Chapter 4

On "Auxiliary Precautions" (Publius) and Role of Federalism and Separation of Powers in the Evolution of European Integrations and Institutions

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Abstract

In the process of the development of the EU as an innovative, *sui generis* political and economic union of states, the forms of preventive constitutionalism – namely, federalism and the separation of powers – are shaped, modified and applied. This means that European constitutionalism, in order to nurture a "prudent attitude towards citizens", must be understood as a policy that will follow Madison's path and "compensate for a lack of better motives" with opposing and conflicting interests. As a consequence, both the theoretical and practical sides of the EU constitutional framework – if it indeed aspires to become an ever closer union among the peoples of Europe – must not only enable "the government to control the governed", but also equally support and realise all existing and new "auxiliary precaution" measures, and checks and balances within government itself. In this article the author will focus precisely on the separation of powers and federalism as "auxiliary precautions" which every "good government" should take into account, including that of the EU.

Keywords: State, European Union, Member States, Separation of powers, Federalism.

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'Power corrupts and absolute power corrupts absolutely.'
Lord Acton[1]

'The Union's and Member States' constitutions
confront the same central question:
the phenomenon of public power as the heart of every constitutional order.'
N. MacCormick[2]

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1. Introduction

At the very beginning of the creation of the United States as the first modern constitutional democracy, *Publius* (here: James Madison) in the Federalist No. 51. reminds us of difficulties in framing the government 'which is to be administered by men over men': 'You must first enable the government to control the governed; and in the next place oblige it to control itself'.[3] Madison emphasises that constitution resolves that particular problem by using measures of "auxiliary precautions" (*the necessity of auxiliary precautions*). The horizontal separation of powers represents the main constitutional precautionary measure. National government is divided in three different departments: legislative, executive and judicial. Each branch of government is given the power to check on the other two branches. A system of checks and balances is applied so that no branch of power can become more powerful than the others. A further constitutional precautionary measure is the vertical separation of powers, or federalism. Here, the separation of powers refers to the arrangement between the national (federal) government and the state governments. The Constitution removes numerous obstacles as it regards that the governance of the nation and "auxiliary precautions" serve to protect the rights of citizens.[4]

Following the historical example of the United States, which in 1787 adopted a constitution with separation of powers and federalism as "auxiliary precautions" against abuse of power, it took 170 years for the representatives of six European countries to commit to creation of 'an ever closer union among the peoples of Europe' in a manner

1 Acton, 1887.
2 MacCormick, 1999, p. 113.
3 'If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.' The Federalist Papers: No. 51. See also Hamilton and Madison and Jay, 1981, p. 348. The main goal of The Federalist, a series of 85 essays written by the founding fathers Alexander Hamilton, James Madison and John Jay, was to 'urge and recommend' a new Constitution 'to the People of the State of New York', ratification of which was important, but questionable. The essays were published unanimously, signed under the collective pseudonym *Publius*.
4 Ibid.

similar to the American founding fathers. With the adoption of the Treaty of Rome that opens up the perspective of a common development of European states, the construction and realisation of the project of European constitutionalism began, which in the decades that followed expressed all the unique complexities inherent in its nature.[5]

It should be assumed that the "wise architects" of the EU were aware of possible abuses of power in such a new and supranational model of integration and regulation. The migration of constitutional ideas was not an unknown phenomena, but it was also known that it was a "complex and contentious" process, 'both in empirical and in normative terms'.[6] We have already pointed out that in the U.S. Madison used "auxiliary precautions", i.e. the federal separation of powers and different mechanisms of checks and balances, against the concentration of powers in the hands of the legislative body. In the supranational European context, certain ideas began their life and application specifically.

In any case, the possibility of comparing these two historical endeavours of the USA and the EU proves to be useful in many ways.[7] The migration of constitutional ideas has also found fertile ground in this area. The example of the constitution-making process of the founding fathers shows that from the beginning all the important reasons for the necessary rationalisation and application of the form of preventive constitutionalism, by which A. Vermeule refers to as the 'structurally parallel debate on preventive principles of constitutionalism', are an 'attempt to guard against or even minimise particular political risks, such as the "abuse of power" or 'tyranny' particularly feared in the founding'.[8] In that sense the Constitutional Convention in Philadelphia and 1787 U.S. Constitution presented results of long discussions on how to create such a government that will be under self-control. The American founding fathers were designing, exhaustively and for a long time, a way to separate the power between the three branches of federal government. They carefully studied numerous checks and balances that could govern the mutual relations among the different branches of government. And because of those efforts, the Constitution they ultimately presented to the American people included a wide variety of mechanisms to protect people's liberties – including the set of famous "auxiliary precaution" measures.[9]

The time in which similarities in the constitutional development between American and European institutions were emphasised, was replaced by different remarks. G. Nolte indicates that after World War II, and especially after the collapse of socialist systems in Eastern Europe, certain 'issues have emerged which seem to indicate that European constitutional theory and practice is becoming aware that it has developed certain rules and possesses certain properties which are characteristically different from U.S. constitutionalism and vice versa'.[10] The development of European integration, the creation of

5 On different views of EU constitutionalism see Lindseth, 2010, pp. 1–57; Isiksel, 2015, p. 13.
6 Walker, 2006, p. 316.
7 See, for example, Lenaerts and Gutman, 2006, pp. 1–121.
8 Vermeule, 2012, p. 218.
9 Eisinger, 2015, p. 2.
10 Nolte, 2003, p. 10.

numerous and diverse institutions both on European as well as on national levels, and their inevitable influence on each other, expressed through dialogue and harmonisation, opened up the possibility of discovering a particular "European constitutionalism".

Although strong currents of critical analysis against the EU emphasised that a simple "transplanting of constitutional rule narrative in the supranational context" is not exactly natural, and that the EU cannot be simply contextualised using constitutional concepts. From its beginning, the EU constitutionalisation process was related to the process of transformation of "traditional, state-reliance, international organisations" into a community that will gradually develop from a group of legal relations and solutions that bind sovereign states into a vertically integrated legal arrangement that, within the sphere of application of EU law, guarantees legally enforceable rights and obligations to all public and private legal entities.[11]

During the process of development of the EU as an innovative, *sui generis* political and economic union of states, the forms of what Vermeule called instruments of preventive constitutionalism – namely, federalism and separation of powers – will be shaped, modified and applied in a special way. This means that European constitutionalism, if it desires to have and nurture a "prudent attitude towards citizens", must be understood as a policy that will follow Madison's path and "compensate for the lack of better motives" with opposing and competing interests. And the consequence of this is that the tested and rationally built EU constitutional framework "must" not only enable "the government to control the governed", but also equally support and realise all known as well as new "auxiliary" precautionary measures, and checks and balances within the government itself.[12] In this sense, in the following chapters more attention shall be paid to the separation of powers and federalism as "precautionary measures" that every "good government" should take into account, including that of the EU.

2. On the separation of powers and federalism as "auxiliary precautions" in the development of the American constitutionalism in brevis

Starting with the adoption of the federal Constitution in 1787, the state and legal system in the USA rests on two pillars of American constitutionalism: separation of powers and federalism. Despite being exposed to great challenges during the long process of acceptance, opposition and adaptation to new times and changing circumstances, these two principles never lost their qualities as the guardians of the democratic republic.[13]

11 Rittberger and Schimmelfennig, 2006, p. 1149.
12 Russell, 2001.
13 Baraggia, Fasone and Vanoni, 2020, pp. 2–3.

2.1. The separation of powers in the United States

The first three articles of the U.S. Constitution (1787) establish the separation of powers. Art. 1. of the Constitution establishes the legislative branch embodied in Congress which consists of two houses: the House of Representatives and the Senate. Congress is primarily responsible for making laws. As a general rule in the legislative domain, firstly the non-delegation doctrine is accepted, prohibiting the legislative branch to delegate its powers to other entities. However, Congress later accepted the possibility that administrative agencies issue regulations if they are provided with an "intelligible principle" on which they can base their rules. Art. 2. of the Constitution establishes the executive branch of the federal government which consists of the President of the USA. The president approves and implements laws passed by the legislature. Art. 3. of the Constitution establishes and empowers the judicial branch of national government which is represented by the Supreme Court. The judicial branch interprets the laws passed by the legislative branch. The separation of powers in the United States was connected from the beginning with a system of checks and balances. Namely, the system provides each branch of government with special individual powers to check other branches and to prevent the supremacy or superiority of one branch over the others – the Congress has the power to create laws, the President has the power to veto them, and the Supreme Court may declare laws as being unconstitutional. The House of Representatives and the Senate may override a Presidential veto (under the condition of 2/3 vote in both houses). Further, the system of checks and balances provides powers to appoint or remove members of other branches of government. For example, Congress can impeach the President, or convict him for crimes such as treason or bribery (the House of Representatives has the power to bring impeachment charges, the Senate has the power to remove President from the office). Also, the candidates for the Supreme Court are appointed by the President and then need to be confirmed by the Senate. Judges also may be removed from office by impeachment (in the House of Representatives) and conviction (in the Senate). In this way, the system gives the right and authority that, except in the case of nullification of law, each branch of government checks the other branches.[14]

Constitutional acceptance of the separation of powers meant that the founding fathers consciously rejected the parliamentary system which was widely accepted in Europe, and in which the legislative and executive branches were mixed. Naturally, from the perspective of the present day, much has changed since the emergence of the USA as the first constitutional democratic republic in the 18th century. The reality of modern constitutional democracies shows that in reality the separation of powers has always been marked by the dominance of one branch, whatever it was. Later considerations of the theory and practice of separation of powers take different positions. Instead of three equal, independent branches of government, modern government, for practical reasons, actually consists of two branches, or according to

14 Vile, 1998, pp. 131–193.

others, in reality there is only one branch, but it all depends on "how good are we in math". In the United States, for example, every branch of government has been imperial at one particular time – an imperial Presidency, an imperial Congress, and an imperial Court have all been under discussion at some point in time. This is especially true for the modern executive that has become a "giant centrifuge" in today's presidential system sucking in power from all sides, and making *de facto* laws through regulations and executive orders.[15]

2.1.1. Is there a new separation of powers?

During the Heroic Age of American constitutionalism, the interaction of political ideas and practical issues regarding the organisation of government already revealed a series of imperfections in the separation of powers doctrine. The expansion of state activities into all areas of society and stages of life only deepened those imperfections further, which together with a corresponding growth of the administrative state apparatus, irreversibly influenced changes in constitutional systems throughout the world. It has become evident that the old and new controversies of this doctrine were and are not resolved by historical references.[16]

The first powerful critique of the founding fathers' tripartite separation of powers theory came from Woodrow Wilson, the 28th President of the United States (1913-1921). In his conception of government, the Constitution was inadequate as the foundation of modern governance.[17] Therefore the state needed to be managed by administrative "experts", that is modern administrative agencies that combine legislative, executive and judicial competences without clear distinction of functions. According to that concept, agencies made binding rules because they had the authority, issued guidelines regarding the implementation of rules, and ultimately adjudicated alleged rule violations. Wilson argued that "modern government" must implement administrative methods and be guided by "experts", well-educated administrators in administrative agencies which have a special knowledge that goes beyond competences and the interests of ordinary American citizens. Furthermore, they should not be "excessively" constrained by ordinary concepts of democratic governance or constitutional checks and balances. Constitutional democracy must be improved by the implementation of administrative methods of government.

The founders accepted the separation of powers in order to calm emotions and encourage the rule of reason. However in reality, according to Wilson and Progressives, the Founders prevented effective and responsible government. Therefore, the government should be free of limitations imposed through institutional checks and balances in order to function more efficiently and to truly respond to the will of the people. Nevertheless, the more Wilson sought to make politics more democratic, the

15 Schlesinger, 1973, p. 252.
16 Marshall, 1971, p. 124; Levi, 1976, pp. 371–391.
17 Wolfe, 1979, p. 122.

less democratic the administration of government became. Wilson argued that separating politics from an administration led by unelected experts would best achieve the government's goals. In other words, Progressives have shaped the bureaucratic, regulatory or administrative state according to the idea that unelected and highly qualified experts can govern the nation more rationally, efficiently and responsibly than ordinary politicians who are beholden to voters and often prone to corruption. The modern presidency was a key tool for the progressive transformation of government. The Progressives have challenged and fundamentally changed the constitutional arrangements of the Founders. Having separated politics from a government led by unelected bureaucrats, the system of government advocated by progressives not only ignored the consent of the governed, but also greatly expanded the power of the federal government.[18]

Progressive ideas on "good government" differed greatly from the understanding that the founding fathers laid in the foundations of the Constitution in 1787. Namely, Founders assumed that the government can exercise power in two ways. The first way is arbitrary rule in which the government decides on its actions *ad hoc* and where decisions are left to the whim of any official or group currently holding office. The second way is the implementation of a system based on the rule of law, characterised by widely known and promulgated laws that lead the government as well as citizens and which, since it is known exactly what must or must not be done, enables the circumvention of state coercion. In order for the rule of law system to represent the effective protection of citizens' rights, the constitutional mechanism is based on the separation of powers. For the Founding Fathers, the fundamental goal of the separation of powers was to preserve individual rights from arbitrary government.

The essential place of the separation of powers in the U.S. Constitution is actually revealed to us through three important principles of American constitutionalism: (1) The first is the non-delegation principle; which primarily refers to the fact that one branch of government cannot allow its powers to be essentially exercised by another branch. (2) The second principle is related to the first one, in that one branch must not combine functions or powers. (3) The third goal of the separation of powers is that the administration is responsible to the President as head of the executive branch.

Woodrow Wilson believed that a government that wants to live up to the tasks set before the state and society during modern times must seek to reject the restrictions of limited government. In that sense the separation of powers was the most serious obstacle to the new, modern liberalism, simply because it directed the federal government in the direction towards goals enumerated in the Constitution and the Declaration of Independence. Apart from the fundamental difference in the very purpose of government, what was a particular problem to the early 20th century Progressives' vision of national administration were the specific goals of

18 Pestritto, 2012, p. 2.

the separation of powers enumerated above. The range of activities that progressives wanted to regulate was too broad for the original constitutional conception of legislative power. That is why the creators of progressive liberalism designed the delegation of regulation-making, that is, the regulatory authority, from the law-makers in Congress to the increasingly large administrative apparatus of the federal state.

This apparatus would be more suitable for administering a number of issues of the modern complex economy for the simple reason that it was composed of experts capable of any type of adaptation. That is why the realisation of the administrative vision of progressive liberalism required the removal of the non-delegation doctrine and the adoption of combining functions as an operational principle of administrative agencies. Moreover, Progressives believed that administrative agencies would never accomplish their mission if they remained subordinate to national political institutions. Since modern regulations should be based on an objective and politically neutral expertise, administrators should have been freed from political influence. Thus, the constitutional positioning of the administration within the executive branch and under the control of the President represented a problem by which the Progressives sought to separate administrators, not only from the head of the executive branch, but also from politics itself. The idea of separating politics from administration was a fundamental goal of American progressivism and this precisely explains the fierce attack of Progressives on the constitutionalism of the Founding Fathers, based on the separation of powers.[19]

We have seen that the separation of powers constitutes an important principle of liberal constitutionalism. However, the example of the development of the constitutional democratic state in the U.S. has already shown that the traditional explanation of the separation of institutions was no longer an adequate instrument for the distribution of power in the modern state. After World War II, the development of a new model covering the separation of powers theory for the administrative state was advocated for with increasing vigour. Traditional theories should be replaced with newer models that have the potential to both improve democratic checks and balances and legitimise the role of administrative and regulatory bodies in the modern state.

Through explaining how the development of modern governance undermined the principles that had originally supported the separation of powers, this theory tried to identify the ways in which lawyers and administrators sought to preserve some democratic principles in certain areas. These efforts were most clearly expressed in positions towards the division of power in international organisations, especially in the European Union as an innovative framework of the political-legal thinking and in its development from the middle of the 20th century to the present day.

19 Bačić and Bačić, 2016, pp. 123–124.

2.2. On the vertical separation of powers (federalism) in the United States from Philadelphia to Washington

The ideological defence of American federalism as well as of the separation of powers principle has its strongest argument in the advocacy of political freedom, individualism and human rights. For Alexander Hamilton, James Madison, John Jay and other Founders, the creation of an efficient constitutional structure of political institutions, and especially the regulation of relations between the respectable central government and its peripheral parts was one of the central points of the constitutional debates that preceded the adoption of the Constitution in 1787. In the most durable Constitution in the world, the foundations of the division of power between federal Congress and the member states, as well as the most important provisions regarding the promotion of cooperative relations between the two principal actors of the federal organisation of government (for example, the state implementation of elections of federal officials, the consideration of constitutional changes that would be proposed by the Congress, and militia training in accordance with nationally prescribed procedure) were laid out and guaranteed.[20] In this sense, relations between the federal centre and the peripheral holders of political power remained a permanent topic of political relations in the later period as well, as was clearly indicated by the theory and practice of American federalism from 1787 until the present day.[21] That same federalism underwent an evolution marked by several stages. Before the adoption of the Constitution in 1787 and until the inauguration of the new federal government, the United States were a confederation. The Federation was strengthened from 1789 until the end of the Reconstruction era in 1877 and the adoption of the Fourteenth (1868) and Fifteenth Amendments (1870). Inspired precisely by the American experience William H. Riker defines federalism as a 'political organisation in which the activities of government are divided between regional governments and a central government in such a way that each kind of governments has some activities on which it makes final decisions'.[22]

(i) Phase of dual federalism. The key elements of dual federalism were indicated already indicated by A. Hamilton in Federalist No. 32:

> …as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted

20 Zimmerman, 2001, p. 15.
21 Elazar, 1981, pp. 5–19; Peterson, 2006, pp. 92–116; Ewing, 2016, pp. v. et seq.
22 Riker, 1975, p. 101.

> an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant.[23]

The existence of the dual system was also confirmed by the U.S. Supreme Court decisions in cases *Chisholm v. Georgia*, 2 U.S. 419 (1793), and *Abelman v. Booth* 62 U.S. 506 (1858) in which Justice B. Taney ruled that 'the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres'.[24]

This dual federalist phase is characterised by the expansion of federal power, to which the The U.S. Supreme Court contributed greatly. The Supreme Court decided, for example, in the McCulloch v. Maryland (1819) ruling that the constitutional "necessary and proper" clause implied that Congress could establish "all appropriate means" in order to fulfil "the legitimate ends" of the Constitution. In the specific case, the Constitution did not expressly authorise Congress to create a national bank, but Chief Justice J. Marshall argued that Congress could establish the bank as an appropriate instrument that would enable it to facilitate its enumerated powers, such as the collection of taxes, the regulation of interstate commerce and the borrowing of money. Accordingly, under the supremacy clause of Art. 6. of the Constitution states were prohibited to interfere in the lawful activities of the national government.[25]

(ii) Phase of cooperative federalism. In the discussions following the adoption of the Constitution James Madison was convinced that 'the national government cannot be maintained without the cooperation of the states', from which the conclusion was later drawn that the founding fathers did not really insist on establishing a system of dual federalism in the literal sense. That this was indeed the case could also be concluded by emphasising the importance of certain provisions for cooperation between federal government institutions and government institutions at the state level, according to which: (i) the legislature of each state shall appoint two members of the U.S. Senate, (ii) the method of appointing the president and presidential electors in each state shall be decided by its legislature, (iii) the members of the House of Representatives shall be elected by "qualified electors" in each state, (iv) amendments to the Constitution proposed by the Congress shall be decided by state legislatures or conventions, (v) the training of the national guard shall be decided by the states in accordance with the nationally prescribed procedure, etc.[26]

A special impetus to the development of cooperative federalism was given by the President W. Wilson. Namely, Wilson advocated that relations between the centre and the periphery as a type of partnership between national and state governments at state and local level. In such a cooperation the traditional lines of authority, which

23 The Federalist Papers: No. 32.
24 *Ableman v. Booth*, 1858, 62 U.S. 506.
25 *McCulloch v. Maryland*, 1819, 17 U.S. 316.
26 Zimmerman, 2001, p. 19.

were clearly outlined under the regime of dual federalism, began to blur. A key concept of cooperative federalism is partnership. Cooperative federalism implied the willingness of the federal government to negotiate and bargain with state and local officials on the formulation of federal policy and its implementation by states and local communities. However, this federalism greatly strengthened the role of the federal government, which became so dominant that the action of the member states obviously became of "secondary importance".[27]

Based on his political experience from Wilson to the 1960s, D. Elazar described cooperative federalism as opposed to

> …that federalism which implies the division of functions between levels of government as well as the division of government structures. Although the theory of cooperative federalism presupposes a sharing of structures, it accepts that sharing that ranges from programs in formal federal-state agreements to regular informal contacts for information and experience.[28]

(iii) Phase of creative federalism. During the 1960s, the period of creative federalism emerged as an important dimension of the Great Society program, launched by President Lyndon B. Johnson (1963-1969). This form of federalism reflected a new theory of intergovernmental relations that was formulated as a response to the earlier conventional theory. The factual situation was such that the balance of federal power was shifting toward federal government.[29] This type of federalism was also known as "coercive" or "regulatory" federalism for the simple reason that federal government unilaterally imposed its political measures on local and member state governments. According to R. Musgrave:

> Coercive federalism emerged as the dominant contemporary element mainly as a national political response to social movements demanding deep federal interventions into state and local polities in order to protect individual rights, the environment, and other social goods and also to mitigate negative externalities (e.g., air pollution), while fiscally enticing states into redistributive programs despite redistribution being a more common federal function.[30]

(iv) Phase of new federalism. The main idea on which this new federalism rests, is that decentralisation as a policy enhances administrative efficiency, reduces public spending and improves policy outcomes. This type of federalism developed during the administrations of Presidents Richard Nixon (1969-1974) and Ronald Reagan (1981-1989). It was a reaction against the strengthening of the federal government

27 Elazar, 1981, p. 7.
28 Elazar, 1981, p. 17.
29 Yatsco, 2006, pp. 1–2.
30 Musgrave, 1959, cited in Kincaid, 2019, p. 3.

and the increased centralisation that characterised the "creative federalism" of President L.B. Johnson. Nixon's administration tried to decentralise programs and distribute power and funds towards state and local governments. The main recipients of this aid were elected local officials. General revenue sharing programs were created and restrictions on how local governments spent the money were minimised. As for U.S. federalism, the election of President Reagan heralded the advent of a "devolution revolution" in which the President pledged to return authority to the states according to the Constitution.[31]

The U.S. Supreme Court supported ideas and programs of new federalism in its decisions, especially in those cases that aimed at limiting the scope of the federal government's powers. Such was the decision in *United States v. Lopez* of 1995 in which the Gun-Free School Zones Act of 1990 that prohibited possession of guns in school areas was struck down. It also marked the end of a broad interpretation of the commerce clause, which since the 1960s enabled the regulation of numerous local commercial activities.[32]

The return to the re-strengthening of central federal authority was marked by the creation and operation of the Department of Homeland Security as well as by other federalisation measures adopted as a response to the threat of terrorism. This trend continued during the administration of George W. Bush (2001-2009) and during the mandate of Barack Obama (2009-2017).

The federal state was also strengthened during the administration of Donald Trump (2017-2021), when the coronavirus pandemic exposed the model of presidential federalism. Under such circumstances, and opposing the position of his own Republican Party on "limited government", Trump actually used the powers of federal government to 'make America great again', and this was exactly what was paid for by the expansion of federal powers.[33]

2.3. Concluding remarks on separation of powers and federalism as "auxiliary precaution" measures in the United States

The fundamental concept of the founding fathers was the idea of limited government i.e. constitutionalism. Constitutionalism meant the construction of a government that would be limited by the Constitution, that is, a government that would rule only in accordance with the Constitution and conditions related to the assigned competences and approved purposes.[34] It concerns the application of J. Madison's "double security of the constitution" principle, whereby Madison meant two major structural principles of the Constitution: federalism and the separation of powers. Federalism and the separation of powers have both the division of power in a vertical and

31 Marbach, 2006, p. 1.
32 *United States v. Lopez*, 1995, 514 U.S. 549.
33 Jacobs, 2021.
34 Henkin, 1992, p. 885.

horizontal sense in order to prevent the accumulation of excessive power at any level of its activity, and the encouragement necessary for representatives of the people to control the exercise of power by state institutions at different levels in common. Federalism restrains government by creating two sovereign competences – national government and state governments – which limits the influence of both. The separation of powers imposes internal limits dividing the government against itself, giving different branches separated functions and forcing them to divide power.[35]

In the period from 1787 to the present day, the idea of the separation of powers in the U.S. has developed into a complex of norms, which are made up of four principles: (i) the principle of tripartism, which indicates and requires that at the level of federal government, three of its components – the legislative, executive and judicial branches, are formally distinguished; (ii) the principle of division of personnel performing their duties in each of the three branches of state power; (iii) the principle of the division of functions between the three bodies of state power; and (iv) the principle of checks and balances, according to which each government body should have special powers as a means of controlling the function of other bodies in order to maintain a balance between them. Among different checks and balances instruments, the most important is judicial review or the control of the constitutionality of laws as a special American contribution to the theory and practice of the separation of powers. It is exactly judicial review that will prove to be an essential element in achieving division and balance between the legislative, executive and judicial branches of government in the U.S. The adoption of the principle of judicial review as one of the "auxiliary precautions" was actually a means of obliging government to exert self-control and thus to preserve the principle of limited government as a fundamental principle of the newly established constitutional democracy.

Just like the principle of separation of powers, the principle of federalism saw its application in the most complete way within the framework of constitutional democracy in the United States. In this sense, the American federation is the first and most serious application of federalism in the democratic constitutionalism.

3. EU constitutionalism and dimensions of federalism and separation of powers as "necessary precautionary measures"

Following the American and French constitutional revolutions, which generally determined the development of the state and society in the direction of constitutionalisation and democratisation, the modern era can rightly be labelled as the

35 Pryor, 2002, p. 116.

time of the "triumph of constitutionalism".[36] The foundations of constitutionalism and its "fundamental components" were still separation of powers and federalism. Though not perfect, even being described as a "source of folly and frustration", they became permanent and important characteristics of old and new states.[37] Under the influence of constitutionalism, written constitutions established a set of state institutions that ensure the necessary conditions for the realisation of a democratic Rechtsstaat. A large number of such constitutions limit politics by legal means, comprehensively structuring relations of power, normatively helping in integrating societies and offering a practical representation of legitimate democratic rule within the state. Although these achievements cannot be denied, the fact is that the period of maturation of constitutionalism in our time coincides with the erosion of some of the fundamental conditions on which these achievements rested. P. Dobner and M. Loughlin point out that among these conditions the most prominent are those related to the theory and practice of the state and democracy that are generated

> from the claim that 'we the people' are the authorising agents of the constitutional scheme. Constitutionalism is increasingly being challenged by political realities that effect multiple transgressions of the notion of democratic statehood. It is in this sense that constitutionalism can be understood to be entering a twilight zone.[38]

However, the most eloquent denial of this claim regarding the twilight of constitutionalism represents the fact that constitutionalism has spread around the world. According to M. Rosenfeld, after World War II, this process spread in "at least two ways". Firstly, the spread of constitutionalism is at work within a large number of nation-states in which constitutions affirm the spirit of the ideals of modern constitutionalism. Constitutions serve to limit state power, elevate the rule of law, protect fundamental rights and are guarantees for maintaining an appropriate level of democracy. However, the second path marks the diffusion of constitutionalism from its traditional national state environment into transnational or global frameworks, where the "new transnational dimension of constitutionalism" is triggered by the simultaneous internationalisation and constitutionalisation of international law. According to Rosenfeld:

> The internationalization at stake has had in turn two distinct dimensions: a convergence of constitutional norms and values across a multitude of nation-states; and a migration of such norms and values into transnational orderings encompassing several nation-states and/or non-state actors operating across national borders. On the other hand, the constitutionalization of international law has similarly proceeded along two axes: constitutional-type norms and values have increasingly permeated

36 Loughlin, 2010, p. 55.
37 Beckett, 1988, p. 635.
38 Dobner and Loughlin, 2010, pp. XI–XVI.

> international law through the deployment of jus cogens and through other means; and, international legal norms as set in treaties essentially amounting to contracts among signatory nation-states have more recently in some cases acquired a constitutional dimension by virtue of their allocation of legal rights and obligations among nation-states parties to an international treaty and their own citizens.[39]

Constitutionalism is in fact going through "another reneissance" and this time in the context of supranational institutions. International institutions and organisations ranging from the UN to the WTO, different human rights protection instruments and documents including the UN Universal Declaration and the ECHR, *ius cogens*, transnational contract law, the Vienna convention on the Law of Treaties (1969), New York Arbitration Convention (1958), etc. All of these, at one time or another, were considered forms of constitutional order.[40] Bearing transnational consensus on the abovementioned forms in mind, the term "global constitutionalism" is being expanded to denote the school of thought or perspective of a political agenda that advocates the application of constitutional principles in an international context, such as rule of law, democracy, checks and balances, and human rights protection, all in order to improve the efficiency and fairness of the international legal order.[41] Bearing in mind a transnational consensus on the above-mentioned forms, the term "global constitutionalism" is being expanded to denote a current of thought or the perspective of a political agenda that advocates the application of constitutional principles in the international legal order, such as rule of law, democracy, checks and balances, human rights protection, all in order to improve the efficiency and fairness of the international legal order. Constitutionalism is also of crucial importance to the European Union, which emerged as a transnational project after the adoption of the Treaty of Rome (1957) for which it was claimed, in the light of constitutionalism thesis and its evolution, that

> …in critical aspects the Community has evolved and behaves as if its founding instrument were not a treaty governed by international law but, to use the language of the European Court, a constitutional charter governed by a form of constitutional law.[42]

If the elements of constitutionalism are incorporated into the description of everything in the EU – and J. Weiler reminds us that constitutionalism is the "DOS or Windows of the European Community"[43] – a reasonable conclusion would be that the new transnational constitutionalism as a *mixtus compositum* contains traditional

39 Rosenfeld, 2014, p. 178.
40 Isiksel, 2012, p. 102.
41 Peters, 2006, p. 579.
42 Weiler, 1999, p. 221.
43 Ibid.

elements of constitutionalism in addition to new characteristics. Such "most frequently cited signs of constitutionalism" that are connected with constitutional order include 'the hierarchical organisation of norms, the authority to produce binding rules, direct applicability, binding mechanism of dispute resolutions, system of precedent, schedules of fundamental rights, and rudimentary channels of democratic accountability'. In a nutshell, it is being claimed that institutions which replicate the features we associate with constitutional orders must be considered in constitutional terms. To borrow Alec Sweet Stone's colourful metaphor, 'if it looks, walks and quacks like a duck, than it is probably a duck'.[44]

It is actually a form of the functional constitutionalism that will characterise the constitutional practice that appears on the "level of specialised institutions above the state". Referring to Richard Falk, who writes on global constitutionalism as an "extension of constitutional thought on world order", Anne Peters develops the idea on compensatory constitutionalism. Namely, globalisation positions national states and their constitutions in situations of great tension. Global problems force states to cooperate within international organisations and through bilateral and multilateral agreements. Formerly typical governmental functions, such as guarantees of security, freedom, and equality, have been transferred to higher decision-making levels. More and more authority as it concerns exercising of traditional state functions, including military and police, is being given to non-state actors. Now the process of governance in the sense of "overall process of regulating and ordering issues of public interest", as a result of numerous such phenomena, takes place outside and above the constitutional boundaries of states. This in fact means that:

> …state constitutions can no longer regulate the totality of governance in a comprehensive way, and the state constitutions' original claim to form a complete basic order is thereby defeated. The hollowing out of national constitutions affects not only the constitutional principle of democracy, but also the rule of law and the principle of social security. Overall, state constitutions are no longer 'total constitutions'. In consequence, we should ask for compensatory constitutionalization on the international plane. Only the various levels of governance, taken together, can provide full constitutional protection.[45]

The complex phenomenon of "multi-level governance", imposed on the theory by the issue of the legitimacy of European integration, and especially the question of democratic deficit that accompanies the practice of complex multi-level governance structures, has led to more attention being paid to the topic of the understanding of democracy at European level, as well as to the need for its protection. In this context there is an almost natural revival of well-known James Madison's arguments (neo-Madisonian'vision) highlighting that both supranational and intergovernmental EU

44 Isiksel, 2012, p. 103.
45 Peters, 2006, p. 580.

institutions are "legitimised via their instantiation of two core democracy principles" advocated by Madison, namely the separation of powers and the system of checks and balances. The important question posed by A. Moravcsik regarding the possibility of "despotism in Brussels" and his understanding of L. Siedentop's "Democracy in Europe" is beyond mere rhetoric and certainly has its place in questioning the role of "auxiliary precautionary measures" in the EU context. We need to check how the restrictions that prevent the abuse of power are formed in the EU, in what way these measures i.e. the separation of powers and federalism exist in the EU as a 'very sophisticated, contemporary version of Madisonian democracy' and how to draw out an argument on EU's legitimacy from its multi-level composition.[46]

4. Adaptation of the old separation of powers principle in the evolution of European integration and institutions

Despite the resistance and disbelief that the old separation of powers principle would still have a role in a supranational constitutionalism (constitutionalism beyond the state), recent events have shown that 'the structure of governance and the factually implemented separation of powers have experienced far-reaching changes'. In empirically based research, E. Salzberger and S. Voigt point out the emergence of completely new levels of governance, among which the European Union occupies a special place. In addition, a "voluntary submission" to international institutions such as the WTO and their "rules of the game" plays an important role everywhere.[47] The supranational narrative joined the international law narrative and the narrative of nation states (statist narrative). Furthermore, one of the structural premises is the "constitutional narrative" according to which legal relationships between the member states and the European Union have undergone a "substantial transformation". Relations that were regulated by international law have grown into fully developed constitutional relations, and the original international treaties by which the initial communities were founded have been constitutionalised. In that sense, M. Avbelj concludes that it is nowadays beyond doubt that 'the overall relationships between the member states and the EU are indistinguishable from analogous legal relationships in the constitutional federal states'.[48]

The emergence of the European Union opened debates about its legitimacy. It should be pointed out that traditionally, for a long time, debates about the legitimacy of political orders have been conducted around the issue of limitations of political power, methods and instruments of this permanent civilisational endeavour. We will use the

46 Moravcsik, 2001, pp. 114–122; Siedentop, 2001, p. 272; Bickerton, 2011, pp. 659 et seq.
47 Salzberger and Voigt, 2009, p. 198.
48 Avbelj, 2008, p. 6.

debate on the legitimacy of the European Union because it also featured a "neo-Madisonian" vision that recognised the multi-level nature of the EU as a modern version of Madison's argument on the separation of powers and the system of checks and balances. We believe that the separation of powers and the system of checks and balances are still *mutatis mutandi* instruments of democratic responsibility and control in the EU today. This point of view is confirmed by Jacques Ziller who, despite declarations that the concept of the separation of powers is not applicable to the EU system, still considers

> …that there is and will be a genuine separation of powers in the EU system, and that its elements will become clearer in the basic treaties of the EU, due to the contribution of the European Convention, albeit the EU institutional setting will remain a very complex system.[49]

The European Union today is a supranational organisation, an economic and political partnership between 27 European countries, member states that have transferred competences i.e. powers to the EU to facilitate the formation and implementation of European policy in the areas of agriculture and fisheries, the environment, trade policy, and economic and monetary markets. The political centre of the EU consists of seven institutions: the European Council (composed of the heads of state or government), the Council of the European Union (composed of ministers from relevant policy areas), the European Commission, the European Parliament, the Court of Justice of the European Union, the European Court of Auditors and the European Central Bank. In accordance with the transfer of powers and division of competences, the governments of the member states cannot make fully independent legislative decisions in certain policy areas (exclusive competences of the EU).[50]

EU decisions are based on rules already established in the Treaty on the functioning of the European Union. Accordingly, EU institutions and member states must cooperate in almost all policy areas. The European Commission (EC) prepares and proposes laws that (in most cases) are adopted by the Council of the EU and the European Parliament. The governments of the member states are represented in the European Council and, depending on the policy area under discussion, in different compositions of the Council of the European Union. The European parliament is directly elected by EU citizens and acts as a co-legislator (with the exception of any areas specified in Treaties). The European Parliament must give its consent to the proposal of the EC and has the right to amend it. In that way, European citizens participate in the decision-making process in the EU. Today, decisions of the Council are made by a qualified majority vote. This means that decisions are made by a majority vote, subject to the fulfilment of certain additional conditions. Furthermore, mechanisms for the accountability and control of the EU policies are envisaged in Treaties. In addition to being a co-legislator, the European Parliament acts as an important factor in

49 Ziller, 2008, p. 136.
50 Möllers, 2013, pp. 110 et seq; Klabbers, 2019, pp. 25–41.

terms of accountability and control regarding the implementation of EU policies. In that process it is assisted by the European Court of Auditors that audits regularity, efficiency and effectiveness, while its special reports are also discussed in Parliament's Budgetary Control Committee. After the financial and economic crisis, which was reflected in formal or common policies of the EU, intergovernmental policies gained importance, especially between the countries of the Eurozone. Those countries concluded agreements that exclusively concern the Eurozone and may operate outside the treaty framework, thus remaining out of application of the rules on accountability and control that apply to the EU as a whole. The existence of differentiated policy areas such as the Eurozone also results in different arrangements of control.[51]

In what way did new supporters of J. Madison (Europe's Neo-Madisonians) actualise the role of the separation of powers, that "old" and in the same time "new" instruments of government control, and accountability in the EU context?[52] In the traditional sense, the separation of powers has always been a means of preventing tyranny and enabling a system of checks and balances. According to the classical conception, the parameters and procedures for the enactment, enforcement and application of laws are designed to prevent tyranny by separating power between the branches of government and by giving each branch the ability to check any possible abuse of power made by the other branches. Nevertheless, prevention of tyranny and protection of freedom are not the only justifications of such arrangement. Another important justification for the application of the separation of powers is that the elaborated institutional and procedural design of each of the three branches allows for greater efficiency in each. The Constitution divides the state powers not only to establish checks and balances among the branches of government, but also to increase the probability that the role assigned to each particular branch will be performed consistently and effectively.

The EU is faced with the challenge of how to resolve the relationship between institutional construction and the popular will *de manière républicaine*. By all means, the existing problems of today's EU are not the same as those that worried Madison in the 1780s. During his time, there was concern about the excessive politicisation of member state legislatures and the dangers this phenomenon posed to the relations between the states of the federation. Another phenomenon which has been worrying the EU for a long time is the democratic deficit. In other words, the EU is experiencing a problem of insufficient politicisation. Namely, the parliaments of the member states, as well as the European Parliament, are facing serious challenges to restore or regain popular legitimacy.

In the debate about the democratic deficit, one of the most direct and clearest interventions was A. Moravcsik's claim *a la Madison* that 'the classic justification for democracy is to check and channel the arbitrary and potentially corrupt power

51 European Commission, 2009, pp. 1–108; Schimmelfennig, 2020, pp. 992–993.
52 Salzberger and Voigt, 2009, pp. 197–201; Gormley, 1991, pp. 1–18; Möllers, 2003, pp. 1–52.

of the state'.[53] He argues that the EU is not less democratic than the member states, and concludes that as a multi-level system of decision making and plural executive it is in fact more constrained than any national polity, precisely because of institutional "checks and balances, notably separation of powers". Convinced that every description of a "European spectre" as a superstate is absurd, this author concludes that precisely for the reason that the power of the EU is so significantly constrained, many analysts hesitate to call it a state, preferring instead to use the more diffuse, more neutral term of "governance system".[54]

A. Moravcsik argues that the EU as the most ambitious and successful example of peaceful international cooperation in world history is 'not a system of parliamentary sovereignty but of separation of powers'. The existence of checks and balances in all areas in which the EU operates makes arbitrary action and any other actions difficult. For Moravscik, such institutional procedures are the conventional tool for protecting the interests of vital minorities – a design feature generally thought to be most appropriate to polities, like the EU, that must accommodate heterogeneous cultural and substantive interests.[55]

The argument offered by A. Héritier rests upon on the claim that the nature of the EU's political system is fragmented and as such it basically replicates Madison's argument about the agonistic relations that exist between different branches of government. There is competition between institutions which creates distrust, and also prevents mutual control between them. Limititations at EU level are, at the same time, the solution to the problem with tyrannical majorities in Europe, which nation states have so far been unable to solve. Argumentation structured in this way i.e. as a defence of multi-level EU in the name of minority rights, is also advocated by other scholars, such as J. J. Weiler, N. McCormick, etc.[56] This dialogue is supplemented by Jan Zielonka who argues that the fragmented political order represents the answer to the problem of ensuring proper control of political power that must be balanced. Such dissemination of power contributes to consolidating awareness and accountability as different actors that control each other and reacting to any observed abuses of power. Zielonka reminds us of Madison's phrase, "ambition must be made to counteract ambition" and emphasises that "plurilateral governance" of the EU that is compared to "neo-medieval empire" offers an updated version of Madison's arguments on the principles of separation of powers and the system of checks and balances.[57]

53 Moravcsik, 2002, p. 604.
54 Moravcsik, 2002, p. 611.
55 Lijphart, 1990; Moravcsik, 2002, p. 609.
56 Bickerton, 2011, p. 4.
57 Zielonka, 2006, p. 184.

4.1. Integration and Montesquieu redivivus

From the very beginning of the development of the EU, the reality of the connection of this community with the theory and practice of the separation of powers principle was rejected by many. This was collaborated by numerous opinions that such a 'concept is not applicable to the EU system'.[58] Negative views were especially dominant in the initial years of European integration and the development of its institutions, when the division of powers was interpreted in a strictly American way. Namely, consistently to the rigid understanding according to which legislative power is entrusted exclusively to Congress; executive power to the President of the Republic, and judicial power to the US Supreme Court. In that sense, the 'American-style presidential separation of powers regimes are exportable and desirable under certain carefully controlled circumstances'.[59]

However, since the logic of the separation of powers as a principle that guaranteed values of constitutional democracy was wide open, especially at the moment when former socialist countries started with the process of democratisation and accession to European integration, ideas began to be articulated, according to which the European Community from that time

> ...cannot remain indifferent to the imperatives flowing from this principle in relation to the structuring of its own constitutional system of exercise of public authority... As a credible project of supranational government... the European Community is bound to achieve the highest standards of constitutionalism even if this requires it to further question some leftovers of intergovernmentalism which may, on balance, not really be needed any longer to keep alive the appropriate equilibrium of powers between the Community and the Member States.[60]

In Europe, naturally, another constitutional interpretation was drawn about Montesquieu's ideas about the separation of powers. Robert Schütze reminds us that Montesquieu also spoke about the possibility of combining powers, and about authorities that ultimately act in concert (*..elles seront forcées d'aller de concert*):

> To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other. This is a masterpiece of legislation; rarely produced by hazard, and seldom attained by prudence. ... These three powers should naturally form a state of repose or inaction. However, as there is a necessity

58 Ziller, 2008, p. 136.
59 Calabresi and Bady Kyle, 2010, p. 5.
60 Lenaerts, 1991, pp. 11–36.

> for movement in the course of human affairs, they are forced to move, but still in concert.[61]

For Schütze, the basic idea behind this "second" conception of the separation of powers is a system of checks and balances. That was the concept that inspired fundamental European treaties. Namely, Treaties do not place a particular institution within the framework of a related government function. Instead, its authors adopted another, completely opposite nomotechnique. Thus, for example, in the Treaty on the European Union, each institution has its own "article", the first section of which indicates the combination of state functions in which it participates. The fundamental treaties have therefore prepared a system of distribution of powers between the various institutions of the EU, assigning to each institution its own role in the institutional structure of the Union and the tasks it has to perform in it. That was the conception of the separation of powers envisaged by Art. 13(2) TEU: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation'.[62]

This Treaty provision points out to three possible situations. Firstly, each institution has to act within the limits of the powers conferred on it in the Treaties, meaning that the unilateral expansion of its constitutional role is not possible. Meaning, without an explicit mandate, as envisaged in the Treaty, the transfer of competences from one institution to another is not allowed. Secondly, a harmonised institutional balance means that each institution has to exercise its competences with due regard to the competences of other institutions. Institutions are embedded and interconnected within the EU governance processes. Thus, three EU institutions cooperate in the ordinary legislative procedure: The European Commission that proposes a legislative act, and The European Parliament and Council of Europe that jointly decide on its adoption. It is all part of the intentional institutional balance of the Treaty.[63]

With regard to the old question about which state "powers" or "functions" are recognised in the EU, the state of affairs is such that the Treaties do not classify state functions following formal criteria or according to a special procedure. Namely, in accordance with the classic constitutional position, Treaties use the material conception of state authorities. In this sense, legislative power refers to the creation of legal acts, and the executive has the authority to propose and apply them, while the judiciary interprets these acts. In addition to these three "traditional" authorities, in recent times, additional "state" authorities have been shaped by the constitution, known as the "fourth" branch which refers to the relations of the political community (body politics) with the exterior, and is located between the legislative and

61 Montesquieu, 1748, pp. 74, 181.
62 Consolidated version of the Treaty on European Union, TEU, Title III Art. 13 (2).
63 Schütze, 2012, pp. 84 et seq.

executive branches, and a "fifth" branch which refers to the state control of financial markets and is identified with state banks that regulate and maintain the flow of money.[64] In a nutshell:

> The EU – that has a sophisticated system of fundamental rights protection – also has a complex separation of powers regime, so there can be no doubt about its constitutional nature. The EU has bicameral legislative, whereby the EP and the Council in principle share the function of approving laws based on Commission proposals – although in some cases legislative power is exercised exclusively by the Council, without an equal role for the EP. The EU also has dual executive power, led by the European Commission and the European Council, which have mastered the governing function – even if policy direction is increasingly determined by the European Council while the Commission "rules" in matters of less political sensitivity. Finally, the EU has a complex judiciary, centred on the European Court of Justice, but it also includes all national judges.[65]

It is the analytical reconstruction of the powers of EU institutions, in which trends in the functioning of the legislative, executive and judiciary in the EU are dynamically observed, that enables the conclusion that the EU has a complex system of separation of powers, with bicameral legislative, dual executive and complex judiciary. At the same time, in observing contrasting practices in the functioning of the EU's form of government, especially the coexistence of parliamentary and presidential pressures, F. Fabbrini leaves the question open as to further prospects for subsequent reforms of the EU's constitutional architecture in the context of the debate on the future of Europe.[66]

Finally, in the context of post-Lisbon institutional structure, the term "institutional balance" emerged as the new, corrective method of concretising, differentiating and supplementing the functions and competences in division of the power complex. This correlation can be explained in following way:

> Moreover, if the general idea of division of powers may be understood to have a constitutive and in that sense also foundational role in the framework of modern constitutionalism, the idea of institutional balance tends to be used as a corrective tool instead of having a constitutive meaning. Institutional balance provides a convenient conceptual framework for counteracting something that is considered as legally or politically harmful or undesirable in the development of the European Union. Balancing between the extremes of technocratic guidance – democracy is a practical example of this observation….[67]

64 Ibid.
65 Fabbrini, 2023, p. 23.
66 Fabbrini, 2023, pp. 1–26.
67 Moskalenko, 2016, p. 4.

5. EU federalism and its modifications – Irregulare aliquod corpus et monstro simile – So what?

The project of integration of (Western) European countries into a new political-economic alliance, which appeared immediately after the end of World War II., was from the very beginning strongly and permanently influenced by the federal idea, whose "theory and practice are at the very heart of European integration" (W. Burgess). It is worth pointing out that these ideas were of primary interest, regardless of whether their advocates explained the European construction as a perfectly feasible and empirically valid component,[68] or just as another variant of S. Pufendorf's "miraculous platypus" (*irregulare aliquod corpus et monstro simile*).[69] The ideas that matured before and after the adoption of the Treaty of Rome were mostly grouped around the banner whose slogan was 'determination to lay the foundations of an ever-closer union among the peoples of Europe'.[70]

The inspirational source of federalism in the American context is most definitely a perfect union, a kind of "Open Sesame" of American constitutionalism, meaning they are magic words that inspired generations of Americans to build a constitutional democracy in which the value of federalism from the beginning was highlighted in a special way. Namely, constitutional democracy in America is ordained and established for the following main purposes: (i) to form a more perfect union; (ii) to establish justice; (iii) to insure domestic tranquility; (iv) to provide for the common defence; (v) to promote the general welfare; (6) to secure "the blessing of liberty" to then and future generations.[71]

According to Madison, Hamilton and Jay, as stated in The Federalist Papers, the U.S. Constitution contained significant innovations compared to the organisation of federations of the past. The federalism of the founding fathers was the federalism of a double community, in which each citizen belongs to both his state and the federal union. The federalist compromise at the Philadelphia Convention in 1787 concerned a system built on a new conception of federalism that combined a powerful federal executive power, two houses of representatives (one representing the nation, the other representing the states), the Federal Constitution, and after 1791 a broad guarantees of civil rights and citizen's freedoms (Amendments I-X). The federal constitution was not limited only to defence and security, but it also regulated the national economy. This concept of federalism was based on the notion of a dual community, local and global, in which both the harmony of the whole and the efficient functioning of local government were taken care of. The very principle of federalism was understood as the division of political power and responsibility between the centralised federal

68 Burgess, 2000, p. IX.
69 Osiander, 2010, pp. 1. et seq.
70 Treaty of Rome, 1950.
71 Allen, 2021, p. 21.

government on one hand and the dispersed parts (member states of the federation) on the other, with an emphasis on mutual benefits in protecting the freedom of the people and the civil rights of individuals. Thus, federalism in the American case was much more than a mere dispersion of power; it was highly valued as a principle of promoting and preserving self-government and a shield of protection of the rights and freedoms of the American citizens.

In contrast to the American example (a more perfect union), the phrase "ever closer union" in the European context has been the source of numerous polarisations and disagreements regarding the path that European countries should take. The 1957 Treaty Establishing the European Community already contained the objective of "ever closer union" in its Preamble. The real trouble-maker in this context was Great Britain, which, despite the fact that it agreed several times to the EU Treaties and their amendments, of which the stipulation "ever closer Union" was an integral part, constantly sought and found in this phrase "a call forward towards a federal Europe", i.e. Europe as a super-state, a 'lingering symbol of a "United States of Europe" ambition'. Though the phrase "ever closer union" (in its entirety: "an ever closer union among the peoples of Europe") in European law and politics may be found to have already started from 1957, it really did not mean any specific call towards political union, that is creating a new European super state. Treaties emphasise the 'process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen', meaning they don't mention the political union and even the word "union" is written with a lowercase letter u. The phrase has little direct legal effect. The European Court of Justice did not cite it often in the sense of supporting decisions with federalist expansionist pretensions of the centre. However, critics believe that the CJEU pursued an integrationist agenda by relying on the objective of "ever closer union", which therefore 'cannot be described as solely symbolic'.[72]

The question of "genuine" meaning and character of the community that follows the EU from the beginning revives reminiscences of Samuel Puffendorf (1632-1694) whose 1667 treatise *De Statu Imperii Germanici* offered a strong critique of the disastrous state of public law in the Roman-German empire and counted the guild of constitutional lawyers as its apologists. Puffendorf there described the Roman-German empire as a "monster" because it divided sovereignty between the emperor and state. Puffendorf considered the Empire as an "irregular state" (irregulare corpus), because it represented neither a monarchy nor a confederation of states. The book raised an uproar throughout Germany and was quickly banned from universities, while the writer was condemned by the Imperial censor and the spiritual head of the Empire, the Pope.[73]

72 Miller, 2015, pp. 4 et seq.

73 Sæther, 2016, p. 21; Osiander, 2010, p. 6; 'There is now nothing left for us to say, but that Germany is an Irregular Body, and like some misshapen Monster, it can, at least, be measured by the common

Puffendorf's case lays bare all the sensitivities about the issue of federalism, the nature and form of which the political power constantly tried to accommodate to itself with the least possible damage to its untouchable "sovereign" character. Elaborating on the issue of the evolution and contribution of European federalism, attention is drawn in the relevant literature to the old European distinction between the Bundesstraat – federal state, and Staatenbund – confederation, union of states, while still taking into account the useful remark of Henry Sidgwick (1838-1900) that this "strict" historical-scientific distinction may have been given a lot of "undeserved importance" because these two terms, confederation, and federal state. represent just two phases in the development of federality:

> Sidgwick suggested that the term "federality" embraced a wide divergence of views about federal principles, akin almost to a spectrum of federality. And his phrase "federal polity" can be conveniently reduced to two main types, namely, a federal state (or federation) and a confederation (or league of independent states). However, as he observed, 'in neither case is the distinction simple and sharp since the balanced combination of "unity of the whole aggregate" with "separateness of parts", which constitutes federality, may be realised in very various modes and degrees.[74]

From its birth, and until this day, the European Community has displayed prudence in the search for a strict definition of the political-legal character of the European association of states, and caution in defining the relations of central institutions with the member states of the alliance. It is therefore not surprising that from time to time the intellectual search for figuring out the "nature of the beast" is summarised with the following statement: 'Curious and cumbersome perhaps, but the EU is still a formidable creature'.[75]

At present, sovereignty still mainly rests with the states. In addition, the existence of the unanimity rule in several areas such as fiscal and social policy, the exclusive competence of the Council in foreign affairs and defense, the *de facto* intergovernmental Commission and other elements call into question the existence of a true federation. The European Union is an international innovation that combines intergovernmental and confederal, and supranational and federal elements. It is definitely not a federation, maybe just a "federation in the making". The key elements missing are: (a) all EU legislation should be created by co-decision and qualified majority voting, including foreign affairs and defence; (b) pan-European constituencies should be created; (c) the supranational European Commission should be elected by the European Parliament and the Council of the European Union, not the member states; (d) the European Parliament should have the power to pass laws and

Rules of Politics and Civil Prudence, and that nothing similar to it, in my opinion, exists anywhere else on the whole globe'. Pufendorf, 1696, p. 176.

74 Burgess, 2000, p. 255.

75 Thornhill, 2008, p. 17.

to introduce taxes at EU level (together with the Council of the EU); e) The European Council should be limited to the role of the collective head of state; f) interpersonal solidarity mechanisms should be created, such as EU unemployment insurance and health insurance for the elderly; g) The EU should have a single voice in international affairs and security. By all means, in reality a federation treaty could hardly be agreed upon by all the current states. Perhaps only a small number of pro-European countries could initiate cooperation towards the European federation, with a federal core that would emerge within the current eurozone. Reform proposals that have recently been presented in the European Parliament, concentrating, amongst other things, on strengthening the Parliament and the Commission while weakening the influence of the European Council, replacing the unanimity by qualified majority voting in different areas, introducing new exclusive Union's competences and further widening of shared competences, the establishment of a defence union including military units under the operational command of the Union, and strengthening the EU's supervision of national policies, would undoubtedly significantly change the Union and push it towards a federal framework.[76] However, the decision regarding the question if this the right step forward for European integration still remains in the hands of its Member States.

5.1. Federalism as a "precautionary measure" in constitutional engineering of the EU?

Bearing in mind all the misfortunes and misery brought to Europe by rampant nationalism in the period of 1914-1945, enthusiasts behind the idea of a united Europe worked to build an international order with rules that would transcend national borders. The meaning of these rules was sought in suppressing the destructive and protectionist potential of the nation state. The idea of a peaceful coexistence of several states in an alliance was the *l'idee force* of European federalists A. Spinelli, R. Schuman, J. Monet and others. Inspired by libertarian ideas of Lord Acton they believed that 'the co-existence of several nations under the same State is a test, as well as the best security of its freedom'.[77] In Acton's mind, federalism as a division of power between the central government and the governments of the member states was implied as a 'precautionary measure'.

During the time of fierce clashes between Federalists and Anti-federalists at the Constitutional convention in Philadelphia, among the Anti-federalists there was a widespread mindset about the cautious handling of power, and authority. They were aware of the possibility of its abuse, so they found very convincing arguments against its administration. Several of them were firmly convinced that tomorrow 'the cradle of

76 See European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties; See Lionello, 2023, pp. 1–5.

77 Mingardi, 2022.

the Constitution would be the grave of republican liberty'.[78] The content of these discussions had a great influence on the European federalists in the preparation of the first European organisation (The Council of Europe), and the first European communities.

It should be repeated that the essence of preventive constitutionalism (Vermeule) is the advocacy and defence of rules and structures as precautionary measures and procedures against the risk of the abuse of power by acting officials or other constitutional actors, the risk of a tyrannical majority or other political pathologies. In the set of several different forms, the federalist principles of caution have a special significance. We have no doubt that it was precisely this point of view that inspired the understanding of member states as "masters of the Treaties". We believe that this is so because the federalist precautionary principle advocates the strict control of the competencies of central federal institutions. At the beginning of the 19th century St. George Tucker (1752–1827) urged that the Constitution 'is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question'. That is so-called "Tucker's rule", based on consent theory and precautionary measures:

> As every nation is bound to preserve itself, or, in other words, [its] independence; so no interpretation whereby [its] destruction, or that of the state, which is the same thing, may be hazarded, can be admitted in any case, where it has not, in the most express terms, given [its] consent to such an interpretation.[79]

In the European continental political tradition of federalism, there is a permanent awareness of the political "hazard" that centralised power will "destroy" the independence of what in the American context Tucker considered the sovereignty and independence of the member states of the confederation. Such states must be firmly presumed to take adequate precautions for their own survival. Therefore it must also be presumed that they will not risk their own destruction unless they are convinced that taking such a risk is infallible. For many Europeans as well as for early federalist commentators, the main federalist principle of the strict construction of national powers was similar to the X. Amendment of the US Constitution which provides that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'.[80]

It is therefore evident that the process of European integration was from the beginning connected with the idea of federalism. Francesco Palermo, just like many others who have followed the evolution and forms of EU integration, emphasises that it is an ongoing process, that is – a *sui generis* experiment.[81] According to Miguel Maduro, what exists and evolves is nothing but European constitutional pluralism

78 Marshall, 1926, pp. 240–41, cited in Vermeule, 2012, p. 185.
79 Tucker, 1803, p. 423; cited in Vermeule, 2012, pp. 188–189.
80 Vermeule, 2012, p. 189; Grappi, 2007, pp. 95. et seq; Burgess, 2000, pp. 163 et seq; Vayssière, 2022, pp. 1–14; Pinder, 1993, pp. 240 et seq.
81 Palermo, 2019, p. 1.

in action and its "contrapunctual law". With regards to Maduro's theory, its aim is twofold. On one hand constitutional conflict is avoided, while on the other when it does arise it can be managed effectively. Through an analogy with the musical theory of counterpoint, Maduro tries to show that the coexistence of different voices does not result in a cacophony, but instead a harmony that expresses the simultaneous independence and interdependence of the elements. The principles of contrapuctual law are 'the principles to which all the actors of the European legal community must commit themselves and according to which the EU legal order as a system of law'. The aim of the contrapunctual principles is to rise above European and national monism and to realise 'incompletely theorized agreements' (C. Sunstein), whereby 'different actors may proceed from different bases and by different routes, but nevertheless come up with the same (or at least different but compatible) results'.[82]

Reality therefore points us towards a compromise reconceptualised understanding of federalism that would be broader than the classic American model, yet narrower and more principled than the multi-level management approach. Such an attitude and approach identifies a minimum of institutional and procedural elements that are essential for the qualification of a system as "federal", but without excluding different combinations, such as the distribution of powers according to general and specific goals, existential guarantees that protect the rights of all constituent members, and the mechanism of negotiating a compromise based on the equality of members. In this direction, the normative questions of an institutional structure (constitutional engineering) can be seen, which form the basis for the idea and practice of desirable federalism, namely equality among the constituent members of the federation (horizontal dimension), and the balance of power between two, three or more levels of government (vertical dimension). In any case, possible combinatorial variations can be grouped into two different models, the American model of "constitutional federalism" and the European model of "contractual federalism".[83] Which way to go? Which concept of federalism should be used?

The compromise process between the EU in the centre and the member states as a "political periphery" became a political choice with the adoption of the Single European Act (1986), which elevated

> the philosophy of cooperative federalism from a legislative to a constitutional phenomenon by means of two new constitutional ideas: the principle of subsidiarity and complementary jurisdiction. The Treaty on the European Union expanded these two constitutional means into general guardians of European federalism.[84]

Thus, in the 1980s European political philosophy gave impetus to the principle of subsidiarity, which in the context of a general and intense socio-political search by

82 Flynn, 2013, p. 45.
83 Benz and Broschek, 2013, pp. 1–23.
84 Schütze, 2009, pp. 242 et seq.

several actors for a compromise between capitalism (individualism) and communism (collectivism) represented the idea that

> ... the central authority should have a subsidiary function, in the sense that it performs only those tasks that cannot be realised on a more immediate or local level... and with the aim of achieving unity through the harmonious arrangement of several objects.[85]

When the Treaty on the EU (1992) constitutionalised the principle of subsidiarity making it general constitutional principle, the European federalism finally gained a constitutional principle whose exclusive task was nothing more than to 'protect the Member States from the danger of excessive centralisation'. Article 5(2) of TEU, which elaborates the principle of subsidiarity, actually constitutionalised the principle of cooperative federalism as a Union principle. This principle also became the federal guardian of overlapping areas of competence and in that sense had nothing to do with dual federalism.[86]

6. Republic of Croatia as Member State of the European Union and actor of cooperative federalism

A quick look at the political map of the world shows us that we live in an age of federalism. In every review of comparative political systems it is pointed out that of the G-20 states, namely the countries with the most developed economies in the world, at least eleven have federal constitutional structures (USA, India, Germany, Brazil, Argentina, Canada, Indonesia, Australia, Russia, Mexico, South Africa, while several others are experimenting with federalism and the devolution of power). Of the ten countries with the highest GDP sin the world, only two – China and France – lack any semblance of federal structure. Of the ten most populous countries in the world, eight have federative or devolutionary structures. Only two of ten largest countries by land area in the world lack federal structure. One should also keep in mind that there are so many countries around the world which have transferred competences to growing international entities of different kinds (WTO, EU, NAFTA, NATO, etc.). Therefore, it might not be an over-exaggeration to say that "our time is witness to the decline and fall of "nation-states".[87]

85 Schütze, 2009, pp. 245 et seq.
86 Ibid.
87 Calabresi and Bickford, 2014, pp. 123–124.

6.1. Republic of Croatia as an actor in EU institutions

The Republic of Croatia became a Member State of the European Union on 1st July 2013. Joining the EU was one of the Croatia's main goals from the day it first gained independence. Croatia applied for full EU membership on 21st February 2003, and was confirmed as a candidate country on 18th June 2004. Accession negotiations were officially launched on 3rd October 2005. During its first ten years of membership, the Republic of Croatia achieved two strategic goals, moving it deeper into EU integration, namely Croatia joined the Schengen area and the Eurozone.

Following its accession, Croatia became a member of the European Union with all rights and obligations that stem from that membership, and certain competences were transferred to the institutions of the European Union in accordance with the provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union as well as the provisions of the Constitution of the Republic of Croatia (Chapter VIII – European Union).[88] For the purposes of more efficient functioning, numerous laws and decisions were adopted, defining the competences and obligations of various institutions and state administration bodies. For example, the Law on the Cooperation between the Croatian Parliament and the Government of the Republic of Croatia in European Affairs, which defines that the Parliament monitors and supervises the work of the Government in the EU institutions, reviews EU documents the positions of the Republic of Croatia and is able to reach conclusions on them, participates in the process of proposing candidates of the Republic of Croatia for the EU institutions and bodies, participates in inter-parliamentary cooperation between Member States and in cooperation with the European Parliament, etc. An Interdepartmental Working Group for European Affairs was also established, which reviews and prepares position proposals that will be advocated by representatives of the Republic of Croatia, and submits them to the Coordination for Foreign and European policy of the Government of the Republic of Croatia.

(i) Conducting European affairs. National institutions (Croatian Parliament, Government, judiciary, Constitutional Court) are engaged in European affairs based on the provisions of European law and national constitutional law.[89] Croatia's accession to the EU membership on 1 July 2013 reflected changes to the status and the role of the Croatian Parliament. Namely, legislative and non-legislative acts adopted at the EU level are either directly applicable in Croatia, or Croatia is obliged to transpose them into its national legislation. When adopting such acts, Croatia is represented in the Council of the European Union as a legislative body, by the Croatian Government. In the other legislative body of the European Union, the European Parliament, Croatian citizens are directly represented by Members of the European Parliament elected in Croatia.

88 Constitution of the Republic of Croatia, Official Gazette Narodne novine No. 85/2010 (consolidated text).

89 Official data available at the official web page of the Parliament; Hrvatski sabor, no date.

Conducting European affairs in the Croatian Parliament implies the Parliament's participation in the decision-making process at the level of the European Union through the activities of the Croatian Parliament arising from the membership of the Republic of Croatia in the European Union. The Croatian Parliament's participation in European affairs is regulated by Article 144 of the Constitution of the Republic of Croatia, the Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs and the Standing Orders of the Croatian Parliament.[90] The Parliament conducts European affairs indirectly by monitoring the activities of the Government in the institutions of the European Union, and directly by exercising the powers conferred on national parliaments by the Treaty of Lisbon. The powers of the Croatian Parliament in European affairs are, as a rule, carried out by the European Affairs Committee, while the Foreign Affairs Committee is in charge of issues pertaining to the Common Foreign and Security Policy. The European Affairs Committee closely cooperates with other working bodies of the Croatian Parliament that follow the policies of the European Union each within its own remit.[91]

The Standing Orders of the Croatian Parliament provide for the involvement of all working bodies and members of Parliament in European affairs.[92] Members of the European Parliament elected in Croatia may participate in the sessions of all working bodies of the Croatian Parliament.

(ii) Direct participation. Pursuant to the Protocol No. 1 of the Lisbon Treaty on the Role of National Parliaments in the European Union, EU institutions forward directly to the national parliaments all draft legislative and non-legislative acts as well as other documents on Croatian language.

The Parliament directly participates in the decision-making process in the European Union by monitoring its compliance with the subsidiarity principle in the proposals of legislative acts and legislative acts of the EU and by participating in the procedures of revising the Treaties and implementing the passerelle clause. The exchange of views within the framework of political dialogue between national parliaments and the Commission is also a form of direct participation in the decision-making process.

(iii) Indirect participation. The Croatian Parliament indirectly participates in the decision-making process of the European Union by supervising Government activities in the institutions of the European Union. Pursuant to the provisions of the Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs and the Standing Orders of the Croatian Parliament, the Parliament monitors the work of the Government in the institutions

90 Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs and the Standing Orders of the Croatian Parliament.

91 Hrvatski sabor, no date.

92 Standing orders of the Croatian Parliament, Official Gazette Narodne novine no. 81/13, 113/16, 69/17, 29/18, 53/20, 119/20, 123/20, 86/23.

of the European Union by adopting conclusions on the positions of the Republic of Croatia and the documents of the European Union, forming the basis of which the Government acts within institutions, namely holding debates during meetings of the European Council and the Council of the European Union, and by participating in the procedure for proposing candidates for the institutions and bodies of the European Union. During the procedure of consideration of EU documents and the relevant positions of the Republic of Croatia, the discussions on the meetings of the Council of the European Union and the procedure of nominating candidates for EU institutions and bodies, the powers of the Croatian Parliament are, as a rule, executed by the European Affairs Committee.[93]

(iv) Obligation of harmonisation of legislation. As a member state of the European Union, Croatia is obliged to align its national legislation with the *acquis communautaire*. The European acquis is constantly evolving and national regulations must be harmonised accordingly. Since 1 July 2013, the Croatian Parliament has adopted legislation harmonised with the acquis following the procedure established in the pre-accession period, according to which all legislative proposals that align Croatian legislation with the acquis bear the designation "P.Z.E." and are adopted under urgent procedure if so sought by the sponsor. The Parliament adopts the annual legislative alignment plan, which is an integral part of the Government's programme for incorporating and implementing the acquis, and is the basic document in the process of incorporating and implementing EU law in Croatian legislation. Croatia is obliged to implement the notification procedure i.e. to timely notify the European Commission of the measures for the transposition of new directives into Croatian legislation, as well as to properly implement the adopted legislation. The EU acquis is available in the Croatian language, which is one of the official languages of the Union, in order to provide Croatian citizens with equal access to European legislation.[94]

(v) Interparliamentary cooperation. Interparliamentary cooperation in the European Union is an important instrument for the coordination and attainment of the influence of national parliaments on the decision-making process at European level. The Lisbon Treaty has given national parliaments new powers in the field of European affairs, thus increasing the importance of interparliamentary cooperation, which provides for the exchange of information and best practices between national parliaments and the European Parliament. Mutual cooperation between national parliaments of the European Union Member States and their cooperation with the European Parliament is also important for bringing the European Union closer to the citizens. Various forms of interparliamentary cooperation are available to national parliaments, including the Croatian Parliament, and involve conferences and meetings as well as information exchange platforms.

93 Hrvatski sabor, no date.
94 Ibid.

7. Which form of federalism is the dominant modus operandi of European integration?

It is rightly pointed out that the EU, due to its innovations and complexity, is a unique phenomenon in the modern world of political leadership and legal regulation. The evolution process of EU integration and institutions has demonstrated the acceptability of the federal method of governing this complex supra-organisation of modern society. Nevertheless, one could rightly ask what type of federalism corresponds to the EU? Or, what type of federalism already exists in the EU? In the search for systematic answers, two points stand out. In one case, the criteria is qualification, and in the other it is the outcome of European integration. The first approach actually puts the EU into "federalist theory frames", while the latter directly addresses the "nature of the beast".[95]

(a) When it comes to the qualification of EU federalism, the literature distinguishes three alternative categories of federalism: new confederalism, cooperative federalism and regulatory federalism. (i) Scholars who advocate new confederalism take *sui generis* nature of European integration as a starting point. The EU is a polity that functions in practice, but fails to work in theory. P. Vila Maior adds an alternative qualification and poses the question, namely, is the EU a 'new federalist' polity? (ii) Advocates of cooperative federalism point to the fact that the development of European integration encouraged a closer relationship between the EU level and the member state level. Both supranational and national levels are involved in cooperation because they realised that it is the best solution to solve the problem. For supporters of cooperative federalism, the emphasis is on shared responsibilities between supranational and national units of governance. (iii) A related approach is regulatory federalism. The difference between cooperative federalism and regulatory federalism relates to aspects of decision-making. While cooperative federalism focuses on top officials, regulatory federalism pays attention to the bottom-up perspective, where regulatory agencies and networks are the main actors, as they provide the impetus for the final verdict of top officials in the decision-making process.[96]

(b) Answers to the question about the "nature of the beast" are grouped into three categories. The EU is an asymmetrical confederation, a federation without a federal state, and an emerging federal state. Bearing in mind that integration is a process and a laboratory of modern governance, the typology is almost endless. Nevertheless, it is evident that the EU has more federal characteristics, so it can be concluded that: 'In all respects, the EU is consistent with a federation without a federal state, whose internal organisation is characterised by decentralisation in a key sense. Overall, there is strong evidence that the EU is a decentralised federation'.[97]

95 Maior, 2009, pp. 12 et seq.
96 Maior, 2009, p. 13.
97 Ibid.

The long theory and practice of the division of competences between the centre and periphery, central government and states represents one of the "oldest questions of constitutional law". Generally speaking, traditional responses to that challenge, both in practice and in literature, mostly fall into two categories of federalism. One approach, dual federalism, assigns powers exclusively to federal or central (state) agencies. Another approach creates situations where central and peripheral (federal and state agencies) have overlapping competences, often called cooperative federalism.

Among the numerous researchers of the questions, what federal philosophy has the European Union followed and what is the structure of European law, a special contribution to the discussion is offered by Robert Schütze. In his book on dual and cooperative federalism, he specifically researched arguments that, he ascertains, reveal and justify the evolution of the European legal order through different modalities of federalism. The first argument relates to the decline of constitutional exclusivity on the part of the Member States and the European Union. For almost all objects of government, the Union and Member States operate in an area of divided, shared powers. The second argument analyses the decline of legislative exclusivity. European and national legislation increasingly complement each other in solving the social problem. The third argument describes the 'constitutionalisation' of cooperative federalism in the form of the subsidiarity principle and the idea of complementary competences. Schütze concludes that cooperative federalism benefits both levels of government, the Union and the Member States, since the constitutional mechanism of uniform European standards supplemented by different national standards best expresses the idea of a federation as "unity in diversity".[98] This idea was succinctly and wisely summed up by the classic protagonist of modern federalism Carl J. Friedrich (1901 – 1984) in the message that federalism merges in itself, and shapes and reconciles what he called a "federal spirit", which is in fact composed of two opposed aspirations, "one is striving towards diversity, and the other is striving towards unity. It will be shown that coexistence is possible, and that the federal order has a future only when these two aspirations penetrate each other".[99]

8. Conclusion

During its long political history, the Republic of Croatia has experienced various forms of federalism. Leaving aside historical forms for the purpose of this discussion (personal unions, real unions, etc.), as that discourse would not stay within the parameters of this study, we shall focus only on the period of its constitutional and

98 Schütze, 2009, pp. 345–352.
99 Blindenbacher and Koller, 2003, p. 560.

political history from 1945-1990. Despite some assessments that Yugoslav socialist federalism was not "federalism" at all, during the socialist period (1945-1990) the evolution of federalism nevertheless took place within the spectrum of authenticity (centralist, dual, unbalanced) to confederal (asymmetric, cooperative). That period left behind a valuable experience, which brought Croatia closer to the problems of the federal principle, regardless of the form in which it appeared.[100] This is even more apparent when one takes into account the differences that exist between the Yugoslav federalism in its initial, developmental phase (1945-1971) and its relevant features from its "mature", second, experimental phase (1971-1990) which are more than evident. Therefore, the next conclusion is quite legitimate, as it is true that

> ...the Yugoslav political system could be considered a relevant example of a federal system, even a system that can be theoretically considered a very specific federal system... (this is evidenced by) a series of articles on Yugoslav federalism in Publius, a respected journal dealing with theory and practice of federalism in the world.[101]

After all, the events of the early 1970s, when the Yugoslav federation began to "federate", also produced the federalist idea of the Croatian Spring, which was

> …not only an introduction to the movement for the creation of a democratic independent Croatian state in 1989-1991; its results, despite the political defeat of its creators and holders, expressed through the Constitutional Amendments of 1971 and the Constitution of 1974 with the right to self-determination of the republics and their original sovereignty, enabled the international recognition of the Republic of Croatia in 1992.[102]

After the first ten years of "coexistence" between the EU and the Republic of Croatia, we can say that this relationship is no longer a "tale of two discourses".[103] After joining the European Union, Croatia has already had the opportunity to constructively and critically evaluate its first experiences of coexistence within the framework of the new community. In accordance with its possibilities and potentials, Croatia is already participating in the only possible discourse, namely 'the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and closely as possible to the citizen'. It is a process in which the European federal quality is a solid basis for the coexistence of the EU and its member states.

100 Podolnjak, 2007, pp. 89 et seq.
101 Podolnjak, 2007, pp. 95 et seq; see, for example, Denitch, 1977, pp. 107–117.
102 Sokol, 2007, p. 141.
103 Rodin, 2007, p. 258.

References

Acton, L. (1887) *Acton-Creighton Correspondence* [Online]. Available at: https://oll.libertyfund.org/title/acton-acton-creighton-correspondence/ (Accessed: 15 October 2023).

Allen, W.W. (2021) 'Constitutional Reflections: A Recurrence to Fundamental Principles and Forming a More Perfect Union', *Nevada Lawyer* [Online]. Available at: https://howardandhoward.com/media/pdf/NevadaLawyer_Sept _Allen _ConstitutionPart1-CLEarticle_9-30-21.pdf (Accessed: 15 October 2023).

Avbelj, M. (2008) 'The Pitfalls of (Comparative) Constitutionalism for European Integration', *Eric Stein Working Paper,* No. 2008/1, pp. 1–28; https://doi.org/10.2139/ssrn.1334216.

Bačić, A., Bačić, P. (2016) 'Konstitucionalizam i administrativna država', *Zbornik radova Pravnog fakulteta u Splitu,* 53(1), pp. 119–137; https://doi.org/10.31141/zrpfs.2016.53.119.119.

Baraggia, A., Fasone, C., Vanoni, L.P. (eds.) (2020) *New Challenges to the Separation of Powers – Dividing Power*. Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781788975278.

Beckett, C.H. (1988) 'Separation of Powers and Federalism: Their Impact on Individual Liberty and the Functioning of Our Government', *William & Mary Law Review,* 29(4), pp. 635–651.

Benz, A., Broschek, J. (eds.) (2013) *Federal Dynamics: Continuity, Change, and the Varieties of Federalism*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199652990.001.0001.

Bickerton, C.J. (2011) 'Europe's Neo-Madisonians: Rethinking the Legitimacy of Limited Power in a Multi-level Polity', *Political Studies*, 59(3), pp. 659–673; https://doi.org/10.1111/j.1467-9248.2010.00872.x.

Blindenbacher, R.J., Koller A. (2003) *Federalism in a Changing World:* Learning from Each Other: Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism. Montreal: McGill-Queen's University Press; https://doi.org/10.1515/9780773571402.

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

Calabresi, S.G., Bady Kyle, B. (2010) 'Is the separation of powers exportable?', *Harvard Journal of Law and Public Policy*, 33(1), pp. 5–16.

Calabresi, S.G., Bickford, L.D. (2014) 'Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law', *Nomos,* 2014/55, pp. 123–189.

Craig, P. (2021) 'Institutions, Power, and Institutional Balance' in Craig, P., de Búrca, G. (eds.) *Evolution of EU Law*. Oxford: Oxford University Press; pp. 46–98; https://doi.org/10.1093/oso/9780192846556.001.0001.

Denitch, B. (1977) 'The Evolution of Yugoslav Federalism'*, Publius,* 7(4), pp. 107–117; https://doi.org/10.2307/3329500.

Dobner, P., Loughlin, M. (2010) 'Introduction' in Dobner, P., Loughlin, M. (eds.) *The Twilight of Constitutionalism?*. Oxford: Oxford University Press, pp. 11–16; https://doi.org/10.1093/acprof:oso/9780199585007.002.0008.

Eisinger, V. (2015) 'Auxiliary Protections: Why the Founders' Bicameral Congress Depended on Senators Elected by State Legislatures'*, Touro Law Review*, 31(2), pp. 234–295. [Online]. Available at: https://digitalcommons.tourolaw.edu/lawreview/vol31/iss2/7 (Accessed: 17 October 2023).

Elazar, D.J. (1981) 'The Power to Govern: Assessing Reform in the United States', *Proceedings of the Academy of Political Science*, 34(2), pp. 5–19; https://doi.org/10.2307/1173787.

Elazar, D.J. (1985) *Forces Shaping the Federal Svstem Today in Emerging Issues jn American Federalism- Papers Prepared forACIR's 25'th Anniversary* [Online]. Available at: https:// library. unt.edu/gpo/acir/Reports/information/M-143.pdf (Accessed: 19 October 2023).

Ewing, C.M. (2016) 'The Politics of Sovereignty: Federalism in American Political Development'*, Dissertation*, pp. 5–264.

Fabbrini, F. (2023) 'The Separation of Powers in the European Union'*, Rivista Trimestrale di Diritto Pubblico*, No. 2023/1, pp. 13–44.

Federalist Papers (1788) *No. 32 The Same Subject Continued Concerning the General Power of Taxation* [Online]. Available at: https://avalon. law.yale.edu/18th_century/fed32.asp (Accessed: 15 September 2023).

Flynn, T. (2013) *The Universality of Interface Norms Under Constitutional Pluralism: An Analysis of Ireland, the EU and the ECHR*. Edinburgh: The University of Edinburgh.

Gormley, W.T. (1991) 'The Bureaucracy and its Masters: The New Madisonian System in the US', *Governance*, 4(1), pp. 1–18; https://doi.org/10.1111/j.1468-0491.1991.tb00001.x.

Grappi, G. (2007) *La questione antifederalista e il dibattito sulla ratifica della Costituzione degli Stati Uniti, 1787-1788*. Bologna: University of Bologna.

Hamilton, A., Madison, J. (1788) *The Federalist Papers: No. 51*: *The Structure of the Government Must Furnish Proper Checks and Balances Between the Different Departments.* [Online]. Available at: https://avalon.law. yale.edu/18th_century/fed51.asp (Accessed: 15 September 2023).

Hamilton, A., Madison, J., Jay, J. (1981) *Federalistički spisi*. Beograd: Radnička štampa.

Henkin, L. (1992) 'Constitutionalism*,* Democracy and Foreign Affairs'*, Indiana Law Journal,* 67(4), pp. 879–886.

Isiksel, T. (2012) 'On Europe's functional constitutionalism Towards a constitutional theory of specialized international regimes', *Constellations*, 19(1); https://doi.org/10.1111/j.1467-8675.2011.00665.x.

Isiksel, T. (2015) 'Functional constitutionalism in the European Union', *Draft paper to be presented at the EUSA Biannual Meeting in Boston*; https://doi.org/10.1093/acprof:oso/9780198759072.003.0003.

Isiksel, T. (2016) *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*. 1st edn. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780198759072.003.0001.

Jacobs, N. (2021) *Trump, Donald* [Online]. Available at: https://encyclopedia.federalism. org/index.php/Trump,_Donald (Accessed: 21 October 2023).

Kincaid, J. (2019) 'Three Shades of American Federalism', *50 Shades of Federalism* [Online]. Available at: https://ldr.lafayette.edu/concern/publications/nz8060259 (Accessed: 29 October 2023).

Klabbers, J. (2019) 'The European Union in the Law of International Organizations: Misfit or Model' in Wessel R., Odermatt J. (eds.) *Research Handbook on the European Union and International Organizations.* Cheltenham: Edward Elgar Publishing, pp. 25–41; https://doi.org/10.4337/9781786438935.00007.

Lenaerts, K. (1991) 'Some reflections on the separation of powers in the european community', *Common Market Law Review,* 28(1), pp. 11–36; https://doi.org/10.54648/COLA1991004.

Lenaerts, K., Gutman, K. (2006) 'Source „Federal Common Law" in the European Union: A Comparative Perspective from the United States', *The American Journal of Comparative Law,* 54(1), pp. 1–121; https://doi.org/10.1093/ajcl/54.1.1.

Levi, E.H. (1976) 'Some Aspects of Separation of Powers', *Columbia Law Review*, 76(3), pp. 371–391; https://doi.org/10.2307/1121549.

Lindseth, P.L. (2010) *Power and Legitimacy- Reconciling Europe and the Nation State*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780195390148.003.0001.

Lionello, L. (2023) 'A Leap Towards Federalisation', *Verfassungsblog*, September 2023, pp. 1–5; https://doi.org/10.17176/20230922-223502-0.

Loughlin, M. (2010) *What is Constitutionalisation?*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199585007.003.0003.

MacCormick, N. (1999) *Questioning Sovereignty, Law, State, and Nation in the European Commonwealth*. Oxford: Oxford University Press.

Maior, P.V. (2009) 'The European Union as a Federal Polity? An Input to an Unfinished Symphony'*, Paper for the 21st. World Congress of the International Political Science Association (IPSA),* 'Global Discontent? Dilemmas of Change', July 12–16, 2009, Santiago, Chile.

Marbach, R.J. (2006) *New Federalism (Nixon)* [Online]. Available at: https://encyclopedia.federalism.org/index.php?title=New_Federalism_(Nixon) (Accessed: 15 October 2023).

Marshall, G. (1971) *Constitutional Theory*. Oxford: Clarendon Press.

Miller, V. (2015) 'Ever Closer Union' in *the EU Treaties and Court of Justice case law, Briefing Paper,* 2015/07230.

Mingardi, A. (2022) *The EU's future: Like Switzerland or more like Italy?* [Online]. Available at: https://www.gisreportsonline.com/r/eu-future/ (Accessed: 12 October 2023).

Montesquieu, Ch. (1748) *The Spirits of Law*. Batoche Books.

Moravcsik, A. (2001) 'Despotism in Brussels – Misreading the European Union', *ForeignAffairs,* 80(3), pp. 114–122; https://doi.org/10.2307/20050155.

Moravcsik, A. (2002) 'In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union', *Journal of Common Market Studies,* 40(4), pp. 603–24.

Moskalenko, O. (2016) 'The Institutional Balance: a Janus-faced concept of EU constitutional law', *Politeja – Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego,* 13(45), pp. 125–143; https://doi.org/10.12797/Politeja.13.2016.45.07.

Möllers, C. (2003) 'Steps to a Tripartite Theory of Multi-level-Government', *Jean Monnet Working Paper,* No. 2003/5.

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

Nolte, G. (2003) 'European and U.S. Constitutionalism: comparing essential elements', *UniDem Seminar organised in Göttingen on 23-24 May 2003 in co-operation with the Institute of International Law, University of Göttingen, and Yale Law School,* Göttingen, pp. 9–22.

Osiander, A. (2010) 'Irregulare aliquod corpus et monstro simile: Can historical comparisons help understand the European Union?', *Draft paper for the Annual Meeting of the American Political Science Association,* Revised version, August 2010; https://doi.org/10.2139/ssrn.1648807.

Palermo, F. (2019) *What does the EU tell us about Federalism?* [Online]. Available at: http://50shadesoffederalism.com/theory/what-does-the-eu-tell-us-about-federalism/ (Accessed: 14 October 2023).

Pestritto, R.J. (2012) 'Woodrow Wilson and the Rejection of the Founder's Constitution'*, Constitution 201: The Progressive Rejection of the Founding and the Rise of Bureaucratic Despotism*; https://doi.org/10.5422/fordham/9780823251940.003.0009.

Peters, A. (2006) 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', *Leiden Journal of International Law*, 19(3), pp. 579–610; https://doi.org/10.1017/S0922156506003487.

Peterson, P.E. (2006) 'The Changing Politics of Federalism in the United States' in Greer, S.L. (eds) *Territory, Democracy and Justice – Regionalism and Federalism in Western Democracies*. London: Palgrave MacMillan, pp. 92–116; https://doi.org/10.1057/9780230510388_5.

Pinder, J. (1993) 'Federalism Versus Nationalism: The European Community and the New Europe', *New Europian Law Review,* 62(1), pp. 41–54.

Podolnjak, R. (2007) 'Federalizam u bivšoj Jugoslaviji i Europskoj uniji' in Smerdel, B. (ed.) *Primjena federalnog načela i pouke ustavne reforme 1971.* Zagreb: Centar za demokraciju i pravo Miko Tripalo.

Pryor Jr., H.W. (2002) 'Madison's Double Security: In Defense of Federalism, the Separation of Powers and the Rehnquist Court', *Alabama Law Review,* 53(4), pp. 1167–1182.

Pufendorf, S. (1696) *The Present State of Germany.* Carmel: Liberty Fund.

Riker, W.H. (1975) 'Federalism' in Greenstein, F. I., Polsby, N. W. (eds.) *Governmental Institutions and Processes*. Boston: Adison Wesley Publishing Company, pp. 93–172.

Rittberger, B., Schimmelfennig, F. (2006) 'Explaining the constitutionalization of the European Union', *Journal of European Public Policy*, 13(8), pp. 1148–116; https://doi.org/10.1080/13501760600999474.

Rodin, S. (2007) 'Hrvatska i Europska unija-priča o dva diskursa' in Smerdel, B. (eds.) *Primjena federalnog načela i pouke ustavne reforme 1971*. Zagreb: Centar za demokraciju i pravo Miko Tripalo, Zagreb, pp. 205–214.

Rosenfeld, M. (2014) 'Is Global Constitutionalism Meaningful or Desirable?', *The European Journal of International Law,* 25(1), pp. 177–199; https://doi.org/10.1093/ejil/cht083.

Russell, G. (2001) *Constitutionalism: America & Beyond*. Office of International Information Programs, U.S. Department of State.

Sæther, A. (2016) *Samuel Pufendorf-The Grandfather of Modern Political Economy?* [Online]. Available at: https://core.ac.uk/download/pdf/288306841.pdf (Accessed: 15 October 23).

Salzberger, E., Voigt, S. (2009) 'Separation of powers: new perspectives and empirical Findings – Introduction', *Constitutional Political Economy,* 2019/20, pp. 197–201; https://doi.org/10.1007/s10602-009-9076-6.

Schimmelfennig, F. (2020) 'The Conference for the Future of Europe and EU Reform: Limits of Differentiated Integration', *European Papers,* 5(2), pp. 989–998. [Online]. Available at: https://www.europeanpapers.eu/it/system/files/pdf_version/EP_eJ_2020_2_16_Dialogues_Frank_Schimmelfennig_00409.pdf (Accessed: 24 October 2023).

Schlesinger Jr., A.M. (1973) *The Imperial Presidency*. Boston: Houghton Mifflin Co.

Schütze, R. (2009) *From Dual to Cooperative Federalism-The Changing Structure of European Law*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199238583.001.0001.

Schütze, R. (2012) *European Constitutional Law*. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9781139031769.

Siedentop, L. (2001) *Democracy in Europe*. New York: Columbia University Press.

Sokol, S. (2007) 'Federalistička ideja od Hrvatskog proljeća 1971. do restrukturiranja Europske unije' in Smerdel, B. (ed.) *Primjena federalnog načela i pouke ustavne reforme 1971*. Zagreb: Centar za demokraciju i pravo Miko Tripalo, pp. 139–144.

Thornhill, J. (2008) *The Nature of the Beast – Curious and cumbersome perhaps, but the EU is still a formidable creature* [Online]. Available at: https://www.ft.com/content/e978e48e-43e9-11dd-842e-0000779fd2ac (Accessed: 24 October 2023).

Vayssière, B. (2022) 'Federalists and the Beginnings of the Council of Europe: Converting Institutions and Opinion to Supranationality (1949–1951)', *Histories*, 2(1), pp. 1–14. [Online]. Available at: https://doi.org/10.3390/histories2010001 (Accessed: 25 October 2023).

Vermeule, A. (2012) 'Precautionary Principles in Constitutional Law', *Journal of Legal Analysis*, 4(1), pp. 181–222; https://doi.org/10.1093/jla/las003.

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

Walker, N. (2006) 'The Migration of constitutional ideas and the migration of the constitutional idea: the case of the EU' in Choudry, S. (ed.) *The Migration of Constitutional ideas*. Cambridge: Cambridge University Press, pp. 316–334; https://doi.org/10.1017/CBO9780511493683.012.

Weiler, J.H.H. (1999) 'Introduction: The Reformation of the European Constitutionalism' in Weiler, J.H.H. (ed.) *The Constitution of Europe – Do the New Clothes have an Emperor and Other Essays on European Integration*. Cambridge: Cambridge University Press.

Wolfe, C. (1979) 'Woodrow Wilson: Interpreting the Constitution', *The Review of Politics,* 41(1), pp. 121–142; https://doi.org/10.1017/S0034670500029363.

Yatsco, T. (2006) *Creative Federalism* [Online]. Available at: https://encyclopedia.federalism.org/ index. php?title =Creative_Federalism596877 (Accessed: 15 October 2023).

Zielonka, J. (2006) *Europe as Empire: The Nature of the Enlarged European Union*. Oxford: Oxford University Press; https://doi.org/10.1093/0199292213.001.0001.

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

Zimmerman, J.F. (2001) National-State Relations: Cooperative Federalism in the Twentieth Century', *Publius: The Journal of Federalism,* 31(1); https://doi.org/10.1093/oxfordjournals.pubjof.a004894.

Legal Sources

Constitution of the Republic of Croatia, Official Gazette Narodne novine No. 85/2010 (consolidated text), 5/14.

Law on the Cooperation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs, Official Gazette Narodne novine No. 81/13.

McCulloch v. Maryland (1819) 17 U.S. 316. [Online]. Available at: https://supreme.justia.com/ cases/federal/us/17/316/ (Accessed: 15 October 2023).

Standing orders of the Croatian Parliament, Official Gazette Narodne novine no. 81/13, 113/16, 69/17, 29/18, 53/20, 119/20, 123/20, 86/23.

Treaty of Rome (1950) [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-eec.html (Accessed: 25 October 2023).

United States v. Lopez (1995) 514 U.S. 549. [Online]. Available at: https://supreme.justia.com/cases/federal/us/514/549/ (Accessed: 15 September 2023).