

Books

REGULATING CONTRACTS by Hugh Collins, Oxford University Press, Oxford, 1999, 386pp ISBN 0-19-829817-X

'Conservative' and 'traditional' are not words that spring to mind when work by Hugh Collins is mentioned. His latest book, 'Regulating Contracts' does not disappoint in its radical approach to the role private law plays in regulating contracts in modern society. In fact, he admits throughout the book that his thesis 'will raise the hackles' of many traditional lawyers. Perhaps it is because he would like to convince traditional contract lawyers such as this one, that he has chosen such an understated and undramatic title for his book, hoping that we will pick it up and not put it down until they are convinced. Yet his book is also aimed at readers from a wider range of social sciences, including economists and sociologists. Indeed Collins says he hopes the title will convey the unfamiliar interdisciplinary work that it covers, including different shades of human association and interaction.

The book is a challenging read. It is long and detailed and the use of economic and sociological theories along side more traditional legal analysis may require readers to grapple with new approaches and ideas. Yet the divergent perspectives mean that many questions are answered that a purely legal analysis would leave awkwardly unanswered. These perspectives also make reading the book enjoyable, as different stories from around the world in the form of case studies, empirical research and legislation, are used to explain and exemplify Collins' thesis.

Structurally, the book is divided into four parts. I will deal with them sequentially, as each part builds on those coming before. Part 1 explains the themes and basic concepts that Collins intends to develop. The book focuses on three themes, namely (1) how can law of contract be seen as fundamental to our social system yet be almost irrelevant to everyday transactions? (2) what sort of legal regulation would allow the legal system to support markets most effectively and efficiently? and (3) that the law is rethinking contractual practices because of the growing dominance of welfarist regulation and is taking into account information about its environment.

Collins first explains what he thinks are the elements of a contractual relation. He lists the valuation of specific conduct set out in the contract, a quantifiable currency of exchange, the discrete nature of the transaction that sets a contract aside from a bond of social solidarity, for example, and the creation of a power relationship on particular terms. But all contracts also have 'embeddedness', as they function in particular social contexts. Collins argues that in addition to moral standards there are other sources of normative standards that affect the contractual relationship, such as the conventions of the market and the identity and past relations of the parties themselves.

Part 2 is entitled 'The New Regulation'. It begins in a chapter on 'The Discourses of Legal Regulation' examining the normative complexity of contract law. Private law is 'closed' and 'self-referential' as it works for the most part independently of other normative systems such as morality and custom. While contract law rules do draw on a number of normative standards, such as governing political theories and the idea of respect for individual liberty and justice, Collins argues that this aspect of private law is coming under increasing pressure to consider other issues in regulating contracts. For example, it should also take account of the expectations of parties that come from their personal relationship and market conventions. There is also pressure for contract law to take account of other areas of the law of obligations, such as tort, and the impact of public law regulation. A main weakness of contract law is that it has lacked the mechanisms to differentiate between different kinds of contracts, because the rules are intended to be generally applicable. If contract law differentiates between types of contracts it can introduce greater normative issues into its reasoning process. 'General clauses in law, such as broad requirements of 'reasonableness' or 'good faith', can be used as gateways which permit social science perspectives to become relevant sources of information to legal doctrine' (p52). Private law should, in Collins' view develop its capacity to learn from the discourses of social and economic regulation, which would effectively amount to it 'reinvent[ing] itself in a more contextual way' (p55).

Chapter 4, 'The Capacity of Private Law', considers the efficacy of private law acting as a regulatory technique. There are many weaknesses of private law in this regard, which Collins details and then provides possible solutions. For example, there is the difficulty of incorporating externalities in setting standards, since there is no mechanism for interests other than the parties' to be voiced. This can be overcome if the courts see the parties in a dispute as representatives of a group, such as consumers or tenants. This is what courts do to some extent when implying terms in law. Another problem is the courts' lack of expertise in choosing standards. 'This lack of expertise in the ordinary courts in regulating markets is the inevitable corollary of the self-referential quality of private law reasoning' (p85). This could be overcome by permitting parties to present statistical information and expert evidence.

However, Collins concentrates on the strengths of private law also. For example, the standards of conduct required by contract law include mandatory standards (taken from the common law or legislation) and self-regulation by the parties in the form of contractual terms. Compliance monitoring is left to the parties and the law will only act to enforce or impose a sanction if one of the parties demands this. Thus, on the whole there is self-enforced self-regulation, which is a major strength, as it provides flexibility. Collins does not conclude that there is no need for public regulation, but that private law has a greater potential than is commonly thought.

Part 3 contains five chapters dealing with the 'Regulation in the Construction of Markets'. Chapter 5 gives an overview of the social behaviour involved in the creation of a contract, which relies on communication, co-operation and shared

expectations or standards. Individuals will enter contracts when the perceived benefits outweigh the risks of disappointment or betrayal. These risks can be minimised when the parties have a relationship of trust founded on personal knowledge or business reputation of the other party. Individuals can also utilise non-legal sanctions or security, such as publicity of promises, rejection of goods, refusal to do business again, publicising damaging news. It is quite well known that contracting parties often do not rely on the legal rights involved in a contract, so the possibility of legal sanctions plays a marginal role in the construction of markets.

The next chapter, 'Rationality of Contractual Behaviour' looks at three things. First, how behaviour of contracting parties that seems against self-interest can still be seen as 'rational'. Collins sees a contract as involving three normative systems, namely, the business relationship between the parties, which is based on trust and customary standards. Then, there is the economic deal, which usually results in participants forgoing the short-term benefit of cheating on the deal in order to secure the long-term benefit of repeated business. The final element is the contract, with its self-regulation providing another term of reference. Each of these elements is a closed communication system. While behaviour might seem irrational if judged by one system it will be rational within another.

The second issue in the chapter is a consideration of why participants attach little weight to formal contractual rights. This is explained by the foregoing analysis, which suggests that one normative discourse will take priority over the others. The contractual framework does not disappear, it may still be invoked, but to do so will often be seen as a betrayal of trust. Collins dismisses the distinction that is often drawn between relational and discrete contracts. He believes all three dimensions are present in every transaction, and it is just that the contractual aspect takes dominance in some cases.

And finally the chapter considers how legal regulation could better support transactions and markets. Collins feels that the legal system should be aware of the different communication systems at work by gathering information about the 'reasonable expectations' of the parties. This could often be achieved by inserted an open-ended standard of 'good faith' or 'co-operation', as it would allow the court to look at the expectation of the parties.

Chapter 7, 'Planning and Co-operation' focuses on written contracts and the priority given to them by the law. There is often a conflict between what lawyers see as their role, namely to minimise risk for their client, and the deal that is struck between the parties, who want to agree on the basic issues and then leave future issues to be worked out through non-legal means. Business people have been reported as saying the contract 'don't mean a thing'. However, the law will often give priority to the legal document, which is problematic when it does not adequately or accurately express the expectations of the parties. Collins is impressed that the courts are skilled at incorporating standard terms of trade usage into agreements, but disapproves of the strict approach taken to broad clauses that are designed to achieve flexibility.

'Formalism and Efficiency', chapter 8, considers what sort of legal regulation is good for business. From the earlier chapters it is already clear that Collins believes that contract law should follow the parties' rational ordering of the normative frameworks of their expectations. So contract law should give priority to the business relation, then the business deal and the formal document should have a very minor role. Traditional lawyers might feel confronted by this idea because it removes the certainty so highly prized and the glory from drafting the precise formal document. But the certainty that business people want is the knowledge that the legal system will support their expectations from competing normative frameworks: 'Legal regulation that fulfils business expectations therefore shuns an exclusive focus upon the discrete contractual discourse' (p180). To support this argument Collins draws on data about the preference of businesses for arbitration ahead of courts when a dispute needs to be settled. Arbitrators do not give priority to the formal contract but remain open to the competing normative points of reference, such as trade expectations and norms. Yet Collins points out that the common law does have the capacity to be sensitive to the normative context, since there are many cases where the courts emphasise the factual matrix of a particular case in reaching a conclusion, which allows greater protection of genuine expectations. Another way of achieving this is through open-textured rules such as requirements of 'good faith'. The chapter concludes with an overview of 'relational' or long-term contracts that require co-operation between the parties and a suggestion that a traditional formalistic approach that strictly enforces legal rights is not supportive of the relationship involved. Collins is optimistic that the common law can adapt to be more useful.

In the final chapter in the part, Chapter 9 'Contract as Thing', Collins looks at two types of financial instruments, negotiable instruments and futures contracts, and how the common law has proved irrelevant to these relations. This is meant to provide an illustration in the extreme of the unimportant role contract law can play in transactions. He believes this is caused by the failure of contract law to contextualise contracts and take into account the non-legal standards at work.

The final part of the book, Part 4, is entitled 'Distributive Tasks of Regulation'. This part of the book considers what regulation is required to control the unfair distributive results of markets. Chapter 10, 'Power and Governance' considers the different explanations of power relations in contract. Most instances of power differences in contractual relations have been constructed by the parties to achieve certain economic goals. Yet that is not always the case. Collins believes the best way for private law to regulate the misuse of power is to require duties of fair procedure, to refrain from opportunism or abuse of power and duty to perform in good faith. This again would require a sophisticated analysis of the contract involved and the market in which it was created.

'Should one of the purposes of regulating contracts be to deter unfairness?', reads the beginning of Chapter 11, 'Unfair Contracts'. Collins begins by examining whether most cases of 'unfairness' are not unfair at all. Cases are considered unfair because the price seems excessive, there is one-sided allocation of risk or the agreed remedies for breach that seem punitive. However, Collins

argues that the context of the transaction must be considered to see whether the price paid explains the allocation of risk or remedies involved. There may be advantages received for the price, such as, maintaining a long relationship or obtaining goods on credit when other sellers would not provide the goods on those terms. He also maintains that open textured rules, such as 'good faith', and 'fair and reasonable' allow an adjudicator to consider all the circumstances of the case. He rejects the criticism that the uncertainty that comes with these rules can damage the constitution of markets. But he again argues that courts must begin taking into account the different discourses involved in a transaction rather than limiting their reason to the legal contract. Collins is not convinced that legal regulation designed to correct market deficiencies, such as asymmetries of information and expertise, actually reduce the number of substantively unfair contracts. Even if there are obligations of disclosure, there is still the cost of digesting that information. He does feel there is still room for public regulation in particular markets, such as consumer sales, where there is little incentive for consumers to access formal legal systems.

Chapter 12 is a short chapter on 'Quality', that considers the problems that arise through defects in quality of goods or services. Collins lists three. First, the fact that there may be latent defects leads to consumer uncertainty, which needs to be countered by business through the building of trust and reputation. Second, defective quality can raise issues of external problems, such as damage to other people, for example a defective car can injure others. And thirdly, if it is difficult to detect problems with quality then people can dishonestly take advantage by providing faulty goods at higher prices, which reduces consumer confidence generally. Collins argues that private law regulation is well equipped to achieve an efficient standard of quality and private law offers a cheaper method of regulation than public regulation. However, private law is not without its weaknesses. For example, private law should take into account industry self-regulation, while maintaining the capacity to demand an even higher standard if required. Furthermore, the range of remedies should be expanded to include for example a rejection remedy for consumers, punitive damages and injunctions preventing certain goods being sold.

Collins then considers the increasing use by governments of contracts in providing public services in Chapter 13, 'Government by Contract'. He argues that the use of contracts in this situation has particular problems when it comes to legal regulation because of the dominant normative concern of political responsibility. This requires courts to develop the capacity of legal reasoning that includes this important factor.

Chapter 14 considers 'Dispute Settlement', in which Collins restates his point that legal regulation should be better suited to meet the expectations of contracting parties. Consumers would prefer to avoid formal expensive dispute resolution and businesses normally prefer to avoid disputes to preserve long-term business relations. In cases where the incentives to settle are insufficiently compelling, arbitration is preferable to litigation. He rejects the suggestion that what is required is greater access to justice and easier vindication of contractual rights. Instead, he

encourages a focus on non-legal sanctions to support complaint-handling mechanisms. His primary suggestion is the implementation of a system of independent certification of businesses by reference to a model code of conduct. Certification could be advertised by a business to promote its trustworthiness. There could be legal sanctions for fraudulent use of a certification logo. This method would encourage businesses to revise their practices in a certain direction which is beneficial to the interests of consumers.

The final chapter provides a 'Conclusion'. Collins emphasises that legal regulation is not necessary to the operation of markets and usually plays a very minor role. To be more useful, legal regulation should seek to support the real expectations of the parties, which requires a consideration of the forces of market conventions and the ongoing relationship between the parties. This requires the adoption of open-textured rules, rather than giving priority to a written contract. Private law is appropriately suited to this task with its respect for self-regulation by the parties. Collins concludes that he is optimistic about the future for private legal regulation working in conjunction with public regulation.

This book cannot be easily be 'dipped into' for ideas on a particular point. To understand Collins' thesis requires a complete reading of the book. And it is an enjoyable and rewarding read. He draws on a fascinating collection of empirical studies, cases and legislation from all over the globe, from Canada to Japan to Africa to the European Union and while there is not much on Australian law, the Contracts Review Act of NSW gets a mention. Some might see this approach as a disadvantage, as it makes his thesis less applicable to one particular jurisdiction that might seek to implement his suggestions. Yet the insights gained from different jurisdictions show that more than one route is possible. There is an emphasis in the book on consumer contracts, but most of Collins' arguments are applicable to all contracts, and there are some chapters that deal with other particular types of contracts, such as government contracts in chapter 13. His ideas are worthy of consideration and I recommend this book to contract scholars and anyone interested in the impact of legal regulation on social behaviour generally.

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