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Accumulated executive power in Europe

The 'most dangerous' branch of government in the European Union

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INTRODUCTION

The interaction of law and politics across governance levels in Europe is the subject of this lecture. I am interested in describing, mapping, and understanding the broad contours of the emerging political order beyond the level of the nation state. As a legal scientist I am not just interested in what is formally laid down in international treaty texts concerning the powers and tasks of the various institutions. I am also interested in getting a sense of what those institutions do in practice and how they become 'living institutions'. What actually happens after the great formal bargains are made and the treaties are written?

Multi-level governance is the term used by some (Hooghe and Marks, 2001 and Kohler-Koch 2003). I use this notion of multi-levelness too but in a top-down way for the 'bigger picture'. Multi-levelness refers to the different layers and interactions involved in decision-making beyond that of the nation State. The layers in decision-making may be multi-level but paradoxically the *actors* both political and administrative are often the same. In other words national ministers and national civil servants will appear on various political stages – international, European and national- even though they may be playing different roles in each. These actors may adopt decisions at one level with no forum able to hold them to account for their action, either politically as in a parliament or election procedure or legally as in a court. Decision-making beyond the state may cause erosion in core values of constitutional states such as those values of democracy and of legality. This may be difficult to see very clearly as the borderlines

between the different levels of governance – international, European and national- are increasingly grey, uneven and porous.

My specific focus is the institutionalization represented by the European Union but viewed in the context of its interactions both upwards to the international level and downwards to the national level. So how exactly must we understand the nature of the EU sandwiched in between universal intergovernmental organizations on the one hand and national political – and democratic – systems on the other hand? In the rest of this paper I analyze the manner in which different 'layers' of executive power accumulate in and around the executive power in the territorial states in Europe in particular and how they have come into being over time. The term 'executive order' ranges from the early beginnings (post-Westphalian) of a system of diplomacy in Europe that gradually became institutionalized in one form or another all the way to highly developed international organizations such as the EU that have evolved their own executive power that interacts with national executive powers. In the latter instance we may be able to speak of a transformation of executive order in the sense that national executives have to some extent become part of a European executive as well as still fulfilling purely national *and* international roles.

THE EMERGENCE OF 'EXECUTIVE ORDER' IN EUROPE

In terms of what may be termed 'recent history' the Treaty of Westphalia (1648) can be taken as a convenient starting point for the semi-institutionalization of a system of territorially defined *states* in Europe (Cross, 2007). A *system* of formally sovereign *states* presupposes information about the ideas and activities of the other system participants. From the second half of the seventeenth century resident ambassadors became the rule even among the smaller countries (Cross, 2007). *Bilateral* diplomacy was seen as the means of ensuring that information was made available about the ideas and activities of the other system participants. Within the time frame from 1648 onwards, bilateral diplomacy on a regular basis can be considered as the *first* executive order in Europe (Curtin and Egeberg, 2008). It can be considered as an 'order' because it is organised and because common norms and codes of conduct gradually developed so that diplomats came to perceive themselves as being grounded in two distinct worlds: their respective home state on the one hand and the diplomatic community on the other (Batora, 2005 and Jonsson and Hall, 2005). At

the same time this classic model of diplomacy was of a distinct and unified national diplomatic service that 'represented' the state internationally and at the same time could be distinguished from the normal (internal) civil service dealing with governmental policy within the limits of the territorial state (Geuijen et al, 2008). Among early political scientists the word 'diplomacy' was used interchangeably with 'international relations' (Cross, 2007).

At the Congress of Vienna in 1815 the diplomatic institution became more formalised: for example, the senior ambassador, i.e. the ambassador who had been longest at the post in a particular capital, became the *doyen* or dean of the diplomatic body, or corps, in that particular country (Nicolson, 1969). The fact that this person represents the other ambassadors in any disputes affecting their corporate rights and interests reflects very well the existence of a community. This congress semi-institutionalised *multilateral* diplomacy in the form of conferences at the ministerial and ambassadorial level among Europe's great powers (the *Concert of Europe*) and can thus be considered the start of the *second* executive order in Europe. The further institutionalization of multi-lateral diplomacy in intergovernmental organizations can be considered as the fully-fledged *second* executive order (Curtin and Egeberg, 2008). It was the highly specialised sectoral or functional IGOs established from the second half of the nineteenth century (e.g. the International Telegraph Union and the Universal Postal Union) that gave rise to new initiatives such as a permanent secretariat with a fixed location, the division of labour between a general conference and an executive council, and regular meetings. According to Claude, 'nothing essentially new has been added by the multi-lateralization and regularization of diplomacy until the secretariat is introduced; this is the innovation that transforms the series of conferences into *an organization*' (Claude, 1964, at p.175).

INTERNATIONAL ORGANIZATIONS

The term 'intergovernmental organization' already indicates two aspects of international organizations that are relevant for the subject-matter of this lecture: first, the joining together of the 'governmental' functions of (sovereign) states at the international level and second, the institutionalization and 'ordering' implied by the term of an 'organization', implying a separate and new entity with legal personality. Gradually the idea came into being that the intergovernmental organisation could eventually exercise

in its own capacity certain governmental functions (Gaja, 2003, at p.15). Their existence led Mosler to the conclusion that 'they now form a kind of superstructure over and above the society of states' (Mosler, 1974).

The reason why international organisations are created in the first place is the result of the need felt by states to cooperate within *an institutional framework*. In contradistinction to the open-ended and general public tasks of states, international organizations are created to perform specific functional tasks (Virally, 1977, pp. 277-300). Those tasks are governmental in nature. In general in Europe the term 'governmental' in this context is used in a restrictive sense as only covering the executive branch of government. On this understanding inter-governmental organizations are concerned with cooperation between the executive branches of the governments of the member states (Schermers and Blokker, 2003) in an institutionalised *order*. The constitutions of these organizations lay down a number of substantive ground rules. Organs are created with their own powers. An institutional framework is established 'within which the member states can further the objectives of the organization, adapt its substantive rules to changing circumstances and supervise the implementation of obligations by the member states' (Schermers and Blokker, 2003, at p.6).

There was a general tendency in IGO's that the organ representing the separate governmental interests – a *council of ministers* in one form or the other – was the central decision-maker. Decision-making will traditionally take place pursuant to the unanimous consensus (or vote) by all the representatives of the constituent governments. Organs composed of persons independent of the Member States, committees of experts or parliamentary assemblies may play an advisory role, but they will generally not have the power to take final decisions.

Inter-governmental international organisations are institutions that provide a context for the collection, elaboration and diffusion of data, analyses, visions and ideas, for agenda setting and for collective problem solving (Barnett and Finnemore, 2004; Marcussen, 2004). It has been documented that expert-based permanent secretariats contribute significantly to task expansion at the international level and that they may also be able to forge transnational coalitions by linking previously disconnected actors (Cox and Jacobson, 1973; Finnemore, 2004; Trondal et al 2005). Thus, although international organisations are created by states, once established, they do not necessarily operate as straightforward tools or agents of those states.

Because modern states are highly specialised both in sectoral and functional terms, and since problems to be dealt with generally presuppose the

availability of rather specialised expertise, specialised institutions tend to interact directly with their counterparts in other countries or within the secretariats of international organisations rather than going through their respective foreign ministries or other central state authorities. This is what Keohane and Nye term 'complex interdependence' (Keohane and Nye, 1977). In this context this refers to the fact that sub state actors and non-state actors may have formal and informal ties with their counterparts transnationally. Slaughter's portrayal of a 'new world order', consisting of disaggregated states that interact in a compound manner within and alongside IGOs builds heavily on the complex interdependence perspective (Slaughter, 2004).

There are in effect two models operating side by side in contemporary international relations. One model still assumes that states still act as relatively unitary actors and may delegate powers to a limited number of international organizations that will then often be directly enforceable. The other model assumes largely disaggregated states in which national civil servants and experts 'interact intensively with one another and adopt codes of best practices and agree on coordinated solutions to common problems- agreements that have no legal force but that can be directly implemented by the officials who negotiated them' (Slaughter, 2004, at p. 263).

This is the general picture of the kind of executive order that had evolved over the centuries to its current rather institutionalized form of (general) international organizations. It has been argued elsewhere (Curtin and Egeberg, 2008) that the European Union and its predecessors are in effect significantly different to other inter-governmental organizations. With the European Union (EU) and its predecessors it has been argued that Europe's executive order started to transcend its basically intergovernmental pattern inherited from the past. This transformation phenomenon is due in particular to the consolidation of the European Commission (Commission) as a new and distinctive executive centre at the European level, outside of the inter-governmental locus, the Council of Ministers (Council). But this new executive order did not seem to replace the previously existing orders or even transform them. Rather, it tends to be layered around already existing orders so that the result is an increasingly compound and accumulated executive order.

This raises the need to focus more specifically on the question as to the nature of the EU (and its predecessors) as such. Must we understand it as a – sophisticated – international organisation and seek comfort in the further refinement of the notion of an international organization? Or is it more accurate in the current stage of development both of its own

institutional system and powers as well as its impact on national political (and legal) systems to analyze it more in comparative political terms as an evolving political system or (non-state) 'polity'? Is the EU really unique or are there historical precedents, going even further back in history, for the manner in which it diffuses and fragments power?

THE NATURE OF THE EUROPEAN UNION

A sui generis entity?

The nature of the European Union is it seems a perennial chestnut. One recurring theme in the vast literature on the EU system is the apparent e*xceptionalism* of what has actually developed in post-war Europe. Historians may deny this on the grounds that there are arguably parallels that can be made with ancient times and the rise of the Holy Roman Empire. This may indeed be the first example of a polycentrical order with no fixed hierarchical relations (Zahle, 1995). Another parallel is possible with the rise of the Catholic Church from the eleventh to the fourteenth century in Europe and its state-like ambitions. At this time of 'fragmented authority' in Europe power was shared across several (governance) levels with their own rule-making authority, at times overlapping and at times conflicting (Pagden, 2004).[1]

It can and often is argued that even in terms of the comparison with other international organizations the EU is *sui generis.*. Above all it is seen to be exceptional in that it lacks a so-called *'demos'*, a European people, and hence by definition, or so it is asserted, it is a system that *cannot* function democratically. This strange and ill-defined polity was moreover deliberately constructed in this way from the very beginning by *national executive politicians* (Mair, 2005). Some authors go so far as to claim this is its *raison d'Etat* (Koenig-Archibugi, 2004). This is the idea that national governments in fact use international cooperation to gain influence in the domestic political arena and to overcome internal opposition to their preferred policies.

Lawyers are particularly attached to the label of uniqueness. After all it was the European Court of Justice that as long ago as 1962 ordained that the European Community constitutes: 'a new legal order of international

1 I am grateful to Jan Luiten van Zanden for making this historical parallel and drawing it to my attention. I am also grateful to Emile Lamberts, University of Leuven, for discussing further with me the possible relevance of historical parallels from earlier history.

law for the benefit of which the states have limited their sovereign rights'.[2] That legal order, in its own words, has a 'special and original nature'. Political scientists phrase the issue of framing a little differently. They commonly refer to the European Community and its successor the European Union as representing an n of 1, as being unique and arguably requiring a theory and framing all of its own (Caporosa, 1997). It is of course possible to argue that the processes of integration in Europe are specialized, and qualitatively different from processes elsewhere. But what is the case for the uniqueness of the contemporary European Union? Different perspectives will in any event give radically different answers. An international relations scholar will tend to view the European Union as an *external order* that impacts on domestic policies and political institutions. This is the rather classical view that the Union is still today best analyzed as an international organization no matter how sophisticated the EU has become in these terms (Werner and Wessel, 2005; Moravcsik, 1993). Seeing the EU through the lens of an international organization (and thus as intrinsically something that can be compared to other international organizations) helps, in the words of Paul Magnette, to 'avoid optical illusion, highlight its originality and understand its proper value' (Magnette, 2005, p. viii).

An international organization?

It does not take much effort to conceptualise the EU as an international organization and indeed at the formal level it simply is one in remarkably sophisticated form. If one wishes to be more specific then the EU can be described as an 'international integration-organization' (Virally, 1981, pp.50-66.). This label is used for those international organisations that do not merely purport to establish cooperation between their member states but aim to go beyond this cooperation by establishing *integration* in one or more policy areas. 'Integration' can range however from mere cooperation to ultimately almost complete unification. Federalism has been construed as a particular way of bringing together previously separate, autonomous or independent territorial units to constitute new forms of union based upon principles that broadly speaking can be summarized in the dictum 'unity in diversity' (Burgess, 2004). Both the process of integrating and the end results (the degree of integration achieved) can be considered essential to an analysis of integration. But that can take place in a wide variety of ways with the basic spectrum running from a confederation – a union of states – rather than a single state – to a federation.

2 See C-26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

An essential feature of so-called integration organizations is that competences are transferred from the member states to the organization or that new competences of the organization are created, for example to set rules to harmonize the legal systems of the member states in certain areas (Dekker and Wessel, 2004). A number of international organisations have evolved into autonomous legal entities with competences to govern the behaviour of the member states. This may be not only at the level of the international legal order but also within the national legal orders of the member states. It is in particular such integrator organizations 'that are in need of a whole toolbox of governance instruments to steer, stimulate or enforce the cooperation between member states and to get a grip on the actions of their citizens. this means that a larger number of legal acts in a variety of shades conceivably form part of the legal system of international organizations ... and thus of the national legal systems' (Dekker and Wessel, 2004, at p. 236). The EU is in any event no longer the only international organization with such competences: NAFTA, Mercosur and the WTO can all be placed along a continuum with the EU with regard to the level of integration aimed at, with the EU still in the vanguard.

A political system?

A relatively new perspective grounded in comparative politics analyses the evolving nature of the EU in a manner that does not compare it to either international organizations nor states and state formation (Hix, 1994) This approach analyses the EU not as an external (international) order but as something comparable to (national) political orders. The frame of comparison with state or indeed other international organizations or federal states is on this analysis not relevant since the purpose of using the term political system is precisely, by using a more abstract category, to avoid the confines of other more precise categories and offices that might not seem to be overtly connected with the state. By using the conceptual language of a 'political system' rather than that of a (federal) state to frame the component parts of the EU it is possible to 'encompass pre-state/non-state societies, as well as roles and offices that might not seem to be overtly connected with the state' (Finer, 1970). Both political scientists (Hix, 2005; Mair, 2005) and lawyers (Van Gerven, 2005) now use this term to describe the nature of the EU.

In the EU context the use of this classic language in political science terms as well as its set terms of reference has the major advantage of allowing the EU to be treated as a political system and in this sense as something that is also comparable to *other* political systems. Given this helpful theo-

retical framework, enabling one to analyze the EU in substantive terms as a (would-be) political system, it is possible to address to the EU the questions that can be addressed to any political system. The attractiveness of understanding the EU as an evolving political system is that it may be divorced from specifically state building exercises and be viewed at a different level of abstraction. At the same time as a self-standing political system we can address to the Union the questions that can be addressed to any political system. We can expect of the Union the standards of legitimacy and accountability that are expected of other political systems (Mair, 2005).

This perspective arguably accords much better with the manner that the EU has developed as a matter of practice, incrementally, over the years. Who can deny that the recent trajectory of the EU can be understood in terms of a developing, albeit unfinished, political system? Indeed much of the content of the Constitutional Treaty and its successor Treaty of Lisbon can also be understood in these terms. The EU may not have a (formal) government as such but it does have a political system, it does have a lawmaker, it has a plural (multi-headed) executive, it has a judiciary, it has the beginnings of a police force and even an army of sorts. And is not only concerned with the low-level, technical, 'boring' aspects of detailed regulation. On the contrary it is and can be concerned with the definitive allocation of values (Follesdal and Hix, 2005). This approach conceptualizes the EU as a polity, namely as a regime responsible for authoritative decisions concerning the allocation of values in a society.

EXECUTIVE POWER IN THE EU POLITICAL SYSTEM

Introduction

The picture that emerges at the level of the EU political system in terms of executive governance is a dispersed and fragmentary one, lacking the unitary conception of 'government' in the nation state as a general term to describe the body that has authority in a given unit as well as to describe the whole constitutional system (Curtin, forthcoming). Such opposition to 'government' as there may be must be understood in the sense of an authority set above the administration in political terms. Attempts by scholars to describe the Commission, the Council of Ministers, or the European Council as the 'government' of the EU in a constitutional sense remain far-fetched (see, *contra* Eijsbouts, 2005).

The further delimitation of executive power at the level of the EU involves discussion of the possible politics-administration dichotomy. Does

the 'executive' include the administration or bureaucracy? Europeans in fact tend to use *politics* and *administration* as an internal subdivision of the executive, in contrast to the American view of administration as *an appendage* to the separation of the three distinct powers: executive, legislative, and judicial (Rutgers, 2000, at p. 297). On the European view the executive is considered to have two types of power: *political*, the leadership of society through the proposal of policy and legislation (agenda-setting and initiative – and adoption – of measures) and *administrative*, the implementation of law, the distribution of public revenues and the passing of secondary and tertiary rules and regulations (Hix, 2006). The executive on this understanding comprises the individuals – mostly ministers and the civil servants – who actually control, from day to day, the state's instruments of coercion, wealth and information (Daintitth, 1997). The administration is thus part of the system of government and administrators complement the political role of those who are either elected or appointed by those who are elected.

Executive power in the EU consists of various bits and pieces that have been cobbled together across a spectrum of institutions, sub-actors and policy areas. No fewer than *three* institutions of the EU and its predecessors can claim to exercise executive (in both its political and administrative components) authority within the EU, albeit to varying degrees and with varying emphasis: the Commission, the Council and the European Council. With regard to the intended new status of the European Council (if the Treaty of Lisbon enters into force at some point) as a fully-fledged institution of the Union[3] it is specifically provided that 'it shall not exercise legislative functions'. In this case not legislative is to be equated with executive functions, in any event political and, possibly, more administrative in nature. But in terms of the existing situation the core of executive power is exercised by the Commission and the Council of Ministers and this will be briefly outlined below. In addition there are a number of 'satellite' actors who have in a variety of ways had executive powers delegated to them but whose role is even more 'in shadow' (see further Curtin, 2007).

The European Commission

The argument is that the EU and its predecessors bring about a new executive order that transcends the inter-governmental origins due in particular to the consolidation of the European Commission as a new and distinctive

3 Article 13 of the TEU as it would be amended by the Treaty of Lisbon.

executive actor at the supranational European level, outside of the intergovernmental locus, the Council of Ministers. The Commission can be described as the 'core executive' of the Community/Union. (Hix, 2006, at p. 32). Its tasks gel remarkably well with what Craig described as the central executive tasks in any political system: it initiates legislation and thus up until recently was the only agenda-setter in the EU context; it is the most important executive actor when it comes to implementation of legislation and delegated rule-making; it has a leading role in external relations and is responsible for drawing up and accounting for the Union budget (Craig, 2004). But unlike national administrations it is not in the business of service delivery and it only has a limited 'direct administration' (for example, in the fields of competition policy) much of its focus is on policy-making and regulation. It depends heavily on national administrations in respect of service delivery and enforcement. In the words of one scholar 'The European Commission is one of the most unusual administrations ever created. It was born as a body that would perform both mundane administrative and overtly political tasks. It has always found it difficult to perform them simultaneously and well' (Peterson,1999, at p. 60).

The precursor of the Commission, the High Authority in the European Coal and Steel Treaty was designed in such a way that 'politics' was effectively 'organized out'. The Commission was designed as a technocratic body composed of independent experts to propose solutions to policy problems, to broker deals, to constitute the 'motor of integration' and to be the guardian of the common European interest. In the words of Wille the integration and mediating function of the Commission "was to be guided by the judgment of a technocratic elite rather then by political judgment since politicians are bound to be short-sighted and self-seeking, as they are subject to electoral mechanisms. It would make for better governance to take the impartial, the overall and long-term view of the 'technocrat' as a guardian of the European interest. The Commission's role would hence depend on its expertise and its credibility as an impartial mediator between political views, conflicting national interests and interest group pressures." (Wille, 2007)

Yet the Commission is best understood in its contemporary form if compared with a national executive: 'The Commission consists of a series of executive politicians who are in charge of various administrative services. Similar to national executives the Commission is authorized to initiate and formulate policy proposals and to implement policies, or more commonly, to monitor their implementation' (Egeberg, 2002) In other words,

the Commission has in several respects become 'normalised' as a political executive. A clearer demarcation now exists between the political top and the administrative body, both in terms of recruitment and of decision-making. It focuses more than in the past on what it perceives to be its core political tasks, delegating away or contracting out other non-political tasks to outside bodies and an elaborate network of agencies, both Community level and national. However the Commission does not represent a kind of parliamentary government, even if there are clear signs that the College of Commissioners is gradually becoming more and more dependent on the European Parliament. This is especially the case with regard to new provisions of the Lisbon Treaty (not yet in force) providing for the election of the Commission President by the European Parliament. These new provisions stem essentially from an effort to enhance the democratic legitimacy of the Commission in particular- the belief is that by increasing the 'politicisation' of the Commission in this manner will attenuate in one respect at any rate the 'democratic deficit' of the Union.

The Council of Ministers

The Council of Ministers is not only to be understood as a profoundly political organ with the member states *de facto* in the steering seat but also as an EU executive institution which has gained (oversight over) not insignificant administrative and even operational type powers in the past decade or more (Hayes-Renshaw and Wallace, 2005). This belies a purely intergovernmental reading of the Council of Ministers but is not widely understood in such terms in the legal or political science literature. In other words the Council of Ministers has also acquired what can be called *an autonomous executive* role. This is true at various levels. It has been reinforced and consolidated in the new Treaty of Lisbon with the scope and role of the *political executive* greatly increased. Thus the *European Council* will (if it enters into force as such) acquire a semi-permanent President and be supported by the Council Secretariat; the Commission President sees its powers enhanced in certain respects and the EU acquires effectively an EU Foreign Minister, even if the latter has been renamed the High Representative for Foreign and Security Policy.

In terms of the more *administrative* part of executive power a considerable expansion in tasks and responsibilities have taken place as part of a process of a 'living institution' that develops in legal and institutional practices. When the administrative part of the Council of Ministers was originally created, the *General Secretariat,* it was designed to fulfil the classic inter-governmental functions of conference organisation and committee servicing. The Council of Ministers can thus arguably also be analyzed in

terms of a politics-administration dichotomy in the sense that the level of the ministers is the obvious political (and inter-governmental, albeit qualified with the advent of widespread qualified majority voting) level and the administration is the General Secretariat of the Council of Ministers that for a long time was considered merely a supporting secretariat along the model of many international organizations.

The Council has in fact *two* different types of bureaucratic support or input into its political decisions. First, like the Commission, it has a (much smaller) staff of European civil servants, responsible for 'public administration' largely in its General Secretariat. When the administrative part of the Council of Ministers was originally created, the *General Secretariat,* it was designed to fulfil the classic inter-governmental functions of conference organisation and committee servicing. In the past decades however a considerable expansion in its tasks and responsibilities have taken place. In recent years the role of the Secretariat has evolved to the point where it has assumed more significant tasks in policy making and implementation that would traditionally have been carried out by the Commission as an executive actor in other (Community) policy fields (Christiansen, 2006 ; Christiansen and Vanhoonacker, 2008).

The endowment of the Council Secretariat with executive tasks has been particularly striking since the establishment of the European Security and Defence Policy and the appointment of Javier Solana as High Representative of the Common Foreign and Security Policy at the same time as being Secretary General of the Council Secretariat. It seems as if parts of the Council Secretariat in this field have very incrementally and –on the whole-quietly developed features that are more similar to those found in executive offices than in classical secretariats. Its tasks include agenda setting, policy formulation and implementation, especially in the fields of internal and external security.

Second, the system of working parties and committees that participate in formulating and sometimes finalizing the contents of its (political) decisions, are also 'administrative' in the sense of being populated by national civil servants. The Council of Ministers is indeed a more chameleon like institution than the Commission since it also houses within it committees, working groups etc that are populated by national civil servants acting presumably within the web of national politics and not European politics (Wallace, 2002). The Commission knows its functional equivalent in the area of implementation of EU legislation: the comitology committees that carries out rule-making functions under the auspices of the Commission (with powers delegated to it by the Council) and populated by both national civil servants and (independent) 'scientific' experts.

THE 'MOST DANGEROUS' BRANCH OF GOVERNMENT?

Introduction

The separation of state powers has been a central concept of modern constitutionalism ever since Montesquieu. The classic formulation is that there are three distinct functions of government – the legislative, the executive and the judicial – which should be discharged by three separate agencies – the legislature, the executive (or government) and the judiciary (or courts) – and that no individual should be a member of more than one of them (Vile, 1967; Barendt, 1995). Over the years it has become quite clear that the principle of the separation of powers as originally conceived is in any event not always respected in practice or only weakly.

At the international and European level the principle of separation of powers is not applied and has never been. In the context of the European Union there has never even been lip service paid to the principle of separation of powers. In the words of Lenaerts: 'It simply appears impossible to characterize the several Community institutions as holders of one or other power since a close analysis of their prerogatives certainly does not indicate a clear-cut line between the legislative and the executive branches of Community government' (Lenaerts, 1991). Moreover, as a matter of practice it emerges that in fact EU administrators do adopt forms of legislation and that administrators do enjoy some real policy discretion in certain instances (von Schendelen and Scully, 2003). In the (failed) Treaty for a Constitution for Europe an attempt was made – for the first time – to define much more closely in the EU context the content of 'legislative' power by defining the procedure that had to be followed in adopting a legislative act. The implication was that all the 'rest' was 'non-legislative' and thus by implication fell within the scope of executive as opposed to legislative power, albeit not more closely defined.

For decades now authors have pointed to the growth of *new* additional powers or branches of 'government' not originally included in the tripartite principle. What has been called the 'fourth branch' of government has been variously described: already in 1937 *The President's Committee on Administrative Management* referred to independent regulatory committees as a 'headless Fourth Branch of Government' and in the 1960's it was variously used to refer to the press and media on decision-making (Cater, 1963) and the (federal) civil service (see, Woll, 1963). Later the term the 'fourth branch' was used to refer more generally to public administration and civil servants (Crince Le Roy, 1969 and 1976; Bovens, 2000). The term the 'fifth branch' was used to describe science advisers and experts

as policy makers (Jasanoff, 1990) and even a further (sub-)branch: autonomous 'unelected organs' (Vibert, 2007). The latter can also include it seems more private bodies performing in some sense public functions as well as the more classic non majoritarian agencies.

What is interesting is that the so-called 'new' branches is that they can all in some sense be considered as types of 'satellite' actors around the executive power as such, rather than one of the two other powers. This may have something to do with the fact that it is much easier to define and delimit the 'judicial power' or tasks of a judicial nature and 'legislative power' and a legislative assembly than the executive power as such or the scope of governmental (and non-governmental) power. Both courts and legislatures can be defined and written about extrapolated from particular constitutions even if there are of course different institutional differences in different contexts. This is a real difference with the executive: the diversity of executives between states and the variety of institutions within the executive makes an abstract approach outside the bounds of an actual constitution impossible (Barber, 2001, at p.87).

All the suggested 'new' branches of government are in effect modern-day offshoots of the 'executive power' as such. If we define executive power as more than the political level but as also including the administrative/bureaucratic level as well as the delegation of powers to more autonomous actors, that may include some private actors but do not necessarily do so, we may not need to think conceptually of *more* branches of government as such but rather can focus on the existence or otherwise of the requisite countervailing powers in the political and legal system. This constitutional perspective may focus more on the strengthening of various types of 'checks and balances' and on the manner in which various types of powers are exercised rather than on a modern day re-conceptualization of the separation of powers principle as such (Vibert, 2007; in the US context see, Redish ad Cesar, 1991).

Externalization of contemporary executive order

The lack of separation of powers has become more overt in the context of international organizations other than the EU in recent years. For example in the *Security Council of the United Nations* a (limited) number of national ministers meet and agree not only diplomatic resolutions but also what increasingly resembles *legislation* (Talmon, 2005). A striking example is the freezing of assets of suspected terrorists and terrorists placed on UN blacklists and then implemented further at the regional level of the EU by the Council of Ministers, composed of members of national executives

(see further, Eyckes, forthcoming). The law enforcement authorities of the respective Member States are then the 'street level' bureaucrats that freeze ban accounts, arrest individuals etc. This mixing of the legislative and executive functions takes place in a context where individuals have very limited judicial remedies or protection (if any).

The series of laws and executive measures adopted, after the tragic events of 11 September 2001, by the Security Council of the United Nations cumulatively blacklisted certain terrorist organizations as well as individuals. Blacklisting of groups and individuals is a legal sanction that criminalizes the named 'terrorists'. The very serious consequences include the freezing of their bank accounts and other assets, in the final instance by national administrations and enforcement authorities (Alvarez, 2003; Happold, 2003; Krisch, 2003). We do not associate the Security Council of the UN as being a lawmaker in the sense we know from our constitutional states in Europe. It is an inter-governmental organ, composed of representatives of the executives of 15 member states. In this sense it is a profoundly 'political' organ, albeit operating at the international level and not the national level The decisions it takes are binding not only on the 15 States 'represented' at that time in the Security Council but on all 192-members of the United Nations. As an intergovernmental organization the UN is not meant to affect the rights and interests of individuals directly. Yet it is increasingly adopting normative rules that are 'legislative' and executive in their effects (Talmon, 2005). The 'freezing of assets' rules as adopted by the Security Council are binding in the international legal order but require further implementation. At the regional level of the European Union the Council of Ministers is the political organ that in a series of legislative and executive decisions incorporated the UN blacklisting laws into the European legal order (Nettesheim, 2007). One of the effects of this action is that the competent national authorities in the Member States are legally obliged to freeze the bank accounts and other assets of the named individuals. Individuals whose rights and interests are affected cannot defend themselves in any way against Security Council laws and rules. At the level of the United Nations there is no court that can hear actions from individuals or organizations challenging the legality of UN laws.

The evolving role of the Court of Justice

If there is one feature that distinguishes the EU in the family of international organization it is the general power (although by no means complete) that the Court of Justice possesses in ensuring that the *rule of law* is maintained. The existence and functioning of the Court of Justice in Luxembourg with a

relatively broad mandate is precisely what distinguishes the European Union from other international organizations such as the UN. It was only in more recent years with the advent of more (legislative and non-legislative) powers for the Council of Ministers that the Courts role was challenged also within the Union legal system for the reason that it only enjoyed very partial jurisdiction in new policy areas since the Treaty of Maastricht (Peers, 2007).

The Court of Justice has built the equivalent of the national '*rechtsstaat*' or 'law-state' at the European level (Jacobs, 2007). It declared in the early 1960's that the European Community – as it then was – constituted a new and supreme legal order. Later it transformed the original treaties governed by the rules of international law into what it calls a 'constitutional charter' (Mancini, 2000). A constitutional charter aims to ensure that the exercise of power by the Union (its institutions) is subject to effective constitutional constraints and the rule of law. In particular the famous *van Gend en Loos* and *Costa* judgments affirmed Community law as an autonomous legal order, implying that the Community legal order had a material constitution of its own (de Witte, 1999). When the Court in its path-breaking decisions took EC law to be an autonomous legal order it did so on the basis of a presumed direct relation with the peoples of Europe. It was this premise that accorded an independent normative authority to the EU and its legal order. The assumption of independent normative authority has required the adoption of constitutional doctrines to constrain and legitimate that authority – it was thus a constitutionalism instrumental to and limited by the claim of normative authority (Walker, 2006: Poaires Maduro, 2005).

In the context of the example of the UN freezing of assets rules, the role of the Court of Justice and its further elaboration of the contours of EU legal order continue to be primordial. In recent years the European Court of First Instance (CFI) and on appeal the European Court of Justice (ECJ) has heard a series of challenges brought by individuals 'named and shamed' on terrorist blacklists.[4] A number of these were successful in having blacklisting decisions overturned (Hayes, 2007). The Court was in particular concerned about lack of respect for fundamental rights and due process. One case prompted a full review of the blacklisting regime by the Union.[5] This resulted in some changes in particular the release of reasons why blacklisting is proposed/has taken place and a procedure

4 For an uptodate list of cases brought and pending see: Statewatch terrorist list sites, http://www.statewatch.org/terrorlists/terrorlists.html

5 See Case T-228/02, *Organisation des Modjahedines du people d'Iran v. Council of Ministers,* judgment of Court of First Instance, 12 December 2006, not yet reported.

for de-listing.[6] Despite the ruling by the European Court of First Instance that the EU acted unlawfully in freezing the PMOI's assets, the organisation remained on the EU 'terrorist list'. The PMOI brought another case before the ECJ seeking removal from the list and € 1 million in damages.[7] This ongoing inter-connection illustrates the potential role of the european courts in giving further content to the 'rule of law' in the European legal system and to ensuring that some checks and balances are introduced into the EU legal and political systems.

An example of dynamic, albeit perhaps 'defnesive', constitutionalism is provided by Advocate General Maduro's recent opinion in *the Kadi case*.[8] The Kadi case concerned an appeal to the Court of Justice by an *individual* whose assets had been frozen as a suspected terrorist pursuant to the Security Council regulations as implemented into the EU legal and political order by the Council of Ministers. The appeal was from the judgment in first instance at the European level, the of First Instance that had ruled against the applicant on the grounds that Security Council opinions had a type of 'supra-constitutional' effect in the European legal order.[9] In other words no legal protection could be given to the applicant because the UN system did not provide any and it was not up to the EU system to fill the gaps in that regard.

The Advocate General advised the Court of Justice to follow a radically different tack. It was precisely the absence of 'a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations' that meant that the EU had the obligation to provide for judicial control of implementing measures that apply within its own legal order. In other words Union measures necessary for the implementation of resolutions adopted by the Security Council are *not* exempted from the constitutional principles set by Union law. Those EU constitutional principles include the rule of law and the right to judicial review. Since the UN Security Council instruments on which the EU instruments offended the rule of law, they should be annulled.

6 See the Council's response to the Court judgment: http://register.consilium.europa.eu/pdf/en/07/st05/st05418-re03.en07.pdf

7 Case T-256/07, *Peoples Mojahedin Organization of Iran v. Council,* OJ C 211/50, 8.9. 2007.

8 Case C-402/05 P, *Yassin Abdullah Kadi v. Council of the* EU *and Commission of the EC,* Opinion of Advocate General Poiares Maduro delivered on 16 january 2008.

9 See, Case T-315/01, *Kadi v. Council and Commission*, judgment of 21 September 2005, nyr.

CONCLUDING REMARKS

The scope and nature of executive power in a given political system remains difficult to define in substantive terms. This may have something to do with the fact that the executive power is rarely fixed and determinate but evolves over time, shaped by social and political circumstances as well as the letter of a constitution. One thing that does seem inherent in executive power is its tendency towards expansion (Poguntke and Webb, 2005). It seems that nowadays it is the executive branch that may be 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'[10] At the same time the executive power can be considered in structural terms 'in shadow' (Daintith and Page, 1999, at p.2). In the political system of the EU this may be aggravated by the fact that the legislative and executive functions are so mixed together, more so than in the political systems of the constituent Member States where the legislative power will basically be exercised by a directly elected parliament (with input into the system by the executive power in terms of an often non exclusive power of legislative initiative).

The executive branch of government can arguably be considered today as 'the most dangerous branch' (Flaherty, 1995-1996)[11] compared to the other two, the legislative and judicial branches particularly in the context of externalization and Europeanization. It can be argued that considerable emasculation has taken place in practice of the legislative branch in particular, despite the fact that with incremental Treaty revision processes, the European Parliament has acquired more powers of formal 'co-decision' over a wider range of policy areas. Since 9/11 in particular we have seen both in the United States and in Europe the consolidation of an executive power that subsumes much of the tripartite structure of government (on the US see Symposium, 2006). The 'incoming tide' of law and legal rules into the national legal systems is illustrated by the specific set of rules adopted by the UN Security Council in the 'war on terror' and their interpenetration with the European and national legal orders.

The separation of powers as it is classically understood also includes the idea that one branch of government will be checked and balanced

10 These are the words originally used by James Madison to describe the 'legislative department'. See, *The Federalist,* no. 48, at p. 309 (James Madison), Clinton Rossiter ed., 1961.

11 Alexander Hamilton wrote in *The Federalist Papers* that the judiciary was 'the least dangerous' branch. *The Federalist,* no 47, at pp. 302-03 (James Madison), Clinton Rossiter ed., 1961.

by the action of another (Marshall, 1971) The essential constitutional 'value' behind the principle is that it functions as a guarantee against tyranny –or put more positively in order to ensure the protection of liberty. Checks and balances' do not presuppose a radical division of government into three separate parts, with particular functions neatly parcelled out amongst them. Rather, 'the focus is on relationships and interconnections, on maintaining the conditions in which the intended struggle at the apex may continue' (Strauss, 1984, at p. 578). The role that the Court of Justice of the EU may choose to play in applying what amounts to 'higher law' (see generally Koopmans, 2006), in particular the principle of the 'rule of law' as a defensive mechanism protecting certain core principles of the EU constitutional legal order against attack – or 'shafting' – from the outside, may be key in this context.[12]

We have seen in this lecture that there are executive actors and administrative constellations that transgress levels of governance and national borders in a manner that e the coherence of national governments is challenged in an unprecedented way. The new executive order does not seem to replace the former order; instead it tends to be layered around already existing orders. The result is an increasingly compound and accumulated 'order' of executive power in contemporary Europe (Egeberg, 2007 and Curtin and Egeberg, 2008). Needless to say, such a layered and cumulative order complicates the discussion on accountability.

The problem that I have sought to highlight is that political actors may adopt decisions at one level with no forum able to hold them to account for their action, either politically as in a parliament or election procedure or legally as in a court. That gap in accountability may infiltrate other levels of governance such as the European level and subsequently the national level. This raises sensitive questions about which actors should be held to account: holding governments to account may no longer be enough and will need to be complemented with mechanisms and forums that focus both on the accountability of supranational executive bodies as well as national agencies and agents with dual loyalties (national and European). The crucial challenge in coming years is how these various levels can be better related and interconnected with one another in a perspective inspired by the need to ensure that growing executive power is subject overall to a cumulative system of checks and balances. As James Madison put it in *The Federalist Papers* more than two hundred years ago:

12 The Court of Justice in its judgment of 12 september 2008 in the Kadi case reflected the vast majority of Advocate General Maduro's opinion and annulled the Council regulation in question.

'if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.'[13]

13 *The Federalist,* no.51, at p.160 (James Madison), Roy P. Fairfield ed, second ed. , 1966.

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