



A new constitution for Europe – getting closer to federalism?

The proposed new constitution has power-sharing provisions that could turn the EU into something more closely resembling a federation.

BY UWE LEONARDY

By June 2005, the new European Constitution will have faced the voters in referendums in several EU countries – including France, whose former president, Valéry Giscard d’Estaing, wrote the draft. No one knows whether these referendums will pass or not. Some countries may even want to amend the constitution before it is ratified.

But does the draft constitution give the new Europe a federal structure?

Some critics deny that the constitution has any federal elements at all. But even before the constitution was drafted, the EU had these significant federal characteristics:

- **Direct legislation:** EU laws have always automatically come into force for individuals and corporations (and other “legal persons”) without the need for member countries also passing those laws. And the EU’s legal rules have since gained supremacy over the relevant provisions of national laws. (This resembles the role of the national or federal government in a federal country.)
- **Division of powers:** The resulting division of legislative powers between two different levels of government – the European Union and the member states (including their regions) – is the clearest federal element of the European structures and the defining feature of a federal system.

While these characteristics were in existence long before the Constitutional Treaty came into life as a draft, that Treaty has continued the EU’s evolution in a federal direction still further.

- The name of the Treaty makes a political claim. By its intent to “establish a Constitution for Europe” in law, it shows that the Union already has state-like features in many respects. The further development of these

Uwe Leonardy is the former Head of the division dealing with constitutional matters of the Lower Saxony Mission to the German Federal Government and former Senior Fellow, Centre for European Integration Studies University of Bonn. He is the author of “Is Europe heading toward a federal constitution?” in *Federations*, Vol. 1 No. 5.

Subsidiarity in the European Union

In line with Article 3b of the European Maastricht Treaty, subsidiarity means that decisions in a multilevel system of governance should be made as close to the people as possible. Subsidiarity, in other words, is a political principle of guidance rather than a legally binding stipulation. This means that its application requires negotiated agreements.

Thomas O. Hueglin, From the International Conference on Federalism 2002, St. Gallen, Switzerland, Report of Work Sessions 6 and 18 on Decentralisation and Good Governance

features has been set out as a political program for a federal state, although one of a unique and unconventional type.

- The technical and legal detail of the Constitution marks the most substantial step yet towards a genuinely federal structure for the EU. The introduction of rules for how to divide legislative powers between the Union and its member states is a clear sign of federalism.

Is the “flexibility clause” really about flexibility or does it hide some real constitutional dangers?

Exclusive and shared powers

Up to now, there were only a few exclusive powers of the European level in various scattered provisions of the existing Treaties on the Community and the Union. The bulk of the powers the EU exercised in practice were derived directly from the politically defined wide objectives of the Union. This has over the years led to expansion of powers by the EU, which many member states acknowledged in their own constitutions or rules of constitutional interpretation.

The proposed division of powers lists them and defines exclusive and “shared” legislative powers. To the shared powers, the EU has added “areas of supporting, coordinating and complimentary action”. The exercise of the “shared” powers - in fact the EU’s priorities - is subject to the principle of *subsidiarity* (see Box 1 and Box 2). Thus the shared powers are regulated by one of the central features of federal systems.

A new wide-ranging and controversial “flexibility clause” now also legalizes action by the Union if this “should prove necessary, within the framework of the policies defined ... ,

to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers" (See Box 2). Although the "flexibility clause" was based on a (weaker) existing clause, some critics see it as a dangerous instrument.

Two significant issues arise from these new parts of the constitution:

- Is the Constitutional Treaty's division of responsibilities between the Union and its Member States sufficient? And is it efficient?
- Is the "flexibility clause" really about flexibility or does it hide some real constitutional dangers?

Defects in the rules

Whether the shared powers meet European priorities is the most relevant test of the choice of the shared powers in the constitution. However, the choice of shared powers of the EU is not based on such concrete criteria as the maintenance of legal or economic unity as necessitated by

the Constitution. Instead, in defining the shared powers, the new Constitution merely subtracts the exclusive powers from the EU's list of powers and adds "supporting, coordinating and complimentary actions".

To limit the EU's right to use of these "shared powers", the Constitution resorts to the principle of subsidiarity without binding that use to any legally defined criteria. This does not adequately answer the demands for a clearer and more efficient division of powers between the Union and its Member States.

The fact remains that subsidiarity is legally ambiguous and subject to political manipulation. The result is a kind of a circular solution. In the area of shared powers, in which the member states continue to exercise authority where the institutions of the EU do not make use of theirs, the conditions for laying claim to these powers and the requirements for making use of them can only be clearly established by concrete criteria.

But there is another factor in determining rules for the division of powers. The Constitution enumerates no fewer than 202 provisions for binding legal acts of the Union in a wide variety of categories (European laws, framework laws, regulations and decisions). But none of these provisions is linked in any legal way to the Constitution's rules on the division of responsibilities. The Constitution does not indicate which of those legal acts are to be considered as deriving from either the EU's exclusive powers, its shared powers, or its other powers. In that sense, the rules for the division of powers seem to be rhetorical rather than constitutional norms.

The effect of the "flexibility clause" is to give the Council the power to alter the Constitution's divisions of powers without requiring an amendment to the Constitution. That gives the clause significance far beyond mere adaptation in the context of existing constitutional rules. If you consider the enormous efforts necessary for ratification of the Constitution by all member states, then granting power to the EU to modify the power balance in the Constitution seems out of proportion and extremely questionable.

Not cause to reject the constitution

The fact is that there are provisions in the European Constitution that should evoke some concern. But to say that does not imply any plea for the rejection of the Constitution in its national ratification procedures and especially not in the upcoming referenda. No constitution has ever been perfect from its very beginning. A constitution can only be improved once it exists. Still, its faults need to be identified in time.

That applies particularly in a situation in which the EU has to consider other applications for membership. Because these include such problematic ones as Turkey and Ukraine, the EU may need all its creativity and must be open to considering brand new ideas. The creation of a fully federal "United States of Europe" by a core group of countries, and the use of this new state as a nucleus of a less supranational European Union, could be one of those brand new ideas. It could also be an alternative, if the Constitutional Treaty fails to stand the test of the referenda. ☺

The European Constitution on flexibility and subsidiarity

Article I-11 - Basic Principles, Paragraph 3 "Subsidiarity"

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.

Article I-18 – the "Flexibility Clause"

Flexibility clause

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European Commission shall draw national Parliaments' attention to proposals based on this Article.
3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation.

Further reading:

Official website of the European Convention:

<http://european-convention.eu.int/>

Full text of the constitution:

http://europa.eu.int/constitution/index_en.htm