Better regulation – Variations on a theme

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Résumé

Les origines du "Mieux Légiférer" se situent dans un contexte national britannique spécifique, qui a conditionné son développement dans l'Union européenne et dans les relations internationales de l'UE, par exemple avec la Chine. Ces variations sur un thème commun démontrent que le "Mieux Légiférer" n'a pas pu surmonter les limites de ses origines. En plus, il est à noter que les notions de 'Better Regulation' et 'Mieux Légiférer' sont très différentes, ce qui est encore une indication des difficultés de la transposition des pratiques juridiques.

Abstract

Better Regulation (BR) originated in a specific national United Kingdom context, which conditioned its initial theoretical and institutional expression and shaped its later development. In the EU, the proponents, idea and practice of BR encountered different opportunities and constraints. The EU's international economic relations with China encompass a conjunction of the legacy of BR, EU realpolitik and a complex and rapidly changing set of economic relations. However, BR has not overcome the limitations of embeddedness to which all social practices, including law-making practices, are subject.

Better Regulation is best viewed as variations on a theme, rather than as an unalterable model that can easily be transplanted from one context to another. This brief article aims to make three main points. First, Better Regulation (BR) originated in a specific national political, social, economic, cultural and legal context, which conditioned its initial theoretical and institutional expression and which then shaped its development after it was transposed to the European Union (EU). Second, in the EU context, the proponents, idea and practice of BR encountered very different opportunities and constraints as compared to its national origins, and it has not been able to overcome the limitations of embeddedness to which all social practices, including law-making practices, are subject. In particular, it has never been

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able to achieve many of its original idealistic objectives. Third, these limitations have become especially apparent when BR is considered in the international context. In the context of the EU's international economic relations, we see a conjunction of the legacy of BR, EU realpolitik and a complex and rapidly changing set of economic relations. All of these points turn on the same assertion. Law, understood in the broad sense, is not only part of its social context ('law-in-society' rather than 'law-and-society'), but it is also embedded in its social context, the limitations of which are very difficult to escape. Much may be lost in the translation of legal ideas, institutions and associated social practices from a national context, to the EU context, to the international context.

1) Origins

Years ago I went into a post office in central London and read with pleasure an announcement about the campaign of the then UK government to make legislation easier to understand, first by ensuring the acts of Parliament and administrative instruments were written as clearly as possible, second by using simple language if possible and third by drawing on the strengths of UK and common law drafting style to spell out legal and other obligations in as much detail as necessary, indeed sometimes using soft law guidelines instead of legislation for this purpose. In 1997 the UK Cabinet Office sponsored the creation of a Better Regulation Taskforce as an independent body to advise the Government.[2] Almost ten years later, the UK enacted the Legislative and Regulatory Reform Act 2006.[3] With increasing emphasis on risk regulation as a central function of government, the Better Regulation Commission, growing out of the Task Force, was established in 2006 and was succeeded in 2008 by the Better Regulation Executive.[4]

These developments did not occur in a vacuum. In the UK Margaret Thatcher was leader of the Conservative Party from February 1979 till May 1979 and then Prime Minister from May 1979 till late November 1990. In addition to its laudable objectives with regard to legislative drafting, BR was very much a child of the then Prime Minister's strong orientation towards 'more market and less State', or the so-called 'free market', in which, as Max Weber remarked in his classic *Law in Economy and Society* '[b]y virtue of the principle of formal legal equality … the propertied classes … obtain a sort of "factual autonomy" '.[5] The five basic principles which the UK Better Regulation Taskforce identified to improve what it considered to be 'governmental intervention' in the economy were proportionality, accountability, consistency, transparency and targeting; the last principle referred to focusing on the specific problem and minimising side effects.[6]

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2 See Better Regulation Taskforce, 'Principles of Good Regulation', p. 10, available at http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf , last accessed 15 March 2017. See also OECD, Public governance framework for Better Regulation, Executive Summary: United Kingdom, available at http://www.oecd.org/unitedkingdom/44912018.pdf, last accessed 15 March 2017.

3 Bill 111, Session 2005-2006, cited in Wikipedia, 'Better Regulation Commission', available at https://en.wikipedia.org/wiki/Better_Regulation_Commission, last accessed 15 March 2017.

4 See J. Black, 'The Role of Risk in Regulatory Processes', in R. Baldwin, M. Cave and M. Lodge (eds), *Oxford Handbook of Regulation* (Oxford University Press, Oxford, 2012), pp. 302 -349.

5 M. Weber, *Economy and Society, Volume 2* (Guenther Roth and Ckus Wittich, eds) (University of California Press, Berkeley, Los Angeles, 1968), p. 699, available at https://archive.org/stream/MaxWeberEconomyAndSociety/MaxWeberEconomyAndSociety_djvu.txt, last accessed 15 March 2017.

6 See Better Regulation Taskforce, 'Principles of Good Regulation', pp. 1, 6, available at http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf , last accessed 15 March 2017.

2) Elaboration in the EU

The European Commission's guidelines on BR state:

'Better Regulation» means designing EU policies and laws so that they achieve their objectives at minimum cost. Better Regulation is not about regulating or deregulating. It is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by the comprehensive involvement of stakeholders. This is necessary to ensure that the Union's interventions respect the overarching principles of subsidiary and proportionality i.e. acting only where necessary and in a way that does not go beyond what is needed to resolve the problem.'

These guidelines are very similar to the UK's conception of BR. Such similarity testifies to the legacy of the origins of BR, though in light of the forthcoming Brexit this may appear to be singularly ironic.

In the EU context, however, the original idea and practice of BR encountered very different opportunities and challenges. The lack of transparency and democracy of EU institutions, at least from the citizens' perspective, different regulatory traditions of the EU Member States, the complex quasi-federalist logic of EU legislation and other acts, and the interrelationship in the EU between national, supranational, transnational and international social and economic regulation provided poor soil for the fragile plant of BR.

For example, economists often tell us that European integration involves the integration of three markets: the market for goods and services, the market for factors of production (land, labour, capital) and the market for public policy. If we apply such a micro-economic model to public policy, we might expect that public demand would be met by public authorities who would supply legally binding norms to deal with social problems. However, the EU is as much a regulatory system as it is a legal system, or even more so. All over the world, regulation in contemporary societies usually means governance by experts, not public politics.[7] This is only one example of the tension between law and regulation, which is an unavoidable aspect of BR.

Better regulation has not really been able to escape its ideological, political and economic origins, but perhaps it did not need to do so. Doubtless, the explanation lies in the politics and economics of European integration. German Ordo-liberal scholars and government officials played a fundamental role in the drafting of the EEC Treaty, the development of EU competition law and the elaboration of EU anti-dumping law.[8] But the Ordo-liberal perspective provides too limited a conception of the internal market. Even at its origins, EEC law concerned not only with market access but also with

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7 See F. Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation*, Hart Publishing, Oxford, 2010), Chapter 2, 'Globalisation and the Law', pp. 11-41; T. Büthe and W. Mattli, *The New Global Rulers: The Privatisation of Regulation in the World Economy* (Princeton University Press, Princeton NJ, 2013).

8 On anti-dumping law, see F. Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Hart Publishing, Oxford, 2010), Chapter 6, 'Global Legal Pluralism and the Creation of New Legal Concepts: the "Non-Market Economy" in EC Anti-dumping Law', pp. 209-264.

market regulation, for example in the field of agricultural policy.[9] Moreover, from 2004 to 2014 the President of the European Commission was José Manuel Barroso, whose two terms of office embraced the EU's major enlargement, development of the market-based open method of coordination, approval of the Bolkestein directive on the free movement of services and adoption of the Lisbon Treaty. It also witnessed the 'paradox of subsidiarity', of which the principle of proportionality seems to have led to greater use of soft law, reduced judicial control of EU acts, an increased role for market actors and a decline of EU legitimacy.[10]

In the EU it is not surprising perhaps that, as Professor Peraldi-Lefeuf remarked at the conference, 'BR is a political programme possibly in search of legitimacy'.[11] In the EU context, the idea and practice of BR encountered very different institutional structures, democratic checks and balances and expectations of citizens from those of its country of origin. Nevertheless, it is depressing to note that in the EU BR has never been able to achieve most of its original, idealistic, non-economic and citizen-oriented objectives. So far as the citizen is concerned, the EU BR initiative remains a theoretically admirable but in practice a largely unattained and probably unattainable ideal. In a 'market without a State',[12] to what extent is it possible to simplify complex regulatory law and make it clearly understandable by citizens? What does 'clarity' mean in the context of a multi-national, multi-lingual polity without a real political public sphere? One should also ask: 'clarity' for whom? It is well-known that clarity for a lay person may well be ambiguity for a lawyer, and clarity for a lawyer is likely to be overly technical and overly complex, if not incomprehensible, for a lay person.

3) Competing Conceptions of Regulation

When BR crossed the Channel, it also encountered strikingly different conceptions of regulation. Terminology is one indication. For example, Better Regulation (BR) is usually translated into French as *Mieux légiférer* (ML). However, the two expressions have very different associations in their respective legal cultures and legal systems. BR derives from British, common law thinking about the flexible use of many types of norms to achieve desired social objectives.[13] ML stems from continental civil law systems, notably French law, with its emphasis on centralised government, legislation and very different conceptions of regulation.

We can distinguish four different conceptions of regulation upon which BR and ML drew in various settings. First, in its original conception in the United States, regulation, at first economic regulation and later social regulation, referred to governmental intervention in the market which was deemed to be necessary to protect public goods as a result of market failures. In other words,

9 See e.g. F. Snyder, 'CAP' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *Oxford Handbook of the European Union* (Oxford University Press, Oxford, 2012), pp. 484-495.

10 See F. Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer Academic Publishers, Dordrect, 1994), pp. 197-226.

11 Based on my notes taken in English of Professor Peraldi-Leneuf's presentation in French at the conference.

12 See the work of C. Joerges, F. Scharf and also J. Caporaso and S. Tarrow, 'Polanyi in Brussels: European Institutions and the Embedding of Markets in Society', RECON Online Working Paper 2008/01, available at http://www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html, last accessed 6 November 2016.

13 See for example C. Scott, *Regulation* (Routledge, London, 2003).

the market was the desirable starting point or state of affairs, but it was not able to provide or protect certain public goods such as a good environment and healthy food. As a result of such market failures, government intervention was necessary, for example in the form of legislation or judicial decisions.

A second conception is the Marxist or neo-Marxist approach developed in France by Robert Boyer. This macroeconomic perspective is concerned with 'an examination of geographical and historical variations in the institutional arrangements that define capitalist economies.[14] As Boyer and Saillard point out, among users of the English language the French term *régulation* was often 'confused with regulation (règlementation in French) ; furthermore, as a result of conservative deregulation strategies [such as the Thatcher revolution] English usage of the term 'regulation' has experienced a revival'.[15] Clearly, this second conception of regulation involved completely different assumptions and questions and reached different conclusions from those of the first conception of regulation.

A third conception is the *'droit de la régulation'* founded in France by Marie-Anne Frison-Roche. It imports from American scholars the idea that governmental intervention, usually in the form of legislation, is necessary in case of market failure. However, it adds that certain sectors, such as public health, should not be governed by the market but require governmental action in the public interest to preserve a balance between market efficiency and public interest, including fundamental rights.[16] It thus weaves together two strands: first, the idea that market failure requires governmental intervention in the market, usually in the form of legislation, and second the idea that certain areas of activity should not be left to the market. It also assumes that the government represents the public interest, an assumption was not necessarily a feature of the first conception of regulation.

A fourth conception of regulation is that developed primarily at the London School of Economics and the Australian National University School of Regulation and Global Governance (RegNet), with considerable faculty exchange and joint publications. According to this conception, regulation is the use of numerous institutions, tools and techniques to ensure the achievement of desired social goals.[17] It does not assume the free market as ideal, or that governmental regulation stems mainly from market failure, or that the markets is inevitably deficient in providing public goods. Regulation is not limited to the government; it can be and frequently is redistributed among many actors and institutions, including private actors. Nor is it limited to legislation, or even to law or formal norm-making processes. From this perspective, many institutions, not only the State, may represent the public interest.[18]

These different conceptions of regulation often remain hidden, implicit and unarticulated in the expression 'Better Regulation'. They testify to two tensions: one between law and regulation, and the

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14 R. Boyer, *The Regulation School: A Critical Introduction*, trans. C. Charney (Columbia University Press, New York, 1990); R. Boyer, 'Introduction', in R. Boyer and Y. Saillard, *Regulation Theory: The State of the Art* (Routledge, London, 2002), p. 2.

15 R. Boyer, 'Introduction', in R. Boyer and Y. Saillard, *Regulation Theory: The State of the Art* (Routledge, London, 2002), p. 1.

16 M.-A. Frison-Roche, *Les 100 mots de la régulation* (Presses Universitaires de France, Paris, 2011).

17 For an EU example, see F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', *Modern Law Review*, 56, 1, January 1993, 19-54.

18 For representative publications, see J. Black, *Rules and Regulators* (Clarendon Press, Oxford, 1997); J. Braithewaite and P. Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge, 2000); C. Scott (ed), *Regulation* (Routledge, London, 2003); P. Drahos (ed), *Regulatory Theory: Foundations and Applications* (Australian National University Press, Acton ACT, 2017), available at http://press-files.anu.edu.au/downloads/press/n2304/pdf/book.pdf?referer=2304, last accessed 16 March 2017.

other concerning the relative scope of law and regulation. Each of the four conceptions or schools of regulation views these tensions in a different way. Let us take the example of the LSE/ANU conception, to which I subscribe and indeed have contributed. From this standpoint, regulation is a process. It may or may not require legislation. The law in the general sense of legally binding measures or in the narrower sense of legislation may be used an instrument of regulation. But regulation may and often does involve soft law, in the EU and elsewhere.[19] In addition, regulation cannot be reduced to proceduralisation, in the sense of agreement on procedures to be followed and respected in situations when the parties cannot agree in advance on ultimate outcomes. But this conception of regulation does not require that agreement on procedure replaces agreement on outcomes. Parties may agree on outcomes, or they may agree simply on procedures, or they may agree on procedures, including agreement to accept the outcome of procedures. It may involve both agreement on procedures and prior agreement on substantive outcomes. Such processes may involve the State but they do not necessarily do so. From this standpoint, BR seems very distant from a classic understanding of ML.

A similar example stems from the observation that the main problem of BR is that it leads to a 'negotiated law'. However, this feature may be inherent in regulatory law, at least according to the fourth conception of regulation. The command-and-control model of regulation is out-dated and often ineffective, especially in democratic societies. Many current theories of regulation recognise the significance and frequency of reflexive law and of transnational normative repertoires. In the former, which has long been recognised as a principal characteristic of economic law and regulation, first perhaps in the UK, the basic rules are negotiated between regulator and regulatee. In the latter, domestic and EU rule-makers draw from a range of concepts, principles, rules and procedures which have been generated by national and international legal processes. Both may be seen as aspects of 'negotiated law'. It would be unusual if BR were any different.

Finally, regulation is not limited to the national legal system or domestic political arena. Indeed, there is an enormous academic literature on international and transnational regulation.[20] Many scholars of WTO law regard the WTO institutional and normative system as a regime for regulating international trade. The WTO is a good example of the globalisation of local practices, notably from the United States and the EU. The norms, procedures, assumptions and legal culture of WTO law draw heavily on American international trade law, and decision-making concerning standardisation or anti-dumping borrows from US administrative law concepts and principles such as transparency, coherency, consultation, evidence-based decision-making, minimum cost and least administratively burdensome. International trade regulation is a prime illustration of proceduralisation. In this context, such a policy choice represents a choice that quasi-judicial institutions rather than diplomatic negotiations will settle disputes, particularly because the WTO agreements are the result of international negotiations and compromise and hence often deliberately vague or ambiguous, even though of course they are legally binding.

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19 For example, on China see H. Luo and G. Song, *Soft Law Governance: Towards an Integrated Approach* (William S. Hein, New York, 2013).

20 See for example F. Snyder and L. Yi (eds), *The Future of Transnational Law: EU, USA, China and the BRICS / L'avenir du droit transnational: UE, USA, Chine et les BRICS* (Bruylant, Brussels, 2015).

4) Better regulation, the EU and International Economic Law

As the preceding paragraph suggests, some aspects of BR are relevant to international economic law, despite the very different context. However, if the translation of BR to the EU and relations among Member States was difficult, its potential transposition to the radically different context of international economic relations has been fraught with difficulty. The change of context and numerous conflicts of interest, especially with the transformation of international economic relations in recent decades, have undercut whatever potential application BR and its companion REFIT might have had. An instructive example is the current negotiations with China concerning the non-market methodology in EU anti-dumping law.

These negotiations focus on Section 15 of the Protocol of Chinese Accession to the World Trade Organisation, which concerns price comparability in determining subsidies and dumping.[21] The most controversial provision states that:

'(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector'.

Section 15 expresses a complex, negotiated international compromise among numerous conflicting interests instead of the clarity which might have been possible by virtue of the original ideas of BR. The basic issue in disagreement is whether this provision allows other WTO Members to continue to use their current non-market economy methodology in case of imports from China until specific conditions are satisfied, or whether the provision grants China market economy status (MES) automatically as of 12 December 2016. Both sides of the debate use economic, political and legal arguments.

Unfortunately, many recent commentators seem to neglect the basic methods of interpretation of public international law. As set forth in Article 31 of the Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[22] The EU lawyer may note that these methods of interpretation are the reverse of those expressed by the Court of Justice of the European Union since Case 26/62 *Van Gend en Loos.* The recent proposal

21 World Trade Organization, Protocol on the Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, 23 November 2001, available at https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn, last accessed 16 March 2017.

22 Vienna Convention on the Law of Treaties, Article 31(1), available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, last accessed 16 March 2017.

by the European Commission to reform EU anti-dumping law[23] attempts to achieve a reasonable compromise among numerous conflicting interests and objectives. Space limits prohibit an analysis of the proposal here. It is noteworthy, however, that the proposal is based on consultation of stakeholders, including China, and on an impact assessment, both of which are principal characteristics of BR.[24] It is not clear what weight was given to consumers, and the proposal remains true to the Ordo-liberal origins of EU anti-dumping in failing to recognise Chinese State capitalism as one of the varieties of capitalism. Nevertheless, it represents an effort to steer between the Scylla of long-standing protectionism and the Charybdis of widespread loss of EU jobs.

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This brief paper focused on origins, development and application of Better Regulation, tracing similarities and differences among several variants of BR. It emphasised the importance of the contexts of law. BR focuses mainly on markets, partly because of its ideological and political origins and partly because of the mainly economic orientation of European integration and the EU. However, the original promises of BR concerned not simply market actors but also citizens. If BR is to fulfil its original promises, we need to rethink its current orientation.

How can we escape this market focus, and how can we develop a perspective which takes account of recent economic and political developments? Three points stand out. First, the most powerful market actors today are organised global value chains, including many SMEs which form part of international production networks or international supply chains. Second, market economies produce winners and losers, unless BR or other forms of regulation embody strong redistributive policies. Third, the basic principles underlying BR should consist not simply of a focus on procedures but also, and more broadly, of social solidarity ethics, namely development, respect for the environment and social justice.[25] These crucial points should be considered seriously in reshaping BR or similar normative processes in the interests of citizens.

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23 European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, {SWD(2016) 370 final}, {SWD(2016) 371 final}, {SWD(2016) 372 final}, COM(2016) 721 final, 2016/0351(COD), Brussels, 9 November 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155079.pdf, last accessed 16 March 2017.

24 See also European Commission, Trade, New Archive, 'Commission proposes changes to the EU's anti-dumping and anti-subsidy legislation', available at http://trade.ec.europa.eu/doclib/press/index.cfm?&id=1573, last accessed 16 March 2017.

25 On social solidarity ethics, see F. Snyder, *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (Hart Publishing, Oxford, 2010), Chapter 10, 'Social Solidarity Ethics and the WTO', pp. 381-423.