The EU Institutions: Power Division within the Current Treaty Base

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Abstract: *The regime of parliamentary democracy, widely used all over the world nowadays, has been able to spread into so many state structures due to its unique constitutional quality of effective division of power. Its importance has, in the past century, come to a permeation with the international law structure and has certainly affected the principles of international organisations' existence as well. The aim of this paper is to analyse the question of power division within the European Union with a closer look at the fundamental EU institutions and their standing in the current treaty base. The contribution comes to the conclusion that the state model of public authority is able to be pursued into the supranational organisation structure, just in its simpler, overlapped and incomplete form, due to the character of the surveyed sample of such an organisation. The fundamental EU institutions are not just being close to represent the public authority, they are also subject to the division of its power (including the non-well or partly-set elements of power division) and principles of constitutional checks and balances (with its overlapping competences character).*

Keywords: *representative democracy, state division of power, international organisations attributive competences, EU as a sui generis, EU institutions, the Treaty of Lisbon*

1 Introduction

The regime of parliamentary democracy, which is nowadays widely used all over the world, has been able to spread into so many countries due to its unique constitutional quality of effective power division (together with a system of checks and balances). Its importance in the state system has, in the past century, come to a permeation with the international law structure and has certainly affected the principles of international organisations' existence as such. Analogically with detached, but complementary parliamentary, governmental and judicial powers establishment within a state system, there are recognised institutions, working on a basis of attributional (partial) subjectivity, within international organisations as well. The aim of this paper is to analyse the question of current power division within the European Union, being a specific *sui generis* example of the international organisation, with a closer look at the fundamental EU institutions and their standing in the current treaty base (especially after the Treaty of Lisbon entered into force).

To fulfill the aim of this paper, I have set up the following research questions: Is the public authority model within a state system able to penetrate into supranational organisation? If so, to what extent is the principle of power division to be found? What are the characteristics of its parliamentary, governmental and judicial power represented institutions? Finally, how exactly is the "supranational and yet constitutional" situation analogically related to the former understanding of state division power?

For the empirical-analytic critical approach purpose, I use the original power division theory of Charles Louis Montesquieu, which explores the concept of parliamentary democracy (with its elements of effective power division, system of checks and balances, principle of representative democracy and human rights protection) on the example of constitution-like division of power amongst legislative, executive and judicial based institutions. After critical data collection of the EU institutions and its related issues (considering the characteristic of the EU as a specific *sui generis* unit of international law), I apply the original state power division theory by Montesquieu to find the basics of the power division in the European Union (and the resemblance of the EU institutions to the different legislative, governmental and judicial branches in this matter), which also consequently answers the research questions. Moreover, this paper includes a closer look at specific, newly introduced mechanisms, such as leading positions in the EU institutions, and present proposals *de lege ferenda* to some legally but still vague issues.

The first chapter presents a theoretical point of view of this paper, more concretely the Montesquieu power division theory. The second charter depicts transfer of competences in international law in light of the actual international treaty based rules and principles (incl. the division of competences based on their attributive

character to cooperative and integrative organisations). The third chapter deals with the characteristic of the European Union as an international unit sui *generis* (incl. detailed European law observation). In the fourth chapter, the gained information is finally put under critical scrutiny using the Montesquieu theory applied to the specific European Union characteristic. This chapter includes the analysis of legislative, governmental and judicial power together with the principle of representative democracy and it consequently deals with specific topics of the EU leading positions, the democratic deficit of the European institutions and the EU accession to the European Convention on Human Rights and Freedoms), incl. proposals *de lege ferenda.* Due to the closely defined aim and extent of this paper, I intentionally overlook other issues, which do not necessarily relate to the power division within the European Union (such as linkage of the EU institutions to the EU Member States national institutions). As another interesting topic for further research, I would highly recommend the question of national institutions Europeisation as a long-term process of a state membership within the European Union.

2 Division of Power According to Charles de Louis Montesquieu

"Every human, having power over the rest, also tends to abuse it" (Montesquieu 1947: 170). At this point it is effective state power division, which is to be found suitable to prevent any power misuse. That is why Montesquieu proposes any state power to be split within the legislative (the power to issue law), executive (the power to execute legal decisions) and judicial branches (power to judge crime and disputes). Matching each power with a separate and independent state institution creates a guarentee of general development and mutual control inside the public sphere. Elected representatives of the House of Representatives have an ability to issue law and monitor its introduction. The House of Lords has lesser power based on diverting the lawmaking process if appropriate. The power of execution i. e. putting an ultimate end to any legal process, such as the institute of amnesty, is to be handled by an emperor only. This executive power does not need to be tied with any other power, since it has got its constitutional limits already. The judicial power is represented by independent judges, chosen from citizens to serve a certain period of time. Judgments issued by these courts have to have an ultimate validity and, according to Montesquieu, they are supposed to stand above the law (Montesquieu 1947: 174).

These three powers are independent (politically non-responsible, not subordinated towards each other, but abided by principles of functional independency and incompatibility) of each other in specific situations only. Apart from them, they have to balance each other and keep an eye on their respective outputs (principle of checks

and balances, Zinek 2003: 18). Montesquieu approves a certain co-dependency and co-influence in that even though they might find it hard to follow each other sometimes, at the end of the day the actual outcome is what counts, because *"laws being issued by legislative institution must comply with principles of good governance"* (Montesquieu 1947: 56). Therefore, it is due to an existence of law and order in these moderate constitutional regimes, that there is enough of political freedom at the same time to be found (Montesquieu 1947: 321).

According to Montesquieu, each specific form of social life differs on the basis of geographical, historical and cultural conditions from a specific regions. Each civilisation and each nation continuously re-creates commonly known societal rules into particular forms, being influenced by its climate, religion, history and manners of politics. *"This all makes a spirit of nation, where its nature and manners are mirrored"* (Montesquieu 1947: 320). On one hand, laws cannot exist that are universal for everyone, on the other hand *"more nations meet and the more they mirror each other, the easier they change their manners afterwards"* (Montesquieu 1947: 322).

The predictable model of parliamentary democracy has been gradually installed and proven. Nowadays, it functions in slight moderations in Europe as in the rest of the world. Is it possible that its principles have penetrated even to a legal system of a supranational organisation? If so, to what extent is the principle of division of power attributed to its institutions by member states to be found in such an international organisation? What kind of relation is formed between fundamental institutions of legislative, executive and judicial power of this organisation? And finally, how exactly is the "supranational and yet constitutional" situation analogically related to the former understanding of state division power?

3 Division of Power According to International Law

In the sphere of international law these days, there are many inter-governmental organisations operating. The purpose of their establishment has come from their specific needs as well as it being influenced by external conditions. A common, relatively permanent community of states usually works on the basis of its primary act, which defines the aims and principles of its activities, its structure, functions, legal basis and not to forget its division of power. Its aims are being fulfilled by its name and by its institutions (Malenovský 1993: 136).

Apart from the primary law existence, declared in the fundamental legal acts of each international organisation, there are other legal norms to be found that are attributed and derived from the primary law. These subsidiary acts become obligatory in their specific ways to member states themselves as well as to institutions of this international organisation (Malenovský 1993: 140). When it comes to its

institutions, both its proactive approach and common decision making, make them crucial elements in the international organisation internal development (David et al. 2006: 214).

Organisational structure, institutional relations and competences come from the development and aims of the organisation as well as being formed by issue stances by different member states. In general, international organisations have got institutions that not just express different member states' interests, but also form a common organisational interest. These institutions may also exist in the form of a permanent secretary, a court to judge over dispute situations or they may be found in other institutions representing different societal interest groups.

In every international organisation, speaking from the democratic and also purely practical point of view, there is always a certain power division. It seems inevitable to distinguish these powers, so as to define the organisation (Hungr 2007: 27). Jiri Malenovsky offers a cooperative and an integrative international organisation division. Integrative international organisation differs from a classic well-known international organisation model by having supranational structural elements, which at the same time, do not necessarily comply with a federal state structure. Power division into legislative, governmental and judicial branches, originally being purely characteristic of state systems, is now considered as one of the integrative organisational elements. The crucial institution in this type of international organisation is an inter-governmental body, which equally represents all member states' particular interests. Other institutions usually serve as consultative or administrative units. Besides further integration processes within the structure of such an organisation, the division of power here is nowhere near accordance. Institutions themselves do not possess full sovereignty in the strict state sense and that is why it is desirable to name these bodies being quasi-parliament, quasi-courts or quasi-government sessions.

The difference between cooperative and integrative organisations is not easily revealed straight away, it depends rather, on the amount of cumulative supranational elements within the structure of a particular organisation (Malenovský 1993: 150). There are elements of qualified majority voting in sensible areas (overstepping unanimity voting) in so-called governmental bodies, quasi-lawmaking of representative bodies, secondary law existences and its common protection that all at once put the respect to one state sovereignty and its public auhorities´ exclusivity into question.

4 The European Union as a Sui Generis Unit

European Union law, as well as European integration, is well-known for its complex, multi-layered, dynamic structure. Taking into account its content and effect, it is based on the international law, but at the same time it crosses its boundaries

and interferes significantly into the field of national law. Therefore, the European law is considered to be a very unique and autonomous legal structure (Dehousse 2002). However, due to the different ways of issuing legal norms and the diversity of subjects involved, any classification of its sources proves difficult. A certain differentiation was made by the Court of Justice of the EU, according to its legal power, top to bottom as following: Member States acts issued as agreements between subjects of international law, such as fundamental, complementary and subsidiary treaties and acts of third states deputies; so-called mixed, legal acts that have a special place within the EU law structure due to a presence of external signatory subject (such as trade or association treaties). This primary law has a crucial position in the hierarchy of the EU norms. From this fundamental law, being a cornerstone, all the other legal norms of lesser legal power are derived. Secondary (derived) law is issued by the EU institutions in forms of regulations, directions, decisions, proposals and sui generis acts. Apart from the primary and secondary law, the EU legal structure composes of common legal principles and the Court of the European Union jurisdiction, which both contribute in a significant amount to complete the former, so as to make it more concrete (Šišková et al. 2007: 91).

As we see, the European Union today clearly does not fit into a classical image of international cooperation amongst sovereign Member States (Börzel 2007). Taking aside visible elements of the classical cooperation model of international organisation, such as unanimity voting, the use of veto during political bargaining, no existence of kompetenz-kompetenz principle of power division (Svoboda 2010: 15), the European Parliament without a right to propose legislation or an incomplete enforcement of secondary law towards a single person, European integration still goes a bit more out of this frame (Sorensen 2005: 105). Therefore we talk about a visibly stronger emphasis on creating common institutions on a supranational basis having real normative power, together with attributing legislative and governmental competences with state-based character on these bodies (such as delegative power of the European Commission, Art. 290/291/2 TFEU). We also might take into account the direct European Parliament elections or existence of an autonomous legal system, which penetrates into national legal systems of the Member States and its enforcement of application by the judicial system of all Member States and the EU. These elements, settled in the primary law of the EU, turn this Community into constitutional and legal uniqueness, so-called *sui generis*, that oscillates between inter-governmental integration and some might even say confederation (Höllander 2009: 107).

Despite such a high level of integration within the EU, the role of *Masters of the Treaties* still lies in the hands of the Member States themselves. Member States representatives have always had a crucial say in the constitutional and political development of the EU by deciding, approving and issuing competences, procedures, main or smaller topics of interest (Kysela 2009). Every sovereignty transfer from

member states towards the EU institutions depends on common inter-governmental meetings and its own constitutional-based decisions (such as Council of Ministers proceedings while accepting new member states, Art. 49 TEU).

To conclude, it is noted that the European Union as such does not operate within a vacuum, but moreover, is a subject to a complex change of classic international relations structures, so as to change the state sovereignty (Egeberg 2005). So to say, the change within the organisation itself has come into the simultaneous global process of searching for alternative sources of legitimacy (Wintr 2009: 171).

5 Power Division in the Current Treaty Base

At the beginning of European integration, it seemed that the European Parliament, having controlling power over the High Authority and consultative power over the Council of Ministers during the lawmaking process, being composed of delegated representatives of national legislative bodies, would not possibly become the legislative institution as we know it today. Furthermore, the European Parliament nowadays serves not only as a legislative body (having a right to issue amendments, putting forward absolute veto power in certain legislative procedures and approve usage of the passerelle clause, Art. 48 TEU), but it also possesses budgetary power (where it is able to dismantle the EU budget proposal as a whole, Art. 319 TFEU), is a representative body (direct EP elections grant this body its direct legitimacy) or institution to appoint (EP plays an important part in European Commission appointment and its dismissal) and control institution (with its right for interpellations or a right to request a review of legal acts issued by other institutions, Art. 11 TEU). To compare the European Parliament with a classic state-based legislative body, there are still some differences to be found. When it comes to the EP, there has not been a common single election regulation set up (or a common election area for that matter), the EP also does not have a full right to issue legislative proposals (it may only suggest proposals informally, Art. 225 TFEU) and after the pillar structure abolishment it still has not a fully sovereign position within the former second pillar of EU policies (Svoboda 2010: 50). To conclude, it is undeniable, that the European Parliament on one hand resembles the perception of legislative body, as we know it, from the state public authority, but on the other hand its form is to be found incomplete, lacking full sovereignty.

The executive (or administrative) power was in a context of the European integration, originally proclaimed to belong to the High Authority. This institution, which formerly served as a rather technical and administrative body, was also given the power to a limited executive competence over once issued legislative norms (Ondřejková 2010: 672). The Treaty of Lisbon has broadened the High Authority

power capacity from the sphere of legislative initiative, legislative proposal amendments and European law enforcement in the first pillar policies, mostly to the area of the former third pillar (Svoboda 2010: 30). At the same time, the European Commission competences have been closely tied with the European Parliament, becoming a crucial factor to appointment as well as dismissal of the Commission. In an area of competition law and public company law, the power of the Commission remains untouched (Ondřejková 2010: 672). Apart from these legislative, judicial or administrative powers, the new institute of the High Representative for Common Foreign and Security Policies, being a Vice-Chair of the European Commission at the same time, has legally set up a new dimension of the former second pillar policy execution by mixing up functions of the Council of Ministers and the European Commission (Svoboda 2010: 46). By taking into account the Commission power deficiencies, we must not overlook the issue of Comitology, where this institution is still overshadowed by the Council of Ministers and partly by the European Parliament. We also must note that its role in the foreign and security policies still lacks further sovereignty power. Last, but not least, the appointment of the Commission is not purely left upon the decision of the European Parliament yet, but still makes space for the European Council and the Council of Ministers to have their say. To conclude, the European Commission's executive power is weakened by the Council of Ministers' involvement, as well as the Commission's derived legitimacy coming from the European Parliament. This puts its treaty-based declaration of independence into question, together with its possible perception, as a somewhere near classic state-based government that mirrors the majority sitting in the parliament.

The power of jurisdiction, or otherwise known as, the power to judge disputes among member states, institutions and persons, has belonged exclusively and from the early beginning of European integration, to the European Court of Justice. By providing legal interpretation and solving disagreements, this institution has not just confirmed the seriousness of the integration pledge in competency issues (such as the Luxembourg compromise for instance), it has also contributed actively to further development of the European law (such as principle of direct effect or supremacy of the European law). Together with the further development of the European integration, the position of the European Court of Justice (as well as the European Commission, being both considered as "the most pro-European" institutions) has risen, its competences have broadened to more integration issues and its decisions have become binding for more member states (Wallace 2010: 84–85). The inter-governmental decision to create the General Court or specialised courts has approved a real need and also a willingness of member states to make this institution more professional, so as to make it more effective at the same time. Currently, when we look at the procedure by which judges of the Court are selected (by a special panel), as well as the process of the establishment of specialised courts (by a co-decision procedure,

Art. 255 TFEU), or if we observe the legal scope of the European courts system (now broadened by incorporating areas of former third pillar or declaring the Charter of Fundamental Rights and Freedoms as a binding document), we come to the conclusion that the Court of Justice of the European Union is to be considered as a highly respectable and independent power, very much resembling the judicial system in a state structure [as it cumulates administrative, constitutional, civil, arbitral and appeal court competences (Šišková et al. 2007: 115)]. At the same time, there are situations in which its influence is not absolute (such as the area of the former second pillar), although it must be mentioned that the judicial scope of power must always be compatible with the norms and principles of the European law (principle of non-direct effect).

The role of the Council of Ministers and the European Council within the power division system equals the character of the EU as an international organisation in a more classical point of view, so it clearly confirms the crucial role of the inter-governmental approach within the European integration. Member States, represented within these two institutions by direct mandates, despite usual debates over further federalisation of the EU, have always held the position of the highest political authority (Kysela 2009). The Council of Ministers nowadays significantly interferes into the area of the executive power (by common administration of the external relations policy area or by having a partial say concerning the European Commission appointment) and until now it was a significant power in the judicial power establishment (judges appointment). Its crucial competences are within the area of legislation (such as legislative initiative or legal norms and budget approval). When deciding, the Council shares its competence with the European Parliament in many policy areas already (Svoboda 2010: 73). To elaborate this thought, we may compare the Council and the Parliament to two chambers of the legislative body, where the Council would be an upper appeal chamber and the Parliament would be depicted as a house of representatives. When it comes to classical senate competences, the Council participates on the law-making process differently, depending on the procedure used. It also has the ability to issue a suggestion for legislative initiative, as well as having appointment power (towards the European Commission or the Panel to vote for the Court of the EU judges).

Framing the current position of the European Council from the power division point of view does not seem an easy task due to its chronic, non-legally defined status (Piris 2010: 206). Its competence to initiate and broaden political directions might resemble a right of legislative initiative (especially with the presence of the European Commission President at the European Council meetings). When dealing with very sensible political issues in the Council of Ministers, the European Council contribution might have either very supportive, or either very condemned impact due to its informal, but decisive voice (Art. 15 TEU). Generally, we might compare

the position of this body to a head of the state (mainly due to its Chairman, who is often compared to the President of a state in this matter) and it does so because of the European Council's range of competences such as being an initiator, mediator, nominator (High Representative election), representative (especially when it come to the role of its chairman), but also a symbolic body (Svoboda 2010: 73). Therefore, it must be said that the image of the Council and the European Council competences is not to be taken as being absolute (Mathijsen 1999: 88). Both institutions are part of the institutional structure, so their activities are consequently subordinated not just by the European Parliament's interpellation proceedings, but they might also become subject to the law enforcement mechanism of the Court of Justice of the European Union (Art. 263, 264 TFEU, The Treaty of Lisbon: An Impact Assessment: 78).

The image of common fundamental EU institution relations is not generally framed within the primary law, although it is usually defined as an institutional balance (Jacqué 2004: 385). Partially, we might find this term in the introductory Art. 13 of the Provision on the Institutions, which says the following: *"The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."* From a procedural point of view, there is Art. 295 of the TFEU: *"The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude inter-institutional agreements which may be of a binding nature."* To conclude, taking into account the EU fundamental legal basis with subsequent legal norms (institutional statutes, secondary legislation and following jurisdiction) as well as the current complex and dynamic character of its institutional frame, it can be presumed that the state-based model of power division with its checks and balances principle (Montesquieu imaged in this matter) is to be partially, but decisively applicable to the European Union institutional structure as well.

5.1 Principle of Representative Democracy

The principle of the representative democracy, that assures constitutional power limitation (checks and balances system) as well as civil rights protection, is to be found as a real example of the power division system according to Montesquieu. In a context of international law, of which the EU is a part of, there is to be mentioned not just the imperfect power division within common institutions, but also the imperfect civil rights protection. In this case, the latter serves more as a supplement of the state civil rights control. The representative democracy, which is perfectly embodied in

a democratic state system in a form of a constitution (including principle of direct elections of its legislative body for instance (Jirásková 1999: 64), is analogically being mirrored into a primary law of such particular international organisation (being the EU in our matter).

The civic participation on the European Parliament composition is well illustrated through the process of direct elections. This institution, originally composed of delegated representatives of national parliaments, has applied the principle of universal suffrage since 1979. Therefore, we talk about the direct mandate, by which we also mean that voters usually know their candidates very well throughout their activity on national, regional or even local place. In this matter, it can also be mentioned that no common election rules or common election area exist as yet (Zbíral 2007: 26). As we speak about the European Parliament accountability from a formal point of view, it is the relation between the institution and voters in each Member State, not of voters of the international organisation (the EU) as such.

The European Commission, being an institution composed of Member States delegates is, according to the current legal norms, accountable for its activities to the European Parliament. It is the EP's approval that puts the new Commission into work and the EP has also got its say when it comes to the dismissal of the Commission on a basis of vote of distrust. Similarly to the situation of the European Parliament, this principle of accountability of the European Commission might be seen as a revolutionary tool in the international organisations law. It quite adequately resembles the principle of direct legitimacy of the legislative body and indirect legitimacy of the governmental institution in a state-like image (Svoboda 2010: 44).

Apart from the Commission and the European Parliament, the connection between citizens of the EU Member states and the Composition of the Council of the Ministers and European Council is practically of a minimum basis (or rather to say it is channelled through national parliaments of member states). In case of the Council, its representatives have an indirect mandate that comes from the will of the legislative majority and so consequently from the government in each Member State. The legitimacy situation in the European Council does not differ too much, although one slight difference might be the fact that some of the representatives are elected directly, therefore they are obliged by the direct mandate principle. A possibility on how to omit a sudden situation of discontent with representatives of member states within these institutions seems to be *"an open, transparent and regular dialogue with representative associations and civic society."* (Art. 11 TEU), bounded with *"a right to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language."* (Art. 20 TFEU). In the case of suspicion of guilt of a certain representative, there is always another legal way of proceeding according to a certain Member State legal norms.

5.2 Legal Issues and Proposals de Lege Ferenda

Having such a treaty basis, legal tools and a real influence on the corresponding parts of the European law, the Lisbon Treaty has undoubtedly brought a new, single platform for the European Union. This legal act changes, not substitutes, the former primary law basis and at the same time it expects *"to improve the way the EU works to assure the Union of nowadays performs its own activity in a most efficient way, assuring more efficiency in the decision making on the European level and helping to stand out as a single entity"* (The Treaty of Lisbon: The Impact Assessment). Apart from adopting such hopeful words towards a future EU development, it is essential to put the Treaty into a further elaboration and to analyse not just its legal opportunities, but also deficiencies in certain legal spheres with a closer look at the institutional framework and its power division. Right after this analysis is complete, there finally comes a time when ideas for further legal reforms (*de lege ferenda*) are brought up. Taking into account the dynamic development within the EU, but also on the world scene, these ideas might be seen as more than useful and desirable in the very near future.

5.2.1 Leading Positions in the EU Institutions

In the intentions of the Lisbon Treaty in the specific area of competences, there seem to be the most controversial points of view of the relations between the triangle of the President of the European Commission, the modified position of the President of the European Council and the newly found post of the High Representative for Foreign and Security Policies. Is the newly legally guaranteed frame of their competences sufficient for single activities as well as for common cooperation?

The institution which seems to have gained the most power is the one of the High Representative. The reason might lie in the dual legitimacy of this institution towards the Council and the Commission as well as gaining quite a crucial place for acting in the foreign and security policies area. Despite all the novelties, the question has remained the same: *"Who is the single voice on the telephone?"* Is it the High Representative, whose activities are bounded with the Council and Commission competences spheres or is it the European Council President, delegated to his position by single approval of all EU Heads of States? Despite the hope of greater efficiency in common negotiation within the EU, there is still a slight possibility that the institute of the High Representative might also bring certain competitive disputes, therefore a further innovation in competences towards their taxative division seems to be desirable. An idea of leaving the representative role to the President of the European Council with the consequent limitation of the High Representative to a pure role of advisor and mediator might seem as one suggestion.

Another example of a quite complicated and unclear legal state of affairs is the competence delimitation of the President of the European Commission, Head of the European Council and the High Representative in terms of accountability and

legitimacy. It might seem that the High Representative, being a Vice-Chair of the European Commission at the same time, is logically subordinated to the Head of the European Commission. In reality, it is not completely like this. Apart from the rest of the Collegium, the EC President does not have the right to call the High Representative off his position. He may, however, do so after obtaining approval from the European Council (Lang 2008). Another interpretation problem lies in the procedural framing of the High Representative's role. On one hand his institute is a part of the Council and the Commission, but on the other hand it also expresses its own pledge with the aims of the EU [European Union — EEAS (European External Action Service)]. Last, but not least, the process of the President of the European Council election together with the permanent nature of this post can be easily compared to the President of the European Commission (Devuyst 2008). In this matter, it is inevitable to speak about a dual institute of the Head of the European Commission, taking into account the quite weak competences of the President of Commission towards the High Representative. We can summarize this as a real weakening of the role of the European Commission Head within the institutional framework of the EU. From this point of view and due to the traditional nature of the European Council as an inter-governmental institution, it might seem logical to put the role of the European Council President back into the hands of the Member State Presidency.

5.2.2 Democratic Deficit of the EU

There are many institutes that help measure the way democracy is pursued in each political system nowadays, such as the directly elected legislative body, right to petition or existence of the ombudsman. Due to a consequent issue of institutional frame and its linked problems such as non-transparency of the legislative process or the question of the accountability of the institutions towards the citizens there is to be mentioned a concept of democratic deficit of the EU (or to say of an insufficient level of democracy). The primary law of the EU has tried to solve this problem by issuing an incredible amount of different legal norms that allow it not just to bring the EU legal framework and its institutions closer towards the EU citizens, but also to try to connect the EU institutions in the decision process in a more democratic way. Has the Treaty of Lisbon set up a clear framework to work in? How else can we fight to problem of democratic deficit which is visible in international organisations as well as in state systems?

The Lisbon Treaty inputs the principle of democracy straight into its text (Art. 10 TEU: *"The functioning of the Union shall be founded on representative democracy"*), along with principles of subsidiarity and proportionality (Protocol on the Application of the Principles of Subsidiarity and Proportionality), dialogue with civic society and churches (Art. 11 TEU, Art. 17 TFEU), or transparency in communication of the

EU institutions (Art. 15 TFEU). Besides these declared values, the Treaty of Lisbon brings along the principle of citizens' initiative (Art. 11), which brings the right of the EU citizens to have their say in the early stage of the EU decision making process, with a right to put forward legislative proposals. Newly, the national legislative bodies participate in the primary law reform process (Art. 48 TEU) by being informed about the EU membership applications (Art. 48 TEU), taking part in politics of the former third pillar (Art. 70 TFEU), receiving legislative act proposals and having a right to make comments of whether the principle of subsidiarity is being put forward (Art. 12 TEU) or they might put a veto on the use of so-called passerelle that lead to a change in the decision making procedure (Art. 48 TEU).

Last, but not least, the last primary law amendment, being the Lisbon Treaty, has significantly broadened the European Parliament competences, including the rise in the ordinary legislative procedure with the use of veto, the right to refuse the way in which the EU budget is proposed (Art. 313–314 TFEU), or more interference of the EP in the area of external trade (Laursen 2009). Moreover, when it comes to the European Parliament, it is essential to mention the position of its political fractions as well. According to the Art. 10/4 TEU: *"Political parties at European level contribute to forming political awareness and* (from a practical point of view) *to expressing the will of citizens of the Union."* Besides the EP competence strengthening, the question of possible EP election reform has still not been arranged. Any broadening of the existing EP election legal norms framework (including Regulation 2004/2003 on European Political Parties or Statute of the Member of the European Parliament (Zbíral 2007: 23), namely the proposal for single election area or election regulations (being originally mentioned in the TEC (Tichý et al. 1999: 95), would undoubtedly contribute to enhance the legitimacy and the position of this institution as a legislative body within the EU structure. Moreover, new legal framework in this area would simplify the election process as well as make it more transparent. More understanding would lead to the possibility of a better connection between EU citizens, the EP and the EU as such and therefore it might consequently solve the problem of the democratic deficit. As we speak about the EP election reform, there is a desire to amend the process of appointing any new European Commissions as well. According to the principle of representative democracy and the power division, the role of the European Parliament and the will of its political majority should be respected.

5.2.3 The EU and the European Convention on the Human Rights and Fundamental Freedoms

Last, but not least, taking from the competence point of view, there is another big issue to be elaborated on. In an area of judicial power, especially within the dimension of the human rights protection in the EU, it is still unclear whether the European Union will decide to join the European Convention on the Human Rights

and Fundamental Freedoms in the near future. The current legal provision to do so is to be found in the Art. 6/2 TEU: *"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."*

On one side, these fundamental rights, coming from common constitutional traditions of all Member States, contribute to the content of common legal principles of the EU (Art. 6/3 TEU) and its legal introduction among other primary law norms would enhance the human rights protection, legal certainty and trust of EU citizens as well as lower the democratic deficit threat and assure the human rights protection development all over Europe (Šišková 2008: 163–164). On the other side, there are doubts concerning the inevitable submission to another international organisational judicial body, having different aims as well as an unclear procedure of establishing common EU deputy, question of rights compatibility with the EU legal framework or unclear relations between the European Convention and the Charter of the Fundamental Rights of the EU (Šišková 2008: 165–166).

Putting forward just a few solutions, we might start with mentioning the necessity of building a legal structure of the permanent post of the common EU judge (using existing procedures for instance), assuring the submission of the Court of the European Union to the Strasbourg Court, or even assuring autonomy of the Court of the EU in decision making relating to the EU issues (best by taxatively limited competences).

Conclusions

Further analytic research concludes into the following statement: **Even though the European Union cannot be, in terms of the international law, be classified as a state system, but a *sui generis* unit, its treaty base already shows some of the state system characteristics, namely the division of power into legislative, executive and judicial branches. The legal framework of the Treaty of Lisbon is about to enhance this tendency towards the creation of a more complex, territorial subject-matter and functional venue of the EU institutions with strong elements of supranationalism, all of which mostly come along with no clear legal form.** It answers the set of academic questions at the same time. The state model of public authority is able to be pursued into the supranational organisation structure, just in its simpler, overlapped and incomplete form, due to the character of the surveyed sample of such an organisation. The fundamental EU institutions are not just being close to representing the *public authority*, they are also subjects to the division of its power (legislative, executive and judicial parts, including the non-well or partly-set elements of power division) and principles of constitutional checks and balances (with its overlap

of competences character). It is to be said that there is certainly an analogy of the EU primary law principles with the state system of power division according to the theory of Montesquieu.

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