Index

aboriginal law
in Australia 5, 168–85, 227–8
defining acceptance of 177–9
and sovereignty 169–70, 173–80, 182–3
accountability, of private law entities
and public law 211–12
Action Plan on Nanoscience and
Nanotechnologies (EC) 129, 139
adat 14, 21
Administered Man, condition of 34, 41
Advisory Committee for Hazardous
Substances 141
African law studies 14
ambiguity, and development of hard/
soft law 130–31, 138, 144–5
America
environmental regulation in 109,
111, 115–18, 125–6
euthanasia in 201–3
non-contractual business practices/
regulation in 17–18, 23
arbitrariness 41
and bureaucratic authority 46–7
law, as limitation of 88–9
and morality 44–5
and rule of law 223–5
arbitration 19, 48
association
duties regarding 213–15
freedom of/ in 34–6
inner order of 38–9
society as web of 37
auctoritas 98–100
Augustus, Gaius Julius Caesar
Octavianus 98–100
Australia
Aboriginal law 5, 23, 168–85, 227–8
and British law 169–70, 173–80, 182–3
legal pluralism in 180–85
tax law, regulation of compliance
(NSW) 5, 151–3, 227
enforcement problems 153–5
nodal governance, development of
152, 155–65
authority
administrative, of private
institutions 213–15
allocation of, as law-job 58, 65–7
and codes of conduct, for
monitoring/ enforcement 65–7
and consent 42–3
in institutions 36
and morality 44–5
of non-state law, imposed by court
212–15
and power 82
of Roman law jurists 97–100
Barber v Superior Court of the State of
California 202
Barnard, Chester 38, 42, 44
barristers see legal profession
barter systems, as form of regulation
13
Bedrossian, Vahan 154
Behrendt, Larissa 180–84
Beiträge zur theorie der Rechtsquellen
(Ehrlich) 94–7, 103
Better Regulation Taskforce 138–9
binary concept, law as 70, 178, 224–5
Black, Donald 51
Black, Julia 210
Boethius, Anicius Manlius Severinus
95–9
Britain
nanotechnology, regulation in 5,
136–45
sovereignty of law of, in Australia
169–70, 173–5, 179
British Standards Institute (BSI)
141
bureaucratization 46–8
Burris, Scott 156

certification schemes 65–7, 67, 118, 212–13
Chagga people 18
Charles, Prince of Wales 138–9
Cicero, Marcus Tullius 95, 98
citizenship, rights of 49
co-regulation 1, 114–15, 161
see also self-regulation
coercion, role in law 14, 79, 157, 163–4
collective bargaining 39, 46–7, 63
colonialism 12–14, 25–6
see also Aboriginal law
customary laws created by colonizers 14, 21, 23, 172–5
early studies of 12–13
methods of territorial acquisition 176
command-and-control approach 111–12, 116, 125–6, 157, 226–7, 229
Commonwealth v Yarmirr 177
Communication on Nanosciences and Nanotechnologies (EC) 137
Communication on the Precautionary Principle (EC) 138
‘Community right to know’ 118
compliance, regulatory
advantages of going beyond 111, 120, 226
Concept of law, The (Hart) 65
conduct, channelling
law-job of 59, 62–5, 67–9
conduct, codes/rules of 3, 66, 223
also as norm for decision 26
defining 22–3
failure, implications of 153–7, 162–3
and labour-related issues 63, 66, 70
and in law-job theory 59, 62–5, 67–9
monitoring and enforcement 64–5, 155, 209–10, 221
allocation of authority for 65–7
multi-stakeholder 63
in nanotechnology 133, 136–7, 142, 227
role of 62–5
conflicts, resolving
law-job of 58–62
consent, and authority 42–3
Consolation of philosophy, The (Boethius) 98–9
constitutional law, defining 102
constructivism 135–6
contract law, and institutionalization 35–6
Corporate responsibility and labour rights (Jenkins) 63
corporations, multinational, role in law-making 19–20, 27, 221
Cotterrell, Roger 56–7
court judgments
influence of non-state law on 1, 209–19, 228
authority/duties imposed 212–15
criteria for regarding as state law 210
Crime and custom in savage society (Malinowski) 12–13, 21
culture, and direction for group organization 68–9
customary law 168, 222–3
and indigenous/ primitive law 14, 24–5
and legal pluralism 180–84
and native title, common law concept of 5, 23, 168–76, 184–5, 227–8
and Roman law 103–4
customary practice
lex mercatoria 19–20
regulation through 17–18, 21
cyberspace see Internet
de l’esprit des lois 1
decentred regulation 152, 156, 164
defereence 91, 203–4
delegation 91
democracy
Ehrlich and Kelsen on 84–7
of legislation 86–9, 92
role of legislature in 3–4
deregulation 1, 65–7, 226
development, moral/social 44
Digest (Justinian) 96–7, 101
dispute settlement
alternative methods of 19, 48, 60
as law-job 58, 62
without reference to contract law/
sanctions 17–18
doctors see physicians
Dominello, Francesca vii, 5, 227–8
Dorbeck-Jung, Bärbel 227
Dutch law see Netherlands
‘dynamic references’ 213

ecological modernization 118–20,
123–3
Edelman, Lauren 52
Ehrlich, Eugen 11, 27
conception of state/ non-state law
76–7, 81–2
Kelsen’s critique of 77–9
role of feelings 77, 81
on facts of law 76–9, 82, 92
Global Bukowina 19, 27, 74–6,
89–92
‘living law’ 3, 15, 22, 37–9, 82–7, 94
political influences of 83–4, 87
on Roman law 4, 94–104
on rules of conduct/ norms for
decision 22
on state and society 74–7
Ellickson, Robert C. 18, 60–62, 71
‘emergent law’ 3, 39–40, 46–8, 224
Enchridium (Pomponius) 96–7
enforcement
certification schemes 65–7
codes of conduct 64–7, 155, 209–10,
221
and self-regulation, failing to act
153–7, 162–3
Environmental Information Systems
125
environmental management systems
113
environmental partnerships 116–17,
122
environmental regulation 226–7
complimentary provisions,
advantages of using 125–6
and ecological modernization
118–20, 122–3
environmental management systems
113
environmental partnerships 116–17,
122
growth in interest in 110–11
participatory governance under civil
regulation 117–18
policy development, influences on
123–6
reform, political/ economic
influences on 109–12
regulatory reconfiguration 109,
111–12, 226
smart regulation/ regulatory
pluralism 114–16, 122
European Nanotechnology Trade
Alliance 141
euthanasia 6, 191, 228
active/ passive/ indirect, defining
198–202
in America 201–3
conflicts of 192–4, 204
in Germany 193–205
court rulings on 195–7
legislative interpretations 197–201
Hippocratic Oath 193–4, 201, 204
living wills 194–205
in Netherlands 203–5
and omission 199–201
executive, role of 1–2

fachjurist 101
facts of law, Ehrlich on 76–9, 82, 92
feelings, role in defining law 77, 81
Fiorino, D. 114, 124–5
talk law see primitive law
Follett, Mary Parker 44
Fuller, Lon L. 36–7, 51
Fundamental principles of the sociology
of law (Ehrlich) 75, 77–9
Gaebler, Ted 115, 121
Galanter, Marc 16
German Historical School 100–101,
103
Germany, euthanasia in 193–205
‘Global Bukowina’ 19, 27, 74–6,
89–92
global legal pluralism see globalization
globalization 18–20, 26, 89–92, 221–3
deregulation trend of 1, 226
enforcement of codes of conduct
64–5, 221
human rights law 20
Internet 20–21, 24
lex mercatoria 19–21, 23–4, 92
lex sportiva 19–20, 24
governance
common law of 50–51
conditions for 51
defining 156
nodal 152, 156–65
sources of, defining 48–51
Government Information Act (Netherlands) 211–12
Grattan, Scott 174
‘greengold thesis’ 120
Greenpeace 117–18
Griffiths, John 14
groups
direction, providing, as law-job 67–9
organization of cultural aspects of 68–9
Grundlegung der soziologie des rechts (Ehrlich) 94–104
grundnorm (legal norms) 79
Gunningham, Neil vii, 4–5, 123, 226–7
hard law see state law
Hart, H.L.A. 25, 65
Havinga, Tetty 64
Hertogh, Marc vii, 3, 69
on types of non-state law 23–5, 151–2, 163–4, 223
Hippocratic Oath 192–4, 201, 204
Hooker, M. 14
Hughes, I. 173–4
human rights law 20
immigrant groups 16–17
incipoate law 39–40, 46–8
incipient law 39–40, 46–8
incorporation, non-state law 91
indigenous law see primitive law
indigenous people
see also Aboriginal law
studies of 16, 18, 171–2
industrialization, and emergent/incipient law 3, 39–40, 46–8
institutionalization
and dynamics of legitimacy 43–4
and patterns of injustice 52
and rule of law 34–6, 41–3, 46–8, 50–52
internal law 16–17
International Labour Organization (ILO) 63
international law, relationship with state/non-state law 90–91, 132–3
International Organization for Standardization (ISO), on nanotechnologies 129–30
Internet 20–21
‘intuitive law’ 3
ius civile 94–104
ius publicum 94
ius respondendi 98–100
Jenkins, Rhys 63
Job, Jenny vii–viii, 5, 227
Journal of legal pluralism and unofficial law 14
jurismonic method 224
as law-job 59, 69–70
justice
distributive 59
importance of 22
restorative 59
role of law to establish 37–8, 50, 81, 84–5
scope of experience of 16, 223
Kant, Immanuel 192
Kelsen, Hans
criticism of Ehrlich 75–9
on democracy 86–9
on legal norms 79–81, 87–9, 91–2
on natural law doctrine 85
and non-state law, recognition of 90–92
political influences of 85–7
pure theory of law 79–82, 87–92
Kornhauser, Lewis 60–62
Krygier, Martin viii, 223–4
labour law
collective bargaining 39, 46–7, 63
labour-related codes of conduct 62–4, 66, 69
law, generally
see also legal; non-state law; public law; Roman law; state law
and arbitrariness 41
as binary concept 70, 178, 224–5
Index

defining 21–2, 36–9, 192, 210
and clarity 151
and juristic method 59, 69–70
legal norms 79–81
political implications of 83–9
and democracy 85–7
facts of law 76–7, 82
feelings, role in defining law 77, 81
as generic phenomenon 38–9
juristic 76
legal evolution, stages in 39–40, 46–8, 50–51
levels of 15–16
normative science of 78
and power 79–80, 82
as property of society as whole 15–16
shadow of 60–62
sociology of law 4, 40–41
Ehrlich on 75, 77–9
Kelsen on 77–81
Selznick on 36–40
test for 157
theories of law
law-jobs (Llewellyn) 57–60
pure theory of law (Kelsen) 75–81
Law, society and industrial justice
(Selznick) 32, 34–6, 38–40
‘law in action’ 37–8
law-jobs theory 57–60
allocation of authority 58, 65–7
channelling conduct 59, 62–5, 67–9
criticism of 57–8
organization of groups 58, 67–9
questing nature of 59
resolving conflicts 60–62
Law of the Twelve Tables 97, 99
Leadership in administration (Selznick) 33–4, 48
legal endogeneity 52
legal evolution, stages in 39–40, 46–8, 50–51
legal orders 17–19, 50–51
and conception of law 86–9
parallel nature of 12
and rule of law 41–2, 44, 48
state as personification of 79–81, 86
legal pluralism
in Australia 180–85
and colonialism 12–14, 25–6
criticism of 182
and globalization 18–20, 26, 221–2
at home 14–18, 111, 223
development of approach 14–15
in immigrant groups/ cultural minorities 16–17
social networks/ organizations 17–18
and motivation for law 191
and native title 174
and political movements 181
regulatory pluralism 114–16, 122
in Roman law 103–4
legal positivism 4, 85–7, 191–2
legal profession, self-regulation of 153–5, 158–63
Legal Profession Act 2004 (NSW) 154, 160–61
legal theory see theories
legality
and democracy 50, 86
principle of 37, 41–8, 50, 223–4
legislature
criticism of 1
decrease in function of, and rule of law 2, 222
influence of non-state law on 2–6, 121–2, 132, 164–5, 209–10, 212–13
Lembcke, Oliver W. viii, 5–6, 228
Lewellyn, Karl 57–60
lex mercatoria 19–21, 23–4, 92
lex sportiva 19–20, 24
‘living law’ 3, 15, 21–4, 37–9, 82–7, 223
and facts of law 77
and Roman law 94
living wills 192, 194–205
purpose of 195
Loader, Ian 89–90
lobbying, political and regulation 117–18
Mabo v Queensland (No.2) 23, 168–76, 184–5
Macaulay, Stewart 17–18
McNamara, L. 174
Malinowski, Bronislaw 12–14, 21
Mason, Anthony 153
media, role in regulation 155–6, 159–60, 162, 227
Meidinger, Errol 66–7
Melanesian community, Tobriand Archipelago 12–13, 21
Meriam people, Australia 23, 168–76, 184–5
Merry, Sally Engle 20
meta-regulator, state law as 90
meta-risk management 113
Michaels, Ralf 18–19, 83, 87, 91
Milirrpum v Nabalco 172
minorities, ethnic/cultural 16–17
Mitteis, Ludwig 103
Mnookin, Robert H. 60–61
Mol, Arthur 119
Moluccan community, in Netherlands 16, 22–3
Montesquieu, C. 1
Moore, Sally Falk 17–18
morality
and authority 44–5
and rule of law 45
Morality of law (Fuller) 36–7
multinational corporations, role in lawmaking 19–20, 27, 221
NanoSURE (NIA) 141

Nanotechnological Governance Code 139, 142–3
nanotechnology
impact on/challenges for governance 5
locked-in/entrenched technology, implications of 131–2
precautionary principle 138–9
regulatory approach regarding 129–46
risk problems of 130–31
role of hard/soft law in 140, 142–5, 227
UK regulation of 136–45
codes of conduct 142
development of 138–9
funding 142
hard law, role of 140
media/publicity, role of 138–9
objectives 138
principles of 137–8
rules of conduct 136–7
soft law, role of 142–5, 227
standardization/metrology schemes 141–2
voluntary schemes 140–41
Nanotechnology Industries Association (NIA) 139, 141
native title 5
common law concept of 23, 168–76, 184–5, 227–8
court limits on 172–3, 175–9, 181
date for determining 176–7
and sovereignty 176–84
Native Title Act 1993 (Australia) 169, 173–9
natural law doctrine 85
Netherlands 16–23, 22
euthanasia in 203–5
private bodies acting in public service, judicial interpretation 210, 228
administrative authorities 213–15
‘civil servants,’ defining 211–12
duty to associate 213–15
dynamic/static references 212–13
primacy of public law 216–19
public task case law 215–16
Two Ways Doctrine 217–18
New Guinea 12–13
New South Wales, regulation of tax law compliance in see under Australia
nodal governance 152, 156–65
non-contradiction, principle of 92
non-state law
advantages of 2
beyond/within context of national state 2, 21, 109, 114–16
and colonialism 12–14, 21
conceptual map of types of 20–7, 163–4
defining 3–4, 11, 26–7, 192–3, 209, 222
enforcement of 151–7, 210
force of law of 210
and globalization 18–20
growth of 1–2, 11
influence on legislature 2–6, 121–2, 132, 164–5, 209–10, 212–13
and international law 90–91, 132–3
legal pluralism at home 14–18
living wills 191–205
and native title 5, 23, 168–76, 184–5
private government 21
and rule of law 31, 222–8
self-regulation, implications of
failure to act 153–63
and soft law 132–3, 139–45
and state law (see court judgments;
customary law; euthanasia;
juristic method;
nanotechnology; native title; tax
law)
as alternatives to 2
consequences for 228–9
differences from 4, 209–10,
222–3
implications for 121–2
relative importance of 11
as support mechanism 154–7
where no state law exists 81
strategies for dealing with 201
non-state organizations, as political
communities 48–51
normative social theory/ systems 37–44
norms
for decision-making 22–5, 223
also as rule of conduct 26
as primary rules with legal status
25
informal 18, 60–61
legal
defining 79–81, 87–9
and revolution 87
validity of 80–82
öffentliches Recht (public law) 81
Olympic lex sportiva 20
organization, of groups
cultural aspects of 68–9
as law-job 58, 67–9
organizations, legalization of 45–6
Osborne, David 115, 121
overregulation 1
Oxonica (NIA) 141
parliaments, role of 1
patterns of social ordering 22–5
Patton, P. 183
‘pela’ 16
Peters, Hans viii, 6, 228
physicians
Hippocratic Oath 192–4, 201, 204
role/ duties of 6, 193–4, 202–5 (see
also euthanasia)
Pitty, Roderic 173–4
politics, implications for defining law
83–9
Pomponius, Sextus 95–7
Porter, M. 120
positivist conception of law 4, 85–7,
191–2
Posspil, L. 15–16
Post Office v Estuary Radio Ltd. 175–6
post-Westphalian conception of law
see globalization
Pound, Roscoe 37–8
power
and authority 82
and law 79–80, 82
and social constructivism 135–6
precautionary principle 138–9
primitive law 21, 23–4, 222–3
see also customary law
integration with colonial law 14
legal status in 13
studies of 12–14
terra nullius doctrine 168–76, 182
property law
see also native title
and institutionalization 35–6
Proprium ius civile (Pomponius) 95–7
public law
see also Roman law; state law
and governance, defining 48–9, 65,
76, 81, 91–2
private law in public context 211–12,
215–16
and recognition of status 49
public task case law, in Netherlands
215–16
Quinlan, Karen Ann 201–2
R v Bonjon 171
references, dynamic/ static 212–13
reflexive regulation 112–14, 121–2
regulation
see also environmental regulation;
non-state law; soft law; state law
command-and-control approach 157
compliance, advantages of going beyond 120
complimentary provisions, advantages of using 125–6
dcentred 152, 156, 164
deregulation 1, 65–7, 226
loss of state powers to regulate 4–5, 109
market responsibility for 119–20
nodal governance 152, 156–65
non-state, within national state context 109, 114–16
participatory governance under civil regulation 117–18
policy development, influences on 123–6
promoting innovation 119
regulatory reconfiguration 109, 111–12, 226
reflexive regulation 112–14, 121–2
responsive 157–8
smart regulation 109, 114–16, 122
win-win outcomes of 120, 122–3
regulatory pluralism see smart regulation
Reichsrecht und volksrecht in den östlichen Provinzen des römischen Kaiserreich (Mitteis) 103
Reinhardt, Forest L. 120
‘Reinventing environmental regulation’ (Clinton–Gore) 115, 117–18
revolution, and legal norms 87
risk management 113
Ritter, D. 170–71
Roman law 4, 225
auctoritas 98–100
and customary law 103–4
Ehrlich on 94–104
ius civile 94, 102–3
in Imperial Rome 98–101, 103
and local custom 103
Republican jurists, development by 95–9
ius publicum 94
ius respondendi 98–100
jurists
authority of 97–100
similarities with modern 100–101
legal pluralism in 103–4
and state law, whether concept applies 101–2
rule of law 1–2
and arbitrariness 2, 223–5
and incipient/emergent law 39–40
and institutionalization 34–6, 41–3, 46–8, 50–52
and labour relations 32–6, 41–2, 50–52
and legitimacy 43–4
and morality 45
and non-state law 31, 222–8
Selznick on 31–52
and sociology of law 40–41
Safe Nano initiative 139
sanctions
fear of, as motivation 80, 121
informal 16–17, 20, 61, 163
legal
implications of lack of 20, 154–5, 165
role in regulation 80, 126, 163–5, 201, 227–9
Savigny, Freriedrich Carl von 100–101
Scott, Colin 155–6
self-regulation 4, 23–5, 91, 210, 226–8
see also certification; conduct, codes of; soft law
as basis/preparation for hard law 5
of businesses 21, 23–4
and channelling conduct 59, 62–5, 67–9
duty to associate 213–15
in environmental regulation 113–16, 119, 122
failure, implications of 153–63
incompatibility with state law 218–19
Two Ways Doctrine 217–18
Selznick, Philip 3, 31–52
Senden, L. 133
separation of powers 1
Shasta County, California, dispute settlement in 18, 60–61, 70–71
Sinclair, D. 123
smart regulation 109, 114–16, 122
Snyder, Francis 132
social constructivism 135–6
social networks/organizations 17–18
‘Sociology and natural law’ (Selznick) 36–41
sociology of law 4, 40–41
Ehrlich on 75, 77–9
Kelsen on 77–81
Selznick on 36–41
soft law 5
advantages/disadvantages of 133–5
broad/narrow approaches to 133
defining 129, 132–3
legality/legitimacy of 145–6
nanotechnology, role in regulating 136–46, 227
relationship with hard/state law 132–3, 142–6
and social constructivism 135–6
sovereignty
Aboriginal 169–70, 173–80, 182–3
of British law in Australia 169–70, 173–5, 179
decline of 48
of public law in Netherlands 216–19
staatsrecht (state law) 80–81
standard contract forms and conditions
business preference for 19, 26
state law
and certification schemes 67, 212–13
compliance, economic burden of 110
as constitutional law 102
defining 56–7, 76, 192, 222
and globalization 89–90
historical development of concept 101–2
and international law 90–91, 132–3
as meta-regulator 90
and non-state law (see also court judgments; environmental regulation; euthanasia; juristic method; nanotechnology; native title; soft law; tax law)
consequences of 228–9
differences from 4, 209–10, 222–3
legislative references to 212–13
methods of assimilation 91–2
support mechanism for 154–7
primacy of, in Netherlands 216–19
suitability for contemporary policy needs 121
state regulation see environmental regulation; state law
‘static references’ 212–13
status, recognition and public law 13, 25, 34, 49–50, 83
Stichting Kwaliteitsgarantie Vleeskalversector (SKV) 216–18
stufenbau (legal norms) 80, 86–7, 92
suicide, assisted see euthanasia

Tabula Contrebiensis 103
Taekema, Sanne viii–ix, 4, 224–5
on juristic method 59, 69–70
tatsachen des rechts (facts of law) 76–7
tax law, regulation of compliance (NSW) 5, 151–3, 151–65, 227
enforcement problems 153–5
nodal governance, development of 152, 155–65
technology, locked-in/entrenched
131–2
Tellegen-Couperus, Olga ix, 4, 225
terra nullius, doctrine of 168–76, 182
Teubner, Gunther 112, 134
theories
allocation of authority 58, 65–7
channelling conduct 59, 62–5, 67–9
law-jobs (Llewellyn) 57–69
pure theory of law (Kelsen) 75–81
Three Mile Island nuclear disaster 112–13
Topica (Cicero) 95, 98
transnational industries see globalization
tribal law see primitive law
trouble, prevention of, law-job of 58–62
Türk, A.H. 1
Two Ways Doctrine 217–18
uncertainty, impact on development of hard/soft law 130–31, 138, 144–5
van Amerom, Marloes vii, 227
van Klink, Bart viii, 4, 225
van Schooten, Hanneke viii, 221
Index

Verschuuren, Jonathan ix, 221
Vogl, Stefan 83–4
voluntarism see self-regulation
Voluntary Reporting Scheme (VRS) 140

Walker, Neil 89–90
Weber, Max 17–18, 44
theory of bureaucratization/
rationalization 46–8

Western Australia v Ward 175, 177–9, 181, 185
win-win outcomes 120, 122–3
Wisconsin, business practices/
regulation in 17–18, 23
Wolff, R.P. 181–2

Yanner, Murrandoo 184
Yorta Yorta Aboriginal Community v Victoria 175–9