SEPARATION OF POWERS AND SEMIOTIC PROCESSES

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ABSTRACT

In this paper we will discuss the relations between the doctrine of the separation of powers and processes of semiosis. On the basis of an example of constitutional change in the Netherlands (1983), we shall try to illustrate the usefulness of semiotics for legal and political science. The lesson semiotics teaches us is that we must not try to exclude ambiguity and processes of change from the basic structure of political society, but that we need to incorporate them and try to deal with them rationally.

The change in the Dutch constitution can be interpreted as a change from a Kantian model of separation of powers to a concept that results in a system of checks and balances. Before 1983, the separation of powers was based on a separation of branches and the superiority of the legislative branch; notions in accordance with the Kantian conception of separation of powers. After 1983, the separation of powers has been based on a separation of functions and a declining power of the legislative branch; notions closer to the conception of checks and balances as expressed by the American federalists (the Madisonian model). These changes can be made intelligible by reconstructing the theories of meaning underlying both concepts. It goes without saying that this reconstruction must not be understood in an empirical, psychological sense, as if the drafters of the constitution were actually aware of the theory of meaning underlying both conceptions. Neither do we intend to say that the drafters consciously designed the constitution following the examples of Kant and Madison. What we are trying to do is to reconstruct both the conceptual models underlying the successive constitutions and the theories of meaning implicit in these models in a rational way, by means of ideal types.

The theory of meaning underlying the Kantian concept expresses the idea of fixed meaning of statutes, guaranteeing a strict separation of powers as well as the superiority of the legislative branch. Semiotics however, challenges this theory of meaning by demonstrating the fundamentally changeable and ambiguous character of all signs (including words). The conception of checks and balances can be seen as a realistic alternative to the Kantian model. It incorporates the ideas of change and ambiguity and offers possibilities to deal with these phenomena rationally.

SEPARATION OF POWERS

Liberal-democratic political theory is a normative theory (theory of justice) on the requirements the basic structure of a political society should meet. Its object is the traditional tension, resulting from the fact that human beings are both distinct individuals and part of social classes and groups. Specifically it aims at the realization of individual freedom. An important means in order to achieve that goal is the design of a legal state ("rechtstaat"), which can, to a certain extent, be interpreted as the constitutional translation of liberal-democratic political theory. The idea of the legal state stands for two requirements concerning the structure of the relations between citizens and their government. First of all in a legal state governmental actions ought to be based on law. This is the principle of the rule of law. Secondly (and strongly related to the rule of law), powers ought to be divided between several power-holders. This is the principle of the separation of powers.

In this paper we concentrate on the second principle, but it should be quite clear that it cannot be analyzed without being aware of its connection to the first. The idea of the separation of powers is primarily concerned with legal powers. In this first paragraph we will analyze the concept of separation of powers by looking at its three analytical parts: the legal nature, the constitution of different types of legal power and the separation of those types of legal power. However, before doing this we will go back to the original meaning of the idea of the separation of powers and create two ideal types for using (interpreting) the original idea.
1. **CLASSICAL DOCTRINE**

The idea of the separation of powers is traditionally linked with the work of Montesquieu. As every so often in scientific discourse it is not quite true to think of only one person as the sole inventor of a theoretical framework. The insights Montesquieu refers to were already known from the work of e.g. John Locke. However, Montesquieu's work is important in two ways. Firstly, he was able to develop a system of concepts with which it was possible to think of political power as a kind of power within specific boundaries. Secondly, he used his concepts to describe the political system of a super-power such as Great Britain, by which it became clear that limited government is not only an ideal, but also quite realistic.

Montesquieu's framework is simple (figure 1). He distinguishes between the four functions of government: legislation, execution, "prerogatives" and administration of justice. Each function should be executed by a specific body. The executive and "prerogative" function must be performed jointly, because they both refer to the same sort of activities. This means that, in order to realize the ideal of limited government ("political liberty"), every government should be divided into three branches: a legislative body, an executive body and a judiciary.

**FIGURE 1. SEPARATION OF POWERS**

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<thead>
<tr>
<th>BRANCHES</th>
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<th>EXECUTION</th>
<th>ADMINISTRATION OF JUSTICE</th>
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The coherent and realistic conceptual framework of Montesquieu was widely accepted as an instrument in the struggle against despotism. On the European continent it became an unavoidable theme since Kant accepted it as the hard core of his theory of the state.

1.1 **KANT**

With regard to its impact the importance of Kant's use of Montesquieu's theory cannot be underestimated. He introduces it like this:

"Ein Staat (civitas) ist die Vereinigung einer menge von Menschen unter Rechtsgesetzen. So fern diese als Gesetze a priori notwendig, d.i. aus Begriffen des äusseren Rechts überhaupt von selbst folgend, (nicht statutarisch) sind, ist seine Form die Form eines Staats überhaupt, d.i. der Staat in der Idee, wie er nach reinen Rechtsprincipien sein soll, welche jeder wirklichen Vereinigung zu einem gemeinsen Wesen (also im Inneren) zur Richtschnur (norma) diert.

Ein jeder Staat enthält drei Gewalten in sich, d.i. den allgemein vereinigten Willen in dreifacher Person (trias politica): die Herschergewalt (Souveränität) in der des Gesetzgebers, der vollziehende Gewalt in der des Regierers (zu Folge dem Gesetz) und die rechtsprechende Gewalt (als Zuerkennung des Seinen eines jeden nach dem Gesetz) in der Person des Richters (potestas legislatoria, rectoria et judiciaria) gleich den drie Sätzen in einem praktischen Verhandlungs: dem Obersatz, der das Gesetz jenes Willens, dem Untersatz, der das Gebot des Verfahrens nach dem Gesetz, d.i. das Princip der Subsumtion unter denselben, und den Schlussatz, der den Rechtspruch (die Gesetz) enthält, was im vorkommenden Falle Rechens ist."6

This lengthy quote shows first of all the way Kant introduces the "trias politica" in the context of the state as it ought to be, while Montesquieu primarily used the theory in a descriptive way. Secondly, he relates the work of Montesquieu with Rousseau's concept of the general will: individual citizens enter into the contract that in future they will submit themselves to the will of the majority of the members of the political society. Thirdly he relates the model to deduction as a method of inquiry. The legislative branch provides the general rule and the other branches, each in the framework of their specific function, apply the general rule to specific cases.

Kant's view dominated the theory of the legal state ("Rechtsstaat") as it developed in the last two centuries. As such it also determined the text and structure of the Dutch written constitution until 1983. This legal document was divided into chapters of which three had the names of the three branches of government as their heading. These three chapters were seen as the core of the document. In 1983 a revised version of the constitution came into force. It is not the legislative, executive
and judicial branches that make up the structure of that constitution, but the legislative, executive and judicial functions. This shift from branches to functions is important and not just a superficial, technical change in the document.

In order to understand the nature of the shift it is useful to look at an alternative way of interpreting Montesquieu's conceptual framework. For that purpose we may go to the constitution of the United States of America, as it was discussed in the Federalist Papers.9

1.2. THE FEDERALIST PAPERS

The Federalist Papers are a collection of eighty-five contributions to New York City newspapers. They were published with intervals from October 1787 until August 1788 and written by Alexander Hamilton (1755-1804), James Madison (1751-1836), and John Jay (1745-1829), as reflections on and justifications of the constitution, that came into force in 1787.

In one of his contributions Madison refers to the work of Montesquieu, agreeing with him in his idea that the accumulation of power in one branch of government would result in despotism. This leads him to reject the British system of representative democracy, the system of parliamentary sovereignty. According to Dicey this principle of the sovereignty of parliament implies three doctrines: (a) Parliament has the right to make or unmake any law whatever. (b) No person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament. (c) The right or power of Parliament extends to every part of the Queen's dominions.9

According to Madison a system of parliamentary sovereignty is a threat to the individual freedom of the citizens, because it makes legislative power the superior force in the state. Four institutional measures are thought to be necessary in order to prevent a system of democratic despotism from arising: a federal system of government, democratic legitimation for all branches of government, recruitment of representatives from the "moral community" (Fuller) or moral elite and statutory review by the judiciary. Apart from the elitist thoughts on representation, the most important shift in the idea of separation of powers here is that Madison scatters the simple structure as we have seen in figure 1. The theory becomes what Vile calls a theory of mixed government. The concept refers to a complex system of checks and balances:

"The theory of mixed government was based upon the belief that the major interests in society must be allowed to take part jointly in the functions of government, so preventing any one interest from being able to impose its will upon the others, whereas the theory of the separation of powers, in its pure form, divides the functions of government amongst the parts of the government and restricts each of them to the exercise of its appropriate function."10

It is important to note that Madison (as one of the authors of The Federalist Papers) does not incorporate the democratic ideas of Rousseau into his theoretical framework but goes around them in order to secure the more fundamental values that make up individual freedom. This is why the work of Madison is often related to the idea of natural rights as implied by Locke's theory of consent.11 Consequently there is a fundamental difference in looking at governance between Madison and Kant: the latter conceives governance as the activity of a superior organism in the state, while the first sees governance as the public sphere of the social realm of private persons living together. In the public sphere various actors play their separate roles, without assuming a hierarchical relationship between them.12

1.3 IDEAL TYPES

Our assumption that the idea of the separation of powers refers primarily to legal powers, means (as announced in the introduction to this paragraph) that the concept consists of three analytical parts: legal, powers and the separation of those powers. In order to achieve a clear picture of the difference between the Madisonian and the Kantian interpretation of the separation of powers it is important to distinguish between these three parts.

In the Kantian tradition the legal relations between the various branches of government are primarily determined by the sovereign, the legislative branch. This means that the legislator determines the content of the legal system. Law is positive law: "Die Normen einer Rechtsordnung müssen durch einen besonderen Setzungsakt erzeugt werden."13 The "Setzungsakt" or declaration can only be legitimately performed by the legislative branch of government. Thus Kant takes a more restrictive view on law than Montesquieu.
Montesquieu accepted the "prerogative" as a natural part of the executive branch: there are certain powers of the King that cannot be infringed upon by parliament.

Madison was concerned with a republican system of government. "Prerogatives" in the monarchical sense of the word did not fit in. On the other hand Madison seems to recognize the possibility that law is more than just statutory law. This insight is an assumption of the dynamic system he creates, by putting different branches in the context of mixed or balanced government. For every branch has a special kind of responsibility for the execution of its function and this may go further than just doing what the legislative branch orders them to do. The scope of law is wider than the wording of a statute suggests.

Legal powers are powers of a special kind. They are powers within the context of the law; powers to create legal facts. Within the Kantian framework the abilities to create norms are provided by the legislative branch. Consequently, law becomes a hierarchy of norms. The norm that provides validity for another norm is relatively "higher" than the latter. This, however, introduces the question of the boundaries of the legal system. Kelsen puts it like this:

"Aber die Suche nach dem Geltungsgrund einer Norm kann nicht, wie die Suche nach der Ursache einer Wirkung, ins Endlose gehen. Sie muss bei einer Norm enden, die als letzte, höchste vorausgesetzt wird. Als höchste Norm muss sie vorausgesetzt sein, deren Kompetenz auf einer noch höheren Norm abgeleitet, der Grund ihrer Geltung nicht mehr in Frage gestellt werden. Eine solche als höchste vorausgesetzte Norm wird als Grundnorm bezeichnet."

The system of law in the Kantian tradition is for a large part static, that is grounded on a "Grundnorm" or basic norm. The Madisonian tradition, on the other hand, is primarily based on a dynamic concept of law. The dynamics result mainly from the important role of the judiciary in the system and the primacy of case law over statutory law.

Legal powers refer to an agent, to what the agent is able to do and to the way in which the agent is able to execute its ability. The separation of legal powers may be based on each of these parts. As we have seen in an earlier part of this paper, separation is traditionally based on the autonomy of agents, on the basis of the type of their abilities. There is or ought to be a separation between a legislative, executive and judicial branch of government. The difference between the Kantian and the Madisonian tradition is that the former does not provide a procedure by which the legislative branch may be controlled, whereas the latter does.

1.4 CONCLUSIONS

In this paragraph we have drawn a succinct picture of the idea of separation of powers. We have seen that the Dutch constitution until 1983 was based on a Kantian interpretation of Montesquieu's Trias Politica. We can now conclude that the change in 1983 towards a functional approach to the separation of powers may be interpreted as a shift from a Kantian interpretation of the Trias to a Madisonian interpretation. In paragraph 2 we will try to make this shift intelligible, using the concepts of semiotics in order to show a fundamental tension in the Kantian concept. In paragraph 3 we will, again from the standpoint of semiotics, evaluate the Madisonian concept of checks and balances.

2. TENSION IN THE KANTIAN CONCEPT

How can we understand the shift in text and structure of the Dutch constitution in 1983? If we look at the Kantian concept of the legal state it becomes clear that this classical constitutional framework refers to the separation of powers. This concept leads to a constitutional design in which three branches of government are involved in one single process, the expression and execution of the will of the people. The role of the legislative body in this process is the enactment of general and abstract rules, whereas the role of the administration and the judiciary is restricted to the application of these rules to individual cases (figure 2).

FIGURE 2: LEGAL PROCESS

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legislative → general rule → administrative process → individual decision (concrete norm)
|                   |                              |
|                   | judicial process              |
|                   | individual decision (concrete norm) |
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The passive role of the executive and judicial branch was never actually realized in existing constitutional systems. Especially with the unfolding of the welfare state the administration and the judiciary acquired discretionary powers. These empirical arguments, however, cannot serve as an explanation of the shift that took place in the Dutch constitution. Given the logical gap between 'Is' and 'Ought', one could argue in favour of changes that would make the facts fit to the norms. Therefore we will have to demonstrate that the shift from the Kantian model is not the consequence of mere empirical developments, but results from a fundamental tension within the Kantian concept itself.

The core of the Kantian model is that statutes are viewed as a means of expressing an authoritative meaning. It is presupposed that statutes have the same meaning for both the branches of government and the citizens. No modifications or alterations of that meaning should or must take place. If such modifications or alterations do occur this means that there is a problem which has to be solved in accordance with the idea of the primacy of the legislator.

Any challenge of this presupposition would destroy the Kantian concept. It is necessary, therefore, to reflect on the possibilities and impossibilities of a fixation of the meaning of law. In order to be able to do so, we shall now turn to the semiotics of Charles Sanders Peirce.

2.1 SEMIOTICS

One of the questions dealt with in the work of Peirce is how we constitute the meaning of the world we live in. He argues that we can only know the external world through (a system of) signs, defined as:

"something which stands to somebody for something in some respect or capacity. It creates another sign, the interpretant. The sign stands for something, its object in reference to some idea, the ground."15

A sign has three functions: representation, relation and quality. It is a sign to some thought which interprets it, a sign for some object to which in that thought it is equivalent and it is a sign in some respect or quality.16 The three functions (correlates) of a sign match with the three general modes of being that Peirce distinguishes: law (thirdness), actual fact (secondness) and possibility (firstness).

This means that an object is represented by a sign with regard to a so called ground or quality. A sign is not an objective mental representation for this would imply that the object has a definite meaning. Peirce rejects the idea that the external world manifests itself as a meaningful structure to a passive observer. Meaning is created in the process of semiosis: the constitution of meaning by way of interplay between object, sign and interpretant. Whereas the object is represented by the sign (in some respect and for somebody), the meaning of the sign itself is expressed by another sign, its interpretant. As little as the sign is a neutral representation of the object, the interpretant is a sign that simply copies the former sign. The interpretant will in some way or other interpret and develop the sign it is connected to. Object, sign and interpretant interrelate in a dynamic way. Objects can only be known through signs, signs will always be developed by interpretants, the latter being signs in their turn. As the interpretant is itself a sign, it can be explicated by yet another sign developing the interpretant etcetera. This process of semiosis goes on until we reach the so called ultimate or final interpretant. The ultimate interpretant Peirce calls a habit or a habit-change17:

"It can be proved that the only mental effect that can be so produced and that is not a sign but is of general application is a habit-change; meaning by a habit change a modification of a person's tendency towards action [...]"18

The quote shows that Peirce's semiotics are essentially a philosophy of action. The interrelationship between (conceivable) action and meaning marks the difference between Peirce's philosophy and other philosophies of knowledge. Being closely related to action, the meaning of a sign (like the words of the legislator) is ambiguous and capable of change. It would nevertheless be a mistake to conclude from this ambiguous and changeable character of signs (words) that the constitution of meaning is arbitrary.19 Although signs lack an unchangeable basis, they can not be changed at ones own discretion (see also section 2.4). To the very concept of a sign belongs the idea of consistency. Peirce again:

"Consistency belongs to every sign, so far as it is a sign; and therefore every sign, since it signifies primarily that it is a sign, signifies its own consistency."20
Let us try to understand this phrase by looking at legal reasoning. An example is the meaning of the word "King" in Dutch constitutional history, e.g. in the provision "Executionary power is vested in the King" (art. 46 Constitution 1972). In the successive constitutions since 1813 the word referred to the man who was asked to be the sovereign leader of Dutch political society: William the first, or descendants of this person. A King or sovereign possessed all legal powers that were not explicitly endowed to other agents. Owing to an increase in the political power of parliament the position of the King changed: in the parliamentary system legal powers became related to responsibilities. The agent who exercises legal powers can be held responsible by parliament. This however does not fit with the idea of sovereignty. Consequently the word "King" in the constitution was reinterpreted: it no longer referred to the King as a person, but to this agent and the ministers in the cabinet (government).

The meaning of the word "King" and the sentence in which it was used changed, but it changed in a consistent way. This consistency is of little surprise when the behavioral background of semiosis is kept in mind. The final interpretant of the sign is a habit-change, a change in the way of dealing with the world. These habits are relatively stable and therefore cannot be changed at random, but only by turning back to the sign system and the other habits that exist at a certain point of time.

The example of the meaning of the word "King" in Dutch constitutional history does not only provide us with an idea of coherence. It also teaches us that the concept of a habit as an interpretant has a specific meaning in constitutional law. In a legal state, habits are formed within a specific prestructured by legal or constitutive rules (see par. 1). The classical form of a constitutive rule is: "X counts as Y in context C" [21]. A violation of a constitutive rule results in a failure of the intended action (e.g. an invalid enactment of rules). Constitutive rules do not just regulate existing forms of behaviour; they create a context in which certain acts have institutional meaning (like marriage, purchase, enactment).

The importance of constitutive rules for the creation of meaning can hardly be overestimated. Agents will interpret each others actions and gestures according to existing constitutive rules (and by doing so also develop these rules themselves). The constitutive rules serve as a conceptual scheme relating the subsequent phases of the social act.

This way of expressing the importance of constitutive rules is related to the work of George Herbert Mead, one of Peirce's successors, on institutions. Mead writes:

"The institution represents a common response on the part of all members of the community to a particular situation. This common response is one which, of course, varies with the character of the individual." [22]

In this frame of reference meaning is related to three elements:

- gesture of organism A, directed at organism B (e.g. an enactment of a statute);
- adjusting gesture of organism B (e.g. rule following behaviour);
- social act in which both gestures are embedded (e.g. valid law).

In semiotic terms we can say that the gesture of A becomes an actual sign for B against the background of the institution 'law', having as its interpretant the conception of the possible adjusting responses of B. For the social act to succeed, A and B must reciprocally conceive of each other's gesture as having the same meaning (within the same social act).

The foregoing provides a better insight into the meaning of the remarks made before, concerning the consistency of the sign. On the basis of Peirce's semiotics we are able to understand both the stability and the changeability of the meaning of signs. It shows the impossibility of fixing the meaning of signs (see par. 2.3) for signs are always interpreted further by other signs. On the other hand it shows that signs are not fully arbitrary but rest on ways of dealing with the world, on habits (institutions). Change always takes place against the background of stability.

2.3 FIXATION OF BELIEF

We noted that semiosis is ultimately founded on a habit. Closely related to the idea of a habit is Peirce's notion of (individual or collective) "belief": the ideas upon which man is prepared to act. [23] Habits are not mere responses to stimuli, but founded on (common) ideas, beliefs. The process of semiosis is directed towards establishing these beliefs in order to reduce uncertainty and doubt. According to Peirce, belief and doubt are the fundamental existential states under which man has to
live. Belief is the positive pole; it is the "calm and satisfactory state which we do not wish to avoid". It guides our desires and shapes our actions. Belief is the kind of - often implicit - background-knowledge that enables us to develop patterned modes of reactions in certain circumstances. In this indirect way it is linked to action (habits). Doubt, on the contrary, is the "uneasy and dissatisfied state from which we struggle to free ourselves and pass into a state of belief". Doubt motivates action in a direct manner: an actor in a state of doubt will start an inquiry in order to free himself from the confusing situation of doubt.

Peirce distinguishes four methods for arriving at and fixing the satisfactory state of belief: the method of tenacity, the method of authority, the method of a priori knowledge, and scientific method. The aim of our inquiry does not make it necessary to elaborate on all methods. We will therefore concentrate on those which are directly relevant to our problem: the method of authority and scientific method.

The method of authority aims at the protection of the pure doctrine. Deviant behaviour and opposition should be driven out by special institutions (like the inquisition), which also instruct the people and keep the subjects ignorant of other opinions and doctrines. This method of authority gives rise to impressive results (as for example the Saint-Peter in Rome shows), but it only works within a relatively isolated group. As soon as belief is fixed by way of authority an unexpected experience becomes a threat.

The scientific method is also called the rational method or the method of self-control. Its essence is the notion of fallibility, the possibility of learning from our experiences. Its strength is the combination of experience and reasoning, that enables us to deal with frustrated expectations and beliefs. Whereas in the method of authority disappointments are dangerous and can only be dealt with by neglecting the facts, the method of self-control makes it possible to move rationally from one belief to another. The scientific method combines three forms of reasoning: abduction (firstness), deduction (secondness) and induction (thirdness). The inquiry in which these three forms of reasoning are involved starts with an unexpected experience C, that violates the beliefs of the agents. This surprising event is mysterious and brings forth a state of doubt. In order to escape from this doubt, we try to make the event a matter of course by introducing an explaining rule A. Introduction of the rule is the first step in the process of reasoning and is called abduction. Peirce:

- The surprising fact C is observed;
- But if A were true, C would be a matter of course;
- Hence, there is reason to suspect that A is true.

It should be kept in mind that the outcome of abduction is a hypothesis that might be true. Abduction can only give plausible outcomes but can never secure their truth.

The next step in reasoning consists of inferring all conceivable practical consequences of the explaining rule. On the basis of this deduction we formulate our expectations concerning the world. The explaining rule functions as a belief that gives rise to several expectations regarding the conceivable practical consequences of it.

The final step of the inquiry is the verification of the real existence of the conceivable consequences of A. If unexpected events keep happening, our belief is frustrated again. In that case we are back at the first stage of inquiry: the effort to formulate an explaining rule that makes the surprising event a matter of course. It is this circularity that ensures the rationality of the scientific method for it enables us to correct ourselves on the basis of experience and reasoning.

2.5 CONCLUSIONS

In this section we have tried to explain the change in the Dutch constitution, using the concepts of semiotics. We have elaborated upon the tension within the Kantian model resulting from the emphasis on the supremacy of meaning imputed to statutes by the legislator on the one hand and separation of powers on the other hand. This tension can only be solved if the legislator fixes the meaning of statutory provisions.

The Kantian idea of fixation of meaning is closely related to one of Peirce's methods of fixation of belief, the method of authority. Both aim at preventing individuals so that they behave as rational, self-controlling agents. This resemblance implies that the Kantian model suffers from the same inadequacies as the method of authority. In an open and fast changing society it is impossible for a legislator to control the relevant beliefs and the meaning that is given to statutory
provisions. The Kantian presupposition is untenable and the tension in the Kantian concept is unsolvable within the context of Dutch political society. The change in the Dutch constitution can be made intelligible by means of semiotics.

3. SEMIOTIC PROCESSES AND GOVERNANCE: THE MADISON CONCEPT

In this paper we specifically look for a way to make the change in the text and structure of the Dutch (written) constitution in 1983 intelligible, in that way demonstrating the usefulness of semiotics for the theory of (constitutional) law. Until 1983 the constitution was based on a Kantian interpretation of Montesquieu's principle of separation of powers. We have now concluded that the Kantian model is inadequate.

An alternative way of interpreting Montesquieu's principle is found in the work of Madison (par. 1.3). By turning from Kant to the Madisonian model we must answer the question of whether this model is an acceptable alternative from the perspective of the semiotics of Charles Sanders Peirce. Can the Madisonian concept overcome the problems attached to that of Kant?

Comparing the Kantian and the Madisonian framework one comes to realize that both have a lot in common. We are not talking about two different worlds. Both are of a liberal-democratic nature, i.e. manifestations of a normative theory on the requirements that the basic structure of a political society should meet if it aims at the realization of individual freedom. The main difference between the two frameworks is that Kant looks at governance as the activity of a superior agent in the state and designs a constitution that reflects this view, while Madison sees governance as the execution of public duties in the social realm by essentially equal agents and looks for constitutional measures reflecting this perspective. Madison rejects the idea of parliamentary sovereignty and suggests institutional measures which protect the system against despotism: a federal system of government, democratic legitimation for all branches of government, recruitment of representatives from the elite and statutory review by the judiciary. In its effect these measures result in a system of checks and balances. If we relate the central ideas behind this system to Peirce's two methods for arriving at and fixing the satisfactory state of belief - the method of authority and the scientific method - all signs refer to the scientific method as the one that grounds the theory of checks and balances.

In the Madisonian model the role of the judicial branch is essential. The judicial branch has the power to correct the legislative branch as far as it concerns the fundamental rights of the people. This does not mean that the judiciary is able to dictate what should be law. It just means that it has the power to say what is in accordance with fundamental law. The judiciary can neither act as a legislator nor ignore its constitutive role in the formulation of legal rules. One of the highlights of the legal and political debate in the United States at this moment concerns precisely this role of the judiciary. Owing to the fact that the Constitutional Court developed some guidelines for federal legislation on abortion (starting with Roe v. Wade, 410 US 113 (1973)), some groups defend their opposition to the decision with the argument that the Constitutional Court exceeded its powers.

The power of the judicial branch reflects explicitly the more or less equal positions of the branches in the Madisonian model. The executive and the legislative branch play their separate parts, each of them controlled by the judiciary. All positions on the constitutional field are strengthened by the fact that all branches have their own democratic legitimization. Not just the legislative branch. This conjures up the idea of a forum in which different agents should come to terms with one another in solving the problems of the public. None of the agents in the forum are able to control the actions of the others absolutely. This search for a mutually acceptable outcome of debates is typical for the system of checks and balances and is also the core of the scientific method of fixation of belief. This method implies a process of introduction of an explaining rule (abduction), inference and verification.

Given this characterization of the Madisonian model and the resulting constitutional system in the United States of America, those who are acquainted with the situation in the Netherlands will only partly accept the hypothesis that there is a parallel between the two. An important characteristic of the Dutch system is that the independent judge lacks the power to check parliamentary approved statutes against the constitution (art. 120). This is contrary to what we described as the most important characteristic of the Madisonian model. However, we think the hypothesis can be corroborated by looking at Dutch constitutional law.
First of all there is a development towards the articulation of general principles of legislation. As far as parliamentary statutes are concerned these principles cannot be upheld by the judge, but in the constitutional system several other agents have a special responsibility to that effect (e.g. the First Chamber of parliament and the main advisory body of the government, the "Raad van State").

Secondly the independent judge in the Netherlands has developed several lines of reasoning in order to get a greater hold on the discretionary decisions of the executive branch. One of them implies that the execution of discretionary powers is assumed to be based on general (policy) rules. These rules can be explicit, but when they are not, the judge makes them explicit by inferring them from the concrete norms set by the executive branch.

Another important development in the role of the judges is the use of general principles of governance. These unwritten standards are developed and applied by the judiciary branch in order to maintain a certain standard of propriety in the actions of the executive branch. However, not only the judicial branch is of importance here. Since 1982 an important role is also played by the Ombudsman.

One of the general principles that was developed and is applied is the principle of scrupulousness ("zorgvuldigheidsbeginsel"). This principle is used to express several other, more specific standards or requirements for governance. For us the most important one is the standard that all who have a reasonable interest in a decision should be able to express their opinion on it. In this way the lack of influence of the people that results from the absence of parliamentary provisions is compensated.

A final development we would like to mention is the internationalization of national constitutional systems. In Western-European countries the communal legal order is of special importance. Since the European Court of Justice has stated the precedence of European law over national law, the judiciary has the power to check national statutory provisions against European standards, at least as far as they fall within the sphere of the powers delegated to the agents of the European Community by individual countries (Francovich, Case C-6/90).

3.1 CONCLUSIONS

The problem we have discussed in this paragraph was whether the Madisonian model is an acceptable alternative from the perspective of the semiotics of Charles Sanders Peirce. Solving this problem was the last step towards making it acceptable that the change in the text and structure of the Dutch constitution in 1983 was a necessary one. It results from the impossibility to deal with the tensions in the Kantian model of interpretation. As we have shown by reference to three important constitutional developments the new constitutional foundation reflects the idea of a forum in which different agents should come to terms with one another in solving the problems of the public. The discussion on the effects of the Madisonian model on the constitution of the United States of America, made it clear that looking for a balanced outcome of debates is typical for a system of checks and balances and is the core of the scientific method of fixation of belief, which implies a process of introduction (abduction), inference and verification of an explaining rule.

The idea of a public forum and of checks and balances is of course only a necessary condition to secure a rational way of dealing with the problems of governance. However, it would outstretch the scope of this article to elaborate upon further conditions such as the political culture, the distribution of economic powers, racial equality, etcetera.

4. GENERAL CONCLUSIONS

In this paper we have discussed the relations between an essential part of liberal democratic theory, the doctrine of the separation of powers, and semiotic processes. As announced in our introduction it was not our intention to look at the problem as professional philosophers. Our interest in the field of semiotics is primarily based on the idea that semiotics provides tools for legal scientific research. We have tried to find support for the hypothesis that there is a relation between the theory of meaning and the way the separation of powers is structured in the legal system. A change in the system of separation of powers may be made intelligible by theories of meaning underlying the concept of the polity. This was demonstrated by the shift in the Dutch constitution in 1983. This shift from a Kantian conception of separation of powers to a system of checks and balances can be under-
stood by reflecting upon the theory of meaning underlying the Kantian concept. The Kantian idea of the absolute primacy of the legislator is only possible on the presupposition that the meaning of legal statutes can be fixed. However, as semiotics has taught us, signs (words) are always further interpreted by interpreters (ultimately through habits) and their character is principally changeable and ambiguous. These insights from semiotics help to explain why the strict separation of powers together with the primacy of the legislator must fail.

A more realistic view of the state is held by the American federalists, defending a system of checks and balances within the government. Although the federalist model is far from flawless the central idea it expresses remains fruitful for legal and political theory. In the Madisonian model, each branch of government has its own democratic legitimation however none of the branches of government have the power to determine the actions of the others completely. This idea of checks and balances makes rational changes in the meaning of statutes more likely than the strict separation of powers.

NOTES

1 By ideal types we mean coherent images of a social phenomenon, which need not necessarily be of a descriptive nature. See M. Weber, Wirtschaft und Gesellschaft, Tübingen 1980, p. 10.


4 J. Locke, Two treatises of government, London 1984. Important in the work of Locke is that he neglects the judiciary. The most important elements in his theory are "the sharing of the legislative authority, and the division of the functions of government". See M.J.C. Vile, Constitutionalism and the separation of powers, Oxford 1967, p. 67.


7 J.-J. Rousseau, Du contrat social, Paris 1762.


13 H. Kelsen, Reine Rechtslehre, Wien 1983, p. 201. See also H. Kelsen, Allgemeine Theorie der Normen, Wien 1979, p. 4: "Eine durch einen in der Seinswirklichkeit staatfindenden Willensakt gesetzte Norm ist eine positive Norm. Vom Standpunkt eines Moral- oder Rechtspositivismus kommen als Gegenstand der Erkenntnis nur positive, d.h. durch Willensakte, und zwar durch menschliche Willensakte, gesetzte Normen in Betracht".


15 Collected Papers (CP), II.228

16 Morris used these three aspects of a sign to develop what he mentioned the three "dimensions" or three "levels" of semiotics: grammatics, semantics and pragmatics. See C.W. Morris, Foundations of a theory of signs, Chicago 1966, pp. 6-7.

17 CP, V.476

18 CP, V.476


20 Philosophical Writings (PW), p. 249.


23 Selected Writings (SW), p. 91.

24 SW, p. 99

25 SW, p. 99

26 CP V.189

27 This does not mean that the method of return at another level in perhaps a more
dangerous form. In modern government, some specific fields are regulated by small groups of bureaucratic experts. As the literature on social psychology and public administration shows, these groups tend to develop their own beliefs and with this the ways to prevent deviant behaviour. In extreme cases this can result in what Janis, echoing Orwell's famous double-think, called 'group-think.' (Janis 1972 p. 9).

This idea of a public forum is also put forward by Jürgen Habermas in both his political writing (Strukturwandel der Öffentlichkeit, Neuwied 1968) and in his writing concerning the legal discourse (Recht en Moraal, Kampen 1988). See for the latter also R. Alexy, Theorie der juristischen Argumentation, Frankfurt am Main 1978.

The High Court of the Netherlands (HR) confirmed the meaning of this article in a recent decision. See HR April 14th 1989, AA 1989/6, pp. 578-593.

In this paper we can not deal with other important influences like international treaties on human rights and the control systems that were brought into being with them.

Van Gend en Loos, Case 26/62, Jur 1963 (5); Costa-Enel Case 6/64 Jur 1964 (1199).