Separation of Powers

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A. Introduction

1. The separation of powers constitutes one of the most important principles of a contemporary liberal → democracy and the → rule of law. It requires the allocation of governmental authority to separate institutions consisting of, at least in principle, separate individuals. Each institution may then serve as a check on the actions of the other institutions. However, the meaning of this principle is ambiguous and, as a result of various theoretical and dogmatic approaches, may be understood in various ways. It must also be noted that the idea of the → independence of the judiciary (which can be traced back to eighteenth century England) was shaped alongside, and later became more closely connected to, the separation of powers.

2. Additionally, the term ‘separation of powers’ (a vertical separation of powers, as opposed to a horizontal one) is used in the context of the division of competencies between central authorities and the authorities of parts of a federal state (→ federalism) and in relation to the phenomenon of sharing powers between state authorities and local self-government (→ local government).

3. In this entry, theoretical issues will first be examined, followed by the historical development of the doctrine of the separation of powers. The entry will also refer to the current constitutional law in selected countries and end with conclusions relating to modern issues around the separation of powers doctrine.

B. Theoretical Insights

1. The Pure Theory of Separation of Powers

4. The so-called pure definition of the separation of powers was presented in the literature by Vile in his famous monograph, Constitutionalism and the Separation of Powers (Vile 14). According to this concept, in order to retain political freedom, it is necessary to separate the state apparatus into legislative, executive, and judicial branches, with each one having a separate state function (→ legislative powers; → executive powers; → judicial powers). Each of these powers must be restricted to the performance of its own function and may not be authorized to interfere with the function of any other. In Vile’s approach, no person may be a member of more than one power. Vile’s definition provides a tool for understanding the genesis of the separation of powers doctrine, as the postulates of the pure theory have never been accepted in legal provisions or political practice.

2. Checks and Balances

5. Apart from the pure theory of the separation of powers, the theory of checks—also known as the system of → checks and balances—can be differentiated. In this approach, while there is no strict separation of functions between the branches of state power, there exists a set of rules and principles that guard against the concentration of power in the hands of a single body (Barendt 609). The system of checks requires a partial distribution of functions among the separate powers, such that every organ of the state can execute partial control over the remaining ones through certain legal instruments. The reciprocal restraining of state authorities is intended to achieve a relative balance within the state apparatus. However, in contemporary → constitutionalism, the system of checks may be interpreted in various ways. Nevertheless, all elements of the relations between the divided powers do not create a system of checks. There may also be elements of ‘positive effects’ amongst the divided powers, referred to as cooperation elements, which allow one body to influence the activities of another in an inspiring (initiative-based) or an arranging
(organizational) manner, differently from the system of checks which comprises the immanent features of counteraction (Kuca and Mikuli 129).

6. In the context of mutual interactions between the organs belonging to various state powers, Barber, for instance, proposes discussing so-called institutional self-defence. Within this concept, state organs are endowed with negative (shields) and positive (swords) mechanisms of self-defence. The shields protect one institution from the attentions of another, while the swords are devices that ‘give an institution a weapon it can use against another constitutional body’ (Barber (2013) 558). On the one hand, the shields include, for example, decisions of the legislature that are not subject to → judicial review on the grounds of rationality and fairness or in situations where the head of state is given immunity from prosecution whilst in office (→ immunity of heads of state under constitutional law). On the other hand, swords include, for instance, the → impeachment of members of the executive branch by the legislature or the right to → veto acts of the legislature. Barber adds that for self-defence reasons, institutions may also possess the capacity to behave in ways that run counter to some rules of the constitution. According to Barber, the interaction that the separation of powers can create may be characterized by cooperation and friction. Friction is needed both to guard against errors as well as to enable institutions to restrict the range of moral considerations that they include in their decisions (Barber (2013) 571).

3. Separation of Powers versus Fusion of Powers

7. The system of checks, as well as other mutual links between state institutions, causes a divergence in the theoretical notion of the separation of powers from its rigorous, pure prototype. Within the separation of powers, one can speak of a functional division, which means that public authority should be dissected into different spheres—mainly legislative, executive, and judicial. In parallel, an institutional separation exists that requires the allocation of these functions to different organs or groups of organs. In addition, there is a personal separation, which refers to entrusting the management of these organs to different people. Today, the degree to which separation is implemented in a country varies from one system to another (Heringa and Kiiver 23).

8. It must be noted that Marxist constitutionalism rejected the separation of powers. The constitutional systems of so-called real socialist states were based on the concept of the uniformity of state authority. The state apparatus was built according to the principle of centralism, in which the formal key role was entrusted to parliament as the supreme organ through which ‘the working people’ exercised authority, yet the real power was concentrated in the hands of the Politburo of the Communist Party (see → socialism; → communism).

C. Genesis of the Theory

1. Ancient Antecedents

9. Certain constitutional lawyers (see eg Ervin Jr 108) have combined the separation of powers doctrine with ancient philosophy. Aristotle specified the ‘three things in all states which a careful legislator ought well to consider’, in Politics. These are: (a) the deliberative; (b) the official; and (c) the judicial (Aristotle Book IV Chapter XIV). However, Ancient Greek philosophy promoted the ‘mixed regime’, in which state power was divided between the monarchy, aristocracy, and the people in order to maintain socio-political balance. In the mixed regime, it was not assumed that every state authority should be limited to executing competencies of one kind. Organs were supposed to represent various layers of the society.
The Greek philosopher Polybius also described the government of the Roman Republic as a perfect combination of democratic, aristocratic, and royal elements (Polybius VI 11–18).

2. Levellers, Locke, and Montesquieu

10. According to Gwyn, the separation of powers theory as such was originally formulated by Lilburne and presented in his pamphlet, *England’s Birth-Rights*, in which he attacked Parliament for possessing unlimited powers (Gwyn 39). Symptoms of the theory were also visible, according to Gwyn, in other documents issued by Levellers, mainly in their draft constitution, *Agreement of the People* (1647). Vile, in turn, traced the origin of the separation theory to writings by Nedham, who was of the opinion that separating the legislative and executive powers was a condition for maintaining freedom (*Vile passim*). After the fall of Cromwell, the theory of balanced government was developed in England. This constituted an amalgamation of the concepts of the separation of powers and the mixed regime. To maintain the socio-political balance, the state power (especially the legislative function) was supposed to be dispersed between the monarch, the nobility, and the people, with simultaneous partial division of powers in the functional and organizational aspects, combined with a system of checks (Małajny 14–15).

11. In more advanced separation of powers doctrines, the division of state functions is a dominant element. Such qualifications may be observed, for instance, in the views of Locke and Montesquieu. Locke conducted a functional division simultaneously with an organizational one. He differentiated the legislative, executive, and federative powers (Locke Section 143 et seq). The last of these specified executive power regarding external affairs. Similarity between these two executive functions allowed Locke to endow them to one organ. The weakness of Locke’s doctrine was that it did not recognize the role of the judiciary. Similarly, Montesquieu is usually connected with a modern trifold division. Montesquieu wrote:

> [w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty … Again; there is no liberty if the power of judging is not separated from the legislative and executive (Montesquieu Book XI Chapter 6).

12. He also excluded the personal union of powers:

> [t]here would be an end to everything, if the same man, or the same body, whether of the nobles or the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes (Montesquieu Book XI Chapter 6).

13. According to Montesquieu, the division of powers was not absolute as it was complemented by a system of checks. Since legislative power tended to exceed its competencies, it had to be balanced by applying due brakes. Each state authority had the power to decide (*faculté de statuer*) within its tasks, and the executive also had the power to reject (*faculté d’empêcher*) in the form of a right to veto. Montesquieu, contrary to Locke, wrote about the judicial power (*la puissance de juger*), but treated it in a slightly different manner. Judicial competencies were supposed to be fulfilled by ad hoc tribunals (*divers tribunaux qui se tempèrent*); thus, the judicial authority was not constant as in the case of the other authorities. For Montesquieu ‘of the three powers above mentioned, the judiciary is in some measure next to nothing’ as it is ‘no more than the mouth that
pronounces the words of the law’ (Montesquieu, Book XI, Chapter 6), which can be interpreted as only the legislative and the executive having political character.

3. Constant’s Doctrine

14. In later approaches, the state powers were also sometimes divided into more than three branches. The forerunner of these tendencies was Constant, who contended that one could distinguish five powers: royal power, executive power, representative power of long duration, representative power of public opinion, and judicial power (Constant 184–185). Royal power should be neutral and constitute a guarantee that the other ones are balanced —ie that none of the other powers ‘should overthrow [any] of the others, but that all of them should support and understand one another and act in concert’ (Constant 184). Constant argued that executive powers should be vested in ministers, representative power of a long duration in the hereditary assembly, representative power of public opinion in the elected assembly, and judicial power in the tribunals. Representative powers were counterparts of the legislative and executive powers proceeding the general execution of laws; in turn, judicial power applied laws to particular cases. Apart from the representative powers, Constant wrote about municipal power, expressing his view concerning the need to decentralize the state (Constant 251 et seq) (→ decentralization).

D. Separation of Powers in Contemporary Constitutional Systems

15. The separation of powers as a constitutional principle may be prescribed directly in constitutional texts, such as:

- Section 3 of the Constitution of the Republic of Finland: 11 June 1999 (as Amended to 2007) (Fin);
- Article C of the Constitution of the Republic of Hungary: 18 April 2011 (as Amended to 26 September 2013) (Hung);
- Article 49 of the Political Constitution of the United Mexican States: 5 February 1917 (as Amended to 24 February 2017) (Mex);
- Article 10 of the Constitution of the Republic of Poland: 2 April 1997 (Pol);
- Article 3 of the Constitution of the Republic of Slovenia: 23 December 1991 (as Amended to 27 February 2003) (Slovn)),

or may be derived from the whole layout of the constitution, such as in the names of particular chapters or construed from the entirety of the relationships between state authorities. See:

- Constitution of the United States of America: 17 September 1787 (as Amended to 7 May 1992) (US);
- Basic Law of the Federal Republic of Germany: 23 May 1949 (as Amended to 13 July 2017) (Ger);
- Constitution of the Kingdom of Spain: 6 December 1978 (as Amended to 27 September 2011) (Spain);
16. In this section, the realization of the separation of powers in its horizontal aspect in the main government systems will be briefly presented by referring mainly to the examples of the United Kingdom, the Republic of South Africa, Japan, the United States (‘US’), Brazil, France, and Switzerland.

1. Separation of Powers within Parliamentary Systems

17. In British constitutionalism, these powers are derived from the monarch, and this still affects their interrelationships. British scholarship on constitutional law has always been heterogeneous as to the assessment of whether the separation of powers refers to the country’s constitution. Though Montesquieu’s doctrine was presented by making reference to the English constitution, the constitution was only a literary device that had little in common with the reality of eighteenth century England. The classical approach presents a rather sceptical attitude towards the compliance of this principle with the government system in the United Kingdom (Jennings 281–282; Robson 16; Marshall 124; de Smith and Brazier 18). The critics of the relationship of the separation of powers with the British governmental system often appeal to Bagehot, who wrote in his book *The English Constitution* (1865–1867) that ‘the efficient secret of the English constitution is the nearly complete fusion of the executive and legislative powers’ (Bagehot 65). However, a revisionist orientation may also be distinguished that is more favourable in its assessment of the reception of the principle (Allan 53; Barendt 599–619; Barnett 123–157). Munro emphasizes that the separation in the British constitution ‘although not absolute, ought not to be lightly dismissed’ (Munro 332). Symptoms of the separation of powers in the United Kingdom, *inter alia*, include apolitical civil service, the development of the control function of the House of Commons, and the last constitutional reforms abolishing the judicial function of the House of Lords as well as the reform of the Lord Chancellor’s office. The relevance of the separation of powers was also confirmed in certain judicial decisions; however, this was mainly intended to emphasize the limits of judicial control over the legislative activity of parliament and justify, but also constrain, judicial review of executive actions. Lord Diplock argued that ‘it cannot be too strongly emphasized that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them’ (*Duport Steels Ltd v Sirs* (1980) (UK)); in turn, Lord Mustill stressed that ‘it is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain’ (*R ex parte Fire Brigades Union v Secretary of State for the Home Department* (1995) (UK)).

18. In the South African Constitution, the separation of powers is not expressed directly, but for the → Constitutional Court of South Africa, this principle is undoubtedly of importance, as confirmed *inter alia* in the *South African Association of Personal Injury Lawyers v Heath and Others* (2000) (S Afr). In the South African constitutional system, as in a parliamentary system, there are many interdependencies between state institutions. The president is elected by parliament and can be removed by parliament in cases of misconduct, inability, or serious violation of the law. The president participates in the appointment of judicial officers (with the interposition of the Judicial Service Commission), and it is the president’s function to assent to parliamentary bills before they become law. One can also observe the lack of personal division of powers; members of the executive are also members of parliament. It must be noted as well that the institutions of head of state
and prime minister were merged in this country (Art. 83 of the 1996 Constitution). The Constitutional Court seems to pay attention to the core functions of a particular branch of government, simultaneously arguing that the separation of powers is not a rigid constitutional doctrine (Certification of the Constitution of the Republic of South Africa (1996) (S Afr)). In its case law, the Constitutional Court maintains that a law seeking to bring the judiciary under the control of parliament or the executive infringes the constitution under the separation of powers doctrine, even if that legislation does not conflict with any of the express provisions of the constitution (Langa 6).

19. One can find interesting solutions in the Constitution of Japan: 3 November 1946 (Japan). Although it was inspired by the US constitutional text, it creates a specific type of parliamentarism with the cabinet and prime minister holding powerful positions. The 1946 Constitution distinguishes between three traditional state powers. Each power is vested in different organs—namely, the Diet (Art. 41), the cabinet (Art. 65), and the Supreme Courts and other courts (Art. 76)—while the emperor is ‘the symbol of the State and of the unity of the People’ (Art. 1). The characteristic feature of the Japanese parliamentary system is the blurred distinction between the executive and the legislative. The cabinet members are also elected deputies. The executive is mainly responsible for preparing legislative drafts by relying heavily on the various departments and agencies, in what may be perceived as a symptom of the strong powers of the Japanese bureaucracy (Goodman 43). In the Japanese constitutional system, the separation of powers is complemented by a system of checks and balances comprising typical instruments inter alia such as the possibility of the Diet passing a ‘no confidence’ resolution against the cabinet, the dissolution of parliament by the executive, and judicial review of legislation and administrative actions (→ no confidence vote; → dissolution of the legislative body).

20. Indeed, it seems that the concept of the separation of powers can be referred to not only as a presidential system of government but also as a parliamentary one (→ presidential systems; → parliamentary systems). In the latter, the division of power is based on a mild separation as well as on the more significant mechanism of reciprocal connections. State powers interact with one another, especially the legislative and the executive. The division of tasks between the legislative powers is usually transformed by means of the political homogeneity of the government and parliamentary majority and the executive authorities. Consequently, it happens that the same individuals serve concurrently as the leadership of the legislative body and of the executive authority. Such an approach is visible in many constitutions of countries where parliamentary regimes exist. Despite being a strong departure from Montesquieu’s ideas, this does not necessarily preclude the normative sense of the separation of powers doctrine, as it involves, first of all, the differentiation of legislative and executive functions. In parliamentary systems, one can sometimes observe certain references to Constant’s doctrine, whereby the head of state is not counted amongst those with executive power but rather as a neutral organ standing above current politics and entertaining competencies to intervene in critical situations (eg in the Constitutions of Spain or Portugal (Constitution of the Portuguese Republic (Seventh Revision): 2 April 1976 (as Amended to 12 August 2005) (Port)), but to some extent, one can also observe this tendency in the Constitution of the French Republic: 28 September 1958 (as Amended to 23 July 2008) (Fr)).

2. Separation of Powers in the United States and France

21. The framers of the US Constitution endeavoured to achieve a separation, but the specific system of checks also leads to some interconnections between the most important federal organs. They were aware that total separation could be counterproductive and cause the supremacy of the legislative body (The Federalist No. 49 327–332). The system of constitutional checks belonging to Congress and aimed at the president include the power
of the purse (ie taxing power and → spending power), and the powers of the Senate to confirm (or not) the appointment of high officials nominated by the president, to consent to the ratification of treaties, and to try officials against whom an impeachment has been brought by vote of the House of Representatives. Constitutional practice led to extraordinary checks that could be used by Congress, such as investigations carried out by its committees (→ power of legislature to conduct investigations). For a time, Congress also exercised a legislative veto over executive rule-making, but this was held to be in excess of its authority (INS v Chadha (1983) (US)). In turn, the presidential veto, which normally only remits the proposed law to Congress for reconsideration and possible re-enactment by a two-thirds vote, in rare cases may totally strike down a statute (the ‘pocket veto’). The institution of judicial review significantly strengthens the position of the → Supreme Court of the United States and creates a strong check from the side of the judiciary. Thus, even in the US, the separation of powers functions in the attenuated form. In the case of Panama Refining Company v Ryan (1935) 400 (US), Judge J Cardozo noted that:

the doctrine of ‘separation of powers’ is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment in response to the practical necessities of government, which cannot foresee today the development of tomorrow in their nearly infinite variety.

22. The US presidential system inspired a number of South American countries; however, one must take into account the strong authoritarian tendencies in this region, which has, throughout the years, modified the formal division of powers entrenched in consecutive constitutions (see → authoritarianism). However, in Brazil, for example, one can observe tendencies to limit the strong position of the executive. The principle of the separation of powers in this country was included directly in Article 2 of the Constitution of the Federative Republic of Brazil: 5 October 1988 (as Amended to 15 September 2015) (Braz): ‘[t]he branches of the Union are the Legislative, the Executive and the Judiciary, which are independent and harmonious with each other’. The Brazilian Constitution also explicitly subordinates the respective organs to the given state powers. The legislative power is entrusted to the National Congress, which comprises the Chamber of Deputies (→ chamber of deputies) and the Senate (Art. 44); the executive is vested in the president of the republic ‘assisted by the Ministers of the Federal Government’ (Art. 76); and the judiciary comprises tribunals and the council of the judiciary (Art. 92). According to Article 60, paragraph 4 of the Brazilian Constitution, the separation of powers is one of these principles and rights that cannot be formally abolished. In the current constitution, the president of the republic no longer has the power to issue decree-laws envisaged in the 1937, 1967, and 1969 constitutions (Rosenn 885). Nevertheless, the president is endowed with exclusive competencies to submit bills concerning several important issues. Brazil’s 1988 constitution also strengthened the independence of the judiciary by enhancing the powers of the → Supreme Federal Tribunal of Brazil (Supremo Tribunal Federal) to enable control over the constitutionality of legislation.

23. In the Constitution of the Fifth Republic: 4 October 1958 (as Amended to 23 July 2008) (Fr), the separation of powers was also not expressed directly. A reference to this principle can be found in the → French Declaration of the Rights of Man and of the Citizen (1789) (‘Declaration’), which is treated as a part of the French Constitution in a substantive sense. Article 16 of the Declaration stipulates that ‘[a]ny society in which the guarantee of the rights is not secured, or the separation of powers not determined, has no constitution at all’. The normative value of this principle can be derived from the general picture of the relationship between state organs, and is recognized by the → Constitutional Council of France (Conseil Constitutionnel). The French attitude towards the separation of powers was

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also historically connected to the rigid separation of courts from the domain reserved for parliament and the executive. This model has similarities to Montesquieu’s approach, in that the judiciary was not traditionally recognized as a power *per se*, since it was assumed to be strictly limited to applying the law (Garapon and Epineuse 273). Thus, ordinary courts were not endowed with competencies of striking down decisions issued by administrative organs, and administrative tribunals were perceived as a part of the executive power; however, later, the Constitutional Council’s use of the concept of the separation of powers confirmed the independence of administrative justice (Decision No. 80–119 DC (1980) (Fr)). It is also worth mentioning that the problem of separation of powers was, to some extent, addressed in the Constitutional Law of 3 June 1958 (Fr) authorizing the government to establish a constitutional draft, which was to become the Constitution of the Fifth Republic. The Constitutional Law, among others, stipulated that the executive power and the legislative power must be effectively separated so that the government and the parliament each assume the fullness of their competences. This formula summarized the main Gaullist criticisms of the preceding political regimes, the Third and the Fourth Republics, in which, as in all parliamentary regimes, a rigid separation of the executive and the legislative powers is blurred. The French Constitution of 1958 introduced a unique allocation of competencies among state authorities by creating a semi-presidential system of government with the significant role of the president of the republic, who ‘shall ensure by his arbitration, the proper functioning of the public authorities and the continuity of the State’ (Art. 5) (see → semi-presidential systems). Simultaneously, the executive was endowed with the implied competencies in law-making at the expense of parliament, which must have been perceived as a serious disruption of the harmony between the functional and organizational divisions of powers (see → implied powers). Only afterwards, the case law of the Constitutional Council extended the scope of legislative competencies of the National Assembly. In turn, the constitutional reform of 2008 was aimed at balancing the institutions of the republic (rééquilibrage des institution) by strengthening parliamentary competencies. The Constitutional Council detects the principle of balance between state authorities (see eg Decision No. 2001–448 (2001) (Fr)) and often links the separation of powers to the concept of the independence and → impartiality of the judiciary (see eg Decisions No. 70–40 DC (1970) (Fr); Decision No. 2001–445 DC (2001) (Fr); Decision No. 2016–548 DC (2016) (Fr)).

### 3. Specificity of the Separation of Powers in Switzerland

#### 24. There are particular uncertainties as to the relevance of the separation of powers in the Swiss constitutional system. The reciprocal relations between the state authorities in Switzerland may suggest that this system implies the supremacy of parliament rejecting the separation. According to Article 148(1) of the Federal Constitution of the Swiss Confederation: 18 April 1999 (as Amended to 15 March 2012) (Switz): ‘[s]ubject to the rights of the People and the Cantons, the Federal Assembly is the highest authority of the Confederation’. Article 169 also stipulates that ‘[t]he Federal Assembly exercises oversight over the Federal Council and the Federal Administration, the federal courts and other bodies entrusted with the tasks of the Confederation’. The Federal Assembly has competencies that cannot be qualified to the traditional functions of the legislative power. It, *inter alia*, participates in shaping foreign policy (Art. 166(1)), supervises the maintenance of foreign relations, and takes ‘measures to safeguard external security and the independence and neutrality of the state as well as to safeguard internal security’ (Art. 173(1)(a) and (b)). Other state organs demonstrate some symptoms of the separation of powers, such as the Federal Council, which is described in the constitution as the governing and executive authority (Art. 174), and the Federal Supreme Court, which is the supreme judicial authority (Art. 188(1)). The competencies of these latter organs cannot be overtaken by parliament. Moreover, parliament cannot dismiss the Federal Council by means of a ‘no confidence’ resolution; therefore, the government cannot be treated as an
executive committee of parliament. Furthermore, statutory supervision instruments
directed towards the executive are not formally bound.

4. Conclusions

25. It must be emphasized that in liberal democratic regimes, irrespective of whether they are based on the parliamentary government system or include certain presidential elements, reciprocal interactions between the executive and legislative powers are very common and are, to an extent, essential for securing the efficiency of the state apparatus. Yet this phenomenon may easily lead to dangerous predominance of the executive, which often shows a tendency to colonize the legislative function. Undoubtedly, the separation of powers principle requires a stricter organizational and substantive distinction between the judicial organs. The judiciary should be perceived as the least politicized branch of government, which has not only been created for the → administration of justice but also to fulfil the important role of scrutinizing both the executive and legislative sectors by means of a constitutional review of legislation and a competence in terms of reviewing the legality of administrative actions. However, the degree of judicial independence in a particular constitutional system depends not only on legal regulations but also on the legal and political culture.

E. Current Challenges in the Separation of Powers

26. It seems that the notion of the separation of powers, despite its diversity, has a common element—namely, the review and control of the existing functions of the state with a simultaneous discussion about the proper allocation of these functions to various state authorities. The separation of powers involves the existence of a set of rules and principles that protect against the concentration of powers in the hands of a single body, as this concentration may lead to abuse. In this context, the separation principle also constitutes a guarantee factor of the protection of civic and social rights (Bognetti passim). In an academic discussion on the separation of powers, another aspect that is given attention is that apart from securing liberty, the principle is supposed to promote effective and efficient state action by ‘matching of tasks to those bodies best suited to execute them’ (Barber (2001) 59 et seq) to fulfil the main objective of the state, which is the advancement of its citizens’ wellbeing (see Barber (2010) Chapter 2).

27. New challenges facing the modern state lead to the creation of diverse new, independent organs that participate in the decision-making process and possess exclusive areas of competencies. In this sense, the three-fold institutional division is insufficient and subject to criticism. Many of these organs defy a simple classification, using the language of the traditional three functions (→ independent agencies; → ombudsman). An interesting concept of the separation of powers is presented by Carolan, who criticizes the traditional approach and calls for a new model of the separation of powers that is meant to enhance democratic checks and balances and legitimize the role of administrative and regulatory bodies in the modern state (Carolan passim). According to Carolan’s concept, the division is also tripartite, but in a different manner—namely, courts, political bodies, and the administration. All three must ensure the non-arbitrariness of the state. Political organs include the parliament and the government, while the administration appears to be a separate institutional power. These political organs aim at taking into account the common good, while courts ‘focus on the fairness of this modified policy to a particular person in a given case’ (Carolan 128). In turn, the administration takes care of the needs and wishes of
the individual. Thus, the whole state apparatus must balance effective social action and effective individual protection.

28. The evolution of the separation of powers is also understandable, considering that the attitude towards the legislative power is in a phase of transition, since the parliament has lost its privilege as the sole lawmaker. Constitutional courts are no longer only negative legislators (see → constitutional courts / supreme courts as positive legislators), and the role of transnational law continues to increase. The law is frequently perceived to be the result of a wide process of consultations in which different bodies may take part. Taking into account these phenomena, for instance, Rousseau created the theory of continuous democracy, which requires the participation of various subjects in developing the shape of legal norms (Rousseau passim). According to Rousseau, determining the meaning of a law, therefore, is a collective endeavour that cannot be left to one body, be it a (supreme or constitutional) court or parliament. Subsequently, for Waldron, separate governing functions make governance a consecutive process, and the participatory aspects of the different governmental functions are a requirement of the rule of law. In this context, the separation of powers demands an articulated rather than simple, undifferentiated form of governance (Waldron 64–65).

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