

Checking and Balancing Law-making Beyond the State: Probing European and International Practices

Workshop

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organized within the framework of
“the architecture of postnational rulemaking”

Courts and administrations on different levels of governance make gradually larger parts of European and international law. They strike sensitive balances between competing public policy objectives and take a multitude of politically laden decisions. They increasingly impinge on the room of manoeuvre of alternative (political-legislative) sites of law-making and encroach upon spheres of individual as well as collective self-determination. In light of imperfect alternatives (Komesar 1997), judicial and administrative law-making is not all curse. It frequently steps in where alternatives fail. Common wisdom for example teaches that the European Court of Justice took on a more expansive role precisely in light of stalled intergovernmental law-making processes. Similarly, administrative law-making reacts to the incapacity and inadequacy of legislators to rule on matters where they lack expertise. The political process on the international level is yet more fraught with difficulties so that, to some extent, it falls upon the judiciary to step in (von Bogdandy & Venzke 2012). At the same time, the cumulative effect of administrative law-making on different levels of governance contributes to strengthening the overall weight of the executive (Curtin 2009; Mendes 2012).

In domestic political settings, it is a well-received argument that the separation of powers is supposed to contribute to meeting normative aspirations of individual and collective self-government, or, slightly less aspirational, to limit as well as legitimize power (Habermas 1997). In a dominant reading, the separation of powers differentiates between institutions according to the specific function they fulfil in the broader institutional set-up (Möllers 2013). In a prominent formulation of the German Federal Constitutional Court, the “institutional and functional differentiation and separation of powers serves the distribution of political authority and responsibility as well as the control of those in power. It pursues the aim that, as much as possible, decisions are right. This means that they be taken by those institutions, which, according to their organization, composition, function, and procedure, are best suited for taking them.”¹ Law-making, though centred on the political-legislative process, is not confined to any single institution. It is not *categorically* but *gradually* separated or, rather, divided, between institutions that complement and check each other.

¹ 68 Bundesverfassungsgericht (BVerfG) I, p. 86; 98 BVerfG 218, p. 251-2.

The thought of limiting and legitimizing law-making through the separation of powers is as entrenched at the domestic level as it is evasive beyond the state—both for the European level and even more so for the international context. The workshop *Checking and Balancing Law-making Beyond the State* therefore sets out to think about the separation of powers in European and international law-making. It canvasses three broad clusters of inquiry:

- First, the workshop tries to gain *normative traction* by asking which ideas and normative programmes underpin the separation of powers in different contexts. What is their normative sediment? Which more concrete factors does the separation of powers suggest for normative guidance that could be transposed to settings beyond the state? How has the doctrine changed and is it still viable?
- Second, can we see *iterations* of the separation of powers *in the practice* of law-making beyond the state? How do these practices apply and transform the separation of powers? How does their normative programme compare to domestic experiences? For example: what has inspired the European Court of Justice to shape the principle of institutional balance and how does it operate? How does international judicial law-making take into account and contribute to the shaping of political processes / how does it deal with the lack thereof? How does the balance between judicial and administrative law-making work, if at all, beyond the state?
- Third, what are the *implications of structural differences* between political settings and how do they affect the separation of powers? A key issue is of course the prowess of parliaments beyond the state. How then does a horizontal separation of powers relate to vertical divisions of authority (Benvenisti & Downs 2009; Nollkaemper 2010)? How can thinking about the separation of powers (not only domestically, but beyond the state) help explain the internal effects of European and international law?

Generally, we see European and international law-making as one of the main, if not the single most important, modus of exercising public authority beyond the state. It therefore strikes us as a close step to now ask how the exercise of such public authority should be checked and balanced in the postnational constellation.

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References:

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- Mendes, Joana (2012), 'EU law and global regulatory regimes: Hollowing out procedural standards?', 10 *International Journal of Constitutional Law* 988–1022.

- Möllers, Christoph (2013), *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press).
- Nollkaemper, André (2010), 'Rethinking the Supremacy of International Law', 65 *Zeitschrift für öffentliches Recht* 65–85.
- von Bogdandy, Armin & Ingo Venzke (2012), 'In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification', 23 *European Journal of International Law* 7–41.

Specific themes to consider & possible contributions, tentative outline:

1. INTRODUCTION: Thinking about the separation of powers beyond the state
Ingo Venzke & Joana Mendes
- I. NORMATIVE TRACTION
2. Separation of powers in comparative public law / constitutional-political theory
C. Möllers
 3. The new separation of powers I (constitutional law)
D. Curtin & E. Carolan
 4. The new separation of powers II (administrative law)
Loïc Azoulay
- II. ITERATIONS IN PRACTICE
5. The agenda of the European Court of Justice in shaping the principle of institutional balance in the EU
Bruno De Witte
 6. The interaction between administrative and judicial lawmaking in the EU
Sophie Boyron
 7. The “traditional” tri-partite setup of international organizations
Jochen von Bernstorff
 8. The Separation of Powers and the ECtHR
Mikael Rask Madsen
 9. Iterations of the separation of powers in international law
Diane Desierto
 10. Judicial lawmaking in EU private law
Chantal Mak
- III. IMPLICATIONS OF STRUCTURAL DIFFERENCES
11. The Prowess of Parliaments in Political Processes beyond the State
Kalyso Nicolaidis
 12. Regulators' legitimacy claims: Implications of transnational lawmaking on separation of powers
Julia Black [tbc]

13. Implications at the international level: Linking the separation of powers and Standards of Review
Andreas von Staden
14. Explaining direct effect and absence thereof
Armin von Bogdandy
15. CONCLUSION: The Promise of the separating powers beyond the state: (Elements of a research agenda) / Linking the horizontal separation of powers with interactions between levels of governance
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