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Regulation, institutions and networks

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1. Regulation and rules

When we set out for a shopping trip to our supermarket most of us do not think of it as an encounter with an increasingly global regulatory order. If asked to guess about the regulations applying to the supermarket, we would probably nominate things such as zoning rules, food safety standards and rules regulating opening hours and working conditions. We might sum up by saying that supermarkets are probably regulated by lots of rules passed by local and national governments. By implication, we would be thinking about the definition of regulation in terms of legal rules backed by penalties for noncompliance. We might even, in a moment of jurisprudential inspiration, label this the juridical version of regulation. This is not a false picture of our regulatory world, but, for reasons we will explain, it is a radically incomplete one.

We enter the supermarket, not having really noticed the private security guards in the mall or the surveillance cameras, and head over to the fresh fruit and vegetable section. We will not be thinking about the pesticide residue levels on the fruit or vegetables. If asked about this, we would guess that there is a government regulator setting and enforcing safe limits on health matters such as this. Not many of us would know about the links between national regulators and the

Codex Alimentarius Commission (Codex) in Rome or the hundreds of Codex technical committees working on harmonising food standards, including maximum limits on pesticide residue levels. The effect of being a member of the World Trade Organization (WTO) when it comes to implementing Codex standards is not a topic of conversation for most of us and we would perhaps be surprised by the number of industry representatives with interests in the outcome of these standards who sit on Codex committees. We might wonder whether the science triumphs over the commerce.

We pick up some berries for dessert. The name on the label is ‘Driscoll’s’. If we could be bothered researching it, we would find it was a US company that owned a lot of the genetics in berries. It seems odd to be able to own the genetics of something. That would seem to be a big regulatory stick with which to beat competitors over the head. Where did those standards of intellectual property regulation come from?

As we move down the aisles, we are surrounded by information, most of which we do not take in: labels, logos, special offers and so on. We may be registering only a fraction of all this information but we are still making purchasing decisions. On what basis? Perhaps we are being ‘nudged’ into making some of our choices. After all, supermarkets have had decades to study our behaviour in the aisles of their many stores. It would not surprise us to learn that large businesses are investing millions of dollars in understanding what happens in our brains when we see their brands (Yoon and Shiv 2012). We might know something about the standard-setting processes that sit behind the labels on some of the products we buy. Perhaps we have done some research on fair-trade labels and like the idea that producers will end up with more of the dollar we spend to buy their product. But there will be many labels communicating standards about which we know nothing. We could scan the information on some of the labels using smart apps, if we had the time. Supermarkets have their own labels, we notice. Have they become some sort of combination of regulators and ‘nudgers’?

Of course, we might decide to do our shopping over the internet, but, if anything, that brings us into an even closer encounter with the global regulatory order. Internet ordering is an efficient way for supermarkets to gather data about their customers and to communicate with them. The compilation of customer data has been going on for decades through the issue of loyalty cards and linking purchases to credit card numbers, but digital technologies are allowing supermarkets to turn their fuzzy

sketches of consumers into intimate portraits. We might like the idea of the anonymity of cash, but for how long will payment by cash remain an option? The regulation of payment systems seems to be heading in the direction of total transparency of our purchasing behaviour. Will the anonymity and privacy of these transactions become things of the past or will new payment systems like Bitcoin preserve some aspects of these two things? Where all these data might end up depends on factors such as the cybersecurity competence of its holders, privacy laws and even trade negotiations. The Trans-Pacific Partnership Agreement, should it ever come into force, tilts the field against restrictions on data export limitations (Greenleaf 2016).

2. Regulation: The broader version

Supermarkets are one of the places where we can see or trace many of the fundamental changes in regulation that have occurred in states over the past few decades. The rise in private security services, private voluntary certification standards and the globalisation of regulation are some examples of such changes. Concepts such as the regulatory state and regulatory capitalism capture the scale and dynamics of these changes (see Scott, Chapter 16; and Levi-Faur, Chapter 17, this volume). However, if we approached a study of regulation and supermarkets that confined the meaning of regulation to rules commanded by a sovereign for the purposes of guiding or restraining behaviour, we would miss or only glimpse many of the processes of which supermarkets were a part. We might not pick up, for example, the way in which supermarkets were setting standards for those in their supply chains and how farmers, if asked, would say that supermarkets were the new regulators. Moreover, if we wanted to strategically intervene in systems such as the food system, a rules-based definition might mislead us as to how best to intervene.

Assume for a moment that we become convinced that one highly effective way to tackle the rise in obesity is to do something about the fat and sugar content of foods. If we were operating with a rules-based view of regulation, we might conclude that it is a matter of influencing national authorities to make laws limiting fats and sugars in food. But planning an intervention strategy based on targeting the legislature might not be the best strategy or not the only one we should be pursuing. A broader view of regulation that included non-legal forms of norm-making, along with the idea that private sovereignty over such

norm-making mattered to regulatory outcomes, might lead us to think about other strategies. Perhaps supermarkets with their command over the layout of choices to be found in their aisles could be persuaded to bring more healthy choices into focus for busy consumers. We might consider harnessing the regulatory power of code through smart apps that allow consumers to scan products for information about their fat and sugar content. We might also focus on the work of committees on the Codex—committees such as the one on fats and oils or the one on sugar. The work of Codex committees is geared towards having a worldwide impact on food standards of all kinds. It is foundational to a global trading system in food. A picture of regulation that ignored the Codex and its standards, or, for that matter, the global level of regulatory decision-making for any substantive area, would miss the empirical reality of the origins of many national regulatory standards.

So, one virtue of moving beyond the narrow or juridical view of regulation is that it leads to a theory of regulation with much more empirical content. All of the essays in this book in one way or another contribute to this broader theory of regulation. Importantly, and as we argue in Section 5, the state does not drop out of this broader picture of regulation (although some states may increasingly become rule-takers rather than rule-makers). Rather, the state becomes part of a network of regulation in which the tasks of regulation are redistributed in various ways among actors within the network. As the preface to this volume makes clear, all the authors have at various points been part of the Regulatory Institutions Network (RegNet) at The Australian National University (ANU). Aside from contributing to a broader understanding of regulation, the chapters also link to more specific concepts and themes that are distinctive of RegNet's work over the past decade and a half and that have led to shared approaches and related theories of regulation. We begin a discussion of these concepts and themes in the next section.

3. Regulation and RegNet

Through the analytical development of concepts such as meta-regulation (see our discussion below, as well as Grabosky, Chapter 9, this volume), RegNet scholarship has played a major role in opening the door to a world of regulation by networks in which the same actor in one context might be the regulator and, in another context, the regulatee. If, for example, supermarkets collude on price, they risk

the wrath of competition law regulators, but they can and have cooperated in the global development of certification systems on matters such as food safety, sustainable production and animal welfare—standards with which their suppliers have to comply (known as the Global GAP (Good Agricultural Practice) initiative).

A book that did much to explore the creative possibilities of a world of distributed regulatory capacities was Ayres and Braithwaite's *Responsive Regulation* (1992). The theory of responsive regulation developed in that book aimed to shift the debate about business regulation away from the frozen positions of those who favoured deterrence-based regulation through the consistent and present application of rules and penalties and those who favoured removing as many of those rules as possible, thereby maximising the role of freedom and rationality in the business world. Responsive regulation advanced the idea that regulators should understand the context and motivations of those whose conduct they were regulating and then choose a response based on that contextual understanding. A responsive regulator is not denied the option of penalties, but is denied their first and automatic application. The question of when 'to punish or persuade' (Braithwaite 1985) led to the development of the now famous regulatory pyramid in which a range of possible responses is arranged in sequential order, with dialogue and persuasion appearing at the base of the pyramid. As one travels up the pyramid, options carrying a greater degree of coerciveness become available to the regulator. There is a heavy presumption in favour of starting at the base of the pyramid because dialogue is a low-cost, respectful and time-efficient strategy for obtaining compliance. The responses of the regulatee to interventions drawn from the base of the pyramid are the ones that determine if, how far and when the regulator escalates up the pyramid.

Responsive Regulation was important not just for what it said about compliance and enforcement, but also for what it said about the role of public interest groups in increasing the regulatory capacity of a society. A relationship of close cooperation between a regulator and a firm can begin a slide into a partnership in which the independence of the regulator is replaced by corruption. A way to counter this danger is to think about models of regulation that draw third parties into the circle of regulation. Labelling this 'tripartism', Ayers and Braithwaite argued

that tripartite models of regulation required public interest groups to be given the information available to a regulator, the chance of a seat at any negotiations and the power to initiate enforcement actions.

Tripartism recognises that society cannot rely exclusively on law and its agencies of implementation. The law and society movement that had begun in the first half of the twentieth century had brought the methods of the social sciences to bear on the actual operation of legal rules and found too many gaps between what they promised and what actually happened. Legal rules were not enough to alter the pattern of the ‘haves’ always coming out ahead (Galanter 1974). The combination of law and reason on which social-contract theorists such as Thomas Hobbes and John Locke had placed so much emphasis as a means to a largely peaceful and safe state for citizens was looking less and less sufficient.

Behind the model of regulatory tripartism found in *Responsive Regulation*, there is a more basic message to citizens of a polity. If you want to safeguard your interests within the state then you will need to contribute in some way, big or small, to building a world of distributed regulatory capacities and enforcement. It is not enough to assume that legal rules and rights alone will protect you. It is not enough to think of civil society as an arrangement devoted exclusively to the pursuit of self-interest. And, in the end, and to a large extent by implication, it is not enough to count on civic virtue or even associations of the civically minded. The norms of civic virtue have to be accompanied by the organisation of regulatory networks—networks that have meaningful powers of intervention. Law has to become part of a much larger regulatory world in which there are many defenders, guardians and protectors of public interests, all operating under conditions of full information, mutual transparency and accountability.

Tripartism is not itself a novel idea, but a systemisation of the hard-won insights of social movements such as the consumer movement. If one wanted better regulation of car safety then, as Ralph Nader showed in the 1960s, one had to establish a consumer movement that would fight for better safety standards and help to enforce them. The alternative of leaving it to the regulator and the US car industry was a death and injury toll from cars that were ‘unsafe at any speed’ (Nader 1965).

The theory of responsive regulation is an important part of a conceptual evolution in which the narrow view of regulation as a subordinate species of law is replaced by a broader view in which law becomes part of

a regulatory world in which regulation has multiple levels and sources. This broader view of regulation is nicely captured in the definition of regulation as ‘influencing the flow of events’ (Parker and Braithwaite 2003: 119). This, as we discuss in the final section of this introduction, pushes regulatory theory in the direction of much greater engagement with processes of change and responses to change. A lot of RegNet’s ideas about regulation turn out to be ideas about processes: processes of escalation up and down enforcement pyramids and processes for bringing together victims and offenders into restorative justice circles. This wider definition of regulation underpins much of the writing by RegNet scholars and has, among other things, led to theories of networked, nodal or polycentric regulation or governance (see Holley and Shearing, Chapter 10; Brewer, Chapter 26; Maher, Chapter 39; and Holley, Chapter 42, this volume). In these types of theories, regulation emerges as increasingly networked interventions in processes of institutional change.

Much of the work done by RegNet scholars on institutions has been aimed not at a general theory of institutional change so much as at an understanding of how individuals engage (or do not engage) with institutions. Valerie Braithwaite’s (1995, 2009) concept of motivational postures has been foundational to understanding this engagement and, in particular, how those in positions of regulatory authority might better learn to look for and interpret the signals coming from individuals reacting to regulatory interventions. Motivational postures are a composite of values and beliefs about authority that are held by individuals and used by them to enter into a positioning game with regulatory authorities. The positioning game is a dynamic process in which individuals may choose a posture such as commitment but at some later point, because of an adverse experience, adopt a posture of resistance or disengagement from authority. Whether regulatory authorities realise it or not they operate in regulatory domains that are saturated with signals from individuals about how close to or distant from the goals of the authority each individual views herself. Motivational postures of resistance and disengagement are linked to actions of defiance, with defiance itself taking on two distinct forms: resistant or dismissive. Without elaborating the distinction in detail, resistant defiance targets particular rules of an authority for change while dismissive defiance targets the very legitimacy of the authority itself. The dismissively defiant are much more likely to enter behavioural worlds in which the reach of authority no longer matters.

Motivational postures are empirical constructs arrived at by means of statistical testing of large-scale survey data obtained from specific domains such as tax regulation. Although the theory of motivational postures has been tested in domain-specific contexts and is closely linked to theorising about regulatory compliance, it is also relevant to a more generalised theory of institutional change. For example, the apparently sudden collapse of institutions or states, as in the case of former Soviet Bloc states, might have its micro-foundations in a long lead-up period in which individual citizens increasingly adopt motivational postures that enable defiance. Regulators that do not actively scan their respective domains for signalling behaviour and put effort into interpreting its processual implications may end up learning about its meaning when they are confronted by a 'sudden' mass movement—a movement that is coordinated by leaders in whom the defiant have vested their hopes. The mass movement may seem sudden but it will generally have a long history in the form of trails of psychological engagement/disengagement by individuals with the institution to which the mass movement is the latest and now, worryingly for authorities, potentially highly coordinated response. Pretty well everyone was surprised by the collapse of European communism, but in retrospect they should not have been. More recently, the results of the Brexit referendum and the 2016 US Presidential elections came out of the blue to most of us. In both cases, we seem to explain with retrospective ease what we never saw coming. Perhaps with a better analysis we would suffer fewer surprises.

So far we have seen that two themes weave their way through much of RegNet scholarship. The first is a focus on the possibilities of regulatory change and improvement in the state when the tasks of regulation have become radically re-distributed (a theme we explore in Section 5). The second is an emphasis on the use of processes to respond to the changing dynamics of regulatory domains (Section 6 discusses the implications of this shift). A third and final theme is the importance of including the emotions in a theory of regulation and, in particular, understanding the potential of institutions to catalyse processes of repair and healing of relationships among individuals. In analysing the connections between emotions and regulatory institutions, RegNet scholars have been early movers in a more general movement within the social sciences that has exposed the limits of rationality in explaining and predicting human behaviour and has begun to look to the emotions for a fuller understanding of our chosen actions. The next section expands on this theme.

4. The emotions as regulators

David Hume, perhaps more than any other philosopher, formulated the relationship between reason and the passions in provocative terms. Reason is, he argued, the ‘slave of the passions’, its role being ‘to serve and obey them’ (Hume 1739: 217). Responses to this particular provocation by Hume were slow to gather, as philosophy and the social sciences for much of the twentieth century focused on reason, assuming that its study would unlock most of what was important about the mental and behavioural life of human beings. Over the past several decades, more of social sciences, as well as the sciences, have developed theories and models of the emotions, perhaps even ‘over-intellectualizing’ the emotions (Goldie 2000: 3). The greater focus on emotions is to be welcomed because, among other things, it has helped to widen the discussion of what the ultimate objects of an economic system might be, prompting data-driven investigations of the links among the emotions, progress and economic systems (see, for example, Helliwell et al. 2015).

Emotions may help to account for the long-running ideological debates over regulation, but it remains true that theories of emotion do not generally feature strongly in theorising about regulation. Implicitly or explicitly, the use of regulatory tools and strategies by a regulator to alter the behaviour of regulatees is dominated by the assumption of rationality. The relevant binary is thought to be rational/irrational rather than rational/emotional. Our intention here is not to question the robustness of the rationality assumption. If anything, regulators around the world do not make enough contextual use of the links between, for example, rationality and deterrence. For example, multinationals generally have superior information and resources compared with national regulators. The use of financial penalties will often not change the cost–benefit calculations of these multinationals when it comes to compliance with regulatory standards. However, threatening to strip these multinationals of their intellectual property rights might be a much more effective means of deterrence because in today’s global knowledge economy multinationals all depend on intellectual property rights such as trademarks for their income and valuation.

The assumption of rationality has to remain a part of our regulatory world view, but this does prevent an exploration of theories of the emotions and their implications for regulation and institutions. The challenge in opening up the emotions for investigation is the

difficulty of generating universals about them. As Jon Elster (2007: 146) points out, for every supposed attribute of an emotion, counterexamples can be found. They may or may not generate action, they may be fleeting or long lasting—sometimes, seemingly, as in the case of anger, pride or shame, being transmitted across generations. For the physicist, it would be similar to trying to write equations about a universe in which the electrons carried a negative charge at some times, a positive one on other occasions and no charge at other times, with variations in intensity, time and place, and with all other particles also behaving as if they were carrying fluctuating rather than stable charges. Whatever laws we might write to describe this universe they would not be of the kind ‘all As are Bs’.

One issue of major significance for regulatory theory lies in the causal attributes of the emotions and, in particular, whether emotions are dependent on beliefs or in some way account for the origins of our beliefs (Frijda et al. 2000). The former account suggests the comforting possibility that mounting evidence will eventually overcome those emotional commitments fuelled by false world views. The emotional genesis of beliefs is a less comforting hypothesis because emotion may so suffuse an actor’s world view that no amount of contrary evidence will change an actor’s beliefs. So, for example, irrespective of the evidence around the inadequacy of gun control in the United States, its National Rifle Association will defiantly hold on to its beliefs and maintain its adopted identity of civil rights defender. The existence of emotionally resilient but false beliefs can create regulatory problems on a national or transnational scale, as does, for example, the belief in the curative powers of rhino horn (see Ayling, Chapter 29, this volume). In a world where truth is not a self-executing regulatory tool of persuasion do we return to the pre-Socratic traditions of rhetoric to influence emotion and therefore outcomes? In reality, these techniques have never left practical life and politics, only that nowadays they are practised on digital media at a speed and scale unimaginable to the rhetoricians of Ancient Greece. Social media, as Peter Grabosky (2016) has argued, has made the use of ridicule an even more potent form of regulation.

Hopefully, to use an emotional term, it should be clear that theories of emotion as well as specific emotions such as shame and pride deserve more attention in regulatory scholarship. The psychology of rationality, along with its heuristics and biases, continues to occupy much of the social sciences’ stage (see Gilovich et al. 2002). Well-developed theories

of framing help to explain why a food manufacturer will advertise its chocolate bars as ‘fat-reduced’ rather than ‘fat-included’. If we were totally rational utility calculators, the presentational language around products would not make a difference and manufacturers would not invest in developing and using it. Understanding the contextual fallibility of rationality is only one small part of understanding human behaviour. As Aristotle suggested long ago in his *On Rhetoric*, there are different paths to persuasion, of altering the course of affairs, including through the awakening of emotions. There are famous chapters in *On Rhetoric* discussing paired emotions such as anger and calmness, friendliness and hate, fear and confidence and shame and shamelessness. The emotions, if the Greek myths are any guide, are likely to explain at least as much of the judgements of men and women as theories of cognitive heuristics and biases.

As the chapters by Valerie Braithwaite (Chapter 2), Kristina Murphy (Chapter 3), Nathan Harris (Chapter 4) and Heather Strang (Chapter 28) show, the connections between emotion and regulation have formed an important part of the RegNet corpus, with much of the foundational work being done in the years when RegNet’s formation was conceived. Examples of this early pioneering conceptual work that have carried over into RegNet projects include John Braithwaite’s *Crime, Shame and Reintegration* (1989), Eliza Ahmed et al.’s *Shame Management through Reintegration* (2001) and Valerie Braithwaite’s (1995) work on motivational postures to explain the variety of individual responses to regulatory authority. From these beginnings, RegNet’s engagement with emotion theory has widened to include a focus on institutions of hope (Braithwaite 2004).

5. Redistributing regulation

In their contribution to this volume, Holley and Shearing recall the frontispiece to Hobbes’s *Leviathan*, which encapsulates a whole political philosophy, topography and armoury in one deftly drawn page. At its centre, and towering over the well-ordered society (‘Commonwealth’) in the foreground, is the sovereign, literal embodiment of his people and indispensable guarantor of their lives and any chance of ‘commodious living’. His huge sword, which also towers over the landscape, protects and enforces obedience among the populace living in the tidy settlement below.

Obedience to what and to whom? Hobbes makes clear in the text of *Leviathan* that the sword is the necessary handmaiden of the *law*, which ‘is not counsel, but command; nor a command of any man to any man, but only of him whose command is addressed to one formerly obliged to obey him’ (Hobbes 1946: 172). And who can issue such commands? ‘The legislator in all Commonwealths is only the sovereign’ and ‘none can abrogate a law made, but the sovereign’ (Hobbes 1946: 173).

Hobbes’s philosophy has been endorsed, amended and rejected by scores of later hands, but the political frame and architecture that he half-observed, half-designed and the elements—sovereign state, law and rule—that he regarded as foundational to it, have over centuries remained at the heart of Western political imaginaries. Some wanted *Leviathan pur sang*, others wanted to moderate it, tame it and make it benevolent. Anarchists loathed it, but, as exceptions that prove the rule, their aim was defined by it: their focus was on *Leviathan*, even as their aim was to destroy it. In the meantime, sovereign, rule and law were what we supposedly had to deal with in the normal course.

Certainly, that is what generations of legal theorists have assumed. Anglophone lawyers learnt from John Austin that ‘law is the command of a sovereign to habitually obedient subjects’; Continentals examined variations of the *Rechtsstaat* or *état de droit* or *stato di diritto*. The terms (and meanings; see Krygier 2015) differ, but the locations and occupants of them, and their instruments of rule, less so.

Within this frame, regulation appears as a subcategory, a species, of law. Thus, Orbach explains:

People intuitively understand the word ‘regulation’ to mean government intervention in liberty and choices—through legal rules that define the legally available options and through legal rules that manipulate incentives. (Orbach 2012: 3)

Narrowly construed, regulation is commonly reduced to a technical meaning of subordinate rules passed to amplify the operation of a statute. Even in its broader sense, the meaning of regulation remained narrow; regulation was carried out by states using law. Governance was also part of an analytical jurisprudential circle in which the state was the primary governor and good governance was about the rule of rules (rules being the essence of law).

Indeed, while the literature on governance is a little akin to a big-bang phenomenon, many definitions of governance retain this jurisprudential influence. The World Bank, for example, as part of its worldwide governance indicators work, presents governance as consisting of ‘the traditions and institutions by which authority in a country is exercised’, including the selection of governments (see World Bank 2015).

So: sovereign/state/government > laws > regulations > society. Those of a sociological inclination often switch the first and last place-holders, so that society comes first. Either way, these are the familiar parts of a picture easily visualised. You might be friendly or hostile to any element in the picture, think it works well or ill, but its place in the landscape can be assumed. A major finding of regulation theory is, however, that it cannot.

One way in which that finding is expressed is in discussion of ‘meta-regulation’. The Greek term *‘meta’* implies that in talking about meta-regulation we are referring to something beyond regulation. What lies beyond regulation, as commonly understood? RegNet theorists use the term to draw attention to two phenomena. The first is that regulation is not just something that applies directly to objects but may itself be an object of regulation. The answer to the question of what lies beyond regulation is more regulation. The point of the second use of the term is to redraw the map more radically: it is that the activity of regulation has many sources other than the state (multisource regulation).

In the first sense, the regulation of the regulatory process still often has the state at the centre, but the distance between it and its targets increases, intervening actors between it and them are introduced and sometimes targets themselves are enlisted in the processes of supervised self-regulation. Thus, Braithwaite’s model (1982) of enforced self-regulation, which gave origin to this use of the term, begins from the premise that the state will, in the context of corporate crime, generally fail when making corporations the direct object of regulation because of resource issues (for example, not enough inspectors, not enough technical expertise). The model has two prescriptive elements, the first of which is to switch to making the self-regulation of corporations the object of regulation, with the second being to strengthen the process of self-regulation so that it is more likely to generate the social benefits of compliance rather than the private rewards of noncompliance. In short form, this means the state requiring corporations to develop credible rules around, for example, accounting standards and then enhancing

the capacity of corporate compliance units to act independently in the enforcement of those rules. Enforced self-regulation is all about finding ways to tilt the exercise of the discretionary core of self-regulation into the zone of socially responsible decision-making.

In the second usage of the term, the redistribution of tasks—often called the ‘decentring’ of the state—is more wideranging; indeed, it is multiple. The state is decentred, so is law, so too regulation. We speak of redistribution rather than the more common ‘decentring’, since moving from the centre is only part of the story. A lot more has been found to be happening than that. Thus, the early work on multisource regulation by Peter Grabosky (for the history, see Grabosky, Chapter 9, this volume) and John Braithwaite has blossomed into a field of research by RegNet scholars on the role of third parties in regulation that looks at, for example, how professionals can infiltrate corporations to render them more ‘open’ (Parker 2002); how banks, non-governmental organisations (NGOs) and online auction houses might be drawn into a regulatory strategy to help make progress on seemingly intractable problems such as the illegal taking and trafficking of wildlife and timber and the international dumping of toxic waste (see Ayling, Chapter 29, this volume); or how intellectual property owners, the US state and payment providers such as Visa, Mastercard and PayPal have formed a global enforcement network that reaches across borders to close websites believed to be infringing intellectual property rights (see Tusikov, Chapter 20, this volume).

Conceiving of regulation as being multisourced leads, as many chapters of this book discuss, into theories of polycentric, networked, nodal, decentred, new, plural or collaborative governance or regulation (see, in particular, Brewer, Chapter 26; Holley and Shearing, Chapter 10; Holley, Chapter 42; and van der Heijden, Chapter 41, this volume). At the risk of offending proponents of these labels, the differences among these approaches are more of nuance than of kind, with all recognising that regulation no longer has one exclusive command centre and that rising interconnectedness characterises the relationship among the many centres and sources of regulation in the modern world. So, for example, if one focuses more on the qualities and capabilities of organisational sites of governance then one can usefully think of this dimension of governance as nodal governance. If, on the other hand, one is more interested in the interaction among nodes (where nodes now

refers to any set of objects making up a network) then one can think of this as networked governance. Placing the emphasis on the influence of non-state actors leads to decentred or polycentric governance.

The network concept is highly relevant for regulatory studies because it offers a better description of how regulation is changing, as well as allowing researchers to focus on both the structure of regulation and the strategic behaviour of actors within regulatory domains (Easley and Kleinberg 2010: 4–6). It is also useful since it allows us to track connections that exist both within and without the boundaries of states, without needing to make some conceptual leap or contortion, in the face of empirical links that are often seamless and borderless.

For the most part, RegNet’s researchers have not followed the precise metrics of social network analysis (SNA) (for example, measures of density, centrality, fragmentation; see Everton 2012: 11–12), although, as Russell Brewer’s chapter makes clear, some use has been made of SNA techniques in studying crime (see, in particular, the references to the work of Benoit Du Pont). RegNet researchers have been more interested in networks that form ‘webs of influence’ (Braithwaite and Drahos 2000: 550) than in the algorithmic mapping of the actors and their ties in a network. One can have a network, such as the names in a telephone directory, without that network constituting a web of influence. Webs of influence are constructed, in the jargon of philosophers, by intentional agents acting on their beliefs and desires to intervene in processes. Through disaggregation into webs of dialogue, coercion and reward, webs of influence provide a more fine-grained explanation of how power is used within such networks to secure regulatory outcomes and bring about institutional change. The focus of RegNet researchers has predominantly been on behavioural dynamics within these distinctive types of networks, as well as on the possibilities for weaker actors such as groups of indigenous people (Drahos 2014), small farmers in developing countries (Hutchens 2009) or scientists fighting for open-source principles (Hope 2007) to create strands that may be tied to webs of empowerment across space and, as Terry Halliday’s Chapter 18 in this volume suggests, across time. Network thinking, it is fair to say, has become part of the attitude of responsiveness (Drahos 2004).

Apart from shifting topographies, matters of style also change with location—not now ‘meta’ but what might be ‘better’ or ‘smarter’ (see Gunningham and Sinclair, Chapter 8, this volume). When regulation moves from the state to various differently configured ‘nodes’,

it shifts not merely in space but often also in kind. RegNet researchers have found, and have recommended, hosts of kinds of regulation, in hosts of kinds of places, generated by hosts of different actors, which ‘challenge rulish presumptions’, as John Braithwaite puts it. Rules might still matter inside and outside states and law, but, even where they do, there are many contexts in which they ‘derive strength from being woven with other strands into a fabric of flexible regulation’ (Charlesworth, Chapter 21, this volume).

Where the state is and what it does in relation to particular forms and styles of regulation are matters to be discovered and analysed. They can no longer—if they ever could—be assumed. States have a range of powers for good and ill that few other institutions, even today, can match, and there are many contexts where it might indeed turn out that ‘the state remains at the centre of regulatory space’ (Grabosky, Chapter 9, this volume). The point is that the extent to which this is so must be a matter of theorisation and investigation, not presumption, and what theory and investigation we have suggest that it varies hugely between societies and across domains.

So none of this is to suggest—and no one at RegNet does suggest—that states are irrelevant or laws of no use to regulation. Rather, the state and its law are not always to be found at the centre of the action, nor are they always the best things to be found there. That does not mean they are unimportant. Nor even that we know as a general truth what else can/should replace them or what it should do. What we do know, or are coming to see, is that assuming there is one entity, in one metaphorical space, behaving in one commanding way, to which regulation is or must be attributed, is both empirically misleading and normatively misguided. Indeed, even to think of regulation as a *thing*, and the process of regulation as imposing things of one sort on things of another, already misleads.

6. Things and processes

Consider the disarmingly simple definition of regulation as ‘influencing the flow of events’ (Parker and Braithwaite 2003: 119). The greater attention being paid to regulation and governance within the social sciences is a long story, but in abstract terms it has to do with ideas and concepts that shift the focus from an ontology of things to an ontology of process. So, to illustrate, Michel Foucault’s (1980: 98) insight that power

circulates rather than being a thing possessed by a sovereign represents one of many starting points to seeing power and governance in network terms. Friedrich von Hayek (1945), to take a rather different thinker, also contributes to an ontology of process through his insights concerning the dispersal of knowledge among individuals and how markets can bring about economic processes of spontaneous ordering based on the use of this knowledge. A third and final example is the emergence in the twentieth century of philosophical ideas about language that spread to produce, among other things, analyses of rights not as entities, but as behavioural outcomes of speech act processes (Jackson 2010) and legal concepts as the outcomes of processes engaged in by interpretative communities (Robertson 2014).

Conceiving of regulation as influencing the flow of events connects regulation to the study of processes—processes that spread in terms of their ordering effects far beyond anything that is captured by thinking of regulation as rules commanded by a sovereign holding the authority to do so, or indeed any jurisprudential theory that ascribes to regulation the essentialising characteristic it has selected for law. The enforcement pyramid in responsive regulation is an example of how, in much of the work done by RegNet scholars, there is a mild ontic commitment to the category of process. The pyramid comprises sequenced interventions that begin with processes of dialogue and persuasion and escalate to processes of punishment. Whether or not processes of intervention will produce compliance is contingent on a variety of other processes. Compliance with gun regulation will depend on, for example, institutional processes of procedural fairness, as well as the role emotion plays in the genesis of beliefs held by an individual about the need to possess guns. Emotion theory suggests that some psychological processes may not be responsive to processes of intervention based on rational persuasion or procedural fairness because, as Valerie Braithwaite's chapter makes clear, the emotions have set individuals on a path of disengagement that pushes them towards the precipice of coercion and counter-coercion.

Whether process is the most important ontological category for understanding the world (as opposed to categories such as objects or events) is an issue for professional metaphysicians using their analytical tools of investigation. Process is certainly a useful category for regulatory studies in that it helps us to make sense of observable data. We can identify many chemical and biological processes of transformation in the physical world. Even if we begin with a study of events, we may

end up with a much wider investigation of the processes that enable us to understand those events as part of a pattern. So, for example, we can think of forest fires as events, but explaining their frequency will very likely be connected to deeper processes of climate change. In the social world, the study of processes allows us to follow trails of evidence across contexts and scale, jumping the fences of the social science disciplines as we go. For example, studying the shame of a people within a nation and the shame of an individual within a group may reveal processes of formation common to both, perhaps suggesting processes for the peaceful resolution of shame capable of applying across contexts (Ahmed et al. 2001: 3). More abstractly, process has some claim to be the naturalistic starting point for the development of concepts that unite micro and macro contexts of regulation. By linking regulation to the study of processes of intervention or influence in other processes, we can draw on the insights of thinkers as different as Hayek and Foucault and work our way towards a more coherent and general theory of regulation. Once we tread this processual path, the distinction between regulation and governance becomes blurred and perhaps collapses altogether. If a distinction is needed, one can see them as part of a continuum in which the focus of regulation is on actors and their modes of intervention or influence, while in governance we focus more on the normative attributes (for example, accountability, authority, legitimacy) of institutions.

Summing up, linking regulation to the category of process creates a link between regulatory theory and what appears to be true—namely, that we live in a world where processes from the most microscopic to the most macroscopic are everywhere. If we adopt the responsive attitude to regulation, our approach should be to study this multiplicity of processes to better intervene in them. What has been learned from this study of processes occupies the remaining chapters of this volume.

Further reading

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