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# **The Great Compromise: Experiences from the Constituting of the USA and Europe**

by

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By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed. ... We call this a good government, when ... the whole administration of public affairs is wisely pursued, and with a strict conformity to the principles and objects of the constitution.

--Lord Bolingbroke, 1733

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## Preface

This work has been predominantly influenced and inspired by the decision of the heads of states and governments of the EU member states to create the Convention, an institution empowered to make the European Constitution. That decision was enacted during the meeting of the European Council that was held in Laeken (Belgium) in December 2001.

For the majority of those researchers interested in the European integration process, the way in which the European Constitutional Convention was made might seem very similar to the process of constituting America two centuries ago. The main intention of the first chapter of the paper is to compare the processes during which both the Basic Constitutional Acts of the USA and the EU were created<sup>1</sup>.

The most voluminous and the most challenging is the second chapter of the thesis dedicated to a normative comparison of the legal systems of the USA and the EU. There are two key issues that are discussed here: first is the distribution of powers between the organs at Community or federal level, the organs that play a role in the decision-making process and are related to the functioning of the entities in question. Second is the issue of federalism and vertical distribution of competences. The topics that are discussed in this paper are even more challenging if we accept the fact that the European Union, and this is not the case with the USA, represents a “moving target” i.e. it is constantly changing and its character may be explained only with very broad descriptions of the European integration process, European history and its development in the last fifty years.<sup>2</sup> The work of the Convention is even more significant if we take into consideration that its final paper – the proposal of the Constitution – should finally articulate the character of the EU and at the same time define the point in time at which the whole process of integration will stabilize.

The third chapter deals with the issue of philosophy of law and functions of the constitution as such. Part of it is about the author’s vision of a federal Europe in the future.

The last chapter goes on to cover the field of political ideas on which those entities are founded. The obvious influence of the different traditions of political thought on the whole process is also discussed in

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<sup>1</sup> Note that while this paper is being written, the EU Convention is still working on the proposal for the constitution.

<sup>2</sup> This may be especially important if we take into consideration issues of European culture and identity. There is an interesting essay on this topic written by Thomas Risse, «*Nationalism and Collective Identities: Europe versus the Nation-State*» in *Developments in West European Politics*, ed. by Paul Heywood, Erik Jones and Martin Rhodes, New York: Palgrave, 2002, p. 77-93.

this chapter with the institutional arrangements of the entities as the core field of analysis.

At the end of this part, I would like to thank to my supervisor professor R. Alexander Lorz, for his patience and highly useful suggestions.

I'm especially grateful to my colleagues Slobodanka Goseva, Rebecca Clark, Damir Davidovic and Svetoslav Pintev for the time they gave up to debate and suggest additional arguments on the issues that make a part of the whole text. Especially important was the feedback that I was given after the presentation of the basic ideas that lie in each chapter. This means that the first version of my work has experienced enormous change and now we have a text which is somehow different from the first, preliminary version.

No deserves a better word in my attempts to make this paper as good as possible than my brother, my parents and my friends. Not to forget technical assistance by Maja Grgurovic, who did a proofreading of the text.

Finally, I was honoured to have the chance to cooperate with the people who are engaged at the Centre for European Integration Studies as administrative staff, namely Ms. Cordula Janowski, Ms. Barbara Giordano and Mr. Lars Zimmerman. They helped me by their thoughtfulness and advice, which encouraged me to do my best in writing this thesis.

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## Chapter I

### The Origins

*“Among the most formidable of the obstacles which the new Constitution will have to encounter may readily be distinguished by the obvious interest of a certain class of men in every state to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold under the State establishments; and the perverted ambition of another class of men, who will either hope to aggrandize themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies than from its union under one government.”*

Alexander Hamilton, *The Federalist*, 1787

In attempt to replace existing agreements with a Constitutional Treaty, the European Council has decided to create a Convention, which is the body entitled to prepare a proposal for the future Constitution of the European Union.<sup>3</sup> This means that the EU will finally define its nature and character as an actor that has been in the process of changing, reshaping and remaking for more than half a century. At the same time, the debate on this issue will come to its end because it will be clear whether this entity is just an organization of supranational character or a federal state.

It was clearly stated in the Laeken Declaration that there are four aims to be fulfilled by the work of the Convention:

- Reorganization of the competences between the organs;
- Simplification of the Union’s instruments;
- More democracy, transparency and efficiency;
- Simplification of the existing Treaties.

The central part of this work is dedicated to the analysis of whether those aims may lead to the creation of a closer union i.e. a kind of federal like state and whether there are some examples on which the EU may rely in this matter.

The debate on this issue is becoming more interesting if we remember the fact that the US Constitution, which was created two hundred years ago, was a result of a wide discussion within the

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<sup>3</sup> Laeken Declaration on the future of the European Union, Annex to the Presidency Conclusion, pages: 19 – 27, see the web site: <http://ue.eu.int/Newsroom/makeFrame.asp?MAX=&BID=76&DID=68827&LANG=1&File=/pressData/en/ec/68827.pdf&Picture=0>, (visited on March 3<sup>rd</sup>, 2003)

American Convention in the year of 1787. This chapter of the paper contains the comparison of the conditions and reasons that pushed political actors in both the USA and Europe to create their own Constitutions. We'll try to give an answer to the following questions: To what extent is the EU Convention process modelled by the work of the US Convention? What are the reasons behind creating Conventions in the USA and in Europe? To what extent will the results of the work of the European Convention be conditioned by the way the Convent does its job? In other words, we are trying to discover whether the Europeans are experiencing a kind of their own Philadelphia.

## 1. The Constitution-Making in the USA

The creation of the US constitution was preceded by the war of independence. That war had been bound by two events: the first one is the American Declaration of Independence, by which 13 American colonies decided to form an alliance which would not be a part of the United Kingdom; and the second event was the signing of the Peace Accord in Paris in 1783, by which Great Britain recognized the independence of North-American colonies.<sup>4</sup> During the war, "The Articles of Confederation" were made. It is a document which until the announcement of the new Constitution in 1787, served as a kind of basic treaty, which regulated the relations between the colonies that mutually participated in the war against the British crown.

The Articles of Confederation contained thirteen articles<sup>5</sup>, and the document was used to represent an agreement between colonies by which the "league of friendship"<sup>6</sup> had to be made. This should have enabled separate entities to have a common diplomatic service and united military actions against the king<sup>7</sup>. That was the first document made during the war of independence which regulated the relationship between the colonies to a certain level.

After the fragile alliance of American colonies had reached independence from the British crown, the question of redesigning the Articles of Confederation became urgent. It was James Madison who

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<sup>4</sup> Besides the fact that the war was already over in the summer of 1781, it took almost two years to prepare a conference on which the Peace Accord was signed.

<sup>5</sup> The following colonies were members of the newly established confederation: New Hampshire, Massachusetts-Bay, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

<sup>6</sup> Useful paper on the origins of the American federalism is given in: Richard P. Nathan, "Federalism – the Great –'Composition'", in *The New American Political System*, edited by Anthony King, The AEI Press, Washington DC, 1990.

<sup>7</sup> The text of The Articles of Confederation may be found in: Jerome B. Agel, *We the People*, Barnes & Nobles Books, New York, 2000, p. 21 – 27.

studied political theory a lot and who made research on the works of Herodotus, Plato, Aristotle, Polibius and Montesquieu, in order to find a formula on which a new country should be based. He considered confederation as a very weak form of government, unable to set the institutional rules that should have directed American states into a form of union that would guarantee prosperity, freedom and happiness to its citizens. Madison thought that strong, central government, which would share responsibilities and competences with states, could only be capable of ensuring a new stable state, safety of life and order. That was the reason, which lies behind the creation of the Constitutional Convention. And that's why America needed a new constitutional treaty in order to provide the new country with a new legal system.<sup>8</sup>

The creation of the American Convention has an interesting history too. It was preceded by the proposal made by Madison and Tyler, which was sent to the Assembly of the state of Virginia. The proposal suggested that the Continental Congress should<sup>9</sup> have as one of its competencies, the power to regulate trade within the confederation. The Virginian Assembly accepted that proposal as an excellent one and at the same time sent a letter to the representatives of all the other states to come together in a Continental Congress to discuss the issue. The Congress was held in Annapolis, in September 1786 and its main result was a declaration, written by James Madison and Alexander Hamilton. The Declaration suggested to the representatives of the American colonies that they should create a Convention, which should have as its main aim the revision of The Articles of Confederation.

The interesting thing is that neither James Madison nor any other person had the competence to write such a text of declaration, but that did not prevent the Continental Congress issuing an official invitation to the delegates who gathered in Philadelphia in 1787. Their main task was to agree on the need for changing the existing constitutional document.

Fifty-five delegates representing newly established sovereign states came to Philadelphia at the end of May 1787 in order to participate in the discussion on the need for a new constitution.<sup>10</sup> George

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<sup>8</sup> Different authors have different views on the motivation of the Convention participants to act in this or another way. See interesting essays on this issue: John P. Roche: "The Founding Fathers: a Reform Caucus in Action"; and Charles A. Beard: "Framing the Constitution" in Peter Wall: *American Government, Readings and Cases*, Harper Collins College Publishers, New York, 1993, p. 11 – 43.

<sup>9</sup> The Continental Congress had an interesting history too. It was founded in 1774, before the war against Great Britain started. It was the sole organ of the American colonies that existed during the war. It represented the union of colonies despite the fact that it didn't have formal competences for doing that. The Continental Congress prepared and proposed the Articles of Confederation, adopted in 1781.

<sup>10</sup> One can read more about this in the following books: Max Belloc, *The Debate on the American Revolution*, Nikolas Kaye Ltd, London, 1949; Barbara Silderdick Feiberk, *The Articles of Confederation: The First Constitution of the United States*, Twenty First Century Books, 2002. Interesting information on the work of the Convention and

Washington was elected president of the Convention. The Convention worked for almost four months with very serious discussions between the so called federalists and non-federalists, between the supporters of the strong central government and those who wanted to keep the competences of member states as wide as possible. The work of the Convention resulted in appointing a new Constitution, which was sent to all the states on ratification.

Simultaneously with the work of the Convention, representatives of the different positions towards future relations of the American states, had tried to convince public opinion in their respective countries of their positions and arguments. As a result of the pro-federalist engagement, the Federalist Papers were created. The Federalist is the most valuable and the most significant written document on the theory of federalism. It consists of the 85 texts of the founding fathers – James Madison, Alexander Hamilton and John Jay – written in defence of the ideas that America had to be maintained on federal principles.

The American constitution came into force when the last ratification had come from the ninth member state. It happened on July 2<sup>nd</sup>, 1788 when New Hampshire ratified the Constitution. At the same time, the Congress sent an invitation to the representatives of the Committee in charge to declare that new constitution was adopted.

## 2. Making the European Convention

While the constitution making process in the USA followed the war of independence, European experience is significantly different<sup>11</sup>. More than a half a century has passed in the attempts to integrate European states. Those attempts were first realized in economic cooperation and at the end of the XX century that cooperation emerged as a kind of organisation which is neither a state, nor an international organisation.

Throughout history there have been many ideas promoting Europe as a united political entity. Among others, we may mention William Penn and his: “An Essay towards the Present and Future Peace of Europe”, written in a period from 1692-94. Very famous but not so influential was the work of Abbé de Saint Pierre: “Mémoire pour la Paix

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biographies of its participants are available at the following web pages:  
[http://www.archives.gov/exhibit\\_hall/charters\\_of\\_freedom/constitution/founding\\_fathers.html](http://www.archives.gov/exhibit_hall/charters_of_freedom/constitution/founding_fathers.html) (visited on February 20th 2003);  
<http://www.wae.com/freedom/conhist.html> (visited on February 28th 2003)

<sup>11</sup> On the development of the process of European integration see: Peter M. R. Stirk, *A History of European Integration since 1914*, Continuum, London, 2001; Anthony Pagden (ed.), *The Idea of Europe: from Antiquity to the European Union*, Cambridge University Press, London, 2002; Volter Laker, *Istorija Evrope 1945 – 1992*, Klio, Beograd, 1999.

Perpétuelle en Europe". Many years have passed since the French Minister of foreign affairs Robert Schumann initiated the integration of the Western-European nations<sup>12</sup>. His idea was to create an organization which would bring France and Germany closer to each other and so make new wars on the European continent less likely.

Schumann's initiative resulted in the foundation of the Coal and Steel Community in 1951, followed by the creation of the European Economic Community and European Community for Atomic Energy in 1957. During the Cold War, founding countries had tried to create a free economic area, which would serve to link the economic systems of those states. The idea behind this was to enforce the western European block as a strong economic entity.

The Single European Act of 1987 finalised economic integration and the Maastricht Agreement introduced into the process the question of the Union's citizenship and the issue of the political character of the EU. The Treaties of Amsterdam and Nice strengthen the idea of developing Europe not as an international organisation, but rather as a supranational organisation, having some of the characteristics of state.

Fifty years of prosperous development of the Union meant that the process of integration had to be deepened and strengthened. In the year 2001 the European Council decided to create the European Convention, with the main task to create the Constitution of the Union that should replace the existing treaties containing the basic principles on which the Union was founded.<sup>13</sup>

One of the main objectives of the Convention is to give legitimacy to the whole process of European integration, which, according to some authors, was lost during the half century of the Union's development. Its ambition is to make the Union more democratic, more transparent and more efficient. The creation of the Convention is one of the most significant moments of the institutional building of the EU, since the first elections for the European Parliament were organized in 1979 and since the Treaty of Maastricht came into existence in 1992.

Finally the task of the Convention is to prepare a document that may become a constitutional treaty for the Union. This event gives a chance to all interested in this scientific area to precisely see the nature and character of the entity, which has been constantly changing since its foundation in the early fifties.

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<sup>12</sup> Robert Schumann, *Za Europu*, Europski dom, Zagreb 2000, p. 65.

<sup>13</sup> Basic documents that are usually taken as the constitutional treaties of the EU are: **The Treaty establishing the European Coal and Steel Community (1951)**, **The Treaty establishing the European Economic Community (It is often called the Treaty of Rome, 1957)**, **The Treaty establishing the European Atomic Energy Community (1957)** and **The Treaty on European Union (1992)**.

When the Convention was founded it was taken into consideration that a wide debate should be organised with all the involved parties. That's the reason why, besides the representatives of the EU institution and representatives of the member states and accession countries, the interests of the Committee of Regions, European Social Partners, and NGOs are represented. This means that the work of the Convention needs wide support and legitimisation.

### 3. Looking into the Mirror?

In the attempt to compare those two processes, we have to take into account all similarities, but also differences that lie behind them. Both similarities and differences may be argued in a different way and on different levels and we'll try to collect some of them in the following paragraphs.

#### **How similar are those processes?**

First of all, both entities were founded as a kind of league or organisation, in which different states participated in common affairs to a certain extent and their cooperation was regulated by an agreement that existed even before the Conventions were made. In the case of America that agreement was called: "The Articles of Confederation"<sup>14</sup>, while in Europe we have a number of basic Treaties, which, in the interpretation of some authors, have a constitutional character.<sup>15</sup> Both processes were conditioned by the need to overcome the weaknesses of the previously established systems.<sup>16</sup>

Secondly, it's the fact that in both cases we have member states, which have different views towards the way in which the wider entity has to be ordered. Both cases represent the struggle between the agitators for either strong central government, to which member states should be subordinated, or for a very weak central government, which should have as a key role the coordination of policies between members.<sup>17</sup>

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<sup>14</sup> The Articles of Confederation were made in 1781 and lasted until the ratification of a new Constitution in 1788.

<sup>15</sup> There is an excellent text on this issue: Jean Claude Pirijs, *Does the European Union have a Constitution? Does it need one?* Text is available at the internet page: <http://www.jeanmonnetprogram.org/papers/00/000501.html#fn1> (visited on March 14<sup>th</sup> 2003)

<sup>16</sup> See: John P. Roche, "The Founding Fathers: a Reform Caucus in Action", in: *American Government...*, p. 12-15.

<sup>17</sup> Regarding American example Roche says: "Standard treatments of the Convention divide the delegates into 'nationalists' and 'states righters' with various improvised shadings ('moderate nationalists', etc.), but these are posteriori categories which obfuscate more than they clarify." Roche: "The Founding Fathers", p. 16.

In both cases we see a clear intention of all the entities to make a kind of a wider association or league. Absolute consensus was made about the necessity of creating common government. But, differences appeared when the discussion came to the question of the vertical distribution of power, in the debate to what extent the competencies of the central government or Community institutions should be enlarged.

Thirdly, in both cases we have a huge discussion, represented in the way in which the Convention worked and duration of the whole debate. That means that both processes were seriously undertaken having in mind all consequences they might have on the future of all actors. While in the American Convention, the representatives of states participated in constitutional discussion, the European Convention gathered not only representatives of different national institutions, chosen by member states, but representatives of existing European institutions, accession countries, NGO, Social partners etc.<sup>18</sup> This may obviously confirm that the framing of the Constitutions in both cases was/is a democratic process. Final agreement will surely have democratic legitimacy.

Fourthly, America was an experiment and this may be equally said for today's Europe.<sup>19</sup> Despite the fact that in the European case we may follow the examples of the creation of other federal states i.e. the USA, Canada, Switzerland, Germany, Australia etc, it's for sure that the process of European integration is unique. This is one of the reasons why we are trying to compare the constitution making processes in the USA and Europe, in order to foresee possible consequences of the European experiment. It appears to be a fact that it is to a certain extent modelled on the way in which the American constitution was made.

Finally, the American constitution could have easily been called the great compromise even at the end of XVIII century, due to the way in which the balance of power between central government and member states was created. Having in mind an institutional architecture of the EU so far, it may be easily predicted that constitutional debate will result in a kind of "Great Compromise" between national states that are reluctant to lose their power and Community institutions, which want to cover as wide an area as it is possible. The question may be to what extent those compromises may be different and what the main causes for this are. We'll try to discuss this issue in the next chapter, which analyses the

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<sup>18</sup> The democratic capacity of the American Convention was nicely described by John P. Roche: "The Philadelphia Convention was not a College of Cardinals or a council of Platonic guardians working within a manipulative, predemocratic framework; it was a nationalist reform caucus which had to operate with great delicacy and skill in a political cosmos full of enemies to achieve the one definitive goal – popular approbation." Roche: "The Founding Fathers", p. 12

<sup>19</sup> Ludger Kühnhardt, *Towards Europe 2007: Identity, Institution-Building and the Constitution of Europe*, ZEI Discussion Paper, Center for European Integration Studies, Bonn, 2001, p. 34.

institutional set up, distribution of power between the organs and the vertical distribution of competences.

### **Differences**

In order to notice relevant differences, we should start with a legal framework that existed in both entities before Constitutions or Constitutional treaties were enacted. Despite the fact that the USA and Europe had practiced a kind of common life under the frame of certain agreements, we have to mention that the practice cited above had different causes and developments in those entities. While the American states finished the war of independence and needed safety for their borders, the European Convention has in its background 50 years of economic prosperity and development of the integration process.

The European integration process is mainly developed thanks to the wish of the European political elite to finally bring an end to the wars and disputes within Europe. Moreover, economic means have been used to amortize and to give strength for achieving this goal. In other words, it was not a matter of danger from abroad that forced Europeans to go deeper into the whole process.<sup>20</sup> It's rather the question of peace between European countries as such and their wish to further develop their economic strength and position on the global level.

Secondly, among the main reasons for gathering the American Convention, the founding fathers emphasized that the Convention should take into consideration the utility of the Union, which means safety from a foreign danger, safety from dissension among states or several confederacies and safety from domestic factions, rather than the insufficiency of the present confederation and a need for a central government which will be founded on the principles of the separation of power and vertical distribution of competences between federal and state level.

The European Union is partly a different example. The utility of the EU is one of the main arguments of Euro-optimists, but if we compare the meaning of this to the meaning of the utility during the Constitutional debate in the American Convention, we can easily see some differences. The European countries do not feel a kind of threat from a foreign danger as was the case in the USA. Since the creation of NATO, most of the EU member states are members of NATO, an organisation originally designed to secure the Euro-Atlantic countries from the danger of communism. After the end of the Cold War, the mission of NATO has been slightly changed, but it is still an organisation which serves the

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<sup>20</sup> One can always argue that there was a serious threat from the Soviet Union. But what we want to stress is that European countries themselves realized how appropriate it could be to have an integration process which has as its main goal, peace among European countries. Foreign threats could just give strength to the process, but the process itself could have been realized even without outside pushing.

secure defence of almost all EU countries<sup>21</sup>. In addition, the European Security and Defence Policy has been introduced but as a part of the NATO structure. This convinced us that the EU doesn't feel any kind of foreign threat under which it doesn't have valid forces to rely on in case of danger.<sup>22</sup>

As a third argument we can mention insufficiency. But insufficiency of the present institutions may not be a good argument in the case of the EU. For the last 50 years those institutions were very successful and they developed due to their efficiency. The main difference between the EU and the USA is that the founding fathers realized that institutional changes were indispensable for the future development of that country. Their development was forced because of the insufficiency of the existing institutions. However, the EU is quite a different example. European institutions pushed the integration process forward and enabled European countries to create a close union among themselves.

Finally, the socio-economic ambient in the beginning of the XXI century differs a lot from the one that existed two centuries ago. The European integration process has been influenced by the phenomena of globalisation, which may direct the whole process in a way which will be different from the one that the USA experienced. The period of globalisation has influenced and will continue to influence the process of integrating Europe, and this is where the American and European experiences are significantly different.



One may conclude that those processes have something in common, but it's also obvious that some great differences also exist. In the opinion of the author of this paper, the key line of discussions that took place in the case of the USA, may be easily compared with those that are being discussed through the work of the European Convention. Actually, it's quite impossible to imagine a situation in which two such processes are modelled in completely the same way.

This is why we can assume that the work of the European Convention may result in the kind of compromise that happened in the case of America. And this is why we'll try to analyse an institutional architecture of both entities in order to see whether the existing "great compromise" is similar in those cases.

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<sup>21</sup> The EU members that are not members of NATO are: Austria, Finland, Ireland and Sweden.

<sup>22</sup> It can be discussed here whether the Europeans feel comfortable under the domination of American generals in NATO, but still, there is no doubt that Europe is not endangered as America was in the end of XVIII century. As an additional argument we have to mention that the European countries have their own armies which may serve the purpose of common defence if needed.

## Chapter II

### Legal Comparison of the Constitutional Systems

*"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."*

James Madison, *The Federalist*, 1787

This chapter contains remarks on the similarities that exist between the EU and the US regarding the question of distribution of power between the organs on a federal or Community level and also vertical distribution of competences between the central institutions and bodies in which constitutional entities are represented.

It is obvious that both the US and the EU have to deal with very complicated systems, which guarantee constitutional competences to more than one level of government. We'll try to conclude to which extent the compromises that were established in both systems are similar. In other words, we'll try to find how much the great compromise made in the US looks like the compromise that exists in the European system.

The American system has usually been described as a presidential system in which the executive branch of power is represented by a very strong president who has the competence to create his cabinet, which acts as a government of the USA.

The US constitution written in the year 1787, which has never been drastically changed, but rather amended by 27 amendments so far, contains 7 articles out of which 4 are entirely dedicated to the question of the distribution of power between different organs representing central authority. Institutions that exist on a federal level of government are: the Congress, the Presidency and the Supreme Court.

The case of the EU is somehow different and more complicated. The Treaty on the EU, created in Maastricht and amended by the Treaties of Amsterdam and Nice, says: "The Union shall be founded on the European Communities, supplemented by the powers and forms of cooperation established by this Treaty..."<sup>23</sup> This means that all institutions, established by the Treaty on the European Community, are at the same time institutions of the EU. And there is an institution, which is not an institution of the EC, but only an institution of the EU, namely the European Council.

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<sup>23</sup> *The Treaty On European Union*, Article 1, paragraph 3, text of the Treaty available at: [http://www.europa.eu.int/abc/treaties\\_en.htm](http://www.europa.eu.int/abc/treaties_en.htm) (visited on May 6th 2003)

Nevertheless, Article 7 TEC tells us which institutions should carry out the tasks entrusted to the Community. Those institutions are: the European Parliament, the Council of Ministers, the Commission, the Court of Justice and the Court of Auditors. At the same time, Article 4 TEU tells us that the European Council is the institution of the EU whose task it is to provide the Union with the necessary impetus. Its main goal is to define the general political guidelines.

One may say that it is not even clear whether the European system may be regarded in the same way as the American. The main reason for this lies in the fact that European institutions are intertwined by their competences, but it is not clear whether this intertwining represents clear division or the sharing of power in the classical sense.

Having in mind all of this, we can ask the next question: What kind of power does each institution have? In this chapter we'll try to provide an answer to this question and to compare the institutional settings of the American and European systems.

#### 4. Distribution of Power Between the Organs

In order to compare two systems and to make a good classification, it is necessary to show the key elements and the way in which both systems function. After reading the Constitution of the United States of America and Basic Treaties of the EU, it may be concluded that the highest (central) level<sup>24</sup> of the decision-making process in both cases has been represented by institutions that have different or shared competencies. We'll try to see whether those institutions are clearly divided through the lines that separate the legislative, executive and judicial branches of power, by pointing out the responsibilities of each of them. This will be an even more challenging task having in mind that while the American system is based on the principle of the separation of power, it is not clear whether this is the case with European institutions.

##### *Legislature*

The legislative branch of power within the constitutional system of the USA is excellently described in "The Federalist".<sup>25</sup> Not only is this branch of power nicely presented by James Madison, but the way the system functions as well. Confirming that the American system should be based on the principle of

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<sup>24</sup> There is also a difference in terminology which is quite important. This level is called Federal in the US, and Community level in the EU.

<sup>25</sup> The essays (No 52 to No 66) are dedicated to the legislative branch of power and it is most interesting that all authors (Hamilton, Madison and Jay) wrote at least one of those. More about this in: Alexander Hamilton, John Jay, and James Madison, *The Federalist*, Random House, New York, p. 336 – 429.

“separation of power”<sup>26</sup>, which is the one that can guarantee the efficiency of the formula “In Pluribus Unum”, Madison quoted Montesquieu, who wrote that “the entire legislative can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of the third, can try and condemn all the subordinate officers in the executive departments”.<sup>27</sup>

Having in mind that neutrality of laws must be laid down together with the separation of power, the writers of the American constitution wrote about legislative power in the very first Article of the Constitution. The competences of this branch of power are enumerated there and Article 1 begins: “All legislative Powers herein granted shall be vested in a Congress of the United States...”<sup>28</sup>

This should mean that no law can be enacted by any other actor apart from the Congress. This first article contains paragraphs on the structure of the Congress and the election of its magistrates, but the most salient section, regarding our interest here, is section 8 of the first Article, which states the powers of the Congress. This section contains a long list of competences<sup>29</sup>. It is obvious from the list that every single decision made by executive authorities must rely upon laws created in Congress. And there are two interesting points regarding the relationship between the legislative and executive branches of power:

- a) The first one is all about competences that are additional to the basic competences of the Congress – section 3 of Article 1 says that the Senate (upper house of the Congress) shall have the sole power to try all impeachments.<sup>30</sup> This power can be exercised only in cooperation with the second chamber (House of Representatives), which was stated in the last paragraph of Section 2 of Article 1.

This means that under certain circumstances, the President of the USA can be charged before Congress. One may conclude that this serves as an additional competence of the Congress, made to strengthen the checks and balances principle.

The second objection relates to the limitations put down in front of Congress while doing its job:

- b) Section 7 of Article 1 says that: “Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law,

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<sup>26</sup> On the separation of power as a key principle of federalism and federalism in general, see: Daniel J. Elazar: “Federalism” in: David Sills (ed), *International Encyclopaedia of the Social Sciences*, p. 353 - 367, The Macmillan Company, 1968; Miodrag Jovicic, “Federalizam”, in: Milan Matic, Milan Podunavac: *Enciklopedija politicke kulture*, p. 331 – 340, Savremena administracija, Beograd, 1993.

<sup>27</sup> The Federalist No. 47, in: “*The Federalist*” p. 310.

<sup>28</sup> The Constitution of the United States of America, in Jerome B. Agel (ed), *We, the People, Great Documents of the American Nation*, Barnes and Noble Books, New York, 2000, p. 36.

<sup>29</sup> The Constitution of the United States of America, in: “*We, the People...*”, p. 39.

<sup>30</sup> The Constitution of the USA, in: *We the People...*, p. 39

be presented to the president of the US”<sup>31</sup>. And in that case, the president has power to stop and in some cases veto the law proposed by Congress.

This paragraph looks like a contra-balance to the previous one. In this case, the president is the guardian of the Constitution and he may prevent Congress from the attempt to enact everything. The checks and balances principle is ensured by this objection too.

Those two objections show how intertwined the executive and legislative branches of power are. They are not just separated so that each of them does its own function. The whole system supports a kind of control between them and enables each to follow and check all the actions of the other.

Taking into consideration the general topic of this paper, we may conclude that with regard to the legislative issues, it’s clear that the American Congress is a body entitled to deal with creating laws. It has a sole legislative power and it may even control the President, if doing unjust actions, by using impeachment. At the same time, its power is not unlimited because the President can monitor the whole legislative procedure and prevent Congress from creating unjust laws.<sup>32</sup>

If we switch to the case of Europe now, one may say that the European Parliament might have the sole legislative power within the EU constitutional framework. But, that would be a wrong assumption because it is the Council of Ministers that plays the key role in creating laws within the legal framework of the Community. Those legislative acts may have different forms and they are different by the way in which they are enacted and also by the legal effects they have on member states. Those acts are classified and described in the Article 249 TEC.<sup>33</sup>

Having in mind that the next chapter contains details on the effects that those acts have on the member states, we’ll focus here only on the relationship between Union institutions regarding their competences.

The Treaty on the European Union says that the Parliament, the Council and the Commission play a role in a legislative procedure within the EU. It is the Commission that has power to initiate or to propose a document, which in a further procedure may become an act with a legislative character. The power of the Commission is limited up to the initiation.<sup>34</sup>

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<sup>31</sup> The Constitution of the USA, in: *We, the People...* p 39.

<sup>32</sup> For more information on the presidency of the USA see the essays: Fred Barnes, “Congressional Despots, Then and Now”; Lawrence C. Dodd, “Congress and the Quest for Power”, in Peter Wall, *American Government, Readings and Cases*, Harper Collins College Publishers, New York, 1993, p. 410 – 431.

<sup>33</sup> Those legislative documents may be: regulations, directives, decisions, recommendations and opinions. More on this in The Treaty on European Community, the text of the Treaty is available at: [http://www.europa.eu.int/abc/treaties\\_en.htm](http://www.europa.eu.int/abc/treaties_en.htm) (visited on May 6th 2003)

<sup>34</sup> In some cases, the Commission may use its competences to create a law and this was used during the privatisation of telecom industry. But, a huge consensus must be achieved before the Commission may act in this way. After the telecom industry had been privatized this has never happened again.

The Articles 251, 251 and 272TEC regulate the role of the EU Parliament in the legislative procedure. Sometimes and on some occasions the Parliament is given the power to prevent the Council enacting a law. But this is a pre-emptive, rather than an active, role in law making.<sup>35</sup>

Finally, it is the Council that must approve every single piece of legislation. It may adopt or reject the proposal of the Commission, it may act by simple or qualified majority, it may consult the European Parliament but it cannot be banned by the Parliament's opinion (except in some cases mentioned above). The most salient thing is that the Council gathers representatives of the national governments. This means that national interests are being put in the first place.

It is more than obvious that in comparison to the legislative process within the US constitutional system, the EU's scheme looks more complicated. And what is more interesting, the European legislative triangle is unbelievably intertwined by the various forms of possible law making. The European theory and practice shows examples of three key ways of cooperation between those organs: co-decision procedure, co-operation procedure and consultative procedure.<sup>36</sup>

Which of those procedures is going to be used depends on the type of document that is to be adopted. Having in mind that  $\frac{3}{4}$  of EU legislation has been created by the first of the above-mentioned procedures and that the European Parliament has a significant role within this procedure, one may assume that simplification of those procedures will strengthen the position of the Parliament. This also means that the legislative process will be more and more directed to the institution that, by its nature, should be in charge of legislative matters.

### *Executive*

Article 2 of the American Constitution tells us more about the executive power within the American political system. The following is written in section 1 of this Article: "Executive power shall be vested in a President of the United States of America".<sup>37</sup> All the competences of the President are enumerated in section 2 of the Constitution. Those competences cover both internal and foreign actions of the executive branch of power.

The power of the President is even confirmed or legitimised by the way he is to be chosen. He is elected in general, direct elections, which enable him to directly communicate with the citizens and to justify his policies by the general

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<sup>35</sup> In a co-decision procedure, the Parliament plays an important role, but it is still too weak in comparison with the parliaments of national states.

<sup>36</sup> All those instruments are described in the Articles 251 and 252 of TEC, *The Treaty on the European Community*.

<sup>37</sup> *We, the People*, p. 40

will of the people.<sup>38</sup> The President is obliged to give Congress the report on the state of the Union and this must be done periodically. Except by the legal norms created by Congress, the president's actions may only be limited by the power of the Congress to start the process of impeachment.

After the American Convention had finished its work, one of the Founding Fathers, Alexander Hamilton, wrote: "There is hardly any part of the System which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none that has been inveighed against with less condor or criticized with less judgements."<sup>39</sup> Reasons for this were clear: The institution of the Presidency was given the core part of competences and the whole system looked semi-presidential in nature. It was Alexander Hamilton who wrote, "Energy in the executive is a leading character in the definition of good government".<sup>40</sup> But some opponents of the new American constitutions used to call the whole system monarchist because of the amount of competences or "energy" that is constituted in the executive.

It is clear from the Constitution that the American president has competences in:

- Realizing all executive actions;
- Participating (in a very limited way) in creating laws by using his right to veto some laws. He may return a law announced by the Congress after which a new discussion has to take place. In order to have that law enacted, the Congress must accept it with a qualified majority of 2/3 of representatives;
- Electing ambassadors, consuls, magistrates etc – this is a competence shared with Congress;
- Choosing judges of Supreme and Inferior Courts – competence shared with Congress;
- Respecting the pardons, which is the power extended to all cases except those for impeachment;
- Leading the US Armed Forces in a state of war. He is the commander of the army, the air force and the navy of the USA. This doesn't mean he is the one to declare a war. That is the sole responsibility of Congress.<sup>41</sup>

What is the most interesting thing and what was even described in the *Federalist*, is the fact that all executive power rests in the hands of one single man who may form his cabinet without consultations with Congress. Three main points limit his competences:

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<sup>38</sup> There are two things that have to be mentioned here. First of all, there is a debate whether the elections over electors are direct elections. Consequently, the question of legitimacy may be reopened again and again.

Secondly, the concept of general will has its roots in the theories of social contract from the XVIII century. The question is whether the way in which the American president is elected represents a clear will of the majority of the citizens in a country.

<sup>39</sup> Alexander Hamilton, "The Federalist No. 67", in *The Federalist*, p. 429.

<sup>40</sup> Alexander Hamilton, "The federalist No. 70", in *The Federalist*, p. 447.

<sup>41</sup> Article 2 of the Constitution of the USA, in *We, the People*, p. 41.

- He is supposed to submit regular reports on the state of the nation to Congress;
- Congress may accuse him of non-doing his job properly in which case the process of impeachment may take place;
- Presidential elections have to be held every four years, which is a period too short to make that person too relaxed with his competences, but too long not to care about the possibility of abusing his power.

One of the main reasons for defending a strong executive power was a fear of disunity and dissolution. "The unity may be destroyed in two ways: either by vesting power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counsellors to him".<sup>42</sup> The American system had to be created as a system that could secure not only internal integrity and freedoms, but external frontiers, peace and economic development.<sup>43</sup>

The European Union has been differently developed and its executive powers are regulated differently if we compare it with the USA. Regarding this branch of power, there are two Community organs that share competences in this field: the Commission and the Council of Ministers.

Usually called "the guardian of the Treaties", the Commission is saliently involved in the EU decision-making process at all levels. If we assume that the Commission deals with both legislative and executive functions (judiciary is out of question), we can say that the Commission acts as an executive body through:

- The actions of its President;
- The activities of the Commission as a whole.

As a *primus inter pares*, the president of the Commission is expected to:

- Represent the Commission when it comes to the relationship between the EU institutions;
- Represent the Commission and the EU to outside bodies;
- Provide forward movement for the EU;
- Oversee some of the Commission's most important administrative services;
- Take on specific policy portfolios of his own.<sup>44</sup>

The Commission's executive competences are not identical to those of nation states and they may be divided into several categories: rule-making power, management of EU finances, supervision of "front-line" policy

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<sup>42</sup> Alexander Hamilton, "The Federalist No. 40, in *The Federalist*, p. 249.

<sup>43</sup> For more information on the presidency of the USA see the essays: Clinton Rossiter, "The Presidency – Focus of Leadership"; Richard E. Neustadt, "Presidential Power"; James David Barber, "The Presidential Character", in Peter Wall, *American Government, Readings and Cases*, Harper Collins College Publishers, New York, 1993, p. 292 – 328.

<sup>44</sup> Neil Nugent, *The Government and Politics of the European Union*, Palgrave, New York, 1999, p. 107.

implementation, management of regulatory policies, external representation and negotiation, mediation and conciliation.<sup>45</sup>

The Council of Ministers is another institution empowered by certain executive competences. It is usually called the Government of the Community, which again emphasises the differences between the pillars of the EU.

Despite the fact that the Council has a central role in making legislation, it certainly has some other powers too. It has:

- Supervisory powers – mentioned in the Article 202TEC by which the Council is empowered to control whether the actions of the Commission were in accordance with its decisions;
- Coordination of general economic policies – which includes that the Council is the body that takes care of the coordination between economic policy of the member states;
- Drafting the budget – it is the Council which is supposed to establish the draft budget and forward it to the Parliament;<sup>46</sup>
- Foreign policy – it is the Council that plays a central role in external activities. Article 12TEU enumerates this list of instruments that may be used regarding common foreign policy and it includes defining the principles and general guidelines for the common foreign policy, deciding on common strategies, adopting joint actions, adopting common positions, strengthening cooperation between member states.<sup>47</sup>

Regarding the type of instruments it uses, the Council may act unanimously or by qualified majority.<sup>48</sup>

In conclusion, we may say that the Council and the Commission have a role in European executive matters. They share some of the powers, but the Council representing intergovernmental interests is a central body.

## *Judiciary*

Article 3 covers a deliberation on judicial power within the US constitution. This Article basically says that the judicial power of the USA shall be vested in one Supreme Court and in some inferior courts as Congress may from time to time ordain and establish.<sup>49</sup>

The same Article enumerates the cases in which the Court shall have competences to judge. And it is only in case of impeachment when the American

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<sup>45</sup> Nugent, *The Government...*, p. 123.

<sup>46</sup> The whole procedure is a little bit complicated because it involves the Council, the Commission and the Parliament and this is exactly the place where the Parliament may exercise its power. The Parliament has a right not only to amend the draft budget, but it can reject the budget, which may have significant political consequences. See Article 272TEC.

<sup>47</sup> See, *The Treaty on European Union*

<sup>48</sup> The process of negotiating with a third party in the field of European foreign policy is described in Articles 300 and 310TEC, see the Treaty on the European Community.

<sup>49</sup> *We, the People*, p. 42

Congress and not the Supreme Court shall have the sole power to act. In all other cases,<sup>50</sup> the Supreme Court shall have competence together with the Inferior Courts.

During the constitutional debate, a huge discussion was dedicated to the question of the role of the Supreme and inferior Courts. This can be best illustrated by the number of essays that Alexander Hamilton wrote in the defence of the proposed solutions.<sup>51</sup>

The Founding Fathers and writers of the American constitution focused their attention on many more or less important questions, such as the duration of judges in office, good behaviour, the support and removal of judges, the relations between federal and state courts, trial by jury etc. What we are interested in here is the relation between the judiciary and other branches of power.

As Montesquieu stated in his famous *Spirit of Laws*, “of the three powers above mentioned, the judiciary is next to nothing”. And why is that the case? It’s because the judiciary is not supposed to create laws, it’s not supposed to create and realize policies, it exists just to control the procedure on which the relationship between existing powers is respected. It is also not supposed to abuse its own competences. One can say this makes sense and that’s right, but Montesquieu’s thoughts may be easily accepted if we acknowledge that of the three powers, he preferred the legislative branch from which he developed all the other powers.

If we take a look at the solutions implemented by the American constitution, we may say that the role of the Court has diminished, but it certainly is not the case. The only thing that is out of the Court competences and relates to the trials is the question of impeachment. But, impeachment requires a procedure that can hardly be achieved. It is used only in those cases in which there is an obvious abuse of the president’s powers. The whole procedure was made this complicated in order to protect the president from less serious complaints by different actors.

The European legal framework gives us enough materials for comparing those systems. The European Court of Justice (ECJ) and the Court of First Instance (CFI) are somehow in a different position in comparison with the judiciary branch of power in the USA. In order to analyse the competences and functions of the ECJ and CFI, we have to underline the distinction between its limitations regarding different pillars. While in the second pillar (CFSP), the ECJ has no competences it has some power in the third pillar<sup>52</sup> and the core of its competences are valid within the frame of the first and so called Community pillar.

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<sup>50</sup> Those are the cases enumerated in the section 2 of the Article No. 3: all cases affecting Ambassadors, other Public Ministers and Consuls, all cases of admiralty and maritime Jurisdiction, controversies to which the US shall be a party, Controversies between two or more states, between Citizens of different States... See, *We, the People*, p. 42.

<sup>51</sup> He dedicated 6 of his essays to the role of Courts and presented his arguments in details. See, *The Federalist*, p. 495 - 546

<sup>52</sup> This is known as a “Pasarelle Procedure”

It is said in the Treaty that the basic task of the European Court of Justice is to ensure lawfulness of all Community acts under the Treaties. This is a very similar formulation to the one used in the section 2 under the Article of the American Constitution.

While its jurisdiction mostly refers to any illegal behaviour of member states (and this is a subject of the second part of the chapter), there are certain provisions that say that the ECJ shall take care that all Community institutions behave in a way which is regarded as legal. Such provision is laid down within Article 230TEC: "The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European parliament intended to produce legal effects vis-à-vis third parties."<sup>53</sup>

This means that the ECJ plays a significant role in the part of the Union that represents economic integration, freedoms etc. It has some competences within the third pillar but it still has no jurisdiction over the Common Foreign and Security Policy. And that is exactly the opposite to the US where the Constitution clearly says that the Court has power over all cases arising under the Constitution including Treaties with third parties and controversies to which the US shall be a party.<sup>54</sup>

## 5. Vertical Distribution of Competences

Different federal systems show varying degrees of centralisation. It is usually the case that federal constitutions contain provisions that precisely say what are exclusive competences of the central (federal or community) government or what are the competences reserved for the constituent parties. The question of the relationship between authorities of the central government and state governments is at the core of theorising federalism. Federal states presuppose that activities of the government are divided between constituent parties and central institutions in such a way that each kind of government has some activities on which it makes final decisions.<sup>55</sup>

There are two levels of discussion that may apply here: first of all the question of whether the system as such is centralized. The second question is how strong is the position of member states or constituent parties within the federal institutions.

The American constitution shows that the level of centralisation in the USA is very high, where states were excluded from the national decision-making process. The tenth amendment of the American constitution says: "The powers

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<sup>53</sup> *The Treaty on the European Community*

<sup>54</sup> "The Constitution of the United States", in *We, the People*, p. 42

<sup>55</sup> See, David McKay, *Designing Europe, Comparative Lessons from the Federal Experience*, Oxford University Press, New York 2001, p. 9

not delegated to the member states by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.”<sup>56</sup> Bearing in mind that the Constitution itself is a very short document, one may conclude that most of the powers and competences are not enumerated within its provisions. But it is just the opposite in the case of America. Many provisions excluded the states as actors able to exercise some competences. Article 1, section 8 of the Constitution enumerates great numbers of competences that may be exercised by the Congress.<sup>57</sup> The list of powers of the central authorities is additionally expanded by the competences that may be exercised by the Presidency.<sup>58</sup>

In addition, the Constitution expressly forbade the states to enter into treaties and agreements with one another.<sup>59</sup> This means that decisions made by federal authorities cannot be challenged by the activities of one or a group of member states.<sup>60</sup>

This doesn't mean that the decision-making process is completely centralized. What we may say here is that there is a high level of centralisation where the constituent parties have their own political systems developed to the extent in which all of them have their own legislation, executive branch of power and judiciary. The power of the member states is strengthened by the bicameral structure of the Congress and this is exactly where we come to the second point of analysis of the relationship between federal and state level in the American system.

A bicameral structure means that the legislative body is divided into two parts out of which one represents the member states (it gathers delegates of the member states). As it is written in Article 1 of the Constitution, the Congress of the United States of America consists of a Senate and the House of Representatives. While the House of Representatives is composed of the members chosen on elections, the Senate is composed of two senators from each state and where each senator has one vote. The president of the Senate is at the same time the vice-president of the United States.

Taking into account that the Congress is granted all legislative power and that both houses play a role in making legislation, we can say that the member states' interests are protected to a certain extent. It is not only the list of competences that defines the scope of activities for the member states; it is the structure of the federal legislative body, which defends their interests too.

The facts cited above show how complex the balance between the federal and state competences is within federal systems. It is also clear that this balance is created to prevent member state blocking the functions of the central authorities and at the same time to prevent central authorities from becoming despots. That is why the USA is usually described as the best federal system in history.

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<sup>56</sup> *We, the People*, p. 46

<sup>57</sup> *We, the People*, p. 38-39

<sup>58</sup> *We, the People*, p. 41

<sup>59</sup> Article 1, Section 10, see, *We, the People*, p.41

<sup>60</sup> David McKay, *Designing Europe*, p. 24

The European legal framework tells us that the vertical distribution of power may be regarded as twofold, as was also the case in the USA.

When it comes to the question of economics and economic performances, it is mostly regulated by the Community provisions. It is the Treaty on the European Community that regulates those issues. The problem appears when we arrive at the questions of the second and third pillar of the EU i.e. foreign and defence policy and police and judicial cooperation in criminal matters. There are Community provisions dealing with these issues but they are still almost the sole responsibility of the member states. If we compare it with the American experience, it is obvious that while the American constitution granted the federal authorities more power in foreign affairs and criminal matters it is completely the opposite in the EU. Consequently, the European system seems to be more decentralised than the American. In addition, the member states in Europe enjoy a stronger position than the American states. This is the field in which we can find an argument that says Europe cannot be regarded as a federal state.

While still dealing with the first aspect of analysis (the relationship between two levels of government), we must not forget to mention the principle of subsidiarity, which basically says that all decisions within the EU will be implemented on the level which is closest to the citizens and community institutions will interfere only in the case where the lower level of government is not able to deal with the issue in question. This means that in a strict division of competences, the lower level of government i.e. the member states or regional governments, is granted the possibility of dealing with all the questions in which their actions may be efficient. Community institutions may interfere in this field only if the final goal may not be sufficiently achieved by the member states. This not only proves that the division of competences between two levels of government exists, it also proves how complex the European "federal" system is.

Regarding the influence of the constituent parties in decision-making procedure within Community institutions, the European Parliament cannot be compared with the American Congress. Despite the fact that Parliament members in Europe are chosen through direct elections, it must not be forgotten that they are chosen on behalf of national parties participating in the elections. Furthermore, the EU Parliament is not of a bicameral structure and it doesn't play a crucial role in the decision-making procedure.

The powers of the member states are even strengthened by the fact that no single legislation may be adopted without a vote of the Council of Ministers in which the interests of the member states are protected. This means that intergovernmentalism prevails over the Community method. But, there are some other facts that lead us to the opposite opinion. Three quarters of Community legislation is adopted by qualified majority voting and the European Parliament is being given more and more competences and powers. European party-political groups are being formed and it is expected that they will be able to participate in the European election as single groups and not as separate entities in their own national arenas.

Still, it is more than clear that Europe may be regarded rather as a very decentralised entity, that is to say a very weak federal state with the tendency to become a stronger federation. Much of its future development depends on the work of the European Convention which is to reshape European integration.

## 6. Great Compromise

One who is familiar with the process of the US constitution can easily see that the whole process represented a “clash” between the interests of integrationists and those who wanted to keep the sole power in the hand of the member states. Because of the hard work of the participants of the American Convention to find a solution that should make all the parties more or less satisfied, the final solution was named “the great compromise”.

This compromise resulted in a formula that took into account the need for a balance between the institutions on the federal level and also well-balanced relations between the federal government and member states. This was the formula that enabled American citizens to enjoy the benefits of the liberal political system. This system guaranteed fundamental rights and freedoms to all of them and at the same time assured them that their respective member states would enjoy certain rights.

That is a very complex system, in which the power is shared between several levels of governments. Those levels include:

- The relationship between federal organs – which should ensure the citizens that no governmental institution may act without control of the other institutions. This sharing of power between the organs is done so in a way described as the “Spirit of Law”;
- Fundamental Rights and Freedoms are guaranteed to all citizens of the Union – which means that regarding basic human rights there can be no difference between different states within the federation. And there is a Court that is to control and observe that those rights are not violated;
- The relationship between the federal level of government and the member states leaves the member states without the sole power in every policy area, but at the same time grants them certain powers to influence the decision-making process on a federal level. Simultaneously, member states were enabled to act within certain fields without any consultation with higher levels of government.

The question now is whether we can speak about a great compromise regarding the legal structure of the European Union. It was clear from the beginning of the European integration process that Europe was going towards a closer cooperation between its constituent parties. The decision to create a Convention has moved the majority of analysts toward the question: Does the Constitution mean that Europe is going to become a state? And what is more interesting for us: Does the existing legal framework of the EU or the one that is

going to be established once the Convention finishes its work make us comfortable with the statement that the European “great compromise” is somehow similar to the one made in the USA?

If we carefully compare the institutional aspects of the functioning of both the USA and the EU, we can come to the following conclusions.

1. The EU as well as the USA has law-making institutions, namely the magic triangle made of the Commission, the Parliament and the Council. The most important difference between the USA and the EU regarding this issue is that legislative power within the American system is in the hands of one body – the American Congress. But we should not forget that the Presidency is given certain powers concerning legislative process, which is described in the fourth part of this chapter. The idea is that in both cases, the legislative power is clearly defined within the Constitution (in the case of the USA) and basic treaties within the EU.
2. As is the case in the United States, Europe has executive institutions represented by the Commission and the Council of Ministers. Despite the fact that some crucial issues are still part of the implementing measures of the institution of the member states, we can not deny that some semi-executive state bodies play a role in the decision-making process within the EU.
3. The Court of Justice has the power to rule on disputes between the institutions themselves and between the institutions and the Member States about the extent of their respective powers, and on the rights and obligations of Member States and citizens under European law. In fact, the Supreme Court in the USA has a wider competence but it wasn't the case at the time when the American system was being established. Many decades were needed until the whole system assumed the form it has now. And if we assume that the European integration process will be strengthened in the coming years, it is legitimate to expect that the role of the Courts will significantly increase.
4. The laws adopted by the Community institutions are superior to the laws of the Member States and may have direct effect on the citizens of the Union. The Union has a single market and manages a single currency and monetary union for most of its Member States. There are a number of fields for which the Member States have lost the power to adopt legislation or to negotiate international agreements. There are other fields in which "laws" (regulations and directives) or treaties can be imposed upon the Member States, which they are obliged to implement, otherwise they are faced with having to make lump sum or penalty payments, as well as paying compensation to adversely affected people. This is also the case in the USA.
5. The legal order of the European Union is embodied in fundamental texts which define these institutions and their powers, and oblige them to respect the rule of law and human rights. These fundamental texts, which

have been adopted by the governments of the Member States and approved by their peoples through referenda or through their elected representatives, make a kind of constitutional treaty for the EU. But those documents will additionally be strengthened by signing a new Constitution, which is expected to be done at the end of 2003 or during the first half of 2004.

6. Not only are the competences between federal or Community organs defined both in the USA and the EU, but the vertical distribution of power in both entities is regulated on the similar principles. In both cases, we have two levels of governing entities with a clearly defined line of competence between the actors involved.<sup>61</sup>

The similarities mentioned above may lead a reader to the conclusion that there are no significant differences between those entities, which might not be the case. But the differences don't arise when we speak about the character or principles on which those entities are based. The differences arise when it comes to the question of **"measuring" the way** in which the competences between the organs or central and constituent authorities are distributed. And when it comes to this question, one can easily see that in comparison to Europe, the American central government certainly possess more competences (in relation to the member states), then the Community organs within the EU do. It is also obvious that the "separation of power" is one of the defining principles of the American legal system, while in Europe we have only the rudiments of that idea implemented through the functioning of the Council, the Commission, the Parliament and the Court of Justice.

But, if we seriously read all that is written in the previous parts of this text, we can also argue that while the "great compromise" achieved within the American system represented the result of the willingness of the participating parties to secure their common interests, the Europeans did the same thing. The great compromise happens when the old national states, such as all the EU members are, participate in a process which would lead to the creation of a supranational body, entitled to create laws independently of its constituent parties.

We can also speak of a great compromise when the great European powers, such as Germany, accept the possibility to be out-voted by the qualified majority system on an enormous number of issues, which are covered by the activities of the European institutions.

It is not to be forgotten that the struggle over the competences between the different organs within Community during the debate on the Constitutional

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<sup>61</sup> When we speak about the EU in this context, we should not forget to mention that not only Community or Member States, but the regions play a significant role in decision-making process. The principle of subsidiarity, defined in the Article 5TEC, enabled regions to participate in policy making within the EU. This is why is it usually said that the EU doesn't have two but three levels of governing entities. This makes the whole system even more complicated and intertwined with different interests and wishes of the participating actors.

Convention shows how hard the compromise on relations between Community organs will be to achieve.<sup>62</sup>

What is more interesting to mention is that the European “great compromise” differs in many ways from the American. But the one and the most salient similarity is that in both cases we have strong member states willing to keep their competences in their own hands. What enabled Americans to achieve their compromise were foreign threats and the economic gains that bigger countries may enjoy.

The case of Europe is slightly different. At the beginning of the 21<sup>st</sup> century, we can not say that the EU feels a danger from abroad, but it certainly feels that only a united Europe will secure its own place in a new international order, dominated by the USA. Apart from this, European countries have realized that the economic benefits of living together and sharing the same market are obvious.

In conclusion, the great compromises made in the USA and Europe are different, but in both cases they have somehow been achieved. The most controversial question for the Europeans is whether their great compromise should lead to a stronger Union, namely a state, or it is going to stay mostly intergovernmental.

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<sup>62</sup> The debate on the creation of the permanent president of the Council is among the most difficult debates just because of the fact that the Commission doesn't want to have the Council so strong. This debate may be found on the web page: <http://european-convention.eu.int/bienvenue.asp?lang=EN> (visited on May 9<sup>th</sup> 2003)

## Chapter III

### Ever Closer Union

*“...creating an ever closer Union among the peoples of Europe...”*

The Treaty on European Union

Great compromise was the final result of the constitutional debate in the USA. Our attempt to compare the American political system with the European one cannot be finished without considering the consequences that the European Constitution (once adopted) will have on the future developments in the Union. Our analyses related to the institutional settings of the EU are based on its basic treaties so far. But, the question is: To what extent the political system of the EU will differ from the existing one, once the European Constitution is adopted?

There are different opinions on this issue. One group of authors is of the opinion that the Constitution will change nothing. It means that the EU will function as it did until now. These analysts` main assumption is that the intergovernmental way of cooperation is the dominant one within the EU.

Another group of authors is of the opinion that the Constitution itself must bring some changes. They argue that the Constitution has completely different meaning if we compare it with the treaties, which are usually regarded as international agreements. And It is for sure that we can hardly find any arguments that support an assumption that the Constitution will make the process of European integration weaker.

Does it mean that the European great compromise will find its final constitutional frame once the Convention finishes its work? Further on, does it mean that the new constitution will make Europe more like a state and not only the state-like entity as it is regarded now?

It is still not clear whether the final version of the European Constitution will differ from the existing structure. However, it is obvious that the Constitution as such will make the EU a state entity. There are two things that should be explained here:

- How can it be that the Constitution as such can bestow statehood on Europe? Is it to become a state?
- What should be the necessary changes for the creation of the real European federation?

## 7. Functions of a Constitution

We should start our discussion on the functions of a Constitution by pointing out the differences that exist between the terms that represent the similar notion as Constitution does. There are differences between the notions of charter, treaty, statute, contract and constitution. While a charter and statute may be used for a description of a basic act of an international organisation and while the contract or treaty may serve as a kind of bilateral or multilateral agreement made between interested parties in whatever field, the constitution is usually used as a term, which represents a basic normative act of the state. There are four views on the functions of every constitution:

- Regulatory;
- Function of limitation;
- Function of legitimization;
- Function of integration, or teleological function.

The first aspect (regulatory function) regards the Constitution as a way in which one state may be ordered. The Constitution always gives a description of legal relations between the most important institutions and actors within the political community. It describes their competences and powers. The idea of the regulatory function of a Constitution has its origin within the writings of Plato and Aristotle. John Locke, Albert Dicey and John Austin are contemporary writers, who belong to Anglo-Saxon constitutional theory and who support this position on the role of a Constitution. They share the same opinion that the Constitution always says what are the most important institutions within a Community and what their relationships are. This function assumes that the Constitution serves as a means to make the political order within a state. This function is regarded as a part of every Constitution.

The second and the third functions of a Constitution are a bit complicated. Basically, they say that in every state a Constitution is a kind of basic law. As a basic law the Constitution represents a kind of social contract between the citizens. The main purpose of this agreement is twofold:

- It gives to Government legitimacy (legitimacy);
- It says in which way the power of the Governmental may be or is limited (limitation).

The idea of a Constitution as a factor of legitimisation may be found in the works of Hobbes, Montesquieu or Paine. This kind of argumentation leads us to the conclusion that state institutions can be legitimised in the way in which the Constitution says so. If the institutions do not act according to the Constitutional provisions, they will stay without legitimacy.

In modern political thought the dominant idea is that the main function of any Constitution is a function of limitation. This idea is the main principle of constitutionalism. We need a Constitution to control and limit political power concentrated within institutions. These ideas are well argued in the works of Mc'Ilveil and the Founding Fathers.

Finally, the last function of a Constitution is a theological function, which says that a Constitution strengthens those functions of community, which strengthen its integrity and legitimacy.

If we apply all the cited functions of a Constitution to the case of the EU, we can see that the Constitution of Europe will for sure contain regulatory functions. Part of its norms will regulate the relations between key political players within the EU.

As a supranational law, the European Constitution will be regarded as a document, which prevails over national constitutions, and the EU institutions will be given more legitimacy. All norms regulating the relations between the EU institutions will be part of the European Constitution.

Regarding the function of limitation, the EU institutions function in a way in which they control each other. After the adoption of a Constitution, the institutions on the European level will be limited in their actions by the norms of the Charter of Fundamental Rights which is to become a part of the Constitution.

Finally, the European Constitution will contain all values, aims and objectives on which the whole process of European integration is based. It will further strengthen the process of integration towards a citizens' Europe.

There is one thing that makes all the functions cited above connected. Those functions say that when we speak about the Constitution we always speak about state or political community. Once the Constitution is adopted it will not be regarded as a matter of international relations but from the perspective of comparative politics. Consequently the European Union is not going to be regarded as an international organisation but rather as a political system, as a political community. Ever closer union is the phrase that may mask different forms of organisation and it is expected of the Convention to clearly say what this phrase really means in the case of Europe. The question should not be: State or an organisation but: What kind of state?

## 8. Towards Europe as a Federation

Europe is to become a real federal state only if the existing institutional structure is to be changed. The idea of Europe as a federation was a dream of many political scientists, philosophers and politicians. And that dream may become truth only if the idea of a "Europe des patries" is to be replaced by a Europe of its citizens. Only in that case will it be possible to have Europe based on the separation of power, the rule of law, with its own legal personality and with its own statehood.

This vision of a federal Europe presupposes the existence of three branches of power sharing their competences. As it is shown in the second chapter of this paper, Europe as it is now, has its own institutions but with no clear and precise division on the legislative, executive and judicial branches of

power. It is obvious that the EU institutional set up masks a kind of separated power, but not those of a real federal state.

A United States of Europe must have its own Parliament in which the legislative power should be vested. That should be a place in which the entire legislature is to be made. The European Parliament should consist of the Lower House or the House of Representatives, whose members should be chosen by direct European elections. The Parliament should have an Upper House in which the representatives of the Member States' institutions should find their seats.

If we look at the existing structure, the Council of Ministers, as the main legislator within today's Europe, should become the Upper House of the European Parliament and the European Parliament as it is today, should become the House of Representatives.

A special balance should be made regarding the relationship between the House of Representatives and the Upper House of a new European Parliament. The Council or the Upper House should be given the responsibilities similar to those that the Senate enjoys within the American Congress. Taking into account the specific needs of the EU Member States, the Upper House should proceed in the same way with the same rights as is to be done by the Lower House. This means that if a legislative act is to be adopted opinions of both, of the European citizens (through the Lower House) and of the Member States' representatives (through the Upper House) should be measured in the same way, by using the same procedure. Only if those opinions are in harmony, may the legislative act in question be adopted.

The executive branch of power should be represented by the Commission. The absolute majority achieved in both Houses of the European Parliament should make the commissioners elected. It should exercise all the executive duties that are usually exercised by the national governments.

The European Court of Justice should become the Constitutional Court of the Union and a Supreme Court should be created instead of the Court of First Instance.

This proposal includes some thoughts on the function of the European Council. That is a body that should be replaced by the institution of a directly elected president of the Union. A person being elected president of the Union should mainly deal with procedural and protocol functions with no significant power. The meetings of heads of states and governments may only serve as consultative meetings. Heads of states and governments, together with the President of the Union and the Commissioners, may gather once a year.

The system as such will guarantee that certain interests of the Member States cannot be overruled and at the same time Europe will appear as a powerful federation. It will appear as a "Europe des parties" rather than a "Europe des patries".

## Chapter IV

### Political Ideas

*“Freedom of men under government is to have a standing rule to live by, common to every one of that society... and not to be subject to the inconstant, uncertain, arbitrary will of another man ”*

Johne Locke, *The Second Treatise on Civil Government*, 1690

While the world is changing towards multipolarity, we witness a huge discussion on the question of whether the US and the EU are entities that share certain values, whether they are based on similar political principles, and whether they have shared the same views on the future of the world. After the American intervention in Iraq, most political analysts are of the opinion that the transatlantic partnership has come to its end and that the USA and Europe will be competitors rather than co-operators.

One of the questions put forward by an American political writer Robert Kagan<sup>63</sup> is: “Is it still a West?” By asking this question he wanted to emphasize that the values and doctrines on which those entities are based and which created their partnership, are not valid any more. And this may be valid when we speak about remaking international relations. Our idea here is to analyse if both the USA and the EU still share the same intrinsic values, values on which their political systems are based.

Our main assumption here is that both entities are based on liberal-democratic ideas, whose development may be followed from the beginning of the XVIII century. Apart from this, their origins may be found in the antiquity and epochs that followed. Some of the main ideas, on which Europe and the US are based, are separation of power and the rule of law.

This may be confirmed by quoting the parts of the preamble of the Treaty on the European Union and parts of the Declaration of Independence in America. In the preamble of the Treaty on the European Union, all the member states confirmed their “attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms”.<sup>64</sup>

When we speak about the American experience, we have to recall the Declaration of independence, which has become the great American symbol of independence, revolution and liberty. It is said in the Declaration that “we (writers of the Declaration, which means citizens of the colonies) hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and

<sup>63</sup> Robert Kagan: *Of Paradise and Power*, Alfred A. Knopf, New York, 2003, p. 76

<sup>64</sup> *The Treaty on European Union*, p. 9

the pursuit of happiness.”<sup>65</sup> And those values couldn't have been guaranteed without a certain institutional structure of a new state that will be based on the separation of power and the rule of law.

We'll recall here only the most significant authors and ideas that have directly influenced constitution makers in both the USA and Europe.

## 9. Antiquity: Plato and Polibius

The idea of separation of power as well as the idea of rule of law was mentioned in the works of early philosophers, political writers and historians. The origins of the rule of law were excellently described in Plato's "Laws". Despite the fact that his "Republic" represents a kind of utopian and totalitarian view of state, his second important book ("Laws") is somehow different.

By pointing out that the state has to be established on the rule of laws and not on the rule of people, Plato says: "There are two most salient things regarding the legal order of one state – first of all the state powers (institutions) and people who will serve to these powers have to be established, their numbers and the way in which they are supposed to be chosen.. After that, the separate powers should be given different laws namely to articulate which of the existing competences should belong to which of the articulated powers.”<sup>66</sup> And then he adds: "While making a law, the law maker has to take into account three things: freedom of the state for which those laws are going to be enacted, unity in love of its people, and rationality of the state”.<sup>67</sup>

Plato didn't develop the idea of different branches of power, but he stressed the necessity of dividing different types of competences among different institutions. This was caused by the fact that he himself had a chance to follow a very active political life of the Athenian people. And not only that the Assembly of citizens existed, but other institutions such as the Magistrates, the Council of Five Hundred and "rulers" of Ancient Athens (Solo, Pisistrat, Temistoklus, Aristid and Pericle) made public life complicated. Athens's generals and delegates to the institutions mentioned above were all aware of the freedom<sup>68</sup> that all the citizens of Athens enjoyed and they all wanted to contribute to the creation of a more rational and well-ordered polis.

This is perhaps why Plato at the beginning of V century BC wrote that the rule of law and not of the people may secure ELEUTHERIA to all the citizens.

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<sup>65</sup> "The Declaration of Independence" in: Jerome B. Agel, *We, the People: Great Documents of the American Nation*, Barnes and Noble Books, New York, 2000, p. 17

<sup>66</sup> Platon, *Zakoni*, Beogradski graficki zavod, 1990, 751B.

<sup>67</sup> Platon, *Zakoni*, 701D

<sup>68</sup> In the opinion of the Ancient Greeks, the main difference between them and barbarians was freedom. And there was a special word for freedom: ELEUTHERIA. The Ancient Greeks were sure that their rights should be respected regardless of the way in which their society was governed. State matters were public matters and not the private things of a despot. See: H. D. F. Kitto, *The Greeks*, Penguin Books, London.

That's the way the Ancient Greeks could say that "Barbarians are slaves and we are free people".<sup>69</sup>

Regarding the separation of power, the main apologue of a so-called "mixed government" or "mixed constitution" in Ancient times was Polybius. His ideas were very similar to Aristotle's ideas on the different forms of government. He wrote that there are three simple forms of government namely monarchy, aristocracy and democracy which differ among each other by the number of rulers. According to Polybius these "three simple constitutions degenerate, over time, into their respective corrupt forms (tyranny, oligarchy, and mob-rule) by a cycle of gradual decline which he calls *anacyclosis*"<sup>70</sup> which means political revolution. Consequently, those simple forms of government are being changed from time to time and being replaced (by another one).

According to Polybius, this could be avoided as it was avoided in Ancient Rome – by introducing a mixed constitution, in which all three forms of government are put in one single government. In Ancient Rome this was realized through the institution of consuls (representing monarchy), the Senate (representing aristocracy) and popular assemblies (representing democracy). This new form of government could prevent *anacyclosis* and should enable each branch of the constitution to check the strengths and balance the weaknesses of the other two.<sup>71</sup>

The idea of a mixed government wasn't first mentioned in Ancient Rome; Plato and Aristotle discussed the issue in a rudimentary form and Cicero continued to evaluate it after Polybius. But it is Charles Louis de Secondat Baron de Montesquieu, the French political philosopher who is often quoted as a founder of the system of checks and balances. Not to forget that the ideas he explained and presented in the most articulate way were being developed in Antiquity.

## 10. Liberal Tradition of Political Thought

It is obvious that both Americans and Europeans share the same ideological values. Those values had been created in the West, but are being shared by other countries with different cultures too. One of the main sources that both Americans and Europeans used to create their political systems is the heritage of the great French political philosopher Charles Louis de Secondat Baron de Montesquieu.<sup>72</sup>

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<sup>69</sup> Kitto, *The Greeks*, p. 8

<sup>70</sup> More about this see in: Donald E. Glover Award, *Polybius and the Founding Fathers: the separation of powers*, 1999, web page: <http://www.sms.org/mdl-indx/polybius/intro.htm>, visited on 3<sup>rd</sup> of March 2003; Polybius, *The Histories of Polybius*, Vol. 3, The Loeb Classical Library, G. P. Putnam's Sons, New York 1928.

<sup>71</sup> Award, *Polybius and the Founding fathers*, p. 4

<sup>72</sup> More than interesting and critical comments upon a Montesquieu's work and his life you can find in: R. Shackleton, *Montesquieu. A Critical Biography*, Oxford, 1961; John Plamenatz, *Man and Society*, Volume I, Longman, London, 1963.

The Founding Fathers admired Montesquieu so much that they used a number of his ideas as the basis for the creation of a new state. Madison's sentence that "the oracle who is always consulted and cited on this subject is the celebrated Montesquieu" is the best proof for the statement that Montesquieu enormously influenced the creation of the American constitution.

And doesn't the Article 6 TEU<sup>73</sup> lead us to Montesquieu again, enabling us to make a conclusion that the European founding fathers were influenced by the same sources as were the Founding Fathers in America? And what is the main idea that Montesquieu defined?

Among many ideas that he discussed we'll focus on the separation of power. He came to this issue not only by reading books written by the ancient writers, but also by travelling through Europe, which was divided into many small and differently ordered states. He was impressed by England and its people.

He found that the British respect ethical rules more than other nations do and he connected this with the British constitutional system that was created to prevent corruption, despots arbitrary in the decision-making process and the irresponsibility that goes along with demagogic rhetoric. He assumed that British prosperity at the time was closely related to the system of the separation of power. One must set a thief to catch a thief; and nothing but power can put a brake on power.<sup>74</sup>

Separation of power is described in the eleventh chapter of »Spirit of Laws«, where he says that state power must be classifiable as legislative, executive and judicial.<sup>75</sup> And this formula became one of the basic principles of all state systems that tend to represent themselves as liberal-democratic states.

As we described in the second chapter of this paper, the mechanisms of checks and balances, or the separation of power, may be implemented in many different ways and this is actually the case with the USA and Europe: the USA which after two hundred years has a strong political system based on this principle and Europe which is a state like entity, trying to define its character and the principles on which it should be based. And there is a European Convention that is expected to define Europe's character and its not state-like but state owned institutions.

Montesquieu believed that institutions created by men are different, that there is more than one way to be civilized, that circumstances create the conditions, that different climatic conditions ask for different forms of government, that state laws must rely on local customs and traditions. This belief may lead us

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<sup>73</sup> *The Treaty On European Union*, Article 6: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States."

<sup>74</sup> On the separation of power as described in the Montesquieu's *The Spirit of the Laws*, see: G. C. Morris: "Montesquieu and the Varieties of Political Experience" in: David Thomson (ed), *Political ideas*, pp. 81 - 94, Penguin Groups, London, 1990; George H. Sabine, *A History of Political Theory*, The Dryden Press, USA, 1973.

<sup>75</sup> Charles de Montesquieu, *The Spirit of the Laws*, Thomas Nugent, trans. New York: Hafner Publishing Company, 1949; reprint 1959.

to the conclusion that even the same forms of government may apply in various ways in different countries. And this is where we can say that constituting Europe as a state will probably follow the way in which the American system was shaped. It means that European institutions as such cannot be regarded as classical state institutions. But behind this curtain, we can see a tendency towards making the institutions of Europe as a state.

This makes us all believe that modern societies, regardless of their geographical position and cultural heritage, are going to implement some ideas that make people able to search for their own happiness, to keep their dignity, freedom and property. This is especially valid when we come to the question of the different institutional structure of the USA and the EU. But this doesn't mean that these differences are as crucial as they may make those entities completely different by their character. In fact, we can say that they are very similar and similarities will be appearing in the future in a more visible way.

Another writer who influenced the founding fathers in setting up both the American and European institutions was John Locke. His work belongs to the period in which Europe was experiencing enlightenment. The chaos that characterized the European order before the Vienna Congress in 1815 had to be defeated by ratio and this idea appeared as a general signature of enlightenment – rationalism.

And here lies an explanation of the need for society. Locke says: "Wherever a certain number of individuals is united within a society as they all give up of their executive power granted them by the natural law and direct their power to the society, only then can we have political or civil society."<sup>76</sup> Society is needed to secure general law (known to every member of the society), no arbitrary judge and common executive. This is the place where Locke stopped developing the theory of the separation of power and where Montesquieu did develop it.

But Locke develops its philosophy in perhaps an even more important direction – he redevelops the concept of natural rights. All men, Locke says, are born with the natural rights in their body, life, freedom and property. This corpus of freedoms will have found its equivalents in the American Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."<sup>77</sup>

While Montesquieu developed the idea of the separation of power, Locke did develop the idea of **constitutional rights** that have to be guaranteed to the members of the society. They don't serve as the benefits of the citizens only, but can be regarded as another limit that cannot be passed by the state institutions.

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<sup>76</sup> Džon Lok, *Dve rasprave o vladi*, Mladost, Beograd, 1978, p. 52.

<sup>77</sup> The Declaration of Independence may be found in: Jerome B. Agel, *We the People*, Barnes & Nobles Books, New York, 2000, p. 17 – 20.

The principle of the natural or constitutional rights is one of the main principles on which both the USA and Europe have founded their systems. Within the American system this principle is implemented by the Constitution Articles that contain the list of the fundamental freedoms that are to be enjoyed by the American citizens. The Fundamental Charter of Human Rights has been approved by the European Council Summit in Nice (2000) and it is going to be a part of the future Constitution of the EU.

Locke's idea was important not only as a kind of catalyst for improving the status and lives of human beings, but what is also salient, to limit more the power that is exercised by state institutions. His idea has an even stronger impact, having in mind that it confirms that the rule of law is the principle that covers many other legal and political principles implemented by all liberal democracies such as the USA and Europe are.



This chapter was about the values that are implemented in the ideas of both American and European integration. It is clear from all mentioned above that each of those entities relies on the same sources within the history of political ideas. That is the line of political theory that led towards the creation of the skeleton of the liberal-democratic state.

The great difference between these entities lies in the fact that Europe was trying to find a political formula for organizing the systems of the European states by practicing old or contemporary political ideas presented by their authors. And it took many centuries before European states were established as liberal democracies.

It was completely different in the USA. The Americans didn't even have their own philosophers to contribute in finding such a formula. What they did have were promoters of the ideas of the European writers, created by Montesquieu or Locke. What makes America different is that while Europe was waiting for new conflicts and divisions, Americans were trying to integrate their states into one single unit, based on the ideas described within this chapter.

It is about time and not about the way in which America and Europe differ. It is clear for Europeans now as it was for the Americans two hundred years ago that their society should rely on the ideas that belong to the liberal-democratic tradition of political thought. The question still may be whether those values can make both entities more comparable as states. And the answer is clear: values themselves cannot change the influence of the political interests towards a European state, but without those values no solution can be valid.

Regarding the last 50 years of European integration, it seems that those values represent a grateful heritage for the future of European unity.

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