board has concluded that there are insufficient grounds to proceed with any legal action for negligence against the former directors, and has no intention of bringing any such action. The board has also completed a similar review in respect of the company's auditors and has determined that no action is warranted.[111]

[104] [1991] BCLC 1028.
[105] [1994] 1 BCLC 561.
[106] A Keay, *Directors' Duties*, (Bristol, Jordans Publishing Limited, 2009) 184.
[107] Keay, ibid 184-188
[108] See generally, D Arsalidou, *The impact of modern influences on the traditional duties of care, skill and diligence of company directors*, (Leiden, Kluwer Law International, 2001).
[109] Keay, above at 213.
[110] Davies, above 491.
[111] As quoted in 'No legal action against Northern Rock bosses', *The Independent*, (London 14 October 2008) available at http://www.independent.co.uk/news/business/news/no-legal-action-against-northern-rock-bosses-960607.html .

This was presumably based upon legal advice from their lawyers as to the limited state of UK law in this regard. Essentially, in so far as the decided cases are concerned, the common law has not moved much beyond the standard set out in *Re City Equitable*. It is too early to say whether the new more objective language of the Companies Act 2006, which came into effect after the events that led to the collapse of Northern Rock, would produce a different outcome. Uncertainty remains on the question of whether the courts will seek to modernise corporate law doctrine applying to directors duties in the light of developments in other jurisdictions and the passage of new Companies legislation in the UK.

### H. Some Conclusions

This chapter has sought to sketch the strands of the debate that has merged from the financial crisis with a view to seeing the range of alternative approaches that will need to be pursued as we look beyond 'light touch' regulation of banks and financial institutions in the United Kingdom. This is not the place to rehearse the detailed features of more appropriate corporate governance arrangements, based on what we know of the key determinants of good corporate governance, but the chapter has instead sought to identify some of the major issues which need to be addressed as this debate develops.

Unfortunately, we are still too close to the pain and suffering that the financial crisis has delivered to be able to develop comprehensive solutions. However, the groundwork needs to be laid for building new regulatory structures and governance strategies over the coming years. These will inevitably have to be international ones. There is of course a danger of 'knee-jerk' reactions, but on the other hand, there is no better time to seek to fashion new regulatory arrangements than in the aftermath of a crisis as minds remain open to consideration of reform issues.

What is clear is that governments will need to be more comprehensively involved and that bank boards will need to consult their various stakeholders in a more effective way. Whilst irrational exuberance and ideology may have stood in the way of reform efforts during the bubble that preceded the current crisis, there is clearly more room for assessment of how the diverse range of disciplines and ideas that bear upon understanding our current predicant are utilised in fashioning new solutions. These need to be able to move more quickly and effectively in dealing with then unwanted results of greed, hubris and plain dishonesty. It is clear that our current systems have not delivered satisfactory outcomes in this regard.