

The Jean Monnet Seminar Series  
Tahditiet Jean Monnet

**BALANCING EUROPEAN AND  
NATIONAL INTERESTS: THE  
DRAFT CONSTITUTIONAL TREATY  
AS A FEDERAL COMPROMISE**

**Constantine A. Stephanou**

*Malta*

*European*

*Studies*

*Association*

Editor

**Peter G. Xuereb**

**Jean Monnet Professor**

# THE JEAN MONNET SEMINARS

The Jean Monnet Seminars are an initiative of the Jean Monnet Chair and the Malta European Studies Association. They are an intrinsic part of the fabric of European Studies development at the University of Malta, bringing together scholars in the field for the purpose of constructive debate and thinking on the main issues in European Integration. The assistance of the European Commission is gratefully acknowledged.

**Professor Peter G. Xuereb**  
**Jean Monnet Chair in EU Law and European Integration**

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# **THE AUTHOR**

Jean Monnet Chair of European Organisation, Panteion University,  
Athens and Visiting Professor at University of Paris II.

Unions of States have traditionally been established in response to  
real or perceived challenges to the security and well-being of

citizens; today such unions are deemed to generate “multiplier” or “added value” effects. In the 20<sup>th</sup> Century international organisations have been perceived as modern forms of unions of states. Nevertheless, the most sophisticated forms of such unions have flourished in the Euro-atlantic area after the Second World War. Initially, they took the form of confederal-type structures which included parliamentary assemblies consisting of delegates of national parliaments, in addition to traditional intergovernmental bodies; moreover, a typical confederal feature was the mutual assistance clause in their charters (in the case of WEU and NATO). On the other hand, however, in the case of the Council of Europe, a far-reaching federal-type system for the protection of human rights, allowing for direct appeals by individuals to supranational jurisdictions was introduced.

The compromise achieved in the context of the Council of Europe between confederalists and federalists was not to the satisfaction of the latter. The federal design was to be pursued by French foreign minister Robert Schuman. In his declaration of 9 May 1950, while re-iterating the commitment to a European federation, he traced an indirect but, in his mind, more realistic way for reaching the goal, namely by establishing a supranational-type organisation, the European Coal and Steel Community. The European Economic Community established six years later also embodied supranational features, in terms of its institutional structure and decision-making powers; but in terms of its goals and competences it was already perceived by German scholars as a functional or special purpose federation. In the mid-1970s a major move in the federal direction was made, with the decision to enhance the legitimacy of the European Parliament, by providing for the direct election of its members. The federal features of the European entity have since multiplied and have been embedded in the treaties, including the Draft Constitutional Treaty of 2004. These features may be summed up as follows:

1. The introduction of political goals and values, or politicisation of the Union;
2. The introduction of federal-type power-sharing arrangements;

3. The introduction of the federal legitimacy principle in the institutional system;
4. The enjoyment of rights by the nationals of member States, usually associated with the constitutionalisation process.

The first piece of evidence of the federalisation process relates to the *politicisation of the Union*. Although the goals of economic integration are still predominant in the list of goals, non-economic goals, such as environmental protection and consumer protection have been added by the Single European Act and the Maastricht Treaty. Furthermore, societal goals, such as sustainable development, which is traditionally perceived as a combination of economic, social and environmental parameters, have been introduced at Amsterdam. More importantly, however, and also an outcome of the Amsterdam Treaty amendments, are the explicit references to the values of human rights, democracy and the rule of law which apply not only to the Union itself but also to its Member States, although indirectly, by means of the provisions allowing sanctions against those which perpetrate violations. The Draft Constitutional Treaty provides, moreover, for the protection of minorities which has traditionally been perceived as a source of interference with state sovereignty; thus, Member States which infringe the rights of minorities could be held accountable under the provisions on the protection of human rights.

The second piece of evidence of the federalisation process relates to the introduction of *federal-type power-sharing arrangements*. The Court of Justice developed the distinction between exclusive and concurrent competences, the doctrine of preemption or *terrain occupé* and the doctrine of implied powers in external relations. Then came the Maastricht Treaty, with the introduction of the principle of subsidiarity, subsequently interpreted by a Protocol annexed to the Amsterdam Treaty. Nevertheless, the most important advance towards federal-type power-sharing is embodied in the Draft Constitutional Treaty which provides for a list of competences of the Union. Although typical of federal constitutions, the subsidiarity principle and the list of competences, were also perceived as safeguards of the sovereignty of the

Member States and, in the case of Germany and other federal states, as safeguards of the competences of the regions.

The third piece of evidence of the federalisation process relates to the introduction of the *federal legitimacy principle* in the institutional system. Federal legitimacy or the dual legitimacy of states and citizens is reflected in the requirement of approval by the European Parliament, in addition to the approval by the Council, applying to most areas of the first pillar of the Union (the Community), although it is conspicuously absent in the other pillars. In the first pillar the European Parliament now holds legislative powers which are equivalent to those of the Council, in the context of the so-called co-decision procedure. It is true that this procedure does not apply to all areas of Community competence but it is reasonable to affirm that it applies to most of them. As far as the treaty-making power of the Community is concerned, an assent procedure allows for the veto of the most important international agreements by the European Parliament. Finally, the appointment of the Commission is subject to the approval of both the European Council and the European Parliament.

The fourth and last piece of evidence of the federalisation process is related to the emergence of a *federal-type legal order*. The key elements of this legal order, the principles of direct effect and primacy of Community law were deduced by the Court of Justice in the 1960s. Nevertheless, there is strong opposition to the application of the primacy principle in conflicts between Community law and the constitutions of Member States. Interestingly, the primacy principle was enshrined in the Draft Constitutional Treaty (art. I-6) although, as observed by the French Constitutional Council in its decision of 19.11.2004, the principle should be interpreted in the light of art. I-5 which safeguards national identities as reflected in the respective constitutional orders of Member States. Nevertheless, if the principle remained in the final version of the treaty, it is by no means certain that the French interpretation would be endorsed by the Court of Justice.

The principle of direct effect of Community law highlighted above marks the beginning of the enjoyment by individuals of rights accruing from the Community legal order; by the same token it marks the beginning of the constitutionalisation process. Subsequently, the Court of Justice upheld the recourse to fundamental human rights, in appeals contesting the validity of Community Acts. Since the Amsterdam Treaty, human rights have formally been integrated in the Community legal order, by explicit references to the European Convention on Human Rights and the common constitutional traditions of Member States.

Nevertheless, reliance on the aforementioned instruments is unsatisfactory in the context of an emerging political entity. Already in the 1970s' the European Parliament underlined the need for a Community Charter of fundamental rights. Such a Charter was finally adopted at the Nice Summit of 2001 as a non-binding instrument which may, however, serve as a source of inspiration for judges applying Community law. Interestingly, the Draft Constitutional Treaty has incorporated the Charter in its second and, probably, most important part. Moreover, political rights have also been embodied in the Draft Constitutional Treaty. These rights are related to EU citizenship introduced by the Maastricht Treaty. The latter provided for the free movement and residence of the nationals of Member States, while also extending the principle of equal treatment of residents of other Member States, to political rights and, more specifically, electoral rights in municipal and European elections.

An important advance was made by the Draft Constitutional Treaty in the field of political rights; the Treaty upholds the link of EU citizens to the European polity by providing that the European Parliament is composed of representatives of the citizens of the Union (rather than representatives of the peoples of the Member States), while also laying down participatory rights, usually associated with direct democracy. Thus, EU citizenship has been transformed into a genuine political link between the citizens and the European polity, thereby enhancing the process of European demos-creation.

## **Concluding Remarks**

The Draft Constitutional Treaty, introduces important innovations which can be better understood when examined in the light of the processes of constitutionalisation and federalisation to which the EC and the EU have been subjected.

We have argued in our short presentation that the Draft Constitutional Treaty expands the federal features of the Union. On the other hand, however, important intergovernmental or confederal features remain. Firstly, the fact that the constitution is based on an international treaty. Moreover, due to the forceful opposition of some Member States, the qualification of the treaty as “constitutional” may also be abandoned at the end of the Intergovernmental Conference which will determine the future of the treaty.

At any rate, the Draft Constitutional Treaty strikes a new balance between federal and confederal features. The latter have remained in the fields of foreign policy and defense, although the introduction of the post of Foreign Minister of the Union may be associated with some form of statehood of the Union – and could therefore be dropped in the final version of the treaty.

The emerging European polity reflects a federal-type compromise. The continuous expansion of Community competences is compensated by various measures enhancing the legitimacy of the Union, as well as provisions aimed at safeguarding diversity, such as the principles of subsidiarity and of respect of national identities examined above. Thus, in our opinion, accusations about the emergence of a European super-state appear unfounded.

The Draft Constitutional Treaty represents a breakthrough in the long polity-building process, which has been highly consensual and is likely to remain so, although, in some areas, a core of Member States are moving faster in the integration process. It is true that the polity-building process is running at lower speed compared to the market-building process; nevertheless, the former is unlikely to stop, whatever the fate of the Draft Constitutional Treaty. At this

stage, some changes of a symbolic value are likely to be agreed, in order to keep the treaty on track and meet the expectations of the European citizens.