DRAFT

Law and Governance: the difference between houses and ships

Pauline Westerman, June 23, 2011

Introduction

The title of today's conference: `Law *meets* Governance' suggests that there are two separately identifiable entities, just as there are two persons who are able to meet each other briefly and then go on leading their individual lives as before. I am afraid that this image is a distorted one. In this contribution it will be argued that governance, as a different way of regulating human affairs, thoroughly and deeply affects the legal system, to such an extent that it can no longer be understood in traditional terms. Instead of talking about law *and* governance it is indeed more appropriate to talk about law *as* governance. Law *as* governance calls for a different approach in which several perspectives are combined.

1. The house of law

A traditional way of viewing law is by regarding it as a system. As such a system law has its own internal ordering, its own criteria, values and methodology. Those who are working `inside' the system are therefore thought to act very differently from those who are thought to be `outside' the system. A recurrent and attractive metaphor of the legal system is the familiar image of the house. The metaphor of the house seems to capture quite a few features that are generally regarded as essential features of law.[1]

- *Territoriality:* A legal system, like a house, stands in a row of other similar houses, each bound to a certain well-defined and demarcated territory and preserving its own internal ordering. Occasionally, one may be aware that there are other houses in the same street, just like one is aware of neighbouring jurisdictions. But these foreign legal systems are at best neighbours, they do not turn into members of one's own household.

- *Autonomy*: A legal system like a house, is separated from its surroundings by walls . It can be more or less open and responsive to the outside worlds, but that is a matter of choice, just as it is a choice to open or to close the windows. Autonomy is determined by the degree in which a legal system is capable of reproducing itself. Legal systems can be distinguished from other systems of rules by the fact that they consist of two sets of rules: rules that prescribe the behavior of the citizen, and rules that pertain to the conduct of legal officials. This second type of rules can be regarded as meta-rules: they stipulate how law should be made, changed and applied. [2]

---

[1] See also my article, The Impossibility of an Outsider's Perspective, in Jaakko Husa & Mark van Hoecke (eds.), *Objectivity in Law and Legal Reasoning*, Oxford: Hart Publishing, *forthcoming*

[2] Kelsen, Hans, *General Theory of Law and State*, transl. by A. Wedberg, Cambridge Mass., Harvard U.P., 1945 and H.L.A. Hart, *The Concept of Law,* (Second Edition, with a Postscript edited by Penelope A. Bulloch and Joseph Raz) Oxford University Press, 1997.

- *Systematicity*: A legal system, like a house, can only function properly if there is a certain internal ordering that should exhibit a minimal degree of consistency and coherence.

- *Continuity and solidity*: A legal system, like a house, has foundations, thought to consist in `rights' or basic `principles'. The main principles are the principles of legal certainty and the principle of equality. These principles may vary and may develop over the years. The development of the formal principle of equality into a more substantive principle of equality serves as an illustration. Yet, in whatever form, these principles retain their function as sources for justification and criticism. They are intrinsically connected to the importance of rules. Erected on these firm foundations, the house of law it thought to survive the ages. In order to survive, maintenance, restoration and a moderate degree of renovation is called for (the flexibility of law, necessary to adapt to changing circumstance) but it still functions as a stronghold against the changing tides of politics and changing morals.

Although these four tenets were never completely uncontested, they are regarded nevertheless as fairly evident by the legally trained inhabitants of the house. Legal practitioners and academics alike often take the demarcation-lines that separate them from the outside world for granted. In this sense, the house is more than just a metaphor; to the inhabitants the legal vocabulary, methodology, values and criteria are felt as parts of the self-evident background of their professional existence. This house, however, is about to lose its comfortable familiarity.

2. The term `governance'

`Governance' is a fairly recent term for a equally recent phenomenon.[3]. Developed in the late eighties as a requirement to be met by Third World Countries in order to get loans or subsidies from the developed world[4], its meaning has been expanded over the last two decades, ranging from `corporate governance' to `global governance', covering the management of institutions as diverse as private companies, trade-unions, secret services, universities and the European Union.

Despite this enormous expansion of its scope, the term has a few steady characteristics.

1. *Ambiguity*. Governance is a descriptive and a normative notion at the same time. `Governance' and `good governance' are not clearly separated. Actual regulatory practices, `best practices' as well as the principles that should be met in order to count as such a `best practice', all seem to be captured by the same notion of governance. Often the term is used as a manifesto or as an agenda for reform.[5]

---

[3] See also my `Governing by Goals: Governance as a Legal Style', in: *Legisprudence: International Journal for the Study of Legislation*, Hart Publishing, 2007, pp. 51-72.

[4]See C Hewitt de Alcántara, "Uses and abuses of the concept of governance" (1998), International Social Science Journal, Vol. 50, Iss. 155, no 1, 105-113.

[5] This is for instance the case in "European governance: a white paper", Brussels, 2001, Commission of the European Communities.

2. *Negativity*. What is `good' governance? There is more clarity about what it is *not* than about what it is. Governance is regarded as `governing without government'[6], or as `policy-making without politics'[7], it is alleged to be marked by the *lack* of a clear separation between the public and private sphere, or seen as an attempt to *reduce* governmental interference, and, above all, as an attempt to *get away* from formalities.[8]

This attempt to escape from the formal *loci* of regulation and control, led to a fragmentation of powers. Not only regulation, but also dispute-resolution as well as monitoring and control are no longer exclusively entrusted to the state. These tasks are performed by a bewildering amount of institutions on different levels, transnational, international, European, regional and, most importantly by institutions that are assigned specific tasks in the pursuit of well-defined aims. Governance is therefore emphatically *not hierarchical*, or tends to translate hierarchical relations in non-hierarchical ones. Institutions are mainly thought to be horizontally accountable to each other or to the public at large. Although one may debate over the question to what extent this is a rhetorical way of hiding or masking hierarchical relations, it is clear that governance is practiced at different levels.

3. *Advocates a style of regulation*. The term `governance'does not stand for a specific institution nor does it describe a specific way of regulation. Rather, and this is consistent with its normative overtones, does the term try to evoke *a whole set* of regulatory arrangements. It advocates a certain *mentality*, a way of doing things, a certain kind of orientation. These are pretty vague expressions that match the vagueness of the use of the term.

What does this mentality look like? The first and foremost characteristic is its purposiveness. Governance is above all a style of regulation that is oriented towards goals. This means that

a. governance is seen as *good* governance if it sets aims that are clear and measurable, and if a system is developed that can be used to assess the degree in which these aims are realized. It is also commonly accompanied by the development of so-called quality-systems. Quality-systems concretise the kind of criteria that have to be used in order to assess the way a certain institution performs.

b. It is important to realize that the demand of good governance is always directed to collective norm-addressees. It is not the individual norm-addressee, but institutions, companies, and organizations that are thought to formulate the abstract aims as well as the concrete targets that should be met.

---

[6]J.N. Rosenau and Ernst-Otto Czempiel, "Governance without Government: Order and Change in World Politics" (1992), Cambridge Studies in International Relations, No 20; R. Rhodes, "The New Governance, Governing without Government" (1996), Political Studies, 44, 465-67.

[7]A. Kazancigil, "Governance and science: market-like modes of managing society and producing knowledge" (1998), International Social Science Journal, Vol. 50, Iss. 155, no 1, 69-79.

[8]ibid.

c. Pleas for good governance are always accompanied with a plea for accountability and transparency[9]. Typical for governance is that these collective norm-addressees have to prove that they realized aims, and that they effectively managed to hit targets and to improve performance. They therefore have to develop the criteria for good performance and have to account for it in open and publicly accessible documents. Quality systems not only prescribe the achievement of aims but are at the same time used as documents in which performance is shown to the outside world.[10]

In general therefore, one may characterize governance as a style of regulation in which aims and achievements are emphasized. The formulation of aims, both abstract and concrete, is the crucial starting-point for this kind of regulation. What is therefore controlled and enforced is not compliance to the rules, but the degree in which these aims are realized. Not compliance but performance is a central concern.

3. The impact of governance

Governance may have begun as a demand or requirement, it may have spread as a buzzword or creed, but the truth is that nowadays it has become standard practice. It is not only a manner of regulation, but has turned into a common way of organising matters. Governance is not always easily distinguishable from the movement of New Public Management from which it took its major inspiration[11]. It has become in use as a management system, and its vernacular (benchmarks, performance-indicators, targets), is management speak. For that reason, it is easy to discard as a `mere' management system, that does not affect the legal system.

However, these management systems are not merely used for internal organization. The performance indicators, criteria and quality systems are not merely used in order to improve one's achievements, but it has also turned into a mechanism of controlling others[12]. These systems are often developed as alternatives for central legislation, or as safety-valves in case central legislation does not bring the expected and desired results, or they function as complementary systems, filling up the gaps of official legislation. The positive aims and objectives that are so central in governance are therefore more than just managerial tools. They are also the sources of what is called `soft law'. It is true that soft law is not hard law. It is the product of *informal* proceedings. Therefore, the various arrangements that pass for soft

---

[9] Davies, A., *Accountability: A Public Law Analysis of Government by Contract,* Oxford U.P., Oxford, 2001.

[10] The double character of these rule-systems as both heuristic and justificatory is explored in my: 'Who is regulating the self? Selfregulation as outsourced rulemaking', in: *Selfregulation*, thematic issue of *Legisprudence: International Journal for the Study of Legislation*, Vol. 4, no 3 2010, pp. 225-241

[11] As formulated by David Osborne and Ted Gaebler: *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector,* Addison-Wesley Publishing Company, Inc., Reading, Mass., 1992. A good critique can be found in: C. Pollitt, *The Essential Public Manager,* Open University Press, Philadelphia, 2003.

[12] Julia Black, , Decentring Regulation: Understanding the role of regulation and self-regulation in a `post-regulatory' world, in: *Current Legal Problems* (2001) 54, pp.103-147.

law do not meet the strict tests for validity that should be met in order to count as hard law. But that does not imply that soft law does not affect hard law.

In order to substantiate my claim that governance does affect the legal system, let me enumerate the above-mentioned features of legal systems one by one and see to what extent governance affects our familiar household.

1. Law is no longer tied to the *territory*. Transnational law such as lex mercatoria, European directives and international agreements all equally and simultaneously penetrate into the national legal order. As I have argued elsewhere[13] the structure of the European directive, which begins by a declaration of aims and merely contains the demand that member-states issue legislation in order to achieve these aims, is reproduced entirely in the structure of principle-oriented laws issued by the national legislators in which this directive is mostly implemented. The demand for accountability may begin as a requirement expressed by some supervisory board vis-à-vis the supervised institution but it spreads right into the way formal government regards its own democratic functioning. The whole idea of a house in a street with comparable houses does no longer exist. The different legal orders penetrate each other. A situation that can be described as the situation that would arise if my neighbour's balcony protruded well into my bathroom, which would call for a drastic reorganisation of my house.

2. Also the *autonomy* of law is undermined. It is no longer a matter of opening or closing the windows. There are no walls anymore. Formal law is increasingly supplemented if not supplanted by other informal forms of regulation such as private lawmaking, different varieties of self-regulation, codes and certificates. But these informal sources are not regulated by meta-rules in the same way as in a traditional legal system. Lists of performance-indicators and criteria may be drawn up in an informal manner, but may be enforced as if they were formal rules. Often, however, their status is highly unclear. It may be clear who is entitled to make these rules, but it is not clear who is entitled to change them.[14] Competences that used to be defined in a strict and formal manner are left unspecified. Self-regulatory codes mainly consist of lists of do's and don'ts. They lack the secondary meta-rules which are so essential to the autonomy of formal law. All kinds of `soft law': brochures, informative communications, general guidelines and conclusions suffer from the problem that their legal status is unclear. The conclusions of the European Council, for example, always fail to indicate their legal status. Some of them have a legal lay-out, but whether they are legally binding remains a matter of speculation.[15]

3. Not only transnational law but also forms of soft law threaten to upset the *systematic ordering* of law. They are Fremdkörper, and they cannot be organised and systematised along traditional lines in which they are assigned a place in the hierarchy of norms. Regulations

---

[13] See my `The Emergence of New Types of Norms', in: Luc J. Wintgens (ed.) *Legislation in Context: Essays in Legisprudence*, Ashgate, Aldershot, 2007, pp. 117-133.

[14] See members of the Steering group Elderly Care, forthcoming dissertation A.L.E.Enequist.

15 See Linda Senden, *Soft law in European Community Law: Its Relationship to Legislation*, Wolf Legal Publishers, Nijmegen, 2003, Ch 8.

pertaining to, for instance, health and safety of workers are worked out by specialists that are in the service of national lower administrate bodies or supervisory boards who come together in Brussels in order to prepare European legislation which has to be implemented at the national level.[16] The process is circular rather than hierarchical.

4. *Solidity and continuity* is very hard to reconcile with a governance style of regulation. It even seems to be an outdated ideal as such[17]. The two principles that are the pillars of the solidity of the legal system, legal certainty and legal equality, are both under severe pressure. As I mentioned above, governance is purpose-oriented. That implies that not rules but the achievement of aims counts. The rules that are formulated in the various codes, mission-statements, as well as the criteria for certification lead only temporary lives. They should be modified if the targets of yesterday are reached.[18] Not legal certainty, but flexibility is the dominant ideal.

Not only the principle of legal certainty, but also the principle of -legal- equality is under pressure. Under a governance-regime, the emphasis on flexibility has led to the demand that rules should be tailored to the specific demands and exigencies of the situation in which the norm-addressee finds itself. It is frequently emphasized that rules, by their uniform nature, are too rigid to do justice to the complexities and rapid developments of modern life. This implies to a large extent a form of *Einzelfallgerechtigkeit*. The nature and degree of strictness largely depend on the specific features of the norm-addressee. This is not, however, regarded as a defect to be remedied but as a virtue of good governance.

Also adjudication is less inspired by the letter of the law than by the desire to arrive at a fair outcome[19]. Finally, also the degree of strictness of supervision and control is allowed to be different in different contexts. The reason for that it that organisations may differ in the degree to which they succeed to realize the desired goals. In the Dutch practice, for instance, organisations are often encouraged to supply self-reports by presenting them with the choice between either such a system of self-control or being subject to stricter -governmental- forms of control. There is even a governmental memorandum in which it is maintained that the principle of equality is not flouted by subjecting the `retarded' organisations to a stricter regime of control than the more advanced ones.[20]

---

[16] Stijn Smismans, *Law, Legitimacy, and European Governance: Functional Participation and Social Regulation*, Oxford U.P., 2004

[17] See par. 12 in my article `Governing by Goals: Governance as a Legal Style', supra, n. 3.

18 In particular this is the problem with the various forms of certification. See R.A.J. van Gestel, Certificatie als alternatief voor toezicht op de naleving van milieuwetten? Over transplantatie van private kwaliteitssystemen naar een publieke context', in: *Certificatie: kansen en risico's*, JA van Schagen et al. (eds.) (Den Haag, SdU, 2002) 11-63.

[19] Alec Stone Sweet, Judicialization and the Construction of Governance, in: *On Law, Politics and Judicialization*, eds. Martin Shapiro and A. Stone Sweet, Oxford UP, 2002.

20 See Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance*, Washington, 2000. For its reception in the Netherlands: P.H.J. Smeets, De probleemgeorienteerde toezichtbenadering van Sparrow in relatie tot beleid

It is therefore not exaggerated, I think, to say that the foundations of law are under increasing pressure. It cannot be otherwise. In governance, the relevance of formal arrangements and formal rules is seen as relative to results and outcomes. We live in an age where the utilitarian decree is victorious: the immutable dictate of Justice with a capital J as exemplified in the formal unchanging and universal rule has given way to fluctuating considerations of social utility.

4. The ship

The above-mentioned features of governance cannot be captured in a house-metaphor. Rather it is the image of the ship that comes to mind as the most appropriate metaphor for governance.

a. *The achievement of aims:* Usually ships do not stay anchored. They may remain in the harbor for some time, but they are meant to move and to reach a definite destination. As I noted above, this orientation to a specific purpose or aim in indeed characteristic for governance. The achievement of goals is deemed more important than compliance to fixed rules. This entails a constant monitoring. Monitoring whether the ship is still on course and to what extent the destination is approached. Quality-systems are designed to do just that.

b. Consensus on aims to be reached. As I noted elsewhere[21] the governance vernacular consistently depoliticizes the debate on the various aims. In most writings on governance such fundamental consensus on substantive values and aims is either presupposed or emphasized explicitly. Governance is said to be `backed by shared goals'[22], it involves a process of `building consensus'[23], and starts by issuing `mission-statements' in which the fundamental objectives and aims are announced. Those who advocate governance are not always so naive as to assume that consensus exists right from the start, but believe that it can and should arise. It is assumed that if the right information is provided and if the right context is created for ongoing discussion, consensus on goals and values may gradually emerge.[24]

c. *No room for democratic debate*

The most famous ship-metaphor is from Plato, who used it to criticize Athenian democracy:

---

en wetgeving, in: *Van het toezicht, de veiligheid en de wetgeving, opstellen aangeboden aan Ferdinand Mertens, oud-inspecteur-generaal van de inspectie V&W,* SdU uitg. Den Haag, 2005, p.131. See also: Verkenning burgerschap en andere overheid, memorandum Second Chamber, 2004/05, no 29361, 9.

[21] See my `Governing by Goals: Governance as a Legal Style', supra, n. 3

[22]J.N. Rosenau, Governance, Order and Change in World Politics, in: J.N. Rosenau and E. Czempiel, supra n 5

[23] Hewitt de Alcántara, supra n. 2

[24] G. Majone, "Analyzing the Public Sector: Shortcomings of Policy Science and Political Analysis", in: F Kaufmann (ed.), The Public Sector: Challenge for Coordination and Learning (Berlin/New York, Walter de Gruyter, 1991) 29-45.

Imagine then a fleet or a ship in which there is a captain who is taller and stronger than any of the crew, but he is a little deaf and has a similar infirmity in sight, and his knowledge of navigation is not much better. The sailors are quarrelling with one another about the steering --every one is of opinion that he has a right to steer, though he has never learned the art of navigation and cannot tell who taught him or when he learned, and will further assert that it cannot be taught, and they are ready to cut in pieces any one who says the contrary. They throng about the captain, begging and praying him to commit the helm to them; and if at any time they do not prevail, but others are preferred to them, they kill the others or throw them overboard, and having first chained up the noble captain's senses with drink or some narcotic drug, they mutiny and take possession of the ship and make free with the stores; thus, eating and drinking, they proceed on their voyage in such a manner as might be expected of them. [25]

Plato conceives of democratic debate as just a nasty quarrel of ignorant sailors because he did not see the need for a debate on the *destinations* to be reached[26]. For him, these destinations are fixed. Politics is about how to arrive at these pre-ordained destinations. However, that means that politics is an expert craft and can be learned. We see the same emphasis on learning in the governance- style of regulation[27]. Citizens, organisations and companies are all admonished to be engaged in a continuous learning-process[28]. They are supposed to overcome their partial interests, partial goals and imperfect knowledge by engaging in a collective process of -guided- learning. Obviously, the image of learning presupposes that there *is* a shared goal to be learned, that there *is* a form of perfect knowledge to be reached and that there *is* something that can be called the general interest.[29]

d. *Lightness and Flexibility*

Ever since the Armada was defeated dramatically by the light and versatile British fleet, it is clear that ships are more successful if they travel light. The principle of proportionality expresses the requirement that one should not take any action that exceeds that which is necessary to achieve the desired aim.[30] Since rules are generally considered relatively 'heavy' instruments to achieve the desired goals, the principle requires that rule-makers first ask themselves whether the aim justifies such heavy means, or whether lighter, less expensive and more flexible instruments are available and it requires that if the latter are

---

[25] Plato, *Politeia*, Bk VI. This translation is taken from http://classics.mit.edu/Plato/republic.7.vi.html, (transl. Benjamin Jowett) visited June 14, 2011.

[26] Renford Bambrough, Plato's Political Analogies, in: Peter Laslett, (ed.) *Philosophy, Politics and Society*, Oxford, 1975, pp.98-115

[27] G. Majone, Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach, in: *Journal of Institutional and Theoretical Economics*, 157, (2001) pp. 57-78.

[28] M. Shapiro, "Deliberative", "independent" technocracy v. democratic politics: will the globe echo the E.U., in: *Law & Contemporary Problems*, Vol. 68, 2005, pp. 341-356.

[29] See my article on Governance, supra, n. 3, section 7; F Kaufmann (ed.), *The Public Sector: Challenge for Coordination and Learning* (Berlin/New York, Walter de Gruyter, 1991); A. Føllesdal, The Political Theory of the White Paper on Governance: Hidden and Fascinating, in: European Public Law, Vol. 9, Iss.1, 2003, pp. 73-86.

[30] See http://europa.eu/scadplus/glossary/proportionality_en.htm last visited June 14,

available, they should be awarded priority.[31] As for flexibility, I already mentioned the reluctance to work with fixed rules and the preference for arrangements that can be adjusted to changing targets and rising ambitions.

5. Consequences for legal theory

So we see that the new style of regulation that is advocated under the banner of `good governance' affects the legal system to such an extent that it can no longer be ignored. However, this is exactly what happens[32]. Governance is seen as a phenomenon that should be studied by those who engage in political studies, administrative science, or management studies. It is seen as separate from law, and far removed from the proper field of legal academics.

II think that there are two reasons for this neglect. In the first place, legal academics are more concerned with the product than with the process. The prevailing attitude of most legal scholars or students of legal theory is to regard policy-making -with or without politics- and governing -with or without government- as activities that should be kept separate from law. Legal academics (as well as legal practitioners) usually deal with rules and regulations, but not with the art of rule-making.[33]

The second reason is that legal academics often identify with the judge. Despite the fact that many lawyers do not act as judges but are employed as experts in rule-making[34] the prevailing -ideal- model of the jurist is and remains the judge. The main concern of judges, however, is to find reasons that inform and justify their decisions in solving cases. Only valid law (precedents, rules, contracts) can supply such reasons. Soft law is a very dubious source for such justificatory reasons, although there are –increasingly so- cases in which there is no other alternative than to resort to soft law. So the main concern of legal practitioners, notably judges, is to demarcate valid from invalid law, and distinguish binding reasons from non-binding ones. It is easy to see that governance, with its emphasis on the importance of informal arrangements, is utterly unattractive if not completely irrelevant in the face of such demands.

Yet, we may question the wisdom of this conventional strategy. In the first place, it does not help the judge to prematurely remove from view the many sources and forms of rules and regulations that fall outside the scope of true and formal law. In practice, legal officials have

---

[31]See the Conclusions of the European Council of Edinburgh, 1992, which were reaffirmed in the Treaty of Amsterdam. For an extensive overview of the various legal instruments, see L Senden, op.cit. supra n. 15.

[32] See also my article on Governance, supra, n. 3.

[33]Cf. LJ Wintgens, "Legisprudence as a New Theory of Legislation" (2006), Ratio Juris, Vol. 19, No 1, 1-25. Also: Mauro Zamboni, *The Policy of Law: a legal theoretical framework.* Oxford: Hart Publishing, 2007.

[34]See also Unger's criticism of this one-sided emphasis on adjudication: R.M. Unger, Legal Analysis as Institutional Imagination, The Modern Law Review (1996) Vol. 59, No 1, 00.1-23.

to do with these alternative forms of rule-making. They have to deal with the often unclear status of codes, self-regulatory arrangements, and half-baked quality-systems and should take them into account even if these strange items fail to pass the traditional tests of binding law.

In the second place, it is simply the core-business of any serious doctrinal academic to systematize the legal material and to try to turn it into a coherent and well-organised whole. In view of the fragmented landscape, offered by the diversity and plurality of institutions and persons entrusted with making and enforcing rules, this task is probably more difficult than ever, but that is only a extra reason to take them into account. To discard these new forms from academic inquiry is like acting as a librarian who ignores digital sources.

In the third place, one may wonder to what extent it is advisable to cling to the traditional role of housekeeper if the house is about to be converted into a ship. For most of those present here, it is already clear that it is no longer possible to confine oneself to the national legal system, leaving it to the occasional European law specialist to `do something about Europe'. European law pervades national systems to such an extent that these tasks can no longer be outsourced. But the same applies to the regulatory instruments and arrangements that are developed at the regional level or in institutions that are assigned the task of working out and implementing a well-defined goal. The products of steering groups and committees that are devoted to improve housing conditions, the educational system or health care cannot be seen in isolation from traditional law. In fact, it may be high time to study from a legal point of view these products, since they are often drawn up by people who lack legal training. The many confusions that surround these products, the uncertainty about their status, the fact that nobody knows who is entitled to enforce them or to change them, call for legally trained minds.[35]

Finally, there are important questions to address that fall outside the scope of immediate legal practicality. There are a number of questions, both empirical and normative, to address. It is in itself a fascinating phenomenon that the emphasis on rules has shifted so dramatically to an emphasis on goals. How can this shift be explained? And how can we account for the underlying assumption of consensus on the desirable aims to be pursued? What is the position of the citizen if collective institutions rather than individual citizens are the norm-addressees. What is the role of democracy in a context in which accountability *post hoc* is deemed more important than participation in the process of decision-making?[36] To what extent should law be allowed to be instrumentalised as mere means to achieve aims and policies?

Traditionally, these different questions are assigned to the different roles that are taken by the actors in legal academia. The judge-oriented and systematizing efforts are assigned to those who are thought to adopt an `internal' point of view, whereas the empirical and normative questions that pertain to the phenomenon as such should be assigned to

---

[35] Mauro Zamboni, Globalisation and Law-Making: Time to Shift a Legal Theory's Paradigm, in: *Legisprudence: International Journal for the Study of Legislation*, Hart Publishing, 2007, pp. 125-153.

[36] See my `From Democracy Towards Accountability': in: E. Kofmel (ed.) Major Trends in Anti-Democratic Thought, Imprint Academics, 2008, pp. 165-185.

sociologists and political theorists resp. philosophers who are thought to adopt an external point of view. This may never have worked out entirely well[37], but it is certainly not advisable to reproduce the dividing line between inside and outside in the face of law as governance.

In fact, it is not *possible* to do so. The dividing lines stand or fall with the assumption of an autonomous legal system, with its own rules and criteria for validity. But exactly *that* is undermined in a governance era. In order to understand ships and to assess the degree of their adequacy, one should take into account not only their internal operation, but also the surrounding elements, the waves and the winds, and the way the ships interact with these elements. That is why I think that doctrinal scholars are not abandoning their `proper' tasks if they engage in reflections about the empirical explanations and normative implications of the new situation. In fact, such reflections would allow them to carry out their systematizing tasks more successfully. Rather than struggling with hopeless questions such as whether soft law is `real', `valid' law or not, they will have the opportunity to ask themselves whether the old criteria are still suited to the tasks at hand or whether they should be modified in order to be adapted to the new situation. It is for that reason that the meeting of governance and law also invites to a meeting of theoretical perspectives. The new complex and hybrid phenomenon that we discuss today can only be studied by an equally complex mix of perspectives.

[37] See my *The Impossibility of an outsider's perspective*, supra n. 1.