LAW, REGULATION AND GOVERNANCE

Workshop at Bielefeld University
Faculty of Sociology
Law & Society Unit

Room X-B2-103

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Organisers:

Prof. Dr. Alfons Bora
Universität Bielefeld, Fakultät für Soziologie, Postfach 100131, 33501 Bielefeld, Tel. 0521.106.4673, Email: alfons.bora@uni-bielefeld.de

Prof. Dr. Michael Huber
Universität Bielefeld, Fakultät für Soziologie, Postfach 100131, 33501 Bielefeld, Tel. 0521.106.4659, Email: michael.huber@uni-bielefeld.de

AR Dr. Marc Mölders
Universität Bielefeld, Fakultät für Soziologie, Postfach 100131, 33501 Bielefeld, Tel. 0521.106.4663, Email: marc.moelders@uni-bielefeld.de

Dr. Peter Münte
Universität Bielefeld, Fakultät für Soziologie, Postfach 100131, 33501 Bielefeld, Tel. 0521.106.12844, Email: peter.muente@uni-bielefeld.de

Dr. Regine Paul
Universität Bielefeld, Fakultät für Soziologie, Postfach 100131, 33501 Bielefeld, Tel. 0521.106.4681, Email: regine.paul@uni-bielefeld.de
1 Summary

The workshop addresses the current discussion on governance and regulation in sociology, jurisprudence, political social science, and history. During the last decades, traditional concepts of societal steering have been replaced by the concept of governance. Criticising evident flaws of a narrow legal »command and control« regulation concept, governance gained importance in the social science debate and has been able to influence also the political and public debate. Currently, we observe a revival of regulation, based on the criticism of governance as being overly inclusive, and thus vague and indistinctive. Moreover, the emergence of the »regulatory state« at a national, but particularly a supra- and transnational level, as well as the establishment of global regulatory regimes in the field of trade, food or climate change have reemphasized the empirical importance of regulation. The workshop gathers an interdisciplinary variety of scholars – ranging from renowned senior scholars to those in earlier career stages – to reappraise the concept of regulation and develops a nuanced evaluation of the current debate on societal steering in four thematic fields: (1) It examines the conceptual strengths and weaknesses of both governance and regulation; (2) from a historical perspective it studies the overarching process of the scientification of politics connected to a certain mode of governmentality; (3) it addresses risk regulation as one of the most important fields for the application of regulation and governance concepts; (4) it analyses the role of the public in processes of governance and regulation.

2 Zusammenfassung


3 Description of the workshop

In sociology, political sciences, and jurisprudence, the notion of governance has gained significant prominence over the last two decades. It replaced older – and certainly rather naïve – concepts of societal steering and regulation. However, it seems as if scholarly debates on governance have increasingly lost their momentum. Irrespective of the undeniable achievements linked to the concept, the ambivalences connected to governance are dawning. Our suggestion is that those ambivalences are connected to certain conceptual aspects of governing that can be better addressed with concepts of (law and) regulation.

3.1 Ambivalences of governance

Governance concepts have emerged as a result of a crisis of interventionist thinking. Post-interventionist theories and concepts of pluralist societies have replaced traditional, rigid con-
cepts of social steering by new ideas of cooperation, negotiation, coproduction, hybrid communication, self-regulation and networks. Originating from economy (Coase 1937, Williamson 1975), governance was focused on »good governance« in organizations. During the last two decades, the semantics of »governance« have spread across the fields of political sciences – especially international relations (e.g. Rosenau and Czempiel 1992, Rosenau 2000) and policy research (e.g. Mayntz 1998). In this tradition, governance is understood as a form of statehood mainly characterized by negotiation and co-operation, in contrast to hierarchical structures as traditionally recognized properties of the democratic national state (Héritier 2002; Kooiman 2002, Rosenau 1995, Schuppert and Zürn 2008, Blumenthal 2005, 1153).

The notion of governance has often been criticized as fuzzy and blurred (Pierre and Peters 2000, 7; Offe 2008; Briken and Dröge 2009, 122). Sack, for instance, distinguishes at least eight different usages of the term, ranging from practical aspects of social control on the one pole and scientific observation and description, on the other (Sack 2012, 29 f). Moreover, the specific amalgamation of social theory and practice connected to governance also provoked questions. One of the hypotheses of the workshop is that the practical prominence of governance results from the far reaching social-scientification of the political system. Governance indeed expanded the instruments of control and the sets of actors involved in decision-making; yet, it did so all while preserving and even strengthening the idea of controlling and powerfully shaping societal conditions. In order to address the very essence of these relations between politics, law, economy, and other social realms, we discuss the core analytical advantages of the term »regulation« (instead of governance).¹

Regulation is not considered a concept that travels well (Black 2002, 2), which might explain why it was increasingly replaced with the notion of governance in academic thinking. Currently, however, we observe a (modest) revival that is linked to the emergence of the »regulatory state« at the national, but particularly the supranational level, as well as the establishment of global regulatory regimes in the field of trade, food or climate change. Studies in these fields have reemphasized the empirical importance of regulation. The promotion of Better Regulation, in particular, distances itself from governance. Concepts such as the reflexive or responsive regulation (e.g. Braithwaite 2011; Baldwin and Black 2008) or regulatory regimes (Hood et al. 2001) have modernized regulation, not only including a broader set of available instruments, but also focussing on broader actor constellations, thus correcting the oft-criticized state-centeredness characteristic of traditional regulation theory. While usefully expanding its conceptual realm, regulation still focuses on how, exactly, society organizes and achieves the provision of public goods and remains alert to the effects of policy interventions. These observations encourage us to discuss the applicability of the regulation concept to current policy issues.

3.2 The perspective of regulation

The term »regulation« has various sources. It has gained a certain prominence in political economy (cf. e.g. the works of Hirsch, Jessop, Aglietta, Boyer and others) and stands for the task of taming modern forms of capitalism. Insofar, the main attention is on the relations between politics and economy and is based on economics as social theory. In contrast to these approaches, we widen the understanding of regulation by subsuming any operation of a social system that aims at deciding, defining, setting the state of another system (i.e. the goal system) with respect to the provision of public goods (Bora 2002, 2012, Black 2002, Hood et al. 2001, Döhler and Wegrich 2010).

¹ We do not claim that the scholarly debate had completely ignored this regulatory nucleus of governance. Zürn (2008, 554) has, for instance, addressed the issue as an empirical fact. However, a theoretical perspective is still missing to reflect this co-existence of terms and practices.
This general understanding of regulation can also be traced back to debates in legal theory and sociology of law of the 1990s. American and British research in those days started to distinguish between governance and regulation whereby it conceptualized regulation as a specific form of governance (Ayres and Braithwaite 1992, Braithwaite et al. 2007). In the tradition of this debate, regulation is concerned with the steering of events and states of affairs, while governance also includes granting, allocating and distributing resources. As it remains unclear, why the latter mechanisms should not have regulatory qualities, it seems advisable to understand regulation as the quintessence of all operations that aim at influencing a goal system. According to this theoretical concept, regulation is not restricted to control and intervention in the sense of regulative law, but it encompasses limiting and risk minimizing instruments as well as promoting and enabling ones. Julia Black speaks about »regulation as facilitation« (Black 1998) and German legal scientists are interested in »regulation fostering innovation« (Eifert and Hoffmann-Riem 2009). For Schuppert governance »largely is regulation« (2008, 395).

3.3 Questions

The tension between regulation and governance raises a set of highly relevant questions, some of which the workshop seeks to address.

On a more general level, one can discuss the inherent relationship of governance and regulation and ask, if the two concepts can either substitute each other or be brought into any hierarchical order? How do they co-exist? Furthermore, do these concepts do not only represent distinct perspectives, but constitute two contradictory cultures when on the one hand, governance provides structures that seek to safeguard and guarantee individual freedom while on the other, citizens are expected to co-operate and contribute to governance at an increasing rate. This expectation requires a kind of ethics and individual constitution (subjectivity) that is compatible with the cooperative policy-making style currently promoted, a regulatory mentality, which significantly contrasts with traditional conceptions of sovereignty. According to the latter, hierarchical decision-making by governments and parliaments – both internally for a bounded society itself and in its external relationships with other countries, trade regimes etc. – is legitimized in representational terms.

The specific pressure of regulation to co-operate and to become engaged goes hand in hand with specific techniques of self (Foucault) and forms of governmentality (cf. Foucault, Bröckling, Lemke and others). Against this background, one can ask, whether the semantics of »governance« diffuses the ambivalences which characterize regulation in modern society. Moreover, the role of science becomes the more contested the more the nucleus of regulation is concealed by the semantics of »governances«, by what one could call the social-scientification of regulation. The new forms of governance act as sublime mechanisms of de-politicization, forcing participants into co-operation and consent, where the insistence on legal rights or manifest interests could be functionally equivalent. This certainly begs the question of power, including the role ascribed to governance rhetoric in processes of societal regulation.

Regulation exposes the legal basis of ruling. Often, the discourse on governance seems to disregard the central role of legal rights and public law in the process of regulation. It is nothing less than trivial to claim that the formal rationality of the law guarantees freedom and subjective rights in general. In regulation, legal rules have their defined place and regulatory means and ends have to be crosschecked against legal provisions. In governance, this relation seems much less clear and frequently even underrated. Insofar, regulation very distinctly opens the view upon both sides of the law, the »iron cage« of modern legal rationality as well as the enabling, ensuring and liberating guarantees.

None of these questions can be or has yet been answered in a definite way. Instead of promising »final« clarifications, the workshop gathers an interdisciplinary variety of scholars – renowned
senior scholars as well as those in earlier career stages - to reappraise (old and new) regulation and governance approaches across a range of specific issues (see below) to provide a nuanced comparative evaluation of these concepts and their analytical value.

4. **Structure of the workshop**

The workshop is designed to address the above questions in four thematic fields; each of the thematic fields reappraises and compares the concepts of regulation and governance by drawing attention to specific aspects of the overall debate.

4.1 **Thematic field 1: Theories and general concepts – crosscutting questions**

The conceptual discussion on regulation and governance introduced above is reflected from a sociological, juridical and political science perspective. Particular attention is given to the major analytical contributions linked to each notion. For example, governance was praised for its ability to draw attention to new actor constellations and networks, and to be inclusive of actors and governing mechanisms beyond traditional notions such as hierarchies and statutory regulation. This seems a substantive contribution when compared to the traditional concept of regulation with its focus on norms or technical standards implemented by state agencies.

Contributions to the session also examine whether the current debate on new forms of regulation and the regulatory state take these innovations serious and develop them further in analytically useful ways, or whether notions such as the regulatory state represent an overly focussed and in a way old-fashioned perspective on the provision of public goods. Do both concepts share a comparable analytical perspective and contribute to the empirical analysis of societal management with a similar resolution of detail? Can both approaches be kept clearly distinct in terms of their empirical interest and conceptual scope and might this distinction even be useful for the social sciences as a labour-divisive discipline

*Invited speakers: Michael Huber/Alfons Bora, Christopher Thornhill, Lars Viellechner*

4.2 **Thematic field 2: Steering, governance and regulation as scientification**

The historical dimension of governance and regulation can be examined as a process of scientification. As the emergence of certain terminological fashions is not least a marker of specific views on social order at specific points in time, the concepts of regulation and governance – and their dynamic career over the last decades in academic debates – will be scrutinized from the lenses of sociology of knowledge, historical research and governmentality studies. Such examination provides valuable insights as conceptual oppositions such as regulation/governance or steering/governance are not just analytic tools for the analysis of a changing society, but also expressions of distinct views on social order; therefore scrutinising such distinctions are important objects of empirical research.

We ask how social order is constituted in discourse and everyday practice of regulation and governance. More specifically, we want to understand how these concepts have been discussed in sociology and in the history of the social sciences and how the respective processes of scientification have been connected to a discursively achieved difference between regulation and governance, or steering and governance.

*Invited speakers: Sven Opitz, David Kuchenbuch, Peter Münte*
4.3 **Thematic field 3: Risk regulation**

Concepts of risk have gained heightened attention in regulatory debate in the last couple of decades: first as a means to identify particular challenges to regulation (van Asselt and Renn 2011) and thereafter as a tool of prioritising regulatory attention (Rothstein et al. 2013). While the first concept is linked to a traditional understanding of regulation, examining standard-setting and rule-making processes as regulatory responses to risk problems the latter is focused on governance or on a wider understanding of regulation (Black 2002). By contrast, studies of risk governance are more concerned with stakeholders as well as with the mechanisms by which risks are »governed« in contemporary societies and across them (Dobusch et al. 2013). Risk-based regulation has been conceived of as a new tool to optimize regulatory performance, perceiving risk less as an object to be regulated a tool for the ex-ante rationalization of acceptable levels of harm (Rothstein et al. 2006).

The underlying ideas of regulation and governance are debated fiercely and witness the renaissance of a much adapted notion of regulation meaning that, essential aspects of governance concepts inform and re-arrange the concept of regulation (Carmel 2014, forthcoming; Dobusch et al. 2013).

The workshop examines conceptual and analytical implications of three varieties – risk regulation, risk governance and risk-based regulation – one by one. Bringing together these contributions will eventually forge a sharper conceptual understanding of uses and limits of risk regulation research.

*Invited speakers: Emma Carmel, Bettina Lange, Regine Paul, Henry Rothstein*

4.4 **Thematic field 4: New forms and functions of the public in regulatory contexts?**

Unlike classical theories of steering, governance as well as regulation emphasize the importance of external and public pressures for initiating societal change (Teubner 2012; Mölders 2013). Though the (re-)inclusion of the public sphere seems compelling, there is a need to clarify theoretically as well as empirically which (new) forms and functions »the public« may assume; therefore we intend to shed light on these new phenomena.

As the consideration of the public seems undisputable, it may be used as a more or less empty »stopover« when interfering with, for instance, the economy: »Tax havens« were known long before the Offshore-Leaks team, and yet it needed the publication of substantive quantity of data gathered by investigative journalists to effect the regulation on banking secrecy in many otherwise restrictive countries. Publicity gave rise to public outrage and exerted pressure on decision-makers, rather than public reasoning (Habermas 1962) or upstream engagement (Willis & Wilson 2004; Mölders 2012).

We also witness attempts to fill »the emptiness of the public sphere«. All of them seek to change the public’s passive and/or powerless role. To name just a few: ProPublica, a US investigative journalism newsroom, tries to awaken public interest in complex issues with formats such as songs, videos, or comic strips; trans-disciplinary approaches like Anticipatory Governance (Barben et al. 2008) or Real-Time Technology Assessment (Guston & Sarewitz 2002) design and organize procedures of public engagement in the context of emerging technologies; Anglo-American sociologists put forward notions like »public (organic) sociology« (Burawoy 2007) or »eye-opening sociology« (Gans 2009) to encourage academia to take part in acts of public elucidation and resistance.

These new forms and functions of the public in regulatory contexts will be discussed in detail in thematic field 4.

*Invited speakers: Marc Mölders, Jan-Felix Schrape*
5 Speakers

Dr. Emma Carmel
University of Bath,
Dept. of Social and Policy Sciences,
Claverton Down, Bath BA2 7AY,
United Kingdom
http://www.bath.ac.uk/sps/staff/emma-carmel
e.k.carmel@bath.ac.uk

Dr. David Kuchenbuch
Historisches Institut, Neuere Geschichte
Otto-Behaghel-Str. 10
D-35394 Gießen
Tel: 0049-641-99-28163
David.Kuchenbuch@geschichte.uni-giessen.de
http://www.uni-giessen.de/cms/fbz/fb04/institute/geschichte/neuere_geschichte/personen/kuchenbuch.david

Assoc. Prof. Bettina Lange
Centre for Socio-Legal Studies
University of Oxford
Oxford
OX1 3UQ
+ 44 1865 284226
bettina.lange@csls.ox.ac.uk

Dr. Sven Opitz
Institut für Soziologie
Universität Hamburg
Allende-Platz 1
D-21046 Hamburg
Tel. +49-(0)40-42838-3811
Sven.Opitz@wiso.uni-hamburg.de

Dr. Henry Rothstein
King’s College London,
Department of Geography,
K7.38 Strand Campus, London WC2R 2LS,
United Kingdom
http://www.kcl.ac.uk/sspp/departments/geography/people/academic/rothstein/index.aspx
henry.rothstein@kcl.ac.uk

Dr. Jan-Felix Schrape
Universität Stuttgart
Institut für Sozialwissenschaften
Organisations- und Innovationssoziologie
Seidenstr. 36
70174 Stuttgart
Tel.: +49 711 685-81004
Prof. Christopher Thornhill
The University of Manchester
School of Law
Oxford Road
Manchester
M13 9PL
Great Britain
christopher.thornhill@manchester.ac.uk

Dr. Lars Viellechner, LL.M. (Yale)
Humboldt-Universität zu Berlin
Juristische Fakultät
Lehrstuhl für Öffentliches Recht, Verfassungsgeschichte und Rechtsvergleichung
Unter den Linden 6
D-10099 Berlin
lars.viellechner@rewi.hu-berlin.de

6 References


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