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### Governance and regulation: making ‘good families’ or ‘families good’?

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#### Abstract

*‘Governance’ is difficult to define yet it is a term that is regularly used in the analysis of the state’s relationships with its citizens. At one level, it can be understood simply as describing the means employed by the state to deliver those goods and services that it is mandated to provide. However, such a definition may mask the broader political purposes of the state at any given historical moment. In terms of welfare practices and family law, the role of the state may be understood as making ‘good families’, i.e. helping families to express choices and to achieve their own goals and ambitions. It may also be understood to include making other families ‘good’ through normative, coercive or exclusionary practices. This paper reviews the extent to which the Seminar Series has engaged with defining governance and what challenges remain. It draws attention in particular to the difficulties of researching governance (both practical and theoretical) and to the challenge of communicating findings in an increasingly fragmented legal and welfare context.*

Robert Rotberg, one of the world’s leading political scientists and former Director of Harvard’s John F. Kennedy School of Government, (Rotberg 2014) recently wrote:

*Would not it be enormously useful if we could establish an agreed-upon definition of “governance”? Doing so would enable researchers to write with comparative precision about critical and important phenomena. Policy and opinion makers could reflect meaningfully upon clearly enunciated and measurable characteristics. Governments could be examined using a common typology.*

He concluded that no such definition was available and indeed ‘governance’ has remained an elusive concept throughout this seminar series.

At its broadest, governance simply means anything and everything that any organisation does to manage its affairs, whether that be a state, a commercial enterprise or a community organisation.

Amongst political scientists, 'governance' has been used as a way of talking about the democratic capacity of states and for the making of high-level comparative judgements on their stability and effectiveness; for others, governance is defined more narrowly as a government's capacity to deliver certain, defined goods and services, including political goods. In other words, governance is regularly used as a way of defining, describing and comparing the broad political nature and purposes of governments across a wide range of the state's activities. At other points it is used narrowly to describe and measure the delivery of specific goods and services.

At this 'regulatory' end of the spectrum, the scope of governance may be more easily comprehended but reflecting on the bureaucratic and administrative competence of governments and making judgements only on how far regulation and professional practices have made 'families good' has not precluded us from asking broader questions about how far the state tries to make 'good families'. Our interest in governance has extended beyond modes and means to include a consideration of ends.

It has not only been amongst political scientists that a distinction has been made between understanding the state as a political institution that accumulates and uses power or as a mere Weberian machine, designed to deliver social goods and services efficiently to its citizens. Those in the practice of welfare have grown used to the narrow instrumentalism of New Public Management and its reliance on the naive scientism of certain forms of evidence based practice that tends towards a commodification of welfare, its marketisation and its subsequent de-politicisation.

Hence, amongst some social scientists, 'new governance' has increasingly been used to describe a move away from State provision of welfare and services to a more mixed provision involving a number of agencies drawn from the public, private and voluntary sectors. According to Stoker, this is seen as a "new process of governing, or a changed condition of ordered rule; or the new method by which society is governed" (Stoker, 1998, p. 17) and one that does not possess an overt or distinctive political character.

The same might be said about the reduced reach of the law as individuals and families are increasingly encouraged/ required to bargain over their affairs in its shadow; recognising, particularly in our context, that 'litigation itself destroys or at least harms relationships' (Brinig (E)<sup>1</sup>). According to some, de-legalisation and the retreat from welfare universalism can be understood as the state simply aligning its services and structures to the aspirations of its citizens as the democratic project matures; part of the unfolding process of our emancipation as citizens and as people.

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<sup>1</sup> For the sake of simplicity, references to papers presented as part of this Seminar Series are marked E (Exeter), M (Melbourne) and ND (Notre Dame), corresponding to the first three workshops. Other references to papers not presented as part of the Seminar Series follow the standard Harvard convention.

However, during the course of the Seminar Series, we have seen how important it is to go beyond this essentially economic and politically neutral conception of governance in the context of the contemporary neoliberal state. As Wacquant has observed (Wacquant 2009, 2013, p. 213), such a conception of the neoliberal state is 'too thin and incomplete, as well as too closely bound up with the sermonizing discourse of the advocates of neoliberalism'. Curbing the 'social turmoil generated at the foot of the urban order by public policies of market deregulation and social welfare retrenchment' (Wacquant 2010, p. 210) is a significant structural innovation (see also Bauman 2004, Harvey 2005, Davies 2011). Our discussions have reflected some of these tensions.

It was the argument of my paper in Melbourne (Butler (M)) that a move away from Keynesian economics, post war collectivism, welfare universalism and from 'government' to 'governance' may produce 'personalisation, independence and choice' (Newman *et al*, 2008) for some but for others, especially for those families at the margins of society, the neoliberal state can with just as much ease produce intrusive, stigmatising and coercive interventions in personal and family life. Tess Ridge (E) also argued that children, especially those who are doubly disadvantaged by being members of the 'constituency of the poor' are uniquely vulnerable to changes in favour of 'social investment' models of welfare, predicated on a poor appreciation of the lived experience of children and families. (See also Harris (M) and Roberts (M) on the question of surveillance and child protection; Doughty (M) on child protection and the avoidance of litigation; Masson (M) on the juridification of social work and the use of 'procedure as solution' in child welfare practice).

At the more micro level, in the case of specific forms of intervention, such as Family Group Conferencing, which was described as an instance of responsive regulation and family empowerment by Judith Masson (E) and as fitting in with the 'political trend to reduce the involvement of the State and (re)-privatize the family', questions arise as to whether this highly variable form of intervention 'removes too much of the state's protection for individuals, colludes in oppression within the family, prevents weaker family members having a say and results in decisions which do not serve the interests of children as well as a properly resourced State could and should.' (See also Barlow (M) on the economic and other drivers in favour of mediation and the 'surprisingly high amount of pressure on parties to mediate from solicitors, the courts, relationship counsellors and partners even in cases which we would have expected to have been screened out.').

These examples raise the first of a number of challenges that thinking seriously about governance raises for academic commentators, welfare policy makers, welfare professionals and family lawyers; namely how to define and to theorise 'governance' for our purposes and in particular, to articulate our understanding of the operation of the state in 'policing' families (Donzelot, 1980).

Even if we had confined our interest to the regulatory mechanisms of the state, as embodied in statute or in the processes of the court, jurisdictional boundaries continued to illustrate cultural as well as political differences and, irrespective of geography, a consistent gap between the regulatory intention and the practical reality. For example, the human and civil rights of children, a decisive point of balance between the individual and the state, have featured strongly throughout this Seminar Series but what is striking is the variety of ways in which they are understood and applied in welfare practice and in legal proceedings.

Barbara Woodhouse (E) described the continental divide that separates Italian and US understanding of children's rights. She points out that Italians 'now speak of children's rights to be heard in courts as rights of *ascolto*, from the verb *ascoltare* (to listen). In contrast, she concludes that 'political, judicial and public cultures' in the US have 'impeded' the development of rights for children. Similarly, Cathy Humphreys (E), reflecting on the Australian experience of children's rights, suggested that the reality fell far short of the rhetoric, pointing out that in Australia 'that there was little appetite amongst the judges for increased contact between judge and children'; contrasting this with experience in New Zealand where meeting the judge was a common practice. Even in the Scandinavian countries, the blueprint for many advocates of children's rights, Anna Singer (E) demonstrated that even though children's rights were widely 'perceived as the ultimate sign of true democracy and a good thing', 'the reality ... reveals a slightly less dedicated practice'.

When children's rights are set against those of their parents (or absent altogether in some jurisdictions in the case of assisted reproductive technology, as Singer (E) discusses) or where mothers' and fathers' rights are set against each other, for example, in the case of determining the pattern of a child's residence, the matter may be determined by the courts but the balance of human and civil rights is set by the state (see also Coenraad (E); Brining (M)).

Where the issues are those of race, gender, sexual orientation or religion, a similar set of complex personal/ political boundaries have to be mediated by the state. As Masha Antokolskaia (E) explored in the case of lesbian parentage, legal regulation is highly variable and actual patterns of family life often at variance with what existing regulatory frameworks allow (see also Sverdrup (ND) for the discontinuities between the 'logic of marriage' and prevailing private law concepts as far as contemporary economic mechanisms and norms operating in relationships). June Carbone (E), using the example of embryo extraction and obligations towards children demonstrated the challenges of seeking to use the law to 'impose a universal result versus use of the law to create alternative frameworks with conflicting norms.' (See also Bano (E); Douglas (M) for a discussion of religion and the regulation of parenting and marriage.) Charlotte Patterson's (ND) striking presentation, given on the same day that same sex marriages were legalized in the UK, on the practical nonsenses that arise when some states in the US recognize same-sex marriage and others do not, presented a powerful case for her

conclusion that 'True marriage equality anywhere ... requires marriage equality everywhere' while at the same time demonstrating that this was far from being the case, yet.

While this Seminar Series has proven the worth of international comparisons and exposed the need to focus further on transnational matters as well as intergenerational issues, the continuing development of conceptual clarity in relation to governance has meant finding the 'comparative precision' that Rotberg (Rotberg, 2014) identified as difficult. This raises the second major challenge for us, going forward; that of how to *research* 'governance and regulation'. There is little agreement amongst political scientists on the metrics by which one might measure governments and the quality or nature of their governance; by reference to ideas of justice; impartiality; transparency or through a precise focus on quantifiable outcomes (see Fukuyama, 2013). It is worth noting that much (but by no means all) of the original empirical research presented during this Seminar Series was focussed on 'input' or process measures of governance (robust and effective procedures and/or a demonstrable capacity of the state to deliver its intentions). Very little addressed substantive outcomes, especially over time, nor, directly, did many seek to use measures of the 'justice'; transparency' or economic efficiency of the practices being described (but see Swennen (ND) as an example of the policy potential of using such measures).

Elizabeth Scott's (ND) paper, which questioned the (mis)use of 'social science and clinical testimony' in custody proceedings (advancing instead the American Law Institute's 'approximation rule') however, illustrates the multiple subjectivities of assessing both processes and outcomes and indirectly supports Fukuyama's position that 'outcome measures cannot be so easily divorced from procedural and normative measures' in the evaluation of governance (Fukuyama, 2013; 356). Reibstein and Trinder (ND) too, in their account of the modest achievements of specific, theoretically well-informed parent education programmes found unexpected resistances which they claim reflect a 'realist governmentality'; an approach that 'emphasizes messiness, complexity and unintended consequences.' In their view, such an 'approach poses challenges for policy-makers who wish to transform or shape parental behaviour'.

Research is an art as well as a science and there are some clear practical challenges facing all of us as we look forward to a more diverse, distributed and less structured set of legal and welfare regimes, whether our interest is directly in governance or not. Accessing a suitable site of inquiry; engaging a sample, especially of those who may be more vulnerable; finding sponsors to pay for research in an eco-system in which there are few with a major financial stake; building relationships with government and government agencies that have absented themselves from many of the relevant areas of activity but which still occupy a regulatory or surveillance interest are likely to prove rather more difficult in the future.

Finally, as 'public intellectuals' (while we still are) and as commentators and problematizers, we face additional challenges in engaging in the process of

developing and sustaining new forms of governance and regulation; specifically in finding ways through which we can communicate to an increasingly fragmentary set of constituencies of interest. As Rachel Field's work should demonstrate (ND), we have a task to ensure that whilst bargaining in the shadow of the law, individuals and families have access to reliable and timely information with which to inform their decision-making. Web based technologies have potential and Leanne Smith (ND) made a convincing case for the importance of the Internet as a source of information in the informal resolution of family disputes. However, her conclusion, that 'the range and the accessibility of advice and information offered online is unprecedented and there is a burgeoning risk of exposure to misleading, inaccurate and potentially damaging messages which may lead to decision-making that is unfair, or even detrimental to children' is a concerning one.

## **Conclusion**

Key to the genesis of this Seminar Series was an awareness of rapid and profound changes in the structure and scope of public welfare in a number of Western democracies and an associated, decisive shift in favour of diverting family matters away from the courts. The series has done much to expose, articulate and compare such processes across a variety of jurisdictions and welfare regimes. We have noted both differentiated responses and common themes, within a global spectrum which clearly confirms the shift to a new governance in which the State's role is arguably less visible in some spheres of family regulation (especially within private law) but is more strongly felt in others and that the degree to which the state intrudes into the regulation of family life is increasingly a function of an individual and family's position in the social structure as welfare provision becomes more residual but all the more normative and corrective as well as more facilitative and enabling.

Notwithstanding this, there remains work to do in identifying the key variables that we might measure in order to make robust judgements of the quality of the socio-legal environments that we inhabit and to inform our judgements of how/ if a particular form or regime of governance is 'working' and in whose interests.

Finding ways to engage in the contest over the politics of welfare and the regulation of society without either being partisan or to occupy such a weak position epistemologically as to be easily dismissed as irrelevant, requires a continuing commitment to theorising 'governance' in our disciplinary areas and a continuing examination of the nature of the state and its role in determining the ends as well as the means of family regulation and welfare provision.

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