Allocating Authority

Who Should Do What in European and International Law?

Edited by
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Introducing the Idea of Relative Authority

JOANA MENDES AND INGO VENZKE*

I. Authority in Global Governance

The exercise of public authority in global governance is contested, both in public opinion and in the academia.[1] We see challenges to international public authority flare up, for instance, in the backlash against investment arbitration, which is a topic that has made it even onto market squares where citizens campaigned against the Trans-Atlantic Trade and Investment Partnership (TTIP). With different nuances, this topic has also drawn significant attention in scholarship. Questions include not only how balances between investment protection and other public policy objectives are struck, but also who should strike them.[2] The exercise of public authority in the field of trade regulation has faced similar challenges for a while now. Should international adjudication in that field decide about the legality of import prohibitions of hormone treated beef or of seal products? Should it defer to the normative output of specialised standard-setting bodies when it comes to these issues or others? The division and allocation of authority between different institutions is decisive with regard to such questions, and for the contestation of

* A different, longer version of this introduction is forthcoming in the *International Journal of Constitutional Law*.

[1] By exercise of public authority, we mean acts based on law that have the capacity to impact the freedom of others. For this conception of public authority see A von Bogdandy, M Goldmann and I Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Law' (2017) 28 *European Journal of International Law* 115. On the contestation of international public authorities see M Zürn, 'The Politicization of World Politics and its Effects: Eight Propositions' (2014) 6 *European Political Science Review* 47; JK Cogan, 'Representation and Power in International Organization: The Operational Constitution and its Critics' (2009) 103 *American Journal of International Law* 209.

[2] SW Schill and M Jacob, 'Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law' (2012) *Yearbook on International Investment Law & Policy* 141.

public authority more generally. This is evident at the European level just as well, despite its very different institutional structure and constitutional framework. Should highly political decisions, such as the programme of the European Central Bank on outright monetary transactions, be allocated to non-majoritarian institutions?[3] Should the European Commission have the authority to reject national budget drafts and request changes? What is the legitimate reach of the European Court of Justice when interpreting EU laws that constrain Member States' social policies?[4]

These exemplary questions have stirred heated debates. By and large, however, the underlying legitimacy concerns that fuel the contestation of public authority remain quite diffuse. They are trapped between the oftentimes unappealing and practically unrealistic option of retreating back to the state, on the one hand, and the limited legitimacy resources of international or supranational administrations and courts, on the other. Tying the authority of inter- and supranational actors closer to the input of actors on the domestic level may often be a good option, but it comes with practical limitations. Experience, together with a wealth of research, has shown that supra- and international actors outgrow the terms of delegation, develop their own agenda, and, using a variety of mechanisms to increase their leverage, they exercise authority in relation to their one-time creators.[5] That is especially the case where treaty frameworks create administrative and judicial bodies, which then contribute to the dynamic development of the law, including their own statute and their own competences.

These starting points leave us with multiple, scattered sites for the exercise of public authority.[6] Those sites are spread horizontally, across different institutions, and vertically across different levels of governance. In particular, the stark quantitative increase of international adjudication over the past two decades has pushed courts and tribunals onto the agenda of global governance as actors who exercise public authority, next to bureaucracies and standard-setting bodies.[7] If one accepts that the exercise of public authority cannot be tied back to any single level

[3] See BVerfG, 2 BvR 2728/13 of 14.1.2014, and Judgment in Case C-62/14 *Gauweiler v Deutscher Bundestag* [2015] EU:C:2015:400.

[4] eg Judgment in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] EU:C:2007:772.

[5] Mikael Rask Madsen supports this view in greater detail and, at the same time, argues that savvy actors on the supra- and international level are compelled to take the consequences and likely repercussions of their actions among domestic institutions into account in their decision-making. See Madsen, in this volume.

[6] S Casese, *The Global Polity* (Sevilla, Global Law Press, 2012).

[7] See A von Bogdandy and I Venzke (eds), *International Judicial Lawmaking: On Public Authority and Democratic Legitimacy in Global Governance* (Berlin, Springer, 2012); KJ Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *European Journal of International Relations* 33; A von Bogdandy, R Wolfrum, J von Bernstorff, P Dann and M Goldmann, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Berlin, Springer, 2010).

of governance or any single actor, the question strongly suggests itself how such authority should be divided and allocated.

We have thus focused on precisely this allocation at two workshops at the University of Amsterdam, and we continued our debates beyond that with the authors of this volume. As we continued to learn, the terms of the debates have shifted. We started out by framing our concerns above all in the language of the separation of powers or checks and balances, but became increasingly convinced of the difficulties of this framework.[8] In the present chapter we introduce the arguments at which we arrived, especially the idea of relative authority, and explain the limits of separation of powers thinking.[9] We speak of the allocation of authority. Allocation presupposes a division of authority and, at the same time, points to its more specific distribution. Allocated authority does not, however, presuppose a deliberate design, or even a constitutional settlement. Instead it can emerge through iterations and institutional interactions.

We conceive of public authority as a law-based capacity to influence the freedom of others. In our conception, authority does not imply normative legitimacy.[10] Public authority is the phenomenon whose normative legitimacy we wish to critique and aspire to improve. Furthermore, we do not purport or intend to define threshold conditions of ultimate (il)legitimacy—conditions under which authority may justifiably demand obedience.[11] Our approach is reconstructive. And normative legitimacy, in our understanding, comes in degrees.

We see public authority as relative in two specific and closely connected ways. First, any actors' exercise of public authority in global governance can best be understood and assessed *if put into relation to other actors*. This shift towards seeing actors in context—especially international courts and supranational agencies—contributes to understanding and assessing the legitimacy of their authority.[12] For example, should an international investment tribunal defer to the authority of an international governmental commission when it comes to the interpretation

[8] On the appeal and difficulties of this idea in the European Union, see Carolan and Curtin in this volume; and for the context of international law see, in particular, von Bernstorff, in this volume.

[9] The term 'relative authority', we note, is also used in N Roughan, *Authorities* (Oxford, Oxford University Press, 2013) to convey that authority's interdependence impacts the assessment of its legitimacy (see in particular 138). Roughan characterises international law's claim to authority as interdependent with that of other authorities and stresses that appropriate relationships need to be established between them. Our approach complements Roughan's work and, at the same time, distinguishes itself first of all by its aim of providing a framework for normative critique that draws on the institutional characteristics of each actor and on the specific legitimacy assets that they are able to mobilise.

[10] For an overview with an argument in support of this position, see B Peters and JK Schaffer, 'The Turn to Authority Beyond States' (2013) 4 *Transnational Legal Theory* 315; see also von Bogdandy, Goldmann and Venzke, above n 1.

[11] For such a focus see, in particular S Besson, 'The Authority of International Law—Lifting the State Veil' (2008) 31 *Sydney Law Review* 343. This is another way in which our approach is different from that of N Roughan, 'Mind the Gaps: Authority and Legality in International Law (2016) 27 *European Journal of International Law* 329–51.

[12] On the diversity of relations see in further detail von Staden, in this volume.

of a vague treaty provision? Under which conditions should it do so? Should the EU legislator and the European Medicines Agency incorporate guidelines on the technical requirements of medicines that ensure their safety, efficacy and quality as adopted by an 'International Conference on Harmonisation', and, if so, in which terms? Second, we see the public authority of any actor as relative in the sense that it *relates to different legitimacy assets*. With legitimacy assets we refer to the argumentative resources that an institutional actor can invoke in support of its authority. As we will argue, those resources specifically connect to the actor's inclusiveness, functional specialisation, and its capacity to protect rights.[13]

We highlight how exercises of public authority need to be justified in relation to other actors and in view of different legitimacy assets. An actor can seek to justify its authority with reference to its composition and organisation, to its procedures or its function in support. It can point to the way in which it is embedded within a context of other institutional actors. For example, the UN General Assembly supports its authority above all with reference to its inclusiveness whereas an arbitral tribunal would point to its independence, impartiality and to the fairness of the judicial procedure. In the European Union, the European Parliament grounds its authority on inclusiveness and, specifically, on the direct representation of citizens at the EU level, whereas the Council and the European Council draw from the representation of Member States at different levels. The authority of the European Commission is anchored on its independence and collegiality.[14]

This way of setting up the idea of relative authority suggests that it is not per se satisfactory that authority be divided so that no single institution rules, so to speak, or encroaches upon the authority of others. Especially at the international level, the point is typically not that authority is too concentrated. Often it is too dispersed and fragmented.[15] In fact, such dispersion and fragmentation may even exacerbate legitimacy concerns as it may undercut accountability mechanisms and opportunities for critique. The point is that authority ought to be justified not by its sheer division, but by virtue of its specific allocation. In other words, we aim at articulated rather than diffused governance.[16]

The two ways in which we think of authority as relative are closely connected: the way in which each actor's public authority should relate to that of others presupposes a comparative analysis of their respective legitimacy assets.[17] The mere

[13] See below S III.

[14] This is of course a stylised view that, given the complex ways in which the European Union operates, may lack explanatory value in specific instances. See Carolan and Curtin in this volume.

[15] See E Benvenisti and GW Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595 (showing how fragmentation serves the powerful).

[16] C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford, Oxford University Press, 2013) 41–44; J Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433; M Goldmann, *Internationale öffentiche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Berlin, Springer, 2015) 317–19.

[17] This is also basic premise in Mattias Kumm's work, with the difference that he grants the higher level of governance a default benefit of the doubt, see M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907.

coordination and cooperation between actors is not a sufficient condition of public authority's normative legitimacy.[18] At the same time, looking for a specific allocation of authority does not necessarily call for a deliberate institutional design or constitutional settlement.[19] Even where overarching institutional frameworks existed, their capacity to guide concrete allocations of authority is often limited. The allocation will thus be a product of institutional practice.

What, then, ought to guide a specific allocation of authority? This is of course a grand question that has neither an easy solution, nor is there a settled way for approaching it. One might cling to first principles of great abstraction or to concrete practices without critical distance. We adopt a meso-level of theorising and analysis that is akin to reconstructive approaches.[20] We see the allocation of authority as a fundamental aspect of democratic legitimation, which provides us with some normative guidance. Concrete allocations of authority may result from institutional practices, but they should be assessed and re-enacted in view of their democratic justification. We see actual practices in European and international law in which the allocation of public authority is both sanctioned and contested. In the reconstruction of such practices, we draw further inspiration from the domestic level of governance and, specifically, from separation of powers thinking, despite the problems that we will discuss in further detail. The institutional set-up on both the European and international level does not readily emulate the domestic context, nor is it clear that it should. And yet, the normative programme that underlies the theory and practice of the separation of powers thinking is instructive, and it can travel across levels of governance.[21] It is by way of induction from practices on different levels of governance and by way of deduction from concerns for democratic legitimation that we identify the three main legitimacy assets that we already mentioned: inclusion, functional specialisation and rights protection.[22]

At the same time, the state may plausibly claim to be left alone in some domains, see M Kumm, 'Sovereignty and the Right to be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law' (2016) 79 *Law and Contemporary Problems* 239.

[18] Unlike Roughan's work, our analysis focuses on allocation of authority and on comparative legitimacy analyses that may ground critique and contribute to the democratic justification of authority (cf N Roughan, above n 11, 349), rather than on interdependencies and relationships as grounds for legitimate claims to obedience.

[19] See, similarly, the contributions in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford, Hart, 2008).

[20] Largely in that line, A Honneth, *Das Recht der Freiheit: Grundriß einer demokratischen Sittlichkeit* (Frankfurt, Suhrkamp, 2011). Methods under the name of normative inductivism or even immanent critique come very close, see K Nicolaïdis, 'European Demoicracy and Its Crisis' (2012) 51 *Journal of Common Market Studies* 351, with reference to A Azmanova, *The Scandal of Reason: A Critical Theory of Political Judgement* (New York, Columbia University Press, 2012). For an early systematic treatment see already N Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 *Social & Legal Studies* 131. For an application of such a method that comes close to ours, see R Howse and K Nicolaïdis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics' in Broude and Shany, ibid, 163.

[21] See also Bruno Simma, *Foreword*, in von Bogdandy and Venzke, above n 7, v–xii.

[22] These standards are widely shared and supported by comparative public law analyses, see Möllers, above n 16; E Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford, Oxford University Press, 2009).

Those assets, we add, are particularly significant in present theory and practice. They are not exhaustive, nor cast in stone. Other considerations may certainly be relevant for assessing an authority's normative legitimacy, especially concerns for redistribution in worlds of inequalities. But these legitimacy assets, we submit, provide a backbone for arguments on how authority ought to be allocated. That, once more, is our ambition: to provide a framework for arguments on who should do what to which extent.

Discussing relative authority both in the context of the European Union and on the level of international law, we add, is insightful for two reasons. First, the conceptual and practical developments at the European level are potentially instructive for international law. Drawing lessons or inspiration does not mean to emulate.[23] Differences may even become more apparent with a deeper understanding of contexts and underlying normative programmes. Second, the exercise of authority within the European Union and in international settings poses similar normative problems. In particular, it moves the exercise of authority in the form of rule- or law-making away from inter-governmental fora (a feature that is perhaps more salient in international law, but also present in EU law) and away from the oversight of national parliaments, notwithstanding their involvement in EU affairs.[24] Our approach brings to the fore the important structural differences between the European Union and international settings. By highlighting them, it also critiques the existing iterations of separations of powers in the EU.

We develop our argument as follows. First, we briefly outline the main scholarly responses to the contested public authority of supra- and international institutions in order to highlight the specific contribution that the idea of relative authority makes in this regard (section II). We move on to develop the idea that authority is relative also because it connects to different legitimacy assets. While this idea originates in separation of powers thinking, there are good reasons to take distance from that specific framework of analysis. A functional division of powers, as it has developed in domestic settings, does not map well onto existing institutional arrangements. But its normative programme bears promise. It teaches precisely that any authority should be divided in a way that is attuned to the specific legitimacy assets that each actor can bring into the governance process (section III). Finally, we trace iterations of our normative programme in practice—we focus on how this programme may be reflected in practice and how it may inform that same practice (section IV). We conclude by summarising how the different chapters of the book discuss the strengths, but also the limitations, of the idea of relative authority in European and international law, and the contributions that they make to shaping this idea (section V).

[23] For such a charge against other strands of scholarship, see JE Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 *Texas International Law Journal* 405, 42.

[24] See, eg, D Jančić, 'National Parliaments and EU Fiscal Integration' (2016) 22 *European Law Journal* 225 (arguing that despite the enhanced role of national parliaments in EU fiscal governance following the Euro crisis, democratic disconnect still favours executive federalism and marginalises parliaments).

II. Towards Relative Authority: Comparative Institutional Assessments

In order to respond to concerns about the legitimacy of supra- and international institutions' exercise of authority, many scholars have turned their attention to issues of accountability and transparency.[25] The normative programme of Global Administrative Law (GAL) further adds obligations of reason giving and opportunities of judicial review to the response.[26] Sure enough, transparency is a virtue, at least within certain limits, and accountability is a core element of democratic rule. In our view, however, these considerations are not sufficient. They do not respond to the more profound questions of legitimacy that the idea of relative authority may, at least in part, be able to capture.[27]

Accountability is concerned with who gives account to whom, with the question of how an actor gives account, and with which possible consequences.[28] It questions the legitimacy of authority only insofar as such authority is exercised without control. One could maybe claim that accountability networks counter potential black holes in settings of scattered authority.[29] But, regardless of which functions those networks may or may not fulfil, they are ill-suited to inform the ways in which decision-making competences are in fact divided and allocated. The focus on holding authority to account only gives secondary consideration to a division and justification of authority that is informed by legitimacy assets. Discourses on transparency, in turn, emphasise the visibility of decision-making, potentially to enable control. At the same time, they have nothing to say regarding the relative role of decision-makers in exercising public authority. As much as accountability and transparency are important elements of legitimation, they are silent when it comes to the question that leads us: who should do what to which extent?

Speaking to the international level specifically, the GAL approach paints with a rather broad brush, prescribing the same cure against legitimacy concerns arising with regard to quite different actors and quite different kinds of acts.[30] It treats

[25] See J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137; A Bianchi and A Peters (eds), *Transparency in International Law* (Oxford, Oxford University Press, 2013).

[26] B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; L Casini and B Kingsbury, 'Global Administrative Law Dimensions of International Organizations Law' (2009) 6 *International Organizations Law Review* 319.

[27] See also Rose-Ackerman in this volume, who places these legitimacy claims in specific constitutional contexts and highlights how they may conflict with others.

[28] M Bovens, D Curtin, and P' t Hart, 'The EU's Accountability Deficit: Reality or Myth?' in M Bovens, D Curtin and P' t Hart (eds), *The Real World of EU Accountability What Deficit?* (Oxford, Oxford University Press, 2010) 1.

[29] See Corkin, in this volume; C Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38.

[30] For a discussion of its achievements and limitations, see the symposium in (2015) 13 *International Journal of Constitutional Law* 465.

under the overarching concept of *administration* such different acts as the practice of international adjudication of the World Trade Organization (WTO), decisions of the Basel Committee about capital requirements, and refugee status determinations of the United Nations High Commissioner for Refugees (UNHCR).[31] By and large, GAL is concerned with institutions and regulatory structures, the legitimacy and accountability of which may fail to match their exercise of authority. This approach has guided impressive empirical research, analysing whether and how such institutions and structures correspond with administrative law principles, namely participation, transparency, reason-giving and review.[32] A merit of the GAL approach, relevant to our concept of relative authority, has been the unveiling of the interactions between different actors.[33] Yet, overall problems of legitimacy are confronted with the same toolkit applied to quite diverse realities.[34] We contend that normative assessments of exercises of authority and possible responses need to be more fine-tuned. Is the WTO Appellate Body the most apt institution, in terms of its organisation, composition and procedures, to develop trade law and to take decisions that have far reaching socio-economic and political implications? Which reasons can it offer to support its authority, which legitimacy assets can it tap into? The same questions could be asked with regard to the Basel Committee or the UNHCR, leading to very different answers. Assessments of exercises of authority would need to differ between different kinds of institutions, the legitimacy assets that they do enjoy, and the main effects that their acts produce.[35] GAL approaches are not attuned to this type of analysis.[36]

Similarly, but with a different impetus, global constitutionalism has reacted to the shift of authority beyond the state by articulating an alternative to the

[31] See N Krisch and B Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1; RB Stewart and MR Sanchez Badin, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law' (2011) 9 *International Journal of Constitutional Law* 556; L Casini, 'Beyond Drip-painting? Ten Years of GAL and the Emergence of a Global Administration' (2015) 13 *International Journal of Constitutional Law* 473.

[32] eg S Cassese et al, *The Global Administrative Law Casebook* 3rd edn (Cheltenham, Edward Elgar Publishing, 2012).

[33] B Kingsbury, 'Three Models of "Distributed Administration": Canopy, Baob, and Symbiote' (2015) 13(2) *International Journal of Constitutional Law* 478.

[34] On the normative contributions of this approach, see RB Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) 13 *International Journal of Constitutional Law* 499. Acknowledging the diversity of the phenomena, M Savino, 'What if Global Administrative Law is a Normative Project?' (2015) 15 *International Journal of Constitutional Law* 492, who argues that 'GAL focuses on three functional dimensions—global regulation, global execution, and global adjudication' (at 493).

[35] Also see, placing emphasis on the effect of the acts, M Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 9 *German Law Journal* 1865.

[36] While Savino argues that different functions (regulation, execution and adjudication) postulate different legitimacy problems and that GAL recipes differ accordingly, the solutions he identifies still return to the same principles of administrative law. See M Savino, 'What if Global Administrative Law is a Normative Project' (2015) 13 *International Journal of Constitutional Law* 492.

contractual paradigm.[37] With due regard to its variations, global constitutionalism is mainly geared towards the effective pursuit of community values and their protection, be they articulated in the form of *jus cogens*, human rights or other constitutional aspirations. On the whole, the focus of global constitutionalism rests on citizens' rights and protections, democratic self-determination, and on the conditions therefore in regional and global settings. By suggesting the concept of relative authority we too draw on constitutional thinking, relying on the normative programme of separation of powers and proposing a reconstruction that may fit the reality of global governance. Yet, our ambitions are more limited as we do not suggest that there is a constitutional set-up or settlement, at least not at the international level. Our point is that the concern to guide politics in the direction of the pursuit of public goods has so far only led few scholars of global constitutionalism to focus on the allocation of authority between actors.[38] Even those who embrace constitutional pluralism—ie the plurality of authority between different levels of governance—do not readily break down their argument to specific institutional actors.[39]

Against this background of two dominant responses to the exercise of authority in global governance, we recall the gist of comparative institutionalism and place the assessment of any actor in relation to its 'imperfect alternatives'.[40] Institutional choice is what the idea of relative authority places centre-stage.

The lack of comparative institutional assessments haunts most pointed critiques of specific exercises of authority. When it comes to judicial decisions, one may critique, for instance, an arbitral tribunal's extensive definition of investment to include the mere purchase of bonds, the broad interpretation of expropriation to include regulatory takings or the narrow reading of circumstances precluding wrongfulness. One may also call into question the authorisation to market pesticides for overlooking environmental concerns, critique a decision based on the scientific opinion of the European Medicines Agency to approve a drug that research has shown to have dangerous side effects, or a Council regulation imposing anti-dumping duties based on a contested finding of threat of injury to Union

[37] See, eg, P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford, Oxford University Press, 2010); J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford, Oxford University Press, 2009); M Payandeh, *Internationales Gemeinschaftsrecht* (Berlin, Springer, 2010); T Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Berlin, Springer, 2012). On the similarities with the GAL approach, see Savino, ibid.

[38] A Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579. Stressing that constitutionalism, in its pluralist variant, facilitates the acceptance of claims of authority, D Halberstam, 'Local, Global and Plural Constitutionalism' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge, Cambridge University Press, 2012) 164.

[39] See, eg, M Kumm, 'Rethinking Constitutional Authority' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012) 39–65.

[40] NK Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago, Chicago University Press, 1997).

industry. That is a worthwhile endeavour. Pointed critique may be well received by decision-makers. The trajectory of the WTO Appellate Body, for instance, shows how it—*sub silencio*, usually—reacts to debates in the Dispute Settlement Body and, arguably, to scholarly criticism. But this kind of critique has its limits, too. More forward-looking and lasting answers oftentimes turn towards institutional questions.

We suggest looking for a better allocation of authority with reference to the legitimacy assets of their authors.[41] It will never happen that a single right balance between competing interests will be found and the job is done. Balances need to be constantly re-enacted and renegotiated. Neil Komesar rightly writes in his manifesto for institutional comparison: '[g]oal choice, no matter how elegantly executed, is no substitute for institutional choice'.[42] Thinking on relative authority leads us to asking not only *how* to strike balances but also *who* should have the authority to strike them. Such a comparative assessment is a principled petitum.

If we situate our inquiry within the landscape of larger theoretical work, we place ourselves in line with research on international public authority.[43] This line of research notably suggests zooming in on specific exercises of authority, to standardise specific acts and their effects, and to ask what kind of legitimacy is required for those acts.[44] We build on this general approach to authority beyond the state and focus more specifically on how authority should be allocated. Building on the more general approach to international public authority, we stay attuned to the way in which authority is exercised in processes of governance where combinations of different actors shape a specific issue area.[45] We claim that it is in their interaction that we can best understand and assess public authority.

Actors use, contest and legitimise the authority of others. Authority is exercised via the combined effect of a series of mutually reinforcing acts. It is instructive to look at the dynamic process in which authority unfolds and thus to better understand and assess it.[46] The guidelines on pharmaceutical testing of the International Conference on Harmonization serve as an illustrative example. They have a significant impact within the Union because of European regulations referencing them. To offer yet another example: formally non-binding food safety standards amount to weighty exercises of authority through their incorporation in WTO law

[41] Such a critique can of course also be articulated in light of specific decisions. See G Shaffer and JP Trachtman, 'Interpretation and Institutional Choice at the WTO' (2011) 52 *Virginia Journal of International Law* 103.

[42] NK Komesar, *Law's Limits* (Cambridge, Cambridge University Press, 2001) 151.

[43] von Bogdandy, Golmann and Venzke, above n 1; A von Bogdandy, P Dann and M Goldmann, 'Developing the Publicness of Public International law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375.

[44] See M Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2009) 9 *German Law Journal* 1865; J Bast, *Grundbegriffe der Handlungsformen der EU. Entwickelt am Beschluss als praxisgenerierter Handlungsform des Unions- und Gemeinschaftsrechts* (Berlin, Springer, 2006).

[45] For an overview of the theoretical terrain also see Peters and Schaffer, above n 10.

[46] J Mendes, 'Rule of Law and Participation: A Normative Analysis of Internationalized Rulemaking as Composite Procedures' (2014) 12(2) *International Journal of Constitutional Law* 22–24.

and jurisprudence.[47] Thorny questions about who should adopt these acts—and critiques of how authority is allocated in existing institutional solutions—can best be answered if placed in this relational setting. It is also in that interaction that we can best see the legitimacy resources that specific actors bring to the table, which legitimacy assets they possibly feed into the process of global governance and which combination of inclusion, rights protection and functional specialisation can support the legitimation of authority.

The idea of relative authority emphasises and links these two thoughts—that an institutional actor's authority be put into relation to other actors and that its authority connects to different legitimacy assets.[48] It links them through the recognition that no exercise of authority can ultimately rely on inclusion, specialisation or rights protection alone. Relative authority is as much about connections as it is about divisions. A parliament cannot do without expertise. Decisions of the executive leaning on the specialised knowledge of its authors may fall short of inclusion. Each may conflict with fundamental or contractual rights. The legitimacy of a court judgment, conversely, ought to be assessed in light of possible politico-legislative responses.[49]

Importantly, each actor should be embedded in a political context in which choices regarding the way in which specific exercises of authority ought to be justified may be challenged and re-enacted. The division between questions deemed to be of a political nature and therefore in need of inclusive decision-making processes, on the one hand, and those that are deemed to be of a technical nature, and thus best in the hands of a functionally specialised institution, on the other, is itself of a highly political nature and best dealt with through inclusive political processes. This division must at least be subject to possible contestation. Too often has a claim to expertise in European and international law shielded the exercise of authority from scrutiny.[50]

III. Normative Traction: Towards a Framework for Assessment

A. Legitimacy Claims

Different actors make different legitimacy claims with which they justify their authority. Authority is relative in this sense even on any single level of governance.

[47] R Howse, 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards"' in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford, Hart Publishing, 2006) 383.

[48] On the former dimension of relative authority also see Roughan, above n 9, 137–45.

[49] See further Corkin and Mak in this volume.

[50] In EU law, this may come in the guise of deferential judicial review of discretion. See Ritleng, in this volume).

In basic terms, the ideal type of judicial adjudication gains its legitimacy from the law that it applies, from party consent, independence and impartiality. Its legitimacy bases are different from those assets that underlie the idea of legislation (representativeness, inclusion) or the idea of administration (competence, expertise).[51] Specific actors feed different legitimacy assets into global governance.

To illustrate the point, the European Commission for instance draws its legitimacy to act 'in the general interest of the Union' mainly from the competence and independence of its members, from its collegial way of acting, and from the way in which it is embedded in the EU institutional system (not only via the powers of oversight of the Parliament).[52] These are the core constitutive elements that define the institutional capacity of the Commission and that explain the authority that the Treaty allocated to this institution.[53] In view of the democratic provisions of the Treaty, and depending on its concrete functions, the procedures of the Commission should be transparent and politically inclusive. Arguably, the extent to which they ought to incorporate such concerns depends on the effects of the acts they adopt. To illustrate the argument further, most EU agencies derive their legitimacy mostly from the expertise that they bring into EU decision-making. Because they incorporate, in different ways, bureaucrats from Member States, the knowledge that they provide also reflects the views of national administrations and, eventually, national social and cultural perceptions. The actual practices of governance complicate this account significantly.[54] Nevertheless, it illustrates that the composition, organisation, procedures of the Commission and of EU agencies provides them with legitimacy assets when exercising authority. Those assets justify their authority to determine whether aid granted by Member States or concerted practices between undertakings are compatible with the rules of the Treaty (in the case of the Commission), and to provide an opinion on the safety of chemicals, food or aircrafts (to name the tasks of some of the EU agencies). They also inform a critique of their authority. Thus, for instance, the Commission's legitimacy to give opinions on draft budgetary plans of Member States is questionable, given inter alia the potential re-distributional effects of those opinions in policy areas that are outside the competences of the EU (even if such a mandate is given by an act of the Parliament and of the Council).[55]

[51] See Möllers, above n 16; B Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633.

[52] See, respectively, arts 17(3) TEU and 245 TFEU; art 17(6)(b) TEU; arts 226, 230 and 234 TFEU.

[53] See, in more detail, J Mendes, 'La legittimazione dell'amministrazione dell'UE: tra istanze istituzionali e democratiche' in L de Lucia and B Marchetti (eds), *L'Amministrazione europea e il suo diritto* (Bologna, Il Mulino, 2015) 89–116. See also Ritleng in this volume, for a discussion of the different legitimacy assets of EU administrative bodies.

[54] On the importance of including them in an analysis of relative authority, see Carolan and Curtin in this volume.

[55] Reg (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L 140, 11–23.

The same applies to the legitimacy of the outright monetary transactions programme adopted by the European Central Bank at the height of the Euro crisis. It is capable of having redistribution effects and economic consequences unsupported by the Central Bank's mandate and legitimacy assets.

Our argument runs close to separation of powers thinking, which indeed emphasises the distinct legitimacy assets that different actors and institutions bring into the process of governance. In this way the idea of the separation of powers—however odd it may sit at first sight with modern forms of governance—continues to express a normative programme that in our view aids critique. In a prominent formulation of the German Federal Constitutional Court, the

> institutional and functional differentiation and separation of powers serves the distribution of political authority [*politischer Macht*] and responsibility as well as the control of those in power. It pursues the aim that, as much as possible, decisions are right. This means that they be taken by those institutions, which, according to their organization, composition, function, and procedure, are best suited for taking them.[56]

When asking 'who should do what to which extent?' we are indeed opening up towards a rich tradition of political-philosophical and legal-doctrinal work in which normative criteria have ripened to fine-tune institutional balances and allocations of authority. But the idea of separation of powers is also one of functional separation and specialisation. That holds promise but also comes with limits, in particular for supra- and international exercises of authority.[57]

B. The Separation of Powers: Dividing Governmental Functions

We are concerned with how authority is allocated in supra- and international settings. Revisiting thinking on the separation of powers allows us to go back to the underlying ideas for divisions of authority between institutions that are bound to act in specific ways.[58] Notably, it reminds us that the ways in which specific institutions can act is tied to the legitimacy assets that they can bring forward.[59] Discourse theory's reconstruction of the separation of powers is insightful in this regard. It suggests that the legitimacy assets that an institutional actor can claim for itself impact the way it should be allowed to reason and justify its decisions. Jürgen Habermas distinguishes discourses of norm justification (the work of the legislature) from discourses of norm application (the work of the administration and the judiciary, in distinct ways). Only the legislature enjoys unlimited access

[56] 68 Bundesverfassungsgericht (BVerfG) I, 86; 98 BVerfG 218, 251-2.

[57] On those challenges more generally see Carolan, above n 22. See also Carolan and Curtin in this volume.

[58] Möllers, above n 16, 93; Waldron, above n 16, 457, 466.

[59] Möllers, above n 16.

to normative, pragmatic and empirical reasons while the norm application of the judiciary has to stay within the bounds of what is permitted in *legal* discourse.[60] The separation of powers is reflected in the 'distribution of the possibilities for access to different sorts of reasons'.[61]

The idea of the separation of powers has oftentimes been caricatured and easily dismissed. Reasons for dismissive tones are that powers do not necessarily come neatly packaged in the three branches of the legislature, judiciary and executive, nor are those powers neatly separated. Neither reason is compelling for abandoning the normative programme of separation of powers thinking or its more specific and doctrinal manifestations. Critiques tend to set up a straw man. Their take on the separation of powers as hermetically split into three cannot even be attributed to Montesquieu.[62] Already James Madison argued in the Federalist Papers that powers are 'by no means totally separate and distinct from each other'.[63] He clarified that Montesquieu's concern was not with clinical separation. To the contrary, it is clear that '[d]epartments must be connected and blended, as to give so each a constitutional control over the others'.[64] What is more, in its dominant reading, the separation of powers postulates a tripartite distinction of functions. While a *tripartite* division is by no means a necessity, any suggestion of a clear-cut distinction of functions may indeed be a reason to take some distance from separation of powers thinking when analysing supra- and international exercises of authority.

In the dominant reading of separation of powers, an allocation of authority that focuses on the links between the legitimacy claims and ways of acting presupposes a distinction between legislative, executive and judicial functions.[65] Roughly, the legislator, as the most *representative and inclusive* institution, is tasked with laying down general and abstract laws. A court exercises public authority in the context of adjudication, retroactively and not on its own motion, in concrete disputes. It is set up at some distance to the political-legislative process dominated by majority voting. At least when it comes to constitutional adjudication, but also in the enforcement of private contracts or statutory provisions, it aims

[60] J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W Rehg trans, Cambridge MA, MIT Press, 1998) 192, 229–37; see further T Lieber, *Diskursive Vernunft und formelle Gleichheit: zu Demokratie, Gewaltenteilung und Rechtsanwendung in der Rechtstheorie von Jürgen Habermas* (Tübingen, Mohr Siebeck, 2007).

[61] Möllers, above n 16, 192.

[62] In this sense questionable, B Ackerman, 'Good-bye Montesquieu' in S Rose-Ackerman and PL Lindseth (eds), *Comparative Administrative Law* (Cheltenham, Edward Elgar Publishing, 2010) 128. See also J Ziller, 'Separation of Powers in the European Union's Intertwined System of Government. A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers' (2008) 73 *Il Politico* 133, 137.

[63] A Hamilton, J Madison and J Jay, *The Federalist Papers* (New York, Bantam Books, 1982) 294.

[64] ibid, 300. On the early American constitutional experiences as revealing of the practical impossibility of hermetic divisions, and generally on the problems of a tripartite division, see Carolan, above n 22, 19–21.

[65] Möllers, above n 16, 79–80, distinguishes between the effect of certain acts according to their scope (who is subject to them?) their temporal orientation (are they directed towards the past or prospective?) and their degree of legalisation (to which degree is the decision already framed by law?).

at the effective *protection of rights*. In this respect, courts are by far the most constrained institutions. Administrations, too, follow highly formalised procedures when acting as adjudicators, or less so when they act as rule-makers.[66] They rely on *competence* or *specialised knowledge* to implement policies, whether enshrined in legislation or not. They carry forward democratic constitutional government.[67] It is this way in which the division and allocation of authority is enmeshed in separation of powers theory with a functional specialisation that can be particularly problematic when analysing supra- and international authority.

C. Limits of the Separation of Powers and its Potential

Revisiting the normative programme of separation of powers thinking is one thing, quite another would be to attempt to project onto the supranational and international realms any ideal-type of a balanced constitution anchored in a tripartite division of functions. The difficulties in delimiting the borders of these functions and the typical absence, at least in international settings, of functioning politico-legislative processes are important reasons to take such distance. A workable theory of separation of powers would also presuppose a division attuned to the specificities of a sufficiently defined system of government in a given constitutional framework.[68] While European constitutionalists could argue that this condition is fulfilled in the European Union, the evolutionary character of the Union also continuously questions the institutional design.[69]

That thinking in terms of a tripartite division of functions could lead us to ask the wrong questions is illustrated by the hitherto vain attempts in European law to delimit delegated acts from implementing acts by reference to their quasi-legislative or executive nature.[70] The division between the two categories of acts was intended to 'guarantee that acts with *the same legal/political force* have the *same foundations* in terms of democratic legitimacy'.[71] This normative ambition comes quite close to our emphasis on relative authority. However, the prism of

[66] The degree to which this is the case varies across legal systems and fields. Variations across legal systems and fields will necessarily temper such a sweeping statement. Further note that the borderline between what is adjudication and what is rule-making can certainly be contested.

[67] On democracy, rights and competence as three core principles of legitimacy, see Rose-Ackerman, in this volume. Also see S Rose-Ackerman, S Egidy and J Fowkes, *Due Process of Lawmaking: The United States, South Africa, and the European Union* (Cambridge, Cambridge University Press, 2015).

[68] Also see Carolan, above n 22.

[69] As shown by P Craig, 'Institutions, Power, and Institutional Balance' in P Craig and G de Búrca (eds), *The Evolution of EU Law* 2nd edn (Oxford, Oxford University Press, 2011) 41–84. See also Carolan and Curtin, in this volume.

[70] For a systematic attempt, see Case C-427/12 *Commission v European Parliament and Council (Biocides)* [2013] EU:C:2013:871, Opinion of AG Villalón. For those difficulties in the context of financial governance, see de Bellis, in this volume.

[71] Secretariat of the European Convention, *Final Report of Working Group IX on Simplification* (Conv 424/02, WG IX 13, 2002) (henceforth 'Final Report') 2 (emphasis added).

the separation of powers turned the question of which acts have the same legal or political force into one of demarcating the substantive realms of legislation and execution.[72] Core to this interpretation was the claim that the 'more technical aspects or details of *legislation*' still belong to the legislator, so to speak. Reasons of efficiency and flexibility arguably justify their delegation to the executive.[73] As 'quasi-legislative matters', they could not be fully taken out of the purview of the legislator at the risk of jeopardising the legitimacy of the delegated acts. This means enhanced controls. By contrast, when the Commission exercises 'purely executive' power, controls by the legislator are not required. They are in fact barred by the Treaty.[74] Where to draw this line has become the core of institutional struggles that found their way to the Court.[75]

In the *Biocides* case—the first after the entry into force of the Lisbon Treaty where the Court of Justice was faced with the question of delimitation between delegated and implementing acts—the Commission argued that the power to specify the fees, which need to be paid to the European Chemicals Agency, was of a quasi-legislative nature and could not be lawfully exercised via implementing acts. The Court sided with the Council and the Parliament, to whom it granted virtually full discretion in deciding what is 'supplementing' a legislative act or 'implementing' a legally binding act of the Union (the Treaty terms). According to the Court, given the detail of the legislative act, the Council and the Parliament could 'reasonably take the view' that the Commission was entitled to 'provide further detail' to the normative content of the legislative act, and thus implement it rather than supplement it.[76] There is no satisfactory substantive criterion to distinguish between supplementing and implementing a legislative act. No substantive criterion may ground a normative assessment on whether the legislative choice complies with the scheme of the Treaty.[77] The alternative, the Court seems to indicate, is to leave the decision on the negotiation table of the Commission, the Council and the Parliament.[78] Ultimately, inter-institutional bargaining

[72] ibid, 8; Commission Communication, 'Implementation of Article 290 of the Treaty on the Functioning of the European Union' [2009] COM 673 final, Brussels, 3; European Parliament Resolution of 5 May 2010 on the power of legislative delegation 2010/2021(INI), recital B; and the respective Explanatory Statement in Committee on Legal Affairs, *Report on the power of legislative delegation* (2010/2021(INI), A7-0110/2010, 2010) 8–9.

[73] ibid; Secretariat, *Final Report* (2002) 8. Commission Communication, *Implementation of Article 290* (2009) 3. Parliament.

[74] Art 291 TFEU.

[75] Judgment in Case C-427/12 *Commission v European Parliament and Council (Biocides)* [2014] EU:C:2014:170; Case, C-65/13, *European Parliament v Commission* [2014] EU:C:2014:2289 (on the scope of implementing powers); Case C-88/14, *Commission v European Parliament and Council* [2015] EU:C:2015:499; Case C-286/14, *European Parliament v Commission* [2016] EU:C:2016:183 (on different types of delegated acts).

[76] ibid, paras 40 and 52; the same approach was confirmed in Judgment in Case C-88/14 *Commission v European Parliament and Council (Visa requirements)* [2015] EU:C:2015:499, paras 28–30.

[77] See, further, Ritleng in this volume, arguing that the degree of discretion left to the institution adopting the act could be a distinguishing criterion.

[78] Case C-88/14, *Commission v Parliament and Council* [2015] EU:C:2015:499, para 32.

(which different agreements between the institutions have tried to stabilise) will determine which checks apply: those of Article 290 (delegated acts) or those of Article 291 of the Treaty on the Functioning of the European Union (implementing acts). In both cases, the Commission will be the author of the act,[79] but, crucially, the role and power of the Parliament and of the Council will be different.

The key question then is: if the distribution of powers of the institutions is currently determined solely by their practice under the imprecise Treaty rules,[80] how can one critique, from a democratic perspective, the legitimation of the adopted acts? The question reaches well beyond the example we mentioned. How far can the authority of the Commission to oversee the national implementation of its budgetary recommendations to Member States be justified solely on the basis of the mandate attributed jointly by the Parliament and by the Council? One could maybe invoke the principle of institutional balance as a possible source of limits to institutional practice. But this principle has neither prevented deep changes in the division of authority in the Union (by the combined effect of Treaty change and case law) 'pulled along the by the strongest current', nor a general judicial endorsement of the institutions' creative use of their powers.[81] Returning to our example, is it enough that the Council and the Parliament (together with the Commission) determine 'on a case-by-case basis whether and to what extent it was necessary to have recourse to "delegated" acts and/or to implementing acts and what their scope would be'?[82] If one tries to argue on the basis of the legislative/executive distinction, the answer is downheartedly positive. Then, however, one is forced to rely on the expectations, political weight and negotiating capacities of each institution under Articles 290 and 291 of the TFEU, on EU non-legislative acts. The logic and rationality of this process may or may not be the satisfaction of legitimacy concerns that grounded and pervade the distinction, ie which acts have 'the same legal/political force' is what the Council, the Parliament and the Commission define, possibly in view of mutual power trade-offs. Their 'foundation in terms of democratic legitimacy'[83] may be a secondary, perhaps uncertain, effect of the schemes of institutional collaboration or conflict that the Treaty rules originated and only partially and imperfectly contain.[84] There are thus good reasons to be critical of attempts to shape the Union's system of governance along the lines of a separation of powers thought as functional differentiation.[85]

[79] The Council may adopt implementing acts in restricted circumstances (art 291(2) TFEU).

[80] For an analysis of institutional practice and its consequences, see M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) 53 *Common Market Law Review* 1524.

[81] See, in detail, de Witte in this volume. See also JP Jacqué, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383, 387.

[82] Secretariat, *Final Report* (2002) 8. The Court endorsed this position in the *Biocides* and in the *Visa requirements* cases.

[83] Secretariat, *Final Report* (2002) 2.

[84] A similar argument is made in J Mendes, 'The Making of Delegated and Implementing Acts: Legitimacy Beyond Inter-institutional Balances' in CF Bergstrom and D Ritleng (eds), *Comitology and Commission Rule-making after Lisbon: The New Chapter* (Oxford, Oxford University Press, 2016).

[85] Carolan and Curtin, in this volume.

Beyond the context of the European Union, thinking about tripartite division according to governmental function faces a yet steeper uphill battle. Neither the UN, nor the WTO—one of the international institutions with most elaborate set-ups—ultimately implement a separation between legislative, executive and judicial powers. The legislative function is generally lagging behind.[86] Historically, only one power of the state was internationalised: administration.[87] Even the WTO only seemingly relies on the conventional separation of powers. It effectively exercises only one of them: adjudication.[88] Article III section 1 WTO Agreement pertains to the executive, and it states that the WTO shall simply *facilitate* the implementation, administration and operation of the Agreement. The role of many bodies, such as the array of committees, in fact goes beyond that.[89] But that is not reflected in this Article III on the WTO's functions. Section 2 pertains to politico-legislative law-making, but suggests that the WTO merely *provides a forum* for negotiations. Only with regard to adjudication does Section 3 state that the WTO shall *administer* the Dispute Settlement Understanding.[90] This imbalance creates difficulties and escapes any tripartite separation of powers.[91]

It may thus be questionable to look at the allocation of authority in international and European law in light of an idea of the separation of powers that has matured in a domestic context of governance that has taken a different, more defined, constitutional setup. We indeed suggest taking distance from a specific tripartite division of powers that closely ties functions to specific branches of government. But the core normative programme that is vested in separation of powers thinking—above all that authority be divided and connected in specific ways that combines ways of acting with legitimacy assets—that is an idea that does travel well and that is insightful for the exercise of authority beyond the state. It also finds resonance in concrete practices.

IV. Iterations in Supra- and International Practices

The complexity of governance dynamics in the European Union and in international settings confirms our claim that the authority of any actor can only be

[86] See A von Bogdandy and I Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford, Oxford University Press 2014) 119–28.

[87] Von Bernstorff, in this volume.

[88] ibid. Also see R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *European Journal of International Law* 9–77; P Eeckhout, 'The Scales of Trade—Reflections on the Growth and Functions of the WTO Adjudicative Branch' (2010) 13 *Journal of International Economic Law* 3.

[89] A Lang and J Scott, 'The Hidden World of WTO Governance' (2009) 20 *European Journal of International Law* 575.

[90] See already A von Bogdandy, 'Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship' (2001) 5 *Max Planck Yearbook of United Nations Law* 609; L Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism?' (2004) 53 *International and Comparative Law Quarterly* 861.

[91] Desierto, in this volume.

assessed in relation to others. This complexity may also hinder the feasibility of our normative proposal of linking authority to legitimacy assets. But there are sufficient indications to think that it is indeed a fruitful endeavour—an endeavour that is met halfway by practice. The case law of the Court of Justice of the European Union has in different ways attempted to align authority exercised in heterarchical schemes with procedures that would render certain actors more suitable to adopt certain kinds of acts or decisions. While this practice does not amount to re-defining the allocation of authority within the EU, such 'process-perfecting' review may adjust the legitimacy assets that EU institutions and bodies may mobilise in support of their authority to legitimately produce acts with given effects.[92] In particular, judicial review of discretion tests the boundaries of legitimate action both by administrators and courts. To a great extent, it has been the role of the Court of Justice to define these boundaries, in ways that some may consider too invasive of discretion and others too deferential. It may seem that there are no normative yardsticks against which to approach these often shifting boundaries, other than the general claims of institutional and material capacity of courts in reviewing acts of the EU institutions and bodies.[93] Nevertheless, on the basis of recent case law reflecting the institutional framework of legislative and non-legislative acts of the Union, the argument can be made that the legitimacy assets of the EU legislator and its 'reserved' authority to make policy choices should entail a different degree of review (and deference) when compared to review of non-legislative acts.[94] At the same time, one may query the limits of judicial action in improving existing institutional and procedural frameworks of authority to make sure that, as far as feasible, decisions are right, ie taken by those that are best suited because of their legitimacy assets.[95] One may question in particular whether courts are themselves the institutions that are well placed to make such adjustments. But first, courts may be well-positioned to further the democratic legitimacy of political processes by shaping and upholding procedural principles.[96] And second, in a somewhat counter-intuitive way, in circumstances of societal change, judicial institutions might in fact be the venue for democratically more legitimate law-making.[97]

When it comes to international practices, it may first of all be reminded that thinking in terms of relative authority faces an uphill battle not only because of repercussions of the long-dominant contractual paradigm, but also because historically, international institutions were constructed only to enhance national

[92] See Corkin, in this volume; also see J Corkin, 'Constitutionalism in 3D: Mapping and Legitimating Our Lawmaking Underworld' (2013) 19 *European Law Journal* 636, 659–60; K Lenaerts, 'The European Court of Justice and Process-oriented Review' (2012) 31 *Yearbook European Law* 3 (defending the argument that process-oriented judicial review may contribute to align political decisions with their legal framework).

[93] P Craig, *EU Administrative Law* 2nd edn (Oxford, Oxford University Press, 2012) 405–09 and 438.

[94] Ritleng, in this volume.

[95] Corkin, in this volume.

[96] Rose-Ackerman, in this volume.

[97] Mak, in this volume.

administration. They did not set up checks and balances, but an administration for limited and specific tasks. This historical origin still resonates in the present day.[98] And yet, the proposed focus on relative authority, and the set of questions that comes with it, does inform a whole host of different inquiries. For example, it helps to respond to questions such as how much weight to attribute to international standards in trade law. Pieter Jan Kuijper opines in this regard that '[i]f one really wants to understand how the WTO functions, it is necessary to take into account the large number of organs and Committees of the organization, their interrelationship, and the division of powers between them.'[99] While the WTO Appellate Body has not found a principle of institutional balance in WTO law, it is surely sensitive to the relative allocation of authority.[100] The notion of 'institutional sensitivity' that it uses stands as a placeholder for a more nuanced normative framework for the division and allocation of authority.[101]

In the field of investment law, too, there are sightings of an explicit discussion of relative authority. One prominent example, which testifies to the analytical purchase of discourse theory and its reconstruction of the separation of powers in terms of available reasons, stems from the controversial *Abaclat* award. The investment tribunal's majority concluded that it had jurisdiction to hear the collective claim of Italian holders of Argentine bonds because 'it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement'.[102] The dissenting arbitrator, Georges Abi-Saab, took issue with the invocation of fairness in his elaborate dissent. In his view, the majority 'strike[s] out a clear conventional requirement, on the basis of its purely subjective judgment'.[103] According to Abi-Saab, a balance of interests has been struck 'at the appropriate legislative level, by the parties themselves'.[104] The balance is reflected in the treaty text, which opens up an avenue towards international arbitration but subjects it to an 18 month domestic litigation requirement. Arguments of fairness or expediency were on the table of drafting the treaty text and they have led to a certain outcome. The tribunal must not unravel the legislative agreement. It is at that level, the legislative or conventional level, that the balancing of interests takes place—at the level of establishing the law—not at the level of

[98] von Bernstoff, in this volume.

[99] PJ Kuijper, 'WTO Institutional Aspects' in DL Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (Oxford, Oxford University Press, 2009) 80.

[100] *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Appellate Body Report (adopted 23 August 1999) DS90/ABR, para 98, with reference to India's appellant's submission, para 27.

[101] *EC—Measures concerning Meat and Meat Products (Hormones)*, Appellate Body Report (adopted 16 October 2008) DS26&48/ABR, para 118.

[102] *Abaclat and Others v Argentine Republic,* 4 August 2011, Decision on Jurisdiction and Admissibility, ICSID CASE NO ARB/07/5, para 583.

[103] *Abaclat and Others v Argentine Republic*, 28 October 2011, Decision on Jurisdiction and Admissibility, Dissenting Opinion, ICSID CASE NO ARB/07/5, para 30.

[104] ibid, para 31.

adjudication, whose domain is the application of the law.[105] It is not open to the tribunal to arrogate to itself the legislative jurisdiction or power of re-examining the rules in order to revise or refashion them, in the name of a rebalancing of interests of its own, according to its whim.[106]

Thinking about relative authority is instructive not only when it comes to the interpretation of substantive law, but also in procedural questions and institutional design. The so-far only case in the field of investment arbitration in which the interplay between the political-legislative and judicial process was a real issue was *Pope Talbot*, when the NAFTA Free Trade Commission (FTC) adopted an interpretation of the fair and equitable treatment standard with an eye on influencing ongoing proceedings.[107] The arbitral tribunal largely side-stepped questions about the role of the political-legislative branch, noted concerns about undue intervention and retroactivity, and held that its interpretation of the applicable standard in fact coincides with what the FTC had submitted to be the law.[108]

Beyond adjudication, the way global regulatory regimes are designed reveals by and large a concern with allocating authority to those bodies that are best fit for purpose. In some cases, a functional allocation of agenda-setting and standard-setting may be discernible, even if intricate relationships between different bodies may end up lumping them together to a significant extent, and thereby question the attempted coherence of the original design (eg the allocation of agenda-setting to technical bodies).[109] However, the point is not one of neatness of institutional designs, whereby the authority to define the agenda in a given policy field would be allocated to a body composed of representatives at the ministerial level and technical issues (such as the equivalence of technical standards) would be relegated to experts from national or supra-national bureaucracies, subject to duties of transparency and participation and, eventually, duties to report to parliaments. Whether agenda-setting and regulatory bodies anchor their authority on legitimacy assets capable of justifying the effects of their decisions on the life of citizens across the globe (and how their authority relates to that of other actors at various levels of governance) has been arguably one of the core issues in dispute regarding the institutional design of TTIP and of other mega-regional trade agreements.[110]

[105] The argument does *not* deny the law-making dimension of international adjudication but instead highlights the different kinds of reasons that are available at different stages of the law-making process. For the discourse theoretical reconstruction of this argument, see above nn 79–80 and accompanying text.

[106] Above n 103, para 251.

[107] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang?en.

[108] *Pope&Talbot Inc v Canada*, Damages, 31 May 2002, NAFTA Ch 11 Arb Trib, 41 ILM 1347.

[109] See de Bellis, in this volume.

[110] See R Bull, N Mahboubi, RB Stewart and J Wiener, 'New Approaches to International Regulatory Cooperation: the Challenge of TTIP, TPP, and Mega-Regional Trade Agreements' (2015) 78 *Law and Contemporary Problems* 1.

V. Relative Authority in European and International Law

Who should do what in European and international law? We approach authority as relative, thereby drawing on the normative programme of the separation of powers without emulating at the supra- and international levels the division of governmental functions. We have offered the idea of relative authority in order to critique existing institutional arrangements, and to assess institutional practices that shape current allocations of authority. Because it conveys the demand for a specific allocation of authority that is attuned to the legitimacy assets of those actors exercising authority, the idea of relative authority ultimately aspires to contribute to democratic governance.

The contributions of the volume's first part ('Empirical and Normative Traction') situate and complement our reconstruction in a more general fashion, by clarifying both the phenomenon and the normative questions it triggers. *Susan Rose-Ackerman* analyses the way in which different constitutional systems have addressed the democratic accountability of executive policy-making. Drawing on the cases of the United States, South Africa, Germany and the European Union, she shows the trade-offs between different legitimacy assets (democratic accountability, rights protection and technical competence) that clash or converge in executive rule-making in different constitutional frameworks. In her analysis, positive political theory explains the solutions that each legal system provides. It also explains how legitimacy assets may favour or condition the role of courts in furthering democratic accountability and competence.

Eoin Carolan and *Deirdre Curtin* take as their starting point those approaches that have analysed the EU through the lens of separation of powers thinking. While agreeing with the normative value of such approaches, they argue that any transposition of separation of powers thinking to the EU should be attuned to the actual governance practices that allocate authority in the EU. They call for a realistic assessment of the legitimacy assets that each institution brings into the governance process, one which takes into account the 'de facto power relations'. In their analysis, they highlight both the dialogical institutional processes that are capable of promoting procedural values and the shortcomings of formal analyses oblivious of informal practices, capable of subverting the formal allocation of authority.

Mikael Rask Madsen turns to the exercise of public authority by the European Court of Human Rights (ECtHR), one of the most prolific international courts. Against the background of the ECtHR's remarkable authority, Madsen focuses on the interplay between the ECtHR and other actors in four specific instances, discussing the ECtHR's authority as a legal and political actor in relation to domestic law and politics. Each case gives rise to distinct kinds of challenges to the ECtHR's authority and to different opportunities for the Court to meet them—which it did in each of the cases. While an informal system of checks and balances is indeed at

work, Madsen argues that better feedback loops are still needed, especially with the Court's political interlocutors. The further institutionalisation of such feedback loops would involve actors with different legitimacy assets and would thus meet the idea of relative authority. In particular, Madsen suggests a different role of the Committee of Ministers in this regard. He also looks at the possibilities of increased participation before the ECtHR, and at the potential of appeals to the Grand Chamber.

Jochen von Bernstorff then draws attention to the uphill battle that the idea of relative authority faces in international law. Von Bernstorff's historical sketch shows how international organisations have emerged as the long arm of national governments in an attempt to increase the capacity of national administrations in a world increasingly marked by cross-border interaction. This dynamic with its origin in the nineteenth century has essentially remained the same in the twentieth century, and arguably remains entrenched in international organisations today. Von Bernstorff thus speaks of 'authority monism'. Seeing the internationalisation of authority from the perspective of national administrations places emphasis on the dominance of sectorial, fragmented interests that prevail in any specific organisation. An additional, interesting pathway of legitimation thus rests in tying the particular interests of specific administrations at the national level to institutions that aspire to pursue the general interest. Conversely, von Bernstorff sees ambivalence, if not strong limits, in the legitimation of international organisations' authority by way of inclusion and participation.

The contribution by *Andreas von Staden* also focuses on the interplay between horizontal and vertical mechanisms of control, arguing that the strength of the latter explains the relative weakness of the former. Von Staden provides a circumspect overview of how authority in global governance is checked and balanced in different relationships, not only horizontal versus but also vertical, intra-organisational versus inter-organisational and specific versus general. A series of institutional mechanisms controls the allocation of relative authority, especially in vertical relationships. More specifically, domestic actors may be able to veto international action, they may threaten exit, change the law, refuse to comply, or comply in a minimalist fashion. Such a set-up, von Staden notes, privileges national executives. While normatively problematic, this is unlikely to change unless domestic constituencies demand such a change and exert pressure on their representatives in that regard.

The contributions in the volume's second part ('Iterations in Practice') probe the purchase of the idea of relative authority by turning to specific actors or specific fields of European and international law. They trace the influence, vel non, of separation of powers thinking as well as the potential and the limits of the idea of relative authority.

Bruno de Witte's chapter provides much-needed guidance through the ways in which the Court of Justice of the European Union (CJEU) has ruled on the principle of institutional balance—a principle inspired by the requirement of limiting

the power of EU institutions. He shows how the principle has enabled the Court to rationalise the complex allocation of authority of the Treaties. In this process, the Court entrenched the Member States' choices, refusing to correct inconsistences across policy sectors in the name of an overarching normative conception of separation of powers. At the same time, in some instances, the Court also gave new meaning to that allocation. Overall, the CJEU has straddled a fine line between a deferential approach to the Treaty and legislative choices, on the one hand, and a re-constitutive effort of rationalising institutional practices and disputes, on the other. De Witte further argues that the case law has been largely guided by the concern for a smooth functioning of the institutions, and even for the Member States' possibility to take EU integration ahead in ways not envisaged in the Treaties.

Joseph Corkin's analysis sheds a different light on the role of the Court of Justice. He focuses on the complexity of interdependences that underpin the exercise of public authority, specifically in EU law-making. Such a complexity may both confirm our claim that authority can only be assessed in relation to others and hinder the feasibility of linking authority to legitimacy assets. Corkin, mindful of the difficulties, argues that the idea of relative authority has purchase all the same. He sheds light on how the Court may contribute to reaching the 'subtle blend of relational legitimacies' that may underpin what he terms a 'new separation of powers', one that can be applied also to the heterarchical relations that are part and parcel of law-making processes in the EU. He concludes that the Court has had a significant role in this respect, even if it has fallen short of accomplishing that role in important instances.

Judicial review of administrative discretion tests the boundaries of legitimate action by administrators and courts. To a great extent, it has been the role of the Court of Justice to define these boundaries, in ways that some may consider too invasive of administrative discretion and others too deferential. There are no normative yardsticks against which to approach these often-shifting boundaries, beyond the general claims of institutional and material capacity of courts in reviewing acts of the EU institutions and bodies. Could our normative proposal help critique the spaces of discretion the Court has granted them?

In his analysis of judicial review of discretion in the EU, *Dominique Ritleng* examines the way in which separation of powers has influenced judicial review of administrative discretion in the EU. He recalls that the differentiation between legislative acts and administrative acts, first in the Court's case law and later in the Lisbon Treaty, is one of the main manifestations of separation of powers thinking in EU law—one where the Court had a pivotal role. Ritleng thus returns to one of the arguments made by Bruno de Witte: the distinction between these different types of acts is the result of an institutional evolution that shaped—or attempted to shape—the allocation of authority in the EU according to domestic-inspired separation of powers. Yet, unlike de Witte, he argues that the rationale of the separation of powers has coincided with that of the principle of institutional balance. This different interpretation of the function of institutional balance in the EU—anchored too on the case law—may be explained by the focus of Ritleng's analysis. Ritleng concludes that, contrary to what could be expected on the basis of

the Treaty, the differentiation between legislative and administrative acts did not lead to a distinct degree of review of these acts, even if it has influenced case law in other respects—a sign of the difficulties of transposing separation of powers thinking onto the EU level, or at least, as Ritleng argues, a demonstration of the Court's inconsistency when it comes to separation of powers thinking.

Chantal Mak shakes up received ways of thinking about the allocation of authority in the field of European private law, arguing that, in times of societal change, courts may end up being the democratically more legitimate law-makers. That is certainly at odds with received understandings of how the process of law-making should be divided between legislatures and judiciaries, at least in reconstructive theory. However, if we adopt a more realist perspective, Mak argues, we can start to see how courts open up new ways for citizens to access and influence the law-making process. This insight should lead us to reconsider institutional arrangements in this field and to imagine different ones, ultimately with a view to rethinking the concept of democratic legitimacy in European private law.

Maurizia De Bellis turns to the fragmented and shifting spheres of relative authority in both global and EU financial regulation. She combines the analysis of both levels of governance to develop two main arguments. She argues, first, that inquiries into the legitimacy of EU institutions in this sphere must take into account the ways in which they are constrained by global regulation. Second, and rather counterintuitively, given the abundant critique of EU financial governance, De Bellis also argues that the EU may in fact contain lessons for the global architecture. She draws specific attention to the rather well-developed procedural framework, though not without its faults, in which EU agencies in the financial sector act. De Bellis thus demonstrates both the analytical and normative potential of thinking in terms of relative authority in this domain of financial regulation. The complex interplay between different institutions is on view just as well as the potential of rethinking this interplay by linking the exercise of authority with specific legitimacy assets.

Diane Desierto shows how the idea of relative authority works in the contrasting fields of international trade and investment law. She draws specific attention to the ways in which challenges to the exercises of public authority in both fields reflect an understanding of how different legitimacy assets should be brought to bear. To start with, authority is certainly allocated very differently in the highly institutionalised field of trade law, where the secretariat of the WTO, an underbelly of committees, and a rich practice of adjudication shape the law. Adjudicators are also influential in the making of international investment law, but state governments remain in the driving seat, Desierto argues. In both contexts, she carves out internal checks and external constraints on law-makers. Desierto then pays particular attention to the different practices of judicial deference as a mechanism for allocating authority, and to the potential of public participation in strategies for contributing to the legitimacy of law-making.

The jury on the idea of relative authority now lies with the readers of the volume. We hope that they will be convinced by the idea and that, even if doubts remain, they will find the texts of the volume instructive.