III-1.5: *Recherche sur la notion de régulation en droit administratif français* [Research into the notion of regulation in French administrative law], by Laurence Calandri

Marie-Anne Frison-Roche, Managing Editor and Director

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MAIN INFORMATION

The ambition of this thesis is to identify the notion of regulation, but strictly limits itself to French administrative law. To do this, the author skilfully identifies the 'act of regulation', created by Independent Administrative Authorities to effectively carry out their regulatory tasks. This is both a functional definition, using the notion of 'mission', and a methodological one, with its permanent reference to Independent Administrative Authorities.

CONTEXT AND SUMMARY

The very title of this thesis reveals its narrow perspective, but also indicates that this a highly precise work, since the notion of regulation is and will only be studied in terms of "French administrative law." This means that economic considerations are excluded, as are the perspectives of other legal systems, and of private law. It may be tempting from the outset to challenge this assumption, because however pertinent the analysis might be, regulation cannot be locked into a branch of national law: this does not do it justice. Reading this 700-page work, one often has the impression that the author feels forced

to study regulation because she believes that this notion has "invaded" administrative law, rather than because she subscribes to it. The thesis therefore begins studying the relationships between administrative law and regulation by seeking to define the latter through a description of the government's organization and activities in its relationships towards citizens.

This starting point is as serious as it is limited, since it simply asks whether regulation is a word that denotes something that truly exists, and thereby modifies the way government bodies function, or whether it is simply a play on words. To do this, the author researches the status of regulatory law in French administrative law, since identifying the notion of regulation enables her to examine to what extent this concept has become integrated into French administrative law. The author continuously adheres to this strict legal perspective under which the term "regulatory authority" is always used, whereas the term "regulator" never is.

The author opts for a functional definition of regulation, meaning that she defines regulation based on the missions delegated to regulatory authorities. It is true that the notion of regulation was introduced into the law through the reality of the “regulator.” However, according to the author, this creates confusion, for it is not because an organization has a regulatory function, such as the Constitutional Council or the Council of State, that it is a regulatory authority. Rather, we should seek the autonomous concept of regulation in the work of Hauriou, who uses it to describe the use of rule-making in order to create equilibriums. This notion of equilibrium and adjustment is increasingly prevalent in contemporary doctrine. Therefore regulation has become "a legal term referring to action taken to ensure proper functioning and maintain a balance.”

The author, in an eminently coherent fashion, defines regulation through the prism of public law and its doctrine, apprehending regulation as the principal function of independent administrative authorities. She therefore adopts not only a functionalist perspective, which the author correctly analyzes as an incomplete process of specialization, but she also insists upon and emphasizes the institutional dimension of regulation. Thus, any regulation produced by Independent Administrative Authorities is similar, or even identical. This leads to a quasi-synonymy between Independent Administrative Authorities and Regulatory Authorities, even though regulation's legal function remains ill defined. This uncertainty is also linked to the ambiguous notion of "function".

The author stresses that French positive law eventually adopted the expression "regulatory function" even if statute is often fuzzy on the definition of this notion, especially under the influence of European law, which, in its various legislative packets, uses the term to refer to national regulatory agencies, rather than to define their function. Therefore, we can find greater clarity in case law, since the Constitutional Council and the Council of State refer to the mission of regulation.

The author of the book thereby shows that the function of regulation naturally produces "acts of regulation". Indeed, we cannot reduce regulation to rule making or police functions, and we must consider that the act of regulation is therefore a new legal technique, a reflection of a shift in government action, rather than a modernized form of such action.

The author continues her analysis by attempting to define the notion of regulation using the powers and methods employed, especially according to whether legal or extra-legal methods are used, and whether or not it is possible to use both methods at the same time. The author does not approve of

what she has decided to call "the thesis of the regulatory hodgepodge" because the various powers are not systemically held by the same authority, and there is no unity between the various authorities. On the contrary, the application of the European Convention on Human Rights has resulted in a legal evolution, and that manifests itself through an internal division between the structures within Authorities. The author therefore considers it necessary to define the concept of regulation by resorting to a "shared set of unnamed acts". The author notes that such instruments are often poorly identified by positive law, such as opinions or recommendations, and that the only way to define them is by identifying the methods used by all bodies officially qualified as regulatory bodies.

Here, the author shows her institutional design perspective, since she defines regulation as being those actions that are common to all Independent Administrative Authorities, those so-called regulatory bodies. In this, the thesis is therefore confined to legal formalism...

The first part of the work tries to define regulation; the second part, to develop upon its legal characteristics. These are influenced by the functionalist perspective that impregnates the act of regulation.

In her perspective, the act of regulation should be defined as an "act of invitation" similar to the concepts of soft law and international recommendations in public international law, and the recommendation of professional associations in national law. In terms of regulation, the Council of State has recognized that the *Conseil supérieur de l'audiovisuel* (French audiovisual content regulator) publishes suggestions for operators, in order to orient their behavior towards compliance with the authority's rules. The judiciary has recognized that the other French authorities publish identical suggestions. Such suggestions, halfway between law and suggestion, have

caused Yves Gaudemet to note that regulation is the “new standard bearer of normativity.”

Certainly, one wonders if a suggestion is a truly legal standard and as such, if the act of regulation is itself legally different from legally normative acts. Insofar as the act of regulation distances itself from the unilateral administrative act, we might be tempted to compare it to the contractual agreement, since the recipient of the act has to agree to it. But the author sees this as confusing, because a negotiated law does not necessarily give birth to a contract. Therefore, according to the author, the incentive to comply is the primary and specific character of the act of regulation, which distinguishes it from other types of acts, and she defines it as a non-legally-binding invitation sent out to various addressees, public or private, in order to suggest that they conform to a behavioral model defined by the sender.

It follows that the act of regulation is both effective and informal. Indeed, effectivity is a major component of regulation, and the act of regulation aims at obtaining an effective change in behavior. Thereby, the act of regulation belongs more generally to the notion of "an act of effective behavior" as conceived by Charles Eisenmann. These original methods can produce an effective change in behavior, but because the act of regulation is non-binding, the author goes so far as to affirm that it is an "uncertain form of execution" because the government trusts its partners to comply. Since the act of regulation is not a standard but a program, a major uncertainty hangs over its follow-up. We observe the uneven way in which the regulatory process has been applied over time, and which has tended to resort to coercive measures to preserve its effectivity, far from the authors' notion of a suggestion. Therefore, the relations between the author of the act of regulation and its recipients can vary greatly.

Yet, the act of regulation remains an informal act. Indeed, we note that acts of regulation often go beyond the agency's legal mandate, and are often examples of regulators' using their discretionary power. Of course, agencies have formal powers, but these are usually limited, both in material and in personal terms (since regulated industries combine both dimensions). We observe, however, that agencies often allow themselves to exceed these limitations by resorting to the 'act of invitation', whose informal status is compounded by the equally informal process by which they are drawn up. Recommendations can be issued on self-referral, or following the industry's request for an opinion, which form part of the close working relationship between regulatory authority and regulatee.

Once the author has functionally explained the concept of regulation, she demonstrates that it has become integrated into French administrative law. The author describes the reciprocal appropriation that the (initially exogenous) concept of regulation and administrative law have performed on one another. Thus, regulation currently corresponds to an activity performed by specialized administrative bodies: independent administrative authorities, amongst which Regulatory Authorities form the kernel. The author demonstrates the historical evolution in which case law, rather than the legislature, has demonstrated that certain Independent Administrative Authorities are regulators.

The author observes that, except for Independent Administrative Authorities, very few other bodies resort to acts of regulation, whether they be specialized administrative jurisdictions such as the *Commission bancaire*, or public administrative establishments, such as the *Agence française de sécurité sanitaire des aliments* (French Food Safety Agency). The author does not mention the assumption of the private regulator, since the theory deals only with administrative law. On the contrary, the thesis goes to great lengths in describing

in detail the particularities of each Independent Administrative Authority, and especially in function to the notions of independence or autonomy.

Finally, the author shows that regulation has become part of French administrative law because it is a novel method for pursuing the general interest. Indeed, the missions that regulatory authorities have been entrusted to carry out are of general interest, but according to the author, they are special in that they are supposed to ensure that the law is applied to complicated areas of the economy. This may be the case when it is necessary to ensure that complex situations or changing rules be made intelligible and clear. The act of regulation's informal flexibility is required to make rules effective. Therefore, the author officially gives birth to an activity she calls "the public service of regulation".

Regulation thereby participates in changing the general interest by using its power of suggestion, which allows it to be effective. In this way, it is a method that derogates from general law: it does not rely on the prerogatives of the public authority, but rather, realizing that the government is powerless, tries to implement better governance practices built on sociologic analyses of what "authority" is. Thus, regulation is the expression of the new face of Authority within the government.

Taking such developments into account, remedies must also be reconsidered. Thus, direct judicial review of the legality of the act of regulation is inappropriate, because such acts are informal and do not entail legal consequences. However, the plea of illegality, a complaint against a refusal to regulate, and complaints related to publicity and publication can be addressed to a judge. According to the author, certain administrative acts can justify full litigation, especially when the government's liability is invoked. In such cases, summary

judgments are particularly appropriate. Such judicial review allows for the elimination of legal errors, especially as concerns legally baseless decisions or manifest error, but judicial review is less important in protecting the proportionality of decisions. When full litigation is required, regulation's function can justify the application of liability for simple negligence, even though some courts still require proof to be brought of the government's gross negligence, and the possibility of invoking liability without fault is limited by a multitude of requirements.

Links with other documents in the same sector

BRIEF COMMENTARY

This thesis has many merits, and one flaw.

As for its merits, we can say that it will be a long time before another work as well constructed, clear, and exhaustive will be published on the subject. Any reader interested in regulation and able to read French will be able to find within everything there is to know about regulation in French administrative law: there is a bibliographic apparatus of over twenty-five pages in length, a perfect, alphabetized index, and a countless number of footnotes.

Furthermore, the author can be commended for her perfect mastery of the age-old approach to French positive law and legal theory, following in the footsteps of generations of scholars of French administrative law.

In addition, the author develops her own conception of regulation, beyond the facts with which she provides the reader on the subject. According to the author, regulation can be defined as the publication of an act of regulation by an Independent Administrative Authority, suggesting that

operators adopt a behavior that satisfies the general interest. Although regulation is not binding, it is generally well received by the receiver, which makes regulation paradoxically quite effective. Good theses can be recognized by the fact that 700 pages of work can be summarized in two sentences: this is the case here, despite the fact that its affirmations are based on hundreds of books and references.

It is possible to believe that regulation should be defined, but this would not be grounds for criticizing this useful work.

It is simply regrettable that the author either did not wish to, or was unable to, take the transdisciplinary nature of regulation into account. The work is limited in scope, since it is built on law, filled with law, but only on French law, and only on French administrative law. Of course, knowledge is obliged to fit itself into various disciplines in order to understand the world. Such constructs, based on distinctions between disciplines, categories, and vocabularies, are even stronger in domains of artificial knowledge, such as law.

But, political tensions, market failure, crises, technologies, etc., are never addressed, even though these situations are shaped by law, through the answers that law seeks to bring to them.

This is not a criticism, since the author states in the very title of her work that it has no other ambition than, like a hunter, to target the notion of regulation within the very narrow confines of French administrative law. But, regulation is much more lively than this accumulation of statutes, cases, and theoretical references. We therefore use the term 'flaw' in the same way as we would for a painting that lacks an essential color.