Marketization of Government and Separation of Powers

An Oxymoron?

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The marketization of bureaucracies –also known as *running government like a business* in the United States, *managerialism* in the United Kingdom, or the *hollowing out of public law* in Spain and Latin America– has been increasing steadily throughout the world for more than four decades. The influence of this phenomenon on policy discussions can be seen, *inter alia*, in recent political discussions concerning the corporatization of Bhutan's public health system or Nigeria's postal services, a judicial decision criticizing the investment of Belgium public resources in vulture funds, and the slackening in the restrictions to fire U.S. American civil service.

In short, *marketization* denotes the expansion of market-like arrangements across other spheres of society that were, until recently, ruled by different coordination mechanisms. As the boundaries of these social domains become blurred, the economizing logic of market has come to determine many pivotal social structures of contemporary societies. Within this context, the process of subjecting government structures to market institutions has been particularly intense – even to the extent of challenging traditional understandings of modern institutional architecture across the world. Government institutions worldwide are indeed now being run along market-like principles such as efficiency, benchmarking, performance indicators, and consumer satisfaction.

One such an institutional arrangement to be challenged is the notion of separation of powers. Consider, to this end, the case for state-owned development banks. For decades these corporatized administrative entities have been allocating funds to other public or private actors solely under bank regulation and without much political scrutiny, despite constituting a budgetary matter that was traditionally handled by the Legislature.

In this context, this essay in comparative public law explores the ways in which the marketization of government is defying the traditional (i.e. trinitarian division of government) or even the more contemporary understandings (i.e. administrative separation of powers within the executive branch) of the separation of powers. By analyzing cases from Brazil, Colombia, and Chile, this essay sketches some of the most fundamental changes this phenomenon has had in reshaping the institutional

arrangements through which it is materialized and enforced the notion of separation of powers (both checks and balances).

This essay is divided into three sections. *First*, I start by introducing the concept of marketization in government domains and situating this process of institutional change within the broader context of a more general and complex phenomenon, which Jürgen Habermas labels as the *colonization of the lifeworld* and Karl Polanyi as the *disembeddedment of the market*. This is especially important since legal scholarship has often neglected these sociological approaches when addressing the normative implications of marketization. However, only by understanding its sociological dimensions can one explain marketization not simply as policy choices made by countries following waves of neoliberal ideas first set by the Reagan administration or the Thatcher government. The causes, indeed, should be traced back much further back. The *second section* deals with the case studies, dedicating one subsection to each of them, using a historicist approach to comparative law. Finally, the *third section* analyzes why and how such facially dissimilar legal regimes have had similar results following reforms aimed at introducing market arrangements elements of their governments.