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# PROBLEME ACTUALE ALE SPAȚIULUI POLITICO-JURIDIC AL UE

## CONFERINȚĂ INTERNAȚIONALĂ

EDIȚIA a II-a

30 OCTOMBRIE 2015

Cezar Corneliu MANDA  
Cristina Elena NICOLESCU  
Crina Ramona RĂDULESCU

SUPLIMENT

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PROBLEME ACTUALE  
ALE SPAȚIULUI POLITICO-JURIDIC AL UE

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Volum aflat sub coordonarea:

Cezar Corneliu MANDA • Cristina Elena NICOLESCU • Crina Ramona RĂDULESCU

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# The institutional balance - Basic principle of the European Union's Institutional system

Oana ȘARAMET\*

## ABSTRACT

Across its existence and evolution, Europe has oscillated between separation and unity, the acknowledgement of belonging to the same continent, as its values became more and more clear since the Middle Ages, when the cultural, spiritual, political and economical values were acknowledged and developed by the times' personalities, support such a statement. Surely, the political, economical, social and military crisis which Europe had to deal with across time, mainly during the twentieth century, has pointed those states, first the western ones and, toward the end of this century and the beginning of the next one, those from the former communist block, toward unity. The organizations or structures which were build for this purpose, including the three European Communities were the basis of what the European Union is today; they have also tried to unify these states on different levels – economical, military, political, thus achieving common goals. The success of this action depends on creating a balances institutional background.

**Keywords:** *principle, institutional equilibrium, Montesquieu, separation of powers*

On April 18th, 1951, The European Coal and Steel Community Treaty was signed in Paris. It came into force July 23rd, 1952 and remained so for over 50 years. At the same date, the High Authority, one of the institutions of this community, started functioning under the ruling of Jean Monnet. Thus, the treaty by which this community was formed, regulated a specific institutional structure, represented by: the High Authority – an independent, supranational institution which represented the interests of the Community; The Special Council of Ministers – an intergovernmental institution which protected the interests of the member states; The Common Assembly – representing the interests of the citizens of the member states and the Court of Justice – a judicial institution which contributed to the unified enforcement of the legal regulations of the Community.

On March 25th, 1957, two new treaties were signed in Rome: the treaty by which the European Economic Community was created and the Treaty regarding the European Atomic Energy Community (CEE/Euratom); the purpose of these new institutions was to create solidarity in certain sectors, as both treaties came into force on January 14th, 1958. The six founder countries (France, Germany, Italy, Belgium, Holland and Luxembourg), based on the already

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functional example of the European Coal and Steel Community, established that these two new communities would have an own institutional system formed of: a Commission with executive duties, a Council with legislative duties, an Assembly, with specific duties such as political control and a Justice Court with judicial duties.

Starting from these brief statements, we can state that the founders of these three communities have designed credible, specialized and durable institutions; this is the reason why other states adopted and adapted this political and constitutional theory, the principle of the equilibrium of powers, being well aware that the lack of institutional balance would shortly lead to the destruction of the newly created communities.

The separation and equilibrium of powers within a state has become a constitutional principle across time, a principle which is characteristic to any lawful state, as it is regulated expressly or deduced by systematic interpretation of the constitutional provisions. Although, at the time this theory appeared or maybe even today, based on a superficial overview, we might consider that power is not only divided, but also that state bodies, public authorities, were independent from each other, there was no collaboration between them, based on constitutional regulations, as well as the constitutional practice and jurisprudence; thus, these institutions collaborate but also control each other in an attempt to exercise state power efficiently. Thus, for example, the Romanian Constitution currently in force regulates in article 4 fourth alignment, the principle of separation and equilibrium of powers within a state<sup>11</sup>.

On the other hand, the certainty<sup>12</sup> of an express regulation rather than the one deduced by interpretation is one of the arguments which determined the Romanian constituent lawmaker to revise the fundamental law in 2003, to regulate, *expressis verbis*, the principle of separation and equilibrium of powers within a state. The organizing and functioning of powers in a state by respecting this principle was obvious prior to revising the constitution, as the provisions of the constitution were strong arguments of this theory. Thus, the three powers – legislative, represented by the Parliament, executive represented mainly by the head of the state and the Government and justice, represented by the bodies of judicial authority – were regulated in classical order and the duties and constitutional relations pointed out the equilibrium which existed between these powers. Also, by its jurisprudence, the Romanian Constitutional Court<sup>13</sup> constantly pointed out the constitutional image of this principle.

Even if this principle is reflected in the constitutional regulations of the states, whether expressly or by identifying the role and duties of the authorities and public institutions which exercise

<sup>11</sup> Article 1 alignment (4) of the Romanian Constitution states that: "The State is organized according to the principle of separation and equilibrium of powers – legislative, executive and judicial – within a constitutional democracy".

<sup>12</sup> See M. Constantinescu, A. Iorgovan, I. Muraru, *Revizuirea Constituției României – explicații și comentarii*, Rosetti Publishing House, Bucharest, 2003, p. 6. Doctrine has retained a contrary opinion, pointing out that the express regulation of the principle of separation of powers within a state and that of equilibrium of powers within a state would represent a „science regress” as well as „a surprising ignore of reality”. See I. Deleanu, *Instituții și proceduri constituționale – în dreptul român și în dreptul comparat*, C.H. Beck Publishing House, Bucharest, 2006, pp. 60-61.

<sup>13</sup> Thus, for example, by Decision 50/2000 regarding the non constitutionality exception of the provisions of article 7 of Government's Ordinance no 27/1992 regarding the protection of the national cultural patrimony, approved with subsequent changes by law no 11/1994 and completed by Government's Ordinance no 68/1994 regarding the protection of the national cultural patrimony as published in the Official Bulletin, Part I, no 277 of June 20th, 2000, the constitutional judge stated that forbidding by law, even if only temporary, the execution of a court's decisions, would represent an interference of the legislative power in the process of achieving justice thus contravening to the constitutional principle of the separation of powers within in the state.

these powers, but also the relations between them, starting for the second part of the 18th century, we must not forget that Aristotle was one of the few who spoke for the first time about a separation of powers within a state, starting from the idea that law based on reason is the basis of society and, among all laws, the Constitution is the basis of state organization and the others must obey it. At the same time, the constitution must determine the systematic organization of all powers within a state, but mostly the sovereign power, as any state is well organized if it is divided in three parts; the general assembly – today's legislative – which rules on public affairs, the magistrates core – today's executive – to which the nature, duties and appointment procedures must be decided upon and the judicial core<sup>[1]</sup>. Aristotle thought that the government is the very Constitution, thus identifying three forms of government, each with a specific Constitution: royalty, aristocracy and republic. Within any of these, the Constitution must represent „the organized distribution of powers”<sup>[2]</sup>. However, due to the effects which were caused by the existing political systems over the regulations of the north-American constitutions at the end of the 18th century, including in the 1787 Constitution of the United States of America, as well as in the constitutions of most modern states, Montesquieu's theory (Charles-Louis de Secondat, baron de la Brede et de Montesquieu) regarding the separation of powers within a state, a theory which he described in his work *De l'Esprit de lois (On the spirit of the laws)*, has become a basic constitutional principle in any lawful state, and the author of this principle was thought to be „the real creator”<sup>[3]</sup> of this theory.

Montesquieu believes that „judicial power by which the elector or the authority punishes crimes and rules on litigation between people”<sup>[4]</sup> „is somewhat inexistent”<sup>[5]</sup>, as the way the other two powers are organized is more important as well as the relations between these two. Thus, legislative power must represent the general will of the state because „based on this, the elector or the authority create laws, amend them or abolish them”<sup>[6]</sup>, and executive power must execute this general will as it is the basis on which „the electors or the authority declare war or time of peace, send or receive emissaries, takes security measures, stops invasions”<sup>[7]</sup>.

In our opinion, Montesquieu did not state the face the three identified powers should be organized and function separately, but pointed out that these powers should control each other, in order to avoid the situation in which one of them becomes tyrant. Thus, the means by which this control can be exercised were identified. Montesquieu mentioned that executive power should have the right to fight the initiatives of the legislative; also, it should participate in creating laws by having a veto right as it will not be deprived of its own prerogatives. As the right to legal initiative belongs to the executive, it must not be an absolute right, because the existence of the veto right would entitle the executive to dismiss the initiatives which it does not agree with. However, the enforcement of laws must be an exclusive duty of the executive, as the legislative can't enforce laws and can't restrict their enforcement because the executive acts in a limited manner by

[1] Aristotle, *Politica*, Antet Publishing House, Oradea, 2004, p. 204.

[2] Aristotle, *op. cit.*, p. 180.

[3] T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar*, Lumina Lex Publishing House, Bucharest, 2000, vol. I, p. 254.

[4] Montesquieu, *On the spirit of the laws*, Scientific Publishing House, Bucharest, 1964, vol. I, Book XI, Chapter IV, p. 195.

[5] Montesquieu, *op. cit.*, vol. I, Book XI, Chapter VI, p. 200.

[6] *Idem*, pp. 195, 197.

[7] *Ibidem*.

prompt actions. Still, the legislative is acknowledged „the right to have special empowering to examine the way its laws were enforced“<sup>171</sup>, thus controlling the activity of the executive. As a result of this control, the legislative does not have the right to judge the person who made a mistake, as the person is intangible, but „since the executive power can't enforce laws without evil advisers, who hate the laws as ministers, although the laws regard the people, they can be prosecuted and punished“<sup>172</sup>, except by judicial power.

On the other hand, doctrine<sup>173</sup> appreciates that, when discussing the distribution of powers, Montesquieu would consider a combination of powers in which case „the idea which is the basis of this conception“<sup>174</sup> regarding the „principle of separation of powers“ resides in a control and equilibrium system of powers, this being the reason why this idea inspired the European treaties<sup>175</sup>.

So, „the separation of powers is a concept born out of efforts to change state power into a non-tyrannical form of government, the doctrine describing distinct spheres of competence among various state powers within a homogeneous political entity“<sup>176</sup>. But „the European Union departs from this model in a number of ways like, for example: the design for European unification, original and unprecedented as it is, does not alter the fact that we are dealing with a Union of states gradually evolving towards some kind of supranational entity, so the European institutions bear witness to the tension inherent in such a project, state bending on pooling portions of their sovereignty“<sup>177</sup>. On the other hand, we are obliged to mention that „this principle was absent in the original Treaties, entered primary Community law as late as the Amsterdam Treaty from 1997“<sup>178</sup>, even that the European Court of Justice was the one which opened the way for this principle in a judgment of 1956 – Meroni Case<sup>179</sup>.

As a consequence „European treaties do not approach each institution in the context of one political function“<sup>180</sup>, „each institution having its own“ article in the Treaty on European Union

<sup>171</sup> Montesquieu, op. cit., vol. I, Book XI, Chapter VI, p. 202.

<sup>172</sup> Ibidem.

<sup>173</sup> R. Schütze, *Dreptul constituțional al Uniunii Europene*, University Publishing House, Bucharest, 2012, p. 82.

<sup>174</sup> It is appreciated that, as opposed to this idea, another one, embraced if only just apparent, by the founding parents of the United States of America would entail that the distribution of powers would lead to a separation of powers, as reflected by the provisions of the USA Constitution, especially in article I first alignment which states that: "All legislative power provided by this Constitution are invested in a Congress of the United States, which is formed of the Senate and the Representative Chamber", or those of article II first alignment regarding the executive power, those of article III first alignment, according to which "The judicial power of the United States is invested in a Supreme Court and in other inferior courts which the Congress can create and organize from time to time". This Constitution has been studied on Site: [http://www.senate.gov/civics/constitution\\_item/constitution.htm](http://www.senate.gov/civics/constitution_item/constitution.htm), accessed on 15.09.2015.

<sup>175</sup> R. Schütze, op. cit., p. 83.

<sup>176</sup> G. Graziano, *Institutional Balance in the EU. The Prodi Administration as a reforming Commission*, Institut Universitari d'Estudis Europeus, Universitat Autònoma de Barcelona, Spain, 2007, p.2. This paper has been studied on Site: <http://www.recercat.cat/bitstream/handle/2072/169868/49.pdf?sequence=1>, accessed on 15.09.2015.

<sup>177</sup> Idem, pp. 3-4.

<sup>178</sup> Idem, p. 3.

<sup>179</sup> Discussing about the objectives set out in Article 3 from the European Coal and Steel Community Treaty, the Court of Justice established that „from that provision there can be seen in the balance of powers which is characterized of the institutional structure of the Community a fundamental guarantee granted by the Treaty...“. Meroni Cause, C-9/56, Meroni/High Authority, EU:C:1958:7. This Cause has been studied on Site: <http://curia.europa.eu/juris/celex.jsf?celex=61956CJ0009&lang=ro&type=TXI&ancre=>, accessed on 15.09.2015

<sup>180</sup> R. Schütze, op. cit., p. 83.

Treaty, whose first section states the combination of political function to which it participates in<sup>171</sup>.

Thus, for example, according to the provisions of article 14 first alignment of the Treaty on European Union, „The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties”.

By its jurisprudence, the Court of Justice pointed out that “treaties created a system of distribution of duties between the different structures of the Community, each having its own missions within the institutional structure of the Community and in achieving its tasks, respecting the institutional equilibrium, assuming that each institution exercises its duties by respecting the duties of other institutions”<sup>172</sup>. The Court also acknowledges that „one of the elements of the institutional equilibrium created by the treaties is represented by the very prerogatives it regulates”<sup>173</sup> for each community institution.

Considering this vision on the principle of separation of powers<sup>174</sup>, which accentuates institutional equilibrium and which is supported by the jurisprudence of the Court of Justice, the provisions of article 13 second alignment of the Treaty on European Union state that „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”. This consecrates the principle of institutional equilibrium<sup>175</sup>, or, in a different opinion<sup>176</sup> - two principles of the functioning of the Union: the principle of awarding duties to the institutions of the Union, the principle of sincere collaboration; thus, „three constitutional postulates”<sup>177</sup> are stated: the obligation of each institution to act within the limits of its duties as provided by the treaties, the obligation of each institution to exercise its duties by respecting the duties of other institutions and the integration of each Union institution in the political procedures of the European Union<sup>178</sup>.

On the other hand, an author underline that „the balance between the institutions can be envisaged in two different ways, one legal, the other political. From a legal point of view, institutional balance is a constitutional principle which must be respected by the institutions and the Member States, infringements may be condemned and sanctioned by the Court of Justice. From a political point of view, it can be envisaged as a means of describing the way the relationship between the institutions is organized”<sup>179</sup>.

<sup>171</sup> *Ibidem*.

<sup>172</sup> Chernobyl Cause, C-70/88, Parliament/Council, EU:C:1991:373, points 21-22. This Cause has been studied on Site: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=153413&pageIndex=0&doclang=ro&mode=lst&dir=&occ=first&part=1&cid=974124>, accessed on 15.09.2015.

<sup>173</sup> *Idem*, point 21.

<sup>174</sup> R. Schütze, *op. cit.*, p. 83.

<sup>175</sup> *Ibidem*.

<sup>176</sup> I. Gălea, *Tratatul Uniunii Europene. Comentarii și explicații*, C.H. Beck Publishing House, Bucharest, 2012, p. 39.

<sup>177</sup> R. Schütze, *op. cit.*, p. 83.

<sup>178</sup> R. Schütze, *op. cit.*, p. 83-84.

<sup>179</sup> J.-P. Jacque, *The principle of institutional balance*, article published in *Common Market Law Review*, no. 41, 2004, p.383. This article was studied on site: <http://ieie.itam.ro/docs06/Montse%20Pi/jacqu.pdf>, Accessed on 15.09.2015.

In order to point out the importance of the existence of institutional equilibrium, as well as the necessity for all European Union institution to function based on this principle, the European lawmaker has regulated this principle in the second alignment of article 13 of the Treaty on European Union, right after identifying, in the first alignment of this article, the institutional frame of the Union, by listing its institutions. Violating this principle and its dimensions would determine the „Union's Court of Justice, the institution which must watch over the respecting of the right to interpret and enforce the treaties, to ensure maintaining of institutional equilibrium and, as a consequence, to exercise judicial control of respecting the prerogatives"<sup>124</sup> of union institutions. Furthermore, disrupting the institutional equilibrium<sup>125</sup> by one of the institutions could affect the functioning of other institutions and even the Union.

Acknowledging the democratic principles of the European Union obliges all its institutions to act exclusively within the limits of their duties as awarded by treaties, by using the necessary mechanisms for controlling each other, which guarantees the respecting of this postulate and, in the end, maintaining the institutional equilibrium.

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<sup>124</sup> Cause C-70/88 Parliament/Council (Chernobyl), point 23

<sup>125</sup> Discussing about the appreciation of institutional balance, some authors underline that the objective of keeping such a balance or equilibrium „among the Union institutions very much depends on how the decision-making within the EU takes place, which in turn depends on which powers are allocated to each European Union institution”. They conclude that „the new legal framework (of European Union – the Treaty of Lisbon) redefines the balance between the Union institutions and confirms the central role of the Community method in the EU legislative and judiciary process”. Because even this Community method has its limits, they came up with the „Union method first mentioned by Chancellor Merkel, method which implied coordinated action in a spirit of solidarity at European level, in the area of one's competence but all working towards the same goal”. See B. Smulders, K. Eisele, *Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon*, paper published in *Research Paper in Law*, no 14, 2012, pp 2-6. This paper was studied on Site: [https://www.coleurope.eu/\\_researchpaper\\_4\\_2012\\_smulderseisele\\_final](https://www.coleurope.eu/_researchpaper_4_2012_smulderseisele_final), accessed on 15.09.2015.

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