

Regulating Lawyers: North American Perspectives and Problematics

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In most modern societies, lawyers—both individually and as a collective profession—are identified as playing significant social, economic, cultural, and political roles. Lawyers are implicated in almost every aspect of our lives: they frequently influence and draft legislation that regulates—among various other things—the roadways and our behaviour on them, how our houses are built and maintained, and the conditions under which we can offer our labour; lawyers provide advice on multiple matters including family relations, exchange relations, taxation matters, domestic trade, and international trade; they help us establish relationships (both familial and commercial) and help us resolve disputes when they break down; when social relations fray, they litigate on behalf of citizens and commercial entities; they defend or prosecute alleged criminals; they advocate for the equality of rights for disadvantaged and minority groups; they protect us from abuses of police power and from state interference in our private lives (and advise the state how to successfully interfere in our private lives). In short, lawyers exercise enormous power and influence.

Because lawyers have access to and exercise such significant power, it is often said that they have a social contract with society. In return for the privilege of being a lawyer, the responsibility of every lawyer, and the profession, is to promote and protect the public interest. Others go further and claim that because of their privileged status, lawyers and the legal profession are fiduciaries.

The inevitable questions, of course, are as follows: how do we ensure that lawyers fulfill their side of the bargain, and how do we guarantee that they will faithfully and effectively live up to their fiduciary obligations? Do we adopt a “trust us” approach, or do we establish norms, institutions, and procedures to frame and, where necessary, enforce lawyers’ obligations?

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1. This mini symposium grows out of a panel discussion sponsored by the North American Consortium on Legal Education in Monterrey, Mexico in March 2015. The papers are dedicated to the memory of Steve Zamora, the “founding father” of the North American Consortium of Legal Education, and a lifelong champion for the cause of greater North American co-operation and collaboration.

The core concern is not so much that lawyers are bad (although there are, of course, bad lawyers in multiple senses); rather it is that there are structures, incentives, and temptations that might distract lawyers from their contractual obligations with, and fiduciary obligations to, society and the public interest. On one level, there is the materialist concern that both individual lawyers and the legal profession generally will put their economic interests ahead of either their clients' interests or society's interests. On another level, there is the social capital concern that like many professions lawyers will give priority to matters that advance or protect their privileged social status. Third, there is the ideological concern that lawyers will articulate, advance, and even enforce their particular worldviews, which may not be generally representative of society.

One potentially fruitful approach to addressing these problematics—indeed these conundrums—is to turn towards the contemporary regulation theory.

I. Contemporary Regulation Theory and Practice²

In the last three decades, there has been an explosion of theoretical analyses and empirical research on regulation. This work has been driven by the insights and interactions of multiple disciplines including (but not limited to) economics, sociology, psychology, political science, law, public policy, anthropology, criminology, political economy, philosophy, history, mathematics, and international relations.³ There have been regulatory investigations of almost every realm of human interaction: political, economic, social, cultural, bureaucratic, 'public', and 'private'.⁴ Regulatory research has been focused on micro,⁵ meso,⁶ and macro-level⁷ relationships and has targeted local,⁸ national,⁹ and international dynamics.¹⁰

2. For a fuller exploration of the relevance of regulation theory to the legal professions, see Richard Devlin & Adam Dodek, eds., *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2017).

3. John Braithwaite et al., *Can Regulation and Governance Make a Difference*, 1 REGULATION AND GOVERNANCE 1 (2007) [hereinafter *Regulation and Governance*]; Robert Baldwin et al. eds., *The Oxford Handbook of Regulation* (2010) [hereinafter *OXFORD HANDBOOK*].

4. See generally REGULATION AND GOVERNANCE, *supra* note 3.

5. See generally Hugh Collins, *Regulating Contracts* (2002).

6. Neil Gunningham & Peter Grabosky, *Smart Regulation: Designing Environmental Policy* 6-7 (1998).

7. See generally Mark Findley & Wei Lim, *Regulatory Worlds: Cultural and Social Perspectives When North Meets South* (2014).

8. See generally Christopher Hood & Martin Lodge, *Pavlovian Innovation, Pet Solutions and Economizing on Rationality: Politicians and Dangerous Dogs in Regulatory Innovation: A Comparative Analysis* (Julia Black et al. eds., 2005).

9. See, e.g., Jacinth Jordana & David Levi-Faur eds., *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Government* (2005) [hereinafter *The Politics of Regulation*]; G.B. Doern et al., *Rules and Unruliness*.

10. See generally John Braithwaite & Peter Drahos, *Global Business Regulation* (2000).

Because of this diversity and richness, it is not possible to provide a definition of regulation that would command the agreement of all its interlocutors. In this sense, regulation is an ‘essentially contested’ concept¹¹ and practice. But for the purposes of this Symposium, we adopt a working definition and suggest that there are four key themes that are particularly significant. By way of a working definition, Black et al. have suggested that:

Regulation is a dynamic exercise in collective problem-solving . . . the sustained and focused attempt to alter the behaviour of others according to standards or goals with the intention of producing a broadly defined outcome or outcomes which may involve mechanisms of standard setting, information-gathering and behaviour modification.¹²

Building upon this skeleton, a review of the literature suggests a few key themes.

Regulation is an inherently normative and programmatic exercise. While there are undoubtedly difficult technical and practical aspects to every regulatory initiative, in the end, all regulation is driven by a desire to improve the public good.¹³ Inevitably, there are different—even competing—conceptions of what is meant by ‘the public good,’ but there can be no avoiding the normativity of any regulatory enterprise.¹⁴ Importantly, even if there is no dispute as to the ideal values, there is usually more than one value at stake in the pursuit of the public good and these various values may be in tension or even in conflict. Regulatory interventions need to be aware of, and responsive to, these normative challenges and dilemmas.

Regulation is complex. Once upon a time, ‘regulation’ was conceived of as an essentially prescriptive, pseudo-Austinian, phenomenon: it was the command and control model whereby one party would mandate rules and enforce compliance through sanctions.¹⁵ Regulation in this model was hierarchical, monological, deterrent-driven, and ‘hard.’ Contemporary conceptions of regulation acknowledge that command and control prescriptions are one form of regulation, but argue that, descriptively and normatively, regulation is more encompassing. Because command and control approaches have their weaknesses and limitations—ineffectiveness, expensiveness, bluntness, and inflexibility—the realm of regulation has been expanded to identify and endorse other forms of regulation that are more collaborative, more persuasive, more co-operative, more accommodative, more dialogical, and ‘soft.’ These have been variously described as

11. W.B. Gallie, *Essentially Contested Concepts* 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1956).

12. Julia Black et al. eds., *Regulatory Innovation: A Comparative Analysis* 11 (2005).

13. OXFORD HANDBOOK, *supra* note 3, at 563; see generally *The Politics of Regulation*, *supra* note 9.

14. *Regulation and Governance*, *supra* note 3, at 1; Christine Parker, *Twenty Years of Responsive Regulation: An Appreciation and Appraisal*, 7 REGULATION AND GOVERNANCE 2 (2013).

15. See generally OXFORD HANDBOOK, *supra* note 3.

'responsive,'¹⁶ 'smart,'¹⁷ 'meta,'¹⁸ 'really responsive,'¹⁹ 'risk-based,'²⁰ 'principles-based,'²¹ or 'outcomes-focused.'²² Such approaches, in turn, generate an additional set of inquiries into the meaning, nature, and dynamics of (non)compliance.²³

Regulatory analysis is highly contextual. Because the realms of social interaction are so diverse, and because the regulatory objectives, goals, and values can be so distinct, it is neither possible nor desirable to seek universalizability of regulatory analyses.²⁴ Rather, it is preferable to identify a particular realm of inquiry, articulate appropriate guiding values, and then interrogate and assess whether those values are being achieved through the prevailing structures, institutions, processes, actors, and dynamics.²⁵ Such contextualism requires us to pay attention not only to what regulators try to do, but also how the regulatees respond.²⁶ Viewed in this light, regulation is a craft, a problem-solving art.²⁷

Change, Flux, and Innovation. Many analysts of regulation argue that because of the inevitability (and rapidity) of social, economic, political, cultural, and technological changes, regulatory norms, processes, and instruments must also be dynamic.²⁸ Regulation is, therefore, always a work in progress.²⁹ To be effective, regulatory thinking cannot be frozen in time, and regulators must be open to innovation, revision, recalibration, reconstruction, and experimentation. Reflexivity and imagination are core capabilities for both regulatory actors and institutions.³⁰

It is important to emphasize, however, that regulatory imagination and innovation are not to be understood as ends in themselves. Rather, any

16. Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* 4 (1992).

17. Gunningham et al., *supra* note 6, at 1.

18. See generally Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (2002).

19. Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MODERN L. REV. 59 (2008).

20. Bridget Hutter, *The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation* (2005).

21. Christie Ford, *Principles-Based Securities Regulation in the Wake of the Global Financial Crisis*, 55 MCGILL L. REV. 257 (2010).

22. See generally Andrew Hopper & Gregory Treverton-Jones, *Outcomes-Focused Regulation: A Practical Guide* (2011).

23. See generally Christine Parker & Viebieke Nielsen, *Explaining Compliance: Business Responses to Regulation* (2011).

24. Ayres & Braithwaite, *supra* note 16, at 110; Robert Baldwin et al., *Understanding Regulation: Theory, Strategy and Practice* (2nd ed. 2011) [hereinafter *Understanding Regulation*].

25. See generally *The Politics of Regulation*, *supra* note 9.

26. Parker & Nielsen eds. *supra* note 23.

27. See generally Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance* (2000).

28. See, e.g., Ayres & Braithwaite, *supra* note 16; *The Politics of Regulation*, *supra* note 9; *Understanding Regulation*, *supra* note 24.

29. Julia Black, *Learning from Regulatory Disasters*, 10(3) POLICY QUARTERLY 3 (2014).

30. Black, *supra* note 12, at 11.

assessment of such changes must be directly related to the norms and values initially identified and the outcomes desired. This is simply a re-iteration of my initial observation that regulation always has an irrepressible normative underbelly.

II. Applying Regulatory Theory to the North American Legal Professions

In this mini symposium, which grows out of a North American Consortium on Legal Education (NACLE) workshop in Monterrey, Mexico in 2015, three scholars from Canada, Mexico, and the United States apply some of the insights of regulation theory to the legal professions in each of these jurisdictions. A comprehensive analysis of the regulation of the legal professions in each jurisdiction would, of course, require a significant volume. Therefore, to make the project manageable, we have identified three key dimensions that are particularly challenging at the current moment: legal education, lawyer regulation, and transnational lawyering. We have chosen legal education because control over who gets permission to enter the profession (and by what criteria such decisions are made) has determinative impact on the delivery of legal services in each jurisdiction. Second, we have chosen lawyer regulation because, in the last decade, there have been several significant controversies in each of the jurisdictions on who, or what, should be regulated, and by whom? Third, we have chosen transnational lawyering because the combination of globalization (and the desire for greater North American integration) and technological innovation suggests to us that the historic national boundaries that have traditionally structured the regulation of lawyers are eroding, with the result that this is an immediate and pressing challenge that cannot be ignored. Each of the essays presents a careful and insightful analysis of some of the most currently significant regulatory challenges in each of the three jurisdictions, and each can be read on its own. But collectively, they also illustrate the four key regulatory themes discussed above.

Regulation is an inherently normative and programmatic exercise. All three contributors clearly illustrate the normative and programmatic nature of regulation. For Professor Lutz, the goal of regulating “inbound transnational lawyers” to the U.S. is to ensure competency and competition, while the goal of “regulating outbound transnational lawyers” is to facilitate trade in legal services and building the rule of law in the world. For Professor Urquiaga, the normative agenda for the regulation of Mexican lawyers must be to ensure the provision of competent, accessible, and professionally responsible legal services. For Professor Roussy, the currently dominant normative imperative is to provide uniform quality in legal education and the ethics standards of the Canadian legal profession.

Regulation is complex. While the circumstances of the United States, Mexico, and Canada are different, each of the authors agrees that the regulation of the legal profession is a highly complex exercise. In Mexico,

the sheer numbers of law schools, legal associations, and lawyers makes coherent and cohesive regulation an enormous challenge. In the United States, regulation is plagued by the tension between the forces of globalized openness on the one hand, and localized protectionism on the other. In Canada, the federal nature of its legal professional framework has created historic barriers to national mobility and uniformity, and has required the Federation of Law Societies of Canada to engage in a slow and patient (but very determined) reconstruction of the regulatory regime.

Regulatory analysis is highly contextual. The essays also reveal the highly contextual nature of lawyer regulation. The economic, political, social, and cultural traditions of Canada, the United States, and Mexico are radically different, and this has a manifest impact on the prevailing regulatory challenges in each jurisdiction. Mexico seems to be struggling to establish some of the rudimentary elements of an effective and efficient regulatory regime for its legal profession. Canada is maneuvering to move beyond its checkerboard historical regulatory practices to constitute a more uniform—and hopefully fair—governance system. The United States is exploring and experimenting with a variety of mechanisms to ensure that it remains a central player in the increasing globalization of legal practice.

Change, Flux, and Innovation. All three contributors demonstrate that change and flux are unavoidable realities of the contemporary legal services market place. They all agree that the dynamics of globalization and the emergence of new technologies will inevitably have an impact on the regulation of the legal professions. Furthermore, they also agree that access to justice—to the extent that it dovetails with access to legal services—is an increasing challenge in every jurisdiction, and that the regulators of the legal professions need to respond to this fundamental challenge to the legitimacy and integrity of their legal professions. But the three jurisdictions seem to vary in their willingness to engage in innovation. While none are particularly radical (compared, for example, to what is happening in Australia or the United Kingdom), the United States seeks to re-orient legal education and become more responsive to transnational lawyering. In Canada, the major innovation is the centralization of power and authority in one national umbrella organization with the express desire to get things done. In Mexico, despite attempts at significant regulatory reform to improve the governance structures of the profession, there has been tough (and seemingly effective) resistance.

III. Conclusion

Professors Urquiaga, Roussy, and Lutz have identified significantly different contemporary challenges for the regulation of the legal professions in Mexico, Canada, and the United States. On the one hand, this indicates that it would be unwise, or at least premature, to espouse the idea (or ideal) of a North American legal profession. But at the same time, the essays illustrate that there is increasing awareness of the global and regional forces

that are having an impact on the obligations of the regulators of the legal professions. While the problematics and perspectives (and even the aspirations) in Canada, Mexico, and the United States might be different, there is consensus that the regulation of the legal professions is a work in progress and that, if anything, the challenges may be getting even more difficult.