

THE POWERS THAT BE

Rethinking the Separation of Powers
A Leiden Response to Möllers

Edited by

Hans-Martien ten Napel and Wim Voermans

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Table of Contents

<i>Introduction</i>	7
Hans-Martien ten Napel, Joost Luiten and Wim Voermans	

Part I: Separation of Powers in a Transnational Era

<i>Chapter 1: The Separation of Powers and Constitutional Scholarship</i>	33
Maarten Stremmer	

<i>Chapter 2: Separation of Powers beyond the State: The ‘inconveniences of [a]bsolute power’</i>	45
Aoife O’Donoghue	

<i>Chapter 3: The Agony of Political Constitutionalism within the European Legal Space</i>	65
Patricia Popelier	

<i>Chapter 4: Accountability and the New Separation of Powers</i>	89
Joseph Corkin	

<i>Chapter 5: Trias Europea: Notes on Möllers Three Branches</i>	111
Tom Eijsbouts	

Part II: Legislative Power

<i>Chapter 6: The Changing Role of National Parliaments in National Budgetary Matters in Light of the Increasing Centralisation of Fiscal Policy in the EMU</i>	131
Michal Diamant	

<i>Chapter 7: The Rise of Regulators</i>	153
Wim Voermans	

<i>Chapter 8: Constitutional Conventions and the UK Human Rights Act: From Parliamentary Sovereignty Towards the Separation of Powers?</i>	169
Gert Jan Geertjes & Luc Verhey	

Part III: Executive Power

Chapter 9: EU Administrative Soft Law and the Separation of Powers 191
Claartje van Dam

*Chapter 10: Making a Virtue of Necessity: The Role of Discretion in
Administrative Implementation* 215
Josephine Hartmann

*Chapter 11: Legitimising Transnational Decision-Making in the
EU State Aid Regime* 237
Paul Adriaanse

Part IV: Judicial Power

*Chapter 12: Enhancing the Legitimacy of the European Court of Human
Rights: Emphasising the Margin of Appreciation Is Not the Way to Go* 259
Titia Loenen

*Chapter 13: Separation of Powers and the Limits to the Constitutionalisation
of Fundamental Rights Adjudication by the ECtHR and the CJEU* 275
Ingrid Leijten

*Chapter 14: 'Make it a Better Place': Transnational Public Interest Litigation
and the Separation of Powers* 295
Jerfi Uzman & Geerten Boogaard

Epilogue

Chapter 15: Separation of Powers – a Short Manual for the Perplexed 321
Christoph Möllers

References 341
Case Law 369
About the Authors 375
Index 381

Introduction

Hans-Martien ten Napel, Joost Luiten and Wim Voermans

1 Origins

The idea of the separation of powers has been subjected to criticism and competition ever since it first came to be during the upheaval of the English Civil War in the 1640s. Since then, it has been dismissed as often as its virtues have been extolled. In recent years the case has once again been stated that the idea of the separation of powers has lost its significance in a globalised world, with a power constellation in which the distinctions between different types of ‘powers’ have blurred and even so-called constituted power holders have become more and more diffuse. Yet even its fiercest opponents cannot deny that the idea of the separation of powers as a theory of government has, in the words of M.J.C. Vile, ‘in modern times, been the most significant, both intellectually and in terms of its influence upon institutional structures’.¹

Vile’s classic description of what he calls the ‘pure doctrine’ of the separation of powers offers us an extensive, but still useful definition to serve as a backdrop for the historical development and practical implementations of this idea: ‘It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct (...). In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the state.’²

The lineage of this idea, which for better or for worse has been prominently featured in western thinking on constitution and government for over three-and-a-half centuries, can be traced back to Greek antiquity where, in the works of Aristotle, among others, rudimentary concepts of

differentiated governmental functions are distinguished. These do not, however, fully match later notions of a tripartite division of legislative, executive and judicial power, if only because the law, once created, was considered to be more or less fixed.³

With the development of a more universal concept of sovereignty during the late Middle Ages, the idea of active and continuous law creation gained sway. As a result, this new legislative power was immediately hotly contested, for who was to wield it? Was it to be held by the monarch, or was it to be used to control him?⁴ These were the stakes in the English Civil War, which began in 1642 and dragged on intermittently for nearly a decade. During this period we see separate, coexisting conceptions of legislative, executive and judicial power emerge for the first time. These three were not yet, however, arranged in the threefold horizontal manner we are now accustomed to, and would not be for another century. Executive power, which was understood to be something closer to what we would call judicial power, and legislative power were both still considered to be part of an overarching ‘judicial power’. It was the task of the government to dole out justice through the creation of law (legislative power) and by passing judgment where controversies arose (executive, what we would call judicial, power). The parliamentary proponents of the Cromwellian Revolution, like John Milton, reserved only the latter task for the monarch.⁵

With the restoration of the monarchy, the radical idea of the separation of powers was replaced by a class-based conception of mixed government. An idea which was really much older, stemming from the works of Aristotle, Plato and Polybius, mixed government propagated a constitutional mixture of monarchical, aristocratic and democratic elements, with each element being represented in one or several state institutions. These institutions shared the tasks of government, rather than each being assigned a particular task.⁶ According to Vile, mixed government was ‘based upon the belief that the major interests in society must be allowed to take part jointly in the functions of government, so preventing any one interest from being able to impose its will upon the others.’⁷

The idea of mixed government, although not fully compatible with the pure idea of the separation of powers, did have a major impact on it in the following century. Its aim of preventing domination of government by any one class or group, gave rise to the idea that a separation of powers should not only distinguish strictly between different governmental functions, but that these functions should ideally not be concentrated in the same hands: a separation of agencies as well as powers.

This partial reconciliation of the ideas of mixed government and the separation of powers took place over the span of a century. An important step in this process was taken by John Locke, who very clearly saw the necessity of the legislatures a separate entity, as well as a separate governmental function. This entity should furthermore be restricted to making only general laws and bound to settled law-making procedures in doing so. However, Locke still mainly distinguishes two functions of government, executive and legislative, with an overarching judicial function a la Milton. The executive could then be divided along the lines of the internal and external responsibilities of the government, to distinguish between executive power proper, and what Locke called 'federative power': the power to declare war, make peace and oversee all other affairs external to the state. Locke also very clearly emphasised the supremacy of the legislative over the executive.⁸

The separation of powers only attained its classical form with Montesquieu, who distinguished three separate powers, 'that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals'.⁹ Although Montesquieu borrows heavily from Locke, and sometimes harks back to his bipartite division, he formulates for the first time what we would now recognise as the classic distinction between legislative, executive and judiciary. The executive is no longer divided between internal and external affairs, and the judicial power takes its place as a separate and independent entity.¹⁰

While Montesquieu's theories offered clarity, sometimes by obscuring problems signalled by earlier writers, the prominence of his work might be the result of timing as much as genius. *De l'Esprit des Lois* (1748), in contrast to other treatises on the subject, did not seek to use the idea of separation of powers for the validation of one political cause or another, but instead presented it as an absolute requisite for a system aimed towards political liberty.¹¹ This supposedly neutral and systematic description of a system of government with separation of powers as a core concept, came at a time when the world was on the cusp of momentous upheavals in the form of the American War of Independence and the French Revolution, in which Montesquieu's thinking found fertile ground.

In the anti-monarchical revolutionary fervour of the American War of Independence, many of the states adopted constitutions in which the idea of mixed or balanced government, seen as an instrument of repression, was rejected and instead a radical separation of powers doctrine was implemented. However, a number of state constitutions of the decade between the outbreak of the war and the drafting of the Constitution

of 1778, particularly the 1776 Pennsylvania Constitution, demonstrated the impracticality of such a system, which could easily lead to legislative domination.¹² So in the federal constitution, the idea of separation of powers still featured as the main governmental principle, but in a subordinate role. The idea of balanced government was grafted onto this idea in the form of checks and balances, which were to prevent the improper exercise of power. After ten years of experimentation in the state constitutions, this was no longer seen as a blurring of the distinction between powers, but rather as a mechanism essential to maintaining that distinction.¹³

The creators of the constitution were aptly aware of the dangers that democracy could pose to liberty. In the preceding decade, several state parliaments had developed a habit of intruding upon the other powers, for example by changing court judgments or deposing officials.¹⁴ The fear of legislative domination was stemmed by providing the President with a qualified veto as well as the power of appointment and the power to negotiate treaties, though both of the latter remained subject to Senate confirmation. Judicial review provides another very important example of a form of checks and balances which is strictly speaking not compatible with a pure doctrine of powers.¹⁵

In revolutionary France, such a union between the separation of powers and checks and balances was never achieved, yielding results very different from those in the United States. The Constitution of 1791 vested legislative power in a unicameral National Assembly and judicial power in an elected judiciary, but executive power remained with the King and his ministers. He was given a suspensive veto, but lacked the power to initiate legislation. The separation of powers in this constitution was nearly absolute. There was a complete absence of the checks and balances which had characterised the American Constitution of four years earlier. Judicial review, for example, was explicitly forbidden by the 1791 Constitution, which showed considerable distrust towards the judiciary in general.¹⁶ It was thought that checks and balances would only serve to permanently set the powers of government against each other in a state of civil war.

This Constitution, like some of the early state constitutions in America, proved that separation of powers in its nearly pure form, without checks and balances, was nigh on untenable. After less than a year, the government devolved into the legislative domination of the *régime d'assemblée*, which reigned supreme from September 1792 onwards. The adoption of the Constitution of 1793, which was never properly implemented due to the more pressing concerns of war, confirmed this emaciation of the executive. The two years of terror that followed, created a desire for a balance between

the executive and legislative, like the 1791 Constitution had unsuccessfully tried to create. However, the use of checks and balances to achieve such a balance was still rejected in favour of a more strict separation of powers. The Constitution of 1795 tried to firmly prevent the legislature from exercising legislative or judicial powers. The executive, the Directory, was chosen by the legislature, but not from within its own ranks. Its members could be impeached by the High Court of Justice, but any other semblance of checks and balances was absent. The 1795 Constitution, like the 1791 Constitution, chose the pure separation of powers as a response to the tyranny of the previous period. And once again, the pure doctrine proved untenable; only this time it was the executive Directory which developed tyrannical traits, heralding a five-year rule, ending in France's transformation into a consulate and then an empire.¹⁷

The idea of the separation of powers reached its zenith in the United States and France in the late 19th century. Although the addition of checks and balances made its implementation generally much more successful in the former rather than the latter, it was the dominant basis for constitutional government in both countries. In the two centuries that separate us from this zenith, the doctrine has suffered almost endless criticism, but endured nonetheless. The most influential governmental model of the 19th century, the parliamentary system of Great Britain, was characterised by a partial separation of functions and a partial separation of personnel, but its real foundation, in the tradition of mixed government, was balance – in this case the balance between the interwoven institutions of parliament and cabinet. As the leading power in the world, Great Britain set an example to other European Nations; the French third, fourth and fifth republics similarly strived towards balance, only they failed to find it.¹⁸

The very social environment in this period was becoming less favourable to the idea of the separation of powers, because through the gradual extension of suffrage, the middle classes were gaining a significant degree of access to the political process, which did away with the necessity of the idea of the separation of powers as an instrument to break down the walls of privilege, monarchy and aristocracy. In fact, in the United States of the early 20th century, populist politicians like Theodore Roosevelt railed against the existing constellation of the separation of powers amended by checks and balances, as a system that protected vested interests, because it prevented popular control over (all of) the agencies of government.¹⁹

The twentieth century saw even further attacks on the theory of the separation of powers, which was deemed incapable of capturing the complexity of the operations of government, a criticism repeated in recent

years in the context of the declining role of nation-states. Vile notes: ‘by the early decades of the twentieth century the beautiful simplicity of the eighteenth-century view of the functions of government lay mangled and shattered’.²⁰

According to Christoph Möllers, author of a well-known recent book on the topic that in many ways formed the starting point for this volume and also constitutes a red thread throughout the volume, many who criticise the separation of powers, or even those who lament what they perceive to be its declining importance, are labouring under a misapprehension: ‘[t]he contemporary academic discussion of the idea of separated powers is defined by a simple, powerful, and mistaken narrative: once upon a time, there was a “classical” system of separated powers (...) [t]oday this system has eroded’.²¹

Vile, who carefully distinguishes between the ‘pure doctrine’ and its many practical and intellectual variations, would probably agree with this analysis. His explanation for the persistence of the idea of the separation of powers in all of its impurity and imperfection, is that all the criticisms levelled at it (until the 1960s) are ‘merely negative’, leaving ‘unrelated fragments of earlier constitutional theories without a new synthesis to fill the gap’.²² Hence, the separation of powers remains very much the major point of reference, to which even those who deride it must relate their ideas. Vile explained this in 1967 by stating that ‘the problems of earlier centuries remain the problems of today; (...) it is (...) the continuity of political thought, and of the needs of political man, which emerges as the most striking aspect of the history of institutional thought.’²³

2 Link with legitimacy

The tenacity of the idea of the separation of powers is partly due to the fact that it is still widely held to be a procedural and institutional prerequisite for providing the state and its laws with legitimacy. It was, and is, considered by many a guarantor of liberty, in the absence of which power cannot be legitimately exercised. Vile certainly articulates this point of view: ‘It is essential for the establishment and maintenance of political liberty’.²⁴ According to Jeremy Waldron, the separation of powers was already ‘accepted among the founding generation as an established touchstone of constitutional legitimacy’ and still is a ‘canonical principle of our constitutionalism’.²⁵

A more specific variant of this idea of the separation of powers as a prerequisite for liberty, is the idea that it is essential to the viability of a system that provides perhaps the ultimate legitimation of government in western thinking: democracy. The objection of majoritarian tyranny has been levelled against democracy since its conception; the separation of powers purports to offer a remedy. In the words of Aoife O'Donoghue it 'prevents democratic legitimacy from becoming a majoritarian orthodoxy'.²⁶

In fact, for Möllers the very form of the classic separation of powers stems from this function. He constructs Montesquieu's triumvirate as a system designed to express and balance the forces of individual and collective (democratic) self-determination. These two are of equal importance in a democratically legitimated system and each is indispensable to the other. Collective self-determination is the sum of individual self-determination, while reversely, collective self-determination is necessary to facilitate individual self-determination, for instance through providing an individual with the protection of the law. In the system of the three classical powers, the embodiment of democratic self-determination is found in the legislature while the judiciary acts upon the initiative and will of the individual who feels her rights have been infringed upon. The executive forms a mediating force between the other two powers, bridging the 'gaps in regulatory scope, temporal orientation, and degree of juridification' between them.²⁷ Viewed in this manner, the separation of powers becomes little less than a precondition for a functioning liberal democracy.

But perhaps we should be careful to depict the separation of powers and democracy so harmoniously. After all, in a state where all legitimacy ultimately emanates from the people, it is not difficult to see how the different powers, separate though they may be, could become animated by the same political spirit. The supposedly autonomous judiciary, for instance, is often very much concerned with maintaining its legitimacy among the people. At the top of the executive branch, the dependence on public approval is even more direct and manifest. This incidentally raises questions on how the media as a fourth power should relate to the traditional three, as they play an important role in the formation of public opinion. Given these considerations, democracy can in fact be antithetical to the separation of powers when carried (too) far. This brings up the question whether the intrinsic protective and legitimating value of the separation of powers, its ability – certainly in combination with the element of checks and balances – to procedurally improve the quality of

governance, does not warrant a greater emphasis on this concept at the expense of continuing democratisation, which appears to be the prevailing dogma in the west.

Nathan Gardels notes that a similar philosophy can be found among the American Founding Fathers, who ‘designed institutions to ward off both monarch and mob’ and understood liberal democratic constitutionalism to be ‘not just about one person one vote elections’.²⁸ Over time, we have moved away from this line of thinking and more and more emphasis has been placed on democratic influence, which, according to Gardels, has led to political gridlock, an inability to forge consensus and incessant short-term governing in western countries. He envisions a middle ground between liberal democracy, with its transparency and democracy, and the Chinese system of meritocracy, with its ability to create ‘unity of purpose and long-term institutional capacity’ as a possible solution.²⁹ The Chinese notion of legitimacy as based on output, i.e. the government’s achievements, instead of input, the electoral process, is sometimes presented as an alternative to democratic legitimacy. This relates to a broader school of thought, which considers legitimacy to be substantial, rather than procedural; it is the actual (beneficial) content of a law or policy that gives it legitimacy, not (just) the way it came to be. Lord and Magnette refer to this as ‘technocratic legitimacy’, the idea that ‘institutions are best legitimated through their ability to offer “Pareto-improving” solutions’.³⁰ Of course, in such a system, the importance of the separation of powers as an essentially procedural mechanism is limited to the extent to which it contributes to actually creating qualitatively better, effective government.

In fact legitimacy *as such* is a very volatile concept and particularly hard to estimate. According to Beetham and Lord, political legitimacy is comprised basically of three different elements: legality, normative justifiability and legitimation.³¹ A political system as a whole – in their view – fulfils these conditions of legality if the political authority is acquired and exercised according to established *rules*; quite a formal criterion. Normative justifiability, the more substantive criterion, refers to the political context of the rules. Are they justifiable according to socially accepted beliefs about what is the rightful source of authority, and the proper aims and standards of government? If a political system aspires to be normatively justifiable, its citizens must accept that different categories of rules are imposed on them by different levels of authority and that they feel that these levels conduct their policies according to the right ends and procedures. Finally, legitimation means that the positions of authority have to be confirmed by

an explicit approval and confirmation of its subordinates and recognised by other legitimate authorities.³² Constitutions and constitutional lawmaking typically performs these functions. Constitutions and the institutions they establish ('a.o. the powers') are attempts to command self-reinforcing legitimatisations for rule and lawmaking. Constitutions are the ultimate vehicles of legitimation vehicles, they are attempts to embody Hart's rule of recognition.³³ But legitimacy cannot be ordained by formal rules alone. There are substantial dimensions as well to be considered. In this respect Beetham and Lord distinguish three dimensions of legitimacy, notably: democracy, identification and performance. Democracy refers to structural aspects such as the representation of the population and the separation of powers; identification points to the popular acceptance of the project of the political authority that governs (the recognition by the people of the exertion of power) and to issues such as identity and citizenship. The last dimension is performance, defined as the relation of the political system to the ends or purposes it should serve and the effectiveness of its decision-making procedures.³⁴

But where does legitimacy come from? If we focus on regulation, legitimacy can come from basically three sources. First of all from democratic input in the enactment of regulation i.e. the way citizens, interested parties or stakeholders participate or are involved in the decision-making process. Secondly from the performance and delivery of regulation – its output for short. In this respect Scharpf distinguishes between input and output legitimacy³⁵ which, couching the foregoing in terms of classic democratic theory, expresses on the one hand the authenticity dimension of democratic self-determination and on the other hand the effectiveness dimension of democratic self-determination.³⁶ Thirdly, the acceptance of government action and especially regulation/legislation is – as Schmidt has argued recently – also dependent on its throughput, i.e. the governance process (interactions) with the people in terms of efficacy, accountability, transparency, inclusiveness and openness to interest consultation and deliberative procedures.³⁷ What distinguishes throughput processes from input and output processes – according to Schmidt – is that input and output can involve trade-offs, where more of the one may make up for less of the other, whereas more (and better) throughput does not make up for problems with either input or output while less (and worse) throughput can de-legitimise both input and output.³⁸

While it is useful to note that it does not stand uncontested, the principle of democracy as the (major) source of political legitimacy will nevertheless serve as the underlying premise of the views on the main

topic considered in this volume, the separation of powers. However, both democratic legitimacy and the separation of powers as concepts have very much evolved alongside the state and over the last decades the state has been giving up ground to other power holders, particularly international (and even supranational) actors. This brings up the question of whether the combination of these concepts is still viable outside a traditional state context, and if so, in what form? This is the central question the current volume seeks to answer.

Not a random question but a topical question we, as researchers of the Institute of Public Law at Leiden Law School, encountered during the past decade when dealing with the questions of our research programme Trias Europea, part of one of Leiden Law School's overarching research programmes *Securing the Rule of Law in a World of Multilevel Jurisdiction* (2004-2014). In Trias Europea we monitored and researched the long and winding road of the developing constitutional law of the EU (including the case law) and the many conundrums this throws up during the search for and debate on the proper balance of governmental powers in the relationship between the EU and its Member States and among EU institutions themselves: A contested, contingent and controversial issue. In the last ten years constitutional developments have succeeded one another with breakneck speed, from the Laeken declaration to the European Convention, via the lapsed Constitutional Treaty to the Treaty of Lisbon and the rapidly evolving case law of the Court of Justice and the new institutional dynamics of the EU in its wake. Those who only follow the fast-moving seconds hand of the clock risk overlooking the hand indicating the hours. The big questions here not only concern what the principles of democracy and rule of law stipulate as regards the institutional setup of the EU, but also how the debate at the level EU is, or is not, typical (and therefore inspirational) for the institutional dynamics of the interplay between national and international organisations that is becoming increasingly important every day for our lives, welfare and liberties in our globalising world. Two core issues kept reappearing during our research: first of all – a lack of contemporary constitutional theory to understand the new dynamics of institutional balance between national, EU and international organisations and the demands the concept of democracy and rule of law set in this respect in our day and age. Secondly: most of the debates on the proper institutional balance between the national, EU and international institutions nowadays do not seem to centre on constitutional principles derived from the concept of the rule law, or the concept of liberal democracies, but on much wider legitimacy

issues than are covered by the theory underlying the rule of law concept or that of liberal democracy.

To discuss these topical questions we organised a conference on the theme of ‘*The Powers that be; in search of new checks and balances in the relation between the legislature, administration (executive), judiciary and media in multilevel jurisdictions*’ in December 2012. The conference, partly the initiative of the Circle of Constitutional Law in the Netherlands (Staatsrechtkring), invited constitutional scholars from the Netherlands, UK, Germany and Belgium, as well as top-level practitioners in the field (including the then President of the Dutch Supreme Court, the Vice-President of the Dutch Council of State and a former Justice of the Strasbourg Court) to reflect on the outcomes of our research in the programme Trias Europea and ask them what to their mind the big questions are to be researched in the near future (i.e. for this book). The conference proceedings, including the questions, were published in a 2013 volume under the title ‘The Powers that Be,’ and form the agenda for the current book.³⁹

As good fortune would have it, 2013 (the year our proceedings were published) also saw the birth of Christoph Möllers’ impressive monograph, *The Three Branches; A Comparative Model of Separation of Powers* (Oxford University Press). The book tied in wonderfully with the agenda we had been handed by our conference; Möllers’ book was spot-on for what we had found to be a missing element: contemporary constitutional theory on the separation of powers. How and to what extent were vintage theories on the separation of powers still useful and valid to be able to understand the new dynamics of interplay of law (and policy) making institutions in a multilevel setting. Möllers’ analysis touches the heart of the matter. In his book he develops a contemporary normative model justifying the constitutional principle of the separation of powers grounded in a liberal theory. He highlights the complexities, limitations and constraints of the traditional model of the separation of powers in the context of international organisations like the EU and WTO and – subsequently – draws on comparative constitutional analysis to present a more jurisdictionally-neutral model for power separation. This inspirational book led to the idea to pitch it against both our agenda (resulting from the 2012 conference) and our own insights, as well as that of fellow travellers in the field. What resulted was a seminar early in the summer of 2014 where, together with Möllers, we discussed the intersections of his theory and our research and insights and this book. In addition, we discussed a new research programme where we take up the second challenge (besides

the challenge of a tailored theory): that of legitimacy. In the years to come we will look into the *Legitimacy and Efficacy of Law and Governance in a World of Multilevel Jurisdiction* together with our research group. But before we do that, it is time to return to the subject at hand: developments with regard to the separation, or rather the interplay, of powers in our World of (increasingly) Multilevel Jurisdictions.

3 Current developments

The challenges offered by the practical developments that the last few decades have witnessed concerning the idea of separation of powers and its natural habitat, the nation-state, are numerous and varied. One general trend is particularly relevant in the context of this volume, i.e. ‘transnationalism’, in the sense of the gradual development of an international (and European) legal order. This seems to go hand in hand with two other phenomena, bureaucratisation and privatisation. Together, these greatly affect the exercise of power by nation-states and have, to an extent, shifted the exercise of power away from them altogether.⁴⁰

Nation-states seem inherently ill-equipped to deal with some of the most pressing issues influencing their own welfare and that of their inhabitants today, since those issues are predominantly of a global nature. But while the capacity of the state to intervene has diminished in this respect, no less is demanded of it by its citizens, who want these concerns addressed. States have therefore logically turned to one another for the necessary clout to address these global issues, pooling their power in multilateral organisations, or relinquishing some of it to supranational organisations such as the European Union (EU). Although the influence of states on international law still shouldn’t be underestimated, an international legal order which isn’t merely based on state consent is slowly but steadily developing.⁴¹

The delegation of law-making power does not end there, however, as states do not only struggle to deal with problems whose global scope transcends their own, but also face burgeoning regulatory responsibilities at home. They are expected to create policy on a vast array of subjects, which often requires increasingly specialised knowledge. Inevitably, a shortage of time and expertise within the parliamentary-governmental complex arises. This is overcome through the delegation of responsibilities to an expansive complex of bureaucratic agencies, experts and advisors, who *are* supposed to possess the necessary know-how and capacity. While

not lawmakers in the same sense of the word as national parliaments, these bureaucratic bodies are often given considerable discretion in the implementation and enforcement of the law and in their advisory capacities they exercise substantial influence on its creation.⁴²

Finally, law-making authority is also delegated to spaces outside of the state altogether, in a process of privatisation. Particularly when it comes to market regulation, the state lacks the expertise, even within its own extended bureaucracy, to intervene rapidly and effectively. It therefore turns to the market actors themselves to create the type of hands-on regulation needed. The relationship between the state and these private or hybrid public-private actors is not necessarily hierarchical. While private actors still tend to operate within a legal framework provided by the state, beyond this demarcation of responsibilities and authority, they enjoy a great amount of freedom both in how they regulate themselves and in the normative regimes they create. Their relation with the state is thus reciprocal and largely horizontal, to say the least.⁴³

Transnationalism and privatisation often go hand in hand, as states turn to international private actors to regulate in spaces where their own geographical boundaries do not allow them to. Moreover, international organisations also often co-opt private actors, although they do not share the same geographical limitations, because they find themselves just as overwhelmed by the task of policy creation as nation-states. The EU in particular, relies heavily on private actors for the hands-on regulation of its internal market.⁴⁴

This diffusion of law-making power naturally has profound implications for the role of the state, which has long ceded its monopoly in this regard and is taking on a role as only one of many actors within an international legal order.⁴⁵ The international organisations and bureaucratic and privatised policy-makers inhabit the space the state has ceded, as they are only connected to the national parliamentary-governmental complexes by a formal chain of delegation. This in itself, is historically speaking not a new phenomenon in any sense. However, the diffusion of power is more diverse and scattered now than ever before and many of its recipients are much further removed from those whose consent generated that power in the first place, the citizens.

Returning now to the main subject of our enquiry, the separation of powers, it is clear that transnationalisation, bureaucratisation and privatisation pose challenges to its tenability, certainly in its classical conception. Thus, the tripartite functional division of legislative, executive and judicial might no longer suffice, insofar it ever did, to capture the

many hybrid forms of governance we see today, even if we consider solely those within the state. Legislative and executive power, the creation and application of law, are inherently difficult to separate, but today they are often explicitly united in the same body. Bureaucratic and private actors are given discretion in both the implementation of the laws and their enforcement. If we add a reliance on self-regulation, even a judicial element enters the fray.

A possible response to these developments, proposed by Bruce Ackerman among others, would be to recognise and indeed constitute an increased number of powers, which can more adequately capture the complexity of the situation. However many categories might be needed, and clearly such a response creates problems of its own, for how are these powers supposed to relate to each other and how do we prevent a decline in democratic legitimacy, when not one in three, but for instance one in five powers is controlled democratically?⁴⁶ The creation (or acknowledgement) of new powers is especially problematic if we accept Möllers' view of the classic triumvirate, in which each branch is assigned a very specific role in maintaining an equilibrium between individual and collective self-determination.⁴⁷

Another problematic aspect of the classical conception of separation of powers in light of the developments outlined earlier, is its primarily horizontal nature. Legislative, executive and judicial powers are part of a specific, chronologically ordered process of law creation, application and review. Nevertheless, each branch is fundamentally equal, hence relates to the other branches horizontally. This equality is upheld by maintaining separation where possible and creating checks and balances where necessary. It was specifically the wish to preserve horizontal equality among the three powers that led to the amendment of the idea of a pure separation of powers by introducing checks and balances; experience had taught that without the latter, imbalance and legislative domination would ensue. However, the emergence of an increasingly autonomous international legal order has created a divestment of power organised primarily along vertical lines, in which states are no longer at the top of the pyramid. At the same time, vertical divestment of power has also occurred regionally and within states themselves through decentralisation. As suggested by O'Donoghue, the separation of powers, might be able to follow suit, by creating a formal, vertical framework, encompassing each layer of governance, international, regional, national, local etc., and giving it specific tasks, as well as the instruments to supervise the other layers. This vertical system could then

be combined with a more traditional horizontal separation of powers on each of the pyramid's steps.⁴⁸

Besides those who argue for a drastic rethinking of separation of powers in order to make it viable in this new constellation, there are those who draw a much simpler conclusion: separation of powers and constitutionalist thinking as a whole are intrinsically bound to a state context and need to be heavily adapted in order to also have a place in this new fragmented world. Instead of trying to 'simply' use normative domestic concepts of constitutionalism and democratic legitimation to apply an overarching structure to the new legal order, we should acknowledge and accept the latter's principally heterarchical nature, although a general concept such as checks and balances might still fit in.⁴⁹ These checks and balances may, however, no longer just apply to the formally constituted powers, but increasingly also between these state powers and a range of non-state actors, thus potentially broadening the scope of constitutional law in a substantial manner.

Despite, or perhaps because of, the import of the developments described above, the classical structure of the separation powers is used as a structural and theoretical starting point for this volume. If nothing else, it is much easier to comprehend and signal change when a more familiar situation is used as a point of departure. Hence, we hold that the three categories on which the classical model is based still, at the very least, have merit as descriptive, functional categories. From this premise, the contributions will explore the new situation, the degree to which the tenets of the classical separation of powers still apply to it and which possible other powers one should (begin to) identify.

4 Synopsis

The first part of this volume considers the separation of powers as a concept and its place within a transnational legal order. The second, third and fourth parts then each focus on one of three classical branches of government and the developments currently taking place within these, starting with the legislative power, followed by the executive and judicial power. The fifth and final part concerns non-state and hybrid actors and how they relate to the powers examined in the previous parts.

In his contribution, 'The Separation of Powers and Constitutional Scholarship', Maarten Stremmer welcomes Möllers' attempt to extend positive constitutional scholarship with discussions about legitimacy,

connecting it with normative political theory. If such an extension, however, does not embed the social and political dimensions of the constitution, it could fall prey to a rationalistic reduction. Following this assumption, Stremler reveals the weaknesses of Möllers' model and introduces another approach which integrates methods of legal philosophy, legal sociology and legal history with constitutional scholarship.

This interplay of sociological and normative origins is further illustrated by the other chapters in this part, which focus on one particularly important broad sociological development, i.e. transnationalisation. They examine whether, to what extent and how the separation of powers might be given normative meaning in a transnational context.

In her contribution, Aoife O'Donoghue argues that separation of powers could indeed play an important normative and organisational role in the new global legal order. In order to clear the path however, the separation of powers could first be used as an analytical tool to explore some largely uncharted territories within global governance. These consist firstly of the persisting gaps in identifying both constituent and constituted actors, secondly in the gaps that exist in the differentiation between the formation, administration and adjudication of law and thirdly of the issue of checking legitimacy and legalism when all actors involved have a questionable status to do so. According to O'Donoghue, these gaps firmly establish a lack of separation of powers beyond the state. Identifying them can help to provide potential solutions.

Patricia Popelier's chapter explores the opposition between two normative conceptions of constitutionalism – political and legal constitutionalism – on a European level. Political constitutionalism propagates the implementation of checks and balances within the political sphere, rejecting the strong judicial review advocated by legal constitutionalists. Several European national legal systems in which this view is prevalent find themselves confronted with a European legal order in which judicial review features very prominently. Popelier offers a comparative analysis of these systems and their responses to European supremacy claims, in order to explore the viability and strategic merit of political constitutionalism within the European legal space.

Joseph Corkin's contribution, 'Accountability and the New Separation of Powers', offers a reconceptualisation of the separation of powers aimed specifically at addressing the third issue signalled by O'Donoghue. Now that lawmaking has moved beyond the state on multiple levels, the idea of legitimacy stemming from one particular source, a democratically legitimated legislature to which all lines of accountability should flow,

must be relinquished. Instead, the separation of powers should be recast as an instrument that can provide legitimacy procedurally, by furnishing the relations of the various actors with appropriate checks and balances. Corkin foresees a particularly important role for the administrative constitutional law of the judicial branch in this respect.

In his contribution, Tom Eijsbouts discusses the application of the *trias politica* on the institutions of the European Union. He is not convinced by Möllers' application of the *trias politica* beyond the state, portraying it as too narrow. Instead, he draws a picture of the European Union as a system which encompasses all the elements of the *trias politica*, using Möllers' book as a comparison.

The second part, focussing on the legislature, opens with Michal Diamant's examination of the implications of the increased centralisation of European fiscal policies following the Euro crisis for the ability of national parliaments to hold their executives accountable. She addresses the question of how national parliaments should position themselves towards both their governments and the newly emerged European economic governance, in order to retain adequate democratic control over public expenditure.

Wim Voermans' contribution 'The Rise of Regulators' offers an appraisal of the impact of 'substantive international regulation' (SIR), international regulatory standards intended for general application which are usually carried by international regulators that lack formal legislative power. Though SIR do not constitute legal acts, they have the same intent and effect, namely influencing public behaviour, leading to discussions about the legitimacy of these regulations. These legitimacy issues are addressed by Voermans in his chapter and he assesses whether classical constitutional standards could still be adequate in this context, or whether alternate solutions might be available.

Gert Jan Geertjes and Luc Verhey explore in their chapter whether the legislative supremacy of the parliament in the United Kingdom is likely to move in the direction of a legally entrenched separation of powers. The enactment of the Human Rights Act was aimed at giving legal effect to the European Convention on Human Rights while at the same time maintaining parliamentary sovereignty. It is contended that it led to the emergence of a convention requiring parliamentary compliance with declarations of incapability. Although conventions cannot override legal rules and the sovereignty of parliament is still present, the emerging convention demonstrates, according to the authors, the strengthening of the doctrine of the separation of powers in the UK.

The third part of this volume focuses on the executive power and especially the blurring of distinctions between executive and legislative power in a European legal context. Claartje van Dam examines the phenomenon of EU administrative soft law in light of the theory of separation of powers and isolates several potentially problematic areas in this respect. The considerable steering effects of soft law on the implementation of EU law might be incongruous with the informality of the process through which it is adopted and applied, suggesting the need for more checks and balances. The establishment of soft law might concentrate executive power in the hands of the European Commission and blur the division of powers between the Commission and the Member States. Given these issues, the chapter explores whether governance through soft law might be aligned with the separation of powers and how this could be done.

Administrative rulemaking on a national level, particularly the implementation (transposition) of European directives by national administrations, can from the viewpoint of democratic legitimacy be regarded as problematic because it largely involves administrative actors in the creation of transposition legislation. Josephine Hartmann, however, proposes a different reading of administrative rulemaking and the exercise of discretionary decision-making powers thereby coming into play. Discretionary powers can be wielded in such a way that decisions become more transparent and effective, while a reimagined principle of checks and balances, based on participatory governance and negotiated rulemaking, could provide the necessary public control. Hence, administrative rulemaking – in using discretion – carries the potential to strengthen the legitimacy of EU directives at the national level.

Paul Adriaanse's contribution analyses EU regulation of government spending within Member States in the field of State aid surveillance. It addresses the question whether there are enough guarantees to legitimise the decision-making process in EU State aid control issues. Noting that the Commission has a decision-making power that is not subject to democratic control and can only partly be reviewed by the European Courts, Adriaanse concludes that its decisions enjoy a very limited legitimacy. He goes on to demonstrate how through means of composite administration and by drawing insights from the theory of throughput legitimacy, further legitimisation can be reached.

The fourth part of this volume focuses on the judicial power. In the first chapter Titia Loenen argues that placing a stronger emphasis on the margin of appreciation in order to address concerns about the European

Court of Human Rights' encroachment on state sovereignty is not an advisable strategy, as it might compromise the court's ability to maintain human rights standards. Instead, the court's 'legitimacy deficit' should be remedied by focussing on balancing powers and rethinking the existing checks and balances, which are based on traditional notions of horizontal separation of powers.

The next chapter also concerns the ECtHR as an established protector of human rights, as well as the CJEU, which has only started to take its first steps towards comprehensive fundamental rights protection. Discussing the 'constitutionalisation' of both human rights courts in relation to the theory of the separation of powers, Ingrid Leijten propagates a limited and diversified conception of the constitutional tasks of the ECtHR and the CJEU. In the case of the ECtHR such a demarcation might be found in offering principled protection of core interests (while the ECtHR could deal with more peripheral claims in a more individualistic fashion). The CJEU's task, on the other hand, is limited due to Article 51 of the Charter and the cases it receives, although being part of a (developing) tripartite structure it may practice a broader fundamental rights review within that scope.

Jerfi Uzman and Geerten Boogaard's contribution grapples with the proliferation of public law litigation, which has accompanied the ascent of transnational law over the past decades. Public law litigation constitutes a break with the traditional role of the judiciary in the classical separation of powers, which is potentially problematic from a legitimacy standpoint. The authors therefore propose a remedial dialogue between the judiciary and the other branches of government, in order to maintain a balance between the protection of fundamental rights and upholding the principle of collective self-determination. The authors reserve an important role in this process for the instrument of declaratory relief.

In his epilogue, Christoph Möllers critically reviews the whole volume. Furthermore, he focuses on the question of what to make of the old idea of three powers given the debate on new phenomena in the volume.

5 Concluding remarks

What is left of the separation of powers and its utility for political legitimacy after the dust has settled? As the chapters that will follow substantiate, it is perhaps too soon to purport to having a definite answer to this question, because the dust hasn't actually settled yet. Scholarship, whether of a legal,

historical or social-scientific nature, is still in the midst of transcending from describing and comprehending the changed constellation of power, to grasping its implications and proposing solutions for its deficiencies. And while it is doing this, its subject continues to undergo rapid change. Nevertheless, the contributions gathered in this volume, to differing degrees, offer a picture from which the separation of powers has most certainly not disappeared as a touchstone of the proper exercise of power.

No matter how wide-ranging their subjects may be, all authors still succeed in assessing, as requested, the position of the separation of powers within the scope of their particular chapters in reference to what Jeremy Waldron calls ‘the separation of powers and its adjacent principles’.⁵⁰ As was set out above already, like Vile, Waldron distinguishes the pure separation of powers, the idea that the functions of government should be separate from one another, from some of the adjacent principles that we have come to associate it with. These are firstly the division of power – the idea that power should not be overly concentrated in the hands of one person, group or agency –, secondly the checks and balances principle, thirdly the bicameralism principle and fourthly the federalism principle.⁵¹ Although not all of them carry (the same) relevance for each of the subjects addressed in this volume, using Waldron’s principles as a theoretical net still leaves us with a healthy catch.

Waldron himself is convinced that the separation of powers, though much diminished in practical stature and subject to many changes, is not yet dead and buried. For him, the value of the concept does not so much lie in its ability to facilitate individual and democratic self-determination, as Möllers proposes, or even in its ability to safeguard political liberty, as advocated by Vile, but in its intrinsic ability to provide differentiated, articulated modes of government and the integrity it provides for each of the distinguished powers: ‘the dignity of legislation, the independence of the courts, and the authority of the executive’.⁵² According to Waldron, it is exactly the phenomenon of undifferentiated government, viewed by some as the nail in the coffin of separation of powers, that should prompt us to hold on to the idea a little longer, if only to recognise what has been lost.

Even Ackermann, who as we have seen zealously exposes the deficiencies of ‘Montesquieu’s holy trinity’ in the current age, proposes that ‘[a] “new separation of powers” is emerging in the twenty-first century. To grasp its distinctive features will require us to develop a conceptual frame-work containing five or six boxes – or maybe more’.⁵³

All in all, it seems clear from these examples as well as from the various contributions in this volume that it might be too soon to leave the separation of powers by the roadside, even though we might not be able to agree exactly on its role or whether it should consist of three, six or an infinity of boxes. If we accept the view of Vile and Möllers that the 'classical' system of separation of powers is at best an ideal type, never fully practically realised, and acknowledge that this idea has in fact been developing and adapting for the better part of four centuries, then it is not hard to imagine that it might continue to do so and maintain a measure of relevance. Certainly, the emergence of a complex international legal (dis)order and the continuing processes of bureaucratisation and privatisation, to name but a few challenges, require us to reassess the value and feasibility of the separation of powers doctrine. With the contents of this volume, we hope to make a contribution towards that goal.

Notes

- 1 M.J.C. Vile, *Constitutionalism and the Separation of Powers*, Indianapolis: Liberty Fund 1998, p. 2.
- 2 Vile, *Constitutionalism and the Separation of Powers*, p. 14.
- 3 Plato, *Laws*, book VII, 798a-d.
- 4 Vile, *Constitutionalism and the Separation of Powers*, p. 30.
- 5 Vile, *Constitutionalism and the Separation of Powers*, p. 32-33.
- 6 M.H. Hansen, 'The Mixed Constitution versus the Separation of Powers: Monarchical and Aristocratic Aspects of Modern Democracy', *History of Political Thought* 2010, Issue 3, p. 517.
- 7 Vile, *Constitutionalism and the Separation of Powers*, p. 35.
- 8 Vile, *Constitutionalism and the Separation of Powers*, p. 57-60.
- 9 Vile, *Constitutionalism and the Separation of Powers*, p. 79.
- 10 C. Möllers, *The Three Branches: A Comparative Model of Separation of Powers*, Oxford: Oxford University Press 2013, p. 18.
- 11 Vile, *Constitutionalism and the Separation of Powers*, p. 71-72.
- 12 Hansen, 'The Mixed Constitution versus the Separation of Powers', p. 511-512.
- 13 J. Madison, 'The Federalist No. 51: Madison', in: G. Wills (ed.), *The Federalist Papers by Alexander Hamilton, James Madison and John Jay*, New York et al.: Bantam Books 1982, p. 261-265.
- 14 Möllers, *The Three Branches*, p. 28.
- 15 Vile, *Constitutionalism and the Separation of Powers*, p. 133.

- 16 Möllers, *The Three Branches*, p. 20-21.
- 17 Vile, *Constitutionalism and the Separation of Powers*, p. 170-172.
- 18 Vile, *Constitutionalism and the Separation of Powers*, p. 207.
- 19 Vile, *Constitutionalism and the Separation of Powers*, p. 228, 229.
- 20 Vile, *Constitutionalism and the Separation of Powers*, p. 12.
- 21 Möllers, *The Three Branches*, p. 8.
- 22 Vile, *Constitutionalism and the Separation of Powers*, p. 12.
- 23 Vile, *Constitutionalism and the Separation of Powers*, p. 3.
- 24 Vile, *Constitutionalism and the Separation of Powers*, p. 14.
- 25 J. Waldron, 'Separation of Powers in Thought and Practice', *Boston College Law Review* 2014, vol. 54, Issue 2, p. 433-468, at 437-438. Waldron essentially disagrees with Vile, however, that liberty is the aim of separation of powers. He emphasises rather the inherent value of separation of powers, which lies in the integrity it gives to each power and articulated modes of governance generally. See below.
- 26 A. O'Donoghue, 'International Constitutionalism and the State', *International Journal of Constitutional Law* 2013, vol. 11, issue 4, p. 1021-1045, at 1033.
- 27 Möllers, *The Three Branches*, p. 96.
- 28 N. Gardels, 'Intelligent Governance for the 21st Century', *New Perspectives Quarterly* 2013, vol. 30, issue 1, p. 7-15, at p. 14. This article is based on N. Bergguen & N. Gardels, *Intelligent Governance for the 21st Century. A Middle Way Between West and East*, Cambridge: Polity Press, 2013.
- 29 Gardels, 'Intelligent Governance for the 21st Century', p. 7.
- 30 C. Lord & P. Maignette, 'E Pluribus Unum? Creative Disagreement about legitimacy in the EU', *Journal of Common Market Studies* 2004, vol. 42, Issue 1, p. 186.
- 31 D. Beetham and C. Lord (eds.), *Legitimacy and the European Union*, Harlow: Longman 1998.
- 32 Beetham & Lord, *Legitimacy and the European Union*.
- 33 H.L.A. Hart, *The Concept of Law*, third edition. Clarendon Law Series 2012 (originally 1961).
- 34 Beetham & Lord, *Legitimacy and the European Union*, p. 4-5.
- 35 F. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press 1999.
- 36 F. Scharpf, 'Economic Integration, Democracy and the Welfare State', *Journal of European Public Policy* 1997, vol. 4, issue 1, p. 18-36.
- 37 V.A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"', *Political Studies* 2013, vol. 61, no. 1, p. 2-22. The concept of *throughput legitimacy* is – when it concerns matters of law and legislation – more or less on par with what Tom Tyler has coined

'procedural justice'. There seems indeed to be some evidence that authorities and institutions are viewed as more *legitimate* and, therefore, their decisions and rules are more willingly accepted when they exercise their authority through *procedures* that people experience as being *fair*. See T.R. Tyler, 'Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?', *Behavioral Sciences & the Law* 2001, vol. 19, no. 2, p. 215–235.

- 38 Tyler, 'Public Trust and Confidence in Legal Authorities', p. 19.
- 39 M. Diamant, M.L. van Emmerik, J.P. Loof & W.J.M. Voermans (eds.), *The Powers that Be. Op zoek naar nieuwe checks and balances in de verhouding tussen wetgever, bestuur, rechter en media in de veellagige rechtsorde*, Publicaties van de Staatsrechtkring 17, Oisterwijk: Wolf legal Publishers 2013.
- 40 J. Corkin, 'Constitutionalism in 3D: Mapping and Legitimizing Our Lawmaking Underworld', *European Law Journal* 2013, vol. 19, issue 5, p. 636–661, at 637. See also his contribution in this volume.
- 41 O'Donoghue, 'International Constitutionalism and the State', p. 1023.
- 42 Corkin, 'Constitutionalism in 3D', p. 642.
- 43 Corkin, 'Constitutionalism in 3D', p. 648, 649.
- 44 Corkin, 'Constitutionalism in 3D', p. 650.
- 45 O'Donoghue, 'International Constitutionalism and the State', p. 1022.
- 46 B. Ackerman, 'Good-bye, Montesquieu', in: S. Rose-Ackerman & P.L. Lindseth, *Comparative Administrative Law: Research Handbooks in Comparative Law series*, Cheltenham: Edward Elgar Pub 2011 p. 3.
- 47 Möllers, *The Three Branches*, p. 108–109.
- 48 O'Donoghue, 'International Constitutionalism and the State', p. 1034–1035.
- 49 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford: Oxford University Press 2010, p. 14–17, 298.
- 50 Waldron, 'Separation of Powers in Thought and Practice', p. 438.
- 51 Waldron, 'Separation of Powers in Thought and Practice', p. 438.
- 52 Waldron, 'Separation of Powers in Thought and Practice', p. 334.
- 53 Ackerman, 'Good-bye, Montesquieu', p. 129.