

LAW & GOVERNANCE - BEYOND THE PUBLIC-PRIVATE LAW DIVIDE?



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## Foreword

Can the concept of ‘governance’ be of service to legal research, and if so, how? In as much as the governance concept may have an impact on legal research, one may assume that it is most likely to especially challenge the notion, broadly accepted among legal scholars, of an essential normative divide between the sphere of private law and that of public law. This challenge follows from the fact that the governance perspective is especially on *how* society is governed (i.e. ‘the actions’) and by *whom* (i.e. ‘the actors’) in contemporary regulatory environments that go beyond classic public regulation. It thus focuses attention on the shift from the uni-centricity (of government) to the multi-centricity of multi-actor and multi-level arrangements creating a complex societal interplay between public and private parties. Both the awareness of these shifts taking place in practice, and the research scope and accompanying theories and models, begs the questions whether the public-private divide is still a relevant distinction in legal and in regulatory practice and whether it makes sense to continue to research legal phenomena from the presumption that ‘public’ and ‘private’ represent truly distinctive normative orientations.

This volume is about such questions and aims to, rather than to try and answer these questions, let alone definitively (if that were a reasonable option anyway), look at both legal practice and at legal research and try to learn from examples of problems and approaches that fit the focus of governance. This is done in this volume under the umbrella of four themes: *Public & Private, Law & Regulation, Law & Technology, Governance & Legal Methodology*. To each of these themes, as editors we took a particular statement as guidance for prospective authors, as part of an open call for contributions to this book. The statements helped select and order the contributions, but the authors were not obliged to reflect on them. As editors we decided that in this stage of the discourse an open approach focused on identifying thought-provoking instances or narratives from legal practice and legal research, would hold more promise than pushing for a pre-ordained frame for discussion. Although such a hypothesis is hard to test, we can firmly attest that the final contributions provide the kind of inspiration that as editors we were hoping for.

The discussion of each theme includes three contributions:

*Public & Private*

The original statement to this theme was, that (in processes of privatisation and publicisation) differences between public law and private law are exaggerated and that in the age of governance we should look more for notions of commonality.

The contributions by Van Ommeren, Verstappen and Raat vary from more abstract to more practice oriented perspectives. They evidence that it would be wrong to speak of completely separate or indeed incommensurable normative realms of 'private law' and 'public law', as there may be more common ground between these realms than first meets the eye. They also show that the involvement of private persons and organizations in matters of public service is an issue which requires careful consideration and proper and clear legal arrangements

*Law & Regulation*

The original statement to this theme was that legitimacy and effectiveness of new (hybrid) types of regulation calls for a governance-based normative perspective that moves beyond the traditional public-private divide.

With the contributions of Gerbrandy, Heldeweg and Neerhof we move into the realm of regulatory governance & law. We are introduced in three regulatory challenges: (1.) the bridging of basic societal values, such as fair trade and sustainability, (2.) the proper design of hybrid rules and regimes, and (3.) in determining the proper place and legal status of technical standards following outsourcing of regulatory burden.

*Law & Technology*

The original statement to this theme was that the entanglement between law and technology in regulating new and emerging technology points at the need for multidisciplinary in legal research.

Technology advancement confronts us with the challenge of law keeping pace with technological change, but also with the fact that law can be vital to achieving proper technological innovation. The contributions by Dorbeck-Jung, Sewandono and Singh present the general point that law can indeed be facilitative to technological innovation. They also evidence that, analyzing from specific perspectives, that the role of technological experts and notified bodies, and their view on how science meets law and politics, remains a challenging issue.

*Governance & Legal Methodology*

The original statement to this theme was that the governance approach can enrich approaches to and methodologies of legal research.

So, to conclude, the contributions by Addink, Colombi Ciacchi and Van der Meulen address three issues: (1.) whether the notion of ‘Good Governance’ leans itself to provide a multidisciplinary normative perspective, (2.) the opportunities to enhance comparative studies of law by applying a multi-dimensional law & governance perspective, and (3.) whether the gap between normative and empirical methodologies can be bridged by a multidisciplinary law & governance approach.

We sincerely hope that the reader will find that this stage-setting for the book has yielded contributions from which we can learn (whether from legal practice or legal research) if, how and to what extent the concept of governance helps identify relevant objects of research and enriching methods by which research can be conducted.

We thank the NILG board for their support in making this publication possible and, especially, Eleonora Goljan and Zeeshan Mansoor for their assistance in finalizing the manuscript.

Aurelia Colombi Ciacchi  
Michiel Heldeweg  
Bernd van der Meulen  
Richard Neerhof





## Table of Contents

<b>Foreword</b>	<b>V</b>
<b>Part 1. Public &amp; Private Law</b>	
- F.J. Van Ommeren <i>Governance and the Public-Private Law Divide in the Netherlands</i>	1
- L.C.A. Verstappen <i>The Hybrid Notary in a Split Between Office and Enterprise</i>	25
- C. Raat <i>Selznick on Governance Revisited: What Can We Learn from Early Legal Sociology?</i>	59
<b>Part 2. Law &amp; Regulation</b>	
- A. Gerbrandy <i>Competition Law and Private-Sector Sustainability Initiatives</i>	81
- M.A. Heldeweg <i>Hybrid Regulation as a Legal Design Challenge</i>	105
- A.R. Neerhof <i>Standardization in Construction Law: An Example of Successful Decentring of Regulatory Governance?</i>	139
<b>Part 3. Law &amp; Technology</b>	
- B.R. Dorbeck-Jung <i>How Technology Governance Mirrors the Relation between Law and Innovation: Transcending the Myth of Law's Stifling Innovation</i>	161
- S. Singh <i>Private Regulation in the Medical Devices Sector: Muddling through Administrative Constitutionalism to Improve the Quality and Safety of Medical Devices on the European Market</i>	185
- I. Sewandono <i>The Dutch Administrative Law Embedding of the Deliverance of Contra-Expertise</i>	207
<b>Part 4. Governance &amp; Legal Methodology</b>	
- A.L.B. Colombi Ciacchi <i>Comparative Law and Governance: Towards a New Research Method</i>	221
- G.H. Addink <i>Governance and Norms: An Interdisciplinary Approach of Good Governance</i>	241
- B.M.J. Van der Meulen <i>Governance in Law: Charting legal intuition</i>	273
<b>About the authors</b>	<b>309</b>