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Regulation and Human Rights in Sociolegal Scholarship

EVE DARIAN-SMITH, and COLIN SCOTT

*This article sets the scene for a special issue of **Law and Policy** which brings together the themes of rights and regulation. The papers explore a number of settings where rapid changes in political commitments and economic systems, often stimulated by international developments, place pressures on rights regimes. The papers deploy a variety of methods to draw out differences in both focus and approach in the understanding of rights, when compared with regulation. This introductory article provides a more detailed analysis of these differences in approach, and is suggestive of ways in which they may complement each other. We argue that the papers collectively demonstrate the added value in juxtaposing rights with regulation. They are suggestive not only of a richer understanding of the impact on rights of broad changes in regulatory frameworks, but more particularly argue for the importance of understanding how processes of institutionalization can underpin or undermine rights regimes, and that regulatory measures may form a key aspect of such institutionalization.*

Introduction

This special issue of *Law and Policy* brings together the themes of rights and regulation in settings where rapid changes in political commitments and economic systems, often stimulated by international developments, place pressures on rights regimes. The papers deploy a variety of methods to draw out differences in both focus and approach in the understanding of rights, when compared with regulation, but also collectively demonstrate the added value in juxtaposing one with the other. The papers are suggestive not only of a richer understanding of the impact on rights of broad changes in regulatory frameworks, but more particularly argue for the importance of understanding how processes of institutionalization can underpin or undermine rights regimes, and that regulatory measures may form a key aspect of such institutionalization.

Regulation and rights have each been an area of policy boom in recent years. With regulation international institutions, such as the OECD and the World Bank, have promoted arms-length rule-based governance claiming it to be a more effective replacement to both public ownership and broad governmental discretion (Levi-Faur 2005). So intense has been the growth in regulation that it has spawned also programs in regulatory reform or better regulation, again through the OECD and other inter-governmental groups such as APEC, within the EU and at national levels (OECD 1997). Within such reform programs ‘better regulation’ is almost invariably conceived in terms of efficiency – seeking the most impact for the least imposition of regulatory burden. Public policy initiatives which promote regulatory reform focus largely on forms of cost-benefit analysis (Morgan 2003), with only a nod to more radical approaches to reconceiving of roles, instruments and objectives within regulatory regimes (Better Regulation Task Force 2000). Socio-legal research in regulation has, to some extent, mirrored the policy search for more efficient modes of government and smarter forms of regulation within this, although with greater willingness to reconceptualise key aspects of regulatory regimes (Gunningham and Grabosky 1998). Arguably it is recognition of a growing international and transnational field of regulation which has engendered growing concern with the legitimacy of regulatory regimes generally, and the implications of regulation for human rights more specifically. Distinct from the question of rights within regulatory regimes, is the potential for deploying a regulatory lens to the understanding of rights more generally.

Though there has been renewed emphasis on human rights, particularly in the context of social rights and transnational economic relationships in recent years, the internationalization of human rights can be dated back to the end of the second world war and a concern to constrain states in the future to follow international norms for the protection of their citizens. Rights have been institutionalized both in international treaties of various kinds and in domestic measures which, in some cases, implement international obligations, and in other instances extend beyond international obligations, for example by establishing bureaucracies charged with monitoring and enforcing rights. Since the turn of the century rights regimes have come under strain from the pressures of globalized economics and politics including, but not limited to, state measures to address threats of terrorism. The terrorism issue has both a private and a transnational flavor due to the practices of the US government in moving suspected terrorists to states which are more favorable to their interrogation techniques, sometimes using private security and aviation companies.

The focus of regulation on effects and effectiveness, both as an instrument of public policy and as an object of academic study might be expected to create tensions with the application of human rights, a discourse and set of practices which emphasizes the enlightenment ideals of the intrinsic value in protecting people over and above instrumental objectives. Both regulation and rights discourses have moved somewhat from traditional conceptions of centralized state power (whether to regulate or to breach rights) as the power of non-state actors is increasingly recognized in regimes where such actors have regulatory capacity and have expectations on them that they will honour rights of others. We may expect these themes to become increasingly intertwined in ways that go beyond current interest in corporate social responsibility (a set of regimes that typically link private regulation to rights of employees and others) (Vogel 2005). A particular strength of a regulatory approach to rights might be a more direct focus on implementation of and compliance with rights regimes.

Since its inaugural publication in 1979, *Law & Policy* has promoted new lines of inquiry into the workings of regulation and governance and the link between these practices and decision-making processes that in turn inform policy. The journal's promotion of interdisciplinary, comparative and international scholarship has helped to open up the field of regulation to new sets of questions, and new theoretical and methodological approaches. Earlier contributions to the journal have, for example, raised directly the difficulty of reconciling the decentering of regulation with compliance with the values of the rule of law (including respect for human rights) (Kingsford-Smith 2004: 454-5, 465ff). Given the importance of *Law & Policy* in nurturing and promoting new ideas, it seems fitting that the journal is publishing this special issue which is dedicated to exploring the intersections between scholarship on rights and regulation. In this exploration, the aim is to expand intellectual inquiry in both the areas of rights and regulation, and provide a more nuanced understanding of their interconnections and interdependencies as they ultimately play out in policy directives.

As will be discussed more fully below, rights and regulation scholarship have conventionally adopted different logics and methods, and typically there has been little conversation between scholars working in these arenas. According to Orly Lobel, "the regulation/rights dichotomy has remained pervasive in policy-making consciousness ... [illustrating] the divide between the administrative impulse to regulate the market and the adjudicative impulse to protect individual rights" (Lobel 2007:23). Moreover, Bronwen Morgan suggested that, historically, there was also a geographical divide at work that helped forge scholarship into two distinct camps, with regulatory scholars working predominantly in Britain and Australia, and rights scholars working predominantly in North America (Morgan 2007:4). But just as geography plays less of a role in

the digital age, at least with respect to the sharing of intellectual work, so too has the apparent contrast between regulation and rights scholarship lessened in the past decade. The goal of this special issue is to highlight some of the ways in which these two arenas of scholarship are connected, perhaps even intimately linked. The ultimate hope is to open up explorations of both rights and regulation to new lines of intellectual inquiry that straddle the agency/structure divide and promote greater insights into the workings of law, governance, and evolving discourses of rights in today's current phase of globalization.

Rights and Regulation

The elaboration and protection of human rights have long been conceived of as rather central to the practices and purposes of legal systems. The protection of rights may be conceived of as part of the DNA of the legal system, not just in ensuring fairness in the operation of the criminal and civil justice system, but also in restraining the state from abusing powers, for example in respect of seizure of property or preventing freedom of speech or religion. Within many legal systems human rights fit well with an ethos that enshrines and protects a doctrinal and universalistic understanding of law (Parker et al. 2004: 4-5) The second half of the twentieth century saw both the internationalization of human rights and later new regimes established to extend social rights to promote equality, product safety, workers rights and environmental protection across many of the industrialized countries (Sunstein 1990). An extended conception of rights was accompanied by new machinery for monitoring and enforcement, often involving the creation of regulatory or other government agencies. Processes of globalization and transparent inequalities between developed and developing countries have supported the emergence of a yet more extensive conception of rights which includes rights of access to key resources and rights associated with development – rights increasingly being asserted by citizens of developing countries against both governments and multinational enterprises.

Regulation can, of course, also be understood as part of the legal system. But 'regulatory law' substantially rejects the universalistic ambitions of the classical legal understanding and displaces this with a more targeted and instrumental idea of law (Parker et al. 2004: 5). Key debates in the socio-legal scholarship have focused on the manner in which regulatory regimes are implemented amongst the actors in the 'regulatory space' (Hancher and Moran 1989). Regulatory studies have had a particular focus on the relationship between enforcement and regulatory compliance (Ayles and Braithwaite 1992). Frequently the objectives of regulatory regimes are assumed within such research, rather than contested (a significant contrast with the more doctrinal bent of human rights scholarship) and the focus is on the operation of the machinery of implementation. There has been a significant loss of faith in state-centered and legal approaches to regulation in this literature and an interest in harnessing the capacities of a wider range of actors not only to secure the objectives of regulatory regimes, but also to define those objectives (Black 2001; Parker and Braithwaite 2003). One consequence of this trend in the world of public policy is a perception that too much trust has been placed in regulated firms, particularly in the financial services sector. Following the onset of the current financial crisis, President Sarkozy used the platform of the Presidency of the European Union to announce that self-regulation in the financial markets sector was dead. Given the limits to state capacity to regulate, this remains to be seen (Marlowe 2008).

Exploring the intersection between rights and regulation is a theme that Bronwen Morgan has been strongly associated with. In a lengthy introduction to the topic in the edited volume *The Intersection of Rights and Regulation* (Ashgate 2007), she notes there is a "gap" in the scholarship:

Rights and regulation conjure up stereotypically different images of research foci, questions and topics. 'Rights scholarship' is concerned with mobilization, social change,

questions of identity and culture, frequently taking the position of those who are disadvantaged or oppressed through judicial avenues, using claims of individualized entitlement as a point of departure. Regulation scholars are more typically concerned with questions of economic efficiency, the evaluation of results, rational design of institutions and bureaucratic or discretionary modes of pursuing generalized public interests. Although these characterizations may exaggerate the differences between rights and regulation, the two are yoked more often in opposition than in concert, and regulation has often been framed as a social practice that restricts rights. Though initially plausible, however, there are ambiguities in this opposition (Morgan 2007:1).

It is these ambiguities and inconsistencies that this special issue seeks to explore.¹ Together the contributors feel that scholars involved in these two intellectual arenas often talked past each other, and sometimes failed to take into account how discourse of both rights and regulation operate in larger political, economic, social and cultural contexts. Specifically, we felt a need to get past the assumption that rights are somehow non-politicized entitlements in law, universal in aspiration, and reflect the individual's identity and legal consciousness. In contrast, it is often taken for granted that regulation and the creation of regulatory laws are highly political, reflect state interests, and are emblematic of the discretionary capacity of states to control and manage the social order. In short, it is often thought that "rights claims act as constraints on state discretion while regulation allows the state to flex its muscles" (Morgan 2007:18). Clearly neither set of assumptions are correct. For instance, it is almost always the case that political content informs rights claims, and regulation, directly or indirectly, routinely makes an impact on the construction of individual subjectivity. In a similar vein, in certain circumstances rights claims may enable the state to expand its discretionary practices, and international regulatory bodies may curtail the power of the state. In other words, the dichotomy between rights and regulation is rather simplistic and in many cases does not hold up to in-depth empirical investigation.

Another concern shared by many of the contributors to this volume is that within both rights and regulation research, the forces of international and transnational legal regimes and a global political economy are often overlooked. Particularly among regulation scholars, it seems that even when examining non-state actors, much of the scholarship assumes the jurisdictional frame of the nation-state and pays little attention, if any, to how state jurisdictions are increasingly open to the influences and challenges of local, regional and transnational regulatory institutions. One only has to think of the regulation of crime or the environment to immediately appreciate the multiple sites and scales and trans-border activities both above and below the level of the state that are involved in the practical maintenance and enforcement of regulatory directives. Growing regimes of non-state transnational regulation further accentuate the importance of joining rights and regulation research. Some of these regimes involve the delegation or pooling of state powers,

¹ This theme was the specific focus of three consecutive Summer Institutes sponsored by the US Law and Society Association and a substantial US National Science Foundation grant. These three institutes were held at the Center for Socio-Legal Studies, Oxford, England (2005), Wits Institute, Johannesburg, South Africa (2006) and University of Massachusetts, Amherst, USA (2007). The 2005 Institute focused primarily on methodology and how to go about de-centering the state and state institutions and actors; the 2006 Institute focused primarily on the impact of the global political economy, and the 2007 Institute focused on issues of culture, identity and legal pluralism. Selected participants' papers from the 2005 Institute were published in a Bronwen Morgan (ed) (2007) *The Intersection of Rights and Regulation: New Directions in Sociolegal Research*, Ashgate. Selected participants' papers from the 2006 Institute are to be published in a special journal issue of *South African Journal of Human Rights* (forthcoming). The essays in this special issue are drawn primarily from the 2007 Institute.

whilst others have little or no involvement of state authorities. The ‘de-centring’ of the state which occurs in such regimes has rather obvious implications for the holding of regulatory actors to account. A particularly important aspect to this is the way that rights are conceived of as operating in favor of citizens against state bodies, with the consequence that growing non-state regulatory power requires either an acceptance of diminished rights or the elaboration of a new rights narrative which more effectively embraces private power (Clapham 2006).

All the authors in this volume are keen to underscore the need to push against the prevailing view that rights and regulation are two distinct conceptual and theoretical arenas. As Morgan has urged us to do, the approach taken here is to think of rights and regulation as mutually constitutive “social practices”; “as part of a six-fold process of disputing (naming, blaming, claiming, rule-making, monitoring, and enforcing) [that] allows us to see regulation and rights as a species of a common genre, rather than as contrasting forms and logics” (Morgan 2007:7-8). By yoking together rights and regulation scholarship and exploring their intersections in a transitional context, a range of micro and macro perspectives, theories, methodologies, and empirical foci emerge that can serve as a basis for new questions and intellectual exchange such as:

1. What are the differences in the form and logic of the practices constituting rights and regulation?
2. What are the differences in the ideals or values pursued by rights and regulatory discourses?
3. What are the differences in the social groups and actors who articulate their demands and practices in terms of rights or regulation? Are there specific political contexts (be these local, regional, national, or international) that encourage groups to frame their practices in a particular way – whether as rights-based or regulatory?
4. To what degree are judicial decision-making (usually associated with the recognition of rights) and state agencies (usually associated with the development of statutes and regulatory strategies) both involved in the application of laws and the monitoring and enforcement of state policies?
5. And connected to the questions above, in what ways may rights-based activism differ from bureaucratic regulatory agencies in affecting policy decisions and legal reform?

Overview of the Essays

The essays in this volume represent a range of disciplines – sociology, anthropology, law – and employ a variety of theoretical and methodological approaches. All the authors historically contextualize their research and are sensitive to comparative frames. In the range of topics and issues explored, from labor laws affecting women in South Africa, to indigenous rights in Colombia, to the control of religious activities in Singapore, the authors examine the complexity of the interconnections between rights and regulatory discourses.

Bridget Kenny in her essay explores the shifting political context to worker’s rights in post-Apartheid South Africa. Specifically, she examines the historical connection between legal categories of employment as defined through statutes and regulatory agencies, and constructions of citizenship. Only certain categories of employment carry rights-based entitlements, of which one is the right to claim citizenship. Kenny points out that the codified rights won by unions in the 1980s on behalf of full-time permanent employees reaffirmed the notion of the proper rights-bearing employee. As a result,

today's "part-time" employees are deemed to have only partial rights in employment law, and "casual" or nonstandard employees no ability to access rights claims at all. Employment law, in short, directly affects people's ability to fully operate as rights bearing citizens. As she powerfully concludes:

The literature on nonstandard employment focuses our attention on the construction of gender, race, and class meanings within regulatory histories of different forms of employment. Yet there has been an under-examination of the political import of routine regulation in constructing subjective political consciousness, in conditioning rights claims and in turn, on how rights claims reproduce assumptions embedded within these regulatory histories.

The significance of 'legal consciousness' has been much explored in the context of mobilization of rights claims but has received less attention in understanding behaviour within regulatory regimes (Larson 2004). Whilst Kenny demonstrates the importance of the legal consciousness of those protected by a regime for its operation (linking strongly the literature on mobilization in respect of rights), the significance of legal consciousness for those whose behavior is targeted by a regulatory regime remains to be explored, and might add considerably to a literature which has largely focused on motivations of regulated businesses rather than cognitive aspects (Braithwaite 1995).

An important point is driven home in the essays by **Diana Bocarejo** and **Kristen Drybread** about the mobilization of rights discourse. Both authors underscore that state recognition of rights for some segments of society often involves the non-recognition or disavowal of equally valid rights for others. In other words, the mobilization of rights claims – be these civil, political, or economic – can be explicitly and implicitly manipulated by political actors, and impose enormous costs on certain segments of society. Both authors situate their research in the context of neoliberal state regulatory policies and the desire by state governments in Colombia and Brazil respectively to be seen to be effecting social reform. **Bocarejo** explores Colombia's politics of multiculturalism and the state's recognition of multicultural rights in the 1991 Constitution. While this new legal instrument represented a huge step by the state in recognizing the rights of minorities, it also set up a dynamic in which different rights discourses were forced to compete. As Bocarejo notes, today there is much bitterness between indigenous and peasant communities precisely because the state gives priority to indigenous rights to undeveloped land over peasant rights to agrarian land. This divide has come about because of the prominence of environmental issues in the political arena, and the increasing role of NGOs and other non-state actors in promoting the need for environmental regulation. It is representative of a broader trend towards seeking to empower both indigenous and dispossessed peoples through the assertion of legal rights, in a manner that might sometimes trump the narrower and more instrumental economic objectives typically associated with regulatory regimes.

Drybread also tells of the state's role in promoting a rights discourse in an effort to institutionalize reform. In a powerful and moving essay, Drybread narrates the rising prominence of universal human rights discourse in Brazil after the fall of the military dictatorship. Specifically, she examines the Children and Adolescent's Act of 1990 which conceded children were rights-bearing citizens. However, Drybread argues, despite the progressive nature of the legislation it in effect backfired when applied to Brazilian street children. This was because the state refused to deal with and regulate the structural inequalities and lack of opportunities for poor children that made living on the streets, at least for some, more attractive than being reformed in state-run institutions. Whilst the legal rights assigned to children were not diluted, an unwillingness to develop the bureaucratic apparatus necessary to vindicate those rights contributed to undermining them. Drybread suggests that the absence of the necessary institutional development may be explained by an ideological commitment to the kind of neo-

liberal agenda which assigns a greater role to the market at the expense of state institutions. From this vantage point we can see that bureaucracies created in many industrialized countries in the 1970s and 1980s devoted to monitoring and enforcing compliance with a wide variety of social rights legislation and constitutional rights were a product of both their time and place.

In the Brazilian case we see the political and symbolic power of rights discourse taking a direction not envisaged by the original legislators, as citizens who perceived the street children as highly protected by the state grew intolerant of them. Citizen action compounded the failure of the state to adequately regulate against gross social injustices. The horrifying result of this unique overlapping of rights and regulation (or more appropriately lack of rights and regulation) is Brazilian's society's condoning of child abuse and murder. As Drybread concludes:

The abstract, ahistorical, and universal nature of human rights discourses elide the fact that rights can only be concretized in contexts shaped by substantive social, political and economic inequalities – contexts in which only a few have the liberty, autonomy, and means to exercise their rights. For those to whom the promise of rights remains illusory, there can be very real dangers to accepting the bestowal of rights as a solution to entrenched social inequalities. As the case of the Brazilian street children shows, merely granting rights to persons who have no practical or political means for making those rights a substantive reality might only serve to increase their social exclusion and political disenfranchisement.

The final essay in this volume speaks to the international dimensions that impinge on any discussion of the intersection between rights and regulation. **Eugene Tan** analyses Singapore's response to 9/11 and the government's efforts to maintain social harmony and political equilibrium in the context of a rising fear of terrorism. The unspoken background to Tan's analysis is the international arena and the largely ineffectual efforts by international organizations to manage terrorist activities. As a result, Singapore has deliberately adopted a policy within its own state to regulate social behaviors in an attempt to build social cohesion and minimize cultural and religious differences. This involves the state in carefully calculated strategies that embrace the intersection between rights and regulation in order to promote religious freedom and tolerance. According to Tan, "Given the nature of the terrorism threat, this intersection of rights, responsibilities and regulation invariably expands the role of the state even as it seeks to attend to the interests and concerns of the key stakeholders (citizens, the Muslim community, and policy-makers) with nuanced sensitivity". The government response to this threat exemplifies a loss of faith in hard law instruments for exerting social regulation. Tan suggests that a key problem of hard law instruments in this domain is that they present the government's definition (and solution) to a problem and fail to harness the capacity of civil society both for defining and resolving difficulties. This is explicitly seen in a softer governance approach which includes both stronger expressions of inclusion emanating from government at the most senior levels towards the minority malay-muslim population in Singapore and the publication of soft law instruments geared towards presenting religious harmony and responsible practice of religion as the norm within the state. It is significant that, notwithstanding the shift towards soft-law instruments, the authority of the state remains central to their effectiveness in this context and that their objective is in part concerned with harnessing the governance capacities of religious groups themselves.

Together the four essays in this special issue offer a significant contribution that helps us to think through some of the intersections of rights and regulation. In particular the contributions emphasise in different ways the way that choices about instruments and institutional arrangements play in the outcomes of regimes concerned with securing public policy objectives which affect human rights. Together they underscore the value in bringing scholarship on rights and regulation into conversation, and pushing against conventional dichotomies between rights

and regulation that tend to interpret them as two distinctly different arenas with different forms, practices, goals and logics. We – as do all the contributors in this special issue – fully concur with Morgan’s elegantly worded conclusion that, “the scholarly juxtaposition of the social practices of claiming rights and enforcing regulation can provide a helpful framework for elaborating a research agenda that reintegrates these hitherto disparate strands of sociolegal scholarship” (Morgan 2007:19).

Eve-Darian Smith is Professor of Law and Society at the University of California, Santa Barbara, and Senior Fellow at the Law School, University of Melbourne, Australia.

Colin Scott is Co-Editor of *Law and Policy*, Professor of EU Regulation and Governance, UCD School of Law and Vice Principal for Research and Innovation at UCD College of Business and Law and Research Associate of the ESRC Centre for Analysis of Risk and Regulation, London School of Economics and Political Science.

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