ABSTRACTS GOVERNANCE MEETS LAW
Groningen (Het Kasteel), 23-24 June 2011

CONCEPT AND METHODOLOGY

Prof. Dr. D. von der Pfordten - Embedding the Relationship between Law and Governance

How can we understand the relationship between law and governance? In order to characterize this relationship it seems necessary to ask: Why is governance now such a big issue? Why had this form to lead a good life in community such a great uprising in the last decades? Is governance a new invention or an old form or mean to lead a good life? To start with the last question: In history we had all times governance structures that is forms of governance. So governance is a form of communal action to lead a good life in communities which had ever existed in the history of mankind. But why have governance and/or the concept of governance become in the last decades such an important instrument to analyze our way to lead a good life in the community? Governance has – this is my main theses – the purpose or function to break up the close – and by many now considered too close – relationship between law and politics. Or to formulate it a little more drastically: Governance has the purpose or function to free law from politics and perhaps also to a certain extent to free politics from law.

Prof. Dr. P.C. Westerman - Law and Governance: the difference between houses and ships

In this article it is argued that governance should be regarded as a style of regulation. Good governance is thought to be flexible, non-bureaucratic, informal and non-hierarchical. The effective and efficient achievement of measurable and controllable aims is deemed more important than compliance to rules. Competences are not strictly defined in a formal manner but are spread over a complex and diverse set of institutions on different levels. In a number of ways, therefore,the requirements of `good governance' are at odds with the traditional core values of legal systems: autonomy, solidity, continuity, formality, legal certainty and equality. After exploring the tensions between law and governance, it is investigated to what extent legal systems are affected by governance practices. The conclusion is drawn that these changes are so pervasive that the assumption of a separate legal realm is no longer tenable. The new constellation should be studied by combining a number of perspectives that cannot be labeled as either `internal' or`external', since they assume demarcation lines that no longer exist.

Dr. C.N.J. de Vey Mestdagh - What is Law? From Governance to Government and back

The complexity of the universe can only be defined in terms of the complexity of the perceptual apparatus.

The simpler the perceptual apparatus the simpler the universe.

The most complex perceptual apparatus has to conclude that it is alone in its universe.

In this paper a (synthetic) empirical approach to studying law is advocated, particularly in projects at the level of abstraction suggested by a title like “What is Law?”. Theoretical abstractions like “law”, “governance”, “social contract”, “freedom”, “the constitutional state”, “justice”, “morals”, “conscience”, “legal decision making” etc. should not be the starting point of such research. Instead, if necessary, these abstractions should emerge from a bottom up empirical approach which starts with the observation of the most concrete data possible in the domain of interest. Abstraction without extension, inadequate validation and normativity are three flaws of jurisprudence that can be avoided by this. To illustrate the viability of this approach, starting with the emergence of elementary particles 15 billion years ago, the evolution of data, data exchange, material rules, natural values, informal and formal norms and eventually legal rules is described. Governance turns out to be an emergent abstraction that precedes and succeeds law and government. These abstractions were actually used in earlier research to design a model of legal knowledge and legal decision making which was successfully used to build and validate legal knowledge based systems. Interestingly enough, as a consequence of this, these systems exhibited rather human characteristics, like subjectivity, nuance, indecisiveness, etc.

Prof. Dr. G.P. Mifsud Bonnici - Law and Governance in the age of technology

The presence of technology in law and governance debates is not new. With each technological development in warfare, for example, the political and academic debate often referred to the challenges and changes the technology posed to international governance. Debates on arms races and control over proliferation of weapons apart, this paper focuses its attention on technologies often associated with the "Information Age" – the Internet, biotechnology, information gathering systems etc. These technologies, it is argued in this paper following Fukuyama and Wagner and Mordini, are different from previous technological developments: they are de-centred, dispersed and disseminated and their control and use depends on individuals, civil society, commercial entities and to a lesser extent with governments. These differences in technology influence the relationship between technology and governance changing the traditional role of technology in the law and governance process. This paper tries to identify the role(s) of technology in current day governance.The paper recognises three possible roles: technology as subject of governance; technology as regulator in the governance process; and technology as an enabler in the law and governance process. In conclusion, the author argues that the three roles are often intertwined, involving multiple actors in using technology for 'better' governance.

GOVERNANCE AS LAW

Prof. Dr. M.L.M. Hertogh - Governance Meets Law: Mapping the Elusive Concept of Non-State Law

Many discussions aimed at exploring the relationship between law and governance also refer to non-state decision- and policy making and examples of non-state law. In recent years, the number of references to 'non-state law' has increased dramatically. Most of these publications, however, on subjects ranging from customary law and indigenous rights to the rules of the world-wide-web, struggle with the same fundamental question: What is non-state law? Because most of this literature has a strong normative focus, important conceptual and empirical questions are left unanswered. This paper is an attempt to fill this gap. It is not a critique of the previous work by lawyers, social scientists and legal theorists. Neither does this paper set out its own theory of non-state law. Instead, its goal is more modest: to review the socio-legal literature on non-state law and to draw a tentative conceptual map of this 'other hemisphere of the legal world' (and its relation to issues of law and governance). The first half of this paper discusses three waves of attention for non-state law in the socio-legal literature: 'colonialism', 'legal pluralism at home' and 'globalization'. In the second half, this literature is used to draw a conceptual map of non-state law. One dimension of this map differentiates between non-state law within and without the national state. The other dimension differentiates between non-state law as rules of conduct and as norms for decision. In this way, our map locates four different types of non-state law. Writing in the early twentieth century, Eugen Ehrlich argued that the legal scholars of his day seriously impoverished the science of law because they confined their attention to the national state. Today, in the rapidly changing 'Global Bukowina' of the twenty-first century, Ehrlich's plea for a decoupling of law from the state has still lost little of its relevance and a 'liberation from these shackles' seems more appropriate than ever.

Prof. Dr. H.E. Bröring - Soft Law in the Public Administration

Soft law in the public administration concerns all kinds of non-legislative rules in favour of governmental or administrative decision-making. These rules are known as quasi-legislation, guidelines, protocols, codes, models, covenants, instructions, norms for standardisation, et cetera. There is a natural need for rules. Rules contribute to equal treatment, legal certainty, transparency, efficiency, et cetera, and democracy (partly) and legitimacy. These functions of rules, which are the rationale the principle of legality, can be attributed to soft law, too. One of the questions concerning soft law in the public administration deals with, is the intensity of judicial review. This intensity depends from the sort of soft law (rules about discretion, fact-finding, interpretation or legal qualification). My central statement is that this intensity, and therefore the Division of Powers and the system of checks and balances, is changing from absolute and static model towards an more relative and dynamic one.

Dr. C.N.J. de Vey Mestdagh – Internet Governance. Policy Networks as a Model for Governance of the Technical Environment

The regulatory powers of states and international organizations are challenged by the dynamics of globalization and privatization. As a consequence formal government, the traditional hierarchical form of exerting regulatory powers, is extended with and in some cases even replaced by more heterarchical forms of governance. The Internet is a powerful catalyst for these dynamics. Technical characteristics of the Internet give rise to processes of user empowerment and government disempowerment. These processes have caused a shift in the balance of powers concerning political decision making about the technical environment. Policy networks of experts and stakeholder representatives are gaining influence in the regular political decision making processes of states and international organizations concerned with the technical environment. In the European Union a first case at hand will be the political decision making around downloading of digital information (the ACTA negotiations and the translations of the negotiation results into European regulations).

GOVERNANCE IN THE LAW

Dr. T. Nowak and Dr. Th.J.G. van den Hoogen - Self- and co-regulation in the EU – three case studies

In order to get a better understanding of how different forms of co- and self-regulation work in practice and to highlight some of the difficulties one encounters when studying regulation with these concepts in mind three short case studies will be presented. They show that co-regulation in the EU is a general phenomenon that comes in different forms. These case studies also highlight the problem of representativeness or the alleged higher efficiency of self-regulation. Although all three cases under investigation contain elements of self-regulation, they differ among other things along the lines of legal status (of civil society's involvement as well as of the produced agreements) and degree of institutionalisation.

The first case study takes a look at the making of the Lawyers' Establishment Directive. Although this directive was passed according to the standard law making procedures of the EU, the special role given to the lawyer's interest group in the formulation phase of the directive brings it close to self-regulation. The second case concerns the much spoken of treaty based social dialogue between management and employees. The social dialogue makes it possible for the social partners to negotiated agreements amongst themselves which will then be adopted by the Council and receive the status of directives. The third case deals with the advertisement industry, an example often used by the Commission for a pure form of self-regulation. In this field national self-regulatory organisations established a European umbrella organisation which reports regularly to the Commission on advertising standards.

Dr. N.E.H.M. Zeegers - Is devolved regulation a two stage rocket to public acceptance of the use of embryos in research? The issue of the human-animal hybrid embryo in the UK

The Human Fertilisation and Embryology Authority (HFE Authority) is UK's independent regulator concerning, among others, research involving human embryos. This Authority is an executive non-departmental public body composed of experts in biomedical research, lawyers, ethicists and other private persons who are appointed by the Secretary of State.

The Authorities' task, in addition to provide impartial and authoritative information to the public including giving advice to Government, is to take license decisions regarding research protocols within the boundaries of the Human Fertilisation and Embryology Act (HFE Act). However, some of these legislative boundaries, for instance the boundary delineating what is 'human', with each technical innovation have to be interpreted anew. The issue addressed in this paper, the creation of human-animal hybrid embryos, is an example of such technical innovation.

The paper focuses at the contribution that the HFE Authority made to the process in which new legal boundaries for the creation of human embryos were formulated as part of the amendment of the 1990 HFE Act which resulted in the 2008 HFE Act. It shows how this Authority by providing in an extra pre-legislative arena for deliberating the issue of the human animal hybrid embryo, contributed to the public acceptance of this new technique.

Prof. Dr. G.J. Vonk, LL.M. - Civil society organisations in contemporary social markets

In most welfare states, civil society organisations have always played a major role in the governance and delivery of social (security) services.Nowadays, many of these type of organisations are in trouble. One of the reasons attributed for this is the diminishing legitimacy of such organisations, caused by factors such as secularisation, 'depillerization', and individualism.In our view the demise of the traditional role of social society organisation in the delivery of social services is also linked to another factor, i.e. the emergence of social markets. The term social markets is used here to denote quasi-markets a particular mode of governance whereby states organise social services through third parties which compete for governmental contracts, subsidies, rights of privileges (cf. Le Grand 1991 and 2008; Vonk and Tollenaar 2010). The third parties are not only not for profit organisations operating in the domain of civil society but are also commercial private organisations.As a result of the competition, the not for profit organisations tend to behave like commercial entrepreneurs, by introducing new forms of management, enlarging the scales of operation and entering into new profitable activities.In doing so they lose their original flavour and character. The law within which the organisations operate tends to strengthen this process, as many free market regulation tends to be based upon a rigid public/private divide and does not take into account hybrid characteristics which pertain to socials society organisations.One step towards the market, implies that a legal transfer from public to private; civil societies organisations are treated as commercial enterprises.

Paradoxically, social markets may also give rise to new civil society groups often operating on behalf of clients, thereby representing the "consumer interests". The role of these new organisations and their impact upon the quality of the social markets is still evolving.

This paper discusses the relation between civil society organisations and social markets in twofold manner, by raising the question of

- how social markets impact upon the evolution of civil society organisations;

- how civil society organisations can help to improve the quality of social markets

In the first paragraph we discuss how the social market model threatens traditional not for profit organisations and simultaneously gives rise to new civil society initiatives. Our theories in this respect are illustrated by four cases studies drawn from the situation in the Netherlands. We will look at the demise of two traditional organisations and the emergence of two new initiatives operating in the social housing sector and in the medical/home care sector. These are:

- Rochdale , a housing co-operation which has collapsed under its commercial ambitions versus the woonbond, a new alternative interest group representing the interest of tenants in the rental sector;and

- Meavita, a commercial home care group which arose out of the merger of some former civil society organisations which went bankrupt in 2009 versus Per Saldo a new initiative for the protection of the interests of clients in the home care sector.

The second paragraph contains some theoretical normative observations.It is argued that the success of the social market model depends upon a strong input of social society initiatives which represent the interests of the stakeholders, i.e. the clients and the workers.

In the third and final part we will discuss how the role of new civil society organisations can be embedded in the law and institutional arrangements. It is argued that consumer organisations should be consulted in important government decisions to grant advantages to third parties and for that purpose should be able to access all information that is that is available to government and private contracting parties so as to be able to allow their watchdog function. In the meantime, the special position of old civil society organisations which are active in delivery of social services should be given better legislative protection.

Literature:

P. van Lieshout, 'Indentiteit in zorg en welzijn' in: Behoud en vernieuwing van identiteit, J.P.

Balkenende en T.J. van der Ploeg (red.), 1999,Lemma, Utrecht

Ingo Bode, Disorgnized welfare mixes: voluntary agencies and new governance regimes in Western Europe, Journal of European social policy, 2008, 246-259

Kenneth Gibb, The social housing quasi market, CPPR discussion paper no. 4, 2005

Julian Le Grand, 'Quasi-markets and social policy', The economic Journal, 1991, 125-1276

Julien Le Grand,The Other Invisible Hand: Delivering Public Services through Choice and Competition, Princetown University Press, 2008

Emmanuele Pavolini and Costanzo Ranci, 'Restructering the welfare state: reforms in long term care in Western European countries, Journal of European Social Policy, 2008, 246-259.

Gijsbert Vonk and Albertjan Tollenaar, Social Security as a Public Interest, Intersentia, a Multidisciplinary Inquiry into the Foundation of the Regulatory Welfare State, 2010

E. Steyger en J.W. van den Gronden, Deel II: De publieke taak: diensten van algemeen (economsich) belang en de gevolgen van de Richtlijn, preadvies NVER SEW 2007, 279-398

Prof. Dr. H.B. Winter - In search for evidence-based regulatory enforcement

The expectations of regulatory enforcement in our present-day society seem to be sky-high. But the constraints are ambiguous. One the one hand politicians favor lower costs of inspections, more trust to companies and more integration of inspections. On the other hand enforcement is needed to ban all dominant risks and warrant safety. Between these positions, regulatory enforcers need to clarify their ambitions. What can be expected of inspections and what cannot? In the Netherlands a case is made for growing insight in the effects of inspections. A distinction must be made between compliance effects and societal effects. Most regulatory agencies nowadays are able to inform the public about compliance levels and the causal relation with their work. Less information is available on the effects of inspections on societal goals. What happens with the quality of the environment? Do school-performances improve? The paper enlightens some of the insights attained with research on effectiveness and formulates recommendations pointed at researchers, inspectors and policy-makers on how to realize these kinds of projects.

Prof. Dr. W.A. Zondag, LL.M. and Prof. Dr. H.H. Voogsgeerd, LL.M. - The Role of Private Regulation in Creating, Interpreting and Enforcing Labour Law

Labour law is an early example of a field of law in which non-state actors participate intensively in its creation, interpretation and enforcement. Ever since Teubners' concept of 'reflexive law' (Teubner, 1983) it has become mainstream to involve other actors in government-activity, because it is presumed that these actors are better able to regulate themselves or their members for the sake of effectivity of the policy in general. Sometimes, governments use minimum rules within which these actors have to operate.

One of the oldest examples of 'reflexive law' is the collective labour agreement. Also here, governments are involved with the work of non-state actors such as trade unions and employers' organizations. On the one hand the state ought to respect the fundamental right on freedom of association and collective bargaining. It should be a state-free zone according to the fundamental ILO conventions. On the other hand the state ought to facilitate a machinery in order to stimulate the process of collective bargaining. Especially in the decision to impose this collective agreement on a complete sector of the economy: to make it generally binding, the minister of Social Affairs and Employment has a responsibility.

In this contribution we will analyze the interaction between the legislator (the minister) and the social partners in the creation, the interpretation and the enforcement of labour law. The focus will be on the Netherlands and on Dutch law with a brief excursion into the EU-level negotiations between management and labour. After an introduction into the concepts of reflexive law we will give an overview of the interaction in the Netherlands between management and labour on the one hand and the legislator on the other hand. A continuum of forms from pure soft-law to private regulation in the area of Dutch labour law will be given. The most important part of our contribution is a limited number of case studies: private regulation by collective agreement replacing legislation; private regulation by collective agreement complementing (minimum)-legislation; private contract (ondernemingsovereenkomst) interpreting legislation; enforcement of private regulation by collective agreement by a foundation. In what way does the interaction between private regulation and public regulation evolve?

Keywords: reflexive law, collective labour agreements, private and public regulation

Dr. J.A. Nijboer, Prof. Dr. B.F. Keulen, Dr. H.K. Elzinga, LL.M. and Dr. N.J.M. Kwakman, LL.M - Expert registers in criminal cases. Governance in criminal proceedings

On 1 January 2010 a Dutch national public register of expert witnesses was created as a result of the new Expert Witness in Criminal Cases Act. The creation of this register can be seen as an example of (good) governance in criminal proceedings. The department of Criminal Law and Criminology of the Law Faculty of the University of Groningen has conducted an ex ante evaluation of this new register. In this research a comparison of expert registers has been made between five national systems – besides The Netherlands also Belgium, Germany, France and England and Wales. Furthermore, key figures from the Dutch criminal justice system, the public prosecutor's office, the legal profession, forensic science (expertise on DNA), forensic psychology and the team behind the register were interviewed extensively about their aims and expectations regarding the future functioning of the Dutch register. Our research revealed a number of operational, product and system aims which more or less resemble key factors for good governance like efficiency and effectiveness, organisational capacity, reliability, predictability and the rule of law, participation, accountability, transparency and open information systems. It is debatable whether an expert register on the European level can be an attractive option. For many fields of expertise, the question whether governance of expertise can be furthered through a European expert register probably has to be answered in the negative.

GOVERNANCE THROUGH LAW

Prof. S. Comtois - Deference and judicial review: a necessary step in the transformation of governance in Canada

Whether it relates to contract, property or administrative action, governance through law, it is said, involves creating mechanisms by which social actors seeking to achieve coordinate action can work together to accommodate their own legitimacy, diversity of objectives, values and interests [1] .

In countries of common law tradition, such as Canada, Judicial review is an integral part of governance in the administrative state; it influences, oversees and reviews all administrative bodies, including tribunals, the "so called" adjudicative branch of government. [2]

Taking into account the traditionally problematic relationship between judicial review and other parts of the administrative justice system, I will consider how the Supreme Court of Canada, through the policy of deference central to the law of judicial review in Canada, acknowledges the transformation of the role of the administrative state to reinterpret its own role in this new model of governance.

The text is divided in three sections. The first section provides an overview of the Canadian law of judicial review emphasizing deference. Using a Canadian example, section two illustrates the new dynamics of interaction between courts and tribunals resulting from the policy of deference. Section three assesses the

contribution of the Canadian policy of deference to the emergence ofa new model ofgovernance in the sphere of adjudication.

Note: This paper is concerned with administrative adjudication solely, e.g. tribunals whose function is to review initial decisions originating from officials who belong to the executive. Issues concerning the application of the policy of deference to rule-making and broad discretionary powers by non adjudicative bodies will not be addressed .

[1] Pierre Issalys, "Choosing Among Forms ofPublic Action" in Pearl Eliadis, Margaret M. Hill & Michael Howlett eds., Designing Government From Instruments to Governance (Montreal; McGill-Queen's University Press, 2005) 154 at p. 180; Philippe Moreau Defarges, La gouvernance (Paris: Presses universitaires de France, 2003), 6 et 71; Jean-Pierre Gaudin, Pourquoi la gouvernance? (Paris : Presses de Sciences po, 2002), 43; Roderick A. Macdonald, "The Swiss Army Knife of Governance" " in Pearl Eliadis, Margaret M. Hill & Michael Howlett eds., Designing GovernmentFrom Instruments to Governance (Montreal; McGill-Queen's University Press, 2005), 203.

[2] It is the terms the Supreme court of Canada uses to describe the administrative tribunal in GovernancOcean Port c. B.C. (Liquor Control) [2001] 2 R.C.S. 781

Prof. Dr. J.H. Hubben, LL.M. and Dr. J.H.H.M. Dorscheidt, LL.M - Public Supervision in Health Care and Good Governance

In 2010 is de Wet uitbreiding handhaving volksgezondheidswetgeving (WUBHV) in werking getreden. Deze wet introduceert nieuwe bestuurlijke bevoegdheden op het gebied van de volksgezondheid. De Inspectie voor de Gezondheidszorg (IGZ) krijgt de bevoegdheid tot het opleggen van een bestuurlijke boete en kan zonder toestemming van de patiënt diens behandeldossier inzien. Er is reden voor fundamentele kritiek op deze verruiming van bevoegdheden. In belangrijke opzichten is immers sprake van een afwijking van wat in het bestuursrecht gebruikelijk is, terwijl de mogelijkheid tot inzage van medische dossiers zonder toestemming van de patiënt een onnodig grote inbreuk op de privacy van de patiënt vormt.

Prof. Dr. I.J.J. Burgers - Taxation and Governance through the Law

Governance through the law includes legal phenomena which are instruments of decision- and policy making. In the field of taxation three different phenomena can be distinguished regarding instruments of decision- and policy making that aim at good governance in the tax area.

In the first place tools have been developed by the Global Forum on Transparency and Exchange of Information aiming at creating a level playing field and preventing a further pressure on states to reduce effective tax rates. The Standard for Good Governance developed by this Forum in 2004 has been accepted by most of the 101 Member States of the Forum.

Furthermoretools have been developed for promoting more transparancy towards their stakeholders on the tax obligations of companies, amongst others in Corporate Governance Codes and in annual accounting standards and regulation.

And finally tools have been developed for establishing more efficient procedures for establishing the right amount of tax payable and providing more certainty to taxpayers on the amounts due. An example is the recent enhanced relation of the tax administration of the Netherlands with its taxpayers through "Horizontaal Toezicht".

It is too early to say whether these tools will achieve their goal.

Prof. F. Giglio - Public Law Values in the Law of Damages: Recent Developments in the English Common Law

This paper examines the interaction between the English law of damages for civil wrongs and a wave of interest for public values which has gained momentum in the last ten to twenty years. Vindication is generally seen as a secondary aim of many, if not all, civil remedies. Very recent decisions of the Supreme Court of England and Wales deal with the issue of vindication as a primary aim. Their Lordships debate the issue of the compatibility of the so-called vindicatory damages with the English private law.

In particular, vindication as a legal response is considered in the context of the remedies for the violation of constitutional rights and as an award triggered by the perpetration of human rights wrongs. The latter have become increasingly more relevant after the enactment of the Human Rights Act 1998. The conclusion is that the social aspect of vindicatory damages constitutes a major cause of friction with the Common Law, because it collides with the liberal approach of the law of wrongs.

Prof. Dr. M.H. Wissink, LL.M. - Better Governance of Contract Law through a European Optional Instrument

In 2009 the ongoing debate on European private law resulted in a Draft Common Frame of Reference, the outcome of a large research project sponsored by the European Commission. The DCFR states as its purposes that it (i) may serve as a possible model for a political CFR, (b) will promote knowledge of private law in the jurisdictions of the EU and (iii) may be a possible source of inspiration for, inter alia, higher courts. As a step towards a political CFR, in May 2011 the Commission Expert Group on European Contract Law published a Feasibility study for a future instrument in European Contract Law. Such a future instrument will probably be an optional set of European rules of contract law, which the parties may choose as the law governing their contract (instead of or supplemental to national law).

Regarding the effects of this European Optional Instrument (EOI) important questions are whether there will be a market for it (will parties indeed choose the EOI as the governing law?) and whether it will promote cross border commerce within Europe. However, even if the EOI would not be a success measured by those standards, it is submitted that the EOI will be more than a possible source of inspiration for higher courts. Arguably, its very existence should lead national higher courts to taking the EOI into account in the interpretation and development of their national contract law.

'Taking into account' does not mean that courts should try to interpret national law as much as possible in conformity with the EOI (as in the case of 'regular' EU law). It may suffice that courts refer to a given solution in the EOI and mention how this relates to the rule(s) of their national legal system. Where appropriate, courts may explain that the EOI and national law offer different solutions to a problem and why national law should be brought in line with the EOI – or why this should not be done.

It is submitted that higher courts should take into account the EOI with a view to benchmarking their national rules and thus (a) taking a critical look at their national contract law and (b) making their national contract law more accessible (and perhaps more attractive) to international parties. Furthermore, in this way courts may contribute to a European legal culture/practice regarding the application of the EOI.

Prof. M. Zamboni - Dis-Incorporating Corporate Social Responsibility

This work aims at demarcating the starting line by answering the question of whether, in today's transnational law, a corporation can already be considered as socially responsible or whether corporate law has to be changed in order to make the transnational corporation (at least from a legal perspective) per definition a socially responsible economic organization. In order to perform this investigation and forward certain normative proposals, this work starts by sketching the situation concerning corporate social responsibility in the transnational context, in particular in relation to the regulation of corporate governance. In particular it denotes one particular aspect that needs to be taken into consideration when dealing with transnational law in general: the latter is based more on legal principles to be weighed against each other than on specific and "either-or" rules. This particular feature of transnational law is fundamental in order to understand where and in which forms the normative proposals as to the corporate social responsibility for multinational corporations are going to have to operate. This work then offers to legal actors possible strategies in order to insert the idea of corporate social responsibility as a necessary legal requirement for an economic organization to be called as corporation. Once the best strategy is identified, i.e. a mixture of hard and soft law measures, the final part of the work proceeds in offering an example of how to introduce the interests of others than shareholders in the very core of the regulation of corporate governance, namely through the figure of an in-house corporate ombudsperson.

Prof. Dr. D.A. Lubach - Construction law as an example of interaction between law and governance

The development of construction law as a "functional "part of law shows various examples of an interaction between rules stemming from private initiatives and government regulation. In this respect one can say that governance and the expending rules of regulationof construction by government authorities are two sides of the same issue.

Zoning law and technical building regulations are developed when the government recognized that private ruling was insufficient and/or did not guarantee a minimum standard of quality and safety.

Regulation of the process of tendering was enacted (mainly under the influence of European law) to guarantee free competition in the construction market

Regulation of building contracts is mainly enacted by private organizations; therefore in this field rules of governance are in practice at least as important as the regulation in the Civil Code.

GOVERNANCE AGAINST THE LAW

Dr. H.G. Hoogers - Governance against law: the strange case of the Dutch constitution

It is generally considered to be one of the most important functions of a written constitution to lay down the law of the land: at least the most fundamental norms shaping and defining the body politic are to be found in the constitution. This document, usually also of a hierarchically superior character vis-à-vis other norms, is broadly speaking also the norm creating the state organs and their political and legal powers; this special and fundamental character is usually reflected by the procedure of amendment, which usually involves qualified majorities, plural readings, plebiscitary elements or a combination of these.

The Constitution of the Netherlands is no exception to this rule. It came into force in March 1814 and is therefore, apart from the U.S. Constitution, the eldest Constitution in the world still in force. It is no longer the highest constitutional document of the Kingdom: since 29 December 1954, the Statute of the Kingdom is the highest source of (internal) law for the Kingdom. The Statute, regulating the relationship between the Netherlands proper and the three autonomous countries of Aruba, Curaçao and St. Maarten in the Caribbean Sea, is not a 'full' constitution, however. Most of the constitutional law of the Kingdom as a whole is still to be found in the Constitution itself: the Statute enhances and modifies the Constitution to regulate the constitutional autonomy of the three Caribbean countries in the post-colonial Kingdom. The Constitution of 1814 as amended therefore remains the prime document in Dutch constitutional law. Its central position is also clearly illustrated by the extremely ponderous amendment procedure laid down in chapter eight. The Constitution of the Kingdom can only be amended through an Act of the legislator (King and States-General together) passed in the ordinary manner, followed by an obligatory dissolution of the Second Chamber (the directly elected Chamber of the States-General) and new elections. The newly elected Second Camber and the First Chamber then have to pass the amendment a second time, by a two thirds majority in both Chambers. The Constitution is the prime source of constitutional law in the Kingdom of the Netherlands and likely to remain so.

Perhaps surprising then, is the fact that this very entrenched constitution, laying down the fundamental rules of the Dutch body politic, is corrected, added to and sometimes even overruled by unwritten norms and practices. A classical historical example of this in Dutch constitutional law is the clause stipulating that ministers were appointed and dismissed by the King 'according to his personal liking' (naar welgevallen), that remained part of the Constitution up to 1983. Since 1868, however, the Kingdom of the Netherlands has been governed through a parliamentary system, in which no minister can remain in office without the support of the majority of parliament. This norm, in Dutch called the vertrouwensregel (rule of confidence) has always remained unwritten. Between 1868 en 1983, an explicit clause in the constitution itself was made invalid by an unwritten norm or practice, which is (apparently) of a higher hierarchical status. There are other examples, which will be touched upon in my presentation.From the point of view of most jurisdictions in the possession of a written constitution, this is a very interesting phenomenon. For how is it possible that written, constitutional norms can wholly or partially lose their validity because of other, unwritten norms or practices, when they form part of a document of such an extremely entrenched nature? Is this not a complete turnover of normal legal hierarchy and procedure? And is this not, in a way, an example of governance against (written, constitutional) law?

Prof. H. Mostert - Governance against the Law: customary and statutory perceptions of tenure security in South-Africa

This paper is about how different perceptions of tenure security in South Africa influence different approaches to governance of land. The governance of communal land tenure arrangements is especially hotly debated. Communal tenure insecurity affects millions of South Africans. The State is constitutionally mandated to effect legislation that will address this situation. The Communal Land Rights Act 11 of 2004 was signed into law to create a land administration system to regulate communal land tenure. The Act aimed to provide security of tenure by providing self-regulation to communities through corporatisation and the formalisation of land rights by means of registration. Community governance structures would also be incorporated in to local government structures. The Act, however, did not provide for adequate consultation measures with communities, current community practises of governance and state support. Governance of land rights imposed by the State clashed with the horizontal governance of communities. Four communities challenged the constitutionality of these measures in the Constitutional Court

. They argued that the effects of the legislation would leave them in a worse position than was the case under the repressive apartheid regime. The Court subsequently declared the Act unconstitutional on substantive and procedural grounds. Thus, after a more than a decade of democracy in South Africa almost one third of the population still suffers from legal tenure insecurity without support from the state. State intervention in local land governance structures failed to accommodate local realities on the ground. Instead, communities are calling for alternatives that recognise their own attempts, at grass-roots level, to achieve tenure security. Adequate interaction between the state and private actors in the governance of land tenure is sorely needed. Current attempts to rectify this situation are limited to political promises with no clear policy framework.

Prof. Dr. H.B. Krans - European Law and Dutch Civil Procedure Law

It is common knowledge that European legislation is relevant for civil procedure law. In this respect, Article 6 ECHR is of great importance for civil procedures. In recent years many European rules have been formulated on certain international aspects of civil procedure law, such as the European Enforcement Order for uncontested claims. There is also a third source of European influence on national civil procedure law, however, European law that mainly focuses on substantive law. To achieve the goals that 'Europe' is aiming for, for example with unfair contract terms and consumer sales, several instruments of a procedural nature are used. This third source of European influence on national civil procedure law is considerably less well known than the other two sources of European influence on national civil procedure law and will be the topic of my presentation.