

GOVERNANCE MEETS LAW

Exploring the relationship between law and governance: a proposal

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Concepts and Methodology

I. The aim of this project is to explore the relationship between law and governance in general, and the governance dimensions of the law in particular. There is a huge discussion on governance in political and social science and a huge discussion on the concept of law in legal theory. This project however does not start from specific theories. It follows a bottom-up approach instead. It aims at assessing and comparing the governance dimensions of specific phenomena of law and regulation.

Before starting assessing and comparing the governance dimensions of specific phenomena of law and regulation, it should be clarified how the concept of governance is understood in the framework of this project. Despite of the variety of meanings the concept of governance has acquired in the different academic disciplines, one can identify a minimum content, a common core:

Governance may be understood as decision- and policy-making within a group of persons or within an institution, or within a system of institutions. It is, so to say, governing with or without a government, policy-making with or without politics.

Governance is more than organisation and management: it involves policy. Policies are common interests and goals pursued by a group or institution. Policies are a plurality of interests which can come into conflict with each other.

Governance is not a synonym of regulation. Firstly, not all what can be regulated can also be object of governance. Only societies, societal groups, collective entities and human relationships in general can be object of governance. Secondly, governance can be performed through other means than regulation, such as politics or more informal deliberative processes.

One of the most important goals in governing both private and public institutions (corporations, owner's associations, religious communities, states, supranational entities...) is that the interests of all participants are well represented and realised.

Governance structures are often multi-layered. Governance at the local level coexists and interacts with governance at the state level, and these coexist and interact with governance at the supranational, international and global level. The relationship between the layers of such a multi-level system of governance is often a non-hierarchical one.

The question now arises how governance relates to law. This question is actually a whole bundle of questions, including the following:

- Are law and governance always two different kinds of phenomena?
- Is there a law which is not governance?
- Is governance always embedded in the law?

- Is there any governance which is not legal?
- Is law just one means of governance, besides other means of governance different than law?
- Is perhaps governance a way of making law, besides other possible ways?

A scientific, in-depth exploration of these questions does not seem to have been tried before. This project aims at filling this gap. It assumes that an accurate analysis of the different relationships between law and governance is likely to advance the state of the art of both legal studies and governance studies.

Moreover, this exploration is likely to help both jurists and non-jurists to develop their understanding of law and governance further, and perhaps even inspire them to better realise good governance in our society.

In sum, this project assumes that it is possible and rewarding to look closely at the relationship of law and governance and try to conceptualise it as good as possible.

II. Between all phenomena three very abstract types of relationships (in a wide sense) can be specified, which are characterized by (1): identity, (2) relativity, (3) difference.

- (1) *Governance as law (= Identity of law and governance)*
- (2) *Governance and law in a specific, non-identical and non-differential, relation to each other (Relativity of law and governance)*
- (3) *Governance and law separated from each other (= Difference of law and governance)*

The second type of relationship (relativity of law and governance) can be further specified in at least three relations: the *in*-relation (one phenomenon being contained in the other), the *through*-relation (one phenomenon functionalising the other), and the *against*-relation (one phenomenon conflicting with the other). In sum, the relationship between law and governance can be abstractly systematized in the following ways:

- (1) Governance as law = law as governance (= *Identity*)
- (2) Governance in the law + law in governance (= *Part/whole relation*)
- (3) Governance through law + law through governance (= *Instrumental relation*)
- (4) Governance against the law + law against governance (= *Conflictual relation*)
- (5) Governance apart from law = law apart from governance (= *Difference, separation*)

To each of the above abstract types of relationships, one may associate some more concrete phenomena:

- (1) *Governance as law* includes phenomena of decision- and policy-making which per se constitute law. Particularly interesting for the purposes of this project are phenomena of non-state¹ decision- and policy making which per se constitute law. Examples could be the consolidated practices of international commerce which constitute the customary law called *lex mercatoria*, or the ICANN system of decision-making which constitutes the law of Internet domain names.

¹ The term „state law“ in this paper includes also law produced by a community or plurality of states, as well as law produced by public authorities, such as EU law, international law, WTO law, municipal law, case-law by public courts etc.

Law as governance includes legal phenomena which per se constitute acts of decision- and policy-making within an institution or a group of persons.

- (2) *Governance in the law* includes phenomena of decision- and policy-making embedded in the law. In this regard, particularly interesting for the purposes of this project are phenomena of non-state decision- and policy-making which may be embedded in the creation, interpretation, application and enforcement of state law. As to the creation of law, for example, public authorities may partly or totally delegate regulatory power to professionals' associations. As to the interpretation and application of law, for example, technical standards set by non-state organisations may become the main source of inspiration for state courts in interpreting and applying due diligence rules in liability law. As to the enforcement of laws, for example, private consumer associations may play a decisive role in the enforcement of state consumer protection law. In sum, the most interesting phenomena of *governance in the law* seem to be the ones in which phenomena of decision- and policy-making by non-state actors positively interact with phenomena of decision- and policy-making by state actors, thus creating a system of public-private governance.

Law in governance includes legal phenomena which are embedded in contexts of decision- and policy-making.

- (3) *Governance through law* includes legal phenomena which are instruments of decision- and policy making. Here, several aspects are interesting for the purposes of this project:

Firstly, the question arises of in how far a certain law can be considered an instrument of good governance. This question can be explored from different angles: efficiency, democratic accountability, transparency etc.

- From the viewpoint of efficiency, one may ask to what extent a law which is mainly enacted in order to reach a certain policy objective (e.g. a legislative Act aimed at combating late payments in commercial transactions) is actually adequate to reach this objective. This question can not be properly answered on the basis of legal arguments only: the law concerned has to be looked at from the viewpoint of the relevant empirical, socio-economic context.
- From the viewpoint of democratic accountability and transparency, one may ask to what extent a state law which is supposed to pursue the public interest actually does so, and to what extent it may be seen, on the contrary, as the result of lobbying by powerful private interests.

Secondly, the question arises of to what extent decision- and policy-making by state actors (public governance) through law requires the limitation of decision- and policy-making by non-state actors (private governance). In this regard, the *governance through law* approach explores a completely different kind of interaction between public and private governance than the above-mentioned *governance in the law* approach.

Law through governance includes phenomena of decision- and policy-making which are instruments of legal phenomena.

- (4) *Governance against the law* includes phenomena of decision- and policy-making breaching legal rules. Here, several questions arise which are of interest for this project.

- The first question is to what extent the illegality of such phenomena of decision- and policy-making may be justified by legitimate grounds or good

reasons. For example, civil disobedience against unjust laws may be seen as a form of good governance against the law.

- The second question is whether some illegal forms of governance, e. g. criminal organisations governing a certain territory, are perhaps difficult to eradicate because they arguably operate in a more effective way than the legitimate governance by the state on the same territory.
- The third question addresses the relativity of legitimacy and legality of governance. It has happened quite often in history that an organisation which had made use of criminal acts or violations of human rights or the rule of law in order to acquire, consolidate or maintain its power, eventually managed to establish itself as a legitimate, legally recognised decision- and policy-maker.

Law against governance includes legal phenomena which combat forms of decision- and policy making within an institution or group of persons deemed as harmful.

- (5) *Governance apart from law* includes decision- and policy-making which is in no way linked to law and is realised through other means than law, e.g. politics or economics. The question of where the borderline between law and other types of social phenomena should be drawn is certainly highly interesting. However, the issue could be more properly dealt with in a separate project than in a project aimed at assessing and comparing the governance dimensions of the law.

Law apart from governance includes legal phenomena which are in no way linked to decision- and policy-making within an institution or group of persons. Arguably, some legal phenomena are just forms of individual decision-making, not of decision- and policy-making within an institution or group of persons. There may be individual legal decisions, such as single judgments or out-of-court dispute regulations, which their actors (and possibly also the prevalent opinion in legal science) do not consider as policy-making. One might question whether a legal phenomenon without a policy dimension could exist altogether. The exploration of unintended, hidden policies of allegedly policy-neutral legal acts is certainly a fascinating task, to which an entire research project could be devoted. It is submitted that these issues could be more properly dealt with in a follow-up project, which would build on the conceptualisation and comparison of the governance dimensions of the law which are the subject of the present project.

III. Out of the mentioned possibilities this project is considered to concentrate on the following four types of relationships between law and governance and specific phenomena within them:

(1) *Governance as law*

Societal self-organisation and policy-making which directly and substantively constitutes law without the medium of state law. In particular: law entirely or predominantly produced by private actors.

(2) *Governance in the law*

Societal self-organisation, non-state policy-making and non-state law embedded or otherwise involved in the creation, interpretation, application or enforcement of state law. In particular: interactions between public and private actors in making, interpreting, applying and enforcing state law.

(3) *Governance through law*

States or communities of States governing society through their law, inter alia by setting limits to societal self-organisation or self-regulation. In particular: Public actors governing society through law, inter alia by setting limits to private activity.

(4) *Governance against the law*

Societal self-organisation and policy-making by illegal means.

In the following, some examples of topics pertaining to each of the four groups will be made. These examples serve the purpose of evidencing the governance dimension of many fields of law, of which some may not have been considered from a governance viewpoint before.

Scholars affiliated to the GCL and NILG would be most welcome to propose sub-topics which are not yet contained in the following structure, but could nicely fit in one of the four parts.

Part One: Governance as Law

1. Communities where no distinction between private and public actors is made

- Tribal law
- ...

2. Patterns of regulation entirely shaped by private actors

- Lex mercatoria
- Self-regulation of religious communities
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3. Patterns of regulation predominantly shaped by private actors

- Corporate governance
- Contract governance
- Internet governance
- Quality certificates for products or business firms (e.g. sustainability labels)
- Private agreements in family law
- Bans against shoplifters set by private networks of shop owners
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4. Regulation as a market product

- Private institutions producing rules to be sold to private or public actors
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5. The limits of governance as a form of law

- Governance as law: a danger for legal certainty, equality and democracy?

Part Two: Governance in the Law

1. International agreements between governmental organisations and private actors

- Agreements between the United Nations and private enterprises (e.g. Global Compact)
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2. Lawmaking through agreements between public and private actors

- Drafting of EU Directives delegated to private associations
- (Examples in administrative law)
- Car safety standards set by associations of garage businesses in agreement with public agencies
- The role of recommendations issued by private institutions in the making of labour law
- (Examples in land law?)

3. Legislation setting a framework for public-private co-regulation

- Public-private co-regulation of quality standards in the health care system, referred to by legislation

4. Public powers setting a framework for self-regulation

- Regulation of self-regulation through the European Commission
- Self-regulation of professionals (architects, journalists, medical doctors, lawyers, notaries...)

5. Private regulation flowing in legal rules set by public powers

5a. Private regulation referred to by legislation

- Technical norms and standards set by private institutions, referred to in product safety law, construction law, etc.
- Collective labour agreements in labour law
- Agreements between tenants' and landlords' associations in tenancy law
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5b. Private regulation flowing in judicial interpretations of open legislative norms

- Codes of conduct enacted by private actors referred to by judicial interpretations of negligence in continental European law
- Private regulation as a criterion for the determination of fairness standards in consumer law
- Private regulation as a criterion for the determination of reasonableness standards in labour law
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5c. Private regulation flowing in common law and equity

- Press codes of conduct referred to by courts in breach of confidence cases
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6. Involvement of private actors in the enforcement of legal rules set by public powers

- Involvement of consumer associations in the enforcement of consumer law
- Involvement of environment protection associations in the enforcement of environmental law
- Involvement of private associations in the enforcement of competition law

- Citizens' right to investigate and/or prosecute crimes
- Private experts in criminal proceedings
- Privatisation of jails
- Privatisation of psychiatric clinics for mentally ill criminals
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Part Three: Governance through Law

1. The limits of law as a means of governance

- Compliance and effectiveness
- Social effects of law
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2. Governance through lawmaking

- Democratic governance and lawmaking
- Public interests versus private lobbies in legislative processes
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3. Governance through adjudication

- Transnational judicial governance
- Democratic governance through judicial review
- Arbitration: democratic governance problems
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4. Conflict of laws and conflicts of governance

- Governance through jurisdiction rules
- Governance through rules on recognition and enforcement of foreign judgments
- Governance through rules determining the applicable law
- Conflict of laws and conflicts of governance between EU and national level: the Lissabon judgment of the German Federal Constitutional Court

5. Governance through public policy rules

- Public policy exceptions in conflict of laws
- Public policy exceptions in international conventions
- Procedural public order
- Public policy as ground of limitation of fundamental freedoms in EU law
- Public policy and good morals as grounds of invalidity of private autonomous acts
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6. Governance through constitutionalisation of private law

- Constitutional values as ground for extending the recoverability of damages
- Constitutional values and judicial control on the content of contracts
- Private damage claims against public powers for breach of fundamental principles of Community law
- Horizontal effect of human rights on commercial practices
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- 7. Governance through limits imposed on private regulation**
- 7a. Anti-discrimination law**
- Age limits, anti-discrimination law and market governance
 - Public governance and discriminations on grounds of nationality
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- 7b. Fairness control on the market self-regulation**
- Fairness control on commercial practices
 - Fairness control on consumer contracts
 - Fairness control on business-to-business contracts
 - Fairness control in competition law (antitrust law etc.)
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- 7c. Public control on contracts**
- Protection of tenants
 - Protection of employees
 - Protection of consumers
 - ...
- 7d. Public control on family relations**
- Protection of children's interests against their parents' will
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- 7e. Public control on property relations**
- Land law
 - E-conveyancing
- 8. Governance through positive and negative obligations imposed on States / Global Governance**
- 8a. Peoples' rights of self-determination**
- Rights of indigenous people
- 8b. International environmental law**
- Climate protection
 - Protection of biodiversity
 - Regulation of GMO
- 8c. International law of intellectual property**
- Protection of intellectual property vs. free use of knowledge
- 8d. International investment law**
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- 8e. International criminal law**
- Prohibition against double jeopardy
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Part Four: Governance against the Law

1. Governance through citizens' protest

- Civil disobedience
- Citizens' protest as engine for changes in the law
- Professionals' disobedience (e.g. medical doctors practicing euthanasia against the law)
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2. Laws generating governance against the law

- Prohibitionist laws generating criminal organisations and illegal markets
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3. Governance through illegal practices by private parties

- Market governance through cartels
- Governance through illegal actions by trade unions or employers' unions
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4. Governance against the law by religious sects

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5. Governance of and through criminal organisations

- Self-regulation of mafia and mafia-like organisations
- Welfare gaps filled by Southern Italian criminal organisations
- Diamonds and ivory "mafia"
- Nuclear materials "mafia"
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6. Governance of and through political organisations making use of terrorism

- Hamas' welfare activity
- Al Qaida's political governance
- Paramilitary organisations
- IRA
- ETA (?)
- SWAPO (?)
- FARC (?)
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7. Governance of and through piracy

- Social role of pirates
- "Piracy" in the music industry

8. Criminal origins of power

- Criminal origins of public powers
- Criminal origins of private powers (e.g. IBM, Krupp)

Comparative Assessment

This project intends to enrich the law-and-governance debate through a new comparative method which is multi-national and multi-disciplinary at the same time. It will be a three-dimensional comparative law.

- (1) The first dimension is the traditional comparison of models and solutions from different countries. This is known in the Netherlands as “external comparative law”.
- (2) The second dimension is known in the Netherlands as “internal comparative law”: the comparison of different fields of law. Here, we will compare commercial law with administrative law, private law with criminal law, EU law with WTO law, and so on.
- (3) The third dimension will be the comparison between different governance discourses and between different governance dimensions of legal phenomena.

In particular, this project will operate an in-depth comparison of the governance dimensions and interactions between law and governance in the areas and modes of regulation described in Part I, II, III, IV.

Finally, this project will try to answer the question of how the analysed phenomena and the operated comparisons relate to the law and governance discourses which are already established in legal, political and social science. This will help evidencing how the comparative assessment carried out within this project has advanced or could be advance the state of the art in the law-and-governance debate.

What Could This Taxonomy Serve For?

1. **Presenting “Law and Governance” as a proper research subject**, with a clear logic and a clear structure. Demonstrating that “Law and Governance” is not just an umbrella, an etiquette for a more or less random collection of projects and persons.
2. **Highlighting the governance dimension(s) of legal phenomena.** Evidencing that most legal phenomena have one or more governance dimensions.
3. Inspiring legal scholars coming from the most different fields of law to **reflect and discuss together about meta-issues** such as “What is law?” “What is governance?” “How do law and governance relate to each other?”
4. Offering to legal scholars coming from the most different fields of law a **new perspective** on their own specific field of research.
5. **Common platform for more and better discussion and communication** between NILG academics from the most different areas of law.
6. **Joint conferences and workshops** (e.g. planned Groningen conference ‘Governance Meets Law’ on 23-24 June 2011)
7. **Joint publications** (e.g. planned Oxford book “Governance Meets Law” in the framework of the RUG visitors’ programme)
8. **Inspiring joint fundraising proposals** (e.g. planned European research network “Public Policy Exceptions in European Law”)
9. **Further development of GCL and NILG research programmes.**