

EDITORIAL

Regulatory governance: experimenting with new roles and instruments

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Defining regulatory governance

This special issue is about 'regulatory governance'. As is usually the case with theoretical concepts used in social sciences,¹ a choice has to be made between the different ways in which our central concept has been defined in the literature.² Two of the differences in meanings attributed to (regulatory) governance are particularly relevant for this special issue.

The first pertains to the relationship between regulation and governance. Some more or less conceive of 'regulation' and 'governance' as synonyms.³ In this sense, regulation and governance both refer to operations aimed at influencing public goals. Others argue that regulation is only a subset of activities that is encompassed with the overarching term governance. They distinguish regulation from the granting, allocating and distributing of scarce resources. While regulation only indirectly shapes the distribution of scarce resources in society by setting, monitoring and enforcing norms and standards,⁴ other policies are about the direct distribution or redistribution of scarce resources.⁵ In this sense, governance refers to both direct and indirect attempts to achieve public goals by way of 'providing, distributing, and regulating'.⁶ All contributions in this special issue deal with setting, monitoring and enforcing norms and standards. Hence, we limit our analysis to governance by regulation and leave out of consideration the subcategory of governance that concerns the direct distribution or redistribution of scarce resources.

The second difference in meanings attributed to governance pertains to the relationship between governance and government. Some distinguish governance from contents and actors.⁷ Conceived of as such governance concerns modes of social coordination to provide collective goods by regulation regardless of which actors undertake these attempts. According to this definition, governance can also include hierarchical steering by state actors only.⁸ Others define governance

1 See Adcock & Collier 2001.

2 Levi-Faur 2012, p 3.

3 Schuppert & Zürn 2008, p. 395.

4 Black 2002.

5 Levi-Faur 2011, p. 4.

6 Braithwaite, Coglianese & Levi-Faur 2007.

7 E.g. Zürn 2012, p. 730.

8 Börzel & Risse 2010, p. 115.

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in terms of the involvement of private parties with the realization of public goals, or ‘beyond government’.⁹ Conceived of as such, governance is distinguished from social steering by state agents only, or ‘governance by government’. The definition which links governance to the involvement of non-state actors is often connected to a so-called ‘governance turn’, signifying a trend wherein other actors than state agents get involved in furthering public goals. Such a definition of governance also contrasts command and control traditionally recognized as properties of regulation by government and governance trying to involve different actors in the regulation process ‘by creating a fluid and flexible policy environment that fosters “softer” processes, which will create an environment conducive to participation and dialogue’.¹⁰ All contributions in this special issue deal with forms of governance that at least partly involve non-state actors.

In this special issue we therefore define regulatory governance as the furthering of public goals by setting, monitoring, and enforcement of regulations directed at influencing behavior and that involves private parties.¹¹

A turn to governance: fact or fashion?

It is unequivocal that the scholarly attention for governance has increased spectacularly since the 1980s.¹² However, it is debated whether this increase in scholarly attention for governance (purely) mirrors a rise in governance as a social phenomenon or (merely) indicates it is a fashionable research topic. Rhodes argues that not every scholar is convinced of the story about the rise of governance.¹³ For example, he cites Marinetto who argues there has been a long-standing tension between centralization (government) and fragmentation (governance) in Britain. In this vein, he also cites Holliday who insists Britain still has a strong core executive, the center has not been hollowed out, networks have not spread, and the center can and does exercise effective control. Based on the work of these two skeptical scholars, Rhodes raises the question whether changes are epiphenomena of present-day government policy or more deep-seated ruptures.¹⁴ However, the thesis that the role of the state in regulation fluctuates is not necessarily incompatible with the insights of those who argue that during the last few decades governance has been on the rise. A classic study of the fluctuation thesis is Polanyi’s *The Great Transformation*.¹⁵ It depicts the nineteenth century as a period wherein governments in Western economies opted for a *laissez-faire* politic and wherein regulation was largely left to the market.¹⁶ This century of the disembedding of the economy from society was followed by a long period of curtail-

9 Lynn 2012.

10 Lobel 2012.

11 Conform Silbey 2013, p. 15.

12 Levi-Faur 2012, p. 5-6.

13 Rhodes 2006, p. 345.

14 Rhodes 2006, p. 346.

15 Polanyi 1944 [2001].

16 Polanyi 1944 [2001].

ing the self-regulation of the market by regulation. First, at the end of the nineteenth century, social policies were implemented. This was followed by the progressive constriction of the market after the financial crisis in the 1930s, and subsequently by the expansion of welfare states after World War II. This expansion ended in the 1980s, when welfare states were confronted with a global fiscal crisis. From then onwards, governments started to outsource and privatize public service delivery and to intensify the oversight thereof ('more steering less rowing'). However, regardless of dominant ideological rhetoric at that time, this did not usher a period of deregulation; on the contrary. Globally, a spectacular growth took place of independent regulatory agencies put at arms length of both politics and business. Levi-Faur classifies this process as the rise of the so-called 'regulatory state'.¹⁷

During the same period in which the number of independent regulatory agencies increased spectacularly, business also increasingly engaged in regulation. Business used the dominant neoliberal ideology of depicting government as the source of and the market as the solution to social problems to increase control over regulation. It did so by coopting and transforming criticism of capitalism and by generating new markets for corporate social responsibility, certification, and accreditation.¹⁸ Moreover, multinational corporations used the globalization of markets to set their own transnational standards or to commission certifying and accrediting bodies to implement theirs.¹⁹ The rise of the regulatory state not only coincided with the increase in self-regulation by business, but also with the increased involvement with regulation by civil society actors such as social movements, interest groups, media, and consumers. What distinguishes 'civil regulation' from governmental regulation is that it operates beside or around the state rather than through it: violators are subject often to market rather than legal penalties.²⁰

This means that during the last few decades the involvement with regulation of both state, market, and civil society has increased concomitantly. Levi-Faur qualifies this development as the rise of 'regulatory capitalism'.²¹ This trend has been accompanied by 'the proliferation of order-creating activities of different kinds and the explosion, as a result, of soft law – codes, rules, contractual and negotiated arrangements, directives, standards, norms, evaluation, and ranking schemes'.²² This results in a state of affairs where plural actors interact at different levels through competition, collaboration, co-optation, compromise and chaos to design, implement and enforce regulatory standards.²³ An illustration of this complexity is, for example, that prolonged efforts of governments of western countries and of International NGOs to ratify international treaties with respect to environmental protection and labor rights have been frustrated by emerging economies invoking rules of free-trade while the failures of implementing inter-

17 Levi-Faur 2011.

18 Silbey 2009; Shamir 2010, 2011.

19 Mayer & Gereffi 2010.

20 Vogel 2008.

21 Levi-Faur 2011.

22 Djelic 2011, p. 41, 49.

23 E.g. Dorbeck-Jung & Oude Vrielink-van Heffen 2006; Eberlein et al. 2013.

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national treaties has been followed by investments of states, business, and civil society alike in hybrid forms of regulation such as certification and accreditation.²⁴

In short: looking back on the last two centuries suggests that a dialectic process has taken place wherein the self-regulation of markets has been alternated by the consciously subordination of it to a democratic society. According to Polanyi, this process has no *telos*, or predefined endpoint. Since there is no end to history, there will be no end to struggles and conflicts.²⁵ However, this is not to say that nothing has changed and that history is purely cyclical. Scott's idea of post-regulatory states nicely summarizes the essence of some of the changes that have been introduced with its inception as regards the regulation of market activities.²⁶ 'This concept suggests a blurring of the distinction between public and private actors, states, and markets, and a much more decentered view of regulation that relies on mechanisms not directly associated with state authority or sanctioning power. [...] Instead of having a small number of powerful centers (i.e. nation-states) from which rule making irradiates toward multiple spheres of social and human life, we have a multiplicity of fields of governance that connect and overlap to a varying extent'.²⁷

Experimenting with regulatory governance

Even when the spectacular increase in scholarly attention for regulatory governance may not always represent more deep-seated changes, it is still undeniable that in regulatory capitalism state, business, and civil society actors are interacting in countless governance networks at different levels and in different contexts. Such networks are complex and may be confronted with innumerable problems: actors may not always be aware that they are participating in a governance network, let alone that they know who else are; useless parties may be included, while crucial parties may be excluded; at the level of governance networks goals may not have been formulated at all, or ambiguously, or they may be conflicting with the goals of the participating organizations or their representatives; power and resources may be unevenly distributed among participants, or participants may have a history of conflicts; leadership may be weak or controversial; or results may be invisible, wanting or unintended.²⁸ Moreover, actors may be uncertain or distrustful about the goals, interests, intentions, and competences of other actors, and of the division of tasks, and responsibilities, while the alignment and coordination within and between networks may fall short.²⁹ Besides, policy networks often contain new instruments, actors, responsibilities as well as new relationships between actors or networks, while at the same time they may

24 Bartley 2003.

25 Somers & Block 2014.

26 Scott 2004.

27 Djelic 2011, p. 41, 49.

28 Huxham & Vangen 2000; Vangen & Huxham 2003; Ansell & Gash 2008; Akkerman et al. 2012.

29 Romzek et al. 2013.

stick to established interests and taken-for-granted ideas. Clear answers on how to deal with these complexities and tensions are the exception rather than the rule. Therefore, it is not surprising that regulatory governance is often linked to experimentation and discretion.³⁰ 'Experimentalism' has even been formalized as a governance approach in and for itself.³¹ 'Experimental governance is a recursive process of provisional goal-setting and revision based on learning from comparison of alternative approaches to advancing these goals in different local contexts'.³²

Experimenting with new roles and new instruments

These experiments with governance raise practical as well as academic questions. This special issue addresses two sets of questions in particular.

The first set of questions concerns the manner in which regulating governmental agencies adapt to their changing political and institutional environment. These public agencies operate in a political-ideological climate which entices them to redefine their traditional roles of commanding and controlling regulations and to experiment with new roles. This raises questions such as what these new roles entail and how these old and new roles compare. Do public agencies embrace these new expectations, do they oppose them, or do they try to strategically influence the roles they are expected to fulfil? Do countries differ in the roles public agencies adopt? And does it make a difference whether such roles are imposed or voluntarily chosen by state agents? With regard to these questions about the new role of the state, Jeroen van der Heijden analyzes ten different arrangements in the Dutch sustainable building sector and shows that state actors are taking up enabling and facilitating roles besides their traditional role of direct regulatory intervention. With the help of fuzzy set qualitative comparative analysis (fsQCA) – a method that renders it possible to analyze several factors in conjunction – he answers the question of how the old and new roles of the state agents relate in terms of the goal achievements of these governance arrangements. He comes up with an evidence based typology of combination of roles that state-actors may wish to take up in seeking positive outcomes of innovative voluntary governance arrangements, or preventing negative ones.

Tetty Havinga compares the way Scottish and Dutch authorities deal with a particular item of European food law, the development of national guides to good practice for hygiene and for the application of HACCP principles by the food industry. She addresses the question why national guides play a larger role in the Netherlands than in Scotland. This question is all the more pertinent since both countries are similar in many respects that have shown to determine national differences in the implementation of EU regulations in different countries. The results of this investigation are consistent with the conclusion of Falkner et al. that the implementation of EU law in both the Netherlands and the UK depends

30 Silbey 2011.

31 Zeitlin 2013, p. 13.

32 Sabel & Zeitlin 2012, p. 169.

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on domestic issues. This study shows how important it is to look beyond transposition of EU regulations and to investigate the implementation of regulations in practice to answer questions about the role of government in governance arrangements.

Jing Liu's contribution adds to the literature on the role of the state, which often departs from developed countries, by studying the role of governments in developing economies. She analyzes the manner in which the emerging economies of Brazil, Indonesia, and China have reacted to the dominant means of transnational forest governance – forest certification schemes and the legality regime – which have primarily been imposed on them by foreign entities. Even though domestically the demand for certified timber is small, the states of emerging economies cannot avoid certification and legal verification because they export to countries which demand compliance with private norms and domestic laws. Particularly because civil society is not a strong countervailing power in these emerging economies and because these states perceive the interference of foreign states or private entities as threats to their national sovereignty, these states dominate the control of the legal verification procedures and set up competing certification systems.

The second set of questions addressed in this special issue concern the functioning of new governance instruments. Which new governance instruments are diffusing? And why is that? What assumptions underlie these governance instruments? And how suitable are these instruments to further public goals? Paul Verbruggen's contribution is the first of three studying experimentations with new regulatory governance instruments. He maps the increasing role that commercial contracts concluded between private actors play as instruments of regulatory governance, its drivers, and the governance challenges that arise from it. That commercial contracts are becoming increasingly important vehicles for the implementation and enforcement of safety, social and sustainability standards in transnational supply chains is remarkable because of the constraints contract law seems to impose on the use of commercial contracts as a regulatory device. Privity of contract implies that, as a rule, firms can bind their contracting parties only and not the other parties that constitute the supply chain, while the freedom of contract implies that parties may determine whether to contract or not, with whom to contract, and the terms of the contract itself. He shows that while different legal techniques are used to overcome these doctrinal limits, they have limitations of their own.

Christine Parker investigates the retail food label as an 'instrument' for governance of chains of food production and distribution. Taking the product label of free-range eggs in Australia as a point of departure, she proposes a methodology for 'backwards mapping' the networks of public and private actors and processes that have constructed the meaning of the product as it is presented to consumers. This methodology enables her to critically assess the neoliberal statement enunciated by governments, NGOs, food producers and retailers alike that the food system can be governed via consumer choice aka 'voting with your fork'. She compares the different ways in which the label of free range is made visible on egg

cartons and what remains invisible, what regulatory governance networks lie behind the claims staked on food labels, and what ideological assumptions about the production, transport and consumption of food underlie these claims. Her analysis shows that the retail food label is an important space for contests between different actors who each seek to govern the food system according to their own interests and priorities and thus introduces the food label as a regulatory arena to regulatory governance scholarship.

Finally, Martijn Scheltema proposes a multi-dimensional evaluation model in order to compare the effectiveness of two international certification initiatives (i.e. sustainable forestry (Forest Stewardship Council, FSC) and sustainable coffee and cacao (UTZ Certified)) from three different angles (legal, impact, acceptance/legitimacy/governance). For different reasons the effectiveness of certification systems is often questioned. Compliance is based on soft law and cannot be enforced, certifying bodies do not have to account to politicians for the manner in which they serve the public interest, and the standards audited by certifying agents are often flexible and bound to local contexts. Because of this combination of factors not only governments and interest groups are demanding evidence for the effectiveness of certification schemes but competing certifying agents who want to distinguish themselves from other agents do so as well. By showing that FSC scores better on some dimensions (e.g. enforcement, cost and price premium, and government acceptance), while UTZ Certified scores better on others (e.g. verifiable evaluation criteria, regular evaluation, innovation), Scheltema shows a multi-dimensional comparison of the effectiveness of private regulation schemes is feasible.

This special issue of the Dutch journal for sociolegal studies, *Recht der Werkelijkheid*, arose out of a conference session at the annual meeting of the Dutch society for sociolegal research in January 2014. The papers in this special issue demonstrate that regulatory governance increasingly occurs beyond the nation state – both in the sense that private actors are present on the scene and that the transnational context gains importance. This special issue is therefore by no means confined to the Dutch regulatory context. The papers in this special issue address evolving roles of government and private actors in regulatory governance in transnational arenas; and take stock of experiments with new instruments and of the transformation of existing arrangements. They contribute to a better understanding of ongoing processes of regulatory governance, but they also show that in this area, change is permanent, and research is never finished.

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