1. Semantics of ruling: reflective theories of regulation, governance and law

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INTRODUCTION

Societal conditions are shaped by both social structures and semantics. The former constitute the givens of social relations and their particular modalities. The latter consist of interpretive patterns, descriptions and explanations, which make social reality meaningful (Luhmann 1989). In the social sciences, the sociology of knowledge has primarily distinguished itself through the study of societal semantics and the constitution of meaning. The following considerations apply a sociology of knowledge perspective to the field of regulatory social activities that pervade the scientific discourses surrounding law, regulation and governance.

One of the main characteristics of modernity has been the idea that society is a product of shaping activities which intentionally or unintentionally create social reality. The rise of this particularly modern self-consciousness is closely linked to the differentiation of science and the emergence of empirical sciences in the seventeenth and eighteenth centuries. Closely related to this upheaval in the understanding of nature is the birth of social sciences such as psychology, sociology and political science. Karl Marx may be referred to as an early and influential protagonist of the idea of man-made social circumstances.

The analysis (and critique) of ideologies as forms of (wrong) knowledge became a characteristic trait of sociology, which emerged alongside the notion of society's fundamental shapeability. Later labelled as sociology of knowledge, this focus on interpretative patterns and structures of meaning became prominent in the works of Max Weber, Karl Mannheim, Peter L. Berger and Thomas Luckmann, or Niklas Luhmann, only to mention a few. Whereas Berger and Luckmann generated seminal insights in the constitutive role of knowledge in everyday life, others like Mannheim, and Luhmann in particular, put additional emphasis on the relevance of

scientific concepts (theories), both in the natural and in the social sciences. The sociology of knowledge departed somewhat from its preoccupation with criticism of ideology and developed into a broad strand of sociological inquiry over time.

In accordance with the last-mentioned thread in the sociology of knowledge, this article will be concerned with scientific models and theories representing the idea of “shaping society”. The analysis will focus on the period from the late twentieth until the early twenty-first century – in other words on the decades since about 1970. This choice is founded on the observation that, during that period, theoretical descriptions of shaping society by means of ruling, regulating or governing – be it in legal or political theory or in sociology – have become increasingly complex and reflective. Therefore, in order to better understand reflective theories of regulation, governance and law, a closer look should be taken at different concepts of “modes of intentional change”. The underlying assumption is that understanding of such semantics will also improve our comprehension of social structures.

The following analysis will focus on scientific concepts, discourses and models of intentional change looking at regulation, law and governance. In doing so, I will be referring to these three aspects in the general as reflective theories of intentional change. These are scientific concepts and discourses focused on intentional change and shaping society, but they can certainly also be distinguished as law, regulation and governance. Such interpretative patterns will be summarized under the general term “reflective theories”. This is because they are scientific semantics, which reflect upon a specific societal field or subsystem. They observe societal activities in the language of (social) science and offer a coherent description of the respective field. Such descriptions contribute significantly to the constitution of related social practices. Insofar as this assumption holds true, reflective theories and social practice lie on a continuum and mutually influence one another. Reflective theories do not determine practices, but they do, however, illuminate their social meaning and thus add an important aspect to sociological explanation.

My overall argument claims that somehow hidden in the multiplicity and mutual ignorance of various scientific discourses, we can identify a number of convergent trends and common points of reference. In various respects, these commonalities refer to the question of how to conceptualize intentional change under conditions of heterogeneity, hybridity and fragmentation in social fields. Against the background of shared references, I suggest that the *exertion of influence* – which can perhaps be labeled as regulation in a broad understanding of the term – is lying at the very heart of all reflexive theories. Secondly, the aspects of governmentalities – that is,

of semantic framings backing, and sometimes even hiding, the ruling character of law – regulation and governance should be highlighted. Thirdly, both these aspects hint at the relevance of legal structures, which stabilize expectations and thereby provide a basis for structure formation in the complex and fluid field of regulation and governance.

As a result, I will identify at least three dimensions of theoretical commonality between law, regulation and governance. The first dimension relates to the core structures of social theory, which is the basis of all the theoretical domains discussed above. The second finds expression in the common interest in social influence; all three theoretical fields are characterized by concepts of shaping society. The third, finally, points to the ubiquitous presence of legal structures in the three concepts.

The chapter is structured as follows. The first section briefly recalls the differences between reflective theories in regulation, governance and law. The apparent divergence of theoretical starting points, basic questions, concepts and theorems will serve as a null hypothesis. With this in mind, the second section describes and analyses some convergent developments in the three theoretical fields. It will work out a number of theoretical points, which represent a common frame of reference for all perspectives. The third section will then make some preliminary suggestions for further research. Serving as points of orientation in this respect will be the core operation of intentional change, the associated forms of knowledge and the systematic function of the law.

REGULATION, GOVERNANCE, LAW: DIVERGENT PERSPECTIVES IN REFLECTIVE THEORIES?

If we take a look at the structures of contemporary science, it becomes obvious that the scientific fields of regulation theory, governance theory and legal theory are more or less self-contained and closed off from one another. This fact does not primarily correlate with disciplinary boundaries or personal idiosyncrasies – there is, indeed, quite a remarkable amount of interdisciplinary interest and communication between the fields. Rather we observe different theoretical foci and specific questions guiding the respective scientific communities.

Theories of regulation have traditionally been concerned with a dyadic relation between state agencies and private actors (often businesses). This dyadic relation between actors or systems exerting influence on the one hand and others being influenced on the other, has been pervading the scientific debate on regulation since its inception (cf. Stigler 1971; Mitnick 1980; Majone 1996; Coglianese/Kagan 2007b; Koop/Lodge 2015). Early

definitions usually concentrated on economic actors. For instance, Stigler claimed that, “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit” (Baldwin et al. 2013a: 10). Selznick’s famous definition of regulation as “the sustained and focused control exercised by a public authority over activities valued by the community” (Selznick 1985: 363) correctly emphasized the “public” aspect of regulation and indicated that not each and every act of control can be conceived of as regulation. That being said, Selznick was definitely preoccupied with the idea of control. As I will argue in the next section, this picture is of course incomplete. There have been various theoretical developments showing a more complex view of regulation. Nevertheless, for the purpose of the current argument, it shall suffice to register that, in its nucleus, the concept of regulation bears the notion of a dyadic relation in which state actors intervene in private business. In a comprehensive overview of the theoretical concepts of regulation based on 108 of the most cited articles in six disciplines, Koop and Lodge (2015: 11) state that the following definition stands for the mainstream regulation debate: “[R]egulation can be defined as intentional intervention in the activities of a target population, where the intervention is typically direct...and exercised by public-sector actors on the economic activities of private-sector actors”. In other words, at their core, theories of regulation are concerned with forms of influence in a two-sided social relation. This dyadic structure relates to the characteristics of the relation, operating on the distinction between an influencing and an influenced side – and not to the number of actors involved, which is often more than two.

Governance theory also focuses on the issue of influence. However, it usually deals with multiple structures, processes and forms of coordination. Governance concepts have emerged as a result of a crisis of interventionist thinking and technocratic models of societal planning in the 1970s. Post-interventionist theories and concepts of pluralist societies have replaced traditional, more rigid concepts of social steering with new ideas of co-operation, negotiation, co-production, hybrid communication, self-regulation and networks. Originating from economics (Coase 1937; Williamson 1975), governance originally focused on “good governance” in organizations. During the last few decades, the semantics of “governance” has spread across the political sciences – especially to international relations (e.g. Rosenau/Czempiel 1992; Rosenau 2000b) and policy research (e.g. Mayntz 1998). In this tradition governance is understood as a form of statehood, which is mainly characterized by negotiation and co-operation, in contrast to traditionally recognized properties of the democratic national state like hierarchical structures (Héritier 2002; Kooiman 2002; Rosenau 1995; Schuppert/Zürn 2008; Blumenthal 2005).

Whereas theories of regulation focus on direct influence, the concept of governance is much more based upon hybrid procedures and arrangements. However, this conceptual orientation should not conceal the fact that in governance theories, there is also a deep-rooted interest in the phenomenon of influence (cf. Bora 2014, 2015). What connects regulation and governance theories is the general idea of a profound shapeability of all social phenomena. Governance theories, in other words, focus on forms of social influence like regulations theories do. However, they turn away from the direct and dyadic model of influence in favor of hybrid and multi-level relations. Not least because of this turn, governance theories have often been understood as a historical replacement for regulation theories (Mayntz 2005).

Legal theory strongly contrasts with regulation and governance theories in at least one central aspect. They do not deal with influence in a primary sense, but rather with expectations. Understood as a system of generalized contra-factual expectations – that is expectations that remain stable in spite of deviance from them (Luhmann 1985) – law draws theoretical attention to questions of validity rather than influence. It produces decision-making programs by formulating the conditions under which decisions would be correct, irrespective of empirical behavior. Such behavior will be differentiated along the line of rightful and wrongful activities. This position characterizes more or less all legal theories. It is more visible in positivist approaches (John Austin, H.L.A. Hart, Hans Kelsen), which look at law as a system of rules (as Hart argues, for example). The interest in normative validity is, of course, not limited to positivist, or neo-positivist, approaches. The same holds true also for critical legal theory (Habermas 1996) and even for de-constructivist theories – think, for instance of Jaques Derrida's "Force de Loi" (Derrida 2005). Moreover, not only legal theory but also sociological theory has emphasized the aspect of normative validity in contrast to empirical effect of law. In *Economy and Society*, Max Weber very prominently and sharply distinguished judicial and sociological perspectives. Legal reasoning, he claimed, is about "ideal" validity, about the "ought" (Weber 1972: 181). From this perspective, law has only normative meaning. It does not refer to what happens empirically and what actors believe to be right. The famous sociologist of law Theodor Geiger later took this intuition to formulate his theory of normative and empirical validity (Geiger 1964), where he strongly predisposed socio-legal thinking in the following decades. In short, the main orientation of law and legal theory is towards the stabilization of expectations. Any effects of law and its influence on behavior seem to remain remarkably under-determined from this perspective.

Summing up this short recollection of reflective theories in regulation,

governance and law, one could come to the conclusion that their respective fundamental discourses are located worlds apart from each other. Theories of influence on the one hand (regulation and governance) and of normative validity on the other (law); of dyadic intervention here (regulation) and of multilateral coordination there (governance) – the heterogeneity of the theoretical field seems to be overwhelming.

In order to compound this problem further, within each of the fields there is “a lack of shared understanding” (Koop/Lodge 2015: 1), blurredness (Pierre/Peters 2000: 7) and a “hectic production of new theorems” (Buckel et al. 2006: X; my translation). This theoretical state of affairs might well contribute to the above-mentioned mutual closure of the scientific fields. Moreover, it aggravates the difficulty of identifying common theoretical ground among the different discourses.

The following section will try to identify commonalities behind the idiosyncrasies that have been sketched out above. It will take a closer look at single theories and will thereby describe some convergent developments that have become visible in the scientific discussions of the last few decades. My assumption is that such convergences will help identify some central points in theories of intentional social change, which could help guide further conceptual and theoretical work.

THEORETICAL CONVERGENCES

The argument in the previous section aimed at highlighting and – for clarification’s sake maybe slightly over-emphasizing – the distinctions between the scientific discourses of regulation, governance and law and their mutual closure. However, I would like to now turn our attention to some long-term developments in the three fields. Although these developments result in still different conceptualizations of intentional change in the respective theories, we find a remarkable common theoretical orientation towards a general heterogeneity, hybridity and fragmentation of social fields. Under these conditions, theories of regulation and governance, which are concerned with the issue of influence, converge in their understanding of the nature of such influence, that is it becomes increasingly complex and reflexive. Legal theories that are primarily occupied with the validity of normative expectations amplify their attention to questions of legal impact and effectiveness, thereby addressing the aspect of influence. In doing so, they are inevitably confronted with external observations and remarks from the social sciences, which have led to an integration of social theories and legal theories. As a result, the three fields converge at least in some of their conceptual fundamentals. In order to elaborate on this

assumption, I will take a closer look at the reflective theories of regulation, governance and law in the following section.

Regulation Theories

The theoretical perspective of regulation assumes that there are some indicators for a seminal trend in regulation theory towards more complex and indirect models. These indicators will be briefly discussed below.

Some indicators

- (1) A first indication of a substantial change within theories of regulation is the fact that, at one time, many authors assumed the concept itself to be outdated. Regulation was not considered a concept that travels well (Black 2002: 2), which would explain why it increasingly competed with the notion of governance in academic thinking. Over time, however, theories of regulation have assimilated with the empirical and theoretical challenges and have even recaptured lost territories. This can be observed in the emergence of the concept of “regulatory state” at the national and particularly the supranational level, as well as the establishment models of global regulatory regimes in the field of trade, food and climate change. Studies in these fields have re-emphasized the empirical importance of regulation (MacNeil et al. 2002). The promotion of “Better Regulation” in particular distances itself from governance (Paul 2007; Wegrich 2011; Wegrich/Lodge 2012). However, this process did not leave theories of regulation untouched. Rather, concepts such as “reflexive” or “responsive regulation” (e.g. Braithwaite 2011; Baldwin/Black 2007) or “regulatory regimes” (Hood et al. 2001) have modernized the theory of regulation, not only including a broader set of available instruments, but also focusing on broader actor constellations, thus correcting the often-criticized state-centeredness of traditional regulation theory.
- (2) There is an overarching development within regulation theory, namely from direct to indirect and complex intervention. The theory of regulation dates back to the late nineteenth century, when over-bureaucratization became subject to political critique as one of the “evils” of regulation. From the 1890s until the 1970s, the command-and-control model of regulation dominated the discussion in order to justify the need for social reforms. The failure of a steering theory that claimed the possibility of direct impact in regulatory relations produced new and creative answers from different positions. The command-and-control model of regulation crisis, which became visible in the discussion of “implementation failure”

and in subsequent demands for “de-regulation” (Moran 2002: 397), provoked a number of counter-movements. These still dominate discussion. The weakness of the public de-regulation model and pure economic self-regulation also became perceptible in the wake of economic and financial crises during the last decades. Therefore, concepts of self-regulation were followed by models of differentiated compliance, for example in John Braithwaite’s famous picture of the regulatory pyramid, in which the basis of regulation is a broad cultural layer of persuasion and informal warning, norm compliance via institutional dialogue and reflexivity, punctuated towards the top by formal enforcement of the law (Ayres/Braithwaite 1992). The picture of the pyramid, although inspiring and instructive, nevertheless conceals the broad variety of fields with very specific regulatory patterns, which do not smoothly fit into the hierarchical structure of the pyramid. The metaphor of the pyramid seems too simple (Scott 2012: 69/70) and as a result, “regulatory regimes” have become an alternative picture. Scott understands regimes as consisting of firstly norms, standards and rules, secondly as mechanisms of monitoring and feedback and thirdly as enforcement (Scott 2012: 67). With a similar motive, but arguing from the perspective of citizens acting as “law enforcement agents”, Susan Silbey (2011) has coined the term “relational regulation”.

- (3) As already mentioned above, the interest in indirect forms of influence coincides with a profound criticism of early regulation theory’s state-centeredness. A significant move in this direction can be seen in an institutional proposal. The idea of the regulatory state (Majone 1996) has gained worldwide prominence since the 1990s and has claimed that globalization is eroding the fundament of the “positive” state (Majone 1997), promulgating a new model of the state which represents a kind of “limited government by proxy” (Levi-Faur 2014: 601), a concept that is closely related to context regulation (Willke 1987) and reflexive law (Teubner/Willke 1984) in the German debate of the 1980s and 1990s. The regulatory state is understood as “a state that applies and extends rule making, rule monitoring, and rule enforcement either directly or indirectly” (Levi-Faur 2014: 207). There has been some critique of the regulatory state. Levi-Faur (2014) argues, for instance, that the presupposition of a clear distinction between regulation and redistribution as a characteristic of the “positive” state cannot be maintained. Moreover, one could add that Majone’s idea of the polymorphic state, where a “morph” is an essential part of a state’s activities, seems rather ontological, as if there could be state activities without regulatory components. This is

possible with a narrow concept of regulation – a concept that has to a certain extent dominated the UK/US debate – but somehow blurs the view on the broad variety of interventions in social systems. To identify these interventions, it might be helpful to adopt a broader concept of regulation, as was already briefly mentioned in the introduction. In addition, I would argue that Majone focuses very straightforwardly on the state. In the world society, this seems also to be a rather narrow perspective. Recent research in constitutional theory (Teubner 2012; Thornhill 2011; Kjaer 2014; Neves 2013; Holmes 2013; Viellechner 2013), for instance, shows that beyond states there are many more and different actors intervening and ruling social conditions. Therefore as was indicated before, it might be appropriate to speak of regimes rather than of states.

- (4) A broad understanding of the term regulation also becomes visible in the idea of meta-regulation. Scott (2012) describes meta-regulation as a form of regulation in regulatory regimes, characterized by fragmented sets of participants and a large variety in control. Against this background he suggests a broad concept of regulation, comprising governments, markets, communities and social forces of various kinds as the actors of regulation (p. 62). They conduct their activities in a world of “fragmented governance” (p. 75), where alternative mechanisms of regulation replace the traditional forms of command and control, but also the enforcement pyramid. Speaking about empirical examples, I would understand the European system of chemical control REACH (Führ 2014) or the model of “chemical leasing” that has been suggested some time ago (Jakl et al. 2003) as illustrative cases of meta-regulation. When it comes to the modalities of control, Scott speaks about hierarchy, competition, community and design. These modalities, as it seems, are not very clearly delineated against each other. Moreover, the presupposition of hierarchies may be a bit problematic in a functionally differentiated society. On the other hand, the core idea of meta-regulation, the concept of regulated self-regulation, fits seamlessly into such a theoretical background. Moreover, it has strong links with reflexive law, and with social constitutionalism, two concepts which have succeeded steering theory and reflexive law in the realm of jurisprudence.
- (5) Within all these changes, last but not least, the law has re-gained a conceptual role in regulation theory. For some authors, it is nothing less than a constitutive criterion of regulation, as for instance Coglianese and Kagan demonstrate, who define regulation as “law specifically aimed at preventing misconduct by business and other organizations, and enforced primarily by specialized government

agencies” (Coglianese/Kagan 2007b: XI). With again a slightly different emphasis, Julia Black (1997, 1998b) suggested understanding rules as products of interpretive communities – as discourses, with the law representing only one of many instruments of regulation. Likewise in many theories of regulation, law is – or used to be – regarded as an instrument of regulation. Meanwhile, as will be demonstrated below in the paragraph about legal theory, the legal component in regulatory theory has also acquired a more complex view and is much more related to structural and systemic aspects. Such a move could also be observed rather early in the United States, where the “rights revolution” (Moran 2002: 395) between the 1960s and 1980s triggered a shift from an understanding of regulation based on specialized agencies towards a type of “social regulation” (ibid.) based on law and constitution. However, in spite of such overlaps between regulation theory and legal theory, the particular modes of operation of the law still remain more or less invisible in regulatory approaches. For many theories of regulation, the law operates as a black box.

A general trend

As a result of the above-mentioned trends in regulation theory, it is not entirely by coincidence that Baldwin, Cave and Lodge (2013b) in their introduction to the *Oxford Handbook on Regulation* describe the term “regulation” as a “moving target”, characterized by flexible and even multiple connotations (p. 5), including command and control and manifold instruments of intervention, but also more indirect effects, which may have even been “set up with aims other than regulation” (p. 6).

There is, however, more commonality in the field than it seems at first glance. Koop and Lodge (2015) have recently assembled an empirical and interdisciplinary overview of contemporary regulation concepts. In the multiple worlds of scientific approaches they identify two core definitions of the term. The first, “classical” definition is “essence-based” and names only minimum requirements for regulation, namely “the intentional intervention in the activities of a target population” (p. 10). The second definition, which they call “pattern”-based, adds some criteria to the first definition: the above-mentioned intervention “is typically direct – involving binding standard-setting, monitoring, and sanctioning – and exercised by public actors on the economic activities of private-sector actors” (ibid.: 11).

Irrespective of the empirical distribution of the two definitions, Koop’s and Lodge’s article shows that there is a large common ground within the variety of regulation theories. This can easily be seen from the relation between the two definitions. Even if a rather narrow understanding (i.e. the “pattern”-based model *sensu* Koop/Lodge) should prevail in the debate,

it is also clear that the broad definition (the “essence”-based model) is included as the *genus proximum*, in contrast to which the former one gains its meaning as *differentia specifica*. In other words, the broad definition is constitutively contained in the more specific one.

This broad understanding is systematically connected with a recent development in social theory. Julia Black’s approach of hybrid and fragmented regulation (Black 2002) may serve as an example for this interpretation. Against the background of a de-centered understanding of society in general and the state in particular, she dismisses the conventional understanding as command-and-control as inappropriate for a de-centered, polycontextural society. She suggests the following definition: “regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification” (p. 20). The idea of regulation as direct intervention has more or less dissolved in a concept of network regulation by indirect means (cf. Schrape and Mölders in this volume).

Black’s understanding is located somewhere between Koop’s and Kagan’s two concepts. If we add the aspect of public interest to Koop’s and Kagan’s broad concepts, we can specify Black’s approach slightly in order to avoid the problem that any kind of social influence would have to be called “regulation”. Against such a theoretical background, I suggest understanding societal regulation as any operation of a social system that intentionally aims at deciding, defining or setting the state of another system (target system or focal system) with the intention to pursue commonweal. The latter term is meant to represent the German word “Gemeinwohl”, which covers the semantic field of common welfare, public wealth, public good or public interest in a broad sense. This specification operates as a confinement or limitation of the definition, which would be merely formal and limitless otherwise. Thereby, in our context, it should become clear that regulation does not refer to the simple control over machines, objects or persons, but always implies a specific social dimension, namely, the (self-)shaping of society, its subsystems and organizations. In contrast to the command and control version, the term is not based on de facto control, but rather on the intention to exert influence. In addition, it is broader than a concept of regulation built upon the use of authority (Black 2002). I would consider this concept of regulation as the common conceptual ground in the current debate.

To summarize the line of argument in this subsection, one can note that theories of regulation have always been focusing on issues of influence and control. They have extensively studied various mechanisms of influence in

different contexts. These issues are embodied in a core concept of intentional relations between regulating and regulated social units, intentionally oriented toward commonweal. Theoretical challenges have emerged to theories that were bearing in their nucleus the notion of a dyadic relation, in which state actors intervene in private business. The theories assimilated to the notion of network relations with more complex, non-hierarchical forms of influence, and with multiple actors and levels. Nevertheless, at their core they refer to the dimension of influence, a dimension that can be subsumed under the aspect of rule. Theories of regulation, therefore, appear today as semantics of ruling under complex social conditions.

Theories of Governance

Embedded in a concept of indirect, heterarchical and interconnected modes of ruling, reflective theories of governance have always been occupied with the exertion of influence, even in cases when they do not treat the issue explicitly. Influence, in other words, is at least a hidden agenda of governance. From this perspective, it will be possible to describe convergences with law and regulation.

Some indicators

As already mentioned, theories of governance literally gained attention in the wake of perceived weaknesses in early regulation theories. In contrast to the older forms of naive cybernetic thinking, governance theories gained a strong attractiveness by re-focusing on three theoretical core elements (cf. Bora 2014). Firstly, the focus on the production of the commonweal somehow weakened in favor of multi-level and multi-actor networks of negotiation between different public and private actors. Secondly, rhizomatic inter-linkages of recursively coordinated actions replaced rather state-centered and linear models of ruling. The third conceptual shift pertains to the instruments of ruling. Whereas the traditional means consisted of law, command, control, allocation of goods and the provision of infrastructure – at least, in the view of governance theories which we have seen do not fully meet the developments in regulation theory – governance theory focuses much more on hybrid procedures and arrangements.

Within the realm of governance theories, therefore, the turn towards non-hierarchic, poly-contextual, multi-level relations is most obvious and nothing else besides a truism (cf. Kjaer 2015). It is a constitutive characteristic of such theories that makes them more comprehensive than the early theories of regulation and also more suited to observe structures and processes of influence in a differentiated society.

However, there has always been a second element in the discourse about

governance. While theories of governance in the above-mentioned respect are perhaps rather developed and productive, they are at the same time in danger of becoming too vague as a result of forgetting about their regulatory nucleus. They have often been criticized as being fuzzy and blurred (Pierre and Peters 2000: 7; Offe 2008; Briken and Dröge 2009: 122). Detlef Sack (2012: 29f), for instance, distinguishes at least eight different usages of the term, which range from practical aspects of social control to scientific observation and description. What is perhaps more interesting is the fact that this theoretical fuzziness arises on a common conceptual ground. Emma Carmel (in this volume) shows evidence that the concept of governance has passed a carrier quite similar to that of regulation. She identifies a certain over-elasticity of the concept and a broad range of applications associated with manifold and specified definitions, which lead to “an expected and classic failing of the stretched concept” (p. 3). Behind this conceptual heterogeneity, Carmel describes some basic narratives, all of which embed the idea of governance in a historic description of what had been “before governance”. Against this pattern, they all use “four key assumptions from liberal political theory” (p. 4), telling the story of lost properties of the state: capacity, autonomy, sovereignty and authority.

Such relationship between theories of governance and political liberalism can be observed in many empirical examples (Bora/Münste 2012b; Bora 2014). It seems to be a main characteristic of governance theory. Moreover, we can even speak of a specific amalgamation of social theory and practice connected to concepts of governance. One of the hypotheses of our research is that the practical prominence of governance results from the far-reaching social-scientification of the political system. Governance theory, as Carmel (cf. above) also shows, expanded the instruments of control and the sets of actors involved in decision-making, and yet did so all the while preserving and even strengthening the idea of controlling and shaping societal conditions.

A general trend

One may summarize that the central interest of governance theories is the structures and processes in which influence is being exercised. In addition, governance theories pay special attention to the actors involved, the forms of co-ordination, negotiation and decision-making in a world that is being conceived in the form of networks. These scholars are less concerned with the nature of influence and the respective mechanisms. Regulation, therefore, is seen as one task among others in governance. Conceiving regulation as a central aspect of every discourse on governance, some scholars even speak about “regulatory governance” (Schuppert 2010: 3; Döhler/Wegrich 2010). Understood in this way, regulation is a ubiquitous

dimension of governance, the “forgotten” or “hidden” ratio of all operations connected with the term governance. Applying a phrase coined by Schuppert (2010: 3), we may call this basic notion of regulation “the beating heart” of governance theory.

The same holds true for the role of law in theories of governance. Law appears as an interconnected structure – a dimension of governance-regimes (Trute et al. 2007). Law is observed as one of many modes of co-ordination and regulation. Interestingly however, governance theories generally do not deal with the question of how these different modes are being coordinated with each other. How are collisions between modes of regulation regulated? Which paradigm or which mode is applied then: competition, power, money, norms? One hypothesis in this respect could be that this meta-coordination in modern governance has something to do with normative expectations; that it takes place, in other words, in the shadow of the law. Governance theories sometimes seem to disregard the central role of legal rights in the process of regulation. Instead, the restricting and limiting effects of legal formality are emphasized – in Max Weber’s words: the “iron cage” of procedural rationality in modern law. In contrast, one can also recall the fact that the formal rationality of the law usually guarantees freedom and subjective rights. Therefore, from the perspective of regulation, legal rules have their defined place, and regulatory means and ends have to be cross-checked against legal provisions. In governance theory, this relation is often less clear.

Altogether, one might say that convergences between the three fields occur most distinctly in theories of governance. Thus in this case, it does not seem appropriate to collect additional indications. What is important to note, on the other hand, is the fact that there is an element of influence even in the most advanced versions of governance theory. The convergence between regulation and governance is two-sided: a rise in complexity and continuity in the basic operation and the exertion of influence.

Legal Theories

I claimed in the first section that legal theory does not primarily deal with influence, but rather with expectations. I would like to add that influence plays at least a complementary role in legal thinking. This role has strongly varied over time and between different legal cultures. Moreover, the semantics of influence are wrapped up in different terms in the context of legal theory. Therefore, it is difficult to isolate the topic unambiguously in reflective theories of law. In the following, some indicators will be identified which suggest that semantic patterns like “effect”, “impact” or “legal regulation” introduce the question of influence in theories of legal validity, thereby relating legal theory to regulation and governance. After drawing

this connection, I will adduce some trends in legal thinking as evidence for the general hypothesis of theoretical convergence.

Some indicators

- (1) In contrast to the theoretical fields of regulation and governance, legal theory has always been widely differentiated into a large number of schools and movements. These different trends are also related to significantly varying legal cultures. In Europe, and particularly in the German-speaking countries since the late nineteenth century under the influence of *Begriffsjurisprudenz* (conceptual jurisprudence) and legal positivism, the orientation towards written law has been rather strong. This orientation more or less prevailed in Europe over other approaches such as *Interessenjurisprudenz* (jurisprudence oriented towards social interests; Heck 1914), *Freirechtslehre* (free law school) and sociological jurisprudence (Kantorowicz 1911) – the latter gaining more importance only in the second half of the twentieth century. In the American case law, however, legal realism and the orientation towards practical jurisdiction drew the attention towards the expected consequences of judicial sentences very early (Baumgartner 2001). Roscoe Pound held that one of sociological jurisprudence's "characteristic marks" was its consideration for "the working of law rather than its abstract content" (Pound 1927: 326). There was a reason for this emphasis on "law in action" rather than "law in the books" in legal theory: the predictability of empirical juridical decisions was at the center of interest, rather than the system of legal terms and concepts. As Justice Holmes famously said: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (Holmes 1897: 461). Like other prominent judges on the US Supreme Court (for example Cardozo and Brandeis), Holmes represented a perspective in legal theory that introduced societal interests into legal decision-making. From this perspective and in sharp contrast to the above-mentioned trends in continental legal theory, this sort of legal theoretical approach sees the law as "a means not an end" for the realization of social interests (Pound 1907: 614). Roscoe Pound coined the term "social engineering" (1923: 152), which gained a certain influence in the European socio-legal context, as we will see in the following subsections. In other words, within the tradition of case law and legal realism, the aspect of legal influence has always been prominent.
- (2) Such orientation towards empirical effects is not an American speciality alone. Beyond the diversity of legal cultures and schools, there has always been a broad consent in legal theory, philosophy and

constitutional theory that the legitimacy of the law has an intrinsic relation to its empirical effects. The German Constitutional Court (*Bundesverfassungsgericht*), for instance, has stated in several instances that any intervention of the state in subjective rights – via legislation – is only constitutionally acceptable if the chance for empirical realization of the legislative goal is guaranteed. According to the principle of proportionality, ineffectiveness becomes a problem for normative validity (Bryde 1993). The focus on social interests and on social engineering, which was formative in American legal theory, also bore some fruit in the context of European legal thinking. In theories of continental civil law, with its typical commitment to written law and conditional programming, legal influence takes on significant relevance. Moreover, the relevance and shape of the concept underwent some major changes during the course of the last decades, resulting in remarkable convergences with the above-mentioned reflective theories of regulation and governance.

- (3) In Germany, since the beginning of the twentieth century under the impression of the above-mentioned *Interessenjurisprudenz* and *Freirechtslehre* and, most notably, Eugen Ehrlich's sociology of law (Ehrlich 1989), the so-called *Rechtstatsachenforschung* (empirical legal research) has occupied a certain niche in legal theory. Although it was always a rather marginal strand in the large field of legal thinking, it has nevertheless become quite visible with protagonists such as Arthur Nußbaum, Ernst O. Hirsch and Manfred Rehbinder, who established a school in empirical legal research during the course of the twentieth century. An early definition by Nußbaum shows how directly *Rechtstatsachenforschung* and the interest in legal influence are connected. *Rechtstatsachenforschung*, as he said, "means the systematic analysis of the social, political and other empirical conditions, under which legal rules emerge; and additionally the inquiry in the social, political and others effects of those norms" (Nußbaum 1940, 1968: 67; my translation).
- (4) In the late 1960s and early 1970s, an additional characteristic development in Germany combined the above-mentioned approach with social engineering by emphasizing the impact of law. The German word *Rechtswirkungsforschung* (Hof/Lübbe-Wolff 1999) designating this specific trend does not have an exact English translation. In a recent paper, Michael Wrase uses the expression "impact analysis of legal regulation" (Wrase 2013: 3). He describes the development of the field from an instrumentalist and rather state-oriented concept of law. He does so by drawing on the broad stream of implementation research in the 1970s, the increase in private and contractual

norm building, regulatory networks and the mobilization of law (Blankenburg 1977), as well as the issue of symbolic use of legislation. This development strongly accelerated during the late 1960s and early 1970s, when the social-liberal coalition under Willy Brandt started a prominent initiative for judicial reforms based on “objective data” in 1969 (Strempele 1998). A number of institutions tackled the task of “rational policy-making”, an undertaking heavily based on scientification, which was met by respective discourses in the academic world. Since 1973, the Federal Ministry of Justice has operated a department for *Rechtstatsachenforschung*. The Federal Chancellery (*Bundeskanzleramt*) founded a working group for an IT-based survey over the research on implementation and legal impact in the federal ministries. Simultaneously, in many universities, programs for the evaluation and testing of legislative activities started, and the idea of Technology Assessment was applied to legal, and respectively, regulatory impact assessment (Böhret/Konzendorf 2004), thereby introducing a strong element of social engineering to the debate.

Although the motive of social engineering has never faded away and is still rather efficacious in theory and practice, we also observe from the side of the sociology of law new theoretical interest in the issue of legal impact (Cottier et al. 2010). In this context, a broader concept of legal impact is applicable, which is not so much oriented towards rational planning and steering, but rather towards regulatory networks in which various societal actors orient their behavior to legal norms. This discussion also takes up the thread of a general theory of action specified as norm oriented action, which was already at the center of the debate in the 1980s. Against this background, legal norms are “a fundamental element of social structures” (Rottleuthner 1987: 81; my transl.), rather than a mere instrument of societal steering. Thus, in this conceptual niche, the theory of legal impact has freed itself from the rather narrow conceptual constraints of its early years to incorporate the notion of more complex relations in regulatory regimes. Still, in the German branch of legal theory called *Rechtswirkungsforschung*, there is a formative focus on impact and influence.

- (5) The last-mentioned debates already indicated that while *Rechtstatsachenforschung* and *Rechtswirkungsforschung* are essentially based on a social engineer’s position, a more theoretical debate within legal theory gained prominence in the 1980s. It also started from the concept of direct influence and steering, but very quickly changed its basic assumption and model, not only under the impression of empirical failure and political termination of the regulatory

approaches (Grimm 1990), but much more because of fundamental theoretical re-orientations. In 1984, Gunther Teubner and Helmut Willke published a now famous article on reflexive law (Teubner/Willke 1984), in which they tried to integrate the idea of shaping society into the new theoretical paradigm of self-regulation and autopoiesis. This paradigm had not only gained significant relevance in sociology (Luhmann 1995), but also attracted some interest in legal theory (Teubner 1988). Teubner's and Willke's central intuition was that, in regulatory processes, the concerned social subsystems engage in mutual co-ordination, whereas the law provides the co-ordinating systems with a basic normative structure called "social constitution" (Teubner/Willke 1984: 7).

With this and similar approaches of new sociological jurisprudence, legal impact theory made a significant move from state law to normative orders within and beyond the state. Willke especially elaborated this aspect in an impressive series of monographs and articles (e.g. Willke 1992, 1995, 1997). The approach was not immune against critical attacks, most of which focused on the question of how one could conceive of successful coordination of perspectives between operationally closed, autopoietic systems (Mölders 2013). Yet recent advances in systems theoretical approaches on legal regulation have quite satisfactorily dealt with this issue. Teubner addresses the question of external pressure on autopoietic systems mainly in connection with constitutional theory (Teubner 2012). This is mainly because he assumes a circulation of mutual perturbations, a so called "ultra-cycle" (Teubner 1996) to be the precondition of a stable coupling between autopoietic systems. Marc Mölders has, in addition, argued that a certain added value has to be postulated on the side of the regulated (focal system) in order to explain its inclination to observe and to react to external pressure by systemic "self-constraint" (Mölders 2013: 19). The art of exerting influence, according to Mölders (in this volume), consists of designing effective irritations. In his sociology of constitution, Teubner addresses the same point when claiming that constitutions ensure the autonomy of social subsystems on the one hand, but on the other hand limit their excessive growth by regulating the collision between fragmented regimes (Teubner 2012: 63, 128). The limiting function can only be performed when the societal subsystems are confronted with an experience of actual and inevitable crisis (Teubner 2012: 129). Whereas old legal theories at this point counted on external intervention or internal self-constitutionalization, the new theory of legal regulation prefers to refer to irritations as leading to self-change (Teubner 2012: 134) or the pressure to learn (Teubner 2012: 146, cf. also Viellechner in this volume).

A general trend

In summary, the new sociological jurisprudence has yielded a number of pivotal innovations in legal theory. From concepts of steering and direct intervention it re-focused the attention to concepts of reflexive law and irritation design in autonomous systems (cf. Viellechner 2013 on heterarchical law and horizontal constitutional law). Sociological jurisprudence switched from normative command to co-operation, from state law to private and hybrid forms of law (Ladeur 2002). The concept of the sources of law, a central part of legal theory, also changed its focus towards contractual and network sources. Last but not least, sociological jurisprudence repealed the idea of the unity of legal structures in favor of a concept of collision law. Altogether, we observe a shift of interest towards the legal constitutionalization of social influence, which emphasizes the enabling and limitative function of legal norms in hybrid and polycontextural regimes. The main challenge to legal theory in this respect might consist in integrating sociological innovations into the mainstream of legal thinking, which is still characterized by conditional programming and the validity of contra-factual expectations.

However, it is not wrong to postulate that legal theories are interested in the influence of the law. This interest is grounded in aspects of legitimacy and validity. In addition, it meets a strong political interest in technocratic planning and steering. With regard to the theoretical groundwork, the early models of direct intervention have been abandoned in favor of regulated self-regulation, network relations and hybrid regulatory regimes.

Common Structures in Theories of Regulation, Governance and Law

This short overview of developments in theories of regulation, governance and law has unearthed a number of analogies between distinct scientific discourses. These similarities promote the assumption that there are common structures lying beneath the different theoretical manifestations. A reflective theory of regulation, governance and law should take these commonalities into account.

We could identify at least three aspects of theoretical commonality, as I already mentioned in the beginning. The first relates to the core structures of social theory, which is the basis of all the theoretical domains discussed above. The second finds expression in the common interest in social influence; all three theoretical fields are characterized by concepts of shaping society. The third finally points to the ubiquitous presence of legal structures in the three concepts.

- (1) All three narratives share basic assumptions with respect to general social theory. Although they are in their respective ways conclusive

and consistent, they nevertheless do not really contradict each other. On the contrary, one could even suggest a historical development “from law, via regulation to governance” – which some authors, indeed, seem to suggest (Mayntz 2005; Jansen 2003; Ladeur 2010: 25). What goes against such an account is mainly the observation that all three discourses are contemporary phenomena and do indeed co-exist. Moreover, they share basic assumptions, which have evolved in each of the fields more or less simultaneously. What is salient beyond all differences, in other words, is a very strong similarity in the conceptual development of all three perspectives. Such similarities can be identified in the following evolutionary shifts:

- From homogeneity to *heterogeneity* – in theories of law as well as of regulation and governance, the growing heterogeneity of society is a central idea. Concepts of rather homogenous forms of society have been replaced by concepts of legal pluralism, fragmentation, multiplicity of actors, etc.
- From unity to *poly-contextuality* – regulation, governance and law are not assuming a single horizon or system as being relevant for their operations. Their environments are not uniform, neither in politics, nor in law, economy or any other system. Rather, all reflective theories assume concurrency and equal relevance of many horizons of meaning.
- From hierarchy to *co-operation* – in all three perspectives, the plurality and multi-modality of modern society is one of the reasons for the failure of hierarchical forms of intervention, which increasingly have been replaced by concepts of co-operation between various kinds of actors, among which the state is only one in a broad variety of social forces.
- From mono- to *multi-modality of influence* – in all perspectives, theories are built on the assumption of a large multiplicity of instruments for intervention, e.g. power, money, law, information, public opinion.
- From central “steering” to a *decentering of societal functions* – models of a society steered by central societal system (politics) have been replaced by de-centered models of a functionally differentiated society.
- From direct to *indirect forms of control* – concepts of direct intervention in social fields have been replaced by the idea of indirect control, meta-regulation, soft law, reflexive law, reflexive governance, etc. We could with some reason speak of models representing the idea of “ecology of control” (Bora 2002).

These aspects show that theories of law, regulation and governance share general features of social theory, and more specifically speaking, a theory of society. They assume the objects of law, regulation and governance to be moving targets, hybrid, fragmented, idiosyncratic objects that are in a certain sense unruly. Their concepts have undergone a noticeable scientification, resulting in complex theories of reflexive law, reflexive regulation and reflexive governance.

The theoretical moves listed above are embedded in a general theoretical shift that might be characterized as a shift from first- to second-order observation – an increase in theoretical reflexivity. In different theories rather ontological models have been replaced – or at least complemented – by a perspective which is oriented towards semantics, discourse, culture. This is a reflective theory, which understands influence as a mode of communication, or as a discourse, rather than as an essentialist quality. In legal theory, reflexivity has always played an important role; this is characterized in many cases by a strong link to a general theory of society. In the realm of governance and regulation, however, a comprehensive theory still seems to be a desideratum. The individual developments of the three fields also demonstrate the fact that, in spite of a broad move towards a more reflexive mode of observation, the fields remain relatively isolated from one another theoretically.

- (2) All three theories share the notion of a profound malleability of society – the general idea of ruling societal objects in spite of their unruliness. Contemporary theories in all three fields operate with the concept of a functionally differentiated society, in which autonomous units – such as functional systems, networks, organizations, etc. – raise the issue of inter-systems relations between autonomous entities. Against the background of a theory of societal differentiation, such relations can no longer be conceived of in terms of direct intervention, control, or steering. Such concepts give way to ones such as regulated self-regulation, meta-regulation or “irritation design”, as Marc Mölders (2014) has phrased it. Such a model of inter-system relations between autonomous social systems enables a broad understanding of the general concept of intended influence of a social system on a target system. One may label this common interest in influence and shaping society as a general theory of regulation (cf. Bora 2014), albeit not necessarily a uniform or consistent way.
- (3) With regard to the law, influence and respectively regulation may not be seen as a function perhaps, but as a performance. Influence could be conceived of as an effect of the law, stemming from law’s central function, that is the stabilization of contra-factual expectations. Recently,

the growing interest in a sociology of constitutions has underlined the double performance of the law in the guise of constitutions: that of enabling and limiting the autonomous operation of societal systems. Thereby constitutionalism moderates the idea of a regulatory trilemma (Teubner 1986, 2015), which claims that legal and political regulation is either irrelevant for the regulated system or has disintegrative effects on the goal system or on the regulatory system itself. Social constitutionalism transforms this figure into the relation of a normative center (Carvalho 2016), which consists of law and politics. Owing to its orientation towards the commonweal, this center supplies other systems with the possibility to develop stable expectations, for instance with normative structures. Such constitutional regimes, which transcend the boundaries of nation-states in a world society, once again demonstrate the regulating effects of the law. Therefore, the law, at least in the shape of the constitution, somehow underpins all regulatory activities. Understood as social constitution in a broad sense, it builds – together with politics – the normative center of modern society, providing societal sub-systems with normative structures. These structures contribute to the formation and generalization of stable – contra-factual – expectations, which are a pre-condition for many forms of exerting influence. Shaping society, therefore, is based to a large extent on the performance of law.

SEMANTICS OF RULING: CONCLUSION AND OUTLOOK

As I mentioned at the beginning, the intention to exert influence for the sake of shaping society has been underlying the emergence of modernity since its origin. Because it creates increased pressure for justification, it has become a seminal chance, but also a burden. The dimension of semantics pulls self-descriptions and interpretive patterns into focus. When looking for semantics regarding the exertion of influence in scientific discourse, we come across semantics of ruling. In the shape of reflective theories, regulation, governance and law are manifestations of common intention to shape society. Their commonalities have sometimes been hidden behind the idiosyncrasies of their specific concepts. These commonalities consist of a number of aspects discussed in the sections above: in short, influence is the medium of ruling. The form that influence typically takes can be characterized as regulated self-regulation. According to all of these theories, exerting influence, or ruling social phenomena, has to be performed in a complex and hybrid environment and under conditions of operational

closure, autonomy of concerned systems and fundamental uncertainty about the behavior of the target system (the ruled). For this reason, the stabilization of expectations becomes a crucial issue. Regulation, therefore, takes place in the shadow of the law. More precisely, the law in the form of social constitutions provides for basic structures and points of reference in all kinds of regulatory relations.

The added value of sociology of knowledge should have become visible from the brief accounts on the different theoretical positions. Guiding the analysis of reflective theories, this focus on the sociology of knowledge helps us understand the reasons for the individual theoretical pathways on the one hand, and on the other hand, enables us to identify common patterns that had somehow been veiled.

Moreover, the sociology of knowledge has a second component, namely the interest in the social structures making regulatory regimes susceptible to specific interpretive patterns. A fruitful study design with respect to such governmentalities could start with the question of which particular form the central notion of shapeability gains under varying social conditions (cf. for example Münte in this volume). The brief account of regulatory concepts in various reflective theories already indicated that there might be categorically distinct notions of shapeability and influence, which explain the various forms in which influence is conceived. A rather technocratic model of social engineering prevailed over some decades, and interpreted society as machinery according to the model of first order cybernetics. Perhaps obvious is the fact that such kind of governmentality was closely connected to a regulatory pattern of command and control. Much less obvious seems to be, however, which patterns of governmentality accompany recent reflective theories. Do advanced reflective theories find any correlation and resonance in their respective fields? Or do we rather experience a mesh of trendy catchwords and rather sublime command-and-control mentality? With this as a consideration, it will be worth studying the interplay between the new semantics of ruling and their enactment in the hybrid regimes and legal orders of world society.