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Steps to a Tripartite Theory of Multi-level-Government

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‚Unsere größte Sünde: die Ungeduld der Begriffe.'
Peter Handke, Die Unvernünftigen sterben aus, 1973.

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Abstract

This paper takes the traditional notion of separated powers and tries to modernize it by developing a legitimacy-based model for the legislative, executive and judicial functions. The starting point of this model is the idea of autonomy as the central element for every legal order that claims legitimacy. The institutional implications of the distinction between individual and collective self-determination will help to develop certain criteria for the organizational design of legitimate law making procedures. In this model the idea of separated powers serves to organize the perpetuate conflict between individual and collective self-determination, both equally accepted by constitutional orders. These criteria can be comparatively applied to classical problems of separated powers – delegation, constitutional adjudication – as well as to problems of multi level-legal systems.

Steps to a Tripartite Theory of Multi-level Government

0. Form, Method and Question of the Paper

0.1. Form: Jean Monnet *Working* Paper

This paper is a working paper – a work in progress. Its publication is not meant to accelerate the already initiated publication of a almost finished peace in a law review. It is rather a reflection, meant to clarify the concept of a book to be written in German language[1]. Thus, this text is highly speculative and scarcely footnoted. It stresses the questions that are posed not the answers that are offered to these questions. It should be read as a meditation on its topic as a speculation with concepts.

The paper's topic is the analytical interrelation between three current notions of public law: legitimacy, tripartite government (traditionally known as 'separation of powers'), and multi-level government. In a three step argument, the paper will attempt to develop a model to analyze some of its topic's questions. To present, to substantiate and to apply this model, the paper will comparatively refer to four public legal orders: the German and the U.S. constitutional and administrative law, the law of the European Union and the law of the GATT/WTO-order. Corresponding to its title, this paper is after this brief introduction made up of three parts: Legitimacy, Governmental Functions and Governmental Levels.

0.2. Method: Deductive Comparatism

Comparison is an elusive practice. The urge for comparison is felt more strongly, when a certain amount of knowledge allows someone to single out similarities and differences in the 'own' and in 'other' societies. This is the common root of comparative and cultural studies.[2] But comparison does not only need knowledge, comparison needs theory as well[3]: not one particular theory and not a theory of comparison. It rather needs

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[1] Christoph Möllers, Legitime Funktionenordnung, 2003.

[2] Niklas Luhmann, Kultur als historischer Begriff, in: Gesellschaftsstruktur und Semantik, Band 4, 1995, 31.

[3] Most obvious and for the first time in the discipline Comparative Literature. Rene Wellek, Comparative Literature in General Education, Journal of General Education (April 1948), 2: 215-218.

a theory that is able to provide for a language that can spell out differences and analogies between the compared systems, that is abstract enough to grasp all the compared elements and concrete enough to be sensitive towards each of them. Without such a theory, legal comparison is likely to become a mere description of several legal cultures that even has trouble to define the concept it tries to describe.

Comparison is en vogue, not only in constitutional law. But has constitutional law a theory to become truly comparative? It seems to have at least the possibility of such a theory. Concepts like democracy, rule of law[4] or human rights contain at least a common vocabulary of several legal traditions. But they have to be made explicit in their different institutional contexts to be 'theoriable'. Put into the terms of disciplinary distinction: They have to be used as concepts of a legal practice, not as concepts of a political theory[5]. This explification of constitutional concepts has to justify and to explain its concept in a way that is valid for all legal systems it shall be applied to. If such an explification is impossible, if there were no common theoretical ground behind e.g. the word 'democracy' in the German and in the U.S. constitutional tradition[6], then comparison would not make any further sense: it remained merely collective (compilatory). The concept proved to be a mere word. Comparative constitutional theory would be the result of an etymological accident. But if there is something like a common background concept, this theory might be a tool for the description and analysis for different legal systems. A common theory might even open the opportunity

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[4] The concept of rule of law ad its German counterpart of the Rechtsstaat is of course a source of many misunderstandings, or: for comparison without a theory. Oliver Lepsius, Verwaltungsrecht unter dem Common Law, 1997, 207 et seq. R. C. van Caenegem, Judges, Legislators & Professors, Cambridge 1987, 113 et seq.

[5] This distinction shows that Michel Foucaults warning for a 'juridification' of political theory as fictitious or normative may be turned around. Jurisprudence has at least the possibility of a close connection to societal practices as parliamentary discourses, judicial decisions etc. Michel Foucault, La Volonté de Savoir, 1983, 108 et seq.; James Tully, The pen is a mighty sword, in: J. Tully (ed.), Meaning and Context. Quentin Skinner and his critics, 1988, 7, 17 et seq.

[6] There are common problems e.g. concerning the democratic organization of the executive: P. Paul Craig, Craig, Public Law and Democracy in the United Kingdom and the United States of America, 1990; Richard B. Stewart, The Reformation of American Administrative Law, Harv. L. Rev. 88 (1975), 1669. And Christoph Möllers, Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit, Verwaltungs- Archiv 90 (1999), 187-207. For an attempt to make use of American discussions: Ulrich Haltern/Franz Mayer/Christoph Möllers, Wesentlichkeitstheorie und Gerichtsbarkeit, Zur institutionellen Kritik des Gesetzesvorbehalts, Die Verwaltung 30 (1997), 51-74.

to develop criteria for the evaluation of different institutional settings: In a globalized legal order, the comparison of governmental institutions (perhaps, but only perhaps different from the comparison of pieces of art[7]) needs evaluative criteria. And as criteria cannot be invented, comparative experiences may be a promissing way to find then.

The approach of this paper will not start with legal cases or norms, but from a theoretical point. The theoretical reconstruction of tripartite government will be the instrument to detect and analyze legal. These analyses will vice versa justify and illustrate the theoretical approach of the paper. Therefore, we can speak of a *deductive comparative approach*.

0.3. Question: Governmental Functions and Levels

What is the question to which this paper shall deliver a tentative answer? The paper takes the old notion of 'tripartite government'[8], later modified to 'separation of powers' or 'governmental functions' and tries to look for a theory that can justify its application to different legal orders. The project asks for the rationale of separated powers, for a background theory in order to make the idea of separated powers comparable, interchangeable or translatable for the different bodies of law. The questions to which the project tries to give an answer are: Is there are common rationale behind the fact that western national constitutional systems distinguish between three governmental functions? And if so can this rationale be used to develop institutional solutions for multi-level governmental systems?

If these questions are fruitful cannot be clarified beforehand: The project can only be justified by its realization. But it seems fair to give intuitive and tentative reasons for the conjecture that tripartism despite of its considerable age still is a concept that is viable for the analyis of contemporary legal orders in and beyond the nation-state:

The tripartite structure of the classical model of separation of powers may have a descriptive worth of its own. Triades are a suggesting form of grasping the world[9] and reducing its complexity. The triade of governmental functions has not only survived

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[7] Theodor W. Adorno, De Gustibus est Disputandum, in: Minima Moralia, Reflexionen aus dem beschädigten Leben, 1947, 92-93.

[8] Perhaps the oldest reference is Aristoteles, polit. 1298a-b.

[9] Reinhard Brandt, D´Artagnan und die Urteilstafel, 1998, 14 et seq.; Daniel Dubuisson, Le roi indo-europeén et la synthèse des trois fonctions, Annales, 33 (1978), 21-34.

quite different historical situations. It is even used to describe institutional forms that are quite different from the 'normal' form of the democratic nation-state. The European Union claims to have a legislator, Art. 207 (3) EC[10] And within the WTO-system one may recognize a judicial structure[11]. Even only equipped with an incomplete set of 'Powers' or 'Branches', one has to refer to the traditional elements of the tripartite model to give them a name and even political scientists make use of this distinction[12]. This may be an accident or only the result of a terminological *faute de mieux*. But maybe there are good reasons for this practice. Of course, these observations do not constitute a conclusive argument for the application of governmental tripartism for modern forms of government. But they give reason to hope that the notion of tripartism, the distinction between legislative, executive and judicial has still analytic value.

1. Step One: Legitimacy

1. 1. Autonomy: Defending Pragmatic Formalism

Modernity has raised serious doubts concerning the justification of government – and simultaneously and constantly enlarged its reach. Common goods like peace, welfare, efficiency or social equality are either too abstract or too contested to produce legitimacy for public action. Instead of defining such goods classically modern political theory[13] switched its attention to the concept of individual and political freedom, autonomy or self-determination. Since the American and French Revolutions, the question of legitimacy has to refer to the self-determination of the involved. Standards of justification no longer come from outside, from some theological instance. They stem from the self-determination of individuals and collectives.

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[10] Art. 6 (1) 1999/385/EC, ECSC, Euratom: Council Decision of 31 May 1999 adopting the Council's Rules of Procedure OJ L 147/13.

[11] Armin v. Bogdandy, Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship, Max Planck Yearbook of United Nations Law, Vol. 5 (2001), 609-674.

[12] *George Tsebelis*/*Geoffrey Garett*, The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union, International Organization., 55 (2001), 357.

[13] As classical modern political theory we refer to theories of individual freedom and collective self-government that prepared the American and French revolutionary traditions: Gordon S. Wood, The Radicalism of the American Revolution, 1991, 229 et seq. Hannah Arendt, On Revolution, 1963, 183 et seq. Ulrich K. Preuß, Revolution, Fortschritt und Verfassung, 1994, 19 et seq.

This classical modern concept of autonomy as founded by Kant and Rousseau shall be the starting point for the following considerations of separated powers. Obviously, this concept has been criticized more and more intensely in the last hundred or so years. These critiques concerned virtually any aspect of 'will' formation and redressed contextual factors, like historical contingencies and social dependencies to render all concepts of self-determination or autonomy as flawed. And indeed: The more intense you look for a 'will', the less probable is it that you may find anything be it an individual intention[14], be it a collective democratic decision. Though there is no doubt that these critiques are important, and may help us to refine and redefine our understanding of individual and collective autonomy, the complete abandonment of any of these concepts is probably as questionable as its unconscious use[15]. To work with concepts of normativity that do not accept any form of 'will' is not only highly counter-intuitive with respect to everyday life. It is also very problematic for any discourse that includes questions of commitment, especially for every legal argument. Therefore, it seems much more appropriate to accept a pragmatist approach and self-determination, that respects will as a perhaps not theoretically demonstrable, but practically necessary assumption for any form of social interchange[16]. Will formation is a normative concept. Against a long-standing tradition in American jurisprudence[17] this concept has to be connected with an at least slightly formalist concept of legitimacy[18]. There is a certain irony in that this formalism can well be justified by reference to the same intellectual tradition that started out with the critique of form: Pragmatism.

The concept of autonomy as the main source of legitimacy for governmental action has two advantages in comparison to other topics of justification like efficiency, welfare or deliberation: It is *procedural* and *inclusive*. It is procedural because it does not define

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[14] As a famous theoretical exchange between Derrida and Searle: Jaqcues Derrida, Limited Inc, 1988. In democratic theory the most influential critique of the democratic may be Joseph A. Schumpeter, Capitalism, Socialism and Democracy (1942), 1975, 250-258. Fritz W. Scharpf, Demokratietheorie zwischen Utopie und Anpassung, 1970, 21-28.

[15] Self-binding: Jon Elster, Ulysses and the Sirens, 1979, 36 ff.; Jon Elster., Ulysses Unbound, 2000, 1 et seq.; Stephen Holmes, Precommitment and the Paradox of Democracy, in: J. Elster/R. Slagstad (eds.), Constitutionalism and Democracy, 1988, 195.

[16] Robert B. Brandom, Articulating Reasons, 2000, 93-96.

[17] Neil Duxbury, Patterns of American Jurisprudence, 1995, 32-64.

[18] Stanley Fish, The Law Wishes to Have a Formal Existence, in: There´s No Such Thing As Free Speech, Oxford 1994, 141.

substantial goals but only the way to determine them. The procedural quality of autonomy is especially important for its use in a legal context: The questions how governmental functions are organized is crucial for the choice and the realization of social goals. 'Goal choice, no matter how elegantly executed, is no substitute for institutional choice.'[19]. If the concept of autonomy is a procedural concept, it is an inclusive concept too: autonomy does not exclude other substantial or procedural concepts of legitimacy because it is only a way of defining them. But the need for the *definition* of social goals (in opposition to its mere discussion) in constitutional questions makes the concept of autonomy more apt for institutional problems than the concept of rational deliberation[20]. Deliberation as the duty to give reasons and to accept arguments can and should be included in a autonomy-generating procedure. But deliberation cannot substitute an autonomous decision making process, especially in an institutional context in which consensus concerning the quality of reasons can only rarely be achieved.

1.2. The two Forms of Autonomy: Competing Legitimacies

Autonomy can be thought in two different ways[21]: as an individual concept it is the freedom of one person to build and realize a will of his or her own. As a collective concept it is the self-determination of a group which can develop an identity[22]. Individual autonomy and collective autonomy have a complicated relationship. On one hand, there is good reason to argue that every form of collective self-determination will eventually come to serve individual freedom: this is the assumption of normative

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[19] Neil K. Komesar, Law's Limits, 2000, 151.

[20] Many theories of deliberative democracy combine democratic autonomy and deliberation, but there is a trend to decouple deliberation from democracy especially with the realm of supra- and international law. For a theoretical account James Bohmann, Public Deliberation, 1996, 151-196. A critique in Joseph M. Besette, The Mild Voice of Reason, 1994, 40-56. For applications: Christian Joerges/Jürgen Neyer, From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology, 3 European L. J. 273-299 (1997).

[21] Critical Martti Koskenniemi, From Apology to Utopia, 1989, 192 et seq. From a different theoretical perspective: Christoph Menke, Die Souveränität der Kunst, 1989.

[22] Armin von Bogdandy, Europäische und nationale Identität: Integration durch Verfassungsrecht?, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 2003, sub. II., IV. 3.

individualism in classical liberal theory[23]. But turning from moral standards to actual legal institutions the issue becomes more complicated: The reach of one person's individual liberty is limited by the liberty of the others. Therefore, the reach of individual freedom cannot be determined by the individual herself, but is potentially defined by all individuals. This is the core of the continental concept of the 'generality of the law'[24] as result of the democratic process. But on the other hand, this democratic process is still obliged to protect individual rights: It has to respect the personalities of all members of its constituency.

There is no general rule to solve this conflict. Political theory may have to chose between liberal or communitarian concepts of society. But instead of developing substantive rules to prefer either individual or collective self-determination, constitutional legal orders delegate this conflict to different procedures. These forms of legitimacy are in a competition for legitimacy that is not decided generally but on a case by case basis by legal institutions. The neo-contractual political theory of Rawls, Buchanan and many others is built on autonomy too. But it is completely uninterested in institutional matters[25]. Both forms of legitimacy generate different forms of institutions and each of these relates in different way to legal institutions. These differences create tensions and conflicts within the legal order. Therefore the original conflict of legitimacies becomes a conflict of institutions. It is not solved by the institutions themselves but is instead rather dealt with on a piecemeal basis.

1.2.1. Protection of Individual Autonomy: Subjective Rights

To protect individual self-determination modern jurisprudence invented the concept of subjective rights[26]. But the wish to found a business, to have an abortion or to leave a country only become a matter of law when a personal decision has been made, this decision has been communicated to others and there is an obstacle to its realization. That does not mean that such personal decisions are not influenced by legal

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[23] Friedrich August Hayek, Law, Legislation and Liberty, vol. I, 1973, 55-71.

[24] Jean-Jacques Rousseau, Du Contrat social, II, 6.. Immanuel Kant, Metaphysik der Sitten (ed. Ludwig), Erster Teil, § E.

[25] Neil K. Komesar, Imperfect Alternatives, 1994, 35-44 (especially to Rawls).

[26] Hasso Hofmann, Zur Idee des Staatsgrundgesetzes, in: Recht – Politik – Verfassung, 1986, 261, 266-269.

institutions[27] – of course they are[28]. It may even be one of the central tasks of the law to shape, modify or irritate individual will-formation[29]. But it is still the case that the legal protection of individual self-determination has to treat ultimately this context as irrelevant. The act of communicating a personal preference is socially embedded and the meaning of the communication cannot be controlled by the individual[30]. But for normative reasons her communication of will has to be treated as HER communication and no one else's. This is a way of acknowledging her personality and her 'right to rights'[31]. In practice this in most cases is not a problem at all. The judge will not wonder if a multinational corporation that goes to court is able to have a will – even though this assumption poses difficult theoretical questions.

But what are the institutional implications of these considerations? So far, we can define two rather abstract but important implications. They are already implicit in the statement that individual rights are protected by legal institutions. First of all: *individual* Rights are protected. That means that institutions designed to protect them must work in a way that is able to respond to an individualized event in a specific manner. Because no one sues for freedom of speech reasons in general but instead for a defined event allegedly abridging freedom of speech, any procedure has to develop means to single out an individual self-determination. Secondly: individual rights are *protected*. Protection is concerned only with something that is already in existence. The individual will formation only becomes a matter of law if it has already failed without the law's help. Therefore legal protection is a retrospective act. Even if protection may have to care for future events it refers to the protected good and its inhibition as to something past. Individuality and retrospectiveness are two institutional features of the legal dimension of individual self-determination.

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[27] W. Michael Reisman, Law in Brief Encounters, 1999.

[28] This is a central point in the critique of liberal economics. The orthodox microeconomic concept is developed in George J. Stigler/Gary S. Becker, De Gustibus Non est Disputandum, 67 American Economic Review, 76-90 (1977). For a critique: Cass R. Sunstein, Free Markets and Social Justice, 1997, 14-31.

[29] Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 993 (1995):

[30] There is no 'private' language: Ludwig Wittgenstein, Philosophical Investigations, §§ 583-584. Saul F. Kripke, Wittgenstein. On Rules and Private Language, 1982.

[31] Hannah Arendt, Es gibt nur ein einziges Menschenrecht, 1949 Die Wandlung, 754, 760.

1.2.2. Production of Collective Autonomy by Democratic Procedures

Legal institutions play a completely different role for each form of collective self-determination. Collective or democratic will formation cannot be taken for granted by the law[32]. There is no unformed, uninstitutionalized democratic will, at least not within one or a plurality of legal systems. Revolutionary acts may be a way to change laws. Protests and riots are by no means white noise in the political process: they influence judges and legislators. This may be a good thing and it may not. But these forms of 'voice'[33] rather have to be conceived as law´s context, not as its text[34]. This is true for at least two reasons. First, there may be just a lack of voice or informal feedback in a given political system. What happens if nobody protests? The government probably will not shut down. It will instead go on referring to formal means of democratic accountability like election cycles. Second, informal protests generate problems of interpretation and of democratic equality. The reception of and the reaction to informal protest provides no procedural guarantee that every voice can actually be heard and what it means. In the optimal case formal democratic procedures do not operate against informal voices, but are designed to receive them and make them politically operable.

Democratic equality[35] is a central feature of democratic self-determination: It is the element that links individual and collective self-determination together. If the democratic subject wants to recognise the wills of its individual members it has to recognise them by giving the same weight to the opinion of every single citizen. The negation of some type of equality would not only constitute a violation of at least one person´s rights[36]. It would also destroy the democratic character of the entire decision making process: The distinction between a political process in which peers elect their king or the biggest shareholder chooses a new CEO and a democratic election is just the necessity of equality of any person participating in the latter. Therefore at least a de minimis element of equality is a prerequisite of any democratic self-determination.

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[32] Samuel Issacharoff/Pamela S. Karlan/Richard H. Pildes, The Law of Democracy, 2nd ed. 2001, 11.

[33] Albert O. Hirschman, Exit, Voice, and Loyalty, 1970, 30-41.

[34] Behind this distinction lurks the problem of inside and outside the legal systems. For a theoretical discussion elaborating the relative autonomy of the legal system: Michel van de Kechove/François Ost, Le système juridique entre ordre et désordre, 1988, 154 et seq.

[35] For this feature in an American context: Woods, The Radicalism of the American Revolution, ch. 13.

[36] Jürgen Habermas, Faktizität und Geltung, 1992, 505.

If the legal system cannot take the reality of a democratic will for granted, its has to create this will by developing appropriate procedures. Legal institutions therefore do not *protect*, but *produce* this democratic self-determination. Any form of democratic will is the result of a legal procedure[37]. It has to be produced by law and when it has been produced, it has to be realized. The realization of democratic decisions is part of law´s future not of its past. In contrast to individual self-determination the relation between democracy and the law is not one of failed realization that has to be fought by means of law. Legal institutions step in to define democratic intentions.

Therefore we can determine two corresponding institutional features of democratic procedures. The first is procedural inclusiveness. The democratic process has to find the means that make the entire membership of the democratic subject part of the decision making process and it has to produce decisions of a broad reach. The second feature is future orientation. Democratic decisions are prospective, not retroactive.

1.3. The Difference between Law and Politics Revisited

Behind the distinction between individual and collective self-determination lurks the difference between law and politics. What are the theoretical repercussion of this difference?

First of all, the difference is living. The identification of law and politics, that has been widely accepted in the American jurisprudence since the Legal Realism[38] is not helpful. Obviously both notions are closely connected especially in constitutional questions[39]. But to describe them carefully it is necessary to keep the two terms distinct and treat this distinction with care. Law is not politics and politics is not law.

Secondly, the distinction between law and politics as perceived from a jurisprudential point of view is asymmetric. Jurisprudence does not adapt the distinction as such but as seen from the perspective of the legal system. From this perspective we can make out differences within the legal system that result from its closeness to the political process. We can recognize legal operations that are closer to other operations of the legal system

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[37] Hans Kelsen, Vom Wesen und Wert der Demokratie, 2nd ed. 1929, 14-25.

[38] E.g. Don Herzog, Happy Slaves: A Critique of Consent Theory, 1989.

[39] Constitutions may even be defined as this coupling. Niklas Luhmann, Verfassung als evolutionäre Errungenschaft, Rechtshistorisches Journal 9 (1990), 176.

(in the terminology of systems theory: that are more self-referential) and operations that are closer to the political process. One may distinguish between the 'law of the law' and the 'law of politics'[40]. An example for the law of the law might be the evolution of common law within the anglo-saxon legal culture that took place with relatively little political intervention, at least with less intervention than in legal cultures with a codified civil law. Of course it is well-known since Legal Realism, that common law cannot be interpreted as an 'unpolitical' form of law. The distribution of property is a highly political question, and courts do not find the law but produce it[41]. But this is not the point of our distinction. Every decision of any governmental authority can be understood as a political decision in its outcome. But not every decision is conceived as a political decision by the legal system itself. In applying common law rules a court treats certain problem as solvable by reference to legal rules. In passing a statute a parliament may understand itself to be bound to certain procedural and substantive constitutional rules but not determined by them in its decision. That means that the production of law is designed in different levels by the legal order. The law determines certain parts of its own evolution more than others and the degree of determination corresponds with a jurisprudential distinction between law and politics.

What does this mean for the distinction between individual and democratic self-determination? For democratic orders we can identify democratic self-determination with instititionalized politics. Obviously the higher complexity and the future-orientation of democratic decisions corresponds to the degree of openness of the political process. The legal rules that govern the democratic process must not determine its outcome. The process lives on procedural consensus[42] and substantial conflict[43] and an open democratic process is crucial to rendering any legitimacy to it. This is different for individual self-determination. The autonomy of an individual subject as such should

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[40] For this distinction: Hasso Hofmann, Das Recht des Rechts, das Recht der Herrschaft und die Einheit der Verfassung, 1998, 40 et seq.

[41] For the Common Law of the United States this is official wisdom since Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938). The interpretation in Lawrence Lessig, The Erie-Effects of Volume 110: An Essay on Context in Constitutional Theory, 110 Harv. L. Rev. 1785 (1997).

[42] Marcelo Neves, Zwischen Themis und Leviathan: Eine schwierige Beziehung, 2000, 108-121

[43] The importance of this conflict is often underestimated, especially by lawyers: Chantal Mouffe, For an Agonistic Public Sphere, in: Enwezor et al. (Eds.), Democracy Unrealized, 2002, 87-96. For American Constitutional Law: Richard Pildes, The Theory of Political Competition, 85 Va. L. Rev. 1605, 1607 (1999).

be open, i.e. the individual has to be provided with the abilities to make up his or her mind. But when this interacts with legal institutions not only this will has to be treated as defined, but also the reach of the law supporting or limiting its realization. This sounds rather abstract but it is crucial to the protection of individual freedom for practical reasons. It has to be possible for individual to know her own rights.

1.4. The Need for Both forms of Legitimacy in Government

Neither mode of legitimacy ranks higher than the other. And even more: though competitive and contradictory both forms of legitimacy refer to and depend on each other. This is generally accepted for democratic procedures that cannot claim legitimacy when individuals are excluded. But individual rights also need to be defined in scope by a democratic procedure in order to prevent the infringement of these rights of third parties. There is no valid claim for democratic legitimacy if individuals are excluded. There is no validity in a right when its scope is not defined by those who may potentially be affected by its exertion. This conclusion has institutional implications. It means that every act of public institutions has to be justified by both types of legitimacy.

2. Step Two: Functions

2.0. Terminology

The problems discussed in this chapter have often been described as related to 'separation of powers'. This expression is misleading but very common[44]. The concept discussed here will be called slightly artificially 'tripartite governmentalism' or 'tripartism'. This refers to the distinction of three governmental branches in the Western tradition of political and constitutional theory that has existed since the writings of *Montesquieu* and *Locke*[45]. To distinguish between functions does not mean to separate them[46], and the doctrine of 'separated powers' often embraces more subtle concepts

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[44] Lawrence H. Tribe, American Constitutional Law, 3rd. Ed. 2000, 137: 'misnomer'.

[45] Charles de Montesquieu, De lé esprit des lois VI, 2; XI, 1-7, 20; John Locke Two Treatises on Government (1698), (ed. Laslett), II, §§ 143, 144, 150, 159.

[46] Carl Schmitt, Verfassungslehre, 1927, 186: ‚Gewaltenunterscheidung'.

than their mere separation. This paper discusses problem of the separation of powers doctrine in this broader sense.

2.1. Classical Doctrine

Why do we need a government of separated powers? A look into the tradition of political theory shows two lines of thought that justify this form of a government. These two lines both make important points, but they are contradictory and almost impossible to handle within a legal discourse.

The first older and more classical line of thought presents separation of powers as a way to moderate, diffuse and diminish government power[47]. The fusion of different governmental branches into one person´s hand is the very definition of tyranny and even the democratic tyranny of the majority has to be prevented by separated powers[48]. Therefore, the separation guarantees the individual freedom of those who are governed.

The second more modern line of thought recognizes that separation of powers can be a way to enhance the efficiency of government and enlarge its power[49]. The fusion of all governmental functions might be dangerous, but it is in any case inefficient. Separated powers are the government´s form of division of labour and it ensures that the public sector is able to realize its agenda.

Is there more or less governmental power through separated branches? Despite their contradictory relation both arguments have their merits. The historic development of governmental institutions shows a parallel between the emergence of the "rule of law" honouring individual freedom and preventing tyranny and a growing differentiation ("separation") of governmental organizations. Based on this evidence one may say that democratic governmental institutions of the western type have simultaneously become more respectful towards individual freedom and more powerful[50]. But this historic parallel does not solve the underlying normative contradiction between both rationales.

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[47] For this almost unanimous stand within the American discussion: M. Elizabeth Magill, The Real Separation in Separation of Powers Law, Virgina Law Review 86 (2000), 1127 (1148-1152).

[48] This is the important motive in The Federalist Papers, No. 10, 47 (both Madison).

[49] Max Weber, Wirtschaft und Gesellschaft (1921/22), 1972, 166-167 N. K. Barber, Prelude to the Separation of Powers, 60 Cambridge L. J. 59 (2001); Elster, Ulysses Unbound, 146-153. For the American constitutional tradition: Jessica Korn, The Power of Separation, 1996, 14-26.

[50] Stefan Breuer, Der Staat, 1991, 161 et seq , Niklas Luhmann, Macht, 2nd ed. 1988, et seq.; Michel Foucault, Il faut défendre la société, 1997, 21 et seq.

This contradiction is another expression of competing concepts of legitimacy, especially the question of whether liberty is more threatened by private actors or by public ones[51]. Instead of choosing between these two perspectives it might be helpful to reject both ways of referring to power, the common denominator of both arguments for several reasons. First of all, it is hard to quantify power in an operable way. Modern organization theory shows that there is no constant amount of power within a certain organization[52]. Therefore the win of power for one governmental department is not necessarily connected with the loss of power of another one. Is the German Bundestag than the U.S. Congress because it is entitled to elect the Federal Chancellor more powerful? Not necessarily[53]. And if so, what are the consequences of this piece of knowledge? Even more problematic than this interrelation is the question of what the specifically jurisprudential ways of coping with the notion of power are. Power makes no distinction between formal competences as vested in certain offices by a constitution or treaty and those gained by informal forms of influence[54]. The distinction between formal and informal forms of government power is a difficult one but this does not mean that they are identical or can be scrutinized with the same theoretical tools. The distinction, though problematic, remains viable for any jurisprudential approach to governmental institutions. The influence of pressure groups on a piece of legislation may be considerable. But even to describe this influence, it must be distinguished from the law making power of a national parliament. 'Power' in a jurisprudential concept of separated powers can only refer to the formal ability to produce law.

2.2. Tripartite Government Reconsidered

Therefore, it may be more useful to present another rationale to the distinction between the three governmental functions: Instead of the notion of 'power' the rationale refers to the different modes of law making and their institutional legitimacy[55]. If the two

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[51] Stephan Wernicke, Die Privatwirkung im Europäischen Gemeinschaftsrecht, 2002, 225 et seq.

[52] George Tsebelis, Veto Players: How Political Institutions Work, 2002. For an application of this insight: Joseph H. H. Weiler, The Constitution of Europe, 1999, 37.

[53] Arend Lijphart, Democracies, 1984, 78.

[54] Hannah Arendt, On Violence, 1970, Ch. 2.

[55] There are many references to legitimacy or accountability particularly in the separation of powers-jurisprudence of the U.S. Supreme Court. For an approach similar to this: Victoria Nourse, The Vertical Separation of Powers, 49 Yale L .J. (1999), 749, 781 et seq.

different modes of legitimacy developed in **Step 1** require different forms of law making, different levels of generality and different time frames, the rationale for governmental tripartism may lie in an institutional or organizational resolution of the conflict between the two legitimacy modes. As we saw before, individual and collective self-determination are simultaneously co-dependent and mutually antagonistic. With some modifications, it even may be possible to preserve the two intellectual traditions we criticized in the previous subchapter. One may interpret the first tradition of power diffusion as a reference to individual legitimacy[56] and the second tradition as a reference to democratic self-government.

The perspective of legitimacy allows a participation-centred[57] approach. In its simplest version this means that all legal subjects that are affected by a governmental decision have to be included into the decision making process[58]. In its more sophisticated version this approach means that decision making processes have to be organized around the two basic forms of legitimacy according to their institutional features: In the ideal case, this will have lead on the one hand to decisions producing democratic legitimacy having to be made in an inclusive or general procedure, be prospective in their formal effects and be legally determined only in a procedural way, and on the other hand to decisions that protect individual self-determination, will have to be individualized, retroactive and as intensely as possible be determined in substance by the law.

In this construction the idea of tripartite government demands a special interrelation between a certain contents of legal decisions, its scope (more or less general or individual) and its time-orientation (future or past-oriented), and certain forms of decision making procedures. With standard terminology, the form of legal decision may be classified as governmental *function*. The procedure and organization of decision making can be categorized by reference to special governmental bodies or 'branches'. A substantive theory of tripartite government has to develop criteria for the appropriate assignment of certain functions to certain bodies. And the source for these criteria is legitimacy by autonomy. Conflicts between the two basic modes of legitimacy have to be solved by means of organization never permanently, but always only on a permanent

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[56] There is, of course, one important difference: The concept of power diffusion defines freedom only as freedom from governmental intervention. For this reconstruction, individual freedom can be threatened and protected by the law. This is particularly important for the understanding of private law.

[57] Komesar, Imperfect Alternatives, 11-12.

[58] This is so far nothing more than the Roman legal principle 'quod omnes tangit ab omnibus approbitur'.

working basis. Tripartism has only to guarantee the institutional side of the legitimacy of public institutions by requiring certain organizational and procedural considerations in the production of certain forms of law.

To review: The most basic form of this concept could be summarized as follows: The more inclusive and prospective a piece of law the more inclusive and open the legal procedure that generates the law has to be. The more individual and retroactive a piece of law is the more individualized and legally determined the procedure has to be. In this model, governmental functions work on a scale that is defined by generality, temporality and legal determinacy. A normative principle of tripartite government in the traditional formula of 'separation of powers' guarantees nothing more than the institutional (procedural, organizational) side of governmental law making.

2.3. Some Intermediate Reservations

What is the methodological status of these reflections on tripartism? What has been lost on the way to this high level of abstraction and how can we come back down to earth? So far, this paper is the attempt to give a normative construction of the concept of a tripartite government under the conditions of a constitutional system that acknowledges democratic self-government and individual freedom. Whether this concept fits into real legal orders and how it may help to analyze them has yet to be proven. Here comparative law must step in and test if the categories so far developed are workable and if they are of any explanatory use. But even if the model is operable it cannot claim to be normative in the same way as positive law. It may acquire this quality if constitutional orders refer to pursuant categories (e.g. to a 'judicial power') and therefore a theory is needed to interpret such constitutional provisions. But even if the model can be used in such a way, this does not mean that all methodological problems are solved. There may be good reasons to deviate from the model, there may be material problems or concrete contexts that are more urgent than the question of institutional legitimacy as such. In this case, the model may keep a modestly useful function for the detection of legitimacy problems.

2.4. Three Functions – Three Organizations

Why three functions? Having defined two modes of legitimacy and assigned two ideal forms of legal decisions and decision making procedures to them the question of why tripartism is needed has not yet been answered. One rather abstract answer to this question could lie in posing the further question of whether these modes of legitimacy have to be understood in an absolute way or in a relative way. If questions of temporality and generality were a matter of degree rather than category, we would have to understand the two modes as two poles of a scale for a continuum of law making functions. This could mean that there are institutional forms in between these two poles. The reason to use a *tri*partite scheme would be cognitive[59]: to describe the defined *one*, the defined *other* and the excluded *third*[60], a third that only could be defined with reference to the other two, negatively as being neither of both or positively as being both of them at the same time. The discussion of the executive function will illustrate this consideration.

2.4.1. The Legislative

In this model of tripartite government, the ideal legislative function would be an all-encompassing and prospective form of law, obviously something like the general law of the Kantian and Rousseauian Tradition[61]. The ideal legislative organ would be able to claim the legitimacy to produce such law would and be an all inclusive assembly deciding with unanimous consent in a open deliberative process. What consequences can these ideals have for constitutional practice? First we can look at the actual design of legislative organs and compare them to this idealized organizational model. Perhaps the most important element of our considerations is the effective openness of democratic procedures (or instead the relatively weak level of legal determinacy of the decisions)[62]. This rule of openness has two major consequences:

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[59] And well-known from the discourse on Christian trinity.

[60] For an approach in legal theory: Niklas Luhmann, Die Codierung des Rechtssystems, Rechtstheorie 17 (1986), 171.

[61] Raymond Carré de Malberg, La loi, expression de la volonté générale, 1931 calls the law ‘première et inconditionnée’.

[62] 1.3.

1. The rule of openness for legislative bodies implies that the organization of the decision making process has to adhere to some basic principles that make it recognizable as a legislature, but otherwise determine its structure as little as possible[63]. To be recognized as legislative the organ must have the right to initiate the production of a prospective law. It has to be accountable to *all* members of its constituency on the basis of democratic *equality*. Legislative law is prime law that is not deduced from higher ranking law. A parliamentary statute must be passed in a constitutional procedure but its contents are not legally deductable from the constitution.

But there are many ways of designing democratic features that define legislatures (e.g. there are many democratic electoral systems, many theories of representation, many forms of majority rule, many modes of transparency, many debating procedures). The small but important thing that can be said about this democratic diversity from our perspective is that the choice between these forms should be made in a legislative procedure itself (be it a constitution-giving or a statutory procedure). On the basis of the indispensable elements democratic inclusion and democratic equality the question of how democratic procedures should be designed must be the result of a democratic process. The concept of democracy leaves this open and under different constitutions, different solutions are presented. The legislature has to invent itself.

2. From the rule of openness it follows that generality and prospectiveness of legal rules are options not duties for the legislative function. A legislative organ is characterized by the right to pass general prospective statutes, but there is no general duty to do so and there is no general reason to challenge the decision if it does not. To combat an old anti-parliamentary bias[64] it must be emphasized that the old continental concept of general laws has two important elements[65]: The necessity of an all-inclusive democratic procedure and the possibility of an all-inclusive decision, e.g. in a criminal or civil code. But if the legislature chooses not to decide generally this choice does not constitute a constitutional problem. The possibility of abandoning generality is, as such, part of the openness of the democratic procedure.

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[63] Compare Adrian Vermeule, The Constitutional Law of Congressional Procedure, Chicago Public Law and Legal Theory Working Paper, No. 39.

[64] Ernst Fraenkel. Deutschland und die westlichen Demokratien, 1990, 137-150. E.g. Carl Schmitt, Die geistesgeschichtliche Lage des heutigen Parlamentarismus, 1926.

[65] Hasso Hofmann, Das Postulat der Allgemeinheit des Gesetzes, in: C. Starck (ed.), Die Allgemeinheit des Gesetzes, 1987, 9, 10 et seq.

But if legislatures do not have to decide prospectively and generally in any case this does not mean that there are no questions if they do not. If a legislative body that is normatively responsible for the general identity of its constituency starts to define specific individual rights its procedural legitimacy comes to its limits. If a body whose 'will' is only the product of its own legal procedures starts to define legal relationships retroactively the same thing may happen. We easily find positive constitutional equivalents for these problems. In the German as in the American constitutional orders retroactive[66] and individual legislative decisions cause constitutional problems. In the American constitution there is even a clause prohibiting both: art. I, Sec. 9, § 3. The U.S. Supreme Court tied this rule to the idea of separated powers[67].

In our model retrospective or individualized legislative rules can easily be connected with the concept of rights. That means that elements of the democratic political process that are reviewable by a court (beyond the question of substantial limits protected by individual rights) emerge in only those fields in which the procedural design abridges individual freedoms. Exclusion or infringement of rights to democratic participation or, from the democratic perspective, infringement of democratic generality and democratic equality are in both legal orders the areas in which the political process cannot be controlled by the legislature alone. It is indeed in exactly these rare cases that the electoral process becomes target of judicial scrutiny[68]. The rule of democratic openness has to be abandoned because the democratic character of the problem is in question[69].

There is no guarantee that the legislative processes will function. We can specify two dangers in this respect[70]. The majority may use the legislature to abuse and suppress minorities and special interests may abuse the legislature by capturing the majority.

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[66] For the American discussion particularly in tax law: Daniel N. Shaviro, When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity, 2000.

[67] 'The Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply - trial by legislature.', U.S. v. Brown, 381 U.S. 437, 440 (1965).

[68] Edward McWhinney, Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review, 1986, 191-194.

[69] With another argument, this is the interpretation of United States v. Carolene Products, 304 U.S. 144, 152, n. 4. But compare another aside in Village of Arlington Heights v. Metropolitan Housing, 429 U.S. 252, 270, n. 21 (1977). John H. Ely, Democracy and Distrust, 1980. 73 et seq.

Both of these problems cannot be solved by institutional arrangements alone and there is no guarantee that any institution can live up to its ideals of legitimacy. If they can live up to them depends on other factors like the political culture or the distribution of wealth and knowledge in a given society. But there is at least one conclusion. Different institutions are more or less well suited to fight these dangers. The concept of rights is designed to protect minorities. But the questions of how far majoritarian institutions like legislatures act in the 'public interest', a contested concept in itself, can only be determined by a majoritarian procedure, even if it is itself endangered by particular biases. The distortion of the democratic will or the adherence to 'special interests' has to be cured by the legislature[71], because only the legislature is procedurally entitled to determine which interest are 'special' and which are not[72].

2.4.2. The Judicial

In this model of tripartite government, the ideal of the judicial law making function would be a retroactive decision defining the reach of a subjective right in an individualized situation, in a 'case'. The ideal-type of a judicial body giving legitimacy to this kind of law would be one in which this body would work responsively not driven by its own but by an exterior will and according to a procedure that could individualize the event and design its decision as completely based upon the law. Can we find these elements in constitutional orders?

First of all it is not difficult to identify these qualities in the decision making procedures and organizational structure of courts. In a comparative perspective courts seem to be organized much less diversely than legislative bodies[73]. Institutions can most easily be

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[70] From different perspectives: Komesar, Imperfect Alternatives, 67-97 elaborating the distinction between minoritarian and majoritarian bias. Similar Elster, Ulysses Unbound, 2000, 130.

[71] A discussion in of courts´ facilities to judge legislative procedures in Komesar, Law´s limits, 83. But compare Einer Elhauge, Does Interest Group Theory Justify more intrusive judicial review?, 101 Yale L. J. 31 (1991).

[72] This is the problem of the observer status of theories like Public Choice criticizing legislative action. Daniel A. Farber/Philipp P. Frickey, Law and Public Choice, 1991, 55-62.

[73] For this: Martin Shapiro, Courts, 1981, 1-19; Mauro Cappeletti, The judicial process in comparative perspective, 1991, 30-35. Different criteria in Laurence R. Helfer/Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, Yale L. J. 107 (1997), 273.

recognized as courts by their organizational autonomy from the political process (judicial independence) and by their lack of initiative. But do courts produce retrospective and individualized law? Do they exercise a judicial function in our sense of the word? And what exactly would be the problem if they did not?

The retroactivity of judicial decisions seems an almost inevitable element because of the lack of self-initiative of courts. Courts have to orient themselves towards a passed event, but there are important exceptions to this in all legal orders. As a matter of fact, in both legal orders an entire doctrine concerning the right temporality of the judicial function has emerged. It defines temporal limits of judicial decision making like mootness and ripeness[74]. Legal orders tend to limit courts' opportunities to anticipate the future.

The individuality of judicial decisions is obviously much more questionable. The individualization of the decision is first secured by the reasoning of the court. The duty of the court to hear the arguments of both parties in each case and to give reasons for its decisions is generally accepted as one of the central elements of the courts´ institutional legitimacy[75]. These duties are elements of procedural justice. But they can be understood in a different way, too: In an ideal case the procedures are instruments to define the parties' conflict as their conflict only[76]. The conflict of he parties should not be generalized: whatever the court decides, there should be no way to understand its decision as a matter of a general political interest. A look at the problem of constitutional adjudication will define this problem more precisely[77].

Because it corresponds to the democratic rule of openness of the political process it comes as no surprise that both the characteristics of the judicial function and its organizational qualities have to be defined more accurately by law than legislative procedures. Questions of standing, mootness and due process have produced a whole legal doctrine whereas questions like the generality of legislative decisions and – as we will see[78] – inherent limits of legislative delegation hardly ever come down to strict legal rules. The same is correct for organizational qualities of the respective bodies.

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[74] Examples for the U.S.Federal Courts David P. Curie, Federal Jurisdiction, 5th ed. 1999, 31-38. For European Law Koen Lenaerts/Dirk Arts, Procedural Law of the European Union, 1999 13-017. For Germany Eberhard Schmidt-Aßmann, in: Maunz/Dürig, Grundgesetz, Art. 19 IV GG (2003), para 245-278-279. In general Cappelletti, Judicial Process, 31-32.

[75] Cappeletti, Judicial Process, 31-32. Martin Shapiro Courts, 1980, 17.

[76] Niklas Luhmann, Legitimation durch Verfahren, 2nd ed. 1975, 121-128.

[77] 2.5.2.

[78] 2.5.1.

Judicial independence is a legally strong concept with defined rules[79]. Legal rules determine the judicial function, the institutional centre of the legal system[80], the 'law of the law', in its entirety much more than the legislative function.

But does this fact constitute anything more than the circular assumption that the law determines the courts and that we can tell from this determination that a court is working here? Indeed, there is a circle structure to this logic. But this circle may help us understand what is going on[81]. With regard to their institutional self-image it remains important that courts must base their decisions on three elements: the facts of a case, a narrative structure that defines an individual case, and their understanding of the law as different from personal or political preferences. The much debunked quotation of Montesquieu proclaiming the judge to be 'la bouche qui prononce les paroles de la loi' has its truth, not because judges exclusively base their decisions on something called the law, but because there is nothing else at hand courts can legitimately use for this purpose. This version of the determinacy does not state that the law in each case binds the legal decision[82]. This is at least contestable but probably even wrong given the plurality of meanings any statute and any precedence can have. It would be more accurate to claim that the rhetorical practice of courts cannot apply anything other than its understanding of the law and that this practice is relevant for judicial decision making.

What are the structural problems of the legitimacy of the judicial function? Within this model, no judicial interpretation of substantive law by a court can be constructed as a problem of tripartism. Constitutional courts tend to check the statutory interpretation of a lower court for 'separation of powers' reasons[83]. Their point is that if a lower court exceeds certain interpretative limits it starts to work like a legislature making rather than interpreting the law, and thus violates the principle of separated powers. But this

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[79] E.g. art. III sec. 1 U.S. const. Art. 97 (1) GG.

[80] Niklas Luhmann, Das Recht der Gesellschaft, 1993, 321.

[81] Similar Oliver Gerstenberg, Bürgerrechte und deliberative Demokratie, 1997, 19-33.

[82] This formalist theory was falsified by Legal Realism in the United States and by the Freirechtsschule in Germany. James E. Herget, The Influence of German Thought on American Jurisprudence, 1880-1918, in Mathias Reimann (ed.), The Reception of Continental Ideas in the Common Law 1820-1920, 1993, 203 (221-227).

[83] A German example: BVerfGE 34, 269, 287-292 (Soraya). An American example Bush v. Gore, 121 S.Ct. 525, 533 (2000). A European example ECJ, Case 415/85, *Commission v Irland*, para 8-9; Case 249/96, *Grant v South West Trains*, para 36.

argument seems to be flawed because this violation of separated powers is decided by a court. If the separation of power argument is concerned with the adequate organization of law making functions it is difficult to accept that a certain statutory interpretation of one court violates the principle of separated powers and another does not. There may be many good substantive reasons to overrule a lower court. But because the institutional setting between lower and higher court is identical this is not a good one. The function of this argument in the reasoning of constitutional courts is hidden. By assuming a separation of powers problem the constitutional court can claim jurisdiction even if this is problematic for federal[84] or other[85] reasons.

Legitimacy problems of the judiciary take different forms within this framework. They appear especially in procedural contexts[86], e.g. when the reasoning of courts is too broad to define the specific problem they have to treat, when courts intrude too much on the future by deciding about incidents that are not yet terminated and when they get too much involved in the practical consequences of their decisions[87]. In these and similar cases one can detect a problem by posing the following questions: How does the actual procedure in court relate to its decision? How is the court equipped to foresee factual consequences? Why is the court entitled to bind other persons than the parties in a particular case, persons that could not participate in the procedure? And when is the court permitted to influence the actions of other branches by binding them in advance? For national legal orders these questions culminate in the analysis of constitutional in the next subchapter.

2.4.3. The Unknown Third: The Executive

In our reconstruction of the three functions, there is no ideal for the executive and its organization. This is no accident. The diversity of law made by the executive and of the executive organization its proteusian diversity is a often and generally complained fact.

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[84] Bush v. Gore 121 S.Ct. 525 (2000).

[85] The German Bundesverfassungsgericht is not entitled to correct statutory interpretation that have no constitutional relevance.

[86] For a critique of the ECJ: Joseph H. H. Weiler, Epilogue: The Judicial Après Nice, in: G. de Burca/J. H. H. Weiler (eds.), The European Court of Justice, 215, 225-226.

[87] For a German example Stefan Korioth/Klaus Schlaich, Das Bundesverfassungsgericht. 5th ed., 2001, 316-318.

The first thing we can learn from this model is that there is no reason to worry about this diversity as such as it shows a legitimate logic of its own. If the construction of two modes of autonomous legitimacy and its institutional implications make any sense, we must ask how the executive function fits into this scheme. An easy answer might be that the executive has to mediate between both modes of legitimate law making. More precisely the generality and temporality of legal decisions is a matter of degree and all degrees are in demand[88]. Legislative and judicial decision making are the two institutional extremes of a scale that has to be filled by the executive.

If this theoretical assumption is useful, one would have to find exemplary constitutional problems in which executives act like a legislature, as well as like a court. This is indeed the case. The whole problem of delegation, well known to American, German and European Law[89], can be interpreted as the executive acting as a legislature. The question of administrative courts and of the degree of judicial control of administrative actions shows the executive acting as a judiciary[90]. The middle-position of the executive branch between legislature and judiciary causes its organizational diversity. The organization of different administrations is much more diverse than that of the other branches. The executive acts as both a political agent that proposes legislation and makes rules[91] and as an executor of the law.

But if the executive is that diverse are there any limits to its organization from a tripartite point of view? Can the executive function be wrongly organized? Indeed, for the internal organization of the executive branch no organizational form should be a priori excluded. Apart from relations between different functions[92], these problems concern the internal cohesion of the executive.

If the role of the executive is as diverse as presumed one has to wonder if it makes sense to talk about *one* executive branch. Is there one executive branch or are there many executives each defined by the plurality of law making functions assigned to it? From an empirical point of view there may be many good reasons to understand the executive as a plurality. But the classical normative solutions for the problem of the 'unity' of the

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[88] For the notion of a demand for law: Komesar, Law´s Limits, 11 et seq.

[89] 2.5.1.

[90] Tribe, American Constitutional Law, 292-298.

[91] Armin von Bogdandy, Gubernative Rechtssetzung, 2000, 136-149; Robert Baldwin, Rules and Government, 1995, 59 et seq.

[92] 2.5.

executive should not be abandoned too quickly. These solutions are law and hierarchy. The fist solution, law, is easily resolved: There should be no administrative action that cannot be traced back to a legislative decision. There is no executive prerogative beyond the law[93]. How ever discretionary the administrative powers might be, they have to be the consequence of a legislative action.

The second solution is much more complicated. Hierarchies create a normative dependence within the executive. Contrary to administrative networks[94], hierarchies are asymmetrically defined forms of authority[95]. It is crucial to keep in mind that hierarchies are meant to create a normative interrelation. As a matter of fact, we do not know if executive orders of the President of the United States or Verwaltungsvorschriften of the German Federal Government can effectively control lower parts of the administration, thus we hardly[96] know if these hierarchies 'really' function[97]. But we can claim that the power to direct the executive from its top creates political responsibility[98]. The only reason to hold chief executives accountable is their legal ability to influence administrative action. In contrast, the concept of network, like the concept of power[99], does not distinguish between formal legal competences and purely informal influence. This may be useful for a sociological or historical account[100] but it is too general for any normative use, be it doctrinal or theoretical.

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[93] Within this model the executive has a special function: producing the form of law that is *closest to the present*. Albeit this does not mean that cases of emergency are beyond the law but that the executive may bear a greater risk of acting illegally, or that its act are attributed to other bodies. Compare ECJ, Case 804/79, *Commission v. UK*, para 23. Christoph Möllers, Staat als Argument, 2000, 264-267.

[94] If networks are power balanced it will be difficult to find them because strictly symmetric relations are improbable. Otherwise the concept of networks tends to hide formal and informal power imbalances.

[95] Gary Miller, The Political Economy of Hierarchy, 1992, 16.

[96] We may ask for empirical research at this point but uncontested results are improbable. This reflects the historical discussion about the emergence of administrative agencies in the U.S. For an overview Daniel P. Carpenter, The Forging of Bureaucratic Autonomy, 2001, 3-11, 15-27.

[97] One can recognize a tendency to a more intensive control of agencies by the President: Elena Kagan, Presidential Administration, 114 Harvard L. Rev. (2001), 2245 (2272 et seq.).

[98] One might quote President Theodore Roosevelt: 'Concentrated power is palpable, visible, responsible, easily reached, quickly held to account. Power scattered through many administrators, many legislators, many men who work behind and through legislators and administrators, is unseen, is irresponsible, cannot be reached, cannot be held to account.' Quoted from Edmund Morris, Theodore Rex, 2001, 541-542.

[99] 2.1.

[100] E.g. Carpenter, The Forging of Bureaucratic Autonomy, 27-30.

Two tentative results may follow from this. As the intermediate law making function the legitimacy of the executive depends on judicial control and democratic legitimacy. The classical way to ensure the first is by creating a hierarchical structure. This has two important implications. It organizes a normative interrelation between the executive organs and a general political process that is not departmentalized and it helps to co-ordinate different parts of the executive[101]. It is not uncommon to abandon hierarchical structures. But in this case the problems that are solved by hierarchies have to be solved otherwise. One possible solution is to install new participatory democratic procedures for special constituencies in different political departments. But problems arise when these constituencies can make decision that may affect others, too[102]. In economic terms, these constituencies produce externalities. In democratic, terms they cannot claim democratic generality.

Secondly, the analysis of legitimacy structures of different constitutional systems can be a good instrument to describe and explain different organizational administrative schemes. The concept of the administrative agency[103] is an illuminating example. Independent agencies are not a mere reaction to the complexities of the modern world[104]. There is no reason why departmental organizations are less suited to cope with them. Agencies rather seem to be the organizational solution for legitimacy conflicts like the conflict between the U.S. President and the Congress or the conflict between the European Commission and the Council.

2.4.4. Is there a Hierarchy of Law making Functions?

The pre-eminence of parliament is an old element of the English parliamentary as well as of the French democratic tradition, and this idea is dominant in other constitutional

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[101] An attempt to make of the American model for Germany Fritz W. Scharpf, Die politischen Kosten des Rechtstaates, 1970.

[102] A German example: § 5 (1) Tarifvertragsgesetz. A European Example in CFI, Case T-135/96, *UEAPME v Council*, para 89-92.

[103] In a comparative perspective Dorothee Fischer-Appelt, Die Agenturen der Europäischen Gemeinschaft, 1999.

[104] Gian-Domenico Majone, The European Commission as Regulator, in: G.-D. Majone (ed.), Regulating Europe, 1996, 61.

discourses as well[105]. In these traditions, the legislature is identified as the 'sovereign' of the constitutional order. Courts, on the other hand, are often referred to as the 'final arbiter'[106] of legal conflicts and, therefore, as sovereign. If courts have the last say in a legal problem should the judiciary not be regarded as the highest function?

For our model of tripartite government any hierarchical ranking of the law making functions is useless. It might be more adequate to speak about law making cycles that run through all law making functions than to think in hierarchies. Formally, the legislature initiates such a cycle, but of course this formal start can be stimulated by judicial[107] or administrative action. Generality and temporality are incommensurable variables and it is therefore impossible to rank them in a defined order.

2.5. Three Comparative Applications

Three examples will now specify these still abstract considerations: the limits of legislative delegation towards the executive, the phenomenon of constitutional adjudication and the question of standing.

2.5.1. Limits of Legislative Delegation

The limits of legislative delegation are an old, important but somehow fruitless topic of American[108], German[109] and, more and more, European constitutional Law[110]. For a normative concept of tripartite government the question is if there are inherent limits of legislative delegation to the executive. The answer to this question seems to be 'no'.

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[105] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. 1959, 37 et seq. For Germany, Martin Kriele, Das demokratische Prinzip im Grundgesetz, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 29 (1971), 46 (63-64).

[106] E.g. Mattias Kumm, Who is the Final Arbiter of Constitutionality in Europe?, 36 Common Market Law Review 351 (1999).

[107] 'They give direction to all law-making' Theodore Roosevelt on judges, quoted from Cappelletti, Judicial Process, 3,

[108] Tribe, American Constitutional Law, 977 et seq.

[109] Hermann Pünder, Exekutive Rechtssetzung in den Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland, 1995.

[110] Koen Lenaerts, Regulating the Regulatory Process: 'delegation of powers' in the European Community, European L. Rev. 18 (1993), 23. Christoph Möllers, Durchführung des Gemeinschaftsrechts, Europarecht 2002, 483, 492-495.

The paradox of the delegation problem is that any limit to legislative delegation is a means to enhance legislative power by formally reducing it. The constitution forces the legislature to decide about things it decided not to decide. From an institutional perspective the decision of what must be decided by the legislature is shifted from the legislature to the judiciary.

On the theory level there is no abstract constitutional criterion to define what is 'important' or 'relevant' beyond the political process, and the legally relevant political process takes place in the legislature. This means that 'nondelegation' is not as such a category that is operable for courts. Judicial review of legislative delegation serves as an opportunity for the courts to apply other substantive constitutional standards to the act of delegation.

This does not mean that constitutions cannot provide for provisions that define delegatory limits. Whereas the U.S. constitution and the European treaties do not know general limits to delegation. Art 80 (2) German Basic law states that a delegating law must define 'contents, aim and scope' of the delegation as necessary elements for the delegating statute. But does this rule make any difference? In order to find an answer to this question one could compare the level of independent power executives have in different constitutional orders. But even if these differences were quantifiable, this comparison would be highly questionable because of some decisive difference between these legal orders. As we have already seen[111], the scope of administrative discretion depends on the relations between legislative and executive legitimacy: In a parliamentary system there is no institutional competition between the parliamentary majority and the government because both rely on the same electoral act. This is different in the American system with several different electoral cycles for the two chambers of Congress and the President. Therefore, agencies may be more or less independent from the President or more or less dependent on the legislature.

Perhaps a better way to compare the systems is to take a look at their constitutional adjudication. At second glance, this comparison shows some remarkable parallels: The U.S. Supreme Court has only twice in its history struck down a statute because of the breadth of its delegation, both in 1935[112]. But this is not the whole story, because the fact that a delegation took place is still relevant for judicial control of administrative law

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[111] 2.4.3.

[112] Panama Refining Co. v. Ryan, 293 U.S. 388, 395 (1935). Schechter Poultry Co. v. United States, 295 U.S. 495, 523 (1935).

making. One may call this phenomenon 'nondelegation equivalents' or with *Cass Sunstein* 'nondelegation canons'[113]. Both systems have in common that judicial review is less oriented at controlling the legislative than the executive decision making process[114] and apply concrete constitutional provisions in the review of administrative law making. Perhaps the most important of these provisions are individual rights. In Germany the practice of striking down parliamentary statutes because of a violation of Art. 80 (2) Basic Law is not as rate as the application of the nondelegation doctrine in the U.S. But it is interesting to take a closer look at which standards are applied by the court. The court interprets the delegation clause not from an abstract perspective of separated powers which presumably would be hollow, but from the perspective of a private citizen. The court demands a statutory contents that can define reasonable expectations for the use of individual rights[115]. This means that the understanding of rights is crucial for the definition of nondelegation standards.

2.5.2. Constitutional Adjudication

Constitutional adjudication constitutes perhaps the most important challenge for our reconstruction of the judicial function. The broad scope of decision making powers available to constitutional courts, like the German constitutional court, or functional constitutional courts like the U.S. Supreme Court and the ECJ, provides them with a quasi-legislative function[116]. Constitutional courts often decide general, highly politicized questions with a pervasive impact not only for the parties involved but also for the whole political process. It is hard to recognize patterns of individualization in constitutional adjudication. So how can we to reconcile this judicial practice with our model of tripartite government? Three kinds of answers to this question seem possible. A theoretical answer concerning the status of constitutional adjudication within a system of self-government (1.), an empirical answer concerning the real political impact

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[113] Cass R. Sunstein, Nondelegation Canons, The Univ. of Chicago L. Rev. 67 (2000), 315, 329 et seq.; Richard B. Stewart, Beyond Delegation Doctrine, American University L. Rev 36 (1987), 323, 342 et seq.

[114] Most prominently: Chevron v. Natural Res. Def. Council, 567 U.S. 837 (1994).

[115] E.g. BVerfGE 1, 14 (60); 78, 249 (272); 85, 97 (105).

[116] Alec Sweet Stone, Governing with Judges, 2002.

of constitutional adjudication (2.) and a legal answer concerning the practice of constitutional adjudication (3.).

1. First of all, constitutional adjudication has been perceived as problematic in many countries with a genuine democratic tradition, most notably the United States, England and France. The long history of the American discussion about the `counter-majoritarian difficulty´ in the United States shows that as well[117] as does the late invention of constitutional adjudication in France[118]. There is much less critique in post-totalitarian or post-authoritarian political systems like Germany, Italy, Hungary and South-Africa[119].

In accordance with a more recent strand of the American constitutional discourse, our model would claim the judicial review of legislative action is, from the procedural side, highly questionable because it gives not accountable in a bilateral procedure the right to strike down democratic laws after a very exclusive procedure. There may be substantial reasons to install this mechanism, but there are procedural reasons to be careful with it[120]. The price that is paid by such an institution is not necessarily compensated by its achievements. The legislature, with its all-inclusive representative decision making structure, remains the first guardian of the constitution[121].

2. On an empirical level, one has to wonder if the impact of constitutional adjudication is indeed comparable to that of legislative decisions. What happens when constitutional courts issue politically contested decisions? Any derogation of a legislative decision which was passed with a democratic majority can be assumed to be contested. How is such a decision implemented? Obviously, court decisions take place in a political environment and this environment may even become a part of the court's reasoning[122]. Empirical research shows that politically-contested decisions need legislative assistance to be realized[123] and that in a democratic political environment opposed to this decision they may not be realized at all[124]. Such decisions may have an important symbolic

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[117] Barry Friedman, History of the Countermajoritarian Difficulty, Part Four: Law's Politics, 148 U. Penn L. Rev. 971 (2000).

[118] Alec Stone, The Birth of Judicial Review in France, 1992.

[119] For this idea I thank Pasquale Pasquino.

[120] Larry Kramer, We the Court, 115 Harvard L. Rev. 5 (2001).

[121] Matthias Jestaedt, Grundrechtseinfaltung durch Gesetz, 1999.

[122] For a famous example: Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579, 63 (Jackson, conc.)

[123] Gerald Rosenberg, The Hollow Hope, 1991; Klaus von Beyme, Der Gesetzgeber, 1997, 300-312.

[124] The most important example is of course the New Deal Supreme Court.

impact for the general political discourse. The considerable narrative or rhetorical value of judicial decisions that take sights in a fight between two legitimate claims[125] may help to better define and move forward a political agenda. This is one possible informal consequence of judicial law making. But there is still a ways to go before the judicial narrative can be a real story for a whole society. It may be no accident that all great emancipatory achievements against discrimination and for democratic inclusion remain the result of legislative decisions[126].

3. On a practical level one may draw further conclusions. Because of their very specific institutional legitimacy courts should avoid a broad scope in their reasoning[127]. Courts should decide 'one case at a time'[128] without burdening the legislative process by creating broad rules or rationales. This requirement may conflict with another traditional element of the decision making especially of higher courts: the development of general standards for a certain set of cases. But higher courts have to distinguish who they must address in their decisions. They may address other courts to find general standards for a certain set of cases within statutory interpretation. This is part of the fact that the legitimacy of courts is not only built on their procedure but also on the fact that they are strictly bound by the law[129]. But they should avoid to demand future legislative action.

2.5.3. Standing

If one central feature of judicial decision making is the 'individualization' of a legal conflicts, the question of who is allowed to sue the government could be central for the institutional legitimacy of the judiciary, because what 'individual' means is initially a question of how to define a right. This raises the question of whether there should be limits the legislative ability to define rights, especially rights that are not granted to

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[125] To paraphrase Hegel´s definition of the tragic.

[126] For the U.S.: Komesar, Imperfect Alternatives, 203-204. For France: Phillip Nord, The Republican Moment: Struggles for Democracy in Nineteenth-Century France, 1995.

[127] See the structural parallels in Luhmann, Legitimation durch Verfahren, 121-128; Cass R. Sunstein, One Case at a Time, 1999, 24-45. For Germany: Andre Brodocz, Analoges Begründen. Über den Beitrag von Verfassungsrechtsprechung zur symbolischen Integration demokratischer Gesellschaften, talk given May 2002, Darmstadt.

[128] Sunstein.

[129] 1.3.., 2.4.2.

protect individual autonomy but to enhance judicial review of the administrative branch. This question has become practical one through the constitutional debate about citizen suits, in the field of environmental law in both Germany[130] under the influence of European law [131] and in the United States.

The U.S. Supreme Court constructed constitutional limits to the granting of standing in citizen suits precisely to protect a system of separated powers[132]. The Court argued that provisions for citizen suits that give anyone the right to sue the executive violated the doctrine of separated powers by giving courts too much control over the executive. The court underlined that it is the primary task of the judicial branch to protect individual rights and not to monitor any executive action[133].

Leaving aside the question what the text of art. III U.S. const. might have added to this argument, we may ask how the model of tripartism relates to it. Two assumptions of the majority ruling seem to be problematic: First, the assumption that a right can be defined by the court as something quasi-natural that exists independent of statutory provisions or even against the construction of a statute. If the statute gives a right to sue, why is this right not an individual right in a constitutional sense? If rights are the result of legislative procedures there are no inherent limits to defining these rights broadly. The second problematic assumption regards the relationship between the executive and the judicial function. Is the judicial function seriously threatened by citizen suits because they create a permanent monitoring of the executive? Why should the executive be protected from such control? There might be functional questions concerning the relationship between administrative procedure and standing provisions. The executive should not be confronted in court with interests that are irrelevant in the administrative procedure. However, this was not the case in *Lujan*.

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[130] Johannes Bizer/Thomas Ormond/Ulrich Rieder, Die Verbandsklage im Naturschutzrecht, 1990, 84 et seq.

[131] Bernhard W. Wegener, Rechte des Einzelnen, 1998.

[132] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-663 (1992). For a theoretical defense within a so-called 'formalist' approach to separation of powers: Antonin M. Scalia, The Doctrine of Standing as an Essential Element of Separation of Powers, 17 Suffolk University L. Rev. 881 (1983). Critique Richard J. Pierce Jr., Lujan v. Defenders of Wildlife: Standing as A Judicially Imposed Limit on Legislative Power, 42 Duke L. J. 42 (1992-1993), 1170.

[133] 504 U.S. 576-577. For a different concept of separated powers in this context: 504 U.S. 602-605 (Blackmun, diss.)

3. Step Three: Levels

3.0. Government or Governance?

The actual academic discussion about the internationalization of public law has produced the distinction between 'government' and 'governance'[134]. This distinction stresses the structural novelty of inter-, trans- or infranational institutions in comparison to the traditional nation-state. But whether one prefers accept the concept of governance or to stick with more traditional terms is purely a question of conceptual strategy. How different are international forms of public organizations from traditional ones, and does this difference require new terms? There is no single answer to this question. The answer depends on how abstract the conceptual framework is that will be applied for an analysis. If the term 'government' is understood in close connection to the nation-state it may be helpful to change the terminology from 'government' to 'governance'. But this is not necessarily a correct understanding. If 'government' is understood more generally as a function of individual and collective self-determination there may be no need for terminological change. Put in a different way, as long as the concepts of 1789 – democracy and individual rights – are the normative core of public institutions, it might be better to remind the academic discussion of this fact by keeping the traditional term. This is justifiable because from a theoretical perspective there is not necessarily any interrelation between the nation-state and either individual or democratic autonomy[135]. Individuals and groups of individuals can organize themselves in forms of self-government beyond the nation-state and they do so. If our model of tripartite government is general enough to be applied to forms of internationalization, there is no need to use the concept of governance.

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[134] The distinction seems to be developed in the institutional context of the World Bank concerning the development of Third World Countries. Christian Theobald, Zur Ökonomik des Staates, 2000, 87 et seq. Joanne Scott/David M. Trubek, Mind the Gap: Law and New Approaches to Governance, 8 European L. J.(2002), 1 (1-18). Carol Harlow, Accountability of the European Union, 2002, 171-186.

[135] This may be different from a historical perspective, but this is ambivalent even in this respect. The French Revolution can be understood as the beginning of a political tradition of individual and democratic emancipation as well as the beginning of modern totalitarianism. One may read the events like Michelet read them or like Burke read them. This is also possible with the American Revolution. This ambivalence with concern to the nation-state can be illustrated very well in Hannah Arendt´s work: Hauke Brunkhorst, Hannah Arendt, 1999, 84-106.

This has nothing to do with putting new forms of supranational regulation into a 'statal corset'[136] as claimed in defense of the concept of governance. Definitions of 'governance' mostly refer to the kind of *regulatory functions* that are fulfilled e.g. by the European Union, particularly its close relationship to transnational capitalism[137]. But even if this were really something new (when compared e.g. to the nation-state at the end of the 19th century[138]), it would give no reason to replace the concept of government. In this case, government and governance were answers to different questions.

3.1. The Concept of Level

3.1.1. What is a Level?

The discussion about the internationalization of legal orders often makes use of the strongly metaphorical sound of 'level'[139]. But what is a 'level'? For the relationship between national and European legal orders this question is still highly disputed. Is the European Community a level of its own or is it only a derivative of the intergovernmentally acting member states? This question is not a merely academic one. It becomes practically relevant especially in jurisdictional competitions between European and national courts[140]. From the perspective of this model only one tentative definition of levels seems to make sense. A legal system acquires the status of a level if it develops its own mechanism of legitimacy that is not mediated by other levels, i.e. if it refers directly to individual or collective self-determination independent from national governments. There is so far no doubt that the European Union is creating subjective rights and an electoral process of its own constitutes a 'level'. Therefore, it is at least

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[136] Harlow, Accountability, 179.

[137] Harlow, Accountability, 179-180. Nick Bernard, Multilevel Governance in the European Union, 2002, 9-11 refers to the phenomenon of lobbying to justify of governance.

[138] Christoph Möllers, Globalisierte Jurisprudenz, Archiv für Rechts- und Sozialphilosophie, Beiheft 79 (2001), 41-60.

[139] There has been not too much effort to define the concept: Ingolf Pernice, Multilevel Constitutionalism and the Treaty of Amsterdam, 36 Common Market L. Rev. 703 (1999); Bernard, Multilevel Governance.

[140] BVerfGE 89, 155 (190) Franz C. Mayer, Kompetenzüberschreitung und Letztentscheidung, 2000.

analytically incomplete to reduce its legitimacy to that of member-states' governments[141].

3.1.2. Is there a Hierarchy between Levels?

The metaphor of levels provokes the image of a hierarchy between them. There seems to be an 'above' and a 'below'. But this idea is as wrong as it is when applied to governmental functions[142]. This does not mean that hierarchies within a given multi-level structure are not possible. Indeed, they are: E.g., special control powers of the EU-Commission may well be understood as a hierarchy between the Commission and national administrations[143]. But in federal systems such hierarchies do not end at the top. Like the tripartite system they ultimately function as a circle. Because the commission is in most cases bound and enabled by law made by the European council and the council is made up of the very national executives that in turn must obey certain rules of the commission it does not make any sense to speak about hierarchies between the two levels. Similar structures are part of the German system. In the U.S. federal system functional connections between the levels are less frequent[144].

3.2. Legitimacy and Tripartism of Multi-level Governments

Multi-level structures emerge from nation-states´ external relations. But within the realm of external relations the whole concept of tripartism becomes highly problematic because the relation between legislative and executive action is reversed. Legislative deliberations are already defined by an external bargain which is struck by the executive. The merits of a legislative decisions only function ex post. The legislative deliberation cannot influence the substance of a treaty. Judicial review of external executive actions comes in many cases too late and has no appropriate remedies. The tripartite design of the democratic governmental system is not adequate for external

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[141] For a still impressive attempt: Marcel Kaufmann, Europäische Integration und Demokratieprinzip, 1997.

[142] 2.4.4.

[143] Alberto J. Gil Ibáñez, The Administrative Supervision and Enforcement of EC Law, 1999, 285 et seq.

[144] Daniel Halberstam, Comparative Federalism and the issue of Commandeering, in: R. Howse/K. Nicolaidis (eds.), The Federal Vision, 2001, 213, 230 et seq.

relations, and it never has been[145]. This fact has become so pressing because of the increasing intensity of international relations and a growing public scrutiny of governmental institutions.

On the governmental levels beyond the nation state two institutional settings are especially common. *Intergovernmental bodies* have the task of a quasi-legislative law making (1.). *Supranational courts* enforce transnational rights (2.) Both institutions produce legitimacy trade-offs that can be analyzed within the framework of our model (3.).

3.2.1. Intergovernmentality

On levels above the nation-state intergovernmental bodies can become 'real' legislative structures or at least a decisive factor of the legislature, be it in a 'classic' International Organization, in the European Council or even in the German Federal Chamber[146] (Bundesrat)[147]. These bodies produce 'first' regulatory decisions that are oriented toward the future and have a high level of generality. But this fusion of legislative function and intergovernmental organization is not only deficient with respect to the national constitutional orders[148]. It is also problematic with respect to the intergovernmental decision making process itself. These procedures are not able to compensate for the deficiencies of national ratification procedures. In terms of legitimacy, intergovernmental legislatures suffer from two interrelated shortcomings: Members of intergovernmental bodies are different from members of parliament. They are deficient in their representative function and in their deliberative qualities, because they represent a set of defined interests that is not open to negotiation or backed by a general political agenda. They are not politically accountable to the constituency of the governmental body they are members of. Their position (and their re-election) depends only on the sectoral success of the constituency they represent, not on the `common

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[145] Still interesting is Locke's idea of an separate power for external relations, different from the executive, the 'Federative Power'. Locke, Two Treatises, II, 145-148.

[146] In contrast to the U.S. Senate which has directly elected members that are politically accountable for the political actions they take.

[147] Many of the discussed problems are the same for government networks: A quite optimistic analysis is Anne-Marie Slaughter, Government Networks: the heart of the liberal democratic order, in: G. H. Fox/B. R. Roth (eds.), Democratic Governance and International Law, 2000. 199-235.

[148] 3.2.

good' of the whole level. Furthermore, in many cases intergovernmental organs neither represent their constituency according to the principle of democratic equality of any individual person nor according to the federal or sovereign equality that would give any member one vote[149]. These facts have repercussions for the deliberative qualities of these decision making procedures. Bargaining structures are more prevalent than political arguments. Even if they were open and transparent, which they are not, the 'common good' of the represented level would not be expressed in the discussions of the body[150]. This means that, as opposed to executive rule-making on the national level, intergovernmentalism is a genuine form of legislative law making in organizational forms that are inadequate.

3.2.2. Transnational Judiciary

Less contested is the establishment of supranational courts and the creation of transnational rights upon which such courts can issue judgements. But to adjudicate rights without a corresponding reactive political process is problematic, too. If the legitimacy of courts depends on the individualizing procedure in court *and* the democratic definition of the law for that court[151], then the legitimacy the judicial function is not independent from the democratic process[152]. Again[153] this procedural perspective can be helpful to explain institutional problems of for example the European Court of Justice. Often these problems are described as questions of interpretative

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[149] This ambiguity in representation will become practically real in the Council once party affiliation of its members becomes more relevant. This can be observed in the German Bundesrat.

[150] This is why the ECJ defines the European Commission as responsible for the European 'General Interest'. ECJ, *Westzucker v Einfuhr- und Vorratsstelle*, Case 57/72, para 17.

[151] 2.4.2.

[152] This is often ignored in favour of a natural-right like approach towards transnational rights. Examples concerning the WTO are: Ernst-Ulrich Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law, 1991; Deborah Z. Cass, The ‚Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Judicial Development in International Trade, 12 European Journal o. International L. 39-77 (2001). A General critique of the Identification of Constitutionalization with judicial law making can be found in Christoph Möllers, Verfassung – Verfassunggebung – Konstitutionalisierung, in A. v. Bogdandy (ed.), Europäisches Verfassungsrecht, 2003, 1, 15-18, 47 et seq.

[153] 2.5.2.

techniques or judicial self-restraint. But which interpretative standards should be the right ones in a institutional setting that merges so many different legal cultures? One has to accept that the interpretation of rights like the basic freedoms and other constitutional or treaty provisions takes place in legislative a context. The more defined the rules are that courts have to adjudicate, the more plausible their reasoning can be. The example of the ECJ shows that a legislative background is important in times when the legislative process works[154] as well as when it does not. Therefore, a structure in which courts compensate for the lack of legislative decision making and actively react to the deficiencies of a political process[155] are particularly questionable. The protection of transnational rights increases the opportunities for individual self-determination. However, the adjudication of rights without a political process defining their limits overextends judicial capacities and the plausibility their legal argument that is so necessary for the acceptance of a court.

3.2.3. Legitimacy Trade-Offs in the Internazionalization of Law

But does this mean that the internationalization of national legal orders can only be described as a forfeiture of legitimacy in comparison to national legal systems? Of course not. The distinction between individual and collective self-determination may help to redefine the problem. Both modes of legitimacy develop in an asymmetric way and this asymmetry lies behind many problems of legal internationalization.

The presence of borders is hard to justify for individual self-determination. If certain rights are granted by a democratic procedure within a certain territory, the limits of this territory as such do not present a legitimate reason to limit the use of the right. Moreover, the subject that claims a right, be it a traveller, a non-governmental organization or a multi-national corporation, has an identity that is not changed or challenged by its own transnational activity. If the subject is resolved to act beyond borders then any border is an abridgement of its rights that should be challengeable under law[156]. Individual legitimacy is the dynamic element in the internationalization of law.

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[154] For the important provision of Free Trade Miguel P. Maduro, We the Court, 1998. 73-74.

[155] Weiler, Constitution of Europe, 39 et seq.

[156] The concept of ‚challengeability' stems from Discussions with Joseph Weiler.

It works just as well the other way around with any collective, that means democratic identity. The formation of democratic identities is supported by the existence of borders[157]. As they are at least partly created by legal institutions[158], the self of democratic self-government becomes more and more fragile when these borders lose their relevance. Democratic identities are pertinacious too. They emerge and they vanish slowly[159]. They are the stable element in the internationalization of law, but this stability, confronted with the dynamics of transnational action, can create unstable conditions.

When the use of transnational freedoms has negative implications for these democratic selves or when it produces uncontrollable implications for national societies then the conflict between democratic and individual self-determination creates trade-off structures. Beyond questions of efficiency and welfare, these trade-offs may present a viable normative reason to create governmental structures beyond nation-states even if their lack legitimacy. Deficient structures may be relatively more democratic than no transnational co-ordination at all. But as in any emancipatory process since the French Revolution – and globalization can be understood as a emancipatory fight against discrimination based on nationality[160] – there are victims and others that do not benefit, at least right away.

Of course, there is no general way to solve these problems. The model may help us at first to analyze legitimacy trade-off structures in the division of labour between different law making functions and levels. The emergence of new levels changes the demands for a legitimate constitutional order within and beyond the nation states that form them. Procedure like 'Fast Track'[161] in the United States or the provisions in Art. 23 (1) German Basic Law react to the shortcomings of classical tripartism in the context of highly institutionalized supranational organizations. They involve the national

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[157] This assumption has to be handled with great care. Cultural identities are constituted by change and difference as well but: Homi K. Bhabha, The Location of Culture, 1994. For a careful legal analysis: Hermann Heller, Staatslehre (1934), 6th ed. 1983, 166-186.

[158] 1.2.2.

[159] Ulrich Haltern, 9 European L. J. (2003).

[160] This understanding of globalization contravenes of course the assumption that globalization is a merely capitalist project in a pejorative sense.

[161] George A. Bermann, Constitutional Implications of U.S. Participation in Regional Integration, American J. o. Comparative Law 46 (1998), 463; Harold H. Koh, The Fast Track and United States Trade Policy, Brooklyn J. of International Law, 18 (1992), 143.

legislature in the negotiation procedure and therefore reverse the traditional sequence of foreign policy making in tripartite government. There may be similar developments in the field judicial review of external relations, still a rare event. And at the end one might wonder if distinguishing between internal and external remains the right way to organize constitutional orders.

3.3. Three Perspectives for Application

Though the aim of the project as a whole is the analysis of concrete legal multi-level problems; this paper can only end with three tentative applications. They are intended more to show what questions could be asked than to provide answers to these questions. These applications concern the problem of direct applicability of WTO Law in the European legal order (1.), the question of which function is best suited to decide competence conflicts between different levels (2.) and the problem of European comitology committees (3.).

3.3.1. The direct applicability of WTO-law within the European order is one of the most contested questions of recent discussions of international trade law. Direct is the legal ability of private persons or a European member state to sue the European Union in the European Court of Justice for the breach of WTO-law. For a distant observer, the multiplicity of possible arguments for or against direct applicability is striking. Rules of the European Legal Order like Art. 300 (7) EC, rules of the DSU, rulings of WTO dispute settlement entities, the status of the accession of the EC to the WTO and general considerations concerning reciprocity, constitutionalization of the WTO, and constitutionalization of the EU provide the debate with arguments *pro* and *con* direct applicability.

Within this complex landscape of arguments, some simple theoretical considerations may be help orienting[162]. How does the question of direct applicability play in the

[162] The closest contribution to the following considerations is: Piet Eeckhout, Judicial Enforcement of WTO Law in the European Union – Some Further Reflections, Journal of International Economic Law (2002), 91, 93-101. Similar result with a similar reference to different theoretical assumptions can be found in Armin von Bogdandy, Legal Equality, Legal certainty and Subsidiarity in Transnational

context of the model of multi-level tripartism? For the European Union, the direct applicability of WTO-rules has the consequence that every GATT rule (or at least any DSB ruling) may create subjective rights within the European legal order. The contents of these rights is, on the one hand, able to overrule decisions of the European legislator. On the other hand, these rights did not pass any political process beyond the GATT/WTO treaty negotiations and the European and national ratification procedures[163]. In functional terms direct applicability creates judicial powers without any corresponding political process[164].

But is this not exactly what happened when the ECJ invented the doctrine of direct effect? In terms of legitimacy this was at least dubious. But even disregarding all differences in the economic and political homogeneity of the EU and the WTO and disregarding the greater transparency of the European project there are important institutional distinctions between the two legal structures. The decision for direct effect in the European legal order concerned law that was under the review of the ECJ itself. The court did not delegate its jurisdiction to another organization or another judicial body as it would in the case of direct applicability of GATT/WTO-law or DSB-decisions. Therefore, the court can react to acts of the European legislature, and it does. The WTO seems even less able to provide a responsive legislative procedure than the European Communities in the era of stagnation. The option to have the ECJ apply DSB-decisions would transform the court into an executive body for DSB decisions. Though there may be good reasons for the direct applicability of international law, especially in the field of human rights, the general idea that the guarantee of rights is legitimacy-enhancing is not correct.

This argument contains two decisive differences between a right for private parties to sue and the same rights for a European member states[165]: First, the litigation of a member state is in itself an act that is politically accountable. The government regularly represents the interests of its constituency. Secondly, member states directly participate

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Economic Law, in: v. Bogdandy (ed.), European integration and international co-ordination, 2002, 13, 24-37.

[163] Joni Heliskoni, Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, 2001, 85-100.

[164] A critical analysis of legislative abilities of the WTO in v. Bogdandy, Law and Politics in the WTO.

[165] A difference that is not made by the ECJ, CaseC-146/96 Portugal v Council, para 34-52

in the European democratic process as well as in the intergovernmental structure of the WTO. Therefore their right to have European law reviewed seems more plausible.

3.3.2. Multi-Level structures dwell in a perpetual competition for competences. But which governmental function should determine them? From the perspective of our model this question could be answered easily. The question of level competence is a highly general one, and it is above all a question of constituency choice. The answer to the question of which level has the power to decide implies an answer to the question which political process will be held accountable for legislative[166] decisions. Therefore, from a functional point of view, the legislature is best suited to define competences.
But a comparative view shows fascinating differences between the national orders of the United States and Germany[167]. Both constitutions give textually very similar powers to the federal level[168]. But in the United States the determination of powers is strongly dominated by Congress, even in times when the Supreme Court has begun to review the interstate commerce clause with greater scrutiny[169]. In Germany this question is completely left to the constitutional court[170]. A recent constitutional amendment has even strengthened its power to review federal competences[171].
These differences are interesting for two interrelated reasons. First of all, they cannot be explained sufficiently either by the constitutional text or by the institutional importance of the constitutional court. We can more easily find explanations in the following: The responsiveness of the constitutional amendment-procedure which is much higher in Germany, especially concerning federal competences; the extent of centralization at the moment when the federal level was founded, the question of whether the distribution of competences between the levels is politically contested on the federal level. This has

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166 We leave out the problem of special competences only for administrative action.

167 In this regard, there are not many comparative studies between Germany and the U.S. But see Daniel Halberstam/Roderick M. Hill Jr., State Autonomy in Germany and the United States, 2001 The Annals of the American Academy of Social and Political Science, 574.

168 Art. 74 (1) No. 11 German Basic Law: ‚Recht der Wirtschaft'. Art. I sec. 8 U.S. const. ‚commerce … among the several states'

169 U.S. v. Lopez, 514 U.S. 549 (1995); U.S. v. Morrison, 120 S.Ct. 1740 (2000).

170 Christian Pestalozza, in: v. Mangoldt/Klein/Starck, Das Bonner Grundgesetz, vol.. 8, 3rd ed., 1996, Art. 70.

171 Art. 72 (2) GG.

been the case in the U.S since the Federalists. The American two party system often mirrored the conflict between states and the federal government, whereas this has not been the case in Germany[172]; and finally trust in the textual interpretation of courts, which is traditionally much higher in Germany[173]. Secondly, the American constitution is often used as a model for a future European federal order. But at least the assumption that competence catalogues 'do not function' which is borrowed from American constitutional history is falsified by the German constitutional development.

In regards to Europe the regulatory technique of competences remains a dilemma. The generality of the level determination as well as the complexity of the treaty ratification procedure speak in favour of a legislative solution in which Council and Parliament are more adequate than the ECJ to define competences. But this point may miss the fact that the conflict between member states and the European level is not represented in the political process of the European Parliament, the part of the European legislature that possesses the most legislative virtues[174]. Still at the moment, competing competence claims between member-state level and European level are more likely to be settled between different organs (EP and Commission as European agent v Council as member-state agent) than by a political discussion with the European Parliament. European institutions do not have a genuine political discourse about the question if Europe should regulate a field or not. As long as this is the case, the ECJ has to resolve competence disputes to avoid 'majoritarianism'[175] of competences.

3.3.3. The Comitology procedure is one of the most frequently discussed topics of European Administrative Law[176]. The discussion of this procedure is important for the understanding of European administrative decision making, e.g. in the field of risk-relevant topics like product standards. What can our model contribute to the question of its legitimacy? First of all, it is important to understand that comitology is a form of *executive* rule-making within a federal administrative structure. Comitology committees participate in the making of rules that are based on legislative rules made by Council

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[172] Stefan Oeter, Integration und Subsidiarität im deutschen Bundesstaatsrecht, 1998.

[173] Robert S. Summers/Michele Tafurro, Interpretation and Comparative Analysis, in: D. N. McCormick/R. Summers (eds), Interpreting Statutes, 1991, 461, 472-473.

[174] 3.2.1.

[175] Weiler, Constitution of Europe, 56-57.

and Parliament; they are an instrument of 'implementation', art. 211 subsec. 4 EC. The final application of these rules normally is within the power of national administrations[177]. Therefore, like in comparable federal administrative systems[178], a need for co-ordination between European rule-makers and national administrators seems to be a central function of comitology. This may have some implications for the discussion: If comitology is a form of executive rule-making, it is unclear if any participation of the European Parliament beyond the distribution of information can enhance its legitimacy[179]. The re-politicization of legislative decisions that have already been does not necessarily lead to a surplus in legitimacy. Quite the opposite: the development of defined rules for committee procedures is more important[180]. Because of the intergovernmental form of comitology procedures, it is questionable whether the deliberation within the committees is capable of creating a communicative legitimacy[181]. Such a broad concept of deliberation could cover up the institutional differences between intergovernmental and parliamentary representation and its implications for deliberation[182]. Within this model, the 'real' problem of comitology lies in the lack of political accountability of the Commission, which almost always remains formally responsible for rule making[183].

4. Conclusion

Seemingly old-fashioned concepts like individual autonomy, democracy and separated powers may still be useful in a discussion about the internationalization of law that

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176 C. Joerges/J. Falke (eds.), Das Ausschußwesen der Europäischen Union, 2000; E. Vos/C. Joerges, EU-Committees, 1999.

177 E.g. Hans Christian Röhl, Akkreditierung und Zertifizierung im Produktsicherheitsrecht, 1999.

178 Halberstam, The Issue of Commandeering, 235-242. Möllers, Durchführung, Europarecht 2002, 503-508.

179 Similar Koen Lenaerts/Amaryllis Verhoeven, Towards a Legal Framework for Executive Rule-making in the EU? The Contribution of the New Comitology Decision, 37 Common Market L. Rev. 645, 680.

180 E.g. CFI, Case T-188/97, *Rothmans International v Commission*. .). *Kieran St. Clair Bradley*, Institutional Aspects of Comitology, in: Vos/Joerges, EU-Commitees, 71, 88 et seq.

181 Joerges/Neyer, Constitutionalization of Comitology.

182 3.2.1.

183 This corresponds to the considerable factual influence the Commission has: Sabine Schlacke, in: Falke/Joerges, EU-Ausschußwesen, 192.

sometimes seems to be overwhelmed by the novelty and complexity of the legal development that asks for a new terminology. But novelty and complexity are only functions of the question that is posed to a phenomenon as well as to the set of descriptive tools that are used to analyze it. If the idea of self-determination is still viable, the retooling of this idea for use in a theory of public organizations may unfold some of its critical and analytical potential without ignoring the institutional change that is taking place. To start out with a reductionist model of legitimacy does not necessarily lead to a ‘big picture’ or overgeneralized conclusions. Instead it may help to give a systematic analysis of diverse legal phenomena. Because the idea of self-government is not the only available normative criterion in public law, it may be fruitful to stick with it until the end and to abstain from confusing it too early with alternative concepts. This may later help to compare its merits to those of different approaches.