



# THE REGULATION OF PROFESSIONALS. TWO CONFLICTING PERSPECTIVES

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## Abstract

The central thesis is that professionals and state regulators have incompatible perspectives, both on their professional practice and on the role of (self-) regulation. Regulators have a top-down perspective (with the state at the top) and focus on the product of the professions. Quantitative measurable output is what counts primarily, and regulation is an instrument to improve that output. Professionals have a centre-periphery perspective (with the profession at the centre) and focus on the professional practice. The quality of professional work is what we should focus on primarily and the standards implicit in the profession are what should guide us here. External regulation is usually a nuisance or a burden.

These perspectives clash, which may explain the current dissatisfaction among professionals. I discuss two partly successful strategies to mitigate this conflict. The first is to construct a buffer or transformer between the two perspectives, consisting of an interstitial managerial layer. The second is to try to reframe the opposition.

## Keywords

Professions, top-down regulation, command-control, managerialization, output-criteria, professional autonomy, aspirations, self-regulation, reframing, perspectivism

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### A. UNDERSTANDING THE CONFLICT BETWEEN THE STATE AND THE PROFESSIONS

Dissatisfaction among professionals seems to be widespread phenomenon in Western countries.<sup>1</sup> Especially in health care, education and research, professionals complain that they are overburdened and cannot do their work properly. Their complaints are often directed against the regulatory state. The state continuously showers them with new regulations, protocols, administrative accounting obligations and extensive control mechanisms. Additional burdens follow from radical reform projects that have not been adequately tested or discussed and therefore usually do more harm than good.

This dissatisfaction is a complex phenomenon and various plausible explanations have been suggested. The increasing influence of market mechanisms is an important factor.<sup>2</sup> Attorneys and notaries are more commercially oriented than they were in the past. Universities are strongly dependent on contract research and competition for scarce government funds. In the Netherlands and various other countries, the public health care system increasingly depends on market mechanisms for allocation of scarce resources. Some professionals may flourish in such a competitive context, but others feel that it prevents them from doing the things they are really good at.

In this paper, I will focus on another explanation: the alienation between state regulators and professionals.<sup>3</sup> My thesis is that professionals and regulators have incompatible perspectives, both on their professional practice and on the role of

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<sup>1</sup> With some variation those complaints may be found in many Western societies, both in the popular media and in the broader intellectual and academic debate. For the Netherlands, see G van den Brink, T Jansen, and D Pessers (eds), *Beroepszeer: Waarom Nederland niet goed werkt*, (Professional ache: Why the Netherlands does not work well) (Amsterdam, Boom, 2005); J Kole and D de Ruyter (eds), *Werkzame idealen: Ethische reflectie op professionaliteit* (Workable ideals: ethical reflections on professionalism), (Assen, Van Gorcum, 2007). For an analysis of similar tendencies and countertendencies in the USA, see E Freidson, *Professionalism Reborn: Theory, Prophecy, and Policy* (Chicago, University of Chicago Press, 1994); in the UK, see eg C Prichard and H Willmott, "Just How Managed is the McUniversity?" (1997) 18 *Organization Studies*, 287-316.

<sup>2</sup> See esp E Freidson, *Professionalism: The Third Logic*, (Chicago, University of Chicago Press, 2001) for a discussion on the tensions between the logics of the market, of bureaucracy and of professionalism. My focus is here on the tensions between professionalism and the type of bureaucracy that comes with the regulatory state.

<sup>3</sup> I will use 'regulators' as an umbrella term for all actors involved in various types of regulation at the state level. This includes politicians, both in the government and in parliament, and other state officials such as department civil servants. Regulation may take various forms: formal statutes, but also detailed guidelines produced at a relatively low level in the departmental hierarchy.

regulation within this practice.<sup>4</sup> Regulators have a top-down perspective (with the state at the top) and focus on the product of the professions. From this point of view, quantitative measurable output is what counts primarily, and regulation is an instrument to improve that output. Professionals, on the other hand, have a centre-periphery perspective (with the profession at the centre) and focus on the professional practice, on their activities. From their point of view, the quality of professional work is what we should focus on primarily and the standards implicit in the profession are what should guide us here. External regulation is superfluous, at best, but usually a nuisance or a burden.

These perspectives clash. This clash is not only responsible for the alienation between regulators and professionals to a considerable extent, but also for a dynamics that tends towards a deepening of the conflict. I will discuss two possible strategies to mitigate this conflict. A first strategy is to construct a buffer, or transformer, between the two perspectives, consisting of an interstitial managerial layer. If it functions perfectly, this managerial layer will help to bridge or dampen the conflict. Yet, it always runs the risk of becoming part of the problem rather than part of the solution. A second strategy is to try to reframe the opposition and construct an integrated perspective. I will argue that this reframing strategy can only be partly successful.

## B. CONFLICTING PERSPECTIVES

The idea that there may be radically different perspectives between the state and its citizens has been developed by various authors. I combine four theories.<sup>5</sup> They are similar in some respects, but they also emphasize different aspects of the conflict. According to James Scott, the state 'sees' in a different way and focuses on a different type of knowledge than those who participate in complex practices.<sup>6</sup> David Schön and Donald Rein, in turn, argue that intractable policy controversies are the result of conflicts between 'frames' or 'underlying structures of belief, perception and appreciation'.<sup>7</sup> In a similar vein, Willem Witteveen suggests that there is a clash of 'perspectives' between the legislator and societal sectors. In the context of

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<sup>4</sup> I will use '(state) regulation' as an umbrella term to refer to rules, protocols and accounting and control mechanisms which find their source in state institutions. This includes legislation.

<sup>5</sup> Of course, these theories in turn are inspired by other authors, such as Kuhn, Feyerabend, Rorty and Nussbaum.

<sup>6</sup> J C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, (New Haven, Yale University Press, 1998).

<sup>7</sup> D A Schön and M Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies* (New York, Basic Books, 1994), 23.

regulation, he claims, we should rephrase the familiar distinction between bottom-up versus top-down perspective in terms of centre-periphery versus top-down perspectives.<sup>8</sup> Finally, I have suggested elsewhere that there are two different 'models' to understand phenomena such as law and morality: a practice model and a product model.<sup>9</sup>

In this article, I will use 'perspective' as the more general term. A perspective is a way of seeing and constructing reality. It is not merely a passive perception; we also act upon a perspective and through our actions make it more true. The conflict is thus not merely a cognitive conflict, but also a practical conflict. As different actors proceed on the basis of different perspectives, they will not be able to fully understand each other. Moreover, they may regard each other's actions as misguided, or even morally wrong, and as thwarting their own actions.

The analysis of the two perspectives is ideal typical.<sup>10</sup> Usually the perspectives of actors are not pure. As they are confronted with other actors with different perspectives, they learn to understand them and even incorporate them – to some extent. Emerging types of alternative regulation may, for example, be seen as partly successful attempts to reframe the conflicting perspectives and construct a common one. In applying or testing such an ideal-typical analysis, we need to have an eye for variation, of course. National traditions, institutional contexts and specific tasks influence the professions. It is unlikely that an analysis of private medical practitioners will be identical to one of state school teachers in a large bureaucratic system. Moreover, I focus only on two actors in this article, whereas in reality other actors, such as patients, students, trade unions and consumer organizations also play a role – both in deepening and mitigating the tensions between state and professionals. Nevertheless, such an ideal-typical sketch may help us to understand the underlying tensions, better.

### C. CONFLICTING PERSPECTIVES ON THE PROFESSIONS

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<sup>8</sup> W J Witteveen, "Alternatieve reguleren: de vele gezichten van de wetgever" (Alternative regulation: the many faces of the legislator), in I Giesen, J L de Wijkerslooth, and W J Witteveen, *Alternatieve regelgeving* (Deventer, Kluwer, 2007), 4.

<sup>9</sup> W van der Burg, "Essentially Ambiguous Concepts and the Fuller-Hart-Dworkin Debate" (2009) 95 *Archiv für Rechts- und Sozialphilosophie*, 305-26.

<sup>10</sup> It is also simplifying in the sense that I start from an uncritical self-image of the regulatory state and of the professionals. These self-images tend to be overly positive about the quality of the state's interventions and of the professional practice, respectively.

The modern regulatory state has good reasons to seek control over the professions.<sup>11</sup> The intensity of control may be a point of controversy, but not that there should be some control. As the histories of the medical and legal professions have shown, there are serious risks of monopolistic practices, paternalism, inertia or inadequate protection of consumer interests. Moreover, most of the professions depend directly or indirectly on state financing (eg, the teaching professions) or provide important goods that require substantial sums of money both from the public and from the state (eg, if they work in a partly privatized health care system). The legal professions are only partly financed by the state. Here the dominant state interest lies in whether the law is administered adequately and good services are provided to all citizens. The state has an interest, therefore, in ensuring a good quality of the professionals' work at a reasonable cost. Finally, the democratic state may legitimately pursue political agendas. As the professions fulfil a central role in modern societies, the effective implementation of these agendas usually requires active collaboration of professionals.

However, state control of the professions is difficult to arrange, as the state is an outsider. Professionals have an internal perspective on their practice, whereas the state can only have an external perspective. For the most part, professional activities can only be completely understood by an insider, because they require practical experience and are highly contextual. They do not lend themselves readily to generalization: they are complex, highly variable, contextual, and illegible for the outsider.

James C. Scott provides an illuminating analysis of the state's perspective on similar illegible practices in his book *Seeing Like a State*.<sup>12</sup> To be able to steer and control a complex practice, the state has to simplify, standardize, measure, count and aggregate the activities that go on within it. It has to make the practice legible. Therefore, it is easier for the state to focus on clear-cut minimum rules and the products the practice delivers and to judge these in terms of quantitative criteria.

There are at least four important differences between the perspectives of the regulatory state and the professionals. The state focuses on minimum rules rather than on aspirations and values. It is interested in the output of the profession rather than in the practice itself. As a consequence of these two characteristics, the state evaluates in terms of quantitative rather than qualitative criteria. Finally, it relies on general, theoretical knowledge of the profession, whereas the professional works with local, practical knowledge. These four characteristics are not distinct but hang together. They are connected with the more basic difference between the state's external and the professional's internal perspective.

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<sup>11</sup> Cf W de Been, "Rules and Aspirations. Self-Regulation and the Professions" (manuscript).

<sup>12</sup> Scott, *Seeing Like a State*, *supra*, n 6, 77 and 80.

### 1. Aspirations versus Minimum Rules

In the literature on professions, a frequent observation is that professions have an aspirational dimension.<sup>13</sup> They are inherently oriented towards ideals, and especially towards aspects of the common good, such as the ideal of good education, of good health care or of fair administration of justice. According to some authors, this is an essential characteristic of professions (which does not imply, however, that professionals are only oriented towards ideals; professions have other dimensions as well). As a consequence, professionals are interested in how much they succeed in delivering those goods and realising those ideals.

For the state, excellence is not easy to evaluate or measure objectively. There are many ways in which excellence can be achieved or approximated and these are often incommensurable. As a consequence, there is a natural tendency to focus on averages or even minimum standards that can be compared more readily. The advantage of minimum standards, from an outsider's perspective, is that they can most easily be formulated in terms of strict rules or measurable output criteria.

### 2. Practice versus Product

The professional is immersed in her professional practice, in her daily work of seeing patients, teaching students or advising clients. Her job should primarily be seen in terms of activities, and not in terms of output. This is different from purely commercial jobs, where often the output is what counts primarily: how many cars did we sell today?<sup>14</sup> The activities of professionals are not so easily measured, whether or not they think in terms of billable hours.<sup>15</sup> The output matters, of course, but it is not the sole – let alone primary – criterion of good practice, and it usually matters more in a qualitative than in a quantitative way. Professional practice is oriented towards certain ideals of excellence rather than to measurable output criteria. These standards of excellence are embodied in the actions as much as in the

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<sup>13</sup> For the relation between professionals and ideals see, eg A T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA, Harvard University Press, 1993); W van der Burg, "The Morality of Aspiration: A Neglected Dimension of Law and Morality", in W J Witteveen and W van der Burg (eds), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam, Amsterdam University Press, 1999), 169-92; M W Martin, *Meaningful Work: Rethinking Professional Ethics* (New York and Oxford, Oxford University Press, 2000); J Kole, "Professionele idealen vanuit ethisch perspectief. Inleiding" (Professional ideals from an ethical perspective. Introduction), in Kole and de Ruyter, *Werkzame idealen*, *supra*, n 1, 1-10.

<sup>14</sup> At least in a company that is short-sightedly obsessed (as the recent financial crisis has shown, this may be promoted by short-term oriented bonus systems for management and staff). In the long run, other aspects, such as customer satisfaction, reputation and solvability are also important.

<sup>15</sup> According to some critics of the legal profession, the focus on billable hours is a sign of decay in the profession. Cf M A Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (Cambridge, MA, Harvard University Press, 1994), 32.

results of those actions. Being a good professional is primarily learnt by example, by hands-on experience under the supervision of an experienced colleague. Therefore professionals have a practice orientation rather than a product orientation.

In order to be able to regulate and control professionals the state needs objective and general standards to evaluate whether they are functioning adequately.<sup>16</sup> Vague and complex standards such as good care or aspirational standards – which may be central to the professional's understanding of her work – are of no use in the state's perspective, because they cannot be measured. There are two possible approaches for the state to set more objective standards. One approach focuses on standards for behaviour; the other on standards for output. Although the first approach fits better with the way professionals themselves perceive their practice, it has a serious drawback from the perspective of the state. Most of the activities of professionals are either legally shielded by rules of professional autonomy and confidentiality or practically shielded by the privacy of the home or the consulting room. In order to get insight into the degree to which professionals conform to these standards, the state must rely on self-reporting, which is usually not very effective.

The state, as an outsider to the practice, is therefore driven towards output-criteria. Regulators need clear criteria to evaluate whether their intervention has been successful. Output criteria measure more straightforwardly whether a profession functions adequately and whether government regulation has the desired effect.<sup>17</sup> For example, we can measure the number of international publications of a researcher, the average exam score of a school, the success rate of in vitro fertilization, or the average duration of a hospital stay. These are all objective and measurable data for the assessment of professional work. Whether they are the *right* ones is a question that usually generates much controversy when output criteria are introduced. However, there seem to be few alternatives, and once it has been accepted that we need objective criteria to assess professional activity, these controversies tend to cool down quickly. Hence, the state's view is characterized by a product orientation.<sup>18</sup>

### **3. Practical, Local Knowledge versus Theoretical, General Knowledge**

Professional knowledge is often practical, local and implicit. An expression like 'the clinical eye' refers to this partly intuitive, experience-based type of knowledge. Scott

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<sup>16</sup> Cf Scott, *Seeing Like a State*, *supra*, n 6. In the Netherlands, this one-sided focus on measurability may be seen in reports by the Dutch auditing board ('Rekenkamer') which frequently criticize government interventions because their effects cannot be objectively measured.

<sup>17</sup> Cf Scott, *Seeing Like a State*, *supra*, n 6, 80 on how the simplifying state focuses on documentary, static, aggregate and standardized facts.

<sup>18</sup> Van der Burg, "Essentially Ambiguous Concepts and the Fuller-Hart-Dworkin Debate", *supra*, n 9.

calls it a sixth sense that comes with long practice.<sup>19</sup> Even those professions that require academic training, such as medicine and law, depend largely on practical training involving real-life examples and engaging in the activity itself. Scott refers to these practical skills and practical knowledge as *metis*.<sup>20</sup> This professional wisdom is not easy to grasp in general theoretical insights, because it is so particularistic and contextual.<sup>21</sup>

For the distant state, this type of concrete, contextual knowledge is of little use. Policy design and regulation require more general, theoretical insights that are abstracted from the particular and lend themselves more easily to general application on a large scale. The state needs general, theoretical knowledge, like epidemiological data, rather than particular data about individual patients.

#### 4. Qualitative versus Quantitative Standards

In the qualitative perspective of a professional focused on the individual case, quantitative criteria seem out of place.<sup>22</sup> A teacher does not focus on the percentage of his class that graduates, but on whether he has been able to get the maximum out of each individual student. Neither does a good researcher find satisfaction in the sheer number of refereed publications, but in the joy of doing research, solving problems, and gaining the recognition of his peers for the quality of his work. A good doctor knows that much of her work cannot be measured quantitatively, as it is about giving each patient her due. Moreover, as professions are ideal oriented, they will often – without ground for blame – fall short of the ideal standard. A patient may die despite the perfect treatment; and students may fail for the exam despite the high quality of the teaching and tutoring. Much research does not lead to the breakthrough hoped for and leads only to minor increases in insight – even if it has been performed adequately. For these reasons, most professionals have an innate resistance against being evaluated on the basis of quantitative output-criteria. It is not that output is not important – of course, it is – but that output criteria have the wrong focus.

For an outsider, the quality of a complex practice is difficult to evaluate. There are attempts to do so, eg, in the assessment of academic institutions by committees of peers, but these are exceptions. Moreover, they are usually very expensive and cumbersome. For the state there seems no other alternative than to try and formulate

<sup>19</sup> Scott, *Seeing Like a State*, supra, n 6, 328.

<sup>20</sup> *Ibid.*, 313.

<sup>21</sup> Scott, *Seeing Like a State*, supra, n 6, opposes *metis* to *techne* and *episteme*. G Ryle, *The Concept of Mind* (with an Introduction by D C Dennett) (Chicago, University of Chicago Press, 2002, orig. 1949), Chapter 2 makes a similar distinction between “knowing how” and “knowing that”.

<sup>22</sup> A different explanation for the resistance against quantitative standards among some professionals, such as lawyers and psychotherapists, may be that, in the Dutch educational system, many of the students choosing those fields have always shied away from mathematics and similar disciplines.

quantitative indicators of the quality of professional practice. Once everyone is accustomed to those indicators, however, they tend to get a life of their own. Rather than merely being treated as rough indicators of the things that really matter, they become the ends of the practice itself. Even if quantitative standards were introduced as mere indicators of quality, they tend to become standards in their own right. A university or faculty then demonstrates the quality of its research with aggregate criteria, eg, the numbers of publications in A-journals, citations, or impact scores.

#### D. CONFLICTING PERSPECTIVES ON REGULATION

As the state and the professionals disagree on what the profession is about, it is no surprise that they also often disagree on whether the profession is functioning adequately. If the state focuses on external measurable output criteria and the profession focuses on the quality of its practice, a gap may be expected. Even if, in its own terms, the profession functions well, it would be a mere coincidence if this would lead to meeting the output criteria set by the state fully. This may lead to a situation where the state sees a need for more intensive regulation and control, whereas the profession hardly perceives a problem.

More importantly, the state and the professions have different fundamental perspectives on regulation. In most political theories, the state legislature is the democratically legitimate sovereign that should be obeyed by its subjects. In the simple positivist and instrumentalist version, laws are the commands of the sovereign to control the behaviour of its citizens. This implies a top-down model of regulation. In the perspective of the profession, however, the state often lacks legitimacy when it regulates the professional field, because it lacks adequate knowledge. It is an outsider. The fact that it focuses on the wrong standards for evaluation (quantitative output criteria), moreover, will only reinforce this perception of the state as an incompetent and therefore illegitimate outsider. What is more, the state is an abstract entity far away, whereas the patients, clients or students are concrete and near by. Therefore, it is natural for a professional not to take state regulation too seriously and to develop an evasive attitude towards it. This analysis, suggests three further aspects in which the perspectives of state and profession differ.

### 1. Centre-Periphery or Top-Down

The top-down perspective is the usual and probably the most dominant perspective among regulators.<sup>23</sup> It pictures society as a hierarchical organisation. Government and parliament are at the top of the chain of command (they derive their legitimacy from democratic elections), various subservient regulatory agencies are intermediary regulators and the citizens are expected to follow the rules.

In the social sciences, the usual opposite of top down is bottom up. In a hierarchical organisation or in a dictatorial state this may be a valid opposition, in as far as there is an effective command-control structure. However, it is inadequate for the relation between the democratic state and its citizens, and positively misleading for the relation between the state and the largely autonomous professions or professional sectors. Professionals do not regard themselves as mere subjects following orders from a legislative sovereign. They have a strong claim to autonomy, and often regard state regulators as inadequately informed outsiders who have no claim to authority. The relation between professionals and the regulatory state may look more like the medieval feudal relation between a powerful count and a distant emperor with little more than a nominal claim to sovereignty.

As a result, from the perspective of the professionals themselves, we need a different characterization of the relation between the largely autonomous professionals and the regulatory state. Willem Witteveen has suggested that we rephrase this relation in terms of centre versus periphery.<sup>24</sup> The professional's perspective focuses on his own practice; that is the centre for him. There are a number of expanding circles from this centre; clients, students or patients are very close to the centre; colleagues and institutions like schools, hospitals and law firms are slightly further away; but the state is only at the periphery. It may provide funds and set certain rules, but these are merely external conditions.

### 2. Burden or Instrument

This difference between who is at the top or in the centre is reflected in the attitude towards state regulation. Usually a top-down perspective is combined with an instrumentalist attitude: law is an instrument in the hands of regulators to guide and control the behaviour of citizens. For the autonomous professional, this may seem

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<sup>23</sup> This is an ideal typical sketch and, therefore, I will neglect the sophisticated theories which incorporate more horizontal views. Even if they are taken seriously by actual legislators in some fields they are never the only view on legislation; the simple top-down command control view is always lingering in the background as well, eg, if populist politicians demand stricter laws and tougher enforcement.

<sup>24</sup> Witteveen, "Alternatieve regulering: de vele gezichten van de wetgever", *supra*, n 8, 4 and 22. Witteveen's claim is a more general one about individuals in semi-autonomous fields and practices, but it may easily be applied to professionals.

preposterous. Who do these incompetent people in the capital think they are – looking for instruments to guide and control the behaviour of expert professionals?

The typical form of intervention in the regulatory state is a statute. In the naïve instrumentalist perspective, passing a statute will suffice to change professional practice. Of course, it does not, so the sophisticated instrumentalist acknowledges that we also need detailed guidelines and auditing and control mechanisms.<sup>25</sup> These sophisticated instruments may help the practice to conform more adequately to the rules. Rules are meant to improve the quality of the practice in terms of output criteria. We may therefore summarize the instrumental approach as the view that regulation is an instrument to improve the quantitative output (or to lower the costs required to realize that output).

In the perspective of professionals, external regulation has an auxiliary role, at best, but usually it is considered a nuisance or even an obstacle to doing one's work properly. The good, experienced professional does not need rules as she knows perfectly well what to do. Rules and mechanisms for auditing and supervision, in this view, primarily have a function for the weaker brothers and sisters and for the inexperienced. Rules may help them to guide their behaviour. But as soon as a professional reaches full competence and has internalized the mores of the profession, she does not need them anymore. Practical experience, the 'clinical eye', will sometimes even require the professional not to go by the book. If state regulation requires strict observation, this may actually impede good practice. When state regulation is combined with auditing and supervision procedures, the associated administrative chores may prove an additional nuisance for the professional.

### **3. Ignore-Evade or Command-Control**

The command-control approach is characteristic of the regulatory state: the sovereign legislator (or its subordinate regulators) formulates rules which the subjects are expected to follow. When citizens do not fully conform, the natural reaction from the top-down perspective is to formulate new, perhaps more specific rules and tighten the supervision and control.

As was already suggested above, this is a perspective that professionals often cannot accept. As the state is regarded as an entity without practical authority and quite possibly with a controversial ideological agenda, the natural reaction of professionals is to ignore the rules and evade them when possible. Strategic

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<sup>25</sup> In fact, there are many more versions of sophisticated instrumentalism that we may encounter in modern regulatory theory and practice. My ideal typical sketch cannot do justice to them all. For an overview see Witteveen, "Alternatieve regulering: de vele gezichten van de wetgever", *supra*, n 8. For a critical analysis of the rise of auditing mechanisms (even referred to as the "auditing explosion"), see M Power, *The Audit Society: Rituals of Verification* (Oxford University Press, 1997).

behaviour towards state regulation is the result. Professionals do not internalize legal rules as guidelines, but regard them as external conditions. Output criteria usually do not intrinsically motivate professionals as something to aspire to – once they have been met (or at least if the presentation of the output can be manipulated so that it seems that they are met), professionals can do their work according to their own professional standards. State rules may narrow the playing field (when they are implemented effectively) but usually they are regarded as mere obstacles that – in the interest of good professional practice - have to be avoided or circumvented.

#### E. CONFLICTING PERSPECTIVES ON SELF-REGULATION

Professions usually favour self-regulation to the extent that it prescribes rules and protocols that do justice to their practical needs and that can be considered as mere rules of thumb. If these rules and protocols have been formulated by experienced colleagues, they may be expected to match the practical wisdom of the profession. Auditing and control mechanisms which are devised and executed by fellow-professionals are no serious threat or burden to good professional practice, and peer review may even improve it. The burdens of self-regulation will therefore be minimal.

The state may also favour self-regulation, but primarily for strategic reasons.<sup>26</sup> As it is developed and implemented by the profession, it does not require state resources. Moreover, there may be more support for self-regulation among members of the profession (but not necessarily among other stakeholders) than there is for state regulation. It may be expected that professionals will largely cooperate voluntarily and follow the rules set by their colleagues. As professional behaviour is often legally and practically shielded from external control (take, for example, the dark numbers of euthanasia and related practices) control mechanisms must rely heavily on self-reporting and internal control by the profession. Self-regulation can therefore be an effective form of regulation and control.

In an instrumentalist-state perspective, however, self-regulation should be legally conditioned in three respects.<sup>27</sup> First, self-regulatory autonomy should be

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<sup>26</sup> Cf. Witteveen, “Alternatieve regulering: de vele gezichten van de wetgever”, *supra*, n 8, 30-31 and 50.

<sup>27</sup> The concept of ‘legally conditioned self-regulation’ was introduced in a Dutch government report *Zicht op Wetgeving* in 1991, and has been used since in Dutch regulatory theories as well as in official policy documents. Usually, it only refers to the second characteristic mentioned here, that state legislation should set the framework for self-regulation. I have added the other two characteristics because, in my view, they are essential elements in the state perspective underlying the concept. See De Been, “Rules and Aspirations. Self-Regulation and the Professions”, *supra*, n 11, for an analysis of the inherent tensions in the idea of legally conditioned self-regulation.

conditional: self-regulation should effectively solve the problems the state wants to address and reach the goals it wants to achieve (eg, higher efficiency). If it does not, the state should intervene, eventually. If professionals cannot adequately govern themselves, the state must reserve the right to step in. Second, there should at least be a basic legal framework of general values and minimal standards, preferably codified in statutes. Professional autonomy cannot be completely unrestricted – that would be too risky. Third, in order to allow an evaluation of whether self-regulation is effective, it must be comparable to state regulation. This requires that it takes the form of detailed and strict rules and allows evaluation on the basis of output criteria. This third element is often ignored in discussions of legally conditioned self-regulation, but it is important.

This implies that even though the state and the professions will both favour self-regulation, their expectations about what it will entail may differ. Whereas professionals support self regulation because they expect that it will not require many changes and will remain close to the demands of their practice, the state supports legally conditioned self-regulation because it is a more effective form of control. Instituting self-regulation on such instrumentalist grounds, however, will probably be experienced as a form of distrust by the professionals and will, as a consequence, be less than fully effective and the basis for continuing controversy.<sup>28</sup>

### **1. Full or Conditional Professional Autonomy**

For professionals, the reason for professional autonomy is obvious.<sup>29</sup> Professionals are the experts, so they can decide best what to do. If regulation and control of the weakest elements is necessary, this is best done by peers, who understand the problems and can decide which mistakes are minor, requiring merely an educative warning, and which transgressions are serious, calling for heavier sanctions.

The state cannot but treat this claim to autonomy with suspicion. After all, for every profession, we may find examples of professionals who did not function adequately, or worse. Apparently, professional organizations were not able to prevent this and guarantee good quality, and there is no reason to assume that they would be able to do so in the future. Moreover, the regulatory state has policy goals of its own for which cooperation of the profession is essential, like reducing the costs of the health care system or making academic research more beneficial to the economy. If the state gives the professionals free range, then how likely is it that they will be fully committed to those policy goals? In order to keep the pressure on the profession, self-regulatory autonomy can only be conditional.

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<sup>28</sup> Ibid.

<sup>29</sup> We may distinguish between personal professional autonomy and autonomy of the profession, but in this context we may combine both under the umbrella of professional autonomy.

## 2. Rules of Thumb and Aspirations or Strict Rules

Many professionals strongly resist codification of their ethics in terms of strict rules. This is perfectly understandable for two reasons. First, a profession has a strong aspirational dimension, a dimension that cannot easily be translated into rule-based codes. Second, professional expertise is largely practical knowledge. Practical knowledge cannot easily be codified in terms of strict rules.<sup>30</sup> We may formulate rules of thumb and these can be helpful if we want to explain to students what we do. But strict rules do not allow for the contextual variation that characterizes the reality of professional life. Therefore, self-regulation should preferably take the form of a number of ideal standards as well as a number of rules of thumb, and should always leave room for going beyond the book. In fact, this is how, in Dutch medical practice, protocols (the product of self-regulation) are supposed to work – as default rules which always should be critically assessed by the practitioner in light of the concrete case at hand. They are not meant as strict guidelines to replace professional judgment.

From the state's perspective this is hardly self-regulation at all. General standards are too vague and multi-interpretable; rules of thumb can always be evaded with an appeal to ambiguous notions like 'professional judgment'. In order to be effective from the state's point of view, self-regulation of professional behaviour should therefore take the form of strict rules. When the profession remains focused on aspirational standards and rules of thumb, nevertheless, this only indicates that professionals cannot be trusted to regulate themselves.

## 3. Vague Standards or Legible Criteria

From the state's point of view, granting regulatory autonomy presupposes that the profession adequately regulates itself. But in order to evaluate whether self-regulation is successful, there must be clear criteria of success. For the state, the obvious standard of comparison is the standard that state regulation would set if the state were to step in. As analyzed in the previous sections this would take the form of minimum rules and output criteria. This implies that from the state's point of view, self-regulation should take the same form. Only then is professional practice legible from the outsider's point of view and is an objective assessment of whether self-regulation works possible.

These are the wrong standards from the perspective of the profession, for the same reasons as were discussed above. Output criteria and minimum rules are not completely irrelevant, but they should not take pride of place. We should focus on aspirational standards and case by case evaluation. Consequently, the profession will

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<sup>30</sup> Scott, *Seeing Like a State*, supra, n 8, 319. Cf *ibid*, 316; "Metis resists simplification into deductive principles".

have a natural tendency to resist the state's pressure to focus on output criteria and minimum rules, not only in state regulation, but also in self-regulation.

#### F. THE INCREASING TENSION BETWEEN THE TWO PERSPECTIVES

In Section 3, I sketched four ways in which the perspectives on professions differ. These differences need not in itself be problematic, as long as professionals can function relatively independently from the state. However, in the regulatory state this is no longer possible. The state intervenes in the professions in many ways and state regulation and legally conditioned self-regulation are important instruments for this intervention. As a result, the difference between the two perspectives is transformed into a conflict.

In Sections 4 and 5, I showed how the perspectives entail diverging views on the role of regulation and self-regulation. Because the state's efforts to regulate professional practice are perceived by many professionals as interventions that are unjustified and misdirected, the conflict has a tendency to deepen. The strategic and evasive attitude of the professionals towards state regulation may easily be perceived by the state as a signal that stricter rules and stricter control are necessary. If they don't want to listen, the only way is to make them feel. Hence, the state makes more specific and detailed rules – in order to make evasion more difficult – and intensifies the auditing and control mechanisms. As a result, professionals feel even more threatened and disrespected by the state and become more evasive and strategic towards its regulations. The result is a dialectical process of decreasing mutual trust, increasing attempts by the state to control the profession and growing efforts by the professionals to avoid control.

This dialectical process is reinforced by the fact that once state regulation of a profession exists, it has a tendency to expand. Even if a profession functions adequately, follows all the minimum rules and meets all the output criteria, this will rarely be a ground for the state to lean back and be happy. Auditing reports will probably show that some professionals achieve better results than others. Clearly, these others do not perform as well as they can. Slightly increasing the output criteria may stimulate them to become more productive. Instead of four articles in refereed journals, five should be the new requirement. New efficiency measures should make it possible to perform five percent more surgeries, or to decrease the average duration of a hospital stay with five percent. Professionals who protest are easily silenced with a reference to their colleagues who already meet the new standards.

A second tightening mechanism is based on the truism that good news is no news, but bad news gets attention. In our mediocracy, every new crisis or

transgression in a profession or professional sector which draws media attention leads to a call for government intervention. For example, after the outbreak of Legionnaires' disease in the Netherlands, state agencies introduced new protocols that not only require public institutions to take adequate measures, but also to do so in a controllable way and to report extensively that they have done so. After all, the operational burdens (flushing every toilet every week) and attached administrative burdens (reporting that it has been done) seem minimal in comparison to the potential loss of life prevented. If the media draw attention to new social problems, we simply instruct the schools to address them, eg, by teaching civic virtues, integration, healthy diets, or a new national historic canon.<sup>31</sup>

These two mechanisms, minor increases of standards and responses to incidental crises, lead to an almost invisible, incremental increase in the impact of governmental regulation. In the long run, however, these minor increases add up, just like minor budget cuts add up. A third mechanism of increasing regulatory burdens, of course, is radical reform. Once government control of a profession is in place, it is easier to introduce more radical reforms. If each new political majority seeks to implement its own political agenda within the four (or less) years between elections, this is a strong incentive for politicians to introduce reforms without the time-consuming consultation with professional experts. Moreover, such a time frame leaves the field too little time to prepare for new changes and recover from previous ones.<sup>32</sup> In recent Dutch discussions on educational policy, the focus has been on those radical reforms and their rapid succession.<sup>33</sup> But we should acknowledge that it is the combination of radical reforms and incremental changes (sometimes combined with incremental budget cuts) that is partly responsible for the feeling of dissatisfaction of many teachers.

There are hardly any countervailing tendencies to reduce the level of regulatory intervention. After all, if the profession functions well, this may be seen as a sign that state interventions are successful. Obviously, we should not abolish the regulations that have brought us this success. Doing so might make the problems resurface that the rules had offered a solution to. Better safe than sorry, so it may seem.

The conclusion is that the tension between the two perspectives is a fundamental one which tends to be reinforced and intensified by state regulation. Self-regulation may seem an attractive solution at first sight, but the basic tension is merely reproduced if the state aims for legally conditioned self-regulation. Therefore, we should look at other ways to solve or mitigate the tension. There are two basic

<sup>31</sup> Witteveen, "Alternatieve regulering: de vele gezichten van de wetgever", *supra*, n 8, 48.

<sup>32</sup> Cf De Been, "Rules and Aspirations. Self-Regulation and the Professions", *supra*, n 11.

<sup>33</sup> Cf *Verslag Commissie Parlementair onderzoek Onderwijsvernieuwingen (commissie-Dijsselbloem)* (Report of the Committee Parliamentary Investigation on Educational Innovations – Dijsselbloem committee), Kamerstukken II, 2007-2008, 31 007.

strategies: an institutional and a substantive one. The method to deal with electric tensions is to create a buffer or transformer between the two poles. In the institutional context, creating an interstitial layer of managers may be a plausible strategy. A substantive strategy would involve the reframing of the conflicting perspectives and the construction of a new common perspective. It is to these two strategies that I will turn now.

#### G. INSTITUTIONAL SOLUTIONS – CREATING MANAGERIAL LAYERS

One way to reduce the tension is to create an interstitial layer between professionals and the state, or, if such a layer already exists, to give it the additional task of serving as a buffer and transformer. There are three possible layers.

The first one consists of administrative and other assistants. For example, general practitioners may hire secretaries and financial and technical assistants to assist them with all the bureaucratic paperwork, the technical rules that they have to comply with, the financial and other forms of auditing and so on. These assistants are subservient to the professionals. They can take care of much of the paperwork that comes with the regulatory state (and with the commercial side of some professions) and thus reduce the feelings of frustrations which professionals often have because they are diverted from the tasks for which they have been trained. Thus, secretaries and assistants can function as a buffer to reduce frictions and irritations. However, the professional is still in charge, which means that she herself still has to deal with the more substantive tensions that state regulation creates.

The second layer consists of managers: hospital directors and their staff, school boards, judges with managerial responsibilities. They fulfil the same buffer role as assistants, but they can also function as a transformer.<sup>34</sup> As they are continuously confronted with the imperatives of the regulatory state, they must learn to understand the state's regulatory perspective. As long as they can identify with the professional perspective as well (eg through intensive daily contacts with the shop-floor) they may be able to effectively transform the commands of the regulatory state in ways that do not frustrate professionals. Ideally, they speak both 'languages' and know how to implement the state's regulations without interfering too much with the primary processes of professional practice.<sup>35</sup> We must distinguish here between those managers who are recruited from the professions themselves and

<sup>34</sup> Cf Prichard and Willmott, "Just How Managed is the McUniversity?", *supra*, n 1, 300: "...some senior academics identify their task as buffering and protecting their colleagues from the demands of managerialism."

<sup>35</sup> At the state level, a similar transforming role may be played by former professionals working in the state regulatory bureaucracy.

managers with a non-professional background. For the latter, it may be much more difficult to play the role of transformer.

The third layer is that of national professional organizations and national organisations of institutions and their managers. Examples of the first are the bar, the general medical association, the teachers' unions, and smaller organizations of specialized professionals like those for history teachers or gynaecologists. Examples of the second are national organizations of hospitals, school managers, and universities. Usually, these organizations are staffed not by professionals still active in their professions but by former professionals or by managers without a professional background. Moreover, they are not institutionally connected with professional practice in the way institutional managers are, and they do not get the daily feedback from the shop-floor in the same way. As a result, their connection to professional practice is much looser (there is an important variation here; smaller organizations, such as those of medical specialists, are usually primarily run by active professionals and therefore may be better connected to the shop-floor). In order to be an effective transformer, these organizations must be able to switch between the two perspectives. The continuous flow of state regulation and the intense contact with the state bureaucracy will ensure that these organizations, even more so than the institutional managers, will strongly contribute to a good understanding of the state's perspective. To what extent the organization maintains the ability to incorporate the professional perspective as well, is a different issue. Many of those working in the organisation do not have first hand or recent experience themselves, and thus the professional perspective becomes more distant than the daily struggle with the state's bureaucratic system. As a result, professional organizations run the risk of losing contact with professional practice and, hence, of losing the ability to function effectively as a transformer.

The second layer is vulnerable for this risk as well. As long as managers in institutions are still in daily contact with professional practice, they may be able to sustain the tension and bridge the gap. However, when the managerial level becomes predominantly staffed by persons without a professional background, the managers may lose the ability to function as a transformer. They also run the risk of becoming primarily immersed in the state's perspective and internalizing it in their contacts with the professionals on the shop floor. Even managers with a professional background who become full time administrators run this risk after some time – as they lose contact with professional practice, they are no longer effective transformers. Rather than shielding professionals from the pressure of the state regulatory institutions, they may even become more effective in implementing the perspective of these institutions and imposing it on the professionals.

This is the paradox of professional managerialization. Initially, constructing a strong managerial layer helps to shield professional practice from the regulatory state and to transform the state's interventions into relatively harmless internal

regulations. However, once a strong and effective managerial layer is in place, it tends to adapt to the state's perspective and finally to adopt it. Once the state's perspective becomes the dominant perspective of the managers, they are an effective instrument to implement and enforce this perspective on the professionals. Rather than part of the solution to the problem of the conflicting perspectives, managers become part of the problem.

This paradox is reinforced by phenomena that need to be mentioned here, even if a full discussion would require a separate article. Firstly, most professions are also confronted with a third perspective, that of the market.<sup>36</sup> Those who feel the market imperative most strongly are usually the managers. In most organizations, their primary responsibility is to maintain a financially healthy, or even profitable organization. Consequently, they have to focus on the financial aspects of professional practice. Secondly, after a while managers are bound to develop a perspective of their own, characterized by their own views and interests. In their position, efficiency naturally becomes a leading value. Moreover, if they are not professionals themselves, they cannot rely on practical knowledge and must rely on general theoretical models about, eg, effective management or effective education, models that may not have been adequately tested in practice.<sup>37</sup> As a result, they develop an agenda of their own – an agenda which may sometimes coincide with that of the state, but which may sometimes be at odds with the perspective of both the state and the professionals.

The paradox of professional managerialization does not formulate a necessary development, but a risk. There are possibilities to reduce the risk that managers become alienated from professional practice. Recruiting managers among professionals and making management only a temporary step in professional careers can be an effective mechanism. This guarantees the continuous input from professional practice. In professional organizations, the board, consisting of professionals, should have a clear lead over the managerial staff, to counteract tendencies of over identification with the state's perspective. In organizations like schools and hospitals, a strong influence from the professionals on the management should be guaranteed. If the risk of alienation is understood and if such mechanisms prove effective, the capture by the state perspective need not become reality, or will be kept to a minimum. Only under those conditions, will the creation of managerial layers contribute to an easing of the tension between the state and the professionals, or at least to a restriction of its negative effects.

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<sup>36</sup> Cf Freidson, *Professionalism: The Third Logic*, supra, n 2, *passim*.

<sup>37</sup> A Dutch example is the new educational philosophy, called “the new learning”, which was strongly promoted by some school managers and politicians, but found much less support among teachers, parents and students. Cf *Verslag Commissie Parlementair onderzoek Onderwijsvernieuwingen*, supra, n 33.

## H. SUBSTANTIVE SOLUTIONS – REFRAMING AND SWITCHING PERSPECTIVES

A second strategy to solve the tension is to construct a new perspective which incorporates the two conflicting perspectives. Schön and Rein suggest that we can solve intractable policy controversies through ‘frame reflection’ resulting in the construction of a new frame.<sup>38</sup> In this theoretical conflict, we should construct a new perspective that combines the top-down, product-oriented, quantitative and theoretical perspective of the state and the centre-periphery, practice-oriented, qualitative and practical perspective of professionals.

It is questionable whether such a full synthesis is really possible. The two theories that were employed in Section 3 to construct the two basic perspectives imply that the differences are fundamentally incompatible. In Scott’s view, the state’s reliance on abstract knowledge and quantitative, measurable criteria is fundamentally at odds with the practical orientation of the professional on implicit knowledge and qualitative criteria.<sup>39</sup> In my own view, the practice and product models are partly incompatible.<sup>40</sup> Therefore, we may conclude that there is no neutral transcending perspective.<sup>41</sup>

Partial reframing, however, may be possible. Both professionals and the state can learn to take account of some of the ideas that are central in each other’s perspectives. For example, the emergence of evidence-based approaches in various professions can be seen as a partial incorporation of the state’s criticism that professionals should not only rely on vague standards and local knowledge but should also try to formulate more general insights –even if the practice perspective is the starting point. Such partial reframing does not bridge the difference completely, but may at least reduce the tensions.

Partial reframing may also be possible with regard to five of the six elements of the conflicting perspectives on regulation and self-regulation.<sup>42</sup> For example,

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<sup>38</sup> Schön and Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies*, *supra*, n 7, *passim*. For a similar suggestion see Witteveen, “Alternatieve regulering: de vele gezichten van de wetgever”, *supra*, n 8, 58.

<sup>39</sup> Scott, *Seeing Like a State*, *supra*, n 6, *passim*.

<sup>40</sup> Van der Burg, “Essentially Ambiguous Concepts and the Fuller-Hart-Dworkin Debate”, *supra*, n 9.

<sup>41</sup> The arguments for incommensurability of the basic perspective require a fuller discussion than can be given here. If, therefore, some readers are not convinced that they are incompatible, I hope the analysis at least convinces them that there are serious tensions to overcome and that distinguishing the two perspectives as at first sight incompatible may help us to understand some of the problems of regulating professions.

<sup>42</sup> The exception is Witteveen’s distinction between centre-periphery and top-down. This can only be transcended by taking a Herculean or God’s eye point of view – but such a view from everywhere is not humanly possible.

sophisticated regulators may drop naïve instrumentalism and the associated command-control strategy and become reflective design regulators.<sup>43</sup> Some theories of alternative regulation, such as negotiated rule-making, or interactive and communicative legislation, can be regarded as attempts to reframe the different views on regulation. However, these forms of alternative regulation usually have only limited success, and my analysis may clarify why. The six characteristics hang together. There will only be a partial reframing if the legislator drops the instrumentalist command-control perspective but still focuses on strict rules and output criteria. More importantly, even if we succeed in partial reframing the perspectives on regulation and self-regulation, we are still left with the four characteristics of the basic perspectives on professions which cannot be completely reframed because they are fundamentally incompatible. Consequently, the synthesis on (self-) regulatory perspectives achieved by partial reframing is inherently unstable, because the tension between the underlying perspectives lingers on. It may be part of the solution and reduce the tensions, but a full synthesis will not be reached.

We can also look at reframing differently. Reframing need not take the form of constructing a single encompassing perspective as a new static frame. It may also take the more dynamic form of accepting that there are two conflicting perspectives, that they cannot be integrated and that, therefore, we must oscillate between the two perspectives. In a dialectical process, it may be possible to reduce the tension, at least in part, by mutual role-taking. Legislators can learn to understand how professionals look at regulative measures and professionals can learn to understand the legitimate concerns of regulators. This will not resolve the tension between the perspectives, but at least it may help all stakeholders to deal with its consequences. In fact, such a process is what both Schön and Rein and Witteveen seem to have in mind when they discuss frame reflection.

This sounds easier than it is. It requires intensive communication between the parties with the different perspectives and, even then, it may be impossible for them to fully understand each other. The frames of the state and the professionals differ in major respects. In order to have an adequate dialectical reframing process, both parties must be able and willing to take account of the specific characteristics, biases and strengths of both their own and the conflicting perspective. For example, professionals must accept that the state has a legitimate interest in the common good (including that of regulating the costs of professional services) and that effective state control implies at least some general and quantitative criteria. The state has to acknowledge that it does not have the local and particular knowledge of the professionals and that the particularistic approach of professionals is legitimate too.

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<sup>43</sup> The idea of a design legislator is introduced by Witteveen, “Alternatieve regulering: de vele gezichten van de wetgever”, *supra*, n 8, 58, inspired by the idea of co-design suggested by Schön and Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies*, *supra*, n 7, 165-87.

Both should be able and willing to learn from each other's perspective and use it to refine their own views. Most importantly, both should be willing to refrain from making their own view absolute.

Witteveen argues that we need a reflective and communicative legislator.<sup>44</sup> Indeed, a reflective and communicative legislator is necessary, if only because the instrumentalist command-control approach is partly responsible for the gap with the professionals. Nevertheless, this is a necessary but not a sufficient condition. We should be sensitive to what successful communication would require. It is not the idealized version of communication that one finds in the work of Habermas or in theories of deliberative democracy. Using a language metaphor, we might say that one party is speaking German and the other Dutch. Though both languages share many words, their speakers certainly cannot fully understand each other, not only because of the differences in vocabulary and grammar, but also because of the differences in cultural understandings that go with it.

There are also practical reasons why an effective dialectical process of frame reflection is difficult, if not impossible. Schön and Rein present only one case where frame reflection was possible and successful – and even there it did not completely solve all conflicts between underlying frames.<sup>45</sup> The primary actor in this process was someone who had not only worked in different roles during her career and knew the conflicting frames from the inside, but also had been able to take a year off for a sabbatical at Harvard. Only during this sabbatical did she manage to reflect critically on the policy controversy she was involved in. Frame reflection requires persons with specific talents and with ample time for reflection. It requires only one such person in case the purpose is solely to construct a new frame that can then be presented to all the parties involved as a solution to the controversy. However, if we are looking for a dialectical process of mutual role taking, we need the involvement of more than one person in the process. In fact, we need to convince all professionals to participate in it, in order to enrich their views and adjust their behaviour. Similarly, we need to include all policy makers – not only the politicians and leading officials but also (and perhaps especially) the lower level bureaucrats. Such an extensive dialogue is almost impossible to organize in practice, for reasons of cost and time.

These theoretical and practical reasons suggest that a dialectical process of frame reflection can only have limited results. It may help some professionals and policy makers to understand why there is such a gap between them and it may give them at least some insight in how to deal with it. Completely bridging the gap, however, is theoretically and practically impossible. At best, reflective regulators and reflective practitioners may learn how to live with it and how to restrict it. Such an

<sup>44</sup> Witteveen, "Alternatieve regulering: de vele gezichten van de wetgever", *supra*, n 8, 60.

<sup>45</sup> Schön and Rein, *Frame Reflection: Toward the Resolution of Intractable Policy Controversies*, *supra*, n 7, 186 and chapter 6.

understanding may be enough to contain the negative consequences, but it will never solve the underlying tension completely.

## I. CONCLUSION

In this paper I have argued that the regulatory state and the professionals have two fundamentally different perspectives on professional practice. The state, with its external point of view, is focused on minimum rules and quantitative standards, is most interested in the output or product of the practice, and is heavily reliant on theoretical general knowledge. The professional, as a participant in the practice, is focused on qualitative standards and on the aspirations inherent in the practice, is most interested in the practice itself, and is heavily reliant on practical, situated knowledge. These different perspectives are reflected in their views on regulation and self-regulation. The state has a top-down perspective. It regards regulation as a useful instrument and basically takes a command-control approach. The professional, on the other hand, puts the professional practice in the centre and the state in the periphery. She regards state regulation as a burden and consequently tries to ignore and evade it. The state sometimes accepts that self-regulation is unavoidable, but mainly for strategic reasons, and it will favour legally conditioned self-regulation. Professional autonomy is only granted conditionally, and self-regulation must take the form of strict rules and legible output criteria. For the professional, autonomy is unconditional; self-regulation should reflect the aspirational character of the profession and hence consist of rules of thumb and vague standards.

In the regulatory state, these differences in perspectives lead to conflicts. Moreover, the tension between them tends to intensify. One way to deal with this tension is through an institutional solution: to build a buffer or transformer between professionals and the state. A managerial level, both at the local level of professional practices, hospitals and schools and at the national level of professional and sector organizations, may function as such a transformer and reduce the tension. However, once such a managerial layer is in place, it runs the risk of co-optation into the state's perspective. Moreover, managers tend to develop a third, distinctly managerial perspective, which may even lead to increased tensions. Therefore, the managerial level can only be part of the solution, provided that certain mechanisms are present that may contain these risks.

A second approach to solve intractable policy controversies is the method of frame reflection suggested by Schön and Rein. Reframing and constructing a new integrative frame may be partly possible, for example with regard to the difference between command-control versus ignore-and-e evade strategies. Nevertheless, in

some of the most basic respects the difference between the perspectives cannot be transcended. One coherent unifying perspective is impossible. This leaves partial reframing as a solution, which may help to reduce the tensions, but which cannot solve them completely. We can also regard reframing as a continuous dialectical process of switching between the two perspectives. However, one condition for an effective reframing process is that it includes most regulators and professionals. This condition is hard to fulfil in reality. Therefore, even a dialectical process of reframing can only be part of the solution.

A third strategy, which cannot be discussed fully here but which should be mentioned, is to take account of some of the actors or dimensions that were left out. This article only offers a simplified ideal typical analysis based on a dualist model. If we were to include market mechanisms in the analysis, we might find tendencies that reinforce the tension between the state and the professionals as well as tendencies that counteract it. For example, reliance on a market mechanism may give professionals a feeling of greater freedom: they could provide a higher quality, or different type of service (eg, pro bono legal services) if they so preferred, provided that they accept the price of a lower income. The same holds for third parties such as patients, students, consumer organizations or trade unions. They could perform the role of transformer, similar to the one performed by the managerial layers, or they could provide a third perspective which may either reinforce or reduce the tension between the state and the professionals.

The conclusion of my analysis is that neither creating a managerial layer, nor reframing, offers a simple solution. The two perspectives are partly incommensurable and there is no method to transcend the differences completely. However, this does not leave us empty-handed. Both regulators and practitioners should understand and accept that their perspectives are fundamentally different, and that the remedy is not just a matter of more effective communication, in order to convince the other party that its views are incorrect. Understanding the fundamental difference between the two perspectives may be the first step to reduce the tension and mitigate the consequences of the conflict. The next step is creating – and carefully monitoring – managerial layers that can function as buffers and transformers. The third step is that regulators and professionals engage in a continuing process of frame reflection, trying to understand the conflicting perspectives while doing justice to the legitimate concerns of both. These strategies will not completely solve the tensions, but they may help to reduce and restrict them in such a way that all parties can learn to live with them.