1. Introduction

1. ADMINISTRATION AT A DISTANCE: SETTING THE SCENE

In area after area of public life, elected government is being replaced by appointive government. Those who are elected count for ever less…; those who are appointed count for ever more.1

A model of administrative organization that nearly all developed states have to some extent adopted in the 21st century is that of administration through entities that are part of the governmental organization chart, but function with a certain degree of autonomy vis-à-vis elected government. For the purpose of this study, these entities will be referred to as autonomous public bodies (APBs).

The ‘depoliticization’ of the administration in favour of APBs has been an ongoing evolution in Western states ever since the aftermath of World War II. The creation of APBs has often been inspired by the goal of bringing more expertise (in a technocratic or broader, experience-related sense) to the administration. This has given rise to a tension between two values that are of central importance to the functioning of the government today. On the one hand, there is expertise, as in informed and knowledge-based decision making. On the other hand, there is the primacy of elected leaders, who take responsibility for government actions. This tension will be central to the ideas and proposals developed in Chapter 5 of this book.

In the 21st century, however, ‘depoliticization’ is no longer exclusively about giving sufficient leeway to appointed experts, even if, in the end, it is indeed mostly non-elected experts who populate the boards of APBs. Many of the more recent initiatives of depoliticization indeed have other roots and are inspired by considerations that are more radical. It cannot be overlooked that, somehow, to some people and in an increasing number of contexts, ‘politics’ seems to have become a ‘dirty word’. What is ‘political’ is most likely negotiated in back rooms, done in an

incompetent way or surrounded by scandal and suspicion, the arguments of the sceptics say. This is even so to the extent that it sometimes feels awkward or inappropriate to associate politicians with something as sacred as (representative) democracy.

Nonetheless, there was a time when it was taken for granted in Western politics that democratic government relied on the elected representatives of the people, who were the only authorities entitled to constrain people’s individual freedoms. For the acquisition of these rights, barricades had been raised and (civil) wars had been fought. They were not to be the subject of limitations and compromise unless for very good reasons, in the public interest. Only the representatives of the people, appointed after free and fair elections, could define this public interest and decide on rules, measures and actions to achieve it. In Western societies, people regard it as self-evident that others should respect their liberal rights and that private parties cannot impose obligations on each other without their mutual permission. This power of making unilateral, binding decisions is monopolized by the state, which is ultimately under the supervision of elected government. These assumptions, derived from the political philosophy of thinkers such as Locke and Rousseau, are seldom made explicit. However, when we think of the reasons why we accept state authority in general, we inevitably end up referring to the democratic mandate that we have entrusted our political leaders with. The title ‘representative of the people’ inspires respect and reliability. In any case, it sounds a lot more august than ‘politician’. Nevertheless, it is obvious that all elected representatives are politicians and it is precisely because they have a particular view on a desirable future and development of the polis that they have been elected by their voters. Considering that politics and politicians constitute a representative democracy, the increasing feeling of distrust towards them – in general, as a category – indeed seems peculiar.

Whether the result of rational trade-offs between competing values or of a sheer aversion vis-à-vis all that is labelled ‘political’, depoliticization is a fact for many parts of the administration today. Moreover, it is more than a political reality. In the past decades, it has also had an impact on public law and more precisely on the law of administrative organization. In recent years, many parts of government administration have deliberately been insulated against political influence and this has been translated in their legal status. Autonomy (or ‘independence’) of politicians is increasingly regarded as a ‘quality label’ for public sector institutions. Numerous public organizations that enjoy various degrees of political autonomy have been established and entrusted with often far-reaching powers in order to execute public missions. Not infrequently, they are
responsible for large amounts of public expenditure. These organizations constitute the object of study of this book.

APBs are anything but a recent phenomenon in (Western) Europe. Many of them were established in the years following World War II,\(^2\) when the welfare state made its entrance and the government’s radius of action enlarged. Later, in the 1980s, characterized as an ‘era when the Zeitgeist has been anti-political’,\(^3\) the theories of New Public Management (NPM) resulted in an increase of the number of APBs. Roughly, NPM promoted the idea that rational and efficient management always requires the fulfilment of the same principles and conditions, regardless of whether an entity operates inside or outside the public sphere.\(^4\)

Disaggregation of large administrations and the increase of the responsibility of the top management were among the most important principles of NPM.\(^5\)

Promoted by the proponents of neoliberalism, also referred to by eponyms such as ‘Thatcherism’ or ‘Reaganism’, NPM resulted in ambitious programmes of reorganization. Hierarchy and centrality of government bureaucracies, two key features of the Weberian model, were regarded as the main impediments to administrative efficiency. ‘Hierarchical control, it was argued, has fostered over-centralisation, with time-consuming referral of decisions to more senior levels, reluctance to take risks and insensitivity to local conditions.’\(^6\) The creation of a number of separate (often specialized) units of government and the decrease of detailed, day-to-day political control were deemed the proper remedies. Managers had to be given autonomy and were to be held accountable on the basis of the final results achieved, rather than on grounds relating to their methods, procedures and day-to-day decisions.

The central panacea of these reforms being ‘less government’, it is at first sight surprising that they have stimulated the creation of such a large

\(^2\) See e.g. Luc F M Verhey, ‘British Agencies: Surveying the Quango State’ in Tom Zwart and Luc Verhey (eds), *Agencies in European and Comparative Law* (Intersentia 2003) 19, 22.


\(^6\) ibid 152.
number of administrative bodies. Notwithstanding important liberalization and privatization projects, achieved under the flag of these same politico-economic movements, the public task has hardly diminished compared to some 30 years ago. As society becomes ever more diverse and complex, new tasks and responsibilities emerge for governments. Furthermore, the liberalization of certain economic industries has not made governmental interference superfluous. Old methods of intervention (direct provision) have been replaced by new ones (regulation), so that the net impact of these operations on the size of public responsibility has not always and everywhere been as impressive as one might have expected. Admittedly, one can regard APBs as ‘governments to a lesser degree’, because they function at a certain distance from the political institutions on the one hand and because they are often organized on the basis of models resembling those applied to private businesses on the other hand. The latter is especially true as far as accountability to principals (accountability for results rather than procedures followed or means applied) and the public (a focus on accountability to stakeholders or ‘clients’) is concerned.7 In 1995, a British author described the emergence of what he labelled a ‘skeletal state’.8 In 2002, the Organisation for Economic Co-operation and Development (OECD) observed that, in some countries, ‘agencies, authorities and other government bodies’ accounted for more than half of public expenditure and employed more staff than traditional vertically integrated ministries.9

The two waves of APB creation had in common that they were driven by political preference and strategy. In other words: whether or not to introduce APBs in administrative organization was a political choice; a choice of policy for national Parliaments and Governments. The political rationalities behind the creation of APBs have been diverse: they range from ‘unburdening’ central administrations to ensuring specialization or expertise, allowing for civil society to participate in the boards of APBs or simply insulating a certain task from political interference.

This book, however, discusses a new, contemporary source of APB creation: EU law. It demonstrates how some of the most autonomous national APBs in Europe have been established or have seen their

7 ibid 156.
autonomy increased as a direct consequence of EU legislation. At the same time, however, many European states are precisely reconsidering their past enthusiasm for APBs as proper modes of governance. National Parliaments and Governments are increasingly sceptical about APBs as panaceas for organizational challenges. APBs are being abolished, their autonomy is being curtailed, or their creation or abolishment made subject to rationalization efforts. This is the second trend that is central to the analysis developed in this book.

First things first, however: we have still not defined the notion of an ‘APB’, nor explained the choice of this term, despite the fact that other designations may have been more obvious to describe the phenomenon just sketched.

2. AUTONOMOUS PUBLIC BODIES (APBS): A TERMINOLOGICAL SHIFT AND A WORKING DEFINITION

[What exactly is the ‘idea of agency’, which appears, superficially at least, to have gripped so many governments around the world? Is it, in fact, the same idea or are there several versions all masquerading as ‘agencification’? Or, are we converging only in the rhetoric, describing the changes, or in reality, or in both?]²¹⁰

A. Terminological Chaos

The literature on APBs suffers from terminological chaos, rendering any attempt to clarify the many complex issues that this phenomenon entails more difficult. The chaos is caused by the use of concepts that appear to be well established, but are in fact used in many different meanings and contexts, which are seldom clarified by authors. In its 2002 study on Distributed Public Governance, the OECD expressed its belief that ‘one important reason for the shortcomings of international comparative research in this area lies in the use of ambiguous terminology and the absence of a coherent classification of the variety of organizational forms’.

²¹¹ OECD, Distributed Public Governance 9.
The term ‘agencies’ is undoubtedly the most notorious example of this problematic use of terms. Recent work in the field of public administration adopts a rather broad definition of the notion of ‘government agency’, describing it as an organization that (1) is structurally disaggregated from the government and (2) operates under more businesslike conditions than the government bureaucracy.12

This broad definition, however, is not always reconcilable with existing national legislation, policy and practice. In many legal systems, the term ‘agency’ or its (translated) derivatives are reserved for specific types of APBs. More precisely, the notion is often used to refer to APBs that are still part of a government department and subject to the hierarchical authority of a responsible minister, but nevertheless enjoy a certain degree of operational autonomy. This is, for instance, true for the agencies (agentschappen/agences) at the Belgian federal level, for the Dutch agencies (agentschappen) and for the executive (‘Next Steps’) agencies operating in the UK. Consequently, ‘agency’ is a multi-interpretable and therefore confusing term, which makes it unsuitable for studies with European or comparative ambitions.

All the more problematic are references to specific terms or typologies that originate from a particular legal system. An example is ‘quango’, an acronym that stands for ‘quasi-autonomous non-governmental organization’, which was introduced in UK literature by Barker. The author himself, however, struggled with its precise meaning within the domestic UK context, describing quangos as ‘the many and varied organizations which stand somewhere between the Government Departments, which Ministers control and for which they are formally responsible in every detail to Parliament, and “private society”, however that may be defined’.13 Others have described the concept as ‘a piece of catchy jargon

---


to which it is now impossible to attach any meaning’. Currently, ‘quango’ is often used for the delineation of often comparative studies on APBs subject to minimal supervision (also called ‘independent agencies’) and its use is no longer confined to the political or legal system of the UK.

The terminological chaos extends to adjectives as well. One example is the use of ‘independent’ in ‘independent agency’. Scholten advises against its use and proposes to use ‘autonomous’ instead, explaining that ‘if autonomy can be measured by various degrees, the term “independent” seems to be an overarching notion of a complete absence of any dependence’. According to the author, the adjective ‘independent’ has a connotation of excluding any oversight authority. It seems that literature increasingly reserves the term ‘independent agency’ for those APBs that operate in environments in which neutrality and/or impartiality are highly esteemed values and political interference is regarded as inappropriate. This is typically the case if a government mission relies heavily on (technical) expertise and/or if a task is supervisory in nature and the government itself is subject to that supervision. These rationales indeed tolerate only mild forms of political interference or oversight. Consequently, ‘independent’ refers to a species, instead of the genus.

In sum: there is a need for a new umbrella concept to achieve conceptual clarity in the international and European literature on delegation to public bodies that perform their tasks with a certain degree of autonomy. This book suggests that the term ‘APB’ could fulfil that role of a coordinating concept.


17 ibid 8.

B. A Definition of (the Creation of) ‘APBs’

For the purpose of this study, creating APBs is defined as ‘entrusting entities distinct from the core administration, but with an institutional link with the government apparatus, with government tasks and letting them perform these tasks with a certain degree of autonomy in relation to elected politicians’. This definition deliberately describes the creation of APBs. Chapter 3 will demonstrate that the (written or unwritten) Constitutions of the national legal systems that this book studies typically centralize the whole of executive or administrative tasks and powers in the hands of the Government and its ministers and/or an elected President. In this sense, APBs are not ‘given’, but ‘created’. Many aspects of the analysis developed in this book concern the process of ‘autonomization’ as such, i.e. the process of creating APBs and/or transferring government tasks to them and the choices and options that go hand in hand with that process.

APBs are distinct from the ‘core administration’. They are separate organizational units, even when they are embedded within the departmental structure. This ‘separateness’, however, is hard to define. The notion ‘core administration’ refers to the entirety of civil servants who prepare or execute decisions in central administrative services, rather than having their own decision-making powers. The term APBs, however, includes services within government departments that fit the other constitutive parts of the definition, and especially the requirement of ‘autonomy’.

APBs are either established by (central) government (with or without legislative interference) or have another institutional link with it, which can, for instance, take the form of a share or participation in the APB or its board. Institutional constructions that are located on the thin borderline with privatization, such as the accreditation of private companies to perform certain government tasks, lack such an institutional tie. The same is true for delegation via contracts, such as the concession of public services.

19 The feature of APBs is also named in OECD, Distributed Public Governance, 12.
20 See Allen Schick, ‘Agencies in Search of Principles’ in OECD, Distributed Public Governance 33, 35: ‘[A]gencies are not departments, that is, they are not conglomerations of multiple activities. The typical agency has a single or relatively narrow purpose, and each has substantial operating independence, even if it is still housed within a department.’
21 In Belgium and the Netherlands, for instance, the periodical quality testing of cars is performed by private actors, authorized or certified by the government.
Creating APBs implies a transfer or delegation of a ‘government task’. A ‘government task’ in this context equals a part of the substantive competence of the government. Advisory bodies are not invested with competences and powers allowing them to take responsibility for the execution of a public task. Their products support the decision-making process, which itself is in the hands of the public body that solicits their advice.22 Government or public sector enterprises that perform both commercial and industrial tasks in competition with the private sector and provide public services (being government tasks) only qualify as APBs when they act in the latter quality.

In times where the distinction between the private and the public sector has become blurred, it is, however, increasingly difficult to determine which tasks are ‘governmental’ in nature and which are not. Moreover, the answer to this question is not static, but fluctuates over time.23 Tasks are ‘governmental’ as soon as and as long as a political community treats them as such.24 They are tasks of which the government believes and society accepts that their performance (as well as the conditions under which that performance takes places) can, in principle, not be left to private initiative. EU Member States increasingly undergo the influence of the EU in this regard. Due to the liberalization of the network industries, which will be discussed in Chapter 2, activities such as the management of utilities infrastructure or the operation of transport services are now no longer considered ‘government tasks’. They are, however, subject to regulation, which has created the need for a new type of APB: the independent regulator.

The definition of APBs requires ‘a degree of autonomy’. What defines APBs and their autonomy is that they have their own decision-making powers. This does not necessarily imply coercive powers vis-à-vis legal subjects, nor the ability to create rights and/or obligations. The question whether or not APBs have coercive powers does, however, play a role in the debate on their accountability, central to Chapter 5 of this book.

24 In that sense: M M den Boer, Preadvies verzelfstandiging van bestuurstaken op z’n Hollands (Tjeenk Willink, 1999) 4–9 and 18.
‘Autonomy’ thus implies investment with a proper, distinctive responsibility for a public mission, irrespective of whether the decisions embedded in the performance of that task are subject to political supervision. Even bodies that are subject to forms of traditional, hierarchical political oversight thus qualify as APBs in the sense of the definition, as long as they hold the (initial) decision-making power. From the viewpoint of constitutional law, APBs that are subject to the hierarchical chain of command provoke fewer questions for lawyers than those that are not. Craig, however, warns not to overestimate the differences between these APBs and others in terms of, for instance, problems of (democratic) accountability.25

This book adopts a broad definition of ‘autonomy’, which is perhaps not an obvious choice, even though some have argued for such a wider perspective in the past as well.26 One could also opt for a more narrow approach, excluding entities that are still part of the hierarchical chain of command. An important flaw in many assessments on the creation of APBs and their validity, however, is that the choice is often presented as being only twofold. Either one opts for an entity with a substantial degree of autonomy, often implying that hardly any form of oversight is deemed permissible, or one continues to require a ministerial signature for each and every decision taken. Tertium non datur. Frequently, however, intermediates offer the suitable solution. As long as they are not incorporated into fundamental analyses on the validity of the creation of APBs, such intermediates will not, however, receive consideration. As a result, the choice between centralization and autonomization will remain a monochrome one and legislatures and governments will not be invited to take into account the full range of options. In many European states, the law on administrative organization indeed presents a rich pallet of possibilities to entrust parts of the administration with a degree of political autonomy.

Literature on APBs has put forward various criteria that help to measure a body’s independence or autonomy. Scholten enumerates four

---

26 A 2005 contribution on agencies and non-departmental public bodies (NDPBs) in the UK speaks of ‘an unfortunate schism in relevant public management discourse’, because APBs embedded within the departmental structure (typically called ‘agencies’ in a UK context) and those that operate outside it (NDPBs) are often defined and studied separately: Roger Wettenhall, ‘Agencies and Non-Departmental Public Bodies’ (2005) 7(4) Public Management Review 615, 629.
Introduction

criteria: institutional, personnel, financial and functional independence. Verhoest et al. distinguish managerial, policy, financial and legal autonomy, clarifying that there are ‘no straightforward relationships between these different kinds of autonomy’. Many of these classifications point to specific areas in which APBs may or may not enjoy a degree of operational freedom that complements or reinforces their (decision-making) autonomy. Such a reinforcement can involve the exclusion of certain types of supervision, the provision of constraints regarding the dismissal of staff members, the enactment of rules regarding incompatibilities etc.

The degree to which APBs can exercise their decision-making powers without external interference is often referred to as their ‘functional independence’. Even though a self-contained decision-making power is a necessary but sufficient condition to qualify a body as ‘autonomous’, there are various gradations of functional autonomy. Verhoest et al. define autonomy as ‘the level of decision-making competency (discretion) of an organization’. The types of supervision to which APBs are subject influence their degree of (functional) autonomy: APBs that are subject to forms of hierarchical supervision that allow for their decisions to be substituted are less autonomous than APBs in respect of which such powers have been excluded.

This brings us to perhaps the most characteristic element of the definition proposed in this book: the persons or institutions in relation to whom the functional autonomy of APBs is defined, being elected politicians. In parliamentary or semi-presidential systems and at the highest political level, government ministers, appointed and controlled by Parliament, are the primary institutions in relation to whom the autonomy

of APBs is usually defined. In some cases, however, the autonomy of an APB may also extend to the relationship with Parliament or the assemblies of elected representatives themselves. This book will dedicate much attention to APBs that are set up in order to make the performance of a task immune to political interference as such. In these cases, it is often argued that even Parliament itself cannot or should not interfere in the body’s decision-making process in ways that are considered too intrusive. An alternative perspective regards parliaments as more ‘neutral’ forces, consisting of majorities and oppositions, which would allow for certain control mechanisms to be maintained without compromising a body’s political neutrality. This debate is topical for many bodies that are subject to the trend of ‘EU impulse’ discussed in Chapter 2, such as economic regulators.

Like all definitions, this one has its flaws and does not pretend to be fit for all academic studies. Its general nature nevertheless make it an adequate starting point for future research that wants to adopt a broader view on APBs than most studies – especially legal ones – have done up until now.

3. AUTONOMOUS PUBLIC BODIES IN THE 21ST CENTURY: WHEN LAW TAKES OVER?

Legal scholarship’s attention to the subject of APBs has developed quite slowly. Political scientists have outpaced lawyers in making APBs central to their research agendas, more particularly within the research field of public administration. Especially in the course of the last two decades, this discipline has produced and published an impressive amount of research on the subject of APBs, which easily exceeds that of lawyers. Political scientists have indeed been quasi-monopolists in this field for a long time. Since political science is less bound to national traditions than law, it has been able to generate much international and comparative work.\textsuperscript{31} The relative absence of legal analysis is, however, perceived as a lacuna by scholars in public administration as well.\textsuperscript{32}


Legal research on matters of administrative organization, however, differs from studies in public administration. Whereas most studies in the latter field aim to find out whether a given form of organization is efficient and effective in the light of the goals that it is meant to achieve, lawyers investigate whether it is lawful and legitimate in the light of higher rules and principles. Legal research indeed departs from a set of meta values and fundamental legal principles, which it believes to be guiding precepts for the development of theoretical legal frameworks. These different approaches are nonetheless complementary: only the combination of both perspectives can generate fully fledged frameworks of assessment and evaluation of the APB phenomenon. Many questions with regard to APBs would indeed benefit from a cross-disciplinary view that merges insights. In this book, for instance, considerable attention goes to the reasons why the EU legislature chooses to delegate powers to national APBs (Chapter 2). For that purpose, it strongly relies on literature in the field of political science.

Apart from the desire to contribute to a cross-disciplinary view on APBs, this book also claims scientific relevance from an intra-legal perspective. Since APBs are entrusted with executive tasks, the study of their legal status is usually subsumed under the research field of administrative law. The enormous diversity of entities operating in the administrative landscape nowadays constantly confronts lawyers with the ambiguity of the concepts of ‘government’, ‘executive’ and ‘administration’, which should demarcate the field of administrative law. Legal subjects indeed no longer find themselves in ‘a relationship’ with ‘the government’, but in ‘various relationships’ with ‘several governments’. Studying administrative law in any coherent manner becomes increasingly difficult if disorder and randomness dominate administrative organization. However, the topic of APBs raises many questions for which the answer is located in the field of constitutional law as well, since it relates to the way in which state institutions work. Constitutional law uses fundamental principles, which it interprets and puts into new perspectives, as touchstones for evaluation. In the Netherlands, the study of APBs is subsumed under the ‘law on administrative organization’ (bestuursrecht), which is situated on the crossing of constitutional and administrative law. Halberstam regards the study of independent regulatory agencies, a type of APBs, as an illustration of the

---

33 In the same sense: John Bell, ‘Comparative Administrative Law’ in Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2006) 1259, 1264.
34 Sjoerd E Zijlstra, Bestuurlijk Organisatierecht (Kluwer 2009) 3.
‘constitutional perspective of comparative administrative law’, since ‘it seeks to ground the comparative administrative inquiry in an understanding of comparative constitutional law and, in particular, in an understanding of the constitutional values of public governance’.35

The law on administrative organization is often regarded as ‘neutral’ or value-free, in the sense that it does not have any perceptible, direct impact on citizens. The opposite is true. Chapter 3 will argue, for instance, that the unlimited rise of APBs has contributed to the unrecognizability of the government for legal subjects. The proliferation of APBs has indeed led to administrative opacity, leading to a perception of administrative organization as disordered and chaotic. The greatest threat formed by APBs for the position of citizens in society, however, stems from the fragility of their democratic legitimacy. This is especially so for APBs that enjoy particularly far-reaching degrees of political autonomy, such as independent regulatory authorities (IRAs). As Gilardi and Maggetti point out, the rise of IRAs:

is not an academic curiosity; its consequences are concrete and wide-ranging. The spread of independent regulators means that more and more aspects of our lives are shaped by decisions made by institutions that are not elected and that are not under the direct control of elected officials, which has important implications for the democratic accountability of policy-making.36

There is an increasing consciousness of the fact that administrative organization is not a playground on which governments and political scientists can experiment without worrying about causing damage. Fundamental rules and principles of public law entail certain limits and constraints and do so for compelling reasons. This book aims to raise awareness of these constraints and contribute to the development of a theoretical framework on the legal limits and possibilities that legislatures and governments face when they consider the creation and institutional design of APBs.

The analysis of this book is structured around two distinct trends.


Introduction

A. A Trend of EU Impulse

Above, it was explained that the emergence of APBs in the European legal sphere has originated from the free will of politicians, inspired, of course, by the popularity of theories such as NPM. Today, however, a new source of APB creation is emerging. In an increasing number of policy domains, European (EU) law relies on national ‘independent’ administrative bodies to implement and monitor substantive obligations. EU directives increasingly contain legal obligations to establish APBs at the national level. In these cases, national Parliaments and Governments lose their discretion to decide whether or not to create – or abolish – the APBs in question.

The very fact that the creation of APBs has ceased to be voluntary for national elected politicians in all cases is a novelty with important implications. Traditionally, international and supranational law have declined all interference with national administrative organization, which was regarded as a domain pertaining to the core of a state’s sovereignty. Almost all national APBs that have up until now originated from this trend of ‘EU impulse’ have in common that they perform tasks of supervision or regulation. These bodies are commonly referred to as ‘independent regulators’ or ‘independent supervisors’. They are composed of neutral experts instead of (representatives of) elected politicians, hence the name ‘non-majoritarian institutions’. The autonomy that they are expected to enjoy is quite far reaching.

B. A Trend of ‘National Restraint’ in Member States

This trend of EU law obliging or encouraging Member States to create APBs, however, coincides with a trend of restraint and rationalization at the national level. National parliaments are increasingly becoming aware that the uncurbed rise of APBs in previous decades has not been a neutral phenomenon, free from legal and particularly constitutional implications. The quasi-unlimited establishment of APBs in previous decades has been vehemently criticized from a democratic point of view. In some states, constitutional courts have been asked to rule on the extent to which entrusting government tasks to (certain types of) APBs can be reconciled with fundamental constitutional principles governing administrative organization.

This translates itself into a new approach to the use of APBs in administrative organization. National parliaments are taking initiatives to regain their grip on both the creation and functioning of APBs. Attempting to put a brake on the unlimited rise of APBs, some states
have developed framework legislation, embedding the creations and status of APBs in conditions that respect the higher framework of their Constitutions. Other states have set up large reform operations. The primacy of politics, the political responsibility of the Government and democratic control are leading values or principles in this evolution. These initiatives are inspired by a revaluation of fundamental constitutional principles that limit the discretion of governments and legislatures when modelling administrative organization. In other words: at the national level, elected politicians are being re-appreciated as central players in public administration.

C. APBs and the Law

In sum, the phenomenon of APBs finds itself on the crossroads of two trends or developments, each representing an evolution in an opposite direction. These trends and the tension between them constitute the central theme of this book. Despite their opposite intentions or effects, both of these trends have something important in common: they have strong foundations in law or legal argument. The impulses stemming from EU law imply that, for some APBs, whether or not to grant political autonomy and to what extent is no longer (exclusively) a case of political choice: it has become one of legal obligation. The trend of ‘national restraint’, on the other hand, is built upon and around legal rules and principles. Law and legal discourse indeed increasingly dominate the topic of the creation of APBs.

4. AUTONOMOUS PUBLIC BODIES: THE NEED FOR A FOCUS ON EUROPE

This book focuses on APBs in the European legal sphere. APBs and especially regulatory agencies are often thought of as typically American models of administrative organization. As Christensen and Lægreid put it, ‘the NPM-inspired regulatory model … was once seen as an expression of ‘American exceptionalism’, but this is no longer the case’.37 The fast creation of APBs that characterized European public sector reforms in the 1980s and 1990s was to an important extent inspired by previous developments in the US. The UK, being the (European) motherland of

NPM, has played a significant role in this process of reception. Especially the Thatcher reforms, leading to the development of the British regulatory state, were inspired by US practice. Via the Anglo-Saxon system, the APB fashion\textsuperscript{38} later reached the European mainland. The reception of an American model in a European context has, however, not prevented the Old Continent from developing its own problems, insights and solutions. Political scientists have, for instance, argued that ‘European polities, partly because they are similarly developed and integrated into international and regional economies, face similar functional pressures for delegations to [non-majoritarian institutions]’.\textsuperscript{39}

The constitutional relationship between the different state powers at the central level in the US, moreover, provides an institutional context that is different from the one in which most European legal systems find themselves and entails system-specific problems. From a US perspective, the constitutionality of delegation to APBs in general, and independent regulators in particular, is often questioned from the viewpoint of the separation of powers (checks and balances) doctrine. Delegation of executive power to independent agencies is often perceived as a way for Congress to remove power from the President (especially when the majorities in the Houses pertain to a different party from the President’s), who is designated as the head of the executive by the US Constitution.\textsuperscript{40}

A related question is whether the President, once a rule-making power has been delegated to an agency, has a power of ‘decision’ (i.e. substitution) or is left with (merely) a power of ‘oversight’.\textsuperscript{41}

These tensions are absent in, for instance, the UK, where ‘a combined operation of the political party system and the principle of [collective ministerial responsibility] means that there is no competition between the


\textsuperscript{40} See e.g. Bruce Ackerman, ‘Good-bye, Montesquieu’ in Susan Rose-Ackerman and Peter L. Lindseth (eds), \textit{Comparative Administrative Law} (Edward Elgar Publishing 2010) 128, 131.

\textsuperscript{41} See e.g. Sidney A Shapiro and Richard W Murphy, ‘Eight Things Americans Can’t Figure Out About Controlling Administrative Power’ in Herwig C H Hofmann and Russel L Weaver (eds), \textit{Transatlantic Perspectives on Administrative Law} (Bruylant 2011) 7, 12–14; Peter L. Strauss, ‘Rule-making and the American Constitution’ in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), \textit{The Regulatory State: Constitutional Implications} (Oxford University Press 2010) 50, 60 with references.
executive and Parliament for control of public administration’. Most EU Member States, like the UK, have parliamentary systems. The most notorious exception is the French system, which is semi-presidential. The French Constitution is also characterized by a strong adherence to the separation of powers doctrine. Chapter 3 of this book will demonstrate how this has caused some constitutional questions or concerns regarding APBs to be more pressing in France. However, the French Conseil d’État itself has declared that it has not discerned pressures between the two elected state powers similar to those that have influenced the rise of APBs in the US.

Yet another question embedded in the separation of powers doctrine in the US concerns the extent to which the delegation of rule-making powers to independent regulatory agencies disturbs the balance of powers within the US polity. The President of the US does not have rule-making powers under the Constitution. Nevertheless, the Supreme Court has accepted that Congress delegates such powers to agencies, qualifying these powers as executive and not legislative in nature. In many European systems, the Constitution itself entrusts the executive with rule-making powers. Chapter 3 will demonstrate how the separation of powers doctrine has also raised questions on APBs’ rule-making powers in France. The suggestion, however, is not that these APBs encroach on the powers of the legislature, but that such a delegation conflicts with the Prime Minister’s (and, thus, the central executive’s) rule-making powers. Moreover, upon closer inspection, these concerns appear closely intertwined with democratic arguments.

Chapter 3 will indeed argue that most criticism of APBs in the European legal sphere stems from democratic claims and more precisely from objections about the harm done to the institutions and procedures of representative democracy. Prosser, for instance, ascertains that constitutional concerns about APBs in the UK have been ‘centered on the extent

---

42 Peter Cane, Administrative Law (5th edn, Clarendon 2011) 25.
45 ibid 50.
46 See also Tom Zwart, ‘Independent Regulatory Agencies in the US’ in Tom Zwart and Luc Verhey (eds), Agencies in European and Comparative Law (Intersentia 2003) 3, 14–16 and 17 (comparing the US with legal systems in which political ministerial responsibility is a central value).
of Parliamentary accountability, rather than any inherent restrictions on delegation’, concluding that ‘the US constitutional issues about the relationship of agencies with the executive branch have not arisen in explicitly constitutional form in the UK’.\textsuperscript{47} Contrasting the US to the UK, Oliver, as well, points out that ‘in the UK, lacking any [such] tradition of separation of powers, there are few constitutional or principled objections to independent bodies or ministers being granted rule-making powers in Acts of Parliament, as long as appropriate accountability mechanisms are in place’.\textsuperscript{48}

5. OUTLINE AND OVERVIEW

Chapters 2 and 3 of this book discuss the trends of ‘EU impulse’ and ‘national restraint’ respectively. Chapters 4 and 5 discuss the relationship between these two contemporary trends. At first sight, the trends seem to be conflicting, since EU law and national law seem to be moving in opposite directions. How and to what degree are the obligations anchored in EU law indeed at odds with the rationales behind the trend of ‘Member State restraint’? What are possible avenues for reconciliation? This tension inevitably provokes the somewhat controversial question of whether the EU, which is itself often criticized for lacking democratic legitimacy, is disregarding fundamental democratic principles when imposing these institutional obligations on its Member States. Chapter 6 summarizes the most important findings and draws some general conclusions.

6. METHODOLOGICAL SPECIFICITIES OF THIS BOOK

A. Law as an Evaluative Scientific Discipline

It is often assumed (especially by other academic communities in the humanities or social sciences) that legal scholarship is primarily there to

\textsuperscript{47} Tony Prosser, ‘Models of Economic and Social Regulation’ in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), \textit{The Regulatory State: Constitutional Implications} (Oxford University Press 2010) 34, 34–35.

\textsuperscript{48} Dawn Oliver, ‘Regulation, Democracy and Democratic Oversight in the UK’ in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), \textit{The Regulatory State: Constitutional Implications} (Oxford University Press 2010) 243, 249.
study positive law, i.e. the law ‘as it is’, and is mostly, if not entirely, descriptive in nature. Legal academia is still regarded by many as a discipline that mainly reproduces knowledge. At most, it can shed light on a range of possible interpretations for a given legal norm or concept (i.e. the traditional view of law as a hermeneutic discipline49). Certainly, describing the law, in a systematic way, is one aim of legal scholarship. It is, moreover, a valuable one. The law has become so complex and multifaceted that we need legal scholarship to systemize it, which increases the accessibility of the law.

But legal scholarship serves other goals as well. First, it assists in ‘finding’ or ‘identifying’ law, an activity that necessarily precedes description. In times in which the law consists of a multiplicity of sources and instruments, this constitutes a particular challenge and requires a thorough understanding of the wider structure and systematics of the law.

Secondly, legal scholarship can have an evaluative purpose. But how does one avoid making unscientific value judgements about positive law? A first possible evaluative purpose of legal scholarship is to assess the law as it is on the basis of higher legal rules or principles or even meta values that underlie the legal system.50 In this capacity, legal scholarship acts as a guardian of higher laws and consistency.

Anne Ruth Mackor locates the difference between a subjective evaluation on the one hand and a scientific legal assessment on the other hand in the use of extra-legal versus intra-legal criteria. The latter can result in statements on ‘which norms should be valid in the positive legal order under investigation or [on] what the content of these norms should be’. These evaluative statements, however, refer ‘to the fairly specific and coherent set of intra-legal criteria that allows for a rational reconstruction of the positive legal order as an optimal internally coherent normative system’.51 They can either address the formal (declarative and procedural)


validity of legal norms or the extent to which a norm ‘is consistent with the substantive constraints posed by legal principles and values’. Mackor stresses that ‘these principles and values are legal only when they are documented in legal sources like treaties, the constitution and case law and when they are established in accordance with the criteria of legal interpretation and argumentation acknowledged in that specific positive legal order’.

Legal meta values, such as constitutionalism, the rule of law and democracy and the more specific constitutional principles that are derived from these meta values are the intra-legal criteria that are central to the analysis contained in this book.

**B. A Practice-oriented Approach to Legal Research**

Legal meta values and principles are not the only benchmarks against which positive law can be evaluated. Another important benchmark is practice. Legal research can gauge the societal impact of legal phenomena and mechanisms. Does a statute fulfil the purpose(s) for which it was enacted? Do certain regulations have undesired, unintended or perverse effects? This approach may require the use of social science methods. Van Schiaijk distinguishes between two types of questions that can guide legal scholars in their research and which are both suited to practice-oriented research, which she labels the ‘is this allowed?’ question and the ‘does this work?’ question.

The ‘is this allowed?’ question tests the compatibility of social phenomena with the law. It is related to the activity of a legal practitioner, since it essentially involves solving a ‘case’. For a researcher who uses this type of question, the analysis of the ‘this’ factor in the question, representing the social phenomenon, would imply the use of empirical research. The legal framework against the background of which this phenomenon will be assessed requires the use of traditional legal methods and heuristics. In the ‘does this work?’ question, the ‘this’ factor does not refer to a social phenomenon, but to the law itself. This type of question studies the social effects of a legal arrangement or phenomenon. Empirical research would here be used to test whether the

---

law functions in practice as intended by those who enacted it or in accordance with the expectations of society. This type of question is closely related to research in legal sociology.\(^\text{54}\) Chapters 2 and 5 of this book contain the results of two sets of in-depth interviews that were carried out in order to test certain hypotheses.

\(^{54}\) ibid 96–98.