



CENTRE FOR EUROPEAN RESEARCH



Separation of Powers in 21st Century Europe

Amsterdam, 29/30 June 2023

As governance takes on new forms and dimensions, it is rendered ever more complex and further removed from the people in whose name public power is exercised. This is a development that is particularly apparent in the multilayered and policentric construction of the EU, which does not follow a classic conception of separation of powers. We can identify the Court of Justice, the Commission and the Parliament as taking the core role and exercising central functions of the judiciary, the executive, and the legislature, respectively. However, neither the Council of the European Union nor the European Council, consisting of national executives but exercising legislative and quasi-legislative functions within the EU, fit easily into that framework. Member States and EU actors interact in a complex framework that transcends national constitutional structures but yet is dependent upon them. In addition, the EU is a particular example of the more general trend towards technocratic governance, which generally render democratic decision-making and judicial control more difficult.

The particularities of the EU's institutional structure are among the reasons why the EU's democratic challenges have been broadly debated and yet persisted. The European Union lacks a deeply integrated political community and is structurally reliant on national sources for its legitimacy (Eckes and Leino-Sandberg 2022). These deficiencies are often countered by reference to how the EU is 'special' and that therefore it 'cannot be measured by reference to traditional nation-State standards' (Lenaerts, 2013). While recognising the EU's specificities, this edited collection is based on the presumption that the need to debate the limits of power is even greater *because* the EU is not a deeply rooted political community.

The EU exercises state functions with direct implications both for the rights and obligations of individuals and for the scope of manoeuvre of democratic decision-making within the Member States. The traditional example is the empowerment of national courts vis-a-vis the other branches (Weiler, 1991). A series of crises during the last decade has led the EU institutions to take on new tasks, making the exercise of executive power more difficult to control. The role of the European Court of Justice has changed as the level of review it exercises in relation to the EU's legislative and executive institutions in particular in crisis situations has become low (Leino-Sandberg 2021). EU decision-making has also affected the powers of national parliaments and produced lasting effects on the EU's institutional balance, creating a need to critically assess their implications on how the EU exercises its powers.

The concept of separation of powers provides a time-tested framework for that analysis. Separation of powers serves as a regulatory ideal that has an identifiable purpose but cannot be realised entirely. It is primarily concerned with preventing the concentration of power in a single source, rather than with the substantive outcome of decision making. The concept of separation of powers serves the double purpose of ensuring collective will-formation and control of those in power (Möllers, 2013). Within these broad terms, several conceptions of the principle have been proposed in literature. This edited collection is based on a relational conception of separation of powers, which emphasises interaction, collaboration, and conflict

between branches rather than a strict separation. This is different from both an institutional conception of separation of powers, under which institutions perform a distinct constitutional role as opposed to a clear function (Strauss, 1987), and a functionalist approach, which focusses on identifying the core functions, tasks, and efficiencies of the different branches (Waldron, 2013; Vile, 1998). Our conception may be seen as closer to a collaborative model (Kavanagh, 2022); however, it does not express a normative guideline that the branches 'should' strive to collaborate. This is also expressed in the emphasis of the value of conflict for democratic will-formation. We analyse the emergence of new divisions of power in the EU against the traditional term referring to a designation and delimitation of public powers with mutual control structures and constraints between the three branches of government: legislative, executive, and judicial (Eckes, Leino-Sandberg, and Wallerman Ghavanini, 2021). This event is the concluding conference of the three-year research consortium 'Separation of powers for 21st century Europe (SepaRope)' between the Universities of Amsterdam, Gothenburg and Helsinki financed through the programme 'NORFACE Democratic Governance in a Turbulent Age' funded by a group of European Academies of Science and the European Commission through the Horizon2020 Programme.

DAY 1: Thursday, 29 June 2023

9:00-9:15 Coffee/Arrival

9:15-9:30 Introduction

9:30-11:00 Panel I: Conceptual Considerations

Päivi Leino-Sandberg, *From separated powers to consensual executive government*

Discussant: Christoph Möllers

Christoph Möllers, *Federal value enforcement in a system of separated powers*

Discussant: Päivi Leino-Sandberg

BREAK

11:30-13:00 Panel II.1: The Relationship between the Legislature and the Executive

Milka Sormunen & Davide Gnes, *A crack in the constitutionalisation of EU migration and asylum policy? Assessing the practical implications of informalization of EU readmission policy on separation of powers.*

Discussant: Martin Westlund

Piotr Krajewski, *The European Commission as a driver of EU trade policy: A constrained executive*

Discussant: Merijn Chamon

LUNCH

14:00-15:30 Panel II.2: The Relationship between the Legislature and the Executive

Merijn Chamon, *Regulatory Cooperation in 21st century Free Trade Agreements*

Discussant: Piotr Krajewski

Thomas Beukers, *The role of Parliaments in EU Economic Policymaking*

Discussant: Antti Ronkainen

Laurens Ankersmit, *Separation of Powers in 21st Century Trade Relations*

Discussant: Christina Eckes

BREAK

16:00-18:00 Panel III: The Relationship between the Judiciary and the Executive

Martin Westlund, *Judicial scrutiny of the external dimension of EU asylum and immigration law: the tensions between human rights and stronger border controls*

Discussant: Davide Gnes

Antti Ronkainen, *Litigating Monetary Policy: The Limits are Ours*

Discussant: Thomas Beukers

18:30 DINNER

DAY 2: Friday, 30 June 2023

9:00-11:30 Panel IV: The Relationship between the Judiciary and the Legislature

Cristina Fasone, *National constitutional adjudication on EMU-related measures: A new field of judicial activism?*

Discussant: Nik de Boer

Allison Östlund & Anna Ghavanini, *Creative control: Judicial review of legislative power in EU migration law*

Discussant: Milka Sormunen

Christina Eckes, *Judicial control of the EU and Member States' trade and investment relations*

Discussant: Laurens Ankersmit

BREAK (small snack)

11:45 – 13:15 Panel V: Cross-cutting Considerations

Marta Morvillo, *The place of expertise in EU governance*

Discussant: Florin Coman Kund

Florin Coman Kund, *Separation of powers within a hybrid EU multilayered system. A cross-sectional outlook*

Discussant: Marta Morvillo

Nik de Boer, *The Role of Constitutional Courts in a Multilayered Conception of Separated Powers*

Discussant: Cristina Fasone

13:15-13:30 FOLLOW UP

LUNCH