INTRODUCTION: RECONCEPTUALIZING REGULATION IN THE ERA OF GLOBALIZATION

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The concept of "regulation" has become sufficiently ubiquitous in recent years, that it may be helpful to begin this collection of papers with some analysis of the term and its usage. At its most general level it refers to the means by which any activity, person, organism or institution is guided to behave in a regular fashion, or according to rule. In principle, reference may be made to the regulation of any kind of social behaviour, which gives the term a very wide scope indeed. However, it is more particularly used, as in this collection, in relation to economic activity.\footnote{Lancaster University Law School} In the context of socio-legal studies, the concept has two main advantages. Firstly, it leaves a useful ambiguity over the extent to which such regular behaviour is generated internally or entails external intervention. Secondly, it embraces all kinds of rules, not only formal state law.

Rethinking Regulation in the Network Society

These two features of the concept of regulation go some way to explain its increased use since the 1970s and in particular the enormous effort spent on rethinking its role and forms. This period has witnessed a prolonged process of social and economic restructuring of the relations between the "private" sphere of economic activity, and the "public" realm of politics and the state, interacting with changes in the form and role of these spheres themselves. These changes have been manifested in different ways across the world, including the collapse of centralized, bureaucratic state-socialism in the USSR, eastern Europe and Africa; the fundamental remodelling of social-democratic welfare-states in Europe, Canada, Australia and New Zealand; the extensive regulatory reforms in the USA; and the crises of the Asian "developmental states" including Japan. But this has not simply resulted from a failure of the state. Major transformations have occurred in the forms of organization of so-called private enterprise, that is to say the business economy dominated by the giant corporation. Large-scale mass manufacturing has been reorganized, and the centralized bureaucratic firm has become the "lean and mean" corporation, concentrating on its core competences, but operating within a web of strategic alliances, supplier and marketing chains, and financial and governmental

\footnote{At least as far back as Blackstone's reference to the role of corporations as including "the advancement and regulation of manufactures and commerce", \textit{Commentaries} (Chicago, University of Chicago Press 1979 facsimile of original Clarendon Press edition of 1765-69), vol. I, 459.}
networks. In parallel, the public sphere has become much more fragmented, as many activities have been divested from direct state management through privatization, and operational responsibility for an increasing range of public functions has been delegated to bodies with a high degree of autonomy from central government. In this "network society" it has become harder to distinguish public and private, and their interactions and permutations are more complex.

These historical developments have challenged much of the commonplace thinking about regulation that was the basis of the apparently conflicting political perspectives of many both on the left and the right of politics. Both implicitly accepted the essentially liberal conception that the private sphere, dominated by economic exchange, is powered by the pursuit of individual self-interest ("greed is good"); whereas in the public realm this can be displaced by considerations of the general interest which may justify action or intervention by the state. Thus, the "left" perspective was that only the discipline of the state based on explicit norms could restrict private greed, whereas the "right" considered that decentralized decision-making based on private preferences would be most likely to produce outcomes beneficial to all. Implicit in both views is the assumption that normativity must be imposed by the public on the private: they differ only on the extent to which this was justified. Both described the rise of the network society as entailing the triumph of "the market". This was hailed from the right as a return to the minimalist state, which should be limited to the protection of private property and the maintenance of order; while many on the left were to be found desperately defending centralized and autocratic forms of state action which not long before they might have criticised as sadly deficient.

Thus, from both these perspectives, the phenomenon of and debates about regulation have been viewed with some suspicion and puzzlement. Much of the commonplace discourse offers no basis for understanding why the "rolling back" of the state has not simply given free rein to market-mediated social relations, but has involved new forms of regulation and normativity. Although liberalization and privatization initially involved "deregulation" by undermining existing forms of state action, they were swiftly followed by "reregulation", by a wide variety of new means, and the rise of a "regulatory state". The growth of new forms of regulation was regarded by the right (now referred to as neo-liberals) as evidence of the pressures on politicians and bureaucrats to justify their own

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existence and to appease special interest groups; while the left criticised them as an abnegation of the attempt to design effective control of private interests through direct state action.

These developments provided potentially rich fields of study for socio-legal research, and an opportunity to rethink old theories in new contexts. Much could be gained by revisiting the classic texts: Marx's account of how the Factory Acts emerged from the struggles reflecting the shift from the old forms of manufacture to "modern industry"; Durkheim's analysis of the important role of corporatist institutions in establishing "organic solidarity"; or Weber's discussion of the various forms of law, convention and usage in the management of economic life. This has been strikingly absent, and the study of regulation quickly became dominated by other (essentially functionalist) perspectives, especially economics. Interestingly, the more fruitful approaches from economics themselves derived fresh inspiration by delving back to and rethinking their own roots, notably with the emergence of the new institutional economics founded on the work of Coase, with its origins in the debates of the first half of the 20th century.

Private-Public Symbioses

It was recognized relatively early in the recent literature that:

Questions about who participates in and benefits from regulation are certainly important: explaining the complex and shifting relationships between and within organizations at the heart of economic regulation is the key to understanding the nature of the activity. But little can be gained by depicting the relationship in the dichotomous language of public authority versus private interests.5

The terms "responsive" or "reflexive" regulation were quickly deployed to explore these new private-public interactions. In the influential work of Ayres and Braithwaite,6 this was a relatively limited concept, referring to the need to respond to industry structure by limited and conditional delegations of regulatory responsibilities to public interest groups, competitors, and even regulated firms themselves. Responsiveness was to be

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4 Thus, for example, the selection offered in R. Baldwin et al (eds), A Reader on Regulation (Oxford, OUP 1998), is largely dominated by perspectives from economics and political science, although it appeared in OUP's short-lived series Oxford Readings in Socio-Legal Studies. A notable exception has been Gunther Teubner, whose contemporary analyses are often anchored in the classic social and political debates about law.


ensured by the deployment of a "pyramid" strategy of sanctions by the public bodies monitoring such delegated self-regulation, speaking softly and carrying both big and a variety of smaller sticks.  

In our present collection, John Braithwaite follows up that perspective by exploring the reasons for reliance on sanctions rather than rewards in this type of regulatory system. His argument is surprising, since his earlier work started from the perception that voluntary is better than coerced compliance, and he points out that both common sense and behaviouralist social science suggest that rewards would more effectively induce willing acceptance than would punishment. However, economic actors can find ways to adapt to rules without complying with their objectives, to "play for the gray" as Braithwaite puts it. In this context, highly reliable monitoring mechanisms would be required if extrinsic rewards are not to distort the intrinsic cost-allocation processes. Other kinds of strategic behaviour might result unless the use of rewards is limited to the bottom of the enforcement pyramid. Braithwaite's conclusion, that the most effective type of reward is praise given with finesse, suggests that there is a significant gap between intrinsic and extrinsic normative processes in his regulatory universe. His analysis here may also give surprising support to critics who have argued that the encouragement of voluntary compliance is too often used as an excuse to temper sanctions to the point of ineffectiveness (there is little sign of a big stick in, for example, workplace health and safety regulation), and who reject the "cooperative" model of regulation, at least as applied to business activities involving risks of serious social harm.  

Peter Vincent-Jones' contribution explores a different genealogy of the concept of responsive regulation, stemming from Nonet and Selznick's conceptualization of modern law as a responsive legal order, having evolved from the repressive and autonomous phases of law. He deflects the criticism of Teubner, who proposed a more far-reaching typology of reflexive law, in which the desired purpose is not determined and enforced simply externally but through a reflexive rationality, by proposing a "subtler conception of purposiveness". He also builds on Julia Black's suggestion that public decision-making should be open to greater public participation through new forms of deliberative democracy. In his account of the changes in central-local government relations in the UK he sees a potential for such new forms in the shift towards "responsibilization", which utilises the techniques of accounting, audit and contracting. He analyses what are essentially arrangements for the governance of diffuse activities regarded as in some sense public, or at least requiring public accountability, involving an "articulation of central and local democratic processes in responsive combinations".

Colin Scott offers a different perspective on private-public regulatory interactions by analysing the instances of oversight of public regulatory functions by privately-owned

\[7\] Ibid. ch. 2.

bodies, which may have mandates which are permissive or obligatory, statutory or contractual, or may operate extra- or quasi-legally. While such arrangements illustrate the "interdependence of public and private power in contemporary governance arrangements", they also challenge the adequacy of definitions of the public based on function, and of the private based on ownership (are bodies such as the Consumers' Association and Greenpeace adequately described as private?). Further clarification is important if effective regulation might require, as Scott suggests, enhancement of the powers of such bodies, coupled with increased accountability.

Globalized Regulation

Liberalization, privatization and the emergence of new forms of regulation have also been international processes, and are central to what is described as globalization. National liberalization initially focused on the removal of border barriers (quotas, tariffs and exchange controls) as the immediate obstacles to the flows of goods and finance. However, the opening up of markets to competition created awareness of the differences between national regulatory requirements, and concerns that such differences constituted "non-tariff barriers". This has led to new approaches to international regulatory coordination involving different degrees and combinations of regulatory competition and harmonization.9

The new forms of complex interaction between a wide range of normative orders across the globe described as multi-level governance have led to a revival of the postcolonial concept of legal pluralism,10 and have been memorably described by Gunther Teubner (recalling Eugene Ehrlich) as "Global Bukowina".11 From Teubner's perspective, it is private legal orders that provide the regulatory dynamic in the newly globalized economic system. He argues that they create new forms of decentred or heterarchical lawmaking which are independent of the hierarchical forms of state law, and he paints a

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seductive picture of "global law without a state". Although he considers that private regulation, such as the new "lex mercatoria", has an essentially independent dynamic, he nevertheless accepts that it will provoke a repoliticization, although he considers that this will not take place through traditional political institutions but via "structural coupling" with specialized discourses.

Our central section includes three papers which explore these issues in some depth and empirical detail. First, Perez offers a rich analysis of the conflict between the environmental world-view and major international construction projects, which are governed by a paradigm form of private regulation: complex standard-form contracts. Perez shows how the development of these regulatory norms in the closed world of construction specialists results in institutional blindness to the issues raised by the environmental impact of these projects. This blindness is rooted in the legal tradition of the lex mercatoria, which seeks to confine itself strictly to the relationships of the private contracting parties, leaving the mandatory requirements of public law to be dealt with by states (preferably without intruding into the private regulatory realm). This disjuncture is highly problematic as it creates incentives for the private parties to externalize the environmental costs of projects, and precludes the possibility of flexible collaboration between the host community and the construction agents which would be crucial to the success of environmental impact management.

Perez goes further, and offers practical proposals for "ecologizing" construction contracts by the incorporation of provisions for an environmental management system, combined with a modification of the dispute resolution arrangements to provide a voice for the extra-contractual community. He sees some hope for such a new approach, partly in recent suggestions that the contract should adopt a new managerial model and a "partnering" ideology, but especially in the awakening of the engineering community to environmental concerns, which might provide a bridge between the environmental and business communities. This perhaps exemplifies Teubner's suggestion of repoliticization of private regulation through new forms of structural coupling. However, it could also be pointed out that, even if the construction contract is a private regulatory form, its power and effectiveness are significantly underpinned by authorizations given by bodies with a public character and functions (although certainly dominated by a private ethos) notably UNCITRAL and the World Bank. If regulation in this important business sphere has been driven by a private logic, it is largely due to the failure of institutions which are supposed to articulate public concerns to do so adequately. Thus, if apparently private bodies may perform public functions, as Scott suggests, it is also true (and perhaps more frequent in recent years) that public institutions may become permeated with a private ethos.

The next two papers deal with areas of national public regulation which have come under pressure to harmonize or coordinate due to the globalization of business, which perceives divergent and sometimes conflicting regulatory requirements as imposing costs and distorting competition. Attempts to harmonize regulation through the traditional processes of international law are cumbersome and beset by political considerations, and at best achieve agreement only in very general terms. Consequently, regulators in many fields have developed direct arrangements for cooperation (involving notification, consultation and information exchange) and sometimes coordination (through procedures
such as mutual recognition, simultaneous examination, and elaboration of common standards or codes).\textsuperscript{12} These informal and flexible regulatory networks are generally anchored in and legitimated by formal legal provisions at the national and international levels. Hence, it is said that these networks "herald a new and attractive form of global governance, enhancing the ability of states to work together to address common problems without the centralized bureaucracy of formal international institutions".\textsuperscript{13} More specifically, it has been suggested that technical specialists such as regulators may constitute "epistemic communities", whose shared understandings might provide a basis for agreement on the detailed nuts and bolts of regulatory arrangements, facilitating the achievement of political consensus on the broader policy principles.\textsuperscript{14}

Imelda Maher surveys some of the debates on international policy networks and epistemic communities and offers an account of the various links that formed what she describes as the competition policy network. Following the work of Drake and Nicolaidis on trade in services, she suggests that early attempts at international agreement on competition policy had little success until the emergence of a global epistemic community of competition regulators in the 1980s, although this overlapped with networks more directly involved with policy, and has more recently intersected with trade policy networks. This account indicates that there is considerable overlap between technical specialists and those with policy responsibilities, and in Maher's judgement discussions of detailed issues among experts can facilitate policy transfer and harmonization.

The contribution by Louise Davies deploys some of the same perspectives as Maher's to examine attempts at the international coordination of patenting. Here there has been greater success in establishing an international legal framework, dating back to reciprocal arrangements in the 19th century culminating in the Paris Industrial Property Convention of 1883, now reinforced as part of the establishment of the World Trade Organization (WTO) in 1994 by the agreement on Trade-Related Intellectual Property Rights (TRIPS). However, Davies points out that the key provisions on patentability of article 27 of the TRIPS are expressed in very general terms leaving considerable scope for interpretation, the implications of which are both important and controversial, especially in the key area of biotechnology. This gives great significance to the work of the informal Trilateral Group of the major patent offices, aiming to develop a common basis and procedures for patent examination through technical studies. Her detailed account shows how the

\textsuperscript{12} For more details see S. Picciotto, "The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks", in W. Bratton et al. (eds.) International Regulatory Competition and Coordination (Oxford, OUP 1996).


\textsuperscript{14} Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination." (1992) 46 International Organization 1-36.
Trilateral’s study of the patentability requirements for biotechnological innovations appears to have produced a convergence in the interpretation of the key requirement of industrial utility, although whether this will prove effective in actual examination practice remains to be seen.

The accounts of both Davies and Maher indicate that there is considerable overlap between specialist epistemic communities and broader policy and advocacy networks, and all intersect with more formal national and international state institutions. This suggests that it is perhaps not so easy to dissociate technical issues from their policy implications. To do so may certainly provide a firmer basis for agreement on those aspects which have been isolated for consideration within the specific technocratic frame (e.g. criteria to evaluate competition or patentability), but at the expense of externalizing consideration of their broader social implications. Thus, the patent offices have resolutely insisted on excluding from their consideration of patentability of biotechnological innovations not only the ethical issues raised by "patents on life", but also the social, economic and scientific impact of gene patenting. No technical analysis can be conclusive, so actors who are able to move between the technical and broader policy forums are in a powerful position to control eventual decisions.

Technical or bureaucratic rationality may certainly be an important defence against the influence which private interests can exercise over regulatory decision-making. However, too often these global regulatory networks seem highly permeable to pro-business viewpoints, often filtered through professional "hired guns" who also double as experts, while excluding public interest perspectives. It is only since the manifestation of an anti-globalization backlash that there has been some tentative debate about the legitimacy of global regulatory networks. As with the interactions of central and local government analyzed by Vincent-Jones, it has been suggested that the global regulatory networks should operate according to principles of deliberative democracy. This by no means excludes or downplays the importance of specialized technocratic and scientific practices and discourses, but suggests that they should be underpinned by principles of ethical responsibility. In particular, it calls for scientific reflexivity and openness, so that experts should be clear about the limiting assumptions behind their models and data and, rather than claiming a spurious authority and general validity for their conclusions, accept the need to test the robustness of their evaluations against those of others based on different assumptions.


16 Picciotto, ibid., p.350.
Interpretative Practices in Regulation

The suggestion that international regulatory coordination might depend far more on the emergence of shared understandings within a community of specialists in the particular regulatory field than on any formal legal texts aiming to harmonize the relevant rules raises the key question of regulation as an interpretative practice. If regulation is understood as a reflexive or responsive process, then it is primarily mediated by the practices of interpretation that are central to the implementation of rules. From this perspective, it is the relative indeterminacy of rules that provides scope for their necessary adaptation in the process of implementation to suit practical circumstances and local contexts. This may be considered to entail creative compliance amounting to avoidance of the intended purpose of the rules; or to help in achieving those purposes; or more broadly to create a social field in which rules and their interpretation help shape but are also shaped by social practices.

Julia Black's work has systematically explored this perspective, and she further extends it in this volume. Her essay here surveys the main themes in the wide-ranging debates around discourse analysis, and deftly explores the implications for regulation of five key contentions. This approach provides a more secure foundation for the issue of rule-indeterminacy, setting aside assumptions about administrative discretion or the inherent vagueness of language, and rooting indeterminacy firmly in the basic concept that meaning is socially constructed. Black argues that discursive practices vitally determine regulation by building among the participants shared understandings and definitions of problems and solutions, as well as their identities and relationships. These practices can be used strategically and may therefore be functional in achieving certain ends, and may

\[17\] Notably, in the work of Doreen McBarnet and collaborators, see most recently Doreen McBarnet and Christopher Whelan, Creative Accounting and the Cross-Eyed Javelin-Thrower (Chichester, John Wiley 1999).


be coordinative if they produce shared meanings as the basis for action. Equally, however, language encodes certain perspectives and values, and meaning is contested, so that discursive interactions are also sites of conflict over power and ideology. One can add that, even if discursively mediated power is described as “soft” power, it is nonetheless effective and may have devastating outcomes. Black's chapter casts a powerful light over many familiar issues in regulation, significantly deepening our understanding of them.

Finally, the chapter by Bettina Lange further underlines the social character of regulation by considering its emotional aspects. The usual view, as she begins by pointing out, is to regard emotions as to be excluded, disciplined, or taken account of in what are regarded as the dispassionate and rational processes of the law. However, if regulation is understood to involve debates and conflicts over normative standards and values, the emotional dimension must be seen as integral. Regulatory initiatives and reforms are often the result of highly emotive social episodes or dramas: for example, food scares (BSE, GMOs, etc), financial crashes (BCCI, Barings), and most recently the epochal events of September 11th. Indeed, regulatory practices are themselves imbued with emotions, such as fear, shame and anger, which significantly structure their practical operation. Lange goes further and, building on the notion that emotions are not just spontaneous but also guided by unarticulated norms, suggests that "The specific outcome of various possible interactions between the laws of emotions and formal legal regulation is regulatory law in action." This perspective challenges the assumption that regulation is simply a cognitive-rational process (legal or bureaucratic), and introduces different considerations which enter into both structure and agency, enabling a much fuller understanding of regulatory systems and institutions. Lange helpfully concludes with some suggestions for integrating the study of emotions into research designs.

Towards a Fully Social Concept of Regulation

No doubt some will consider the issues raised in many of these papers to add further and unnecessary complications and dimensions to a topic already characterised by its breadth and the range of theoretical perspectives deployed to explore it. But if, as I suggested at the outset, both the phenomenon and the concept of regulation raise some fundamental questions for the nature and future of our forms of social organization, it must be appropriate to try to understand every aspect of the social processes involved. Indeed it could be said that, despite the range and quality of much of the work done in the past twenty or so years on the topic, the dominant approaches have come from a relatively narrow part of the social theory spectrum. Building on this heritage, the papers collected here offer a challenging combination of refinement and extension of the theoretical perspectives, together with richly detailed analyses of a range of key examples.