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Kjær, Poul F.; Vetterlein, Antje

*Document Version*  
Accepted author manuscript

*Published in:*  
Contemporary Politics

*DOI:*  
[10.1080/13569775.2018.1452527](https://doi.org/10.1080/13569775.2018.1452527)

*Publication date:*  
2018

*License*  
Unspecified

*Citation for published version (APA):*  
Kjær, P. F., & Vetterlein, A. (2018). Regulatory Governance: Rules, Resistance and Responsibility. *Contemporary Politics*, 24(5), 497-506. <https://doi.org/10.1080/13569775.2018.1452527>

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Download date: 26. Dec. 2024



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**Poul F. Kjær and Antje Vetterlein**

Journal article (Accepted manuscript\*)

**Please cite this article as:**

Kjær, P. F., & Vetterlein, A. (2018). Regulatory Governance: Rules, Resistance and Responsibility. *Contemporary Politics*, 24(5), 497-506. DOI: 10.1080/13569775.2018.1452527

This is an Accepted Manuscript of an article published by Taylor & Francis in *Contemporary Politics* on 26 Mar 2018, available online:

DOI: <http://www.tandfonline.com/10.1080/13569775.2018.1452527>

\* This version of the article has been accepted for publication and undergone full peer review but has not been through the copyediting, typesetting, pagination and proofreading process, which may lead to differences between this version and the publisher's final version AKA Version of Record.

Uploaded to [CBS Research Portal](#): July 2019

# **Regulatory Governance: Rules, Resistance and Responsibility**

Poul F. Kjaer & Antje Vetterlein

## **ABSTRACT**

Regulatory governance frameworks have become essential building blocks of world society. From supply chains to the regimes surrounding international organisations, extensive governance frameworks have emerged which structure and channel a variety of social exchanges, including economic, political, legal and cultural, on a global scale. Against this background, this special issue sets out to explore the multifaceted meaning, potential and impact as well as the social praxis of regulatory governance. Under the notions rules, resistance and responsibility the special issue pins out three overall dimensions of regulation and governance thereby providing a theoretical and conceptual framework for grasping the phenomenon of regulatory governance. This is combined with extensive case studies on a number of regulatory governance settings ranging from the World Bank to agricultural reforms carried by the International Transitional Administrations (ITAs) in Kosovo and Iraq as well as global supply chains and their impact on the garment industry in Bangladesh.

## **Keywords**

Globalisation; Norms; Responsibility; Regulatory Governance.

## **Introduction**

Great transformations are unfolding within contemporary world society due to developments related to, among other things, the repercussions of the financial crisis, rapid technological developments and ecological challenges as well as the re-emergence of political conflicts centred on issues such as social inequality, nationalism and migration. Common for these otherwise very diverse developments is a consistent demand for regulation in order to solve perceived policy problems faster, more adequately and sustainably. Whereas de-regulation, although de facto serving a re-regulatory rather than a de-regulatory purpose, was a buzzword from the 1980s onwards, the tide seems to have shifted towards a new demand for regulation (Rodrik, 2011). Accordingly, a multitude of new regulatory governance frameworks aimed at

stabilising, orchestrating and indeed regulating increasingly globalised economic, political and social processes that have emerged in particular over the last couple of decades (Ponte and Sturgeon, 2014).

In the literature as well as amongst practitioners, the term ‘regulatory governance’ is perceived as a new form of governance away from command-and-control type regimes towards other modes of collaboration across a variety of policy actors (for an overview, see Levi-Faur, 2011). In most cases great hopes and demands are attached to the potential of regulatory governance. Policy-makers and regulatory agencies have even developed policy tools and guidelines termed ‘smart regulation’ to address policy problems in an ever-more complex world (e.g. EU Commission 2010). The notion of regulation is however contested as regulation is a term which has multiple meanings and which is deployed in a large range of different institutional and social settings characterised by different intentions, objectives and normative underpinnings (Levi-Faur, 2011). In addition, the reference to new types of governance in many instances remains elusive and difficult to pin down in practise.

Against this backdrop, this special issue sets out to explore the multifaceted meaning, potential and impact as well as the social praxis of regulatory governance. The introduction will first offer a conceptualization of regulatory governance. This analysis of what regulatory governance embraces will secondly shed light on a number of crucial questions such as: What are the functional and normative objectives of regulatory governance? To what extent can regulatory governance measures serve as tools for the realisation of normative endeavours? And can the hopes and demands attached to regulatory governance possibly be fulfilled? We hence propose three research avenues – rules, resistance and responsibility – that are crucial dimensions of regulatory governance and provide fertile soil for research on the topic. Finally, we provide an overview of the contributions to this special issue highlighting how they theoretically and empirically unfold the three dimensions.

### **Conceptualizing regulatory governance: Governance through regulation**

Regulatory governance has only recently appeared as a term used both, in policy debates as well as academic discussions (Bianculli, Jordana & Fernandez-i-Martin, 2015). The World

Bank for instance runs a project on global indicators for regulatory governance.<sup>1</sup> The OECD (2017) has published a report on how to improve regulatory governance. While the World Bank puts more emphasis on good *governance* and the role of government in regulating as well as transparency and accountability, the OECD report is more concerned with *regulations*, their design and implementation. Yet, there is considerable overlap as both address the institutional context in which regulations are designed and implemented, the relevant regulatory actors, as well as the recognition, access and contribution of stakeholders to the regulatory process. Also in scholarly debates, both terms, regulation and governance, are mainly treated separately and a definition of regulatory governance is hard to find. Most studies zoom in on one of the two aspects of regulatory governance, that is they are either more concerned with the institutional structures of governance and how they enable and constraint action, or with the ways in which regulations are produced, reproduced, contested and changed.

We define regulatory governance as governance through regulation, and we suggest perceiving regulatory governance as a ‘field’ as it would provide a framework capable of capturing the interrelations between the structural aspects of governance and the micro-processes of the emergence and workings of regulation. According to Bourdieu (1984), a field is defined by three components: an object at stake around which the field constitutes itself, power relations amongst all actors relevant in a field of a specific object, and the ‘rules of the game’ that emerge over time through interaction in the field (see also Dingwerth and Pattberg, 2009). The objects are the rules or the policy regulation in question, related to a specific policy field or issue-area. A policy regulation is not just given, but it is, in a process of interaction amongst relevant actors such as the government or other regulatory bodies and stakeholders, negotiated, contested and changed. As apparent from the case studies in this special issue, these interactions are not only characterized by questions of power but they also result in explicit and implicit norms that govern the specific policy area and manage actors’ behavior as well as their expectations.

Before we apply the concept of field to regulatory governance, we take both terms in turn and review the literature on governance and regulation, respectively. This is to show how intertwined both are and why it is useful to apply the field concept to regulatory governance. Governance has been first prominently introduced by Rosenau and Czempiel (1992) as the observation that due to globalization governments seem to lose parts of their steering capacity. It was quickly realized that governments do not lose all their control and remain crucial actors

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<sup>1</sup> See <http://rulemaking.worldbank.org/about-us> (accessed on January 13th, 2018).

in shaping domestic and global politics. Yet, current politics has changed significantly when compared with how things were done 50 years ago. Scholars have not only observed an increased amount of non-state actors who shape politics next to governments but also the emergence of new mechanisms and institutions beyond traditional forms of governing. In addition, the system of global governance is characterized by segmentation and fragmentation (Biermann & Pattberg, 2008). Regulatory boundaries are shifting between the public and the private sphere and new, more flexible and experimentalist forms of governance emerge (Zeitlin, 2015), that are often polycentric in nature. Governance seems more occupied with the development of institutions and the proliferation of general procedures of how things are done and newly emerging actors with the authority to set rules and shape the regulatory context. In particular, the literature on the European Union and the process of Europeanization serves as evidence here (Radaelli, 2003).

The study of regulation, on the other hand, is mainly concerned with the processes of emergence, implementation, monitoring, contesting or avoiding regulation and the sanctioning of non-compliance. Levi-Faur (2011, p. 103) defines regulation as "... the promulgation of an authoritative set of rules, accompanied by some mechanism for monitoring and promoting compliance with those rules." Regulatory agencies can be public or private and located at different political levels. While the governance debate initially was introduced as an era of de-regulation, we can today in fact observe a dramatic increase in regulation on all levels. Some argue that this development goes hand in hand with the decrease of the power of the state, or to frame it with Majone (1997), a shift from the "positive state" to the "regulatory state". He observes those developments in the context of European governance and argues that the growth of regulation is causally driven by the process of Europeanization. There is no doubt, that governance processes and the development of regulation are linked to each other. Yet, instead of attributing cause and effect, we contend to perceive of regulatory governance as interrelated, constituting each other.

Applying the concept of field to the study of regulatory governance, our analysis would start from the identification of the actors that belong to a field and their power positions. Relevant actors are not pre-defined but inductively investigated (Leander, 2010) and could include states, IOs, private sector agents, professional groups, NGOs or other regulatory bodies. Fields are also not stable but constantly subject to change through structuration (DiMaggio and Powell, 1983). The analysis would then move on to trace the regulatory changes of the

particular policy area through constant interaction between relevant actors, and by doing so examine how the rules of the game are reshaped. Theoretically we expect to be able to explain how governance norms are established in specific policy areas through the analysis of social interactions on the ground.

### **Rules, Resistance, Responsibility**

Understanding governance as a continuous process of struggling over rule-making under the conditions of increased involvement of non-state actors on various levels, opens up new research avenues that can be broadly labelled under the categories of rules, resistance and responsibility. Governance fields form around specific issue areas such as climate change for instance or fiscal stability. Rules and regulations exist with regard to such policy issues, and they are constantly produced and reproduced by relevant actors. Yet, at the same time they are also contested and resisting actors are at times able to change them more significantly. Finally, these struggles over the dominant regulatory structure take place in a normative context that provides justifications for what counts as responsible behaviour. The contributions in this special issue zoom in on these three aspects as they are key foci points when analysing fields of regulatory governance.

Formal as well as informal rules provide the functional and normative nucleus of regulatory governance establishing the purpose and mechanisms of regulatory governance thereby defining the focus and direction of regulatory governance frameworks. But how have form and content of regulatory governance praxis' changed over time? And what implications does this entail for governance? Increased globalisation, for example, has implied an increased focus on the regulation of horizontal governance networks and processes of transfer between different societal contexts. As also highlighted in the contributions of Poul F. Kjaer and Larry Catá Backer, this is for example observable in relation to expanded supply chains and intensified knowledge transfers. As a consequence of this development, the very nature of rules has underwent substantial transformations due to the emergence of soft law and other managerial practises which shifts the focus from how decisions are made, *i.e.* their procedural basis, to the outcomes they produce (Koskenniemi, 2007). This again tends to imply a shift from the normative foundations of procedures to the question of the efficiency of outcomes (Frerichs, 2015) and a highlighting of the fundamental indeterminacy of law (Kennedy, 1976). Examples

of this are clearly found in the contribution of Maj Grasten and Konstantina Tzouvala concerning the International Transitional Administrations (ITAs) in Kosovo and Iraq.

Resistance, as the second dimension, refers to the potential of regulatory governance as a mode of reacting to structural pressures and the general volatility and contingency emerging from “the market” and other developments in relation to, for example, technological developments. Resistance can take many forms insofar as it can be observed within formalised political processes, within governance networks, in civil society. Yet, resistance also takes place in less organised ways, for instance within firms and international organisations and in local contexts on the micro-level. This dimension therefore starts from the assumption that rules and regulations are constantly contested and highlights, as also apparent from the contribution of Eugénia da Conceição-Heldt, that the body of formal and informal rules Regulatory Governance Frameworks becomes battlefields where the objectives of meanings of rules are continuously rearticulated, twisted and redefined.

Finally, responsibility emphasizes the normative foundation of regulations and thus addresses questions of legitimacy within regulatory governance. Rules and regulations are based in values and world-views that are provided as justifications. The way in which policy problems are identified and defined has repercussions for suggestions of how those problems should be addressed, and thus, provide the space of possible policy solutions. This in turn implies that things could be different given different or changing societal values. We can observe how responsibility shifts from state actors to the private sector for instance or from transnational levels to local contexts. This issue therefore is at the centre of the two contributions of André Nollkaemper and Antje Vetterlein which both provide answers to the crucial question concerning to what extent regulatory governance can serve as an instrument for developing frameworks of increased reflexivity, justification and legitimation? And, in addition, to what extent can regulatory governance be understood as a central tool for societal development and the construction of new sites of responsibility?

### **Overview of the Special Issue**

Against the backdrop provided by the concepts of rules, resistance and responsibility the special issue sets out to explore and reassess the notions of regulation and governance by offering two sets of contributions. The first set of three contributions provides empirically-



informed theoretical and conceptual insights on regulatory governance, whereas the last three contributions mainly are dedicated to theoretically-informed empirical case studies of regulation and governance that take into focus different actors and contexts ranging from the World Bank over the International Transitional Administrations (ITAs) in Kosovo and Iraq to global supply chains and their impact on the garment industry in Bangladesh.

In first the contribution, Poul F. Kjaer identifies a paradox in relation to how globalisation has advanced. Making the world increasingly uniform has paradoxically implied an increase rather than a decrease of contextual diversity. The implosion of the euro-centric world in the first half of the 20<sup>th</sup> century and the ongoing disintegration of the Western-centric world have increased the pluralistic structural setup of world society (Brunkhorst, 2014). The contemporary world is at the same a community of common destiny and a world which consists of many worlds insofar as the globe is characterised by a multiplicity of contextual societal orders ranging from local communities, the institutional orders of nation states to functional delineated transnational regimes (Kjaer, 2011).

This multiplication of contextual settings, which can be traced back to specific logics of temporalisation and spatial expansion of a diverse set of social processes in relation to, for example, the economy, politics, science and mass media, acts as the central structural driving force for the emergence of regulatory governance frameworks. The concept of regulatory governance has however mutated into an all-embracing buzz-word characterised by a low degree of conceptual precision and empirical focus. Bearing in mind the increased contextual diversity a narrower and more precise understanding of governance and the regulatory function it fulfils is therefore advanced by Kjaer on the basis of the argument that the essential functional and normative purpose of regulatory governance is to facilitate, stabilise and justify the transfer of condensed social components (such as economic capital and products, political decisions, legal judgements, religious doctrines and scientific knowledge) from one social context, located both at the local, national and transnational level of world society, to another. Deploying the metaphor of “rites of passage”, the essential components of regulatory governance frameworks are described as consisting of separation, liminality and incorporation, with liminality describing the perilous moment of in-betweenness where a social component has been extracted from one context but not yet transposed into another context (Genep, 1960).

In the follow-up contribution, Nollkaemper explores one of the central implications of in-betweenness from a legal point of view through the concept of shared responsibility. The contribution explores principles and processes of responsibility that can operationalize the abstract idea of shared responsibility. The concept of shared responsibility refers to situations where a multiplicity of actors located in different contexts interact in a manner which leads or contributes to a harmful outcome, and responsibility for this harmful outcome is distributed among more than one of the contributing actors. The concept of shared responsibility can, he argues, serve as a foundation and triggering mechanism for regulations that address such situations.

In order to address the connection between regulation and shared responsibility, Nollkaemper distinguishes between ex-ante and ex-post responsibility. On the one hand, the term “responsibility” can be used to refer to legal obligations or regulatory requirements that ex-ante structure the conduct of the relevant actors. On the other hand, the term can refer to ex-post facto responsibility for contributions to injury. Although this is the meaning most commonly used in international law the focus of Nollkaemper is mainly on the connections between responsibility in the ex-ante meaning and responsibility in the ex-post way. He fleshes out three different connections between shared responsibility and regulations enabling him to expose the regulatory implications and regulatory dynamics of shared responsibility: First, acceptance of a shared responsibility by multiple actors in relation to a particular problem serves as a justification, and an incentive, to these actors to engage in a concerted action, and to develop regulations, to address that particular problem. Second, when a particular harm has been caused by concerted action, from a strategic perspective assigning ex-ante responsibility can be a better response than turning to ex-post responsibility. In view of the reputational effects of ex-post responsibility, a turn to regulation can be more acceptable to actors, and easier to negotiate, than ex-post responsibility. Third, non-fulfilment by multiple actors of a regulatory requirement (responsibility in the ex-ante meaning), can trigger responsibility in the ex-post sense.

Vetterlein picks up the baton from Nollkaemper, analyzing the concept of responsibility in regulatory governance contexts from a social science perspective. As a starting point, she observes that the concept of responsibility has become increasingly significant in global governance and has begun to materialize across diverse policy fields such as security (‘responsibility to protect’), the environment (‘common but differentiated responsibility’) and

economics ('corporate social responsibility'). A significant empirically based scholarship has emerged that investigates responsibility more explicitly, specifically on the policy areas just mentioned. But Vetterlein argues that there is a significant lack of conceptual clarity when scholars refer to responsibility. Often responsibility is used synonymously with accountability, which highlights the regulatory aspect of governance with a focus on rights, compliance and sanctions. But responsibility is more than accountability. Conceptually speaking, responsibility is closely linked to morality and ethics and thus highlights the norm-based dimension of transnational governance since responsibility entails a proactive dimension (or positive duty), as in *taking* responsibility based on individually held values of what is right or wrong. Responsibility further contains a relational component, as in *responding* (or 'answering') to claims requiring more responsible behaviour. It creates a relationship between an actor – individual or collective – and other social units. Taken together, responsibility – as opposed to accountability – highlights the contestation of policy norms, and thus the negotiated nature of governance.

Against this backdrop, Vetterlein develops a typology of responsibility to first of all engage in conceptual clarification of the term. She highlights the differences between accountability and responsibility and argues that the broader understanding of responsibility is better equipped to deal with regulatory gaps in a complex and fragmented system of global governance. Based on the conceptual discussion of the term, she derives two dimensions that are referred to when theorizing about responsibility: positive versus negative responsibility. She illustrates this in relation to the contextual conditions of Corporate Social Responsibility (CSR) practices on the basis of a distinction between the company and the community level.

Conceição-Heldt takes up the concept of accountability in relation to the activities of the World Bank. Over the past decades, she argues, the World Bank has been extensively criticized by scholars, civil society groups, member states, and the media for being secretive, unaccountable and ineffective. Confronted with this wave of contestation, the Bank established several internal accountability mechanisms in form of oversight units accountable to different internal parties, which include the Independent Evaluation Group, the Inspection Panel, the Internal Audit, which reports to the President and to the Audit Committee, and the Integrity Vice President (INT), reporting to the Bank's President. Apart from these internal accountability mechanisms, Conceição-Heldt however highlights that little is known about who the World Bank is accountable to, for what and how.

On this background, the contribution examines whether these internal accountability mechanisms have rendered the Bank a more responsive and transparent international organization (IO). Drawing on the body of literature on IO delegation and accountability in global governance, she dissects the different types of accountability mechanisms at the World Bank arguing that the choice of internal accountability mechanisms is more likely to lead to a greater insulation and opacity of international organizations. Paradoxically, the myriad of accountability mechanisms within the World Bank had the effect of making the organization even less accountable, more complex and opaque. Studying this nexus between accountability and insulation, and thus legitimacy, adds an important part to the analysis of regulatory governance and complements.

The analysis of the internal accountability mechanisms of the World Bank is followed up by an analysis of the external implications of regulatory governance. Grasten and Tzouvala explore both the political and legal dimensions of international regulatory governance and their social implications in relation to the case of ITAs in Kosovo and Iraq on the basis of case studies on agricultural reforms and related issues of property rights in the two settings. The starting point is the observation that following the emergence of ‘The Washington Consensus’ internationally administered post-conflict reconstruction in countries such as East Timor, Kosovo and Iraq has largely resulted in extensive neoliberal economic reforms. Whereas neoliberal approaches to state-building and the notion of ‘liberal peace’ have been debated intensively among critical International Relations (IR) scholars (e.g., Chandler 2006; Paris 2002; Pugh 2005; Zaum 2007), the role of international law has remained relatively under-analysed. Consequently, the contribution of Grasten and Tzouvala reconstructs how international law was continuously interpreted, twisted and reformulated by an international, poly-centred executive constituted by multiple actors, such as the United Nations Security Council (UNSC), International Financial Institutions (IFIs), the European Union (EU) and individual states, such as the United States (US) and the United Kingdom (UK), which resulted in accountability being diffused across multiple sites of transnational authority in the cases of Kosovo and Iraq. They demonstrate how international law provided the functional and normative foundation for regulatory governance, which shifted legal practices from a formalist approach to law to a rule by executive decrees, orders and regulations, and was based on claims to international expertise, political neutrality and ‘neo-liberal’ policies aimed at transferring

market economy norms and institutions to the internationally administered contexts and integrating the internationally administered territories into the global economy.

The contribution thereby highlights that the ‘regulatory turn’ in the context of post-conflict reconstruction should not be conceptualized as the antithesis of neoliberalism. Rather, regulation is always-already present in the creation, expansion and function of competitive markets. A presence which however is accompanied by a marked *shift* regarding the ‘agents’ of regulation, since polycentric, fundamentally unaccountable international executives have assumed crucial regulatory functions.

The case of International Transitional Administrations is followed up by a final case study by Catá Backer on global supply chains taking his point of departure from the garment industry in Bangladesh. This study is combined with wider reflections on the general state of regulatory governance frameworks as modes of transfer and their related techniques in relation to globalized economic processes thereby theoretically linking back to the first contribution.

Catá Backer argues that regulatory governance is a technique and ideology aimed at replacing the command imperative of law with interplay between market logics and government objectives. It describes itself as aimed at expanding the administrative possibilities of democratic government through the normative expression of self-constituting private power within non-governmental organizations. It is active, reflexive and reactive. It constitutes its own forms of power and resistance to power. It exists simultaneously and in an overlapping manner within the same physical space thereby allowing Catá Backer to advance the thesis that regulatory governance is a normative system with its own ecology, a set of normative values and procedural constraints that serve to structure the internal workings of each regulatory governance framework and to structure their relationships and interactions—the structural couplings of regulatory governance frameworks in those in-between spaces in which they meet, intermesh, and conflict.

Based on this analysis, Catá Backer engages in a reconstruction of the ecology of regulatory governance in the context of Bangladesh and its garment industry. He argues that traditional approaches to regulatory governance—those that remain enraptured of the state and protective of its ancient prerogatives, miss the mark. But then so does the “late modern” version grounded in the political ideology of the post 1945 world. Here is an ecology that is built on the coordination and conflict among law systems, soft and hard moral systems, disclosure and assessment regimes and their institutional sources in enterprises, international organizations,

civil society, and the state. Coordination amidst anarchy, and a cross hatching of ideological drivers produce something that has the appearance of coherence but that may mask its opposite. This becomes apparent when a distinction is introduced between the functioning of the ecology and its ideology, that is the ideologies of those who might see in regulatory governance an instrument toward other ends.

## **Conclusion**

The findings of this special issue first of all illustrates the existence of fields of power and social interaction centred on governance institutions and their broader regulatory reach in relation to a diverse set of institutional formations from the World Bank to ITAs and CSR and supply chain related social processes. More fundamentally it systematically highlights the shared problem constellations, dilemmas and challenges emerging in otherwise very diverse institutional setups located and operating in very different societal contexts and in relation to divergent problem constellations as issues concerning rules, resistance to rules and articulation of responsibility for outcomes are a shared feature which appears in all of these settings. As such the special issue provides a generic framework for regulatory governance studies as well as specific access points for the empirical study of regulatory governance.

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