

# BOOK REVIEW

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*Bronwen Morgen and Karen Leung, An  
Introduction to Law and Regulation (Cambridge  
University Press, Law in Context Series, 2007)  
353pp*

The study of 'regulation' has experienced something of a renaissance over the past decade. It first became popular in the mid-1970s with the emergence of the inter-related 'law and economics' and 'public choice' approaches to explain regulatory origin and administrative decision-making behaviour. Public choice analysis provides an analytical framework with which to explain the political economy of the supply and demand of regulation, based upon neoclassical economic theory.<sup>1</sup> However, by the early 1990s, interest in the political economy of regulation was on the wane with no obvious theoretical alternative. Although a lull in research activity descended over mainstream political economy regulatory research, the foundations of an even more multi-disciplinary and conceptually broad approach to analysing regulation was beginning to form around sociological conceptions of regulation and its role as a governance mechanism in the early 1990s.

The rise of the sociological approach in the early 1990s occurred at about the same time the political phenomenon of 'deregulation' was gaining popularity in many western industrialized countries. Deregulation is a term that has become synonymous with the dismantling of the post-World War II social welfare state and reform of traditional command and control based regulatory arrangements. New perspectives towards regulation free of the narrow and rigid neoclassical economic approach to analysing regulation began to appear in the literature including the socio-legal institutional approach of Ayres and Braithwaite,<sup>2</sup> the structural legal approach used by Ogus,<sup>3</sup> and

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<sup>1</sup> Examples of public choice literature are: G Stigler, 'The Theory of Economic Regulation' (1971) 2 (1) *Bell Journal of Economics* 3-21 and R Posner, 'Theories of Economic Regulation' (1974) 5 (2) *Bell Journal of Economics* 335-58.

<sup>2</sup> I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford UP, 1992).

<sup>3</sup> A Ogus, *Regulation: Legal Form and Economic Theory* (Clarendon Press, 1994).

the sociological systems-theory approaches of Luhmann and Teubner.<sup>4</sup> Although not apparent at the time of their publication, these contributions would provide an important foundation upon which a very different school of analysis would emerge nearly a decade later.

Through the 1990s it became clear that the political organization of the industrialised, democratic countries was undergoing a major transformation and that deregulation was only a part of a much bigger phenomenon. This transformation in the structure and administrative methods of government has been referred to by various names including the 'rise of the regulatory state' (political science), the rise of the administrative state (law), the decentering of regulation (legal philosophy) and the emergence of regulatory governance (political economy). Political scientists have seized upon this regulatory restructuring of government by characterising it as a restructuring of the methods of 'governance' more broadly. However, as a broader theoretical research agenda, governance has lacked something of a solid core. The non-legal approaches to understanding the function and purpose of regulation frequently overlook the necessity to understand the structure, composition and mechanics of regulatory arrangements. It is for this reason that *An Introduction to Law and Regulation* by Bronwen Morgan and Karen Yeung is such a useful book.

*An Introduction to Law and Regulation* is a systematic treatment of the mechanical elements of regulation. It draws from current multidisciplinary research to present the different mechanical dimensions of regulation and the regulatory process within a contemporary analytical framework based upon the sociological approaches to understanding regulation. In presenting the framework, the authors commence in Chapter Two by describing a range of theoretical perspectives directed towards explaining the origins, purpose and functions of regulation and regulatory behaviour that have emerged over the past several decades. The theoretical context is followed in Chapter Three by a more applied description of different regulatory techniques and models as well as how the choice of technique is related to the political questions underlying the choice of regulatory instruments. Chapter Four discusses the important topics of enforcement and compliance focusing on important questions relating to agency behaviour and, indirectly, the effectiveness of differing regulatory methods. Chapter Five examines the issues of accountability and legitimacy which is a necessary foundation for the discussion of the international dimensions of regulation which is presented in Chapter Six.

Among the book's many strengths is that the topics are arranged and discussed within a broader theoretical framework that, embedded within a broad sociological framework, blends the institutionalist and decentred approaches to regulation. This approach is able to incorporate many of the theoretical concepts that form the basis of the broader 'governance' agenda that is now very popular within the political science literature. It is within this broader theoretical framework that the authors focus, more specifically, on the mechanical characteristics of regulatory arrangements. In doing so, this is one of the

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<sup>4</sup> An example of systems theory and regulation include Teubner's systemic approach to the role of law and regulation in society which was inspired by the works of Niklas Luhmann. See: Gunther Teubner, 'Autonomy and Regulation in the Autopoietic Perspective' in Alberto Febbrajo and Gunther Teubner (eds) *State, Law and Economy as Autopoietic Systems* (1992), 3-33.

few books that attempts to consolidate and explain the ‘nuts and bolts’ of regulation and the regulatory process in a contemporary context.

The theoretical chapter (Chapter Two) is very useful. It presents both traditional and contemporary approaches and perspectives. However, it can be criticised for having made, in my view, an unfortunate omission in failing to examine the public choice approach more closely. Although it can be argued that public choice is more closely aligned to political economy than law, the political economy perspective is an important source of normative insights into policy development and instrumental choice. A second reason why the omission is significant is that political economy analysts are the researchers most active in developing (and empirically testing) the agency theories of regulatory formation and behaviour, now frequently used in regulatory analysis.

Chapter Three is another of the book’s strengths. *An Introduction to Law and Regulation* is one of the few publications that lists and describes the different regulatory techniques that have been developed over the years. Beginning with the traditional command and control technique, the authors include excerpts taken from the academic literature, describing alternative regulatory techniques such as competition, consensus and hybrid mechanisms. This however, leads to another minor criticism. Some of the selections chosen by the authors are not as effective in describing the essential characteristics of these different techniques as they might have been. This criticism can also be extended towards Chapter Four, which from an applied perspective, is the most important chapter of the book.

Chapter Four examines issues relating to regulatory enforcement and compliance. It begins by introducing the role of law and rules. Rules are an important tool influencing behavioural change and regulatory compliance among the regulated community. At the same time, rules also affect and influence the behaviour of the regulatory authorities who administer those rules. Though this distinction is identified within the chapter, it might have been explained more clearly and illustrated more effectively by the authors. In addition, the authors omit to mention the critical function and role of judicial review as a fundamental determinant and disciplinary force underlying regulatory behaviour. Although judicial review is mentioned in Chapter Five in relation to the issue of regulatory accountability, the role and influence of public law upon the regulatory process is under emphasized.<sup>5</sup>

A very important feature of the book is Chapter Six. Chapter Six examines the phenomenon of regulation above and beyond the ‘nation state’. As such, *An Introduction to Law and Regulation* is one of the few available books on regulation that deals with the increasingly important topic of international regulation. In it, key differences between domestic and international regulatory arrangements are explained and discussed. The mechanics of the previous chapters provide a framework within which the emergence of international regulatory arrangements is systematically presented. The complexities of international regulatory formation and enforcement are explained within the parameters and limitations of international diplomacy and law.

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<sup>5</sup> M Elliot, ‘The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law’ (1999) 58 *The Cambridge Law Journal* 129-58.

As the authors note in the introduction, *An Introduction to Law and Regulation* can be used as a text for students beginning to learn about regulation and regulatory issues. However, given the nature of many of the readings selected by the authors to illustrate concepts throughout the book, it can also be used at more advanced levels of study. The book's strength is its analytical framework and the selection of topics examined. This makes it possible for an instructor to fashion a course following the book's analytical framework as the basic course structure incorporating *An Introduction to Law and Regulation* as the core text.