Chapter 16

Institutional dynamics of the EU after Maastricht (1993–2023): Separation of powers as an old principle of constitutionalism in new circumstances

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Abstract

In this paper, the author investigates the issue of the separation of powers in the institutional network of the European Union, bearing in mind that it represents an inseparable part of the *materiae constitutionis* of democratic constitutionalism. Since Montesquieu, the goal of this principle has been nothing but to realise, preserve and strengthen the lawful government (*government of law)* instead of maintaining and defending a *gubernaculum* as the mere will and caprice of the holder of power (*car tel est notre plaisir)*. Therefore, it is a legitimate assumption that the doctrine of the separation of powers, which plays a key role in the creation of any political government, especially in the functioning of and respect for a just, lawful and independent judicial authority within the nation-state, *mutatis mutandis* would seek its place across state borders as well. This possibility is also indicated by the construction of the *Maastricht Treaty* (1992) which, by constitutionalising the EU's institutional structure, certainly opened not only a new stage in the adaptation of its organisational principles, but it once again shed new light on the question of the existence, state, adjustment, design, new content and understanding of the separation of powers as an old principle of constitutionalism under new circumstances.

Keywords: Maastricht Treaty, institutions, separation of powers, institutional balance

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1. Introductory note

In Jonathan Swift's famous book *Gulliver's Travels* (1726) there's an inspiring and ironic part of the text, offering a series of solutions to many burning questions *of Lilliputania*.[1] Reading those particular 'modest proposals' one can see how much the imagination of classical literature can serve us as a reminder of how new political and legal entities, with their attitude towards classical institutions and traditional vocabulary of constitutional engineering, almost regularly create, change and dissolve *taboo topics* from the seemingly consolidated glossary of the already known political and legal world as well as of the emerging one.[2] Has not something similar happened with the emergence and development of political and legal institutions in Europe after World War II? Especially as it concerns those institutions that fall within the framework of Europe's ambitious and far-reaching constitutional project of building peace, economic prosperity and the rule of law? The thirtieth anniversary of the *Maastricht Treaty*, signed in 1992, provides a favourable opportunity to recapitulate that event which, on the one hand, impressed with a series of innovations, but on the other hand, it also gave rise to doubts, disbelief and unknowns in the process of its implementation which the European public faced after its entry into force in 1993.

Suffice it to say that over the thirty years since the signing and entry into force of the *Maastricht Treaty*, the Union created by it has grown in size, scope and capacities. Today's *European Union* (EU) is a quite respectable actor on the global stage, supporting peace, the rule of law, social and political progress around the world. The EU is also the world's largest trading bloc and issues the second strongest currency in the world. At the same time, it guarantees rights for almost 450 million EU citizens. A key step towards this extraordinary development was made in 1991 when representatives of the 12 member states gathered in Maastricht to finalise a new alliance treaty. Maastricht, according to Jim Cloos, was a 'key moment' in European integration because it represented the 'crown of economic integration with the creation of a single currency' and the overall movement towards a true European Union.[3] However, examining the processes on a broad scale and within longer time cycles, one can see how the changes that have shaped the EU over the last 30 years also stimulated major shifts at the constitutional, institutional level.

The European Union cannot be understood without being knowledgeable of its institutions. However, researchers of the EU differ on the question of what exactly EU institutions are, how they function and why they are important. The simplest definition of an EU institution refers to it as a *decision-making body*.[4] Such a determination is also connected with the concept of EU institutional politics as a sphere of informal and formal rules, norms, procedures and practices that shape such

1 Swift, 1726; Jacek, 1998, pp. 100–115; Phiddian, 2013, pp. 256–258; Bačić, 2020, pp. 17–42.
2 Ziller, 2008, pp. 133–179.
3 Cloos, 2014.
4 Hodson et al., 2021, p. 4.

decision-making. In this context, institutions can be studied by applying different theoretical approaches – the tradition of international relations, integration theory, insights into new institutionalism, through the separation of power, approaches to governance, public policy and public administration, as well as by understanding EU institutions using critical perspectives. Drawing on these traditions, Dermot Hodson encourages a view of EU institutions in five dimensions: there are intergovernmental versus supranational institutions, international versus transnational, power-sharing (separated) versus power-confusion (fused) institutions, leader versus follower institutions, and legitimate versus contested institutions. Following the movements of those Union bodies that make decisions both within and between the previously mentioned dimensions, certainly opens up the possibility of a more thorough and deeper understanding of the importance of EU institutions.[5]

In order to clarify the issue of *Institutional Reforms in the context of the Future of Europe (FoE) conference,* this paper will try to touch on the question of the separation of powers in the EU and its possible developmental characteristics in one of Hodson's dimensional packages. This segment is interesting for at least two reasons. First of all, because the issue and significance of the separation of powers *nolens volens* has been an inseparable part of the theory and practice of democratic constitutionalism since the 18th century. This means that even Maastricht, which enabled the upgrading of the new *constitutional architecture of the Community*, could not simply ignore the principles of the responsible exercise of the political will and powers of the accepted EU institutions because their main goal, ever since Montesquieu, is nothing but the realisation, preservation and strengthening of the lawful government i.e. the *government of law*, and not the maintenance and defence of the mere *gubernaculum* as the will and caprice of the power-holder (*car tel est notre plaisir*).[6] Therefore, it is a legitimate assumption that the doctrine of the separation of powers, which plays a key role in the creation of any political government, and especially in the functioning of and respect for a just, lawful and independent judicial authority within the nation-state, *mutatis mutandis* would seek its place across national borders as well.[7] This is a possibility indicated exactly by the originality of the "founding" *Maastricht Treaty*. By constitutionalising the institutional structure of the EU, the Maastricht Treaty certainly shed new light on the question of the existence, state, adaptation, design, as well as the new content and understanding of the separation of powers as an old principle of constitutionalism under new circumstances.[8] In this sense, the following is a reasonable conclusion:

> The separation of powers analysis is 'first, descriptively accurate, to a large extent, for much of the working of the EU apart from the law-making role of the ECJ; and,

5 Ibid., p. 7.
6 Plessy, 2022.
7 Vile, 1998, pp. 1–58.
8 Moellers, 2013, pp. 230–231; Walker, 2001, pp. 31–57.

secondly, normatively attractive as a means of practically safeguarding the principles of democracy and the rule of law. This view is supported by an analysis of the substitute for a separation of powers in the case law of the ECJ, namely the principle of institutional balance, which it is argued is too vague and indeterminate to be a satisfactory alternative.[9]

After a brief outline *of the Maastricht Treaty*, I will try to point out the difference between the "classical" division of powers and the substitution advocated by the Court of Justice (CJEU) in the established structure and dynamics of the EU institutions that developed after Maastricht, as well as its organic connection with the rule of law, which remains an essential commitment and characteristic of the European Union.

2. The Maastricht Treaty and affirmation of the new EU institutions

The treaty that created the European Union, signed in the Dutch city of Maastricht on 7 February 1992, entered into force on 1 November 1993 after it was ratified by the then 12 member states of the European Communities. The Intergovernmental Conferences (IGC) on Political Union (PU) and Economic and Monetary Union (EMU), where member states negotiated amendments to the founding treaties, took place against the turbulent geopolitical background of the fall of the Berlin Wall (1989), German unification and the final end of the Cold War. This new agreement amended *the Treaty establishing the European Economic Community* (EEC) and established the European Community (EC) as the first pillar of the Union. It also amended *the Treaty establishing the European Coal and Steel Community* (ECSC) and *the Treaty establishing the European Atomic Energy Community* (EAEC). Furthermore, two pillars of intergovernmental cooperation were added, namely common foreign and security policy (CFSP) in the second pillar and cooperation in the field of justice and home affairs (JHA) in the third pillar.

The structure of the text of the Treaty was outlined and explained using the model of a Greek temple that rests on three pillars. The text was divided into seven titles, followed by protocols and declarations. The main pillar of the temple represents the three Communities (titles II, III and IV, which set out the provisions

9 Conway, 2011, p. 304.

amending the pre-existing founding Community Treaties). The other two pillars represent the areas of intergovernmental cooperation (title V on CFSP and title VI on JHA).[10]

In a historical sense, *the Maastricht Treaty* represented one of the most important evolutionary additions to the European integration treaties. It contained provisions for the creation of an economic and monetary union (EMU), including a single European currency. It tried to increase the democratic legitimacy and efficiency of the decision-making process by strengthening the European Parliament (EP) and by expanding qualified majority voting (QMV). Along with introducing the principle of subsidiarity and the concept of European citizenship, it further developed existing policies such as social policy and added new ones, including education, culture, public health, consumer protection, trans-European networks, industry, research, technological development, environment and development cooperation.[11] The idea implied by all these measures testified in fact to the creation of a far-reaching economic and political union that could one day become the United States of Europe.[12]

Although the concept of *the EU Treaty* (Maastricht Treaty) emerged on a 'wave of great optimism about the EC', one must not forget the context of real political circumstances that still existed in a divided Europe. Namely, the European continent was still 'divided into rival political and legal systems'. It is no wonder then that the Treaty was not a 'completely coherent or symmetrical agreement'. It was obvious that of all the amending agreements, exactly the TEU 'was created in the most difficult way'.[13] That is why it has often been rightly pointed out that the TEU was 'the last treaty of the Cold War'.[14]

10 The Maastricht Treaty (TEU) has seven titles. The first Title – Common Provisions, Articles A to F, among other, regulate the establishment of the European Union (Article A), determine its objectives (Article B), conditions under which the European Parliament, the Council, the Commission and the Court of Justice exercise their powers (Article E), etc. In Title II – Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, Article G amends the Treaty establishing the European Economic Community with the aim of establishing a European Community. Titles III and IV contain provisions amending the treaties establishing the European Coal and Steel Community and the European Atomic Energy Community (Articles H and I). Under Title V of the Maastricht Treaty – Provisions on a Common Foreign and Security Policy (Articles J to J.11) and Title VI – Provisions on cooperation in the fields of justice and home affairs (Articles K to K.9), under which the member states are obliged to 'inform and consult one another within the Council'. Title VII contains the Final Provisions (Articles L to S).

11 Laursen and Vanhoonacker-Kormoss, 2019.

12 Goldstein, 1992, p. 117.

13 Hartley, 2004, p. 7.

14 Pryce, 1994, p. 3; Burgess, 2000, pp. 189–193.

2.1. The importance of institutions

For any attempt to understand the phenomenon of European integration and the EU itself, it is vital to know thoroughly the institutions in their respective context. According to the French administrative law classic M. Hauriou, an institution is

> a social structure established for the performance of a specific function; in which power is subordinated to that end, and in which such subordination justifies the structure's autonomy and, possibly, its legal personality.[15]

According to a more modern and endorsed understanding, institutions consist of

> a set of formal rules (including constitutions), informal norms, or shared understandings that constrain and prescribe political actors' interactions with another. Institutions are generated and enforced by both state and nonstate actors, such as professional and accreditation bodies. Within institutional frameworks, political actors may have more or less freedom to pursue and develop their individual preferences and tastes.[16]

Institutions are important for several reasons. First of all, institutions enable the "architecture" of every political system, including the European Union. The obligation and responsibility of achieving an efficient, democratic and transparent political system rests on its institutions. What distinguishes one environment from another, state from state, wider alliances from simpler ones, is precisely the ability of existing institutions to adapt to the changing economic, political and cultural context. According to P. Dann, analysis of the EU institutions actually represents research of a 'moving object'. Central parts of what today is the very core of the institutional system did not even exist at the very beginning of the European integration process. Dann cites the European Council and the European Parliament as examples, which today are the 'main actors in the institutional setting', noting that the Council was not even mentioned in the *Treaty of Rome* (1950) while the Parliament underwent a dramatic change regarding its role. Of course, considering the profound changes in the institutional structure, it can easily be concluded that 'the system has not yet matured', it is still in motion, and it is therefore 'difficult to interpret it in a coherent way'.[17]

Institutions can be political and legal. Political institutions are mainly concerned with the 'exercise and distribution of power and have a monopoly on the legitimate

15 Hauriou, 1943, pp. 25–27, cited in Mendes, 2020, p. 2.
16 Gilad, Institution. Available at: https://www.britannica.com/topic/institution (Accessed: 5 November 2023).
17 Dann, 2009, p. 237.

use of force'.[18] For neo-institutionalists, according to J.E. Lane and S. Ersson, institutions are answers to interactional and transactional problems in human behaviour. Starting from the assumption, like James Madison in *the Federalist Papers* (1787–1788), that people organise themselves to protect their pertained and vested interests, they interpret political institutions as

> devices for constraining opportunistic behaviour among political elites. Political groups pursue their broadly defined self-interests within the framework of interaction set by political institutions... Institutions restrain individual behaviour – this is the basic idea.[19]

Legal institutions are defined by Dick W.P. Ruiter as '... a regime of legal norms purporting to effectuate a legal practice that can be interpreted as resulting from a common belief that the regime is an existent unity'.[20] Here the element of legal "unity" refers to its institutional and substantive aspects. Institutional aspects refer to the fact that a legal institution is a system of rules and competences that in terms of validity ultimately originate exclusively from one legal source. Such an institution, therefore, is a legally valid, more or less autonomous element within the overall legal system. Furthermore, the unity of the legal institution implies that its legal system must be "coherent", meaning that different parts of the institution's legal regime are linked by common, basic legal concepts.[21]

In the context of the existence of international institutions – and the EU is an international, supranational organisation *par excellence* – it is emphasised that 'institutions are persistent and connected set of rules (formal and informal) that prescribe behavioural roles, constrain activity and shape expectations'.[22] The European Union is undoubtedly one of the most complex international communities in the institutional sense. If there were any lessons that could be learned from the Maastricht experience, one of them was surely that the construction of Europe meant and required forging (new) institutions.[23] The TEU launched the process of building a new political Europe – for some, this Treaty enabled a shift from functionalism to constitutionalism and the strengthening of central institutions, according to others it meant 'crossing the Rubicon to a federal Europe'.[24] For J.H.H. Weiler, the 'almost sinked' Maastricht was the most important 'constitutional "moment" in the history of the European construct'.[25] For A. Moravcsik, the very events between 1992 (*Maas-*

18 Political Institutions. [Online]. Available at: https://www.yourarticlelibrary.com/essay/political-institutions-useful-notes-on-political-institutions/31366 (Accessed: 7 November 2023.).
19 Lane and Ersson, 2000, p. 56; Jupille and Caporaso, 1999, pp. 429–444.
20 Ruiter, 1993, p. 358, cited in: Curtin and Dekker, 2010, p. 6.
21 Ibid.
22 Keohane and Murphy, 1992, p. 871.
23 Curtin and Dekker, 2010, ibid.
24 See Polack, 2019.
25 Weiler, 1999, p. 4; see Walker, 2001, pp. 31–57.

tricht Treaty) and 2007 (*Lisbon Treaty*) determined the course of discussions about the evolution of Europe, and inspired answers regarding the fundamental theoretical challenges of that era.[26]

In 'blessed simplicity' (*sancta simplicitas),* Phillip Dann removes Antje Wiener's complex term *soft institutions* that includes social and cultural norms, rules and routine practices, and in the context of European constitutionalism, he simply accepts that the EU institutions are 'bodies of the Union as set up by the founding Treaties and mentioned in Art. 7. EC and Art. 5. EU'.[27] Even after Maastricht, these are the institutions that constitute the most active part and source of constitutional and sub-constitutional European law.[28] They shape and encourage inter-institutional dynamics within the structure of executive federalism.[29]

Finally, the EU Treaties followed the European tradition of defining the EU and its institutions as unique entities that have a special status. *The Treaty of Lisbon* explicitly states that the Union, as an organisation that enjoys a specific status, shall 'have an institutional framework' consisting of seven main institutions. In addition to the traditional five institutions of the former European Communities – the European Parliament, the Council, the European Commission, the Court of Justice and the Court of Auditors, the EU's main institutions now also include the European Council and the European Central Bank. It is through these institutions – and, of course, through the extensive and complex structure of subsidiary bodies and agencies – that the Union has the ability to act in relation to the member states and its citizens.

26 Moravcsik, 2018, pp. 1648–1649.

27 Weiner, 2003, p. 121; Dann, 2009, p. 238.

28 Article 7: (1) The tasks entrusted to the Community shall be carried out by the following institutions: (a) a European Parliament, (b) a Council, (c) a Commission, (d) a Court of Justice, (e) a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by this Treaty. (2) The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity. Document 12002E/TXT, Treaty establishing the European Community (consolidated version, 2002).
Article 4 shall be replaced by the following: 'Article 4 1. The tasks entrusted to the Community shall be carried out by the following institutions: (a) a European Parliament, (b) a Council, (c) a Commission, (d) a Court of Justice, (e) a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by this Treaty. Each institution shall act within the limits of the powers conferred upon it by this Treaty. 2. The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity. 7) The following Articles shall be inserted: Article 4a. A European System of Central Banks (hereinafter referred to as "ESCB") and a European Central Bank (hereinafter referred to as "ECB") shall be established in accordance with the procedures laid down in this Treaty; they shall act within the limits of the powers conferred upon them by this Treaty and by the Statute of the ESCB and of the ECB (hereinafter referred to as "Statute of the ESCB") annexed thereto. Article 4b: A European Investment Bank is hereby established, which shall act within the limits of the powers conferred upon it by this Treaty and the Statute annexed thereto.' *Treaty on European Union,* [Online]. Available at: https://eur-lex.europa.eu/ legal-content/EN/TXT/?uri= celex%3 A11992M%2FTXT (Accessed 6 November 2023).

29 Dann, 2009, p. 243.

3. Institutions of the European Union from Maastricht to Lisbon (1992–2022)

The *ratio* for adopting the Maastricht Treaty may lie in the move to connect the existing treaties with two new complex areas – *Common Foreign and Security Policy* (second pillar) and *Cooperation in the fields of Justice and Home Affairs* (third pillar) and in the creation of an economic and monetary union. At the same time, the EU as an international organisation developed into a legal system with a clear unique character that encompasses many, and sometimes very different, levels of cooperation and integration.

With the entry into force of the *Treaty on European Union* on 1 November 1993, the member states of the European Communities formally established the European Union. Despite the changes, the functions of the institutions mostly remained as they were defined by the *Treaty on the European Community*. According to Art. 3 of the Treaty, the Union had an 'institutional framework which shall ensure the consistency and continuity of the activities carried out in order to attain its objectives while respecting and building upon *the acquis communautaire*'.[30] The same Treaty in Art. 7. provided that all tasks entrusted to the Community will be performed by the European Parliament, Council, Commission, Court of Justice and Court of Auditors. The institutions were required to act within the powers entrusted to them by the EC Treaty and any other related treaties or acts. The Council and the Commission were assisted by the Economic and Social Committee and the Committee of the Regions. The *European Council* was not specifically designated as a Community institution in Art. 7 because it functioned as a mechanism of intergovernmental cooperation. Set up as an informal forum for discussion already in 1974, it was given a legal basis in 1986 with the *Single European Act*, and finally it was included as an EU institution in the *Treaty of Lisbon*.

3.1. The question of the constitutionality of the Maastricht Treaty

Just before 1 November 1993, when the *Maastricht Treaty* entered into force, the German Federal Constitutional Court delivered its famous judgment on the Maastricht Treaty.[31] The Constitutional Court's decision of 12 October 1993 confirmed the constitutionality of the *Maastricht Treaty* and thereby opened the way for German participation in the future European integration process. However, the Court's decision contains certain remarks (*obiter dicta*) that caused quite a stir in the European

30 Lenaerts and Nuffel, 2005, p. 55.

31 Bundesverfassungsgericht – Judgment on the Maastricht Treaty of 12 October 1993; Cases 2 BvR 2134/92, 2 BvR 2159/92. The full text in German is cited in 89 Official Court Reports, 155 [BVerfGE 89, 155]; See the English translation at: https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf.

Union. The most important among them is the following: 'The German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits'.[32] In other words, the limits of the power of European law will be decided by national and not transnational courts – in this case, the German Federal Constitutional Court and not the European Court of Justice (CJEU). For German constitutional judges, legal acts of the Union that go beyond the competences specified in the Treaty will not be legally binding on Germany.

Of course, the main reasons for mentioning this important decision of the German Federal Constitutional Court are the reactions and conclusions regarding its possible impact on the future of the European Union and the integration process. All such predictions were necessarily speculative though, especially since the Federal Constitutional Court did not elaborate on the likely practical effects of the decision. The sound conclusions were that the Federal Constitutional Court, in spite of everything and although it apparently took bold steps, did not actually call the European Union into question. Instead, the Constitutional Court opened the door and provided guidance for continued European integration.[33]

3.2. Successive reforms of institutions after Maastricht

The successive reforms agreed in Amsterdam (1997) and Nice (2001) did not, for the most part, change the "Maastricht organisational structure", except the fact that the "third pillar" became a platform for police and judicial cooperation in criminal law matters. Also, as the Treaty establishing the European Coal and Steel Community signed in 1951 was concluded for a period of 50 years, it expired on 23 July 2002 and the ECSC ceased to exist. Two other communities – the EC and the Euratom remained in their original form as part of the EU.[34]

In October 2004, the European Council signed the *Treaty establishing a Constitution for Europe*. Its aim was to create a constitution for Europe that would replace many existing treaties and restructure the EU's legal foundations in a clearer manner. The goal was to make the EU more efficient in terms of decision-making, more transparent, more democratic and closer to citizens.[35] However, in May and June 2005, *the Constitutional Treaty* was rejected in popular referendums held in France and the Netherlands. Since the treaty – which was supposed to become a consolidated Constitution for the European Union – was not ratified, the existing EU treaties were amended and expanded. The institutional changes foreseen in

32 Ibid., p. 6.
33 Hilpold, 2021, pp. 159–192; Meessen, 1994, pp. 511–530.
34 Dehousse, 1994, pp. 181–239.
35 Ziller, 2004, pp. 29–69.

the original agreement were nevertheless transferred. This process resulted in the adoption of the *Treaty of Lisbon*, signed in 2007 and finally ratified in 2009.

The Lisbon Treaty retained the most important aspects of the ill-fated Constitutional Treaty. It reformed the EU's political system and abolished the existing three-pillar model. Internal coordination mechanisms were developed, the right of veto of individual member states was limited, and additional powers were conferred upon the Parliament. The EU also acquired legal personality so that it could act as an independent institution in pursuing common foreign and security policy. The Lisbon Treaty was largely about institutional changes. Existing EU institutions had their powers increased, while both the European Council and the European Central Bank were formally given the legal status of an EU institution. Existing powers were reorganised to some extent, mainly through the expansion of the scope of the co-decision procedure. Furthermore, the Council was given more opportunities to apply (the redefined) QMV, the decision-making process in budget adoption was reformed, the President of the European Council, elected for a maximum of five years, became a stable and full-time function, and the position of the High Representative of the Union for Foreign Affairs and Security Policy – who is appointed for five years and is also the President of the Foreign Affairs Council and a Vice-President of the Commission – was introduced, etc. In fact, one might rightfully conclude that the Lisbon Treaty primarily sought to accomplish institutional changes.[36]

4. On the question of the separation of powers in the constitutional arrangement of the European Union

After a brief review of the EU's evolving institutional infrastructure, one could ask the following question: Is the new, post-Maastricht EU structure familiar with the old doctrine of the separation of powers? Some authors explicitly claim that the Union does not align with any rigid doctrine of the separation of powers. Joanne Coles points out that as regards the EU institutions,

> there is little… which can be characterised within the traditional terms used in constitutional law, such as the executive, legislature, administration and judiciary. Instead, Community institutions operate a "separation of interests", and each has powers overlapping with traditional governmental functions.[37]

Although the evolution and successive changes of the EU's institutional framework directly indicated that the diffusion and fragmentation of regulatory authority

36 Laursen, 2011, pp. 45–70; Piris, 2010, pp. 204–237; Ashiagbor et al. (eds.), 2012.
37 Coles, 2001, p. 24.

clearly marked the 'breakdown of old conceptions of the separation of powers', Peter L. Lindseth concludes that traditional constitutional concepts retained a key role as separate mechanisms of legitimation in emergence of the system of administrative governance.

Donato Gianotti (1492–1573) was among the first authors to recognise that legal and political relations outside the borders of the "city-state" are based on special relations and regulations. In his political treatise *Della Reppublica Fiorentina* (1534), he emphasised the need for the recognition and application of the principle of the separation of powers based on the distinction of four state functions (electoral, legislative, executive and foreign and security policy).[38] However, it was in fact Immanuel Kant (1724–1804) who first explained why constitutionalisation on the "home ground" cannot be complete without the corresponding constitutionalisation of external policy powers through international legal rules and principles governing relations between states as well as *vis-a-vis* foreign citizens. Kant simply demanded the extension of the principle of the rule of law to interstate, i.e. intergovernmental relations as well as to transnational relations with foreign citizens.[39] The aim of the doctrine is to establish the rule of law (*jurisdictio*) and not the rule of people or their will (*gubernaculum)*. The ultimate meaning of the classical doctrine, ever since Montesquieu, Madison and others, consisted in the division of state power in its totality. That is because when the power is divided between autonomous bodies, then each of them acts as a controller of the other, so freedom itself will survive precisely because of the existence of control. Finally, the value of the separation of powers lies in bolstering the checks and balances that are necessary to prevent abuse of the ever-growing powers of the executive.

Unlike the nation-state and its organisation of government in which the separation of powers is a central principle, at the levels of political and legal formations above the state, such as the various international or supranational organisations (UN, EU...), this principle has never been applied in a literal sense. G.A. Berman points out that 'the structure of the European Union has never been based so much on notions of the separation of powers (even in a modified form) as it has been on notions of institutional balance'.[40] Moreover, K. Lenaerts claims that it is 'impossible to characterize… Community institutions as holders of one or the other power since a close analysis of their prerogatives does not indicate a clear-cut line between the legislative and executive branches of power."[41]

The attempt to define more closely the legislative and executive powers in the EU related to the failed *Constitutional Treaty*, in the context of determining the substance of "legislative" power and defining the procedure necessary for the adoption of a legislative act. It was then implied that everything else was of a "non-legislative"

38 Petersmann, 1997, p. 422.
39 Ibid.
40 Berman, 2005, p. 443.
41 Lenaerts, 1991, p. 13.

character and therefore belonged to the domain of executive power as opposed to legislative power. Continuous occurrence of the numerous so-called "new authorities" were mainly found to be actors that functioned as "satellites" of the executive rather than of the judicial or the legislative authorities. This is because it tends to be much easier to define and determine what "judicial" or "legislative" power is and what the related specific tasks of one or another power are than do the same for executive and limits of its power. While the legislature as well as the court can be defined and textually generalised on the basis of certain constitutions regardless of their various contextual and institutional particularities, things are completely different with the executive. According to N.W. Barber, the diversity of executive power in the various states and diversity of their institutional forms prove the impossibility of any abstract approach without considering specific limits of the respective constitutions.[42]

Evidently, in Art. 6 of the *Treaty on European Union (Maastricht)*, which states the fundamental principles of the EU, the principle of the separation of powers is not mentioned *expressis verbis*. And yet, there is broad consensus that the principles of 'liberty, democracy, respect for human rights and fundamental freedoms and the rule of law' implicitly include the separation of powers.[43] In other words, the EU's fundamental values follow the meaning of that classical principle of government organisation, aiming at the welfare of the political citizen, the realisation of limited government and the rule of law. There is a similarity here with the *Constitution of the United States* (1787), which was the first document to thoroughly elaborate a modern system of the separation of powers and the mechanism of mutual checks and balances between the institutions that hold power. Namely, the text of the Constitution does not expressly refer to the separation of powers doctrine.[44] It is self-evident that "people are not angels" and that their weakness for the siren call for the abuse of power and corruption is universal; and that power tends to corrupt and unlimited power does so to the maximum, is simply a well-known truth. The possibility of abusing any power is therefore obvious. That is why the fear of latent situations of abuse of power and of corruptive tendencies of ambition – first, at different levels of the national political system, and then at those of transnational political entities – resulted in the incorporation of certain, modified elements of the separation of powers. How?

4.1. Deviations from the classical concept of the separation of powers in European treaties

Instead of the classical principle formulated by Montesquieu several centuries ago, the EU adopts and promotes the concept of *institutional balancing*. Jean Paul

42 Barber, 2001, pp. 59–88; Henkel, 2002, pp. 359–386.
43 Rosas, 2007, p. 1034.
44 Katzenbach, 1987, pp. 243–250; Wills, 1987, pp. 289–297.

Jacque believes that institutional balance is a constitutional principle with two faces: legal and political. That principle must be respected by all EU institutions and member states. Violation of this principle is sanctioned by the highest court of the EU. From a *political* point of view, balance is conceived as a means of organisation of the relations between institutions. Thus, for example, the EU institutional triangle (Parliament, Council and Commission) has been in evolutionary momentum from the beginning. From a *legal* point of view, the principle of institutional balance means that institutions must act within the limits of the given competences. The principle of institutional balance indicates that the parties to the treaty have established a balanced distribution of powers, whereby the weight of each institution equals the weight of others. This simply means that the institutional structure of the Union is 'based on the division of powers between various institutions established by the treaties'.[45]

The Court articulated the principle of institutional balance for the first time in the *Meroni case.*[46] In its decision, the Court rejected the transfer of sovereign powers to subordinate authorities outside EU institutions and ruled that the subject of delegation could only be 'clearly defined executive powers'. In addition, that process of delegation is fully under the supervision of the Commission as the delegator of powers. Although *Meroni* was created in the context of the *Coal and Steel Community Treaty,* its applicability to the EU Treaty was generally accepted, and later confirmed by the case law of the Court.[47] The principle got its clearest expression in the context of the so-called "comitology", that is the method, i.e. set of procedures according to which committees consisting of member state representatives constitute the framework within which the Commission exercises its implementing, delegated executive powers.

The deficiency of this concept developed by the European Court of Justice is the lack of criteria that would determine its correct application. This difficulty is otherwise regularly associated with the issue of balancing. Namely, balancing implies the weighing of countless interests that are opposed to each other, so the entire activity entails the risk of subjectivity. This problem, however, does not exist in the tripartite separation of powers because it depends on a "conceptual definition of the function"; it is therefore about defining a specific type of power and not about assessing how the functionally undefined power of one institution affects the exercise of power by another. To specify functions is thus of primary importance. This is evidenced by the idea of *checks and balances* in the separation of powers theory, better understood as the "partial exercise" of the power of one branch of government by another branch.[48]

45 Jacqué, 2004, pp. 383 et passim

46 Case 9/56 *Meroni* [1958] ECR 11; see the opinion of 17 December 1959 which refers to Art. 95 of the ECSC [1959], ECR 551.

47 Vos and Everson, 2014, pp. 1–17; Craig, 2021, pp. 46–89; Jacqué, 2004.

48 Jacqué, 2004, cited in Conway, 2011, pp. 319.

Altogether, as pointed out by S. Platon, there are several ways of interpreting the institutional balance in the European Union. First, institutional balance can be understood as a *fact* – namely, as the actual balance of power between the institutions noted when observing the way in which EU institutions mutually interact, together with their development over time and the identification of possible future trends. Second, institutional balance can be considered as a *normative principle* – that is, what the balance between institutions should be. Third, institutional balance can be seen as a *legal principle* applied and enforced by the Court of Justice.[49]

The Court of Justice addressed the question of institutional balance again in the *Chernobyl case* (1990).[50] In this judgment, the Court found the following:

> By setting up a system for distributing powers among the different Community institutions, assigning each institution to its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, the Treaties have created an institutional balance.[51]

The Court has the task to maintain the institutional balance, 'and in order to do so must be able to review observance of the prerogatives of various institutions'. Such special prerogatives are therefore 'one of the elements of the institutional balance' that are created by the Treaties. As regards the observance of the institutional balance, it 'means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that is should be possible to penalise any breach of that rule which may occur'.[52]

Respect for institutional balance means that 'each of the institutions must exercise its powers while respecting the powers of other institutions'. This rule serves as a principle of mutual respect between institutions in terms of their competences and powers. The main question regarding institutional balance is whether institutional balance is a "general principle of EU law". It should be pointed out that the explicit conclusion does not unambiguously follow from the jurisprudence of the Court. On the contrary, there were significant fluctuations in the Court's jurisprudence to the extent that three different "ages" of institutional balancing could be identified. As such, there is not even a unanimous opinion whether or not institutional balance is a general principle.[53]

Concluding that 'Montesquieu has never visited Brussels', professor of Constitutional Law and Vice President of the Convention on the Future of Europe G. Amato was among the first to express scepticism towards the incorporation of the

49 Platon, 2022, pp. 136–155.

50 Judgment of the Court of 22 May 1990. *European Parliament v. Council of the European Communities.* Case C-70/88; [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61988CJ0070 (Accessed: 5 November 2023).

51 Ibid., p. 1

52 Ibid. pp. 21–22.

53 Platon, 2022.

separation of powers principle into the new treaty structure. The fact is, however, that the *Treaty of Lisbon* (2007) clarified the EU's institutional system and demonstrated that this classical principle, questioned by many in new arrangements, continued to be an enlightening idea and unavoidable criterion, 'inherent in all forms of political organizations inspired by the idea of constitutionalism itself'. This is despite the Court's pragmatic efforts to persistently seek or emphasise 'an inherent limit to the influence of constitutional law on inter-institutional disputes'. The idea behind such Court policy is obvious: the less time and energy institutions spend on conflicts over jurisdiction, the greater their contribution to increasing the overall efficiency of treaty arrangements will be.[54]

5. Conclusion

The nature of the relationship between constitutionalism and international organisations persistently emphasizes the fact that the basic postulates of national constitutionalism are also upheld as part of the law of international organisations. According to Ernst-Ulrich Petersmann, these are the following principles: the rule of law, the separation of powers, fundamental rights, the necessity and proportionality of governmental restraints, democratic participation and social justice.[55]

European institutions have been open to changes necessary for their better and more efficient functioning since the beginning. This was also true for the institutional changes introduced by the Maastricht Treaty. As in previous cases, the purpose of these changes and amendments was to create a more perfect institutional structure. Bearing in mind the level of complexity of the EU as an international organisation as well as the number of *intra-* and *inter*-relations of its institutions of several directions, this process is undoubtedly far from over.[56] Petersmann, a renowned researcher of contemporary international organisations, concludes that from a national perspective of constitutional democracies and their citizens, these organisations can be viewed as the "fourth branch of government". Just like national organisations, international organisations 'derive their legitimacy from promoting the equal liberties and "public interest" of domestic citizens'. Therefore, right from the beginning and continuously, it is 'important to ensure that international agreements do not undermine the basic constitutional principles of democracies'. That is why an effective rule-making process at the international level must be complemented by "democratic procedures" on the international and domestic policy-making levels.[57]

54 Blanke and Mangiameli, 2013, pp. 1129–1133; Ballman, Epstein and O'Halloran, 2002, pp. 551–574.
55 Petersmann, 1997, pp. 431–434.
56 Rosas, 2007, p. 1033.
57 Petersmann, 1997, p. 440.

This is the framework in which constant search for the principle of the separation of powers in the European Union should be understood. Despite the dominant view that the EU, its institutional structure and the distribution of powers do not precisely reflect traditional *trias politica*, this classical principle still provides the most convincing answers to the problem of avoiding the concentration of power, which is also the purpose of the EU Treaties.[58] The results of new empirical analyses of the exercise of public powers, especially those of the Court of Justice in relation to other EU and member state actors, could help identify accountability and legitimacy gaps in the EU constitutional structure and form the empirically based foundations for strengthening and improving the separation of powers in the European Union.[59]

58 Ramirez, 2013, pp. 421–426.

59 Wallerman Ghavanini et al., 2022, pp. 1–47; Eckes, Leino and Wallerman Ghavanini, 2021, pp. 1–24.

References

Bibliography

Ashiagbor, D., Countouris, N., Lianos, I. (eds.) (2012) *European Union after the Treaty of Lisbon.* Cambridge: Cambridge University Press.

Bačić, A. (ed.) (2020) *On the place and role of the Presidency of the European Council in the executive of the European Union*, in *EU law and politics - old questions, new answers*. Zagreb: Croatian Academy of Sciences and Arts.

Ballman, A., Epstein, D., O'Halloran S. (2002) 'Delegation, Comitology, and the Separation of Powers in the European Union', *International Organization*, 56(3), pp. 551–574.

Barber, N.W. (2001) 'Prelude to the Separation of Powers', *The Cambridge Law Journal,* 60(1), pp. 59–88.

Berman, G.A. (2005) 'Executive power in the new European constitution', *International Journal of Constitutional Law,* 3(2-3), pp. 440–447.

Blanke, H.J., Mangiameli, S. (2013) *The Treaty on European Union (TEU): A Commentary.* Heidelberg: Springer.

Burgess, M. (2000) *Federalism and European Union: The Building of Europe, 1950–2000.* Abingdon: Routledge.

Cloos, J. (2014) *European Union - A Short History of the European Union* [Online]. Available at: https://webtv.un.org/en/asset/k1m/k1mju745oo (Accessed: 6 November 2023).

Coles, J. (2001) *Law of the European Union.* London: Old Bailey Press.

Conway, G. (2011) 'Recovering a Separation of Powers in the European Union', *European Law Journal,* 17(3), pp. 304–322.

Craig, P. (2021) 'Institutions, Power, and Institutional Balance' in Craig, P., de Búrca, G. (eds.) *The Evolution of EU Law.* Oxford: Oxford University Press, pp. 3–86.

Curtin, D., Dekker, I. (2010) 'The European Union from Maastricht to Lisbon - Institutional and Legal Unity out of the Shadows', *Amsterdam Center for European Law and Governance, Working Paper Series,* 2010/02*,* pp.1–40.

Dann, P. (2009) 'The Political Institutions' in Von Bogdany, A., Bast, J. (eds.) *Principles of European Constitutional Law.* Oxford: Hart Publishing.

Dehousse, R. (1994) 'The legacy of Maastricht: emerging institutional issues', *Collected Courses of the Academy of European Law*, 3(1) Dordrecht/Boston/London: Kluwer Academic Publishers/Martinus Nijhoff Publishers, pp. 181–239.

Eckes, C., Leino, P., Wallerman Ghavanini, A. (2021) 'Conceptual Framework for the Project Separation of Powers for 21st Century Europe (SepaRope)', *Amsterdam Center for European Law and Governance Research Paper,* 2021/1, pp. 1–24.

Gilad, S. (2015) *Institution* [Online]. Available at: https://www.britannica.com/topic/institution (Accessed: 5 November 2023).

Goldstein, W. (1992) 'Europe after Maastricht', *Foreign Affairs,* 71(5), pp. 117–132.

Hartley, T.C. (2004) *Temelji prava Europske Zajednice – uvod u ustavno i upravno pravo Europske Zajednice.* Rijeka: Pravni fakultet Sveučilišta u Rijeci.

Hauriou, M. (1943) *Précis Élémentaires de Droit Administratif.* Paris: Sirey.

Henkel, C. (2002) 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary'*, Berkeley Journal of International Law*, 20(2), pp. 359–386.

Hilpold, P. (2021) 'So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European "Popular Spirit"', *Cambridge Yearbook of European Legal Studies,* 2021/23, pp. 159–192.

Hodson, D., Puetter, U., Saurugger, S. (2021) 'Why EU institutions matter, five dimensions of EU institutional politics' in Hodson, D., Puetter, U., Saurugger, S., Peterson J. (eds.) *The Institutions of the European Union,* 5th edn. Oxford: Oxford University Press. pp. 1–26.

Jacek, E. (1998) 'Schemers and Squanderers: Jonathan Swift's "A Modest Proposal" and Flann O'Brien's "Slattery's Sago Saga"', *New Hibernia Review / Iris Éireannach Nua*, 2(2), pp. 100–115.

Jacqué, J.P. (2004) 'The Principle of Institutional Balance', *41 Common Market Law Review,* pp. 383–391.

Jupille, J., Caporaso, J. (1999) 'Institutionalism and the European Union: Beyond International Relations and Comparative Politics'*, Annual Review of Political Science,* 2, pp. 429–444.

Katzenbach, N. (1987) 'Separation of Powers: Then and Now in Proceedings of the American Philosophical Society'*, American Philosophical Society*, 131(3), pp. 243–250.

Keohane, R.O., Murphy, C.N. (1992) 'International institutions' in Hawkesworth, M., Kogan, M. (eds.) *Encyclopedia of Government and Politics*. Abingdon: Routledge.

Laursen, F. (2011) 'The Lisbon Treaty: A First Assesment', *L'Europe en Formation,* 4(362), pp. 45–70.

Laursen, F., Vanhoonacker-Kormoss, S. (2019) 'The Maastricht Treaty' in Laursen, F., Beach, D., Domínguez, R. Park, S-H., Vanhoonacker, S., Verdun, A. (eds.) *Encyclopedia of European Union Politics. Oxford:* Oxford University Press.

Lenaerts, K. (1991) 'Some Reflections on the Separation of Powers in the European Community'*, Common Market Law Review 28*, pp. 11–35.

Lenaerts, K., Van Nuffel, P. (2005) *Constitutional Law of the European Union*. London: Sweet & Maxwell Ltd.

Meessen, K.M. (1994) 'Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany', *Fordham International Law Journal,* 17(3), pp. 511–530.

Mendes, J. (2020) 'The EU Administrative Institutions, Their Law and Legal Scholarship' in Cane, P., Hofmann, H., Lindseth, P. (eds.) *Oxford Handbook on Comparative Administrative Law* (OUP). Oxford: Oxford University Press.

Moellers, C. (2013) *The Three Branches – A Comparative Model of Separation of Powers*. Oxford: Oxford University Press.

Mondal, P. (2023) 'Political Institutions: Useful notes on Political Institutions', *YourArticleLibrary* [Online]. Available at: https://www.yourarticlelibrary.com/essay/political-institutions-useful-notes-on-political-institutions/31366 (Accessed: 7 November 2023).

Moravcsik, A. (2018) 'Preferences, Power and Institutions in 21 st-century Europe', *Journal of Common Market Studies,* 56(7), pp. 1648–1674 [Online]. Available at: https://doi.org/10.1111/jcms.12804 (Accessed: 5 November 2023).

Petersmann, E.U. (1997) 'Constitutionalism and International Organizations', *Northwestern Journal of International Law & Business 398*, 17(1), pp. 398–469.

Phiddian, R. (2013) 'A Modest Proposal in the Context of Swift's Irish Tracts: A Relevance-Theoretic Study', *The Scriblerian and the Kit-Cats*, 45(2), pp. 256–258.

Piris, J.C. (2010) *The Lisbon Treaty - A Legal and Political Analysis*. Cambridge: Cambridge University Press.

Platon, S. (2022) 'The principle of institutional balance: rise, eclipse and revival of a general principle of EU constitutional law' in Ziegler, K. S., Neuvonen, P., Moreno-Lax, V. (eds.) *Research Handbook on General Principles in EU Law.* Cheltenham: Edward Elgar Publishing, pp. 136–155.

Plessy, du N. (2022) *François I-er, roi de France (1515-1547)* [Online]. Available at: https://www.histoire-pour-tous.fr/histoire-de-france/2971-francois-ier-1494-1547.html (Accessed: 6 November 2023).

Polack, M.A. (2019) 'Institutionalism and European integration' in Wiener, A., Börzel, T., Risse, T. (eds.) *European Integration Theory,* 3rd edn. New York: Oxford University Press.

Pryce, R. (1994) 'The Maastricht Treaty and the new Europe' in Duff, A., Pinder, J., Pryce, R. (eds) *Maastricht and beyond: building the European Union.* Abingdon: Routledge.

Ramirez, P. (2013) 'The Principle of Representative Democracy and its Adoption by the European Union' in Blanke, H. J., Mangiameli, S. (eds.) *The Treaty on European Union (TEU): A Commentary.* Heidelberg: Springer. pp. 417–447.

Rosas, A. (2007) 'Separation of Powers in the European Union', *The International Lawyer,* 41(4), pp. 1033–1046.

Ruiter, D.W.P. (1993) *Institutional Legal Facts. Legal Powers and Their Effects*. Deventer: Kluwer.

Swift, J. (1726) *Gulliver's Travels* [Online]. Available at: https://www.gutenberg.org/files/829/829-h/829-h.htm (Accessed: 6 November 2023).

Swift, J. (1729) 'A modest proposal for preventing the children of poor people in Ireland, from being a burden on their parents or country, and for making them beneficial to the public' [Online]. Available at: http://www.readwritethink.org/files/ resources/30827_modest-proposal.pdf (Accessed: 6 November 2023).

Vile, M.J.C. (1998) *Constitutionalism and the Separation of Powers.* Indianapolis: Liberty Fund.

Vos, E., Everson, M. (2014) 'European Agencies: What About the Institutional Balance?', *Maastricht Faculty of Law Working Paper,* 2014/4, pp. 1–17 [Online]. Available at: https://doi.org/10.2139/ssrn.2467469 (Accessed: 6 November 2023).

Walker, N. (2001) 'The EU and the WTO: Constitutionalism in a New Key' in De Burca, G., Scott, J. (eds.) *The EU and the WTO: Legal and Constitutional Aspects.* Oxford: Hart, pp. 31–57.

Wallerman Ghavanini, A., Östlund, A., Pedersen, C., Kaddar, S., Karahan, I. (2022) 'An Empirical Approach to Separation of Powers Research in the EU: Introducing the SepaRope Judiciary Dataset', *CERGU Working Paper Series,* 2022/1, pp. 1–47 [Online]. Available at: https://www.gu.se/sites/default/files/2022-05/An%20Empirical%20Approach%20WP%20220526%20A%C3%96.pdf (Accessed: 6 November 2023).

Weiler, J.H.H. (1999) *The Constitution of Europe - Do the New Clothes Have an Emperor?' and Other Essays on European Integration.* Cambridge: Cambridge University Press.

Weiner, A. (2003) 'Institutionen' in Bogdany, A. (ed.) *Europäisches Verfassungsrecht – Theoretische und dogmatische Grundzuge.* New York: Springer.

Wills, G. (1987) 'A More Perfect Union: Essays on the Constitution in Proceedings of the American Philosophical Society', *American Philosophical Society,* 131(3), pp. 289–297.

Ziller, J. (2004) *The European Constitution.* The Hague: Kluwer Law International.

Ziller, J. (2008) 'Separation of powers in the European Union's intertwined system of government – a Treaty-based analysis for the use of political scientists and constitutional lawyers', *Il Politico,* 73(3), pp. 133–179.

Legal sources

Bundesverfassungsgericht, Judgment on the Maastricht Treaty of October 12, 1993, *Cases 2 BvR 2134/92, 2 BvR 2159/92*, [Online]. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/10/rs19931012_2bvr213492en.html (Accessed: 5 November 2023).

Judgment of the Court of 13 June 1958. Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community. Case 9-56. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61956CJ0009 (Accessed: 5 November 2023).

Judgment of the Court of 22 May 1990. European Parliament v Council of the European Communities. Capacity of the European Parliament to bring an action for annulment. Case C-70/88. [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0070 (Accessed: 5 November 2023).

Treaty on European Union [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= celex%3 A11992M%2FTXT (Accessed: 6 November 2023).