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From Houses to Ships: Governance as a Form of Law[1]

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Governance may be a familiar concept for political scientists or economists but is usually met with mixed feelings by lawyers. In law schools, governance is still considered as a fashionable buzz-word, used mainly to attract funding that would have been unavailable for traditional legal doctrinal research. Even those who are more sympathetic towards governance, tend to regard it as a phenomenon which is located 'outside' the law. Chairs and research centres are usually titled "Law and Governance", just like Law and Economics or Law and Literature, titles that reveal the underlying assumption that this is a phenomenon separated from law proper. I think that this assumption rests on a misunderstanding and that it would be more appropriate to see governance as a particular form of law.

How can we explain the reluctance to view governance as just another form of law? I think that some features of governance practices conflict with some fundamental and shared intuitions of lawyers about what can be considered as essential for law. In order to argue my point of view I will make use of two metaphors which nicely capture the differences between this classical idea of law and the assumptions and ideals underlying governance. The former can be analysed by means of the well-known metaphor of a house, whereas the latter are more aptly conveyed by means of the metaphor of a ship.

My argument is structured as follows. In section 1, the classical idea of law is analysed by means of the house-metaphor. In sections 2 and 3 I will argue why governance should be considered as a form of law. In section 4 I will pay attention to the most important preoccupations of those who advocate and practice governance; and I will argue that these assumptions cannot be conveyed by the metaphor of a house at all but rather in the–equally well-known–metaphor of a ship. Finally, in section 5 I will try to unravel the tensions between both metaphors and I will conclude with some remarks concerning the implications for legal research.

The house of law

It is risky to sketch the assumptions of lawyers concerning the nature of law, because different lawyers may entertain different notions of law which are intrinsically connected to the different activities in which they are engaged. Judges and legislative drafters entertain different views of law. Yet, I think it is possible to identify certain basic intuitions shared by all those who have received legal training, most of which

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may remain implicit and unconscious. These basic intuitions can be identified by taking a look at the ways in which lawyers speak about law.

Characteristic for the way in which lawyers speak about law is the tendency to see law as a system with its own internal ordering, its own criteria, values and methodology. A dominant assumption is that those who are working 'within' the system act and think differently from those who are working 'outside' the legal system. The inside/outside dichotomy is not only present among legal practitioners and legal academics but also prevails among philosophers of law. There is a fierce philosophical debate about the question whether principles are 'extra-legal' standards or whether they should be viewed as legally binding (Dworkin, 1987, p. 37). In academia there is discussion on whether law should be studied from an internal or from an external perspective (Kelsen, 1945, pp. 29-50; Hart, 1994, p. 56). And finally there is a debate on whether the criteria for good law are external or internal (Fuller, 1969).

All this inside-outside talk only makes sense if it is assumed that there is something that separates the inside from the outside; something in which lawyers live, think and work and which protects them from the outside world, or –in the eyes of critical outsiders–: which impedes a good view of what is happening in the real world. By both camps, inhabitants as well as critical outsiders, law is experienced as a house. The house-metaphor (Lakoff & Johnson, 2003) captures a number of features which are usually thought to be characteristic for law (Miller, 1979, p. 209; Westerman, 2013) also. These are:

Territoriality

A house is bound to the ground on which it is erected. A legal system is also usually linked to a well-defined territory that demarcates its sphere of validity (Lindahl, 2010). The various national jurisdictions are regarded as houses in a street, each on its own territory and with its own internal order. Foreign jurisdictions are seen as houses in, at best the same street or quarter, but will never be perceived as member of one's own domestic household. The various areas of law (private law, criminal law) figure as separate rooms of the same house. This view is illustrated by the distinction, common in legal doctrinal research, of two kinds of comparative research: external comparative analysis dealing with other houses in the same street and internal comparative analysis that deals with the question whether a certain issue should be covered by private law or by administrative law, by criminal or constitutional law. The latter form of analysis tries to allocate an issue to a particular room in the house.

Autonomy

Like a house, a legal system is shielded from the outside world by walls. The degree in which the house can be more or less open to the outside world is determined by the inhabitants themselves. They are free to decide on whether to open or to close doors and windows.

This relative autonomy is due to the particular feature of legal systems that contain concepts and rules which are not completely but largely determined by the legal system itself. This might need some further explanations. Legal systems differ from other normative systems by the fact that they contain two types of rules: rules that regulate the behaviour of the citizens and rules that regulate the behaviour of officials. This second type of rules are important to understand the self-replicating nature of legal systems. These rules can be regarded as meta-rules: they regulate how law should be created, changed and applied (Kelsen, 1945; Hart, 1994). In

order to decide therefore on what a valid rule is, one refers to other (meta-)rules that determine the creation of a valid rule. What valid law is, is determined by...valid law. Of course, no system is completely closed and autonomous, but the degree in which a system can realize its autonomy depends on the self-replicating force of this system.

In an autonomous system the meaning of legal concepts is exclusively determined by other legal rules. In a less autonomous system, those meanings are not exclusively or not at all regulated by legal rules but by other non-legal rules, such as moral or political systems. In order to decide whether some act should be regarded as a 'breach of contract' the conditions are partly determined by the legal rules concerning contracts, but may also be determined by non-legal considerations concerning fairness and reasonableness that may not be incorporated in the legal system. Often it is up to the legislator -one of the inhabitants of the house- to decide whether such non-legal standards should be incorporated in the law or not; whether windows should be opened or not.

Coherence

A house is not only separated from the outside world but has also its own internal order. In the legal system this order is mainly brought about by the fact that the various legal concepts refer to each other (Hage, 2009). The legal conditions for a valid contract, such as for instance the requirement that parties should be rational or free, are themselves generated by other legal rules, stipulating the conditions under which one can be held to be rational, and so on. A system is marked by a network of meanings that refer to each other. Coherence is therefore dependent on the degree in which these meanings are consistent with each other and support each other like the walls that support the roof.

Continuity and stability

Just like a house, a legal system is supposed to rest on foundations. Human rights and basic principles are generally regarded as such foundations. The most important principles are the principle of legal certainty and the principle of equality. Obviously, the meaning and extent of these principles are not fixed and can be developed over time, as is illustrated by the development of the principle of formal equality into more substantive varieties. However, their function remains the same: principles act as reasons for the justification and criticism of rules. In this respect, they perform the same function as rules, be it on a different level. Whereas rules serve as justificatory or critical reasons for decisions or actions, principles serve as justificatory or critical reasons for rules (Raz, 1972).

This foundational layer of principles is usually regarded as indispensable for a stable and continuous house of law, able to resist the corrosion of changing political regimes and times. Although maintenance and a modest degree of renovation is deemed necessary (the well-known 'flexibility' of law needed to adjust the law to changing circumstances), foundations are seen as essential for a house which is robust enough to withstand the ages.

Of course, I do not want to suggest that the above-mentioned features are essential features of law. I only intend to reconstruct the assumptions that I think play a role in the notions of lawyers concerning their profession. Although all four assumptions are contested –in fact they were never taken for granted– I nevertheless think that these are the tacit understandings of those who have received legal training, whether they work as legal practitioners or as legal academics. This does not imply

that all lawyers are conscious of entertaining these notions. But it is remarkable that whereas first year law students do not yet recognize the house-metaphor as adequate or appropriate, second year students immediately react with laughter and a great deal of recognition, even though they are not aware of the precise reasons for this instant recognition. We will see, however, that the familiarity of the house-metaphor is in decline. But let me first analyse the notion of 'governance'.

The concept of governance

The concept of governance has become so dominant in contemporary political discourse that one tends to forget that its popularity is a fairly recent phenomenon (Westerman, 2007). 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 (Hewitt de Alcántara, 1998), 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.

Not only its scope has been broadened. The complexity of the term is further increased by an inherent 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. This was for instance the case in the White Paper on European governance, issued by the EC, 2001[3]. It is probably due to this normative and programmatic nature of the term, that whenever political scientists use the term in a descriptive fashion, as an analytical tool or even as an intellectual perspective (Stoker, 1998), they usually define governance in negative terms. Governance is regarded as 'governing without government' (Rosenau & Czempiel, 1992; Rhodes, 1996), or as 'policy-making without politics' (Kazancigil, 1998), 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 (Kazancigil, 1998). Here the origins of the notion as a requirement to Third World Countries is still traceable. Since the formal institutions of those countries are seen as bureaucratic, slow, inefficient and in many cases also corrupt, donor countries tried to circumvent these formal bodies and decided to focus on 'civil society'. Instead of good government good governance was required. From its inception, governance was therefore always linked to a preference for non-state and informal forms of regulation. They are assumed to work in a more efficient and flexible way than formal and governmental institutions.

Governance as regulation by informal organisation is to a large degree inspired by New Public Management (NPM), that originated roughly at the same time and which formed the framework of reference in the development of criteria for good governance (Osborne & Gaebler, 1992; Pollitt, 2003). An important element of NPM is the emphasis on the effective and efficient achievement of aims. What is monitored and enforced is not the extent to which rules are followed but rather the degree in which results are obtained. Not compliance but performance is central concern in NPM (Westerman, 2018). Although the heydays of NPM are over now, this latter concern is still prevalent in governance discourse and practice. Governance cannot

3. See the World Governance Index (2009 Report) www.world-governance.org/spip.php?article469 geraadpleegd 14 juni 2013.

be understood properly without taking into account the central role of targets and results ('deliverables'). Governance is deemed 'good governance' if two requirements are met. In the first place the aims themselves should be specific, measurable, achievable, realistic and time bound (the so-called SMART principle). Second, there should be a system that can be used in order to measure the extent to which aims are realized and results obtained. So-called Quality Management Systems do precisely this. These systems concretise and specify the criteria that should applied in the evaluation of performances.

Quality Management Systems play a double role. In the first place they formulate a couple of concrete goals that are supposed to guide the behaviour of the regulatees. As such they perform a heuristical function. But simultaneously they play a justificatory role. The mere existence of these systems can be used as an argument to convince others that one really and seriously implemented the imposed policy-aims and that progress towards these aims is continuously monitored and checked. Quality Management Systems not only prescribe goals but are simultaneously used as documentary proof of one's achievements (Westerman, 2018). This second function of Quality Management Systems is important because accountability and transparency are seen as signalling good governance practices (Davies, 2001). Characteristic for governance is that the regulatees need to prove constantly that performances are improved effectively and that targets are met. Both the criteria and the performances should be publicly accessible.

Governance as law

In view of the intimate relation between governance and NPM, one might be tempted to think that governance is 'just' a management system which has little to do with the legal system. I think that this is a misunderstanding. Governance is nowadays a form of regulation which pervades any institution, whether public or private. Museums, universities, companies or international organisations, they are all regulated in this way and are constantly engaged in discovering best practices, meeting targets and accounting for performances.

Moreover, governance techniques are indispensable for the particular form of legislation which I analysed as 'outsourced legislation' (Westerman, 2018). Starting-point in this form of regulation is the formulation of aims by the legislator who then outsources further rule-making to the norm-addressees. The law that imposes the desirable aim is not addressed to the individual citizen but to collective actors: institutions, administrative bodies, organisations. These actors are addressed in the capacity of policy-makers who have the duty to make rules and to devise policies in order to achieve the imposed aims, and to account for their performances. These institutions have therefore the

legal obligation to practice good governance in order to reach the imposed goals. If institutions fail to draft rules, codes, protocols or performance-indicators, and to account for their achievements, they risk losing their legal status, license, financial resources or at least their reputation.

Merely formally speaking the legislator does not impose any obligations as to how goals should be reached. The regulatees are formally free to decide on the rules and policies they want to adopt, as long as the aims are met. One might be tempted to think that for this reason governance practices are not a lawyer's concern. Only the abstract duty of care issued by the formal legislator belongs to valid law in the proper sense of the word. Regulations that are issued by the institutions themselves are at best mere 'regulation' and would thereby largely fall outside the legal domain.

I think that this point of view is too limited. First of all, the rules that are drafted by the institution should be seen as an implementation of formal law. To study formal law without taking into account how it is implemented is just as short-sighted as a study of statutory law without paying attention to jurisprudence.

Secondly, one might say that since this form of regulation is in fact commissioned by the formal legislator, it operates in 'the shadow of the law'. For a lawyer there may be an important difference between 'hard' and 'soft' law, but for the average employee of an institution it is of little consequence whether the rules are issued by the formal legislator, by the inspectorate or by its own board of directors. Even if no official sanctions are attached to non-compliance, the rules will be perceived as legally binding.

Thirdly, also the judge has to take into account these 'soft' forms of regulation. In order to assess whether an institution has fulfilled its duty of care, the judge should be informed about the level of performance that is generally accepted in a certain sector or profession. The more the judge refers to these standards the more they turn into authoritative guidelines.

Finally, the traffic between abstract duties of care and soft law regulation is not a one way affair. Not only do the abstract duties of care give rise to soft law, but the reverse also obtains. Abstract formal legislation is only possible in a context in which companies and institutions already practice some form of governance. Thanks to management techniques of continuous monitoring, formal legislation can be 'emptied' and can be confined to issuing mere goals. Although the enormous quantities of rules affect the daily lives of citizens to an extent and with an intensity which was inconceivable in the past, these rules are for a large part merely connected to the formal law by the thin thread of a duty of care. The more governance practices are developed, the emptier the formal legal system.

Governance is therefore not only a fashionable word, not even merely a rival manner of regulation, but a way of governing which has become so intertwined with the official legal system, that we might safely say that it has become a particular form of law.

Governance as ship

But this particular form of law has a number of characteristics which cannot be captured by the familiar image of a house that resists the storms of history. The metaphor which is much better suited to visualize the ideals and practices of governance is that of a ship. The ship is not a novelty in political literature. The ship

of state dominates political thought since Plato who compared Athenian democracy to a ship that has become ungovernable after drunken and quarrelsome sailors deposed the competent captain (Plato, *Politeia*, Bk. VI). A good state is compared to a ship that keeps its course and effectively reaches its destination. The power of the metaphor resides in its ability to evoke a set of features and to connect them with each other. These features are in my opinion all observable in the ways in which governance is preached and practiced.

Achieving aims

Ships are not permanently anchored. They may stay for a while in the harbour but, as was observed by Thomas Aquinas (*Summa Theologiae*, I-II, qu. 2-5), they are built in order to reach a certain destination. As I indicated above, this orientation to goals is characteristic for governance. Achieving goals is seen as more important than compliance with a set of fixed rules. This orientation invites to continuous monitoring. It is necessary to assess periodically whether the ship is still on course. This is the function of Quality Management Systems.

Consensus about the destination

The destination of a ship is rarely topic for heated debate. In most publications on governance a similar fundamental consensus is assumed about the values to be cherished and goals to be obtained. Governance is 'backed by shared goals' (Rosenau, 1992), is accompanied by a process of 'building consensus' (Hewitt de Alcántara, 1998) and where the aims are not imposed by the legislator they will be expounded in 'mission-statements' in which shared commitments are announced.

Emphasis on learning

Plato conceived of democratic debate as the quarrels of ignorant sailors because he assumed a metaphysically objective destination and ultimate aim to be reached by society. In his view, politics was confined to the (more or less technical) question how this pre-ordained destination should be reached (Bambrough, 1975). This implies the well-known Platonic view that politics is a skill practiced by experts, a subject fit for teaching and learning.

Similar assumptions are cherished in the governance discourse (Majone, 2001). (Continuous) learning is emphasized–the learning citizen, the learning organisation– (Shapiro, 2005). To emphasize learning, however, implies that something can be learnt, that there are shared goals and a general interest and that the most important issue revolves around the question how we can realised that shared aim (Kaufmann, 1991; Føllesdal, 2003). Although there is much talk about deliberation, the guiding idea is not what should be achieved but how. The aims themselves are not subject to debate.

Lightness and flexibility

This is the only aspect of governance practice and discourse which does not recur in Plato's metaphor, since Plato's ideal state should be expression of an eternal harmonious order. But since the Armada was defeated by the light and versatile British fleet, it has become clear that ships fare better if they are not too heavily loaded. We see this requirement recur in the principle of proportionality according to which one may only take measures that are proportionate to the aim. Since drafting rules is regarded as a relatively heavy means to realize certain ends, the principle of proportionality requires that rule-makers should first wonder whether

the aim justifies such heavy measures and if not other, cheaper and lighter means can be used to the same effect. If this is the case, these lighter and more flexible means should be preferred. Fixed and entrenched rules cannot be adjusted to changing targets and rising levels of ambition. These preferences are illustrated by the pleas in favour of experimental legislation and sunset-legislation which is valid for a limited time-span only[4].

4. See http://europa.eu/legislation_summaries/glossary/proportionality_en.htm accessed 14 November 2018.

The relation between ship and house

The assumptions that converge in the familiar ship metaphor conflict with the basic assumptions most lawyers entertain about law as discussed in section 1. Let us take a look at these assumptions one by one.

A. Territoriality no longer seems to be the structuring principle of regulation. Its role seems to be taken over by the central aim. Different institutions are grouped together and organised around one central aim, thus creating a 'sector', or (in international law) a 'regime'. Those institutions may draft rules but they might also be concerned with monitoring and enforcement. These activities are not as clearly demarcated as before (Rubin, 2005). The 'sector' also comprises institutions of different hierarchical levels. Benchmarks may be established by international standardization committees, by national professional organisations or by ad hoc committees of a certain institution. Their rule-products may exercise more normative force than formal legislation by the national legislature. The various legal orders cross-sect and are no longer neatly separated from each other as houses in a street.

B. The assumption of a certain autonomy of law is increasingly problematic. The idea that legal actors have the choice to open or to close the windows seems less tenable than ever before. One can even doubt the existence of walls, separating the house of law from the outside world. Formal law is complemented if not substituted by all kinds of informal forms of regulation such as self-regulation or regulation by private actors, resulting in codes of conduct and alternative forms of standardisation and certification. These informal sources are not regulated by meta-rules, as is the case in classical legal systems. Performance indicators and benchmarks, although enforced as if they are formal rules, may nevertheless be created by actors who lack formal competence to do so. Many codes of conduct only specify primary rules (do's and don' t's) but do not contain (secondary) rules that regulate the ways in which these primary rules are created, changed or adjudicated. Or such secondary rules may be incomplete. Usually they only stipulate who are competent to make rules, but are vague about the ways in which these rules can be changed

(Enequist, 2015). Many forms of soft law, such as communications of the European Commission, have an unclear legal status (Senden, 2004). In all these cases the boundaries of the legal system are no longer determined by the system itself.

C. These forms of soft law also affect the extent to which law can be systematicised into a more or less coherent whole. Rules that are drafted by non-legal actors may contain concepts which are not legally defined and are often derived from the non-legal practices in which they are developed. That means that the links connecting legal concepts are less tight or even completely absent.

D. The features of continuity and stability are probably the most difficult to reconcile with governance ideals and practices. There is a certain tension between the ideal of efficient and efficacious achievement of aims and the principle of legal certainty. As I noted above, results are deemed more important than rules. Performance-indicators lead a temporary existence. They are at best bus-stops on the road to the fulfillment of the ultimate aim: as soon as they are reached they are usually supplanted by more demanding indicators. The same applies to that other foundation of the house of law: the principle of formal equality. Rules should be adjusted to particular circumstances in order to reach the underlying policy-aims. In many reports on better or smarter rulemaking, general rules are repeatedly criticised as obstacles that fail to keep pace with rapid developments in an increasingly complex society. The same applies to adjudication, where tailor-made decision-making and awareness of preferred outcomes are advocated rather than consistent rule-application (Stone Sweet, 1999). Finally, this preference for differentiation can be witnessed in the discourse on efficient enforcement: notoriously bad performers should be judged and treated in a stricter regime than institutions which have shown to perform well (Ayres & Braithwaite, 1992)[5].

5. See my criticism (and their answer) in *Regulation & Governance*, special issue on Twenty Years of Responsive Regulation: An Appreciation and Appraisal (edited by C. Parker), March 2013, vol. 7, n° 1, pp. 80-94.

The implications for legal doctrine

Governance is a (new) way to order and regulate society and has turned into a form of law. Why then this preference for titles such as 'Law and Governance' as if governance is a phenomenon external to law, a kind of favourite plaything for political scientists or management specialists but hardly the subject of serious legal analysis? Although administrative lawyers are usually more inclined to take these practices seriously than criminal law scholars, we might safely say that in general legal scholars are reluctant to study these practices as a form of law.

I think that there are two reasons for this reluctance. in the first place, legal scholars are usually more interested in the product than in the process. If they speak about 'regulation' they refer to the rules that are produced; not the actual activity of drafting rules. Regardless of whether rules are drafted by the formal legislator or by private actors, the way in which they are generated remains outside the legal framework. Legislative drafters, graduated in law, generally discover only during their professional career that rules are indeed made (Zamboni, 2007).

The second reason is that legal scholars usually identify themselves with the judge as the exemplary model of a legal expert (Unger, 1996). However, the judge's main concern is to find reasons in order to justify or to reject decisions, reasons which are valid according to law. For the judge, therefore, the distinction between valid and non-valid law is of prime importance. The narrow connection between (most) legal

doctrinal research and legal practice might therefore lead to a search for criteria that demarcate 'hard' law from 'soft' law.

One may entertain some doubts about the wisdom of this conventional strategy. Even the judge has little to gain by discarding from consideration all those sources and forms or alternative regulation. Courts are inevitably required to come to terms with the status of quality systems or self-regulatory codes, even if these are denied the status of valid law according to the rules of the formal legal system.

This applies even more to the legal scholar. Her prime task consists in ordering and systematise the legal material into a coherent whole. This is indeed a difficult task in the fragmented landscape where various institutions are informally entrusted with making rules and monitoring compliance, but the difficulty of this task only increases its urgency. The scholar who ignore governance practices acts as a librarian who does not take into account digital sources.

It does not seem to be a good idea to cling to the role of housekeeper if the house is changing into a ship. Most researchers are aware by now that it is no longer possible to confine themselves to the national legal system and to leave it to their colleagues, trained in European Law to 'do something with Europe'. European law pervades national legal systems to such an extent that such a division of tasks is no longer possible. The same applies to the many forms of governance. The rule-products of steering-groups and expert panels who deal with health or education cannot be studied as isolated from law. On the contrary, a legal framework is of utmost importance in a context of informal governance practices. A legal approach may be indispensable to clear up the uncertainty and confusion about the status of sources, rules and legal competences.

Finally, there are many important empirical and normative questions that need to be researched, even if such research is not immediately relevant for legal practice. In itself it is a fascinating phenomenon that results are deemed more important than rules. How to explain such a change? How can we understand the underlying emphasis on consensus? What is the position of the individual citizen who is affected by informal regulation? What is the role of democracy in a context in which democratic participation risks to be substituted by post hoc accountability (Westerman, 2008)? And to what degree can and should law be instrumentalised into a vessel on its way to a predetermined destination?

Usually these questions are distributed among the various kinds of legal researchers. Issues pertaining to the coherence of the legal system are entrusted to doctrinal scholars whereas normative and empirical are usually entrusted to legal philosophers or sociologists of law who claim to adopt an 'external' point of view (Dworkin, 1987). This division of tasks may never have been wholly satisfactory, but is even less convincing in a governance era. The demarcation lines separating 'inside' from 'outside' are no longer clear.

As I argued in this article, the traditional idea of autonomous law can no longer be taken for granted. If we want to understand ships and to assess their merits, we should not only look at the way they are operated from within, but we should also take into account the surroundings, the waves and the winds. That means that also dogmatic scholars should widen their scope of research in order to reflect on the normative and empirical implications of the new situation. They should address questions such as: what is the role of classical legal principles, what is their relation to relatively new

principles such as proportionality, subsidiarity, transparence and accountability? Those questions can only be addressed. Lawyers begin to be aware of the fact that their house is converted into a ship that sails to an unknown destination ■

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