

Regulating Law

Christine Parker, Colin Scott, Nicola Lacey and John Braithwaite (eds)

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Regulatory theory has emerged as a burgeoning area of scholarship, particularly in terms of its application to and impact on policy and law reform. How does regulatory scholarship interact with legal scholarship? To the extent that there is a 'divide' between legal scholars and regulation theorists, is there a way by which we can 'bridge that divide'? *Regulating Law*:

explores how the goals and policies of the new regulatory state are fundamentally reshaping jurisprudence in the domains of public law, private law, and the regulation of work and business. (cover blurb)

Regulating Law is an edited collection of essays modelled on Hugh Collins' book *Regulating Contracts* (Oxford University Press, 1999), in the sense that each author attempts to apply a regulatory lens to a particular area of law, thus drawing on legal and regulatory scholarship in combination. The authors were asked to 'use the tools of regulatory theory to ask questions about a variety of areas of legal doctrine' (p 1). In doing so, they variously consider questions such as how law and regulation as areas of scholarship interact, how different areas of law interact given that they are regulatory regimes with different regulatory intents, and how law as a form of regulation interacts with other forms of regulation. Julia Black argues that there are 'strong similarities' between law and regulation as areas of scholarship:

What legal and regulatory scholars look at largely coincides when a broad view of law is taken by lawyers, and a relatively narrow view of regulation by regulationists. (p 33)

Some might argue that alleging 'strong similarities' between the areas of scholarship is an over-statement of the position, but it does seem that there are overlaps in the terrain between them which are worthy of exploration.

Regulatory scholars make it clear that 'regulation' is more than 'law', and that law is but one of a number of regulatory mechanisms.¹ The authors of this collection of essays tend to adopt the definition of regulation provided by Julia Black — that is, 'the intentional activity of attempting to control, order or influence the behaviour of others'.² Law can then be analysed as but one regulatory mechanism in terms of its effectiveness, responsiveness and coherence, and in terms of its interaction with other regulatory tools. A regulatory analysis of corporate law, for example, enables Corbett and Bottomley in their chapter on 'Regulating Corporate Governance' to consider

¹ See generally for example Ayers and Braithwaite (1992); Baldwin and Cave (1999).

² Black (2002), p 1.

the public policy goals and objectives of corporate law. They argue that such an approach has resulted in a transformation of 'corporate law' into 'corporate governance' — for example, in the current focus of corporate lawmakers on steering the behaviour of directors (p 61).

Each of the authors has approached their brief in a different way, which adds to the insights and value of the book. For example, in relation to law's interaction with other regulatory mechanisms, both the chapter on 'Regulating Property' by Peter Drahos, and the chapter on 'Regulating Work' by Richard Johnstone and Richard Mitchell take us on an historical journey in relation to the two doctrinal areas, demonstrating the role of customary practices in the development of legal regulation. In this way we see the interaction of regulation through law and regulation through concepts of inherent or customary rights.

One of the tasks undertaken in most of the essays is to identify the regulatory intent found in law — that is, the regulatory purposes of standard setting, monitoring compliance and enforcement. Collins notes in his chapter on 'Regulating Contract Law' that, on a conventional view, contract law is not a form of regulation in the sense that it has no instrumental 'regulatory' objectives. Lawyers are said to regard:

the private law of contract as performing an essentially facilitative role, one which permits citizens to do something, namely, to make legally enforceable contracts, rather than one which purports to control business behaviour by reference to enforceable standards in the pursuit of a particular goal (p 17).

Collins rejects that view, noting that it ignores the essential distributive and welfare goals of contract law that Collins defines as essential. Authors such as Stapleton disagree with Collins in relation to any behaviour-shaping role of contract law, arguing that:

Contract doctrine does not 'row' or 'steer' freedom of private ordering. It merely lays down minimum construction requirements for the canoe that the coxless pair will use! (p 129)

Similarly, in relation to tort law, Stapleton asks whether tort law can be analysed in terms of regulation, in the sense of being 'motivated by an identifiable goal' (p 123) in seeking to shape certain human behaviour. Given that her premise is that tort law has negative goals, as opposed to positive behaviour shaping goals, she argues that:

much of the private law of obligations ... militates heavily against the view that it can, let alone should, be assessed like other regulatory interventions by reference to its effectiveness in pursuit of its 'goals': namely that many of the law's concerns relate to negative goals, rather than steering social arrangements to some positive objective (p 126).

This makes for an interesting debate, which seems to turn on different understandings of 'regulation'. Stapleton's emphasis on the need for positive goals or objectives for law to be regulatory indicates a relatively narrow interpretation of 'regulation'. Collins refers to regulatory mechanisms as 'steering social behaviour' (p 13), an interpretation which does not require clear and unambiguous objectives by lawmakers. Collins' focus is on the regulatory outcomes and nature of contract law, as opposed to its clear regulatory intent. Even accepting that individuals are to a large extent free to exercise their own autonomy in entering into contracts, Collins writes that:

Agreements between people ... are being used as a mechanism for steering and controlling a relationship between two people for the future ... In this sense, many contracts represent an instance of self-regulation at a micro level. (p 16)

In considering the effectiveness of law as regulation, it appears that most of the authors have been forced to consider the area of law in which they are expert from a different perspective — and one that they have found illuminating to some extent. Collins notes that the effectiveness of contract law is hampered to some extent by the reliance on private enforcement by individuals commencing litigation — which may, of course, be prevented by prohibitive costs (p 23). Dewar tests the effectiveness of family law against what he describes as an appropriately modest set of objectives, namely 'the provision of a normative framework that can express and promote agreement about the terms of family life within the community and between individuals' (p 93). Family law is said to have 'wide reach' but 'low intensity' in the sense that it applies to many, but is not used by many to resolve their issues, and that this is appropriate — that well-drafted laws which are easy for people to understand, assisting those people to arrive at their own agreements and resolve their own disputes (p 93). Considering the efficiency of property law, Peter Drahos focuses on the possibility of regulatory capture of the courts by some groups, concluding that the courts 'are more likely to define property rights that deliver rents to some groups, rather than ones that deliver social-welfare-enhancing efficiencies' (p 186). Peter Cane considers administrative law as an ineffective regulator, noting that:

Such empirical evidence as we have suggests that administrative law is likely to be able to make only a modest contribution to the promotion of external goals, however they might be conceived and defined. (p 225)

This leads Cane to conclude with a number of questions concerning possibilities for improving its performance or considering whether it has other important functions outside of regulation.

This edited collection contains a regulatory analysis of a number of areas of law, thus placing 'law in context'. By combining regulatory and legal scholarship, the book invites the reader to consider law in terms of whether it has or should have regulatory intent, and how effective it is in any of its regulatory objectives. It provides a novel perspective on many doctrinal areas

and also provides a blueprint for legal analysis of other areas of law. It should therefore be of considerable interest to all legal scholars.

— **THERESE WILSON**
GRIFFITH LAW SCHOOL

References

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