When this Introduction was written, Italian Prime Minister Romano Prodi had, for many citizens, just failed to apply at the national level those new criteria of “Governance” he had introduced years ago as President of the EU Commission. In 2000, while the European Union was still suffering from the effects of the BSE crisis and its negative impact on the reputation of the European “regulatory state”, Prodi had announced far-reaching and ambitious reforms that showed that the Commission had finally recognised the need for better embedding the European regulatory and decision-making system into the European society, including a novel form of governing that would involve a reorganization of the relations between political actors and civil society, and a more democratic form of partnership between “the layers of governance”. This created a legally undefined “space” and located the Commission’s plans for “governance” somewhere between administrative and constitutional reform.

This approach was, however, not evident at the national level when, in winter 2007, the local population of the Italian city of Vicenza was denied any say on US, local and – in the end – national Government plans to install a new US Airbase and Special Combat Troops in the town. Despite the fact that Prodi had announced his resignation in the aftermath of a huge demonstration against the air base, his subsequent acceptance of the offer of creating another Government merely a week later suggested that this was more a political move designed to win back some former allies who had dared to share the Vicentinians’ concerns instead of being a reaction to the public’s opposition to the plans. As it was, the “voice” of the Vicenza population went unheard – treatment that disappointed many and challenged any “loyalty” to “the system”, as well as bringing into harsh focus the lack of any political alternative. Rather, to many involved, few options seemed likely to put an end to this opportunistic style of political manoeuvring, other than the radical one of “exit” or the establishment of new forms of legitimate social self-organisation. This discourse was not confined to Vicenza, however – the political “manoeuvring” itself shows that classical forms of state sovereignty and political representation lose their structural grip when new forms of “governance” are in development, not least in order to reintegrate large parts of the “exit-community”.

A recent German study tells us that, while there is no general legitimacy

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crisis, either on the national or international level, new multi-level global forms of sovereignty and normative societal structuring are in the making and, moreover, that different political, economic, legal, etc. positions are presently competing to produce an adequate description of this “transition” that we find ourselves in. It seems that the “governance” concept has been widely accepted as the location for this competition, but it may even represent the end of the road for that very “transition”. Indeed, momentum is certainly lost if, like this study, future research takes a Hobbesian description of state sovereignty as its launching pad, and interprets the national and global fragmentation of power and law as a painful exit from such a model while all the time praising the post-second-world-war period and its “values” as its last “golden age”. How golden was this age for the world’s poor? What ingenious mechanisms had King Midas put in place to avoid the poor being affected by his golden touch? We can neither hide nor remove the contingency of our approaches and “values” and, if we take into account the effects of the same “model” in other parts of the world, we cannot even claim that they would at least deserve acceptance in our own context.

Foucault told us that, if we want to know how “truth” is produced in a historic context, we should switch from the question “Who is governing?”, namely the question of sovereignty, to the question ‘How is power exercised?’, which is the question of the “art of governing”. Up to now it seems that any analysis of the “Erosion of State Government” concentrates either on the difficulty of intervening in globalised markets, which certainly require regulation, or on the difficulty of avoiding those frictions and negative externalities produced by autonomous national and global “discourses, institutions or systems”, like law, the economy, multinational enterprises, politics, states, religion(s), communication media, science, medicine, and so on and so forth. As lawyers we are, above all, concerned with those new legal forms that are supposed to cope with “regime collisions” and with the shift of competences to supra- and transnational or self-organising regulatory regimes. But are we in the end just talking about the effects of and speculating as to possible cures for what Luhmann called “the globalisation of functional differentiation”, or is there more? In order to understand this, Foucault would probably have invited us to launch a series of genealogic research inquiries into the architecture of the present (post-neoliberal? post-post-modern?) societal gouvernementalité (or


governance?) to discover how it is working in terms of the (risky) reproduction of the rationalities of those autonomous spheres; how “conflicts” or “collisions” between them are (politically, legally, economically, etc.) managed; and which legitimisation, control and immunisation devices are being installed to defend this “network” against decay and resistance while at the same time maintaining an openness sufficient to facilitate necessary (reproductive) criticism and change.

Do the inevitable asymmetries of this “new spirit of capitalism” better respond to the needs of the multitude of the world’s people, however? Who are the winners and losers or, rather, the included and excluded? We know that any societal re-organization (re-)produces asymmetries and, together with them, (re-)opens the normative question of how should things work (better), all of which gives rise to claims for different realisations of “the common”, of “wealth”, “justice”, “truth”, and “freedom”. The battle for the difference always refers to open or latent contemporary preferences and restrictions. “Liberating the possible” by unveiling the contingency, the radically temporary structure of the present, against any universalism and fundamentalism - this was Foucault’s adoption of the Enlightenment’s “ethos” (with and against Kant) as “critical ontology”. Now the governance concept will also be forced to stand up to such scrutiny.

The governance concept has attracted the attention of politicians and administrators, company managers and trade unionists, international development organisations, sociological, political, legal and economic scientists, and it can also be found in the debate on social movements regarding cooperation, protest and exit. Indeed, the ubiquity of the phenomenon indicates an authentic shift in the way we look at forms of societal organisation, political legitimacy, political economy, and the role and rule of law. Governance appears as the generalised new logic and style of governing through countless decision-making constellations and between various “knots” of the organised global network, i.e. between national, regional, inter- and supranational entities and institutions and other self-organised social organisms and rationalities. Governance constellations basically operate heterarchically, although this does not preclude the emergence of new hierarchies that condition decision-making when and if a solution is “deserving of acceptance”. Similarly, while governance certainly endeavours to cope with conflicts arising from society’s functional differentiations and to compensate for the inadequacies of politico-administrative performances by the modern (nation) state, governance models can neither avoid the residual inadequacy of any “form”, nor the battle for their continuous transformation.
In order to shed additional, and hopefully new, light on the various aspects of the Governance phenomenon, a conference took place on June 30, 2007 at the European University Institute in Florence, contributions to which are published in this volume. They loosely follow the structure of the conference and its division into three interconnected parts, namely “Governance, Civil Society and Social Movements”.

The first contribution provides a legal-technical, legal-political and political-economic analysis of the phenomenon. Governance will be looked at as a response to three interdependent phenomena: the erosion of state government, the emergence of post-national constellations (C. Joerges) and the deficits of traditional interventionist law (L. Zagato). At international level, the term Governance has denoted “policy arrangements” that emerge outside the administrative system of individual nation states, but which, nevertheless, have a significant impact on selected national, regional or global recipients. Examples of this are the BSE crisis, SARS and the bird-flu case. In this context, “Governance” remains rather “government” in so far as it stands for a ‘classical’ form of intervention into economic and social relations. This aspect, it should be noted, is distinct from those European, international, transnational or global activities that are not exclusively public and involve experts, knowledge pools and civil society representatives.

In some national environments, particularly in Germany, the involvement of non-state actors in law-making and their engagement in political programmes designed by governments to tackle social problems appear to be classical elements of “organised capitalism”. Corporate governance and workers’ co-determination were key sectors here, but these constellations have changed as a result of the shift in relations between “capital and labour” to post-Fordist or post-industrialist models and with the loss of previous “balances”; with the neo-liberal trend to align government, the public sector and society as a whole with enterprise management and economic efficiency criteria; with the consequent privatisation and deregulation initiatives; with the societal self-understanding as “risk society”; and, finally, with the Europeanisation and globalisation of these processes. In the course of these events, the application context and the design of governance “modes” have changed. In all issue areas and on all levels, new practices of governance collide with traditional concepts of the private and the public. This leads us to the question: if law will have to change its self-understanding and regulatory styles, what social and legal costs are involved in such a turn to governance, and what politico-societal potential does it have to offer?
The second set of contributions analyses the conditions for the possibility of Governance deriving from the network character of society. Boltanski and Chiapello’s study on the “New Spirit of Capitalism”\(^3\) shows that the “net” metaphor, above all, has freed humankind from the burden of “two-level-metaphysics”, which located single individuals on the first level while the second level consisted of conventions relating the individuals to each other in order to subject them to moral and legal judgements. For a long time these metaphysics determined the meaning of the ‘common good’ of the respective polis concepts. The net metaphor does away with this kind of transcendental conditioning of social structures, eventually allowing these structures to reveal their “pure immanence”\(^4\); their regulatory constraints are self-created and contingent, and thus require legitimate standards, procedures, and fora (mediation and decision making bodies). The question is, then, if the net as such can be subjected to justice requirements, or if we can address (self\(^5\)) regulations only to specific sectors or structured constellations of the net-matrix, like discourses, institutions, and systems, what then would be required to develop a “contextual common good”? Boltanski and Chiapello refer to the “polis” concept of embracing the regulatory requirements of the present capitalist network society as the “project-based polis”,\(^5\) a term that they use in order to combine the basic conditions of the net - its total interconnectedness, poly-centricity, basic heterarchy, “event character” and the permanent fluctuation of countless encounters and contacts – with the necessity of inserting legitimate social organisation and regulation. In the net’s seamless web, “projects” would describe countless value-producing “accumulation spaces”, the structures of which require legitimisation. From this point of view, the basic form of governance constellations could also be characterised as “project”, which would, then, describe single “horizontal” negotiation and deliberation processes whereby “public” and “private”, political and non-political actors can resolve specific economic, political, etc. controversies by establishing mutually acceptable standards. This form is precisely what the Vicentinians were asking for.

Even if we can recognize the “project character” of our present existence, however, the “project constellation” seems to be only a single variant of today’s societal network organisation. This latter form seems rather to re-coagulate into a more stable (albeit contingent) and well-structured forms, which go beyond state hierarchy and have specific Governance requisites.


\(^5\) Boltanski & Chiapello, *supra* note 3
Such forms have been described as “societal constitutionalisations”. The constitution of world society does not come about simply through international institutional relations, nor as an unitary global constitution overlying all areas of society – it seems instead to emerge incrementally through the constitutionalisation of a multiplicity of autonomous subsystems or ‘regimes’ of world society, which are required to “re-spect” each other and their natural and human “capital”. Examples of such forms include the “global economic constitution” (*lex mercatoria*), the global constitution of the science and education system, the “digital constitution” of the Internet, as well as a multi-level global political constitution. All the typical constitutional “juridification” devices can be found here: rules on organisation and procedures, the regulation of each sector’s reflexive “boundary-relations” by the establishment of individual liberties and guarantees for other autonomous societal sectors (fundamental rights) – even relevant environmental protection rules must be provided for each specific sector.

Two of our contributions discuss the plausibility, normativity and legitimacy of such “civil constitutions” and the role they allow the so-called “civil society” to play in their Governance constellations (D. della Porta, G. Frankenberg), while the other contributions exemplify the conditions for the creation of such civil constitutions in specific fields. One paper elaborates the problems of corporate governance and respective concepts, which try to fight forms of intrinsic institutional corruption with rules of corporate social responsibility (J. Dine), while another application is in the context of “the social dilemma of European integration” and, in particular, a new concept of labour – labour that “the new capitalist spirit” would prefer to keep fragmented and freely floating in accordance with its needs. This paper asks: how can Governance formations be used (by social movements) on the European level to develop “flexicurity” standards? (G. Bronzini). Finally, how does the formation of a sectorised network society and of its Governance constellations effect classical theories of constitution and democracy and where can the new global movements be located here? (G. Allegri).

The last set of contributions focuses on the possibilities of Social Movements to re-claim “the common” in different, “alternative” forms. In terms of law, we are now moving on from “justice as adequate complexity” – with social movements as an unspectacular part of a complex societal design – to “justice as continuous becoming”. This is the understanding

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that the achievement of (more) justice always requires, challenging the selective and restrictive results of the government or governance of “life”, along with their mechanisms of discipline and control. The first contribution to this section (M. Blecher) shows how the governance phenomenon brings law back to its “original form” of norm-production: firstly, law is no longer anchored to a specific “polis” or “state” and is thus able to carry the traces of different legitimate definitions of the common good as long as its own normative requirements for creating (ever more) justice under conditions of uncertainty and ever exceeding possibilities are achieved. Secondly, law reveals itself to be constituted by a paradox self-reproductive movement: law organises a continuous battle on normative standards by deconstructing the restrictions of the global social system on democracy, common welfare and justice, and this change of legal standards for political, economic, etc. organisation and operation implies a change in law’s own procedural and substantive parameters, which were supposed to immunise the social system against uncontrolled transformations. In other words, law runs both immunisation strategies and strategies against immunisation. This paradox has been managed by introducing different actors, levels, locations and procedures of law-making, but also by being mobilised by social movements and their claims for freedom, autonomous self-construction and new social rights. Law acts politically here, and in affinity to those movements that struggle against social immunisation and control beyond systemic borders and are exist in continuous self-transformation. The recognition of this affinity and the reconstruction of Jhering’s “struggle for law” as the “struggle of the movements” appear to be necessary prerequisites for the continuation of critical legal thought. The second contribution (R. Ciccarelli) analyses the conditions and consequences of this approach for the organisation of governance projects and constitutions, and for the political-legal necessity to open governance procedures up to the “differences” introduced by social movements beyond those purely strategic conservation interests. One can say that social movements move “in parallel” to the paradox of Law in Movement: they may well be part of the balancing process that aims for adequate societal complexity and thus produces the justification for necessary changes. However, they basically reject the notion of being just another “stakeholder” or “participant” in the governance game; they are not concerned with those “rationalities” and “interests” requiring compatibilisation among each other.

The third contribution by A. Negri argues that social movements are aiming for an permanent acte constituant or positive excess, which not only

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7 R. von Jhering, “The Struggle for Law” or “Der Kampf ums Recht” (Wien: G. J. Manz, 1873)
improves the existing parameters of the common but also re-invents the whole organisational and decisional set-up, including those new common institutions and respective governance procedures. As a result of the unavoidable contingency of these parameters and institutions, both disobedience of and exodus from movements are taken for granted. Can law provide governance formations where this constructive “squaring of the circle” of “positive justice” takes place, while preserving the openness of the process against any false uni- or multilateral “pacifications” or “synthesis”?

G. Teubner’s contribution is rather sceptical in this respect, as, for him, the problem lies with the insurmountable effects of advanced functional differentiation: law can experience the problem of the integrity of body and mind only through the inadequate sensors of irritation, reconstruction and re-entry. The deep dimension of conflicts between (specialized) communication, on the one hand, and (the needs of) bodies and minds on the other, can at best be surmised by law, whereas justice aims (negatively) at removing unjust situations, not at creating (positively) just ones. Legal prohibition seems the only – inadequate – way to apply restraints to the forms and effects of (functional) communication. However, positive excess and justice both claim to create forms of resistance and consequentially impose a (different) politico-institutional asset without following systems, discourses and corresponding strategies. They move “tactically” along the (communicative) structures of territories and contexts and exploit their “fractures” or “gaps of control”. Nothing can be generalised here, nor any theory built on it; such exceeding tactics are composed of singular events. Their descriptions of non-functioning and changing functions always remain single narrations. They can tell us, however, that the “battle for law” must be continuously re-started.

By way of conclusion, J. Hendry’s contribution (“Coda: Governance, Civil Society & Social Movements. Re-Claiming ‘the Common’”) will summarise the debate on governance, civil society and social movements, and give her views on the various positions adopted in the preceding section.