Teaching Regulation at the Law School

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"Technique without morals is a menace;
but morals without technique is a mess".
Karl Llewellyn[1]

The editors of the enlightening book *Regulating Law* capture the contrasts and, as well, the potential dialogue between regulatory and legal scholarship.

> Typically regulationists concern themselves with analyzing various types of regulatory norms, techniques, and organizations (legal and non-legal) and how effective each is in different circumstances. In relation to law, a regulatory perspective asks empirical questions about the proactive effects of law on society as a whole (or at least the target segment of society) –for example, the extent to which enforcement prevents and remedies wrongful conduct- and normative questions about how law and regulatory technique can be designed to be most effective at accomplishing social goals. The methods of regulation are often empirical, and theory is generally aimed to elucidating the impact of law on social practices and institutions external to law, and vice versa. Legal scholars, by contrast, typically take an internal approach that focuses on the content of legal doctrine and its coherence (Parker *et al*, 2004, 3).

In this talk I will make a few comments on some of the most relevant implications for legal education of the contrasts and dialogue between Law & Regulation. First, I will consider some basic skills that must be included in legal education it is foster an effective regulatory practice. Second, I will analyze some of the effects the regulatory perspective on legal education. And, third, I will claim that it is critical that there be a cross-fertilization between a regulation and legal education.

1. Tackling the Problem: Teaching Regulatory Skills

Whether it focuses on economic or other social issues, the very nature of regulation is instrumental. That is to say, in its broadest sense regulating is a question solving or managing problems (Lindblom, 1992). To be sure, regulatory strategies deal with complex problems, and this complexity carries over regulatory practice. Thus, teaching regulation is mostly a matter of learning technical skills for tackling effectively complex problems. In a nutshell, those skills may be summarized in three categories: analysis, design, and management.

Analyzing regulatory context. Problems always emerge in specific contexts. Thus, the full definition of any problem (its nature, relevance, complexity, etc.) depends on the ability to capture the functional relationships between an almost infinite variety of states of affairs, which are *prima facie* unsatisfactory and their contextual variables. Only after a reasonably profound and extensive analysis of the context (economic, political, ideological, geographical, etc.) can a social issue be "constructed" as a regulatory problem: that is, as an issue that can be "manageable" by setting up specific goals or targets that can be pursued by rational social action (Weber 1964). Any sound regulatory practice requires the abilities to recognize, understand and evaluate a large variety of empirical and institutional facts.

[1] Quoted in (Sunstein 1993, 1).

Designing regulatory instruments. Usually, there is more than one way to do something –often, there are many. Nevertheless, only a few available alternatives are rational: that is, only some alternatives are both effective in achieving the goal, and efficient in doing it at reasonable costs (Dahl and Lindblom, 1954). The relevance of a regulatory technique depends, then, on two complementary abilities: first, the ability to figure out o, simply, to imagine operative responses to regulatory problems, and secondly, the ability to choose from an array of legal and non-legal tools, those than can be arranged strategically to solve or manage the problem at the lowest cost for society.

Managing regulatory programs. Often, things do not go as planned and, sometimes, they just go utterly wrong. Everybody knows that planning and designing are very different from doing the job. In order to get a regulatory job done, one needs to be able to push rational action through a "conspiracy" of multiple obstacles (normative, organizational, cultural, etc.). As is well known, regulatory programs can be weaken, deviated, frustrated, or even subverted, by those obstacles (Breyer, 1982). A regulatory program may require adjustments, redefinitions of instruments, and goals and, eventually, in case it does more wrong than good, the hard choice of abandonment. The ultimate justification for the use of regulatory technique lies on the abilities of regulators to recognize, evaluate and react both to favorable and adverse scenarios, make good things happen and prevent bad things from happening, through –and in spite of- those scenarios (Baldwin and Cave 1999).

2. The Importance of Making It Work: The Effects of the Regulatory Approach on Legal Doctrine

Regulation is essentially a goal-oriented activity. No appeal to regulation can be formulated –let alone, justified-, without reference to a set of specific, and often quantifiable, results. Thus, "no results, no trick"… That could be the regulatory motto. This emphasis on consequences rather that on the evaluation of conduct as right or wrong, legal or illegal, etc., has important implications for both teaching regulation and legal doctrine. Here I will consider just three of these implications: a skeptical approach to rule-based regulation, the importance of factual arguments for the design of regulatory programs, and the institutional dimension of regulation.

Rule skepticism. Without necessarily subscribing a full-fledged skeptical theory of the role of rules in legal reasoning and argument (e.g. American Legal Realism), most regulationists share the conviction that rules –even those backed up with a legal sanction- very seldom make the trick, or better, do the work. Although it acknowledges that rules are a central device for controlling human behavior, the regulatory perspective emphasizes the complexity of the motivation of social action. Therefore, the effectiveness of regulation as social technique depends on its capacity to build sets or, rather, systems of incentives that include the use of many instruments that "produce" conduct in different ways: coercion, competition, consent, communication, code, etc. (Morgan and Yeung, 2007, 79). Of course, some of these instruments are relatively alien to the legal realm –or, more precisely, to mainstream legal discourse and imagination-, but this does not imply that legal scholars and practitioners should not be aware of the potentialities of regulation in the sphere of the "law-ways" (Llewellyn 1940). Ones jurists realize that in many instances of legal activity rules "play" just a part of the game, they can formulate sounder theories and, more importantly, improve legal practice.

Facts pervasiveness. As any insider could tell, regulatory discourse is mostly a "facts-talk". What *is* the problem?, What can *be* done about is?, Who *is* in the best position to do it?, What *is* it aimed?, To which extent can *it* be accomplished?… All these are empirical questions that need to be answered if regulation is to be somewhat effective (Hood, 1986). According to some jurists, those answers are just matters of policy that should not worry them excessively.

That is to say, they belong to the fields of social theory, government, economics, political sciences and the kind, definitively not to the legal domain. Nevertheless, for many other legal scholars and practitioners these questions are quintessentially legal, for they share the view that law is instrumental in nature. On this view, if law is to be considered an instrument of social transformation, no community can afford for a long time an anti-realist conception of law and legal knowledge -i.e., law as a normative phenomenon and, consequently, legal knowledge as the apprehension of those norms, without any reference to the factual context of legislation and adjudication- without deluding itself about the real functions that law and legal order perform in that society. In the absence of any of the so-called considerations of policy, legal and regulatory discourses are nothing but rationalizations of the *status quo*. And, sadly, very rarely is the *status quo* justifiable.

Organization matters. As I noted above, good regulation is context-dependent. However, social contexts are not given natural facts but institutional constructions, both of an intentional and non-intentional nature. Thus, any regulatory regime –as much as any legal system- is, to a great extent, a function of its institutional environment, and thus, a product of non-intentional (non-rational) sources of the normative sphere. This claim, albeit obvious to legal sociologists and anthropologists, may somehow cause alarm among other legal scholars who postulate, as the bedrock of legal doctrine, that there exists a sharp distinction between "truly" legal factors -mainly governmental powers- and social factors –information, resources, culture, etc.- for normative outcomes. However, although central for the idea of public law (Loughlin 2010), this "statist" and bureaucratic view of law & regulation has been abandoned for already some time by many regulationists, and replaced by a multi-factorial source of social standards (Jordana and Levi-Faur 2004). In this view, a wider conception of the sources of the normative links regulation with complex processes of governance rather than, exclusively or even centrally, with the rightful exercise of governmental power. Notwithstanding the central importance of legal forms for the Rule of Law, -i.e., the judicial review and democratic survey of regulation-, this movement from government to governance helps legal scholarship to focus on the importance of organization (social, economic, political, etc.) as a relevant factor –and I would say, sometimes, as the critical factor- for good government in contemporary societies. And, therefore, it cannot be set aside by legal scholars without a gross risk of anachronism.

3. Why still Law *&* Regulation?

In the previous paragraphs I have pictured Law & Regulation as a rather uncomfortable couple. From that picture, one may have the impression that regulatory scholarship has transcended the shortcomings of legalism. One may even think that the theoretical and empirical agenda of regulation could be more promising if it were associated with more fitted partners: economics, political science, public administration, etc. In short, that restricting the influence of legal doctrine on regulation to a secondary and formal role would be a winning move for regulatory theory and practice. This would be, nevertheless, a very wrong conclusion. Despite the differences in approach and method that I have just sketched, regulation is –and has to be- embedded in law. Moreover, I contend that without the specific legal framework of constitutionalism, it is impossible for regulation to play its extraordinarily important role in the governance of contemporary societies. I will conclude with three very brief comments on the importance of the cross-fertilization between legal doctrine and regulation.

Choosing ends? Above, I have pointed out the instrumental-technical character of regulation: regulation is concerned with getting things done, rather than with finding the right thing to do. But, one may ask, where do the ends (policies, goals, targets, objectives, etc.) of regulation come from? The cynical would answer straightforwardly: "from the will of whoever has the effective power to set them". But for those who endorse the values of a constitutional

democracy the answer is, however, very different: “the ends of regulation come form *the* law –and, more precisely, from the Constitution” –i.e., from the legally established processes of collective action (democracy) in a context of substantial restraints to that action (rights). In a liberal democracy, regulation is a tool of constitutional governing, not a substitute for it.

Distributing social gains and costs. Regardless its efficacy and efficiency, regulatory programs always have distributive effects. Thus, again it may be asked: who is to win and who is to lose from a regulatory intervention? To be sure, this is a question that cannot be answered from *inside* the regulatory nexus between means and ends. On the contrary, as I have already argued, regulation needs constitutional and legal criteria to determinate which ends (rights, interests, values, etc.) are to be privileged in each situation. By providing these criteria, a constitutional democracy not only establishes legitimate social ends, but also defines the arguments that may be used to justify the distributive effects of regulation. And by doing so, regulation says, laud and clear, what sort of society we aspire to be or, rather, to become.

The Value of the Rule of Law. From what I have just said it may be concluded, rightly, that since in a liberal democracy no governmental power can be exercised beyond the Constitution, every deployment of regulation must be *under* “Law’s Empire”. So, the subordination of regulation to the Constitution looks as a good reason for maintaining the partnership between Law & Regulation (Richardson 1999), and learning the ins and outs of that relationship might seem a good justification for teaching regulation at the law school. In my view there is, nevertheless, a more substantial reason for that partnership and, of course, for teaching regulation. It is obvious that if appealing to the Rule of Law is to signify something more than a rhetoric formula, this principle should imply a credible compromise on effective governing through legal institutions. That is, paraphrasing Madison: in order to ensure that the Rule of Law is substantially upheld it is necessary, of course, the control of government, but also -and centrally- that governments be effective in doing what they are supposed to do. It is precisely because of the need to have “working” government that the regulatory perspective is fundamental for a realistic version of the Rule of Law.

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