Introduction – Why theorise regulation?

Initially, with a particular legal referent, this chapter summarises the guiding contemporary theories of interventionist and non-interventionist regulation. From this exercise emerges a discussion of the different disciplinary foundations and applications of these theories and their ramifications for an integrated and credible regulatory pluralism at a global level. The purpose of the theory review is not to mount a detailed critique or to propose a complex framework for the synthesis and development. Those are other more ambitious projects. For the purpose of a generalist text, theory is interrogated to inform the selection and integration of regulatory strategies proposed in this chapter.

I devise the analysis of a continuum from sharp to flat regulation so that this review of theory can be ordered and organised. This will be further developed in the chapter dealing with strategies and techniques (Chapter 3). I give credit to the regulatory pyramid but prefer a schematic which does not rely on the pinnacle of state sanction. A driving purpose for this book is to explore the future for regulating global crisis in governance contexts where the shadow of state hierarchy is faint and where the state and its agents may in fact be a key part of the regulatory challenge. Such a recognition of any constructive if compromised regulatory role for fragmented states cannot be grounded in a framework of theory which is state-centred or at least ultimately state-dependent. That said, there are few if any modern regulatory frames in the public sphere at least which are not touched by some state imprint. Therefore, the scheme that is developed below does not have as one polar opposite a stateless regulatory theory but rather states in shadows.

Sharp regulation has many of the features of the pyramid. It can be hierarchical, layered, interrelated, consequential and integrated through progressive relationships and outcomes. It operates on a tension between
public and private forces. It recognises the incentives for those against whom regulation is pitched, out of self-interest to attempt to capture regulatory initiatives or to resist their reach and impact. Law features significantly in sharp regulation as does the sponsorship and authority of the state and its agencies.

Flat regulation is as it sounds, less reliant on hierarchies, less complicated, more consensual, less sanction-reliant and thus less benefitted by actionability. It is likely to have a much less interventionist perspective. Law and legal rights and obligations are not an important feature of its framework. In fact, the common regulatory characteristics and institutions of sharp regulation are not essential in these regulatory styles. Flat regulation rests on self-motivation, agreement and the endorsement of civil society rather than the triumph of powerful self-interest. That is not to say that in flatter regulatory modes interest is always common and communitarian. Were that so, then regulation may not in large part be required. For flat regulation, the motivation for compliance is likely to be shared interest or some combination of lesser and less enforceable interest allocations. Therefore, sharp regulation is likely to be employed when the interests of the regulator and the regulatee are not aligned, while flat regulation is most useful when such interests draw closer to each other, approaching mutuality.

Sharp to flat regulation has several measures, some more state-oriented than others. Interventionist (sharp) to non-interventionist (flat) measures obviously have some gradated reference to state governance. Other measures of sharp/flat relate to the:

- presence of the law;
- reliance on penalty;
- significance of actionability;
- importance of conciliation and conversation;
- merging or measuring of competing interests;
- organic or mechanical origins of regulation (influencing the externality of intervention or the internality of collaboration);
- essence of communitarianism (where regulatory forces emerge organically through risk and fate, rather than being imposed by external interests and authority);
- centrality of dispute prevention over resolution;
- eventuality of regulating away the need for regulation.

On this final point, sharp regulation, on the one hand, will perpetuate itself as long as its shadow of hierarchy is strong. Flatter regulation, on the other hand, should eventually diminish the need for regulation as mutuality and collaboration take hold and hierarchy fades.

Perhaps due to the different disciplinary traditions from which regulatory theory has emerged, the discussion to follow takes on a fairly eclectic form.