

Separation of Powers and the Rule of Law

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Forthcoming in: Handbook on the Separation of Powers, Carolan et al. (eds.), Cambridge University Press.

This chapter explores the conceptual and practical relationship between the rule of law and the separation of powers—two foundational yet contested principles of constitutional thought. It argues that both concepts as they are commonly understood today are historically contingent on the rise of the modern constitutional state and share a common purpose: constraining arbitrary power. I first situate both concepts as essentially contested or thick concepts, combining descriptive and normative dimensions. I then map differing interpretations of their relationship, from the separation of powers and the rule of law as distinct constitutional principles to the separation of powers as an institutional embodiment of the rule of law. The chapter then examines how different constitutional systems and apex courts conceptualize and operationalize these principles, with particular attention to judicial independence and challenges posed by democratic backsliding. Recent trends, especially executive overreach in various states, are analyzed as undermining both ideals. The last section addresses the rule of law and the separation of powers beyond the state, considering how international organizations monitor and promote them, but also how they fail to embody both principles.

Keywords: Rule of Law; Separation of Powers; Essentially Contested Concepts; Transnational Rule of Law; Separation of Powers Beyond the State

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Introduction

The rule of law is both a perennially contested concept and one of the most powerful normative ideals in political theory. Contestation surrounding the rule of law concerns not only its conceptual properties but also its utility as a normative ideal.¹ Yet, some of even the starkest critics of

¹ A classical critique that the two premises of the rule of law – namely, that the relevant power relationship that needs to be contained is between the state and its citizens, and that legal rules “can make power impersonal and impartial” – are largely fictitious is Roberto Mangabeira Unger, *Law in Modern Society. Toward a Criticism of Social Theory* (The Free Press 1976), 176-180.

conventional rule of law conceptions concede that the rule of law has served important functions in political theory at different points in time,² or that the notion of the rule of law – despite law’s many shortcomings – might be an “unqualified good” insofar as it has occasionally afforded protection against wholly arbitrary exercises of power.³

Today, the relationship between the rule of law and the separation of powers is under renewed scrutiny as both ideals are under sustained attack in various parts of the world. This chapter was finalized in the months following Donald J. Trump’s inauguration as the 47th President of the United States of America. Both Trump’s excessive use of executive orders as a means to govern and his general disregard for whether any of his actions are lawful are directly relevant to this chapter in at least two ways. First, Trump’s disregard for the law differs in quality from other cases of contemporary autocratic rule in that he does not even attempt to uphold the illusion of legality – he is not a “legalistic” autocrat,⁴ but an autocrat *tout court*. Trump has explicitly threatened the legal profession⁵ and cast doubt on whether he considers himself bound by the U.S. Constitution.⁶ This raises fundamental questions about his commitment to the rule of law. Second, ruling through executive orders and explicitly questioning court orders constitute two distinct challenges to the separation of powers.⁷ To the extent that both the separation of powers and the rule of law have a long tradition in the United States’ constitutional thought, even if they have historically not served all people in the U.S. equally,⁸ the current government is then a particularly stark challenge to both ideals, one that ought to challenge the legal profession and legal scholarship in understanding better what why neither the promise of the rule of law nor the separation of powers seem to have been fulfilled, but also what we might lose if we give up on them altogether.

This chapter explores the relationship between the rule of law and the separation of powers in constitutional thought. Both concepts gained considerable traction with the rise of the modern

² Judith N Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson, Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Carswell 1987), 1–16.

³ Edward P Thompson, *Whigs and Hunters. The Origin of the Black Act*. (Breviary Stuff Publications 2013), 208–209.

⁴ Kim L Scheppele, ‘Autocratic legalism’ (2018) 85 *The University of Chicago Law Review* 545.

⁵ Presidential Memorandum of March 22, 2025, “Preventing Abuses of the Legal System and the Federal Court”, <<https://www.whitehouse.gov/presidential-actions/2025/03/preventing-abuses-of-the-legal-system-and-the-federal-court/>>.

⁶ See Interview with NBC News, <<https://www.nbcnews.com/politics/trump-administration/trump-asked-uphold-constitution-says-dont-know-rcna204580>>.

⁷ Within only his first two months in office, Donald Trump had issued over 100 executive orders, see numbers at <<https://www.federalregister.gov/presidential-documents/executive-orders/donald-trump/2025>>. Compare this to a total of 77 Executive Orders signed by Joseph R. Biden in his first year of office, 55 Executive Orders by Trump himself during the first year of his 2017 presidency, and 40 Executive Orders signed by Barack Obama in his first year of office (2009).

⁸ Paul Gowder, *The rule of law in the United States: an unfinished project of Black liberation* (Hart 2021).

constitutional state and are key to Western political and juridical thought.⁹ I acknowledge the historical contingency of both concepts and provide a primarily descriptive account of how links between them have been conceptualized, as well as of some conceptual varieties that hinge on different contexts.

The chapter is structured as follows. The first section situates both the separation of powers and the rule of law as thick and essentially contested concepts that are historically contingent on the constitutional state, before sketching varying understandings of both concepts and their relationship to one another. The second section provides a necessarily incomplete overview of how different constitutional systems conceptualize both ideals and their relationship, with a focus on where threats to the separation of powers have simultaneously been framed as undermining the rule of law. Section III discusses how both principles apply to contexts beyond the state.

I. The Separation of Powers and the Rule of Law as Political Ideals: A Brief Overview of Their Relationship

1) Beyond thick, essentially contested concepts: the rule of law and the separation of powers as historically contingent

Concepts from constitutional theory, as well as the concept of law itself, have been described as “essentially contested” or as “thick concepts”.¹⁰ Thick concepts, a term coined by Bernard Williams, have both descriptive and evaluative dimensions, a “union of fact and value”.¹¹ The term “essentially contested concept” was coined by W.B. Gallie decades before Williams to designate such concepts that simultaneously accredit a valued achievement whilst being the subject of endless debates as to their precise content.¹² Both characterizations have in common that they emphasize the combination of descriptive elements and normative evaluations. With the caveats mentioned in the introduction, most people would agree that the rule of law and the separation of powers are valuable ideals that ought to be protected; the disagreement begins when we discuss what exactly they entail and why we ought to value them.

⁹ Jeff King emphasizes the importance of rule of law history in explaining how it entered “the semantics of Western political and juristic thought”, in Jeff King, ‘The Rule of Law’ in Richard Bellamy, Jeff King (eds), *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press 2025) 297, 305.

¹⁰ David Enoch and Kevin Toh, ‘Legal as a Thick Concept’ in Wil J Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (Oxford University Press 2013).

¹¹ Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press 1985) 129.

¹² Walter B Gallie, ‘Essentially contested concepts’ (1955) 56 *Proceedings of the Aristotelian society* 167. Gallie provides the concept of “democracy” as one example of an essentially contested concept.

Jeremy Waldron has famously characterized the rule of law as essentially contested: we all agree that we value the rule of law, even if we are unsure about its specific content and hold varying conceptions of it.¹³ Contestation centers specifically around whether the rule of law is restricted to formal properties of the law and its adoption, or whether it also addresses the law's substantive content, e.g. that it respects fundamental human rights.¹⁴ These conceptions need not necessarily be contradictory; rather, they can be "congenial" (Waldron) or be thought of on a spectrum running from "thin" to "thick" conceptions, where in the thinnest possible variant, the rule of law is effectively a rule by law.¹⁵

While, to this author's knowledge, there is no explicit account of the separation of powers as "essentially contested",¹⁶ it displays similar properties to the rule of law or democracy in that it is both considered a valued achievement that can be variously described and that its proper use seems to consist in various, contesting descriptions that are equally considered valid. Aziz Huq colloquially states that "[i]t is a truth grudgingly acknowledged by all 1L Con Law students that judges and scholars have no common sense of what the phrase "separation of powers" means".¹⁷ Christoph Möllers points out that there is deep disagreement amongst the different traditions of the separation of powers over which power needs to be reined in by the others.¹⁸ More recent efforts to reconceptualize the separation of powers explicitly do so in juxtaposition to, and thus in contestation of, traditional understandings.¹⁹ At the same time, broad agreement exists that the separation of powers is a key value in the constitutional state. Both the rule of law and the separation of powers are thus essentially contested concepts.

One important criterion that Gallie puts forward for a concept to be essentially contested (as opposed to simply confused) is that it has an original exemplar, i.e., a prototype or best original

¹³ Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137.

¹⁴ Paul Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) Public Law 467.

¹⁵ Brian Z Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004); this characterization at 92 with reference to Noel B Reynolds, "Grounding the Rule of Law," (1989) 2 Ratio Juris 1, 3. Another possible characterization is between what Jeff King has called the "legal essentialist conception" of and the "limited government approach" to the rule of law, see King (n 9). This distinction has implications for the relationship between the rule of law and the separation of powers, and I discuss it in the following section (at II. 2).

¹⁶ For a potential application to the concepts "citizenship", "war", "genocide", "abortion", "rape", and "hate crime" see David Collier, Fernando D Hidalgo, and Andra O Maciuceanu, 'Essentially contested concepts: Debates and applications' (2006) 11 Journal of Political Ideologies 211.

¹⁷ Aziz Huq, 'Separation of Powers Metatheory' (2018) 118 Columbia Law Review 1517, 1526.

¹⁸ Christoph Möllers, 'Separation of Powers' in Roger Masterman, Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 232.

¹⁹ See e.g. Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press 2023), who offers a relational and collaborative conception of the separation of powers, in juxtaposition to previous accounts, at pp. 4, Chapter 1.

case.²⁰ Because there are obvious cases where not one, but multiple exemplars exist, the meaning of the exemplar is in itself contested. It is perhaps best described as the essentially contested concept's "common core...centered on multiple, paradigmatic examples that do, in fact, anchor the concept."²¹

In constitutional theory, exemplars of the separation of powers are associated with the modern constitutional state that arguably first emerged in Europe and the United States. One of the first conceptualizations is typically attributed to Montesquieu, arguing that there cannot be any liberty unless the power of judging is separate from the legislative and executive powers, because the judiciary and legislative in the same hands would lead to arbitrariness, and the judiciary and the executive in the same hands would lead to violent oppression.²² Often, Article 16 of the 1789 French Declaration of the Rights of Man, that "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all", is invoked as an early legal textual root for the separation of powers.²³

Rule of law scholars typically identify the first antecedents of the rule of law in ancient times and trace them back to Aristotle.²⁴ But the contemporary understanding of the rule of law, in part because it is linked to the separation of powers, as will be addressed in the next section, in part because it is concerned with the constraining of the monopoly of power that (only) the Leviathan state possesses, is likewise linked to the modern constitutional state. The rule-of-law exemplar most theories work with concerns the restraining dimension of law,²⁵ even if newer conceptions of the rule of law emphasize other dimensions, such as its function as a regulatory ideal.²⁶

Both the separation of powers and the rule of law, as they are commonly understood in legal theory, are then historically contingent upon the modern constitutional state, which first emerged in Enlightenment Europe.²⁷ This assertion does not imply any normative evaluation; that is to say, the tradition of the modern constitutional state is not necessarily the best or even a good way of thinking about these concepts. Relatedly, it does not mean disregarding the many different traditions that have evolved today. Beyond the oft-cited divide between continental Europe and

²⁰ Gallie (n 12), 176-179.

²¹ Collier and others (n 16), 220.

²² Montesquieu, *De l'Esprit des Lois*, Livre XI, Chapitre VI «De la constitution d'Angleterre».

²³ See e.g. the collection of seminal texts by Richard Bellamy (ed), *The rule of law and the separation of powers* (Ashgate 2005), where almost all articles refer to the United Kingdom and the United States as exemplars, and many reference Montesquieu and the French Declaration of the Rights of Man.

²⁴ Cf. E.g. Jeremy Waldron, 'Rule of Law', *The Stanford Encyclopedia of Philosophy* (Fall edn 2023) <<https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/>> accessed 9 March 2026; Tamanaha (n 15), Chapter 1.

²⁵ See Tamanaha (n 15), Chapter 9.

²⁶ King (n 9). A similar shift can be observed with older and newer theories of the separation of powers, too.

²⁷ See also Möllers (n 18).

the Anglo-American common law tradition,²⁸ many legal traditions, especially in the Global South, encompass complex entanglements of colonial, indigenous, transnationally forged, and novel rule-of-law conceptions.²⁹ These are important developments and contribute to the rule of law debates today. I take the tradition of the constitutional state, which largely originates in Europe, to be a factual point of departure that must be contended with, not a normative ideal that political entities should aspire to.

2) The relationship between the rule of law and the separation of powers: competing accounts

If the concepts of the rule of law and the separation of powers are both essentially contested, it is not surprising that their relationship is contested, too. How one views the relationship between the two principles depends significantly on how each is conceptualized in the first place. This section establishes some conceptual common ground regarding the rule of law and the separation of powers, before providing a brief, necessarily incomplete overview of the different conceptualizations of their relationship.

The rule of law is concerned with the primacy of law over other reasons for action. There are two dimensions to it: the primacy of the positive law that is in place at any one time and the limits that the law places on exercising government power, including changes in the law.³⁰ The first dimension can be summarized as follows: the positive law that is in place at any one time ought to generally have precedence over other reasons for action. There is no rule of law if those subject to the law do not recognize its authority or do not feel compelled to obey it. Fuller has influentially argued that, for subjects to feel compelled to obey the law, it must display certain properties: generality, publicity, non-retroactivity, clarity, non-contradiction, the possibility of compliance, and congruence between law and action.³¹ This approach has been variously called “legal essentialist view” of the rule of law,³² or “government by law.”³³ These approaches often assume that the rule of law bestows on the individual some measure of predictability in her actions because the legal framework under which she operates is clear.³⁴ While there is contestation on

²⁸ See e.g. King (n 9) 302-303; D. Neil MacCormick, ‘Der Rechtsstaat und die rule of law’ (1984) 39 *JuristenZeitung* 65; Luc Heuschling, *État de droit, Rechtsstaat, Rule of Law* (DALLOZ 2002).

²⁹ Kim L Scheppele, ‘The Life of the Rule of Law’ (2024) 20 *Annual Review of Law and Social Science* 17, 25.

³⁰ Tamanaha (n 15), 115; King (n 9), who distinguishes a “legal essentialist conception” and a “limited government conception”.

³¹ Lon L Fuller, *The Morality of Law* (1969 rev edn, Yale University Press 1964), Chapter 2.

³² King, ‘The Rule of Law’ (n 9).

³³ Martin Krygier, ‘Marxism and the Rule of Law’ (1990) *Law & Social Inquiry* 633, 642-643.

³⁴ Raz calls this the “virtue” of the rule of law, Joseph Raz, ‘The Rule of Law and its Virtue’, *The Authority of Law*, (Oxford University Press 2009) 210-229.

what exactly such rule of law “laundry lists”³⁵ should contain, as well as doubts as to whether all these criteria are met in contemporary legal orders, there is a broad consensus on at least some of these criteria, such as generality, publicity, non-contradiction, and the possibility of compliance.

The second dimension concerns the law’s constraining force on arbitrary power.³⁶ This crucially includes the notion that public power is limited in how and to what extent it can change the law and that it cannot apply it selectively. Government is distinguished from tyranny not only because it rules through law (rule by law), but, importantly, because it is itself constrained by the law.³⁷ In this account, one way of thinking about how the law can usefully constrain government is through the separation of powers as a key tool for limiting the arbitrary exercise of power.³⁸ The separation of powers can thus be understood as one way in which the rule of law is institutionalized in the modern constitutional state.³⁹ The classical statement is Montesquieu’s *Spirit of the Laws*, where he distinguishes legislative, executive, and judicial powers and finds that “there is no liberty” if any of these three powers were united in the same person.⁴⁰ It is based on this classical statement that Maurice Vile developed a “pure” doctrine of the separation of powers,⁴¹ and while it is questionable whether such a pure doctrine ever existed in real life,⁴² the idea of a tripartite separation of powers today serves as the abovementioned exemplar, perhaps with the addition of a vertical separation of powers, especially in federal structures or with regard to supranational entities.⁴³

Of course, this idealized conceptualization is not uncontested. A first point of contention centers on which powers ought to be distinguished. Most conceptualizations are tripartite, but, e.g., in Locke’s conceptualization, the judiciary is absent.⁴⁴ In contemporary debates, so-called “institutions protecting democracy” or “fourth branch institutions” —i.e., independent entities

³⁵ This term comes from Jeremy Waldron, ‘The Rule of Law and the Importance of Procedure’ in James E. Fleming (ed), *Getting to the Rule of Law* (New York University Press 2011) 5-7.

³⁶ This is advanced as key for the rule of law by e.g. Martin Krygier, ‘Rule of Law’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); András Sajó, ‘The Rule of Law’ in Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019).

³⁷ This distinction goes back to Montesquieu, cf. Krygier (n 36).

³⁸ Bellamy (n **Error! Unknown switch argument.**), 436.

³⁹ Jacob T Levy, ‘The Separation of Powers’ in Richard Bellamy and Jeff King (eds), *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press 2024).

⁴⁰ Montesquieu (n 22).

⁴¹ Huq (n 17), 1527 labels such approaches that clearly distinguish between the three powers and accord them a defined, delimited set of powers as the “separation model”.

⁴² Möllers (n 18), 233; see also Madison, Federalist Papers 47, arguing that Montesquieu ought not to be understood that there could not be partial agency of one power in the realm of another, but rather that “the whole power of one department [must not be] exercised by the same hands which possess the whole power of another department”.

⁴³ See below III 1).

⁴⁴ This is pointed out by Levy (n39), 286.

such as national human rights commissions, election oversight bodies, media oversight, or anti-corruption institutions —are increasingly considered to play an important role in the separation of powers.⁴⁵ Secondly, even if one agrees on Montesquieu’s tripartite separation of powers, it is not immediately clear which power is the one that is most likely to misuse its power if left unchecked. Rather, this is subject to debate and has shifted over the course of history, across different political constellations, and different legal traditions. Lastly, there is considerable debate over how separated the powers need to be. Aileen Kavanaugh has recently argued for a collaborative vision of the different branches.⁴⁶ Christoph Möllers calls the term “separation” a “misnomer”⁴⁷; Martin Krygier makes the case, relying on Montesquieu, that “distribution” of powers captures more aptly how the different powers relate to each other through mixing, connection, and overlap.⁴⁸

Based on these characterizations, we can distinguish between different ways of thinking about the relationship between the rule of law and the separation of powers. If one adopts a conceptualization of the rule of law that is primarily concerned with properties of the law, such as prospectivity, generality, clarity, etc., and without an emphasis on the institutional set-up through which the law is made, then the separation of powers is absent from such a conception of the rule of the law and both are considered to be distinct.⁴⁹ If, in turn, the rule of law is understood to be mainly concerned with limiting the arbitrary exercise of state power, then the separation of powers can be considered a key component of the rule of law, namely as one technique of tempering arbitrary power.⁵⁰ The separation of powers can also be considered as the separation of different functions of government, each with an integrity in their own right, and thus as the orderly sequence of lawmaking, law-applying, and adjudication; a violation of the separation of powers thus understood then also amounts to a violation of the rule of law (with the rule of law being the broader concept).⁵¹ Similarly, the separation of powers can be considered inextricably linked to the rule of law insofar as both entail a collaborative endeavor that characterizes the modern constitutional state.⁵²

⁴⁵ Mark V Tushnet, *The new fourth branch: institutions for protecting constitutional democracy* (Cambridge University Press 2021).

⁴⁶ Kavanaugh (n 19).

⁴⁷ Möllers (n 18), 235.

⁴⁸ Martin Krygier, ‘What’s the Point of the Rule of Law?’ (2019) 67 *Buffalo Law Review* 743, 784.

⁴⁹ Levy (n 39), 281 points out that, e.g., Fuller does not address the separation of powers in his conceptualization of the rule of law, at least not explicitly.

⁵⁰ Martin Krygier, ‘The Rule of Law: Pasts, Presents, and Two Possible Futures’ (2016) 12 *Annual Review of Law and Social Science* 199, 224. See also Krygier (n 48).

⁵¹ Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press 2016), 45–71.

⁵² Kavanaugh (n 19). Note that Kavanaugh does not explicitly address the relation between the two principles, but her use of the term “rule of law” (e.g. at 101, 111) implies the above characterization.

II. The Rule of Law and the Separation of Powers in Constitutional Practice

1) Varying conceptualizations of the rule of law and the separation of powers

András Sajó reports that at least 102 constitutions refer to the rule of law, understood as the state governed by law.⁵³ Based on data from the Constitute Database,⁵⁴ a similar number of constitutional texts contain provisions addressing separation of powers in different ways. While only 38 constitutional texts explicitly use the term “separation of powers” or “division of powers”, often alongside the term “rule of law”,⁵⁵ some 85 constitutions contain provisions explicitly establishing or addressing different branches, thus implying that powers are separated from one another.⁵⁶

While these numbers give us an initial idea of the importance of both constitutional ideals, one should not rely too much on constitutional texts to understand how the rule of law and the separation of powers are conceptualized and applied in any given constitutional order.⁵⁷ There are many similarities between formal constitutions adopted in democracies and those in dictatorships,⁵⁸ with the latter often lacking any real separation of powers or a commitment to a rule of law that applies to all. Such legal orders amount to a rule by law at best but offer no real check on dictatorial power.⁵⁹ At the same time, constitutional texts are often a first point of reference for the jurisprudential development of constitutional concepts. In addition, commitments in constitutional texts can be important vehicles for holding states accountable transnationally.

⁵³ Sajó (n 36), 271.

⁵⁴ Constitute Project Database, available at <<https://constituteproject.org>>.

⁵⁵ Examples are Article 18 of the Constitution of Burundi (2018), “The Government respects the separation of powers, the pre-eminence of law, and the principles of good governance and of transparency in the conduct of public affairs.”; Article 56 (6) of the Constitution of Nepal (2015), “The Federation, provinces and local levels shall protect...rule of law, separation of powers and check and balance...”

⁵⁶ See e.g. Article 113 of the Constitution of Colombia (1991), “The branches of government are the legislative, the executive, and the judiciary.”; Article 104 of the Constitution of Italy (1947), “The Judiciary is a branch that is autonomous and independent of all other powers.”

⁵⁷ See Sajó (n 36), 260 (“the constitutional text is not decisive in the practical uses and scope of the term in different constitutional contexts.”).

⁵⁸ Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press 2014).

⁵⁹ A classic statement of the duality of a rule by law with uninhibited dictatorial power is Ernst Fraenkel, *The dual state: a contribution to the theory of dictatorship* (Oxford University Press 2017 [1940]).

The conceptualization of the rule of law, the separation of powers, and their relationship varies across jurisdictions and traditions. This is because both concepts are typically responses to specific governance challenges at different times. Today, an independent judiciary is often regarded as a hallmark of the rule of law across various jurisdictions. Judges as legal experts are considered “special guardians of the law”⁶⁰ and the existence of an independent judiciary has been characterized as a key element of the rule of law.⁶¹ Within judicial review, there has been a special emphasis on constitutional review, especially in younger democratic constitutional states that previously experienced authoritarian rule. Several Latin American countries put into place strong constitutional guarantees and judicial review after decades of military dictatorships, either by specialized constitutional courts, such as in Colombia, or by vesting their Supreme Courts with constitutional review power, such as in Mexico.⁶² Post-communist democracies in Central and Eastern Europe throughout the 1990s established strong constitutional review mechanisms,⁶³ as did new democracies in Asia⁶⁴ and post-apartheid South Africa.⁶⁵

At the same time, “old” democracies took much longer to establish strong constitutional review mechanisms, with the French case being a notable example.⁶⁶ The French reluctance to judicial review in general, rooted in an old republican idea that statutory law is the expression of the “general will”,⁶⁷ illustrates a broader problem regarding the extent of the judiciary’s power to review legislative acts. There is a need to secure constitutional rights against a possible tyranny of the majority, while avoiding an overly powerful judiciary. Equating the rule of law with judicial review in general, and constitutional review by judges in particular, has been criticized for giving too much weight to judges and for resting on a fiction of judges’ own constraint by the law they

⁶⁰ Tamanaha (n 15), 123.

⁶¹ Möllers (n 18), 248 (“judicial review, the epitome of the rule of law”); Jacques Chevallier, *L’État de droit* (Montchrestien 5 edn 2010), 75 (« C’est...de l’exercice concret du contrôle juridictionnel que dépend...l’effectivité de l’État de droit »).

⁶² Ariana Sánchez, Beatriz Magaloni, and Eric Magar, ‘Legalist versus Interpretativist: The Supreme Court and the Democratic Transition in Mexico’ in Gretchen Helmke, Julio Rios-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011).

⁶³ Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008).

⁶⁴ Tom Ginsburg, *Judicial review in new democracies: constitutional courts in Asian cases* (Cambridge University Press 2009).

⁶⁵ James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*, 1 edn (Cambridge University Press 2016).

⁶⁶ Ex-post constitutional review was not possible until the constitutional reform of 2008, which entered into force in 2010 and introduced the “question prioritaire de constitutionnalité” (QPC), cf. now Article 61-1 of the French Constitution. Note that the QPC is limited to rights infringements, not other matters of constitutionality, which can only be reviewed *ex ante*, cf. Article 61 of the French Constitution.

⁶⁷ Denis Baranger, ‘French Constitutional Law’ in Roger Masterman, Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019) 98-99.

apply.⁶⁸ This tension between the principle of legality and the democratic principle has been exploited in recent reforms of the judiciary, which are often justified in terms of democracy.⁶⁹

Variation in the conceptualization of both the rule of law and the separation of powers in different legal cultures' conceptual history finds an expression in terminological differences as well. For example, the equivalent French term to “rule of law” – “état de droit” – was first introduced into French debates by Raymond Carré de Malberg, who was heavily influenced by German jurisprudence and sought to counter the traditional French mistrust of judges.⁷⁰ Montesquieu does not use the term “état de droit”, but simply speaks of the state (“État”); Rousseau uses the term “la République”, although both are arguably concerned with what in the English-speaking world would be considered the rule of law.⁷¹ The English term does not contain any reference to the state, something that is present in Latin languages and German.⁷² The Chinese expression for the rule of law, 法治, can be translated to both “rule of law” and “rule by law”, with the characters signifying “law” (法) and “governance/governing” (治).

Some apex courts have explicitly linked the rule of law to the separation of powers, even though courts are generally reluctant to directly apply the rule of law as a principle in judicial decisions.⁷³ The German Constitutional Court has stated that the separation of powers is “anchored” in the constitutional principle of the rule of law.⁷⁴ Other apex courts have explicitly linked the rule of law to judicial review. The Indian Supreme Court found in its landmark judgment on the Basic Structure that “the Rule of Law has been ensured by providing for judicial review” and that such judicial review is indispensable for India’s constitutional order.⁷⁵ The Australian High Court has ruled that “the Australian Constitution is framed upon the assumption of the rule of law...[and that] judicial review is neither more nor less than the enforcement of the rule of law over executive action”.⁷⁶ Yet other apex courts have emphasized other powers as key to preserving the rule of law – e.g., the Belgian Constitutional Court, in a much-discussed decision that invoked national identity vis-à-vis European Union law, speaks of a “democratic rule of law state” (*État de droit démocratique*), emphasizing the importance of the legislative, although ultimately rejecting the claimants’ request for annulment of the Act approving the Treaty on Stability, Coordination

⁶⁸ Heuschling, *État de droit* (n 28), 426-431.

⁶⁹ Below, section II.2)

⁷⁰ Heuschling, *État de Droit* (n 28), 376 et seq.

⁷¹ *Ibid*, 393 et seq.

⁷² On the German terminology and how it translates into English see Hannah Birkenkötter and Dana Burchardt, *The Rule of Law in Germany: Bringing the Rechtsstaat into the 21st Century* (Hart 2025) 3.

⁷³ Sajó (n 36), 289.

⁷⁴ BVerfGE 142, 25 (56) – Opposition rights.

⁷⁵ *Kesavananda Bharati Sripadagalvaru ... vs State Of Kerala And Anr* (1973), 4 SCC 225, 518, 568 (Supreme Court of India).

⁷⁶ *Plaintiff S157/2002 v. Commonwealth* (2003) HCA 2, 211 CLR 476, 31 (High Court of Australia) citing *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70-71 (Brennan J).

and Governance in the Economic and Monetary Union.⁷⁷ The Colombian Constitutional Court has also emphasized the importance of the legislative process as the expression of popular sovereignty in a rule of law state (*Estado de Derecho*), whilst emphasizing that the separation of powers was a key feature of the Constitution and therefore rejecting the notion that the Constitution could be replaced via a legislative referendum.⁷⁸

Even if the courts did not rely on the principle of the rule of law to reach their final decisions in any of the abovementioned judgments, we can observe some insistence on the importance of the separation of powers in general or specific branches in particular as key to the rule of law. If the separation of powers is understood as a specific form of institutionalizing the rule of law, undermining the separation of powers through attacks on specific branches can and has repeatedly been framed as a challenge to the rule of law. The subsequent section examines this challenge.

2) Undermining the Separation of Powers as a Challenge to the Rule of Law

Dismantling the separation of powers has been described as a key aspect of constitutional or democratic backsliding,⁷⁹ and the term “rule of law backsliding” has also been used explicitly in this context, although less often.⁸⁰ Most challenges to the separation of powers that simultaneously undermine the rule of law have centered on the Executive’s concentration of power. Historically, theorists of the rule of law and the separation of powers, such as Locke and Montesquieu, were primarily concerned with an overly powerful executive vis-à-vis the legislative power.⁸¹ Today, the primary concern has shifted towards the judiciary and Fourth Branch institutions (such as electoral tribunals or anticorruption institutions) and attempts to undermine their independence to the benefit of the Executive. This is in part because contemporary efforts to concentrate power are often rooted in a popular mandate that is gradually abused to concentrate power.⁸² Where autocratic leaders are popularly elected, they generally have the

⁷⁷ Cour Constitutionnelle Belge, Arrêt n° 62/2016, B.8.2-B.8.9 (Belgian Constitutional Court).

⁷⁸ Corte Constitucional de Colombia, Sentencia C-141/10 (2010): “*el procedimiento legislativo es...la manera de actuar la democracia representativa como manifestación de la soberanía popular en un Estado de derecho*” at 4.2. (Colombian Constitutional Court).

⁷⁹ For an overview of the different labels that have been put to processes of deterioration in the liberal constitutional state, ranging from backsliding and regression to erosion and retrogression, variously combined with the adjectives “constitutional” or “democratic”, see Benjamín García Holgado and Raúl Sánchez Urribarri, ‘Court-packing and democratic decay: A necessary relationship?’ (2023) 12 Global Constitutionalism 350, 351. For the substantive argument that dismantling the separation of powers is a key element in backsliding the democratic constitutional state see Aziz Huq and Tom Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 UCLA Law Review 78.

⁸⁰ Laurent Pech and Kim L Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) 19 Cambridge Yearbook of European Legal Studies 3.

⁸¹ See Levy (n 39), 287-288, for this reading of both Locke and Montesquieu, though in different variations.

⁸² Scheppele (n 4).

support of the legislature, at least initially, whereas the judiciary, as the countermajoritarian force, is often the biggest obstacle to the concentration of power.

Where changes in the judiciary are made to curtail its independence and make it dependent on the will of political powerholders, this is aptly characterized as undermining the rule of law. In these cases, the end goal is a greater concentration of power in the hands of the ruling actor(s), at the expense of their being constrained by the law. In turn, there can of course be cases of “court-packing”, understood as the expansion, swapping, or emptying of (especially apex) courts, that pursue legitimate aims and are executed through a legitimate procedure.⁸³ Empirically, it is not always easy to differentiate between judicial reform that threatens to undermine the rule of law and such cases that pursue, at least in part, legitimate aims. On the one hand, autocratic governments often disguise their autocratic tendencies under a veneer of legality.⁸⁴ On the other hand, courts are not an unqualified good; indeed, they can be—and have been—important vehicles for legitimizing authoritarian regimes.⁸⁵ In such cases, reforming the judiciary might be both desirable and legitimate.

Sustained attacks on the judiciary through legal reform, resulting in an effective erosion of checks on the Executive and the Legislative, have become more frequent in recent years and span different continents and legal traditions. In Europe, Hungary and Poland are prominent examples of “rule of law backsliding”⁸⁶ where elected Prime Ministers used their legislative majorities to amend the composition and competence of the constitutional judiciaries, along with other institutional checks.⁸⁷ In Latin America, Bolivia and Mexico are recent cases where the entire judicial branch has been fundamentally altered through introducing popular elections at all levels, arguably with the aim of aligning the judiciary more with the political preferences of popularly elected leaders.⁸⁸ In Israel, limiting the Supreme Court’s powers vis-à-vis the Parliament and

⁸³ For conditions on legitimacy see David Kosař and Katarína Šipulová, ‘Comparative court-packing’ (2023) 21 *International Journal of Constitutional Law* 80.

⁸⁴ Scheppele (n 4).

⁸⁵ See e.g. Jothie Rajah, *Authoritarian rule of law: legislation, discourse, and legitimacy in Singapore* (Cambridge University Press 2012).

⁸⁶ Explicitly using this term for the Polish and Hungarian cases Pech and Scheppele (n 80).

⁸⁷ For an overview see Kriszta Kovács and Kim L Scheppele, ‘The fragility of an independent judiciary: Lessons from Hungary and Poland—and the European Union’ (2018) 51 *Communist and Post-Communist Studies* 189.

⁸⁸ On the Mexican case see Irene Parra Prieto, Rosalind Dixon, and David Landau, ‘Reforma judicial abusiva en México’ (2024) 22 *International Journal of Constitutional Law* 1184; on the Bolivian case see Maria A Castagnola and Anibal Pérez-Liñán, ‘Bolivia: The Rise (and Fall) of Judicial Review’ in Gretchen Helmke and Julio Rios-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2011), explicitly stating that Bolivia’s 2009 constitutional reform, which introduced popular elections for Supreme Court and Constitutional Tribunal, was aimed at curbing the judiciary’s countermajoritarian nature (at p. 304).

altering the composition of the judicial appointments committee was aided by limited constitutional constraints on the country's legislative power.⁸⁹

III. Separation of Powers and the Rule of Law Beyond the State

1) The rule of law “writ large” – a new vertical dimension of the separation of powers?

In some instances, encroaching on the rule of law through attacking the separation of powers has met with resistance from regional organizations. As early as 2012, the European Commission for Democracy through Law (Venice Commission) of the Council of Europe opined that parts of Hungary's transformation of its previous National Council of Judges into a National Judicial Office were not compatible with the rule of law, in particular insofar as there was a lack of checks on its President's power.⁹⁰ While the European Union (EU) was at first reluctant to react to the situation in Hungary, it has since expanded the range of instruments at its disposal.⁹¹ In addition to the so-called “Article 7” procedure, which allows for suspending certain rights of an EU member in the Council, including its voting rights, the EU introduced a Rule of Law Framework in 2014 and a Conditionality Mechanism in late 2020, with the latter allowing for financial sanctions vis-à-vis rule of law backsliding, which was used against both Hungary and Poland.⁹² The Inter-American Commission on Human Rights, an organ of the Organization of American States, expressed its “grave concern” on the Mexican judicial reform shortly after its adoption, “warning of its potential impacts on...guarantees of judicial independence, and the rule of law”.⁹³

Kim Scheppele has characterized such efforts by regional organizations as part of a larger transnational effort to forge transnational rule of law standards that provide a check on the power of nation-states, a development that she calls the “rule of law writ large”.⁹⁴ This development is structurally similar to existing federal structures which provide for additional checks in a system of separated powers. While the term “vertical separation of powers” has been considered inadequate for federal systems insofar as they typically duplicate all three branches at the state

⁸⁹ Yaniv Roznai and Amichai Cohen, ‘Populist Constitutionalism and the Judicial Overhaul in Israel’ (2023) 56 Israel Law Review 502.

⁹⁰ Venice Commission, Opinion 663/2012 (2012) at paras. 43 and 58.

⁹¹ Pech and Scheppele (n 80).

⁹² COM(2014)158 of 11 March 2014 and Regulation (EU, Euratom) 2020/2092 of 16 December 2020, confirmed by *Hungary v European Parliament and Council of the European Union* [2022] ECJ Case C-156/21 and *Republic of Poland v European Parliament and Council of the European Union* [2022] ECJ Case C-157/21

⁹³ IACHR, “IACHR expresses concerns over judiciary reform in Mexico and warns of threats to judicial independence, access to justice, and rule of law”, 12 September 2024, <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2024/213.asp>.

⁹⁴ Scheppele (n), 28-30.

and federal levels,⁹⁵ framing this vertical check to *secure* the separation of powers at the domestic level as part of a broader effort to strengthen the rule of law transnationally seems accurate where such efforts are directed against too high a concentration of power.⁹⁶ To the extent that international organizations can exert vertical pressure on states when they observe threats to the rule of law, we can speak of a new dimension of the separation of powers and the rule of law beyond the state.

2) International Rule of Law Assistance and the Separation of Powers

The “rule of law writ large” is not limited to vertical checks on domestic legal systems. Starting in the early 1990s, the past two and a half decades witnessed a proliferation of rule of law assistance programs in international organizations, from the World Bank⁹⁷ to the United Nations.⁹⁸ Rule of law assistance today is a multi-billion-dollar industry, with countless international and domestic public officials, non-governmental organizations, companies, consultants, local communities, and intermediaries involved across a multitude of states.⁹⁹

Two main rationales have been offered to justify rule of law assistance. A long-standing rationale, advocated by the World Bank starting in the early 1990s, has been that the rule of law is a key element in advancing development, insofar as it affords predictability for foreign investors.¹⁰⁰ This investor-friendly rationale is also underlying the rule of law as one of the “Copenhagen criteria” for accession to the European Union.¹⁰¹ The second rationale relates to post-conflict environments, where the rule of law has been considered a necessary condition for lasting peace.¹⁰² Rule of law assistance efforts typically include an important component focused on building “justice institutions,” which include an independent judiciary as a guarantor of the equal application of the law and often a number of fourth-branch institutions.¹⁰³

⁹⁵ Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013), 37-40.

⁹⁶ Specifically on the role of supranational courts in putting constraints on domestic separation of powers see Leloup, in this volume.

⁹⁷ Critically Tor Krever, ‘The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model’ (2011) 52 *Harvard International Law Journal* 287.

⁹⁸ Hannah Birkenkötter, ‘The United Nations and the Rule of Law’ in Micheal Sevel (ed), *Routledge Handbook of the Rule of Law*, (Routledge 2024).

⁹⁹ The United States of America alone has spent over USD \$ 1 Billion between 2002 and 2015 on rule of law assistance in only one state, namely Afghanistan, cf. Special Inspector General for Afghanistan Reconstruction, *Rule of Law in Afghanistan*, SIGAR 15-68 Audit Report, 2015.

¹⁰⁰ World Bank, report no. 34899, *Managing Development: The Governance Dimension. A Discussion Paper*. 1991.

¹⁰¹ Sajó (n 36) 286-287.

¹⁰² United Nations Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*. (2004) *Report of the Secretary-General*. UN Doc. S/2004/616.

¹⁰³ See e.g. United Nations Secretariat, UN Guidance Note on Rule of Law Assistance (2008), which includes as part of its “Framework for Strengthening the Rule of Law” the following: “a constitution or equivalent, which...defines

To what extent rule of law assistance has succeeded in responding to these two rationales is difficult to determine, not least because of its essentially contested nature. Various “rule of law” indexes measure different things,¹⁰⁴ and activities by international organizations have variously been labeled under “good governance reforms” or “rule of law assistance”, or both.¹⁰⁵ Yet, there are several large-scale rule of law assistance efforts that have clearly not resulted in the desired effects, with Afghanistan being the most obvious example. Important criticism has been leveled against rule of law assistance, including the ideal’s parochial nature¹⁰⁶ and ensuing negligence of local traditions and circumstances¹⁰⁷ despite a formal commitment to include “local stakeholders”,¹⁰⁸ the gap between the rule of law as an ideal of political theory and the actual activities on the ground that are carried out in its name,¹⁰⁹ and the technocratic nature of rule of law assistance by global experts who have recently moved from “disenchanted to self-denying expertise”.¹¹⁰ In that sense, rule of law assistance is inherently fluid, and while it has hitherto comprised the separation of powers, with an emphasis on an independent judiciary, it is unclear whether this will remain true for future rule of law assistance activities, too.

3) The rule of law and the separation of powers in today’s transnational legal order

Rule of law assistance has drawn international attention to the rule of law at the domestic level, at the expense of efforts to sketch out an international rule of law.¹¹¹ Within the United Nations, it was not until 2011 that the Secretariat issued a Guidance Note on the Rule of Law at the International Level upon pressure from member states.¹¹² The Guidance Note emphasizes support for international dispute settlement mechanisms and for international and hybrid accountability

and limits the powers of government and its various branches...empowers an independent and impartial judiciary”, at pp. 4-5, and point 4 “institutions of justice, governance and human rights”, at p. 6.

¹⁰⁴ Compare the Atlantic Council’s Freedom Index’ legal subindex, which includes as indicators “clarity of the law”, “judicial independence and effectiveness”, “bureaucracy and corruption”, “security” and “informality”, but includes “legislative constraints on the executive” under its political subindex, with the World Justice Project’s Rule of Law Index, which includes as indicators “Constraints on Government Powers”, “Absence of Corruption”, “Open Government”, “Fundamental Rights”, “Order and Security”, “Regulatory Enforcement”, “Civil Justice” and “Criminal Justice”.

¹⁰⁵ On this point Stephen Humphreys, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010) 132.

¹⁰⁶ On this point already Shklar (n 2); see also Laura Grenfell, *Promoting the Rule of Law in Post-Conflict States* (Cambridge University Press 2013).

¹⁰⁷ Grenfell (n 106); Vijayashri Sripati, *Constitution-Making under UN Auspices. Fostering Dependency in Sovereign Lands* (Oxford University Press 2020).

¹⁰⁸ Rachel Kleinfeld, *Advancing the Rule of Law Abroad* (Carnegie Endowment 2012).

¹⁰⁹ Humphreys (n 105).

¹¹⁰ Deval Desai, *Expert Ignorance: The Law and Politics of Rule of Law Reform*, 1 edn (Cambridge University Press 2023).

¹¹¹ Sundhya Pahuja, *Decolonising international law: development, economic growth and the politics of universality* (Cambridge University Press 2011), Chapter 5.

¹¹² Birkenkötter (n 98), 383-386.

and justice mechanisms (including criminal tribunals), but does not frame this support as concerned with the separation of powers.¹¹³ To this day, there is profound disagreement as to what a rule of law at the international level might entail, beyond perhaps opposing the rule of law to arbitrary power.¹¹⁴ While it is clear that the institutionalization of international law has given rise to serious accountability deficits, it is far less clear what kind of institutional structure might be appropriate to remedy them, and to what extent we ought to rely on analogues from domestic constitutional law, given international law's decentralized structure.¹¹⁵ This is true both for the rule of law and for the separation of powers.¹¹⁶

If we understand the rule of law as a concept that is traditionally aimed at limiting the exercise of arbitrary power through law and thus legitimizing power exercises as authority, then a necessary step towards conceptualizing the rule of law beyond the state is to identify those actors who wield power in the first place, and those who may be affected by arbitrary power exercises.¹¹⁷ States and international organizations are clearly power-exercising actors.¹¹⁸ One might add other transnational actors, including international non-governmental organizations and multinational enterprises.¹¹⁹ Even a basic conceptualization of power relations between these different actors shows that a core understanding of the separation of powers – precluding the arbitrary exercise of the state's monopoly of power traditionally centered in the executive government – has no clear functional equivalent in a decentralized international order.¹²⁰ Instead, we can identify elements of separated powers in individual actors in the international realm. Most international organizations have some variety of differentiated powers, typically in the form of a plenary, executive, and administrative organ and, in some cases, a judicial organ, although the functional

¹¹³ United Nations, Guidance Note of the Secretary-General: UN Approach to Assistance for Strengthening the Rule of Law at the International Level (2011).

¹¹⁴ Anne Orford, 'A Global Rule of Law' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021).

¹¹⁵ Skeptical in this regard Richard Collins, 'The Rule of Law and the Quest for Constitutional Substitutes in International Law' (2014) 83 *Nordic Journal of International Law* 87.

¹¹⁶ On the difficulty of applying domestic ideas of the rule of law beyond the state *ibid*; recovering elements of separated powers beyond the state Möllers (n 95), Chapter 4.

¹¹⁷ Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315; Brian Z Tamanaha, 'Why Sovereigns Are Entitled to (Horizontal) Benefits of the International Rule of Law' in Gregory Shaffer and Wayne Sandholtz (eds), *The Rule of Law under Pressure* (Cambridge University Press 2025).

¹¹⁸ Denise Wohlwend, *The International Rule of Law: Scope, Subjects, Requirements* (Edward Elgar Publishing 2021) 205-210.

¹¹⁹ A necessary condition would be to acknowledge powerful actors as at least partial subjects of international law. Cf. on the issue Christian Walter, 'Subjects of International Law' (2007) *Max Planck Encyclopedia of Public International Law*. (in case online encyclopedia was used, URL and date of access have to be added: <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1476>>).

¹²⁰ On the difference between public authority exercised by the state as opposed to public authority beyond the state see Ingo Venzke and Joana Mendes, 'The idea of relative authority in European and international law' (2018) 16 *International Journal of Constitutional Law* 75.

differentiation between the organs is not always clear,¹²¹ and the judicial organ may not always be competent to check the powers of the other organs.¹²² Because of the decentralized nature of international law, its multitude of actors and diffuse power relations, we cannot discern patterns of a separation of powers as a dimension of the power-curbing exercise of the rule of law to the same extent as we can in the domestic tradition of the constitutional state. While different accountability mechanisms have been put into place, there is neither a uniform procedural check on powerful actors, nor a clear functional differentiation of power exercises amongst different international organs.¹²³

The fact that concepts developed within the constitutional state cannot be easily applied to situations beyond it stems from a novel historical constellation that requires adapting traditional concepts rather than questioning their core tenets altogether. A future challenge thus lies in whether we can meaningfully develop transnational perspectives on the relationship between the rule of law and the separation of powers, beyond the shared core that both are traditionally aimed at curbing arbitrary power. For the rule of law, such a conversation has already begun. Kim Scheppele has recently advocated for an understanding of the rule of law as a set of standards that are transnationally forged and domestically applied, and that might, qua their transnational origin, be more difficult to attack.¹²⁴ Gregory Shaffer and Wayne Sandholtz contend that the rule of law today must be understood transnationally, lest it lose much of its purchase in curbing arbitrary power.¹²⁵ Adding a separation-of-powers dimension to this conversation would require clarifying which powers necessitate functional differentiation, to what end, and how this could be implemented institutionally.

IV. Conclusion

¹²¹ Chesterman has argued that the UN Security Council has throughout its existence occupied the roles of executive, legislator, and adjudicator: Simon Chesterman, 'The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-based International System' (2008), Final Report and Recommendations from the Austrian Initiative, 2004-2008. On a possible conceptualization of the separation of powers for the United Nations see Cullen and Godzimirska, in this volume.

¹²² Cf. Vera Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' (1994) 88 *The American Journal of International Law* 643.

¹²³ For a similar assessment with regard to whether accountability mechanisms that were put into place vis-à-vis the UN Security Council amount to a separation of powers (with a negative answer) see Jeremy Farrall and Terrence C Halliday, 'Transnational Legal Order through Rule of Law?: Appraising the United Nations Security Council, 1990–2022' in Gregory Shaffer and Wayne Sandholtz (eds), *The Rule of Law under Pressure* (Cambridge University Press 2025).

¹²⁴ Scheppele (n 29), 29.

¹²⁵ Gregory Shaffer and Wayne Sandholtz, 'The Rule of Law under Pressure: The Enmeshment of National and International Trends' in Gregory Shaffer and Wayne Sandholtz (eds), *The Rule of Law under Pressure* (Cambridge University Press 2025) 21-49.

Throughout this chapter, I have shown that both the rule of law and the separation of powers, as they are commonly understood today, are at their core concerned with ways of constraining the arbitrary exercise of public power – in the case of the rule of law through law, and in the case of the separation of powers through the functional differentiation of public power exercises. If we understand the two concepts in this way, there is a clear relationship between the rule of law and the separation of powers in the tradition of the constitutional state: the separation of powers is one way to curb the potentially unlimited and arbitrary exercise of power concentrated in the sovereign state. In this sense, attacks on the separation of powers with the aim of concentrating powers in the hands of the Executive ought to be – and have been – understood as attacks on the rule of law, too, especially in the case of attacks on the judiciary and on institutions safeguarding constitutional guarantees. Both the rule of law and the separation of powers are today embedded in transnational legal contexts, where neither concept is limited to the state, but where their conceptual content is also forged transnationally. In this context, it is important to focus on the core understanding of both concepts – namely, that the arbitrary exercise of power is a vice, and that it can, at least in principle, be remedied through legal institutions. This does not signify a static understanding of either concept. On the contrary: as power constellations shift and new, powerful actors emerge, adaptation without insisting on traditional and historically contingent conceptualization is necessary.