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Book Review

Law and the “Sharing Economy”: Regulating Online Market Platforms

by Derek McKee, Finn Makela & Teresa Scassa

(Ottawa: University of Ottawa Press, 2018)

by John D. Gregory

It must be a rare book that spends as much time as this one in disputing the appropriateness of its own title. The challenge for many of the authors in this collection is that the online “sharing” of goods and services — cars, apartments, expertise — has become big business. There is little room for “caring” in the sharing achieved through Uber, Airbnb and their imitators and competitors. On the contrary, there is disruption of markets and often exploitation of people.

It is therefore clear to all the contributing authors that economic relations of this kind need some kind of guiding hand in the public interest, to protect consumers of the goods or services or their providers, or both. In short, they should be regulated. Thus, the subtitle: “Regulating Online Market Platforms”. The present volume examines how this may be done, given the dynamics of the technology and the legal categories available.

Almost all the contributors use Uber or Airbnb, or both, as their examples. Other online platforms are mentioned, but only in passing. It is quickly clear, however, that these two big platforms operate differently and raise different public policy issues. The regulated systems that they disrupt — licensed taxis for Uber, licensed hotels (and the unregulated housing market as well, sometimes) for Airbnb — have different purposes and protect different interests.

As a result, as the introductory essay says, “it is unlikely that the platforms’ activities are shaping the emergence of a new and unified area of law . . . What we have instead, in this volume, is a set of diverse lenses through which we can examine both the sharing economy and its broader social impacts, and from which certain key themes emerge.” (p. 5)

The book — a compilation of edited presentations from a colloquium on the topic at the University of Sherbrooke in 2016 — collects examples of — or speculation about — what it calls “technologies of regulation” — though it could just stick to “methods” or “techniques” of regulation, or if jargon is wanted, “regulatory instruments”. That said, one understands the inclination to use “technologies” because one of the new elements that online platforms present is the possibility of regulating their technology and not just their effects, their inputs or their outputs.

The book is divided into five parts that help make sense of the analysis:

- the technologies of regulation (e.g. how licensing regimes work or do not work when applied to online platforms, how labour laws fall short, how

internal (and thus online) dispute resolution may or may not be the answer);

- regulating technology (e.g. how technology fits into larger legal or “normative” contexts, and how new normative regimes may need to be devised for it, and how the control of the data generated by the platforms can influence how regulation is applied);
- the space of regulation (e.g. how to understand municipal laws, notably about taxi service, and how international trade agreements can affect regulatory capacity in relevant ways);
- regulating markets (e.g. compensating protected sectors when the law can no longer protect them, and competition issues generally); and
- regulating labour (e.g. how protections for labour can fall short or be made to work for online platforms.)

The essays contain much that is stimulating, and they are bound to give most readers some new ideas or new patterns for their existing theories. These may be based on fairly “conventional” analysis, such as Derek McKee’s discussion of various sorts of licensing regimes and how they fall short for online programs, or Michael Geist’s review of the impact of international trade agreements on the ability to regulate platforms — “conventional”, in both cases, because of the recourse to traditional legal categories, but sometimes surprising as well as enlightening because they make new connections or provide new information.

Other essays are less conventional. Nofar Sheffi’s discussion of Airbnb’s internal dispute resolution process not only refers to Kafka, it also frames the discussion of Kafka in a Jacques Derrida analysis of it — which takes one at times bewilderingly far from the factual dispute of an Airbnb hosting incident that the article leads off with. That said, good points are made about the mystery of Airbnb’s structures and processes — and about the practical impossibility of resolving most such disputes through the courts. One may be compelled to try to address the internal processes for lack of an alternative. But is that access to “justice”, for Derrida, Kafka or you? The author leaves the question open.

Another francophone author, Sabrina Tremblay-Huet, frames her discussion of the labour effects of Airbnb — a less common concern than those of Uber — in an analysis of the concept of “neoliberalism” based on Jacques Foucault’s 1978 publication on the topic, as focused or updated by a modern Texas professor, Wendy Brown, on “neoliberal rationality”. This reviewer, schooled in the Anglo-Saxon traditions, did not find the deep theory helpful in understanding the dynamics of Airbnb’s operations or possible remedies to harms they may cause. Other readers may be enriched by the explorations.

For that matter, the language of “normativity” served as much to alienate me as help me understand the reasoning of Vincent Gautrais’ contribution — I still do not know what “individual normativity” means, after encountering it several times. On the other hand, Professor Gautrais’ basic thesis is important and correct: that novel technology nevertheless operates in existing and applicable sets of norms/rules (largely legal), and to the extent these rules are

inadequate, society can supplement them effectively. Along the way, his critique of formalistic analysis of contracts is on point, and his conclusion that “salvation is likely to lie in oversight of substance rather than form” must be right.

Different authors vary in the deference they give to the platforms. Mariana Valverde does not hesitate to refer constantly to Uber’s operations as illegal in most municipalities — indeed her title refers to the company’s approach as “urban cowboy e-capitalism”, which is not intended as a value-neutral label. On the other hand, Eran Kaplinsky examines the effect of Uber on the value of existing taxi licences and “medallions” in more strictly economic terms, and though he does not come down firmly in favour of compensating licence holders for their losses or letting the chips of innovation lie where they fall, he is not particularly critical of how Uber has had its effect on the licences.

One cannot go through all the articles to highlight all the richness — or even occasional obscurity — of the contributions without turning a review into a chapter of the book. Pretty well every chapter repays the reading for the person interested in how online platforms affect the potential for economic regulation.

One might note that what may be considered the paradigm legal question posed by the platforms — most notably Uber: is the service provider an employee of the platform or an independent contractor? — is addressed in several contributions. While one or two authors at least consider it a difficult question, nobody thinks the independent contractor category fits neatly and nobody thinks it should prevent regulation in some form to protect the drivers — and even the hosts of “shared” living quarters — from exploitation by the platforms. (In France, as Marie-Cécile Escande-Varniol points out, the number of social benefits funded from levies on salaries or from employers makes this status question even more important than the individual protections that we tend to focus on here.)

The different routes the authors follow to reach that conclusion, and the various types of regulation that appear to them to be needed, provide a good deal of the interest of this topical collection. The attempts to generalize the principles inherent in the conclusions will give it lasting value.