MONTESQUIEU AND JUDICIAL REVIEW OF PROPORTIONALITY IN ADMINISTRATIVE LAW: RETHINKING THE SEPARATION OF POWERS IN THE NEOLIBERAL ERA

Lukas van den Berge*

The present era has seen an unprecedented fragmentation of the public sphere, a breakup of public imperium into separate pieces, not only left in the hands of supranational or subnational authorities, but also entrusted to private actors. With the abandonment of previously undisputed notions of strict legal verticality and the undivided general interest, the separation of powers doctrine as applied in most European systems of administrative law is in need of serious rethinking. Current debates on the judicial control of governmental discretion are still hampered by a discursive language and a legal grammar that tend to draw sharp lines between law and policy, awarding each of the three branches of government its own well-defined domain. Contrary to widespread belief, the trias politica as an ideology of disjointed powers and separate spheres cannot be traced back to Montesquieu's theory of law, but only from its philosophical rebuttal and inaccurate reception in subsequent times. Ironically, a proper analysis of Montesquieu's theory may indicate a viable way forward for a system of review of government actions that attunes to its modern social and institutional context.

Keywords: Montesquieu, separation of powers, administrative law, proportionality, neoliberalism

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* Assistant Professor of Legal Theory, Erasmus School of Law, Rotterdam. Thanks go out to René Brouwer and the anonymous reviewers of this journal for their helpful comments on earlier versions of this paper.

I. INTRODUCTION

A familiar image in modern law entails that government officials make some of their decisions within a 'sphere of discretion' in which they are free from binding legal standards, operating only under democratic control. As it has been almost endlessly repeated in many textbooks on administrative law, the administrative court should not take over the role of the executive. Instead, the court is expected to refrain from infringing the executive's area of free decision-making granted to it by the legislature, with the discretionary sphere of government officials being only under 'marginal review'.[1] Such spatial imagery of judicial deference and executive discretion is closely related to the classical understanding of the *trias politica* as a doctrine that prescribes a strict separation of powers, leaving matters of *policy* in the hands of the executive while strictly confining judiciary powers to matters of *law*. The disjunction of political will and legal judgment depoliticizes law, presenting jurists as the legitimate spokesmen for established principles and standards of public consent, 'passive dispensers of a received, impersonal justice'.[2] Staged as an institution that does not mingle in society's ongoing clash of interests, the court merely assesses the executive's abidance to a pre-ordained set of legal rules, upholding its rhetorical stance of strict neutrality and impartiality. As a master strategy of legitimation, the classical separation of powers doctrine sustains the legitimacy of the political order, but also of the judiciary itself. The authority of the courts comes with their fictional isolation from society as an area of political contestation, held to be the exclusive domain of the other powers of the triad. Striking a 'historic bargain', judicial institutions thus purchase formal independence at the price of

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1 For the notion of a 'margin of discretion', see, for example, William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 308-310.

2 Philippe Nonet and Philip Selznick, *Law and Society in Transition. Toward Responsive Law* (Harper and Row 1978) 57.

substantive subordination, having the last say in concrete cases only because they follow an external will, and not their own.[3]

Time and again, this bargain is struck under the aegis of two of Montesquieu's statements about the judge that tend to be mantra-like repeated.[4] The first of these statements is that judges are nothing but 'mouthpieces of the law' (*bouches de la loi*), 'inanimate beings' (*êtres inanimés*) incapable of modifying either its force or its rigour. The second entails that judges should not be annexed to any particular class or other social group, being, 'in some sense, inexistent' in society (*en quelque façon nulle*).[5] The Montesquivian judge is thus invoked as the emblem of mechanical adjudication, regarded as 'law's machine-like intermediary' (*l'organe, en quelque façon machinal de la loi*), or even as a *'juge-automate',* law's robotic middleman, impersonally applying abstract rules to concrete cases.[6] As it is repeatedly and convincingly established in serious academic scholarship on Montesquieu's intellectual legacy, the view of the Montesquivian judge as a '*juge-automate*' is untenable.[7] In legal circles, the belief in the myth of Montesquieu as mechanical adjudication's founding father has nevertheless proven to be amazingly persistent.[8] The persistence

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3 Nonet and Selznick (n 2) 57-60.

4 Cf, for example, Christoph Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (Oxford University Press 2013) 18.

5 Charles de Montesquieu, *L'Esprit des lois* (first published 1748, Gallimard 1949), bk 11, ch 6.

6 François Gény, *Méthode d'interprétation et sources en droit privé positif: essai critique* (LDGJ 1919) 101. For the image of the Montesquivian judge as a '*juge automate*', see Charles Eisenmann, 'La pensée constitutionnelle de Montesquieu' in *Bicentenaire de l'Esprit des lois 1748-1948* (Sirey 1952) 154. The mechanical view is dismissed by Eisenmann himself.

7 Charles Eisenmann, 'L''Esprit des lois' et la séparation des pouvoirs' in *Mélanges R. Carré de Malberg* (Sirey 1933) 165-192; Karel Menzo Schönfeld, 'Rex, Lex et Judex: Montesquieu and la bouche de la loi revisited' [2008] European Constitutional Law Review 274 and, especially, Till Hanisch, *Justice et puissance de juger chez Montesquieu: une 'e□tude' contextualiste* (Garnier 2015), with further references.

8 In the Dutch legal tradition, for instance, the mechanical interpretation of Montesquivian adjudication was picked up by influential scholar G.J. Wiarda, thus establishing itself as an uncontested truism in academic literature on legal interpretation. See GJ Wiarda, *Drie typen van rechtsvinding* (Tjeenk Willink 1972) 7; for a critical discussion of its pervasive influence, see Willem Witteveen, *De retoriek*

of the Montesquivian myth may be explained by the weak discursive links between intellectual history and political theory on the one hand, and law on the other.[9] With each domain typically being trapped within its own issues, a 'doctrinal story' could establish itself that tells a tale of the great Montesquieu as the intellectual champion of a classical model separation, replacing ideological and political struggle with the impersonal and timeless rationality of the rule of law.[10] Today, Montesquieu's legacy would be under threat, slowly but surely breaking down under one or more of such divergent threats as the rise of executivism, technocratic bureaucratism, the privatization of regulatory structures, the internationalization of national legal orders, judicial law-making and much more.[11]

However, the idea of an unspoilt Montesquivian age of separated powers which we now seem to lose contact with is misleading. As I will argue in this article, it does not only give an inaccurate representation of Montesquieu's original theory, but – perhaps even more important – tends to obstruct the development of a modern and balanced *trias politica* that is responsive to current social needs. Contrary to widespread belief, the *trias politica* as an ideology of disjointed powers and separate domains cannot be traced back to Montesquieu's own writings, but only to their philosophical rebuttal and inaccurate reception in subsequent times. With the rise of the managerial state of the neoliberal era, infused with a spirit of governmentality that tends to measure everything by standards of output and efficiency, a return to Montesquieu's original teachings seems more urgent than ever. Shifting 'from government to governance', modern public law typically awards far

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in het recht. Over retorica en interpretatie, staatsrecht en democratie (Tjeenk Willink 1988) 295ff. The 'Montesquivian myth' is widespread in other legal cultures as well. See, for instance, Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009) 28: 'Montesquieu conceived of the judicial function primarily, if not solely, in terms of [...] the application of pre-existing rules to facts. For Antonin Scalia's frequent reference to Montesquieu in support of his theory of legislative primacy and originalism, see David A Schultz and Christopher E Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Rowman & Littlefield 1996) 38.

9 Cf Möllers (n 4) 3.

10 Willem Witteveen, 'Doctrinal Stories' [1993] International Journal for the Semiotics of Law 179, 193.

11 See also Möllers (n 4) 8-10, with further references.

reaching discretionary powers in the hands of a plethora of public, semi-public and private actors similarly put under benchmarks and policy targets.[12] For one thing, this makes the idea of legality as a functional restraint on government actions more and more obsolete. Moreover, the fragmentation and privatization of public law is at odds with the classical ideal of public powers exclusively serving the undivided common good, leaving the public sphere in the hands of a network of public and private actors that seem to be guided by comparable economic rationalities instead. Thus, textbook lessons of judicial deference and 'different domains' of law and policy do not seem to live up to the problems that contemporary public law is facing. Ironically, Montesquieu's *Spirit of the Laws* provides a conceptual understanding of the three branches' interrelation that may offer a viable way forward for a system of review of government actions that is more responsive to the needs of modern times.

In order to be convincing in indicating some way forward in the turmoil of today's most urgent problems and dilemmas, legal scholarship will inevitably have to engage with broader historical and philosophical horizons to which law is inextricably linked.[13] In times of academic specialization, however, much of constitutional and administrative law scholarship has come to show a preoccupation with the interpretation and schematization of recent legislation and case law, setting itself apart from the intellectual context from which public law originally developed. Paradoxically, it may be necessary to get a firm grip on the past before we can find a viable way forward into the future. As Skinner has it, the intellectual historian is like an archaeologist,

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12 Samuel Tschorne, 'Neoliberalism and the Crisis of Public Law' in Anna Yeatman (ed) *Neoliberalism and the Crisis of Public Institutions* (Whitlam Institute 2015); Yannis Papadopoulos, *Democracy in Crisis? Politics, Governance and Policy* (Palgrave Macmillan 2013); Colin Crouch, *The Strange Non-death of Neo-liberalism* (Wiley & Sons 2011) 1-28.

13 Martin Loughlin, *Public Law and Political Theory* (Oxford University Press 1992). See also Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 3, referring to the tale of the drunkard's search for his lost keys under a street lamp. A passer-by sees him searching and decides to help. After searching the keys for some time without success, the passer-by asks the drunkard if he can remember precisely where he dropped them. 'Over there, in that dark corner', he responds. 'Then why are you searching here?' asks the passer-by. 'Because', the drunkard says, 'there's much more light here'.

'bringing buried intellectual treasure back to the surface, dusting it down and enabling us to determine what to think of it'.[14] Law's basic grammar and the legal language with which we have become familiar may seem to be self-evident, but in fact belong to a contingent tradition that we inherited from earlier generations. In shaping the present, the past has a clear presentness, be it somewhat less visible as the pillars below the surface that the present is built on. Only with these pillars having been properly explored and ultimately laid bare for analysis can we think of reshaping them into new fundaments for a legal and political order that lives up to today's social needs, and is fit to meet the challenges of the future. In its relative neglect of its intellectual history, however, law may remain trapped within a set of legal structures and concepts that it cannot really criticize or transcend.[15]

This article's main argument is that current debates on governmental discretion and marginal review in administrative law are hampered by the unreflected adherence to an inherited legal grammar that we fail to recognize as an invented tradition. The evolution of various systems of European administrative law is still disturbed by the idea of clear dividing lines that keep the three branches of government apart, strictly preventing any of them from overstepping its boundaries. The development of judicial review of proportionality in Dutch administrative law provides a clear case in point. Common Dutch textbook wisdom prescribes that the judiciary should never 'occupy the seat of the executive', leaving the government the exclusive control of a 'discretionary sphere' as it is granted to it by the legislature. Only when the government exceeds that sphere's outer margins by taking decisions that are clearly irrational can it be held accountable by the court; any more intense judicial interference with executive decision-making would comprise a brusque violation of Montesquieu's intellectual heritage.[16] However, marginal proportionality testing does not in any way conform to Montesquieu's philosophy of law, but rather to the philosophical and legal

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14 Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press 1998) 112.

15 Cf H Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (5th edn, Oxford University Press 2014) 1-32 on 'tradition' and 'the presence of the past'.

16 For the Dutch tradition of 'marginal review' of government decisions, see especially Boudewijn de Waard, 'Proportionality: Dutch Sobriety' in Sofia Ranchordas and Boudewiijn de Waard (eds), *The Judge and the Proprtionate Use of Discretion* (Routledge 2016) 109-124.

thought of those who either actively resisted his legal philosophy, or wrongly appropriated it to serve their own ideological agenda. Only a thorough analysis of Montesquieu's original theory and its reception in subsequent times may provide the groundwork for a model of judicial proportionality testing that lives up to the trends of administrative managerialism and privatized governance with which we are faced today.

II. MONTESQUIEU'S *BOUCHE DE LA LOI* REVISITED

Historical reconstruction of Montesquieu's appropriation as mechanical adjudication's intellectual champion leads us back to François Gény's *Méthode d'interprétation* as a seminal work of European legal scholarship.[17] Citing French revolutionary and tribune Mallia-Garat's contribution to the discussion on the new French Civil Code with approval, Gény subscribes to the idea that '[t]he law in a republic is an emanation of sovereignty', expressing the 'national will' as 'the only power that free human beings can acknowledge'. In the brave new world of the French republic, 'the simplicity and uniformity of the laws are consequential of absolute equality as the constitution's most basic fundament'. Therefore, it should not be permitted to any human power 'to change the law or to modify it in its execution or to supplement its insufficiency', as such reckless practices would be most detrimental to the clear determination of its guarantees, and could ultimately even lead to 'anarchy disguised as a judge-made order'. In order to prevent such disasters, the court should always follow Montesquieu in being only the mouth that pronounces the commands of the law, itself a neutral and inanimate being.[18] The *travaux préparatoires* of the French Civil Code testify to Portalis' quick rebuttal of Mallia-Garat's selective and decontextualized reference to Montesquieu's writings, but his astute confutation of the tribune's words was left out of Gény's account of the discussion that would turn out to put a powerful spell on generations to come.[19] As Eisenmann noted, the idea of a strict separation of powers and Montesquieu's *Spirit of the*

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17 Gény (n 6). See also Karel Menzo Schönfeld, *Montesquieu en 'la bouche de la loi'* (New Rhine Publishers 1979) 74.

18 Mallia-Garat, as cited by Pierre-Antoine Fenet (ed), *Recueil complet de des travaux préparatoires du Code Civil* (vol 6, 1827) 157-158; cf Hanisch (n 7) 150-151.

19 See also Schönfeld (n 17) 74.

Laws soon became 'two terms inextricably linked' (*deux termes indissolublement liés*) for most, if not all scholars of public law.[20]

Despite the attempts of some to correct Gény's false rendering of Montesquieu's thought, the origin myth of his *trias politica* as a system that prescribes mechanical adjudication, tends to obscure the minds of many jurists and scholars up to the present day. Whereas Montesquieu used to be hailed by the positivists as their great enlightened predecessor, an early-modern tyrannicide who has liberated us from a dictatorship of judges,[21] contemporary scholarship is inclined to dismiss his doctrine of separated powers as a ghost from the past, a belief in legal determinacy that we have now come to know as very naive.[22] Both accounts of Montesquieu's doctrine are inaccurate, equally disconnected as they are from the relevant primary sources. A better-informed report on Montesquieu's theory is provided by Schönfeld, who explains that the Montesquivian image of judges as 'mouthpieces of the law' (*bouches de la loi*) does not refer to mechanical adjudication, but – quite contrarily – to the independence of the court towards the other branches of the *trias*. Widespread medieval wisdom has it that law is embodied by the king as 'the law animate' (*lex animata*), with the law being the 'dumbe king' that can only come to life by the voice of the supreme ruler as the 'speaking law' (*lex loquens*). Consequentially, 'the king is above the law, as both the author and giver of strength thereto'.[23] In other words, the king's commands determine the law and not the other way round. Montesquieu's description of the court as the 'mouth of the law' (*la bouche de la loi*) implies the opposite. Not the *king*, but the *judge* is the 'speaking law' (*iudex est lex loquens*), with 'lex', 'loi' and 'law' not referring to statutory law, but to law and justice in general. The depiction of the judge as an 'inanimate being' (*être inanimé*), then, mirrors royal arbitrariness: the court does not

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20 Eisenmann (n 7) 165.

21 Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Giard 1921) 15-16.

22 Laurence Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' [2005] Oxford Journal of Legal Studies 419.

23 James I as quoted by Schönfeld (n 17) 42; see also Schönfeld (n 7) 274.

invent or *make* the law, but rather *finds* it as it derives from prepositive principles of natural law.[24]

Only quite recently has legal scholarship seen some comprehensive studies placing Montesquieu's theory of separated powers within its proper historical and philosophical context.[25] Montesquieu opens his *magnum opus* by defining the laws 'in their most general signification [...] as the 'necessary relations' (*rapports nécessaires*) arising from the nature of things'.[26] Opposing contractarians like Bodin and Hobbes, Montesquieu adheres to an Aristotelian anthropology of intersubjective relations that conceptually precede individual subjectivity.[27] Only to a limited extent should law be regarded as the artificial creation of autonomous human beings, only constrained by a set of self-imposed rules; in addition to 'the laws of their own making', they 'have some likewise which they never made'. Before there were even human beings, humans were possible, with possible relations and possible laws. 'Before laws were made', therefore, 'there were relations of possible justice'.[28] That is to say, relations determined by law are antecedent to their substantiation in material reality, like the radii of a circle are equal before it is drawn. To say that there is nothing just or unjust, but what is commanded or forbidden by positive laws would turn things upside down, ignoring the principles of natural law that underpin Montesquieu's legal philosophy. Resisting the voluntarist and imperativist Hobbesian absolutism that was dominant at the time, Montesquieu proposes a relational understanding of law that finds its conceptual point of origin not – with Hobbes – in some contract between previously unbound human beings, but

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24 Schönfeld (n 17) 53-55.

25 See Schönfeld (n 7), Schönfeld (n 17) and, especially, Hanisch (n 7), with further references.

26 Montesquieu (n 5), bk 1, ch 1.

27 Cf Paul Carrese, *Democracy in Moderation. Montesquieu, Tocqueville and Sustainable Liberalism* (Cambridge University Press 2016) 22ff.

28 Montesquieu (n 5) bk 1 ch 1.

in relations governed by law that coincide with – necessarily intersubjective – human existence.[29]

Montesquieu's relational view of law and justice is also expressed in his idea of a *trias politica*. Political freedom as Montesquieu understands it is irreconcilable with monistic concepts of sovereignty that derives all powers from the central point of the 'body politic' (*corps politique*) of the people or the 'physical body' (*corps physique*) of the king. Instead, a pluralistic understanding of sovereignty would be required in which *imperium* is shared by multiple actors that wield their powers in equal interdependence.[30] In fact, little would be more despotic than the Jacobin ideal of 'absolute equality' as it would later be advocated by Mallia-Garat and Gény, mistakenly hiding behind 'our great Montesuieu' (*notre grand Montesquieu*) as their great intellectual hero.[31] In its dismissal of any discrimination on the basis of traditional aristocratic values, the 'spirit of extreme equality' would necessarily result in a ruthless democratic majoritarianism that leaves no room for such outdated notions as 'manners, order or virtue', having shaken off all standards of deference that would be given by nature.[32] In a democratic republic 'gone wrong', the people understand liberty mistakenly as the absence of opposition, leaving the legislature free to pass any law it wants and to impose its will at its unrestrained discretion. Equally corrupted is a monarchy in which the prince 'directs everything entirely to himself', dismissing his essential relatedness to others and eventually even confusing the state with his own person.[33] Political liberty can only exist under a 'moderate government' in which public *imperium* is shared by multiple actors entangled in a precarious balance in which no one has the final say, with the constitution establishing some

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29 For Montesquieu's theory of law as a *relational* theory of law, see also Lukas van den Berge, *Bestuursrecht tussen autonomie en verhouding. Naar een relationeel bestuursrecht* (Boom juridisch 2016) ch 9, with further references.

30 See also René Foqué and Joest 't Hart, *Instrumentaliteit en rechtsbescherming* (Gouda Quint 1990) 80-81.

31 Gény (n 6) 101. For Montesquieu's dismissal of absolute equality, see Montesquieu (n 5) bk 8 ch 2.

32 Montesquieu (n 3) bk 8 ch 3.

33 Ibid bk 8 ch 6.

system of 'power corrected by power' (*le pouvoir arrête le pouvoir*) that prevents that the 'necessary relations' between these actors are disturbed.[34]

The relational mindset of essential intersubjectivity also determines Montesquieu's famous description of England as a nation that has political liberty as 'the direct end of its constitution'.[35] The legislative, executive and judicial branches of government that Montesquieu discerns are envisioned to acknowledge their mutual interdependence, with none of these actors regarding 'himself as his own rule' (*lui-même sa règle*).[36] In no case should legislative and executive powers be united 'in the same person, or in the same body of magistrates'; experience tells us that such persons or bodies tend to succumb to the temptation to enact 'tyrannical laws', and 'to execute them in a tyrannical manner'. Liberty would not be possible if the courts were to usurp the powers of the legislative and the executive. The life and liberty of the subject would then be exposed to arbitrary control, threatened by an unchecked government of judges setting its own rules and policies. Political liberty can only thrive when – like in Montesquieu's idealized England – none of the government's branches claim any kind of primacy or prevalence above the other. Instead, each of the actors of the *trias politica* should acknowledge its entangledness in a precarious equilibrium that constantly needs recalibration in the light of specific circumstances. Each actor should do its utmost to prevent that the balance is disturbed. Destabilization – with one actor outweighing the other – is disastrous; 'all would [then] be lost'.[37]

III. Montesquieu's Philosophical Adversaries

Montesquieu's relational account of the branches of government being entangled in a precarious balance has been criticized from several angles. With regard to the judicial assessment of proportionality in administrative law, two strands of criticism are particularly relevant. The first of those strands is well represented by Rousseau and Kant, who emulate Montesquieu in drawing up a political *triad*, but refuse to accept his pluralistic view on

34 Montesquieu (n 3) bk 11 ch 4.

35 Ibid bk 11 ch 5.

36 Ibid bk 6 ch 3.

37 Ibid bk 11 ch 6.

sovereignty, ultimately resulting in a balance of powers that are mutually equivalent. Instead, both Rousseau and Kant adhere to a separation of powers doctrine in which the ultimate primacy clearly lies with the legislature as the only true sovereign. Fearing that a Montesquivian division of powers could rip the 'body politic' as he envisions it apart, Rousseau locates the source of all legitimate power with 'the general will' of the undivided people. The only way to escape the 'might makes right' of nature would be a social contract that entails 'the total alienation of each associate, together with all his rights, to the whole community', forging an artificial body with a united will that releases us from bare natural existence.[38] Guided by 'the general interest' (*le bien commun*) as its exclusive point of orientation, the general will is not misled by the dispersed variety of 'private interests' that threatens to pull the contractants in different directions, breaking the body politic and ultimately bringing back the state of nature. Liberating us from the chains of nature, the 'general will' should certainly not be confused with the 'will of all'. While the latter is no more than 'the sum of particular wills', misguided and confused by opposing private interests, the former derives its clear and focused infallibility by only taking the common interest of the integrated populace into account.[39]

Emphasizing the importance of the unfragmented integrity of the 'body politic' as the only way out of a natural state determined by the right of the strongest, Rousseau heavily criticizes Montesquieu for disregarding the importance of such integrity. With sovereignty divided up between three branches of government, with none of these branches outweighing the other, the Montesquivian state would be nothing more than a 'fantastic being' (*être fantastique*), a deplorable creature that consists of 'disperse components' (*pièces rapportées*) that are only superficially sewn together, not really making up an integrated whole. Theorists like Montesquieu would dismember the body politic, and then re-assemble the pieces into an incoherent body that seems like a man that is composed of 'several bodies, one with eyes, one with

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38 Jean-Jacques Rousseau, *Du contrat social* (first published 1762, Gallimard 1964) bk 1 ch 6.

39 Rousseau (n 38) bk 2 ch 3. On the mysterious notion of Rousseau's general will, see esp. Patrick Riley, *Will and Political Legitimacy. A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant and Hegel* (Harvard University Press 1982) 98-124.

arms, another with feet'.[40] Such erroneous thinking would result from a serious misunderstanding of what the allocation of tasks to different actors should really entail: not a division of sovereignty, but the institution of a *clear* hierarchy that helps the sovereign people to impose, and execute the general will as the state's one and only guiding principle. For Rousseau, 'every free action' (*toute action libre*) derives from the combination of 'will' (*volonté*) and 'power' (*force*) as its two constituent causes, with only the former of moral, and the latter of mere physical nature.[41] The same goes for the 'body politic' of the state: it could only do something when the people as the 'legislative power' (*puissance législative*) is assisted by an 'executive power' (*puissance exécutive*) without which the will of the people could not materialize. A proper 'rationale of government' (*raison du gouvernement*) thus entails the mere execution of the undivided will of the legislating people as the only true sovereign. The same goes for the judicial branch of government (*puissance judiciaire*): like the executive, it is subservient to the legislature, indispensable for the 'body politic' to function properly, but ultimately submitted to the people's 'general will' as its only point of moral reference.[42]

Something similar is expressed by Kant, who regards the idea of separated powers as an important safeguard for civic freedom. For Kant, a free republic requires 'the political severance of the executive power of the government from the legislative power', whereas despotism entails 'the irresponsible executive administration of the state by laws laid down and enacted by the same power that administers them'.[43] In his *Doctrine of Right*, Kant emulates Montesquieu in sketching a political triad consisting of a legislative, executive and judiciary power. Different from Montesquieu's account, however, these powers are not merely 'co-ordinate with one another', keeping each other in check, so as to prevent that any of them would come to regard 'himself as his own rule'. Like Rousseau, Kant acknowledges that the legislative power, belonging to 'the united will of the people', depends on the other powers for its actual realization in the material world. That is not to say

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40 Rousseau (n 38) bk 2 ch 2.

41 Ibid bk 2 ch 3.

42 Rousseau (n 38) bk 3 ch 1. See also Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 132-139.

43 Immanuel Kant, *Zum ewigen Frieden* (first published 1795, Suhrkamp 1977) 205.

that Kant's political triad lacks a clear hierarchy. Notwithstanding their mutual dependence, the governmental powers are subordinate to one another. The executive and the judiciary maintain their authority in their own domains, but both are subjected to the will of the legislative power as their 'supreme master' (*Oberbefehlhaber*) or *summus rector* to which they are ultimately submitted. Like the soul needs the body, the legislature needs the executive to substantiate its will in the physical world, issuing its decrees and promulgating its orders strictly 'in accordance with the law' (*zu Folge dem Gesetz*). Similarly, the judiciary branch of government is expected to derive its decisions from the legislature's will as a 'major premise' (*Obersatz*) ultimately determining the outcome by its deductive application to a given case.[44]

A second strand of philosophical criticism of Montequieu's *trias politica* is represented by those adhering to the organic idea of the state as an 'ethical body', not created by means of some real or imagined contract between its individual citizens, but as a natural community – grown as a particular cultural and historical entity – that conceptually *precedes* the individual. Such organicist thinking – once widespread, but now largely forgotten – flourished especially in nineteenth-century Germany. Hegel, for instance, resists the contractarian tradition by maintaining that the state should not be regarded as an artificial 'union of men under law', but rather as 'a natural growth', 'an ethical whole' (*sittliches Ganze*), given shape by the culture and history of a particular people that would be impregnated with its own 'substantive will' as its essential intersubjective point of moral orientation.[45] With such monistic organicist thinking, Montesquieu's doctrine of shared sovereignty and balanced powers is irreconcilable. As a natural growth, a human body meshed up in pieces cannot survive. Similarly, the continuity of the organic state would be endangered by dividing its sovereignty between a plurality of actors without any sense of unbroken ethical commonality. By all means, the fragmentation of the state as an integrated 'ethical being' should be prevented. Montesquieu's system of checks and balances would only stimulate internal 'animosity' (*Feindseligkeit*), a spirit of 'mutual limitation'

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44 Immanuel Kant, *Metaphysik der Sitten* (first published 1797, De Gruyter 1968) paras 45-48.

45 Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts* (first published 1821, Meiner 2011) para 258.

with the reaction of each power to the others being one of 'hostility and fear'. In their determination to oppose one another, they would produce a fragmented equilibrium rather than a living unity, thus contributing to the 'destruction of the state' (*Zertrümmerung des Staates*) as an organic whole without which none of its members can survive.[46]

IV. Montesquieu's Legal Adversaries

Both strands of philosophical criticism of Montesquieu's constitutional thought have remained of great influence up to the present day. For one thing, Montesquieu's model of balanced powers was opposed by legal positivists like Paul Laband (1838-1918). Giving the contractarian conception of the legal order as an artificial construct a formalist twist, Laband advocated an exclusive rule of deductive and syllogistic legal reasoning as the only way in which law could ever become a true 'science' (*Wissenschaft*). As an academic discipline, law should be kept pure as an abstract intellectual activity, released from any concern about its ethical and social environment as an obstacle of scientific progress.[47] Laband's legal world is filled with the legal commands of the sovereign lawmaker as an absolute master, establishing an impersonal 'government of laws' (*Regierung der Gesetze*) that only acknowledges the binding force of general provisions as the 'abstract laws of pure thought' (*die kahlen Gesetze des Denkens*).[48] On the one hand, Laband's legalistic understanding of law entails that the government can only require anything from its citizens on the basis of written provisions. As such, Laband's 'government of laws, not men' holds the promise of a rule of law instead of arbitrariness and despotism. On the other hand, however, it also entails the impossibility of any prepositive subjective rights of citizens towards the state.[49] Evidently, Laband's positivism is incompatible with Montesquieu's

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46 Hegel (n 45) para 272. On Hegel's stance towards Montesquieu's theory of separated powers, see also Fred R Dallmayr, *G.W.F. Hegel. Modernity and Politics* (Rowman & Littlefield 1993) 147ff; for Hegel's lasting influence on public law theory, see Loughlin (n 40) 146-153.

47 Paul Laband, *Das Staatsrecht des deutschen Reiches*, vol 1 (2nd edn, Mohr 1887) ix, defending the idea of law as 'eine rein logische Denktätigkeit'.

48 Cf Walter Wilhelm, *Zur juristischen Methodenlehre im 19. Jahrhunderts* (Klostermann 1958) 79.

49 Cf Michael Stolleis, *Geschichte des öffentlichen Rechts*, vol 2 (Beck 1992) 159.

legal universe of 'relations arising from the nature of things', resulting in a constitutional architecture of balanced powers and shared sovereignty. Therefore, it comes as no surprise that Laband dismisses Montesquieu's naturalism as a backward theory that stands in the way of the 'constructive work' of modern legal formalism. In its emphasis on a prepositive intersubjectivity, Montesquieu's legal theory opposes the pure 'government of laws' advocated by Laband. In his discussion of Montesquieu's teachings, Laband rests assured that detailed criticism of Montesquieu's intellectual legacy is no longer necessary, as modern scholars would be almost unanimous in rejecting his theory of balanced powers as an obsolete remnant of an unscientific past.[50]

Unlike Montesquieu, Laband refrains from any dilution of the lawmaker's public *imperium* as a dangerous threat of the unity of the state. Instead, he sticks to the idea that the lawmaker's acts of legislation are performed in a legal void, unbound by any prepositive restriction and therefore absolute in their legal validity.[51] The legislature thus possesses an unimpeded freedom that is unchecked by other actors. The practical administration of the state is in the hands of the executive, but only as the 'specific application' of general rules proclaimed by the lawmaker. As the ultimate source of the law, the legislature is the sole bearer of an unshared sovereignty, clearly defining the margins in which the executive is bound to operate. As the executive's counterweight, the judiciary is expected to review administrative actions on the basis of written laws and nothing else. As such, these laws are envisioned as the margins of an executive domain that the administration should never overstep. At the same time, however, it leaves the executive an uncontrolled area of discretion (*freies Ermessen*) as long as it stays within its own domain.[52] In Dutch legal thought, Laband's positivism is clearly echoed in the legal thought of scholar and politician J.A. Loeff (1858-1921) as one of Dutch

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50 Paul Laband, *Das Staatsrecht des deutschen Reiches*, vol 2 (2nd edn, Mohr 1887) 7. In the fourth edition, appearing in 1911, Laband's contemptuous remark on Montesquieu's theory is omitted.

51 Laband (n 50) 172-173: 'Die Akte der Gesetzgebung [...] sind [...] auf freier Willensbestimmung beruhende, und [...] *auch der Rechtsordnung selbst gegenüber freie*. [...] Der Wille des gesetzgebenden Organs ist dem Recht gegenüber der stärkere; das bisher geltende Recht muß ihm gegenüber weichen.' (emphasis added?)

52 Cf Stolleis (n 49) 341-345.

administrative law's most prominent 'founding fathers'. The rule of law as Loeff understands it demands that the commands of the sovereign lawmaker are obeyed without exception, be it by those 'fallible human beings' who make up the administration or by other legal subjects. Therefore, he advances a system of judicial review of government actions that is geared towards the absolute maintenance of abstract legality, ultimately aiming at a 'pure legal order' that is cleared from any unlawful infringements.[53] As long as it remains within its area of discretion, the administration is free to act as it wishes. Any decision beyond these margins, however, should be annulled by the judiciary.[54]

The legal opposition to Montesquieu's relational theory of scholars like Laband and Loeff can thus be seen as the positivistic reflection of the primacy of the legislature as it was purported earlier by thinkers adhering to the contractarian tradition in political philosophy like Rousseau and Kant. A second strand of legal opposition to Montesquieu's relational theory, however, builds forth on the organicist thinking of philosophers like Hegel. In Hegel's footsteps, for instance, Prussian scholar and politician Friedrich Julius Stahl (1802-1861) describes the state as an 'ethical whole' (*sittliches Ganze*), with its individual citizens as its natural constituents. Determined by ethical principles rather than formal commands, the *Rechtsstaat* as Stahl understands it comprises much more than only upholding the commands of the lawmaker.[55] Most essentially, the protection of the *Rechtsstaat* would require the integrity of the state as an 'ethical entity' (*sittliches Reich*) that is not primarily held together by the dictates of rationalistic principles, but rather by the 'ethical ideas' that would be ingrained in the common identity of a particular community. In Stahl's theory, the integrity of the state as an ethical whole requires that the competence of independent courts only pertains to private and criminal law. Determined by much more than abstract legal reasoning alone, the ethical sphere of administrative law should remain

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53 Joannes Aloysius Loeff, *Publiekrecht tegenover privaatrecht* (Ijdo 1887) 6-7.

54 Ibid 62. On Loeff's legal thought, see also Lukas van den Berge, ''Der Staat soll Rechtsstaat Seyn'. Loeff, Struycken en de Duitse staatsfilosofie' [2014] Rechtsgeleerd Magazijn Themis 80, with further references.

55 Cf Katharina Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und Verwaltungsrechtliche Aspekte* (Mohr 1997) 320 ff; Stolleis (n 49) 102-105

beyond their reach. With the administration curtailed by the abstract legal reasoning of the judiciary, the state would be at serious risk of losing its ethical integrity, with its orphaned citizens finding themselves as atomized legal subjects opposed to the state rather than living their full lives as its integral constituents.[56] Stahl may thus be described as an early opponent of a process of juridification that threatens public life by making everything into a 'matter of law' (*Justizsache*), not only subverting the state as an ethical whole, but also disturbing the lives of individual citizens as its organic constituents.[57]

Far removed as we tend to be from the organicist thinking of scholars and philosophers like Hegel and Stahl,[58] we may easily lose sight of the enormous influence that their monist ethics have had on the development of European public law. For Gerber, for instance, it was self-evident that the state is not some artificial entity, but a spirited being that reflects the essential unity of a people sharing a common culture and history. As such, the state would have a 'collective consciousness' in the undivided ethical 'Spirit' (*Geist*) of the populace.[59] Such monist organicism is incompatible with Montesquieu's pluralist theory of a

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56 Friedrich Julius Stahl, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*, vol 2 (Mohr 1845) 447: '[D]ie Unterthanen hätten aufgehört, ergänzende Glieder des Staates, dieses sittlichen Ganzen zu sein, sondern ständen ihm als einem Subjecte ausser ihnen als losgetrennte, unabhängige, gleichartige Subjecte gegenüber.'

57 To contemporary scholars, Stahl is primarily known for his dictum that 'the state should be a Rechtsstaat' (*Der Staat soll Rechtsstaat seyn*). Thus, Habermas holds him (with Karl von Rotteck and Robert von Mohl) responsible for the colonization of the lifeworld that took place in the process of the 'Verrechtsstaatlichung' of society. See Jürgen Habermas, *The Theory of Communicative Action. The Critique of Functionalist Reason*, vol 2 (Polity Press 1987) 357-358. Far more than von Rotteck and von Mohl, however, Stahl was well aware that making everything into a 'Justizsache' may not only have positive, but also negative consequences. See also Dieter Grosser, *Grundlagen und Struktur der Staatslehre Friedrich Julius Stahls* (Springer 1963); Sobota (n 55) 320 ff.

58 Though still reflected in modern conservative thought. See, for example, Roger Scruton, *The Meaning of Conservatism* (Macmillan 1984).

59 Carl Friedrich Gerber, *Grundzüge des deutschen Staatsrechts* (Tauchnitz 1865) 20, where Gerber describes the state 'nicht als eine bloss begriffliche Erscheinung, sondern als ein auf natürlicher Grundlage, nämlich dem Volke beruhendes Wesen', having a 'eigenen Willensinhalt [...] in dem sittlichen, auf das staatliche Leben gerichteten Geiste des Volkes'.

shared sovereignty that lies distributed among several actors, depending on intersubjective relations rather than revolving around some essentialist ethical centre. In the development of Dutch administrative law, the organicist thinking of Hegel, Stahl, Gerber and others is echoed by A.A.H. Struycken (1873-1923) as Loeff's most prominent academic opponent.[60] Raising a polemical attack against his plans for a system of judicial review of administrative actions, Struycken dismisses Loeff's positivistic understanding of law as an emanation of a 'legalistic justitialism' that draws up boundaries between the government and its subjects as 'heterogeneous elements', thus severely disturbing the integrity of the political community.[61] As opposed to Loeff's 'pure theory of law', Struycken adheres to an anti-positivism grafted upon the mysterious idea of monist 'ethical life' (*Sittlichkeit*) as law's most essential fundament. Following the 'mighty voice of Hegel', Struycken rejects the 'all-reasonable [...] spirit of Enlightenment', intent as it would be on the destruction of existing cultural and historical structures and institutions.[62] Suspicious of the 'pure' judicial reason of the courts, Struycken rather puts his trust on review within the hierarchy of the government itself, better capable as they would be to judge administrative actions on the basis of their appropriateness and ethical quality.[63]

V. The Enduring Influence of Montesquieu's Adversaries

In modern public law, the positivistic approach to administrative law is generally regarded as outdated. With the rise of the social state replacing the minimal state of nineteenth-century liberalism, the sphere of governmental activity has dramatically expanded. It is now generally agreed upon that, to some extent, positive state action is required for the proper regulation of society and the substantive protection of civil rights.[64] The social state came with greater powers for government agencies, often awarding them

60 See Van den Berge (n 29) 81 ff; Van den Berge (n 54), with further references.

61 Antonius Alexis Hendricus Struycken, *Administratie of rechter* (Gouda Quint 1910) 15.

62 Antonius Alexis Hendricus Struycken, *Ons koningschap* (Gouda Quint 1909) 1-9.

63 Struycken (n 61) 36-37.

64 Cf, for example, Sabino Cassese, 'Die Entfaltung des Verwaltungsstaates in Europa' in Armin von Bogdandy, Sabino Cassese and Peter Huber (eds), *Handbuch Ius Publicum Europaeum*, vol 3 (Müller 2010) 22-28, discussing the rise of the 'enabling state' or 'social state' (*Sozialstaat*) and the concomitant transformation of public law in various European jurisdictions.

significant degrees of discretion in their concrete exercise. With its wide discretionary powers enabling the government to penetrate deeply into society, the positivistic notion of the *Gesetzesstaat* – a rule of codified laws, not men – came under increasing pressure. The judiciary responded by supplementing its task as the guardian of formal legality with the assessment of administrative actions to principles of proper government. One of the most appropriate tools to control the interventionist use of discretionary governmental powers was found in the principle of proportionality, originally developed in German law, but swiftly spreading to European law and other jurisdictions in post-war Europe. Embracing the proportionality principle, the courts expanded the subsumptive method of adjudication by a balancing approach that takes into account whether government action in a certain case can be regarded as appropriate, necessary and proportional with regard to its aim.[65] Evidently, the balancing approach to administrative law comes with a redefined understanding of the doctrine of separated powers, with 'no walls separating the three branches, but bridges that provide checks and balances'.[66]

The organicist approach to administrative law seems even more disconnected from modern law. The organicist objections against judicial review of government actions were closely related to the idea of the monarch as the embodiment of the state's ethical unity and the related view of the executive as the guardian of the state's ethical integrity. It was once quite common to be very suspicious towards the reasoning of the independent judiciary as 'a class which makes itself exclusive even by the terminology it uses, inasmuch as this terminology is a foreign language for those whose rights are at stake'.[67] In the organicist view, the ratiocinations of independent judicial reason are particularly dangerous in administrative law as a legal domain that should be guided by a heartfelt common ethics, rather than by abstract legal principles. In his polemical attack on Loeff's plans for a system of independent judicial review of government actions, for example,

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65 See Nicholas Emiliou, *The Principle of Proportionality in European Law. A Comparative Study* (Kluwer 1999) 5-22.

66 Aharon Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012) 385.

67 Hegel (n 45) para 228.

Struycken shows himself distrustful of the independent judiciary as an unworldly class of academicians that would be out of touch with the ethics of society. For the adjudication of administrative disputes, Struycken rather puts his trust in the administration itself as 'the embodiment and personification' of 'the common ideals' of the people. Unlike the independent court, the administration itself would not only dispose of the required technical and practical knowledge in administrative matters.[68] Proper ethical guidance would also ensure that government officials have 'the character' that enables them to reach decisions in administrative matters that do not only conform to abstract rules, but also to a common popular ethics as administrative law's most essential principle.[69] Needless to say, perhaps, such monistic ethical reasoning is incompatible with the pluralist legal ethics that have shaped the dominant jurisprudence of today.

The general dismissal of both the positivistic and the organicist stances to administrative law does not mean, however, that their influence on legal debates as they are waged today, has been reduced to zero. Their presence can be still felt in the discursive language in which problems of administrative law continue to be framed. Dutch academic debates on proportionality testing in administrative law provide a clear case in point, with other legal cultures in Europe and elsewhere dealing with similar problems.[70] The discussion on the intensity of judicial review of administrative decisions in Dutch law is still dominated by the spatial imagery of each branch of government controlling its own domain, with each branch inhabiting a 'seat'

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68 Struycken (n 61) 30-31.

69 See Hegel (n 45) paras 294-295 for an exposition on the proper *'Bildung der Beamten',* moulding their character in order to make sure that they would reach the right decisions. The importance of character for administrative judgment is similarly emphasized by Struycken. See Struycken (n 59) 36-37.

70 See Sofia Ranchordas and Boudewiijn de Waard (eds), *The Judge and the Proportionate Use of Discretion* (Routledge 2016) for a handsome overview of proportionality testing in German, French, English, US and EU administrative law, with many further references. The Dutch tradition of judicial deference and 'marginal review' of government decisions more or less resembles the Wednesbury irrationality test as it was developed in English law. See Paul Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265 and Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge University Press 2012) ch 5 for divergent opinions on the merits of the Wednesbury test.

that should be left unoccupied by others.[71] The government has the exclusive control of the 'discretionary sphere' as it is granted to it by the legislature. Within its own domain, the administration is free to balance the interests at hand and reach a decision as it seems most desirable. Only when it oversteps its domain by taking a decision that it 'could not reasonably have reached', the judiciary has the task of correcting that decision.[72] As such, the Dutch administrative court operates according to a logic of marginality that clearly echoes the positivistic notion of a governmental area of 'free discretion' (*freies Ermessen*). *Within* its discretionary sphere, the government is free to act as it pleases; legal obligations only exist *beyond* that sphere's margins. Moreover, the Dutch doctrine of 'marginal review' of government actions seems to be an enduring reflection of the organicist fears of invasive judicial reasoning by unworldly judges. The margins of the government's discretionary domain clearly fence off matters of *policy*, from matters of *law*, and thus make sure that the court only interferes with the latter.[73]

The roots of the Dutch doctrine of marginal review in positivistic and organicist thought clearly emerge from a seminal article by the influential legal scholar H.D. van Wijk as the doctrine's primary intellectual source. In Van Wijk's classical paper, it is argued that the 'ongoing withdrawal' of the almighty legislator that is typical of the rise of the social state does not demand an 'advancing court', but rather a more deferential court 'as the mirror image {that} must depart from the person who moves away from the mirror'.[74] Unlike its civil counterpart, the administrative court would not be a referee, adjudicating the concrete dispute that is presented to him, but only a linesman; all he can do is to judge beyond the 'margin of the free consent of the executive'.[75] Van Wijk's reasoning thus follows the logic of strictly separated powers and legislative primacy. Moreover, his ideas are

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71 For a critical discussion of the pervasive imagery of the three branches of government each occupying their own 'seat', see also Witteveen (n 8) 282 et seq.

72 Extensive explanation and ample references on governmental discretion in Dutch administrative law is provided by Raymond Schlössels and Sjoerd Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, vol 1 (Kluwer 2016) 118-133.

73 See also Van den Berge (n 29) 271.

74 Hendrik Daniël van Wijk, 'Voortgaande terugtred' in *Besturen met recht* (VNG 1974) 99-100.

75 Ibid 105-111.

reminiscent of the organicist view of the court as an eccentric institute of unworldly judges who would not dispose of the proper character and heartfelt acquaintance with administrative matters to reach adequate decisions in those matters. Acknowledging that the 'withdrawal of the legislature' has left citizens unprotected to the discretionary powers of government, Van Wijk argues that proper armour against such powers should not be sought in an administrative court that is moulded to its civil counterpart, but rather in specialized tribunals within the hierarchy of government itself. Detached from the problems and dilemmas of government, an independent administrative court would tend to follow abstract lines of reasoning that alienate it from society. Whereas the judge is distrusted as an ethical outsider, the administration is recognized as a force *within* society that would thus dispose of the ethical knowledge that enables it to take the right decisions.[76]

Van Wijk's model of 'marginal review' of government actions has remained the leading doctrine up to the present day. In the landmark case of *Maxis and Praxis*, the Dutch Council of State (acting as administrative court in highest instance) held that 'courts are not meant to assess [...] which weighing of interests is to be considered as the most balanced'.[77] Instead, the courts should stick to a 'restrained control' of the use of discretionary powers by the government. Article 3:4, section 2 of the General Administrative Law Act (GALA) reads that the adverse consequences of governmental decisions should not be disproportionate to their purposes. As the Council argued, the double negative in that provision implies that judicial interference with administrative decisions is only warranted in cases of manifest disproportionality or arbitrariness. Thus, the Council rejected to follow the German and European example of more pervasive proportionality testing, explicitly confirming the paradigm of 'marginal control' instead.[78] Only the testing of punitive sanctions is excepted from the marginal approach.[79] In the case of a 'criminal charge' as described in Article 6 of the ECHR, the right to

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76 Cf Van den Berge (n 29) 287-290.

77 *Maxis & Praxis* ABRvS 9 May 1996, JB 1996/158. The case is sometimes referred to as *Kwantumhal Venlo*.

78 See also de Waard 'Proportionality: Dutch Sobriety' (n 16) 115-117, with further references.

79 Schlössels and Zijlstra (n 72) 376-377.

a fair trial is taken to require a full judicial review of proportionality.[80] Thus, the courts gave shape to a rather binary practice in which the proportionality of government decisions is either fully or only marginally tested. Only recently, they seem to shift towards a more nuanced approach in which the intensity of judicial review is tailored to the particular case at hand. In a recent case on earthquakes caused by the production of natural gas in the province of Groningen, for instance, the Council of State reduced gas production, arguing that the government's decision for ongoing large-scale production was badly motivated, and therefore untenable towards those who saw their fundamental rights endangered because of it.[81] As commentators were quick to argue, the Council's decision in the Groningen case can only be understood by recognizing it as much more than only a correction of the government's failure to motivate its decision properly; what the court really aims to do, in fact, is to correct its disproportionality. Interestingly, however, the still prevailing doctrine of marginal review withholds it of doing so in a more explicit way.[82]

VI. The Need for a Montesquivian Revival

At the backdrop of the rise of the social state, the idea of marginal proportionality testing as it was proposed by Van Wijk was arguably already obsolete when it was first invented. Based on a monist ideology of legislative primacy and ethical essentialism, it failed to deliver a system in which the strong intertwinement of executive and legislative powers was properly counterbalanced by a strong and independent judiciary.[83] Now that we have reached a neoliberal era in which public space has been infused with an unprecedented managerialism, the need for a strong and independent administrative court as a forceful counterpower has become even more urgent.[84] Exposed to the rigour of a globalized economy, modern states have

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80 de Waard (n 16) 117-118.

81 *Groninger gaswinning*, ABRvS 18 November 2015, JB 2015/218.

82 See also Martha M Roggenkamp, 'The Position of Citizens in Energy Production in the Netherlands: Is a New Approach Emerging?' in Lila Barrera-Hernández and others (eds), *Sharing the Costs and Benefits of Energy and Resources Activity: Legal Change and Impact on Communities* (Oxford University Press 2014).

83 Emiliou (n 65) 267-274.

84 Cf Tschorne (n 12) 10-17.

had little choice but to follow depoliticized economic policies of privatization, reduced public spending and marketization of the government itself, now more than ever focusing on quantitative standards of outcome and efficiency.[85] Some even argue that we have entered post-democratic times in which the democratic institutions have survived, but only to serve as little more than the humble servants of private or non-governmental actors as the real powers determining their policies behind the scenes.[86] While some mark the 2008 financial crisis as 'the end of neoliberalism', scholars like Colin Crouch have convincingly argued that, for the foreseeable future at least, the neoliberal order is there to stay, with democratic institutions still quite defenceless against non-governmental transnational organizations and large corporations.[87] Burdened with traditions of organicism and legislative primacy, leaving far reaching public powers in the hands of a diffused plethora of public and private agents largely unchecked, the judiciary cannot contribute much to defend us against such actors. Therefore, it seems time for a Montesquivian revival that takes the idea of balanced powers – of a system of force and counterforce (*le pouvoir arrête le pouvoir*) – seriously at last. Shifting 'from government to governance', modern public law has typically embraced a network theory of interdependent public and private actors that take common responsibility for public policy.[88] The present era of privatization, decentralization and individualization has seen an unprecedented fragmentation of the public sphere, a breakup of public *imperium* into separate pieces, with its broken fragments often invested with great discretionary powers. For one thing, the ongoing increase of discretionary powers in the neoliberal era seems to make the idea of formal legality as a functional restraint on the wielding of public powers more and more obsolete. Moreover, the governance model of interdependent regulation is at odds with the classical idea of idea of state actors being strictly guided by rules and principles that serve the undivided general interest.

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85 Andrew Massey, *Globalization and Marketization of Government Services: Comparing Contemporary Public Sector Developments* (Macmillan 1997); Mark Freedland, 'The Marketization of Public Services' in Colin Crouch, Klaus Eder and Damian Tambini (eds), *Citizenship, Markets, and the State* (Oxford University Press 2001).

86 Colin Crouch, *Post-Democracy* (Polity Press 2004).

87 Crouch (n 12) 162 ff.

88 Papadopoulos (n 12) 117-139.

Instead, the neoliberal model tends to put public and private actors under similar benchmarks of outcome and efficiency, encouraging them to follow comparable patterns of goal-oriented economic behaviour.[89] Thus, a theory of 'marginal review' in public law that sticks to the classical notion of strictly separated powers and remains overly attached to the organicist idea of independent judges as dangerous outsiders seems unable to deliver the counterweight against governmental powers that is needed in its contemporary social and institutional context. Ironically, a return to Montesquieu's original theory of natural relations, shared sovereignty and balanced powers may provide a possible way forward.[90]

For one thing, the Montesquivian spirit of essential intersubjectivity is incompatible with the idea of the sovereign lawmaker as it is envisioned both in voluntarist and organicist theories of law. Like other legal subjects, public actors are legally bound by 'necessary relations' – that is to say, by prepositive obligations from which they cannot withdraw – the legislator no less than the administration. The idea of an essential and legally binding intersubjectivity is irreconcilable with the classical notion of an area of free discretion as a kind of empty space or vacuum in which the government is exempt from law. Instead, the Montesquivian spirit of forces and counterforces requires full and principled assessment to criteria of appropriateness, necessity and proportionality, binding public and private actors in like manner. That is not to say, of course, that nothing prevents the Montesquivian judge from interfering with matters of policy and law-making – on the contrary, any system in which a branch of government regards 'himself as his own rule' (*lui-même sa règle*) is dismissed by Montesquieu as a path towards dictatorship, as 'all would [then] be lost'.[91] In Montesquieu's 'moderate constitution' of balances and necessary relations, the actors of the classical triad each have their own task – be it law-making, administrating or judging. None of these tasks, however, is performed in splendid isolation, strictly removed from the

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89 See also Mike Raco, *State-led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism in an Era of Regulatory Capitalism* (Routledge 2013).

90 Cf René Foqué, 'Montesquieu en het recht', in Marc Groenhuijsen, Ewoud Hondius and Arend Soetemann (eds), *Recht in geding* (Boom Juridische uitgevers 2014).

91 Montesquieu (n 3) bk 11 ch 6.

reach of the other branches of government. Instead, legislature, executive, and judiciary are inextricably entangled in a precarious balance – an ongoing debate in which no one has the final say.[92]

Moreover, the Montesquivian approach to law also dismisses the organicist tradition of conceptualizing the state as some unified natural body, a mysterious ethical entity with its citizens as its integral constituent. Unlike the ethical monism of Hegel, Stahl, and others, Montesquieu's theory fits well with the pluralist account of law that has become generally accepted today. The idea of some 'Archimedean point' from which to determine a common ethics (*Sittlichkeit*) seems incompatible with modern trends of anti-essentialism and differentialism as they have become *en vogue* in the contemporary western world.[93] As Lefort writes, 'democratic society established itself as a society without a body, as a society that resists its traditional representation as an organic totality'.[94] In a modern democratic society, the collective identity of the community escapes unequivocal determination, with none of its participants being able to impose its monistic will on others. The place of power should remain an 'empty space' (*lieu vide*), free from any permanent occupation, be it either by the mysterious notion of Rousseau's 'general will', or Hegel's common *Sittlichkeit*.[95] By no means does the 'empty space of power' entail that the idea of a common ethics or a collective sense of purpose should be abandoned, leaving legal subjects in an atomic state of fragmentation as feared most, in particular by organicist thinkers like Stahl. On the contrary, power's empty space necessitates an ongoing deliberation about its proper use, so that the emptiness that Lefort describes facilitates connections rather than destroying them. The open space as envisioned by Lefort is only compatible with a Montesquivian *trias*

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92 Cf Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992) 208-237.

93 Neil Walker, 'Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism', in Paul Beaumont, Carole Lyons and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart Publishing 2002).

94 Claude Lefort, 'La question de la démocratie', in *Essais sur le politique (XIXe-XXe siècles)* (Seuil 1986) 28.

95 Claude Lefort, 'L'image du corps et le totalitarisme', in *L'invention démocratique* (Seuil 1981) 172-173.

politica as a balance with none of its actors reigning supreme – bound as they are in a shared sovereignty that requires ongoing discussion.

Surely, the actors of the triad each bring their own special expertise to that debate. However remote they often function from the democratic process, administrative agencies usually have greater democratic legitimacy than courts. Moreover, they tend to possess greater expert knowledge and technical competence while laying out their policies.[96] Both advantages of the executive provide solid ground for judicial deference, preventing the court to install a 'government of judges' in which the judiciary only recognizes its own authority.[97] As Montesquieu reminds us, a political order in which 'the judge himself is his own rule' (*le juge est lui-même sa règle*), aiming to occupy the sovereign throne all by himself, will inevitably fall prey to arbitrariness and despotism.[98] Nevertheless, Montesquieu's theory of law is equally concerned about a legal order in which matters related to policy and law-making are removed from the judiciary's area of competence altogether, fended off from the court's influence by means of some imagined borderline that keeps law apart from politics. As Martin Loughlin has shown with such great force and learnedness in his work on the foundations of public law, the practice of drawing watertight divisions between the legal and the political has turned out to be inappropriate, obfuscating public law's inherently political nature. Therefore, it is time to re-examine and rejuvenate European public law's intellectual roots in the philosophical tradition of 'political law' (*droit politique*), with Montesquieu as one of its primary representatives.[99]

How could a Montesquivian approach to proportionality testing in administrative law take shape in practice? Perhaps the metaphor of 'total football' is a good candidate to replace the sunken imagery of the three traditional branches of government, each tied to their fixed positions. The tactical theory of total football was invented by the 'mighty Magyars' in the 1950s, further developed by Michels and Cruyff in the 1970s, and now elaborated upon by successful football managers like Guardiola and others.

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96 Cf Daly (n 70) 7-35, with further references.

97 Cf Adrian Vermeule, *Law's Abnegation. From Law's Empire to the Administrative State* (Harvard University Press 2016).

98 Montesquieu (n 5) bk 6 ch 3.

99 Loughlin (n 13); Loughlin (n 42).

In accordance with other strategies, the players enter the field in a predetermined line-up, each awarded with a specific task as a defender, midfielder or attacker, posted either on the left or right side, or at the centre of the pitch. Once the game has begun, however, there is nothing that forces them to stick to their position at all costs. On the contrary, they are encouraged to take up position on the field as the game demands it, moving into unoccupied spaces and filling the gaps that other players leave behind.[100] In the current context of privatization and fragmentation of the public sphere, with vast discretionary powers frequently awarded to agents living up to their benchmarks at great distance from the democratic process, there may often still be good reasons for the court to acknowledge the other branches' primary responsibilities in law and policy-making. More frequently than before, however, situations may occur that demand the judiciary to overstep the imaginary boundaries of the domain to which it has so anxiously restricted itself in many modern European systems of public law. The neoliberal administrative state in which we now live, requires a court that no longer hides behind a fixed constitutional architecture, but takes on the responsibilities with which modern administrative reality confronts it. The Montesquivian theory of balanced powers and shared sovereignty provides it with the theoretical tools enabling it to live up to those responsibilities. That is not to say, of course, that the branches of power should forget about their primary tasks altogether. In fact, one of the weaknesses of 'total football' is the disorganization that may come out of unwarranted position switching.

VII. Conclusion

With the outlines of Montesquieu's original theory, its reception and his adversaries' and mistaken interpreters' enduring influence in the present era having been explored, it is time to draw some conclusions. Contrary to common belief, the idea of marginal review of the government's use of discretionary powers is unconnected to Montesquieu's relational account of law. Instead, it relies on the ideas of those who contributed to its refutation and distorted representation, burdening today's debate on executive discretion and judicial deference with a tenacious myth of the Montesquivian

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[100] See, for example, David Winner, *Brilliant Orange. The Neurotic Genius of Dutch Football* (2nd edn, Bloomsbury 2012).

judge as the emblem of mechanical adjudication. On the one hand, the practice of marginal review is driven by the notion of legislative primacy as it can be traced back to philosophers like Rousseau and Kant, whose voluntarist theories of unshared sovereignty were given a positivistic twist by lawyers and jurists like Laband and Loeff. In the empty legal universe of the positivists, the legislature – being the exclusive source of law – is the bearer of an undivided public *imperium* that remains unchecked by other actors, leaving the executive an uncontrolled area of discretion as long as it does not overstep its domain as it is fenced off by the legislature. On the other hand, the concept of marginal review and administrative discretion has organicist roots in the double image of the executive as integral part of the state's natural body, and of judges as unworldly outsiders, unfamiliar as they would tend to be with the common ethics that keeps the public community together.

Even with the positivistic and organicist stances to law becoming more and more obsolete, their influence can still be felt in the imagery, and the discursive language in which contemporary legal problems continue to be framed. The discussion on the intensity of proportionality testing in Dutch law – resembling similar discussions in other legal cultures – is a clear example here. That debate is still dominated by the spatial imagery of each branch of government controlling its own domain, with the legislature, the executive, and the judiciary inhabiting their own particular 'seats' that should be left unoccupied by others. As a distant echo from an obsolete past, leading Dutch doctrinal thought still envisions the governmental domain of discretion as a legal vacuum, sharply distinguished as an area of policy, and not of law. *Within* its discretionary sphere, the government is free to act as it pleases; legal obligations and judicial competence only exist *beyond* that sphere's margins. Originally invented to serve the minimal state of classical liberalism, that model of judicial deference was already at odds with the increase of administrative discretion and the expansion of governmental activity that is typical of the rising social state. We have now arrived in a neoliberal era in which public *imperium* is broken into pieces, left in the hands of a plethora of public, semi-public and private actors similarly put under benchmarks and policy targets. Against the backdrop of that neoliberal reality, the concept of marginal review has arguably become so strange to its social and institutional context that it has become untenable.

For one thing, the neoliberal state invests its agents with discretionary powers that even tend to exceed those of the social state. The ongoing increase of open powers in the hands of governmental bodies makes the idea of formal legality as a functional restraint even more obsolete than it already was in the days of the social state. Moreover, the trends of privatization, decentralization and the marketization of the government itself seem hardly compatible with the classical ideal of directing public power strictly to the enhancement of the undivided common good; instead, both public and private actors seem rather inclined to follow their own institutional interests, guided by similar economic rationalities of output and efficiency. Thus, proper protection of rights needs far more than a deferential court that only intermingles with the executive's task beyond the margins of some legal void as an area that is only political control. The present neoliberal era requires a return to Montesquieu's philosophical spirit of essential relations and mutual balance, with the court providing proper counterweight against the wielding of public power by principled and full constraint by norms of appropriateness, subsidiarity and proportionality. Only a constitution that is permeated with the idea of force and counterforce (*le pouvoir arrête le pouvoir*), envisioning the *trias politica* as a precarious balance in which none of the actors claims the final say, will ultimately deliver the checks and balances that we need in modern society. In that sense, Montesquieu's original doctrine of shared sovereignty and necessary relations provides for an urgent current need.