Index

abstract duties of care 2–3, 107
concretisation of 35–6
principles-based regulation, as 3
Acts
see also the Netherlands
accountability norm in 29
reproducing EU framework
directives 24–25
Social Services Act (2001) (Sweden) 2
Wildlife and Natural Environment
Act (2011) (N Ireland) 2
antecedents
causes, as 132
conditions, as 132, 134
authority
exchange theory, in 84, 86–7, 89–91
indispensable item, as 100
outsourced law, in 79–80, 100
power distinction 82
principal/agent relationship, in 79–80
proliferation of 101
representative democracy, in 79, 82–3
transfer of 100
Bentham Panopticon 179–80
Braithwaite’s pyramids 149, 150, 155
case law
De Nederlandsche Bank NV v.
Stichting Vie D’Or 112–13
Elisabeth Schnitt v. TÜV Rheinland
111–12
‘Kelderluik’ case 109
Urgenda Foundation v. The State of
the Netherlands 108, 109, 114
circles of interaction 14, 48
citizenship 79
Code of Conduct for the Protection of
Children from Sexual Exploitation
in Travel and Tourism 61
compliance 39–40
comply or explain 40
norm- 178–9
prioritising performance over 40, 41
concretisation 26–8, 30, 35, 41, 48, 103
see also norms; specification
accountability norm, of 31–2
aspirational norm, of 31
implementation norm, of 31–2
never-ending quest for 49
themes 27–8, 31, 66, 119
conditional programmes 127–9, 181–2
see also purposive programmes
aspirational norms in 129–30
conditions in 130–31
conditions/causes relation 131–4
intermediate terms in 127, 128, 129, 130
democracy
counter- 75
debate in see democratic debate
deliberative 75
democratic control 100–101
indirect 55
participatory 74, 75
representative see representative
democracy
democratic debate 94–5, 99–100
disciplinary matrix 16
discipline 174, 181
aiming at normalisation 177
counter/infra law, as 180
outsourced law comparison 177–8,
181
radicalised 176–80
double norm addressee problem 18
equality 157–8
effectuated 159
gender 160
non-discrimination principle 158–9
indirect discrimination in 159
paradox of 160–61
presumption of 159
state of affairs, as 160
substantive 159–60
EU
democratic deficit 94
directives 1–2
93/42 111
framework see framework directives
harmonisation 7
independent agencies, and 87
Report of the European Economic and Social Committee (2011) 38, 59
Treaty on the Functioning of the European Union (2007), Art. 191.2 108
exchange theory 82–4
see also principal/agent relationship asymmetrical relationships
alternative sources of benefits 86–9
coercion 89–90
necessity 90–92
unreciprocated benefits 85–6
vulnerability 92–4
authority 84, 86–7, 89–91
power 84
rival principals 87, 88–9
externalisation 99, 170–71
framework directives
see also Acts; EU; norms
accountability norm 23–4, 30
aspirational norm 22–3, 28, 30
concretisation see concretisation
emphasising positive outcomes 34
implementation norm 23, 30
lifetime of 31
Marine Strategy 21, 23
outsourcing law-making 22
reproduction by member states 24–6
specification see specification
Water (2000/60/EC) 21
WEEE (2012/19/EU) 3–4, 21, 23
generality 142–6
see also legal theory; rule of outsourced law
categories in 143
classes of actions 143
essential characteristic, as 142–3
methodological requirement to generalise, as 144–6
norm-addressees 143
goal steering 34
goal thinking 99
governance 6
see also regulation
alternative modes of 13, 20
independent institutions 95
EU and 87
legitimacy of 95–6
value-creation 96, 98
value-claiming distinction 96
outsider
goal steering 97–9
outsiders becoming 98
integral management 49
Interinstitutional Agreement on Better Law-making (2003) 38
intermediate institutions/agencies 93
beyond scope of judiciary 114
diluting democratic control 100, 119
discretionary powers 110, 115, 119
expert knowledge 110–11, 115
makers of norms, as 110
judiciary 102
European Networks of Councils for the Judiciary 117
judicial codes 116–18
discretionary space, giving 117
judicial independence 117–18
judicial ethics 117
self-regulation 118
judicial decision-making
hybrid 102
intermediate institutions, and 114,
115–16
justificatory aims 114–15, 119
multi-level 102
substitution of legal for scientific rules in 114
traditional legal doctrines, using 115
judicial interpretation 103–7, 113–16, 119, 123, 129
see also case law
abstract aspirational norms, of 107–10
duty of care in 107
civil law, in 103
general rules 103, 104
common law, in 103
precedents 103–4
concrete aspirational norms, of 110–13, 114
intermediate institutions, and discretionary powers 110, 114
expert knowledge 110–11, 114
justificatory aims 105–7
exclusionary 105
inclusionary 105, 106
reflective equilibrium in 105
third parties 111
juridification 182–3
de- 183

law
see also outsourced law; outsourcing; traditional law
activity, as 14
civil/common comparison 103, 104, 145
disciplinary mechanisms colonising 181
outsourcing 14–15, 17
regulation distinction 180–81
regulation divide 8–11
soft 10
special technique, as 14
traditional 17, 103
legal research 120–22, 139–40
autonomy in 124–5
comparative 124
creation and maintenance of order in 122–4
criticism of 120–21, 122, 136–7
empirical 134–8

identity of object and theoretical framework 123
future of 137–9
judicial interpretation similarity 123
ordering/understanding distinction 123–4
practice-oriented 123
legal order 14
legal philosophy 9
legal systems
see also conditional programmes
autopoietic, as 125–6
conditional programmes, as 127–9
input-output systems, as 126
Rule of Law 156, 164–5, 167
export-product, as 162
policy aim, as 161
nested concepts of 163–4
not an end-state 162
securitisation of 162–3, 165, 166
legislation
traditional/alternative structural differences 13–14

the Netherlands
Care Institutions Quality Act (1996) 25–6, 44
accountability norm 25–6
aspirational norm 25
deregulation, as 26
framework directive differences 26
inspirational norm 25
steering group 26–7
Constitution, Art. 21 108
Flora and Fauna Act (1998) 2
Good Education Good Governance Act (2011) 184–5
Conditions Act (1988) 2
New Public Management movement 6, 30, 37
non-majoritarian institutions see independent institutions norms
see also framework directives; outsourced law
accountability 23–4, 30, 41, 146
aspirational norm dependence 44
aspirational 22–3, 28, 30, 31, 146
performance indicators, and 39–40
implementation 23, 30, 41, 146
aspirational norm dependence 44
open 3
ought-to-be 32–4
concrete 32–3
inviting further outsourcing 33
not indicating means 49–50
performance indicators as 39
positive obligation in 33, 49
relation to norm-addressee 33
traditional 39
ought-to-do 32–4, 39, 49
reformulation of 34

organisational differentiation 48
outsourced law 18–19, 35–6, 52–3, 72–4, 186–7
see also framework directives; norms; traditional law
accountability norm 23–4, 30, 81–2
specifications of 42
actors in 54
instrumentalisation 170
multiple levels of 54–5
aiming at optimisation 178
aspirational norm 22–3, 28, 30, 69–70
authorisation in 79–80, 100
between conditional and purposive programmes, as 133–4
concretisation see concretisation
decentring effects of 183–5
countering 185–6
discipline differentiation 177–8
discretion in 80–81
dynamic of 49
European framework directives, and 21, 30
goals in 20–21
monitoring realisation of 21, 179–80
implementation norm 23, 30
multi-level governance, as 54, 55, 75, 137
negative sanctions in 178
nested concepts in 164
norm-addressee, choice of 22
one-dimensionality of 43–4
perception of as democratic 55, 74
positive sanctions in 178–9

proportionality 18
public interest in 109–10
rules differentiation 48
self-replicating, as 31, 53, 70, 101
specification see specification
stylistic characteristics of 168–9
differentiation 172–3
externalisation 170–71
instrumentalisation 169–70, 183
subsidiarity 18, 72–3
traditional law entanglement 180–83
outsourcing 5–8, 48
see also principal/agent relationship;
self-regulation
co-regulation 6, 56, 58–9
self-regulation as 60
decentring, as 54
dispute resolution 116
dynamic 100
enforcement 116
leading to one-dimensional rules
48
principal/agent relationship in 56–8, 73–4
proximity in 55, 72
risk minimisation, as 49–52
rule-making 116
self-regulation 6, 56
paradigmatic rules 1, 19, 37
performance
prioritising over compliance 40, 41
supervising 40, 114–15
benchmarking 29, 51
best practices 29
interpreting 41
not indicating means 50–51
ought-to-be norms, as 39
sole function of 170
Standard Evaluation Protocol 42
suggestions, as 40
system-based 30
types of 29
performing state 7–8
policy-making
goals as starting point for 20–21
positive sum game 98–9
externalising problems 99
Index

redistribution distinction 96
    challenging 96–7
    insider/outsider differentiation 97–9

power
    authority differentiation 82
    imbalances 82

principal/agent relationship 56–8, 73–4, 93
    see also exchange theory
    accountability relations 77
    donors, with 165–7
    dependencies in 83, 84
    exchange of benefits 82–4, 90
    normative realities in 70–72
    representative/outourcing discrimination 77–8, 92–3
    accountability 81–2
    authorisation 79–80
    discretion 80–81
    voters as principals 76–8
    vulnerability in 92–4

principles
    providing possibilities for action 14
    principles-based regulation 2–3
    European directives see EU, directives
    proportionality 18, 38, 169–70
    public interest
    debate 109
    outsourced law, in 109–10
    purposive programmes 132, 182–3

reasons
    exclusionary, rules as 45–9, 170
    decline of 160
    first-order 45, 46, 47
    second-order 45, 46, 47

functions of
    coordinating actions 153–4
    criticism 152
    justification for decisions 151–2
    limiting discretionary powers 152–3

redistribution
    positive sum game distinction 96
    challenging 96–7
    insider/outsider differentiation in 97–8

regulation
    see also governance
    law distinction 180–81
    law divide 8–11
    normative order, as 11
    outcome-based 4, 173–4
        techniques of 174–6
    principles-based see principles-based regulation
    results-driven 4
    self- see self-regulation
    smart 135, 151
    system-based/performance-based distinction 29
    toolkit approach 11–12

regulators 93–4
    regulatory capture 94
    regulatory impact assessments 135
    representative democracy 55, 58, 93
    accountability in 81
    authorisation in 79, 82–3
    discretion in 80
    outsourced law as parasitic on 100
    principal/agent relationship, and see principal/agent relationship
    rule of outsourced law 141, 156–7, 167
    see also legal theory, Rule of Law
    accounting to donors, and 165–7
    constancy 155–6
    differentiation 146–9
    flexibility 149–50
    generality 142–6
    thick/thin metaphor 141–2, 151, 160–61

rules
    see also reasons
    changing conception of 160
    compromises, as 43–5 46, 154–7
        content-independence of 43, 45, 46–7
        intrinsic value of 43
    exclusionary reasons, as 45–9, 170
        first-order 45, 46, 47
        second-order 45, 46, 47
    instrumentalisation of 170
    light/heavy perception 42–3
    meta- 45–6
    multiple functions of 67
    negative 33–4
    normative force of 47, 155, 170
paradigmatic 1, 4
positive 33
reversal of burden of proof in 34
proliferation of 42
providing possibilities for action 14
rules as distance meters 52, 151
substitution of legal for scientific
114
vehicles, as 37–8

security 99, 162–3
law relationship 164
securitisation of Rule of Law 162–3, 165
wider rule of Law, as 163, 166
self-regulation 6, 58–9, 68–70
see also principal/agent relationship
codes of conduct 61
commissioned 54–6
justificatory function of 66–7, 68–9
normative realities in 70–72
principal/agent relationship in 56–8
quality management systems 65–6, 69
continuum of 59
co-regulation as 60
internal 62
allocative rules 63, 67–8
behavioural standards 63, 67
meta-rules 64–5, 67–8
rules of the craft 63, 67

SMART objectives 69, 175
stage-setting 64
traffic rules 62–3, 67
substitutive/coercive 59
voluntary 60
specification 28–31, 35, 41, 103
see also concretisation; performance
accountability norm, of 31–2
aspirational norm, of 31
implementation norm, of 31–2
never-ending quest for 49
performance indicators see
performance indicators
stakeholders 102
style 15–17
attitude, as 15
disciplinary matrix, as 16
exemplars 18
surveillance 112, 179–80

traditional law 138–9
see also norms; outsourced law
compliance 44–5
compromises between justificatory
aims 103
concreteness of 44
ought-to-be norms 44
outsourced law entanglement 180–83
providing best individual protection 115

UN Climate Change Convention 108