

## Editorial

Years after Montesquieu has coined his famous doctrine of the *trias politica*, we seem to be living in what one could call the *confusa politica*. It is not so much that the classic institutions have developed and adopted different roles, but that it is mostly unclear what the roles of the different institutions really are. This means that it becomes difficult to assess when the institutions have transgressed their powers and when checks and balances should be in place. This does not mean that there are no checks and balances or that one or more institutions have taken absolute power, but it does implicate a world in which every institution is taking as much power as it can, only to be stopped by another institution that seemingly does the same.

Based on the work of John Locke and a description of the political system of Britain and ancient Rome, Montesquieu's ideal was simple and clear. Separate three powers and vest them in three different institutions. The parliament would have the legislative power, the government would have the executive power and the judiciary would have the judicial power. Such a system was a reaction, among others, to the monarchical system in which all powers were centred in the sole body of the king. He made laws by decree, executed them as head of government and was the highest judge, seeing over the application of rules in specific circumstances. This, obviously, led to abuse of power. The only way to get rid of the king was by killing him, which was indeed a lively practice.

Montesquieu proposed to disentangle these powers and vest them in different institution, so that neither of them could become absolute and transgressions by either one would be sanctioned by the other powers. Parliament was chosen by the people; through it, the people made the laws and policies. The government, the ministers, the police, the provinces and municipalities, executed the rules of parliament. Their principle role was to implement and enforce the rules set by parliament, although there is of course always a margin of appreciation when doing so. Finally, when there was a legal dispute over how a law should or should have been interpreted or implemented, one could go to an independent court. Although this simple ideal model has never been implemented in practice in full, in general, it has been used as a blueprint for institutional design in western democracies. Slowly but surely, however, this has changed.

Parliament, in truth, in most European democracies, hardly makes any law; most laws are drafted by the executive power, and although parliament debates and ultimately validates them, these debates are all too often of marginal importance, as the majority party or coalition normally backs the proposed law. The executive power is still in the hands of government, but increasingly, special police units, intelligence agencies and the military are involved in executing and enforcing the laws. These institutions

fall mostly outside the law or are at the border of the legal realm. In addition, the bureaucracy has often been called the fourth power; civil servants, again, are not, or only indirectly, subject to parliamentary control. Parliamentarians, instead of focussing on the public interest and developing general rules and policies, are focussed increasingly on how laws are applied in concrete circumstances, and speak out to the media when incidents occur. Ultimately, they often adopt the role of the judge, making statements about how laws should be applied and interpreted in particular circumstances. Finally, the judiciary is increasingly acting as a pseudo-law-maker. Filling gaps in obsolete rules, imposing duties on law-makers to adopt certain provisions or interpreting laws and policies in a way never envisaged by the legislative power. The concrete interpretation and implementation of the laws in practice is often left to the executive power, because it is granted a large margin of appreciation.

A similar state of affairs can be seen on a transnational European level. The Council of Europe has no executive branch, but relies on national governments to implement the rules of the Council of Europe. Representatives of governments can adopt recommendations and conventions, but the most important institution is the European Court of Human Rights (ECtHR), which oversees the European Convention on Human Rights (ECHR). As is well known, it not only issues cases on the correct interpretation of the Convention, it actually makes the law; it has interpreted, for example, Article 8 ECHR (the right to privacy) in a way that was not in any way envisaged by the authors of the Convention. In addition, the ECtHR is increasingly willing to annul national laws when it disagrees with the moral assumptions of a law or because it finds that laws do not abide by the principle of 'conventionality'. There are little means to set boundaries to the power of the ECtHR at a European level, although a number of national states have made it a habit to simply ignore the rulings of the Court.

Within the EU, the power structure is even more complex. The European Commission as the executive power takes the lead in much of the law-making. The European Council's primary goal seems to be to limit the realm and authority of the European Union, while the Commission is pushing at the exact opposite direction. The rules are primarily executed by the much famed EU bureaucracy, with institution such as the European Central Bank, European Committee of the Regions and European Economic and Social Committee. The Court of Justice of the EU (CJEU), although for years remaining at the background, has taken an increasingly activist stance, annulling laws, rules and regulations in, inter alia, *Digital Rights Ireland*, *Schrems* and its recent judgment, in which it meticulously sets out what should and should not be in an agreement on the transfer of Passenger Name Record data from the European Union to Canada.

The essence of *confusa politica* is not that one or the other power dominates, but that the powers and the roles of the different institutions are highly unstable. There are no clear boundaries or informal arrangements, there is a constant power play. There is no equilibrium between three clear and distinct powers, there is a myriad of different institutions trying to gain power and push their own agenda. Where Montesquieu feared the centration of all powers in one body, the Monarch, we now face an extremely

sparse and decentralised distribution of power, which has disadvantages of its own. The advantage is that there is no body that can constantly abuse its power or overshadow the others' powers; the disadvantage of is that all bodies are constantly adopting multiple roles and used multiple powers. Both the ECtHR and the CJEU are increasingly law-making bodies, but of course still maintain the power to rule on the concrete interpretation and implementation of laws. Parliamentarians are increasingly taking the place of the judge, but can, if they want, also take the lead in the legislative process. The executive power is often responsible for drafting new laws, but is also the formal executive power, the military and intelligence agencies are increasingly involved with executing laws and policies, etc, etc, etc.

Privacy and data protection seem to be fields in which this new legal-political reality is especially prominent, but it is obviously part of a wider trend. It is necessary to re-think the political realm not in terms of stable arrangements, not by coining a fourth or fifth power alongside the classic three, not by reformulating the separation of power, but by seeing that there is a constant instable political arrangement, with a myriad of powers and institutions, who are not separated in power, but interrelated and dependent on each other: the inseparability of powers. What this will mean for the future of (privacy) regulation remains to be seen.

The future of privacy regulation is also the topic of this edition of the European Data Protection Law Review (EDPL). We are proud to present our yearly Young Scholars Award edition, for which we invite Master and PhD students to submit articles on topics relating to European privacy and data protection law. From all the submissions received, ten were selected for evaluation by a jury of three reviewers. They selected the five best papers to be published in this edition of EDPL. The authors of the best three papers have an opportunity to present their work in a special Young Scholars Award session, hosted by Lexxion at the Computers, Privacy and Data Protection (CPDP) conference on 25 January 2018, Brussels. The author of the best paper will get the Young Scholars Award, to be announced at CPDP.

The five best papers, listed in alphabetical order are by: *Eike Graf*, who has written a beautiful and interesting paper on the neo-republican approach to privacy regulation. Taking a more theoretical approach, Eike discusses how a new approach to privacy could ameliorate the current legal regime. *Zarine Kharazian* writes about the political reality in France. Zarine shows with great eye for detail and sharp pen how the right to be forgotten has been used in France as a political instrument to break the hegemony of the United States. *Anne-Laure Philouze* explains with force and rigour the topic of the legitimacy of the data transfer between the EU and the US. Anne-Laure examines the sustainability of the new adequacy decision. *Merle Temme* discusses the theme of algorithmic transparency in light of the GDPR, a theme about which academics will write for years to come. Merle provides an in-depth analysis and suggests that the GDPR does not sufficiently address special features of automatic decision-making that render automatic decision making different from human decision-making. Finally, *Atanas Yordanov* analyses the topic of the Data Protection Impact Assessment, a top-

ic that has been discussed in EDPL a number of times. Atanas lays down a praiseworthy proposal for an ideal process for such an impact assessment.

We are also honoured to feature forewords by two of the most renowned Canadian privacy experts: *Jacquelyn Burkell* and *Valerie Steeves*. They provide their perspective on the future of privacy. Jacquelyn suggests that we are again forced to define anew the nature and extent of privacy protection in light of technological and social changes. Valerie argues that when doing so, we should remember that privacy is by definition a commitment to the human over the technical. Placing privacy at the heart of the socio-technical systems ensures that we build a future where people can thrive.

As always, special mention should be made of the Reports section led by Mark Cole, which is one of the reasons that EDPL is the leading data protection journal in the world. We continue our GDPR Implementation Series with reports from the UK, written by *Lorna Woods*, and Poland, penned by *Anna Kobylańska* and *Marcin Lewoszewski*. In addition, there is a report on the first annual review of the Privacy Shield agreement by *Sebastian Klein*, *Oliva Tambou* has written about the French Antiterrorism Law, *Tobias Raab* explains a recent court decision in Germany, and *Julian Wagner* and *Normann Witzleb* discuss the concept of ‘personal information’ in Australia. Finally, in the Practitioner’s Corner, *Vanessa Franssen* has contributed a report on the Belgian Internet Investigatory Powers Act.

In the Case Notes section, led by Maja Brkan and Tijmen Wisman, we have three evaluations of important judgments by the ECtHR and the US Supreme Court. *Caroline Calomme* discusses the *Bărbulescu v Romania* judgment, *Jenneke Evers* explains the case of *Vukota-Bojić v Switzerland* judgment, both by the European Court of Human Rights, and *Alan Butler* introduces the reader to the *Packingham v North Carolina* case by the US Supreme Court. Finally, in the Book Reviews section, led by Alessandro Mantelero, *Lorenzo Dalla Corte* has written a powerful review of Greenleaf’s book on Asian Data Privacy Laws and *Milda Macenaite* reports on the book by Brkan and Psychogiopoulou on Courts, Privacy and Data Protection in the Digital Environment.

For those interested in contributing articles, reports, case notes or book reviews to the EDPL, please contact our executive editor Nelly Stratieva at <stratieva@lexxion.eu>. Below the deadlines for submitting contributions:

- Issue 1/2018: 1 January 2018;
- Issue 2/2018: 1 April 2018;
- Issue 3/2018: 15 July 2018;
- Issue 4/2018: 1 October 2018.

I hope you enjoy reading this edition of the European Data Protection Law Review!

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