

An Introduction to Law and Regulation

SECOND EDITION

Contemporary life relies on regulation. The quality and safety of the water we drink, the food we eat and the social media applications we use are all governed by multiple regulatory regimes. Although rooted in law, regulation is a multidisciplinary endeavour. Debates about regulation, particularly in the face of rapid change and the emergence of new ‘risks’, are now commonplace. Despite extensive scholarship, regulation is often poorly understood, even by policymakers, with unintended and even disastrous consequences. This book offers a critical introduction to core theories, concepts, methods, tools and techniques of regulation, including regulatory policy, instruments, enforcement, compliance, accountability and legitimacy. Weaving extracts from texts drawn from many disciplines with accessible commentary, it introduces this important field to students, scholars and practitioners in a scholarly yet accessible and engaging manner with discussion questions and additional readings for those seeking to deepen their knowledge.

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*To my devoted husband, Duncan, and to Erica and Fei, our
wonderful daughters*

To my best friend, Catalina, for being there

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Foreword

It is with great pleasure that I write the foreword for this long-gestating second edition of *An Introduction to Law and Regulation*. As co-author of the first edition, the immersive journey that Karen and I travelled together many years ago was a highly positive and formative aspect of my early academic career and has remained a defining feature of my scholarly outlook as I continue to follow the trajectory of regulation scholarship and its twists and turns over the decades. Writing now primarily from a vantage point somewhat more orthogonal, it has been a stimulating pleasure to travel this path again in reflecting on change and possibility in the field. In keeping with the mission of the Law in Context series to catalyse the development of new fields of teaching through imaginative textbooks, this new edition – appearing some seventeen years after the first – stands as testimony to the enduring significance of the ‘regulatory lens’. Regulation then as now provides a cross-cutting analytical entry point for multiple fields of enquiry at both scholarly and pragmatic levels. Then, as now, it continues to function as a force field for dialogue between economics, law and politics in particular, and to do so in a responsive and adaptable manner that is capable of integrating a range of significant empirical developments across those social spheres. The way in which the preface recounts the pathway between the two editions articulates this ongoing salience and flexibility of the field. And as the preface also notes, the conceptual structure of the first edition has stood the test of time – to an extent that is perhaps surprising given the pressures exerted by polycentric forces as various as war, climate change, shifting geopolitics and global health risks in that time. Those pressures collectively run very deep; they may well be tunnelling cracks in some of the foundational assumptions of regulatory scholarship.

A particular challenge is the shifting tectonics of geopolitical relations between North and South. The preface to this new edition acknowledges the importance of this challenge, and the framing chapter on technology includes pertinent extracts related to digital imperialism. While the reverberations of this may not, at least for some time, seriously disrupt the core features of regulatory scholarship, they are generating significant pressure on the infrastructure of the global economy in terms of overarching frameworks of trade, investment and competition law.

Engaging with these geopolitical dynamics will, in my view, be vital to the future shape of both regulatory scholarship and its adjacent irritants over time. In the 1990s and early 2000s, the regulatory landscape was dominated by a cross-national diffusion of independent regulatory agencies where the emphasis was on apolitical technocratic expertise as a central facet of governing through regulation. Today, we see a cross-sectoral, cross-national variegated network operating under conditions of highly contested legitimacy, where it is institutionally very challenging to pin down where decisions get made, or even when decisions get made.

This second edition skilfully guides the reader through these changes, with the implications mixing continuity and change for readers of regulatory scholarship. Continuous with the insights of the first edition, regulation emerges as a negotiated space of politically charged deliberation over the stakes of rules, carried out in spaces where the regulatory framework and institutions lay down guardrails for that deliberation rather than directly carrying out rule monitoring and enforcement. But since the first edition, the balance of power, at least for certain issues, has shifted away from the state as the guarantor of negotiated deliberative space, and the field is faced with the challenge of grappling much more directly – and less procedurally – with the intrusion of concentrated power – public, private and hybrid – into regulatory state dynamics.

From a substantive perspective, this second edition responds to this challenge of concentrated power through two main avenues: periodic engagement with the implications of the rise of transnational private sector digital economic actors and to a lesser extent with those of climate change. It is useful to briefly speculate here on the potential additional implications of other macro-level geopolitical shifts. The rise of China, for example, with its greater attachment to centralized discretionary state command, is changing the incentives for institutional diffusion, encouraging adaptations of developmental state approaches over the more market-oriented regulatory state. Its governance patterns illustrate an intriguing mix that is more developmental than regulatory: a partial embrace of distributed regulatory governance, especially on issues such as trade and investment, yet continued authoritarian management of the macro-political goals of any of these regulatory regimes. China thus retains a capacity to *selectively reshape* international economic governance.

The rise of China is only one specific example of a rise in authoritarian preferences in governing more generally, including within democracies. These have a dual perverse effect that exposes regulatory state developments to a double undermining. They not only undermine the expertise central to the regulatory state (via the use of arbitrary discretion often driven by populist rationales) but also undercut legitimacy-related *critiques* of the regulatory state that often draw from rationales of democratic participation. And beyond rising authoritarianism, the ongoing salience of *crises* to the development of

regulatory state trajectories has increased in scope, scale and regularity: so much so that something of a sense of permanent emergency, or polycrisis, is emerging – or at the very least the invocation of unusual powers to deal with crisis situations is developing a routinization of its own. All these dynamics combine to ensure that ‘rules run out’, and particularly when populism combines with overtly authoritarian leadership – demonstrated by growing debate on illiberal democracies – then contemporary developments cut deeply against the grain of the regulatory state.

All this said, even if at a macro-political level the regulatory state is increasingly undermined and fragile, yet at the level of detailed governance dynamics within a particular sector, the regulatory state is ever *more* relevant, albeit with more complex, fragmented and distributed institutional outlines. For countervailing pressures continue to steer regulatory dynamics towards rule-based governance. And this second edition very effectively integrates many of the changing institutional settings and forms that depart from the traditional regulatory agency. These include data-driven code, certification codes and standards administered by civil society and non-state actors, as well as an increasing public sector preference for using monetary incentives rather than prescriptive rules. Transgovernmental networks, epistemic communities and transnational advocacy coalitions are also important mechanisms that help to make rules continue to matter, even as their institutional legitimacy and clarity become ever more contested.

Moreover, as the second edition powerfully shows (in the detail of its core chapters on tools, instruments, and patterns of enforcement in particular), digital technology now dominates in ways that cut across both service delivery or provisioning and regulatory oversight. This cross-institutional disruption makes it more likely that increasing swathes of transnational economic life can be governed without the nuanced mix of democratic input and rule of law constraints that the new edition highlights as critical.

At least in the medium term, then, regulatory scholarship as depicted here will remain vital to the ongoing viability of a world under pressure, and this volume will be an indispensable guide. This is demonstrated in part by the enduring nature of the fourfold core of the first edition, which persists in this new edition. Both accounts of the field of regulation move from theories of regulation to instruments and tools, enforcement and compliance and finally to legitimacy and accountability. This structure remains intact, although very significantly extended and explored in greater detail across what are now twelve chapters. There are five particularly interesting facets of this mix of continuity and change.

First is the enduring conceptual and even normative relevance of the public/private binary, notwithstanding abundant evidence of the pressures on that distinction, both conceptual and political, and the much greater practical salience of hybrid facets of regulation since the first edition. While distinct notions of public and private actors, institutions and rationales still structure

theories of regulation (Chapter 4) and important contexts of regulatory policy (Chapter 5) and enforcement (Chapter 10), elsewhere hybridity suffuses the book, particularly marking more recent developments in regulatory theories, tools and mechanisms of accountability.

Secondly, it is notable that there is no longer a separate chapter on ‘regulation above and beyond the state’: perhaps unsurprisingly, the presence of global and transnational dynamics is now pervasive throughout the whole book. That this is now possible is testimony to the useful and adaptive nature of regulatory scholarship in terms of its capacity to capture both transnational and national dynamics of governing within an overarching framework. This is a very useful facet of the field in the context of the shifts in geopolitics alluded to earlier.

Third, the enduring salience of legitimacy and accountability is striking, with these facets of regulation once again closing the book, albeit in this edition integrating the transnational dimension into the chapters as noted above. At the same time, their treatment is more extended, as accountability is now explored through a stand-alone chapter. To my mind this appropriately recognises the sheer complexity of the mechanics of holding parties to account in complex multi-level governance settings that also feature intricate networks of public–private hybrid institutional forms and non-human agents.

This brings to the fore the fifth and most striking feature of the new edition: three entirely new introductory chapters on economics, risk and technology. This change can be read as a meta-commentary on what has shifted since 2007. As globalisation has become pervasive and almost taken-for-granted, as just noted, the need for an explicit conceptual framing for the field as a whole that provides a big-picture lens has become more pronounced. The relentless rise of hybrid public–private institutions and multi-level governance has constrained state capacity and blurred clear lines of responsibility. In this setting, risk analysis and risk management, together with technological innovation, have indeed – as Chapters 2 and 3 outline – emerged as important dual pathways for responsive adaptation to emerging regulatory challenges. They are also frameworks that can bracket, at least in the heat of operational pragmatism, the messy political questions of legitimacy and accountability so long embedded in a web of assumptions now under considerable strain from the wicked problems – digital platform power, climate change, security – that the new edition highlights. Risk and technology therefore provide an adaptive and responsive meta-framework for understanding the changing forms and practices of regulatory institutions both domestically and transnationally.

Yet it is simultaneously fascinating to consider the relative *stability* of the economic theories that inform regulatory thinking. The classic foundational concepts of neoclassical micro-economics, nudged at their edges by more recent behavioural economics, remain staple assumptions that undergird regulatory scholarship as an interdisciplinary field. The new edition

appropriately reflects this, while also hinting at other conversations that are bubbling away beyond the borders of regulatory scholarship: most notably on strategies for commons-based governance that take off from Elinor Ostrom's work noted briefly in the opening chapter. The now pervasive nature of multi-level governance as noted above brings with it challenges of coverage and perspective, and the field of regulatory scholarship has, in this book as elsewhere, trained its focus primarily on national and transnational settings. By contrast, until very recently, much commons-based scholarship has focused on city-scale or local civil society developments that tend to fall outside the purview of the national-international-transnational dynamics depicted in these pages. In these more localised settings, a growing appetite to question, both methodologically and substantively, the core economic assumptions that open this edition poses a possible challenge to the foundational trajectory of the regulatory state that we may see more of in future. The geopolitical dynamics adverted to earlier in this foreword may well intensify the challenge.

In conclusion, some of the big questions facing the field of regulatory scholarship lurk at the edges of the core assumptions underpinning both the first and the second edition. Where authoritarian or populist political dynamics reject the paradigms of democratic representation mixed with rule of law constraints, as well as any assumptions that both interventionist states and efficient markets are committed to a particular form of liberal market exchange as a shared consensus of transnational political life, then we are in new territory. Beyond the edges of this consensus lies the need to respond to the ecological limits devastated by the radiating effects of global capitalism, as well as the enduring exclusion of so many people and groups as inequality yawns ever deeper. The scope and depth of these require a systemic response that will at the very least tax or and may well elude the arsenal of the regulatory state and its dynamic emergent forms chronicled in this book. Yet whatever transformations are sought in our macro-political economy in the medium or even short term, the rule-bound complexities of regulatory state governance will continue to proliferate at the sectoral micro-level in ever more technocratic webs of hybrid public-private collaboration. This welcome and impressive second edition is both a charting of how the field of regulatory scholarship has changed, and a guide to navigating its implications in practical terms. It will remain indispensable.

Bronwen Morgan

Preface

The first edition of this book appeared in 2007 at a moment in time that, in retrospect, proved to be significant. In the period that followed, a series of major social transformations began to surface across the globe. Towards the end of 2007, a global financial crisis emerged, resulting in taxpayer-funded bailouts to avert the catastrophic failure of the global financial system. This broadly coincided with the release of Apple's iPhone, paving the way for rapid and now ubiquitous take up of smart devices by those living in high-income countries with well-developed digital infrastructures that sustain high-speed internet over which massive volumes of digital data now automatically and continuously flow. The wholesale liberalisation and opening up of markets that now enables the free circulation of goods, services, money, ideas and people has reshaped the distribution of wealth and power, facilitated by the networked digital transformation that has fueled the unstoppable rise of Big Tech. Meanwhile, addressing the climate crisis has become urgent and impossible to ignore, political instability and rising violence in many regions have prompted unprecedented waves of forced migration, while rates of national economic growth have declined and cash-strapped national governments have reduced public spending on essential services and welfare provision. Just as the proposal for this book was taking shape, the Covid pandemic began to spread across the globe, prompting a variety of state-mandated interventions intended to safeguard the health and safety of entire populations that had previously been beyond the realm of our current experience or perhaps even contemplation. Yet those measures were unequal in their impacts. It soon became apparent that groups that had historically been marginalised and unfairly exploited, particularly ethnic minorities, women with little socio-economic power or position and those with disabilities, were the worst affected and least protected. Growing public concern about systematic injustice and exploitation, which was particularly vivid in response to individual incidents of scandalous abuse (such as the murder of African-American George Floyd by a white police officer in Minneapolis, Minnesota, in 2020 by kneeling on Floyd's neck for almost ten minutes while ignoring his protests that he was unable to breathe) prompted public outcry as people took to the streets in protest under the banner of 'Black Lives Matter'.

These changes have significantly, and in some cases profoundly, altered the political, social, technological and economic context in which contemporary regulatory governance takes place. For the purposes of this book, we define regulatory governance (or more simply ‘regulation’) as ‘intentional, organised attempts to manage or control risk or the behaviours of a different party through the exercise of authority, usually through the use of mechanisms of standard-setting, monitoring and information-gathering and behaviour modification to address a collective tension or problem’. By 2020, it had become painfully apparent that the original edition was outdated and required significant updating, while the interest and importance of regulation have continued to grow and intensify. All of these changes, and no doubt many others, have meant that much conventional wisdom about the theories, approaches, instruments and practices of regulation were called into question. The importance and variety of these changes meant that producing a second edition necessitated a wholesale rewrite. Meanwhile, we had developed further experience and expertise, informed by our research, teaching and encounters with regulatory policymakers. Both of us employed the original edition of this book as a teaching aid, cautioning our students about its limited coverage of recent developments in the contemporary landscape, and complemented it with more up-to-date materials. We have nevertheless retained the definition of regulation provided in the original edition, informed by a cybernetic understanding of regulatory governance as a control system entailing three core functions: the setting of standards, information and gathering to monitor compliance with those standards and some kind of enforcement activity to bring any deviations back into alignment with the stipulated standards. However, we have widened the scope of our inquiry, resulting in systematic changes that operate across the entire book. Accordingly, the second edition differs significantly from the original edition in the following respects.

Firstly, we no longer confine our exploration of regulation above and beyond the state into a single chapter and limit our focus to regulation taking place at the national level. As processes of globalisation have continued to expand and deepen, regulatory governance now relies more extensively on a wider and more varied range of non-state actors. Thus, the influence of globalisation and the role of non-state actors are kept in view throughout the entire volume rather than confined to a single chapter.

Secondly, we have included a new section that offers an introduction to basic concepts and influential fields of scholarship that occupy an important role in the study and practice of regulation. Hence, Part I of the book, entitled ‘Foundations’, provides an introduction to economics (Chapter 1), to the rise of risk in regulatory governance (Chapter 2) and to technological innovation (Chapter 3).

Thirdly, the number of chapters has doubled. This is an inevitable consequence of expanding the scope of our examination, reflecting growing

complexity and associated challenges that arise in developing and implementing regulatory policies and the growth of academic literature devoted to its study.

Fourthly, we have significantly shortened the length of the extracts taken from scholarly literature, seeking to simplify and paraphrase key arguments from those texts to aid accessibility. The ease with which academic papers are now readily available in digital format means that those wishing to read more extensively beyond the short extract provided can do so easily, provided they have a stable internet connection.

Fifthly, we have sought to provide more examples that are intended to make more concrete the abstract concepts and ideas discussed in the text. We do this through the use of ‘highlight boxes’ in which we offer short case studies or highlight key findings from academic studies of specific events or phenomena that serve to illustrate ideas discussed in the main text.

We have, however, retained the same state-centric conception of law that was taken in the original edition, in which law is understood as a set of authoritative rules backed by the legitimate coercive powers of the state. However, when examining the intersection of law and regulation, we offer a ‘legal perspective’ that departs from the approach taken in the original edition. In that edition, the role of law was depicted by reference to a heuristic framework that identified two roles for law: one ‘facilitative’ and the other ‘expressive’, while invoking two images – law as threat and law as umpire. We no longer adopt this heuristic framework in this revised edition for two reasons. Firstly, because our experience of teaching indicated that students did not find this framework especially helpful and did not engage with it on a sustained basis. Secondly, our encounters with scholarly literature and regulatory policymakers and practitioners highlighted a significant failure to engage with what we might call ‘constitutional legitimacy’. Time and again, we found that regulatory policymakers and regulatory scholars (even those with legal training), often regarded law as merely an instrument in the hands of the state or other powerful actors, which could be readily harnessed in the service of regulatory and other objectives. This belief fails to recognise that within modern legal systems, rules are embedded in a larger, dynamic and highly complex system of legal institutions, actors, norms and practices that operate together and have evolved organically over time in a specific place and context.

In reorienting our ‘legal perspective’ on regulation, the approach taken in this second edition springs from the premise that the law is not just a set of rules people are required to follow. Instead, modern legal systems establish and maintain the foundations for peaceful cooperation between strangers ultimately rooted in respect for the rule of law. In other words, the role of the law is not merely important to regulatory institutions, instruments, policies and practices: it is *foundational*. Although modern legal systems are deeply flawed and imperfect, those who live in communities with strong rule

of law systems expect law to safeguard their basic security, fundamental rights, property rights and the stability of their private arrangements and transactions. In so doing, the legal system provides a stable, coherent and transparent foundation that enables people to plan their lives and resolve disputes peacefully in accordance with law. At the same time, within democratic polities, law also constructs and constrains democratic institutions that enable the discussion and articulation of collective choices for and on behalf of the community, endowing those institutions with legitimate authority to impose those choices coercively (see Chapter 11). In recognition of this, modern legal systems also seek to condition and constrain the exercise of this coercive authority in the form of institutional safeguards, including constitutional principles that express and protect values lying at the heart of democratic freedom that cut across political programmes. It is the law's role as a source of constitutional safeguards against the abuse of power that we highlight in examining the law's encounters with regulatory studies, a role that has often been overlooked in regulatory scholarship and in policy debates.

This interpretation is consistent with understanding law as a set of state-backed rules and in acknowledging its role as an instrument of regulatory policy. But the legal system and legal rules offered are more than merely instruments of control: for without the rule of law there is no freedom or security, and, without these, democratic governance is impossible. Yet as major changes to our social, political, technological and economic landscape have occurred in the period since the first edition was published, there is some evidence of a weakening in this basic commitment to the foundational ideals upon which governance through law depends and perhaps also, or perhaps partly a product of, the ability of powerful actors to evade the law's reach.

In short, this second edition has entailed the rewriting of the original edition in its entirety. It therefore differs significantly from the original edition in its scope, content and contours. Nevertheless, we have sought to retain intact the underlying conceptual framework and core analytical constructs through which we seek to introduce novices to the study of regulation in contemporary society. We believe this framework remains a valuable and versatile lens with which to navigate this important and complex field of study and practice and hope that, in this edition, we have made that lens more accessible to a wider range of readers.

Acknowledgements

This book is long overdue. Since the publication of the first edition, major societal changes have continued to sweep across the globe, rendering it increasingly outdated. Yet time and again, it was easy to find excuses to avoid committing to the time, energy and dedicated effort that writing a second edition would invariably entail. Two events finally motivated the authors of the original edition of this book to overcome their resistance and continued procrastination. The first was the award from the UK's Office for Students to support Karen's work in developing teaching materials for an exciting new interdisciplinary degree at the University of Birmingham, which eventually launched in September 2021. That degree was aimed at those with a legal background who wished to learn some data science and acquire a more in-depth knowledge of the challenges associated with regulating emerging technologies that she considered necessary to help them navigate the serious regulatory and governance challenges posed by the meteoric and rapid rise of artificial intelligence (AI). The second was a polite email from our colleague, Sofia Ranchordás, asking whether a second edition was planned so that she might recommend it as required reading for students taking her Administrative Law and Regulation course at the University of Groningen, having recommended the original edition for many years. Her enthusiasm and energy provided the boost that Bronwen and Karen needed to overcome their inertia, inviting her to join as co-author of the second edition. And so began the journey that has resulted in the production of this book.

This book is the product of four years of teamwork and friendship, meeting almost every Tuesday online. At that time, we were a team of three, working collaboratively to read, select and review scholarship, improve drafts and gather feedback. Yet the authorship of this book refers to only two team members. For a number of reasons, Bronwen Morgan was not able to continue participating as originally intended. It is therefore fitting and appropriate that our first and foremost expression of thanks and heartfelt gratitude is to her, co-author of the first edition, for graciously allowing us to carry on the work needed to produce this second edition. Her foundational work and original vision were pivotal to the inception of the first edition of the book. We are deeply grateful to her, not only for the good faith and the trust that she has

placed in us in continuing the work needed to complete this book but for entrusting us with the task of seeking to continue the book's legacy while attempting to remain faithful to the vision upon which it was grounded.

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