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**Constitutionalization of the EU and the  
Sovereignty Concerns of the New Accession States:  
The Role of the Charter of Rights**

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## *Constitutionalization of the EU and the Sovereignty Concerns of the New Accession States: The Role of the Charter of Rights*

Wojciech Sadurski\*

The European Union is currently undergoing two major historical transformations which will profoundly alter its nature, structure and meaning: the constitutionalization process and Eastward enlargement.<sup>1</sup> Each of these processes, taken in isolation, constitutes a fundamental transition of strategic, historic proportions: taken together, they offer both a major challenge (perhaps even a threat) to, *and* a major opportunity for, the future of Europe.

The *threat* can be seen in the fact that there is deep potential for negative interactions between these two processes: in the traditional perspective, the “deepening” (often, even if misleadingly, associated with constitutionalization)<sup>2</sup> is seen as antithetical to the “widening”. As some authors have noted, these processes (constitutionalization and enlargement) have ultimately different (and mutually incompatible) dynamics built into them. Constitution-making is *finalité*-oriented and an open-ended, dynamic process which invites (indeed, requires) constant contestation, argument, challenges and interchangeability in the roles of norm-setter and norm-follower.<sup>3</sup> Enlargement, in contrast, is rooted in “conditionality”, and may be seen as a process in which the rules of accession are

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<sup>1</sup> Only the imminent entry into the EU of the former Communist states of Central and Eastern Europe (CEE) is of concern for this working paper but this, of course, is not to neglect the significance of accession to the EU by Malta and Cyprus. The argument in this paper, however, is CEE-specific.

<sup>2</sup> The demands for constitutionalization do not necessarily accompany those for “more Europe”; one may see the constitution of EU as a means of halting further integration; see, for example, the “Constitution” for the EU drafted by “The Economist” weekly, 28 October 2000.

<sup>3</sup> See Antje Wiener, “Finality vs. Enlargement: Constitutive Practices and Opposing Rationales in the Reconstruction of Europe”, Jean Monnet Working Paper 8/02 (September 2002), <http://www.jeanmonnetprogram.org/papers/02/020801.pdf> at 6-7.

(almost) set in stone, frozen in a particular historical moment, with the rule-followers subordinate to the rule-setters, and the “take it or leave it” principle permeating the whole process. In addition, there is an understandable concern that the effect of enlargement upon internal EU democracy (for what it is worth anyway) may be detrimental; that “enlargement may worsen the alleged democracy deficit by diluting even more the voice of the single citizen in the European decision-making process; it may also make the prospect of the emergence of a true European *demos* more remote than before”.<sup>4</sup>

In this working paper I will focus on the *opportunities* rather than threats stemming from the current coincidence of enlargement and constitutionalization; on the synergies rather than the antinomies. A good starting point is the realization that this is not a “coincidence” at all, but rather that the prospect of enlargement has been one of the powerful reasons for constitutionalization (or, as Bruno de Witte puts it, enlargement was a constitutional agenda setter for the European Union).<sup>5</sup> I will confine my considerations to only one aspect of constitutionalization in the EU, namely, the inclusion of fundamental rights within the constitutional structure of the Union, as dramatically symbolized by the adoption of the Charter of Fundamental Rights. This is, of course, not the only, and perhaps not even the major aspect of Union constitutionalization. If the attention granted to the Charter during the current Convention on the Future of the Union, compared to other major issues discussed at the Convention, is to be any indication of the weight given to this issue by the Convention, and if the Convention is to be seen as an expression of the interests and concerns of the European national and supranational élites about the future of the Union, then the focus on the Charter in this working paper may seem misplaced. But this is not so: the Convention has attached so little attention to the Charter basically because the Charter has been a relatively non-contentious issue, at least compared to the issues of the institutional architecture of the Union, the division of competences between the Union and the Member States, etc. Moreover, the Charter has been presented to the Convention as a package which should not be opened, with its substance non-negotiable, and the only matter to be deliberated was its status in the future constitutional treaty.<sup>6</sup> As there is a near-consensus that the Charter’s

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<sup>4</sup> Bruno de Witte, “The Impact of Enlargement on the Constitution of the European Union”, in Marise Cremona, ed., *The Enlargement of the European Union* (Oxford University Press: Oxford 2003): pp. 209-52 at 228.

<sup>5</sup> De Witte, id.

<sup>6</sup> Working Group II of the Convention, in its Final Report of 22 October 2002, explicitly stated that the Charter as endorsed by the Nice European Council “should be respected by this Convention and not be re-opened by it”, CONV 354/02, <http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf>, at p. 4. This had been already announced at the outset, as part of the “mandate of the Working Group on the Charter”, by the

elevation to the status of a legally binding document is inevitable,<sup>7</sup> the only issues which were really discussed at the Working Group II dealing with the Charter concerned relatively marginal matters, which may excite some lawyers but to the general public look like hair-splitting: namely the issue of the precise method of incorporation (insertion of the full text of the Charter into the Constitutional Treaty, or insertion of a reference to the Charter in one of the articles of the Treaty?).<sup>8</sup>

In fact, the significance of the Charter – and, more generally, of the place of human rights in the EU in the years to come – is *anything but* trivial, and has been already described as no less than “herald[ing] a reorientation of the historic mission of the Community”.<sup>9</sup> This significance, as I will argue, is particularly clear when one considers the relationship between the Charter (again, as a reflection of the place of human rights in the EU) and enlargement, the latter viewed both in terms of the accession process itself, and the post-accession situation. As far as the accession process is concerned, the Charter performed a useful role in reducing, if not fully overcoming, some disturbing aspects of (what can be called) human-rights conditionality; it could have played an even more significant role – as I will argue – if during the Convention, which happened to open in the eleventh hour of the accession negotiations, the *diktat* about non-negotiable character of the Charter were not imposed with such force. This will be the theme of the *first part* of this working paper. In the *second part*, I will shift the focus somewhat and begin by looking at an issue which may appear unrelated to the Charter’s role in enlargement, namely the “sovereignty conundrum”: an unease that may be strongly felt within the Central and East European (CEE) new member states about “losing sovereignty” on joining the EU. While such an unease may adversely affect the strength of support for accession in those states,

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Working Group’s Chairman, Antonio Vitorino, in his Note of 31 May 2002, see CONV 72/02, <http://register.consilium.eu.int/pdf/en/02/cv00/00072en2.pdf>, and indeed, such was the mandate as formulated in Nice and in Laeken. The Declaration on the Future of the Union adopted in Nice in December 2000 proclaimed, among other things, that one of the aims of the Inter-Governmental Conference in 2004 will be to discuss “the *status* of the Charter of Fundamental Rights of the European Union proclaimed in Nice. . .” Declaration on the Future of the Union to be Included in the Final Act of the Conference, Annex IV, Nice 12 December 2000, SN 533/00, emphasis added.

<sup>7</sup> The Final Report of Working Group II states that all members of the Group either support an incorporation of the Charter in a form which would make it legally binding or “would not rule out giving favourable consideration to such incorporation”, CONV 354/02 at 2.

<sup>8</sup> In addition, the Working Group dealt with the question of possible accession of the Community / the Union to the ECHR.

<sup>9</sup> Gráinne de Búrca, “Human Rights: The Charter and Beyond”, Jean Monnet Working Paper No. 10/01, <http://www.jeanmonnetprogram.or/papers/01/013601.html> at 7.

and consequently, their bona fide commitment to the deepening and constitutionalization of political integration within the EU, this effect may be greatly minimized by the perception of the EU as a human-rights relevant polity. It is in this way that the Charter – as the epitome of the EU’s commitment to strong human rights protection in member states – may be seen as instrumental in both the enlargement, and the socialization of the “enlargees” into a politically integrated, constitutionalized Union. Finally, in the *Conclusions*, I will attempt to tie these two threads of my working paper together by reflecting upon the synergy between the enlargement and the Charter aspects of constitutionalization. In that way, I will return to the point with which I opened this paper; namely, that the concurrence of enlargement and constitutionalization offers not only a threat but also opportunities for the Union as a whole.

### **1. The Charter and Human Rights Conditionality**

As I have tried to show elsewhere, there is a certain parallelism between the enlargement dynamic and the dynamic of the EU’s taking on board of the issue of individual rights.<sup>10</sup> This parallelism responds to a frequently noted contrast between the scope of human rights which have (so far) been the subject of *internal* EU concerns and human rights conditionality applied by the EU to candidate states in CEE. As Andrew Williams remarks, the EU has adopted, in its enlargement strategy, a policy “whereby individual applicant states are subjected to a process of human rights scrutiny and intervention . . . which possesses no imitation *within* the European Union”, and as a result “the scope of rights so scrutinised in the accession criteria extends some way beyond that which falls within the European Union’s internal concerns”.<sup>11</sup>

At the early stage of the rapprochement between the EC and CEE states, soon after the 1989 transitions, there was a good deal of rhetoric on both sides about human rights being an important means of embracing CEE (in whatever form) in the larger, pan-European entity that had been forming after the Second World War on the Western side of the Iron Curtain.<sup>12</sup> But it was just that: political

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<sup>10</sup> Wojciech Sadurski, “Charter and Enlargement”, *ELJ* 8 (2002): 340-62.

<sup>11</sup> Andrew Williams, “Enlargement of the Union and Human Rights Conditionality: a Policy of Distinction?”, *E.L.Rev.* 25 (2000): 601 at 601-2. See also more generally (not just in the context of enlargement) Philip Alston & J. H. H. Weiler, “An Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights”, in Philip Alston, ed., *The EU and Human Rights*, p. 9; Bruno de Witte & Gabriel Toggenburg, “Human Rights and Membership of the Union”, unpublished manuscript 2002, on file with the author.

<sup>12</sup> For instance, as early as 1990 the European Council declared (at its meeting in Dublin on 28 April) that “[the] process of change brings ever closer a Europe which, having overcome the unnatural divisions imposed on it by ideology and confrontation, stands united in its

rhetoric. The main rationale for early cooperation agreements (the “Europe Agreements”) had much more to do with the promotion of free market ideals and the twin goals of stability on the continent and international security than of human rights and constitutionalism.<sup>13</sup> This changed with the Copenhagen Criteria of 1993,<sup>14</sup> which were then followed by human rights scrutiny within the framework of the so-called “accession partnerships” in 1998 – a system whereby the achievement of specific “objectives” for particular candidate countries, itemised within Partnership documents, were assessed within the regular annual country reports.<sup>15</sup>

These matters – democracy, the rule of law and human rights – have largely been taken for granted within the Community itself, and never before 1993 were they included in a formal set of criteria for *former* applicant countries, whose democratic and human rights credentials always seemed impeccable to the members at the time. And this was the case not only because earlier candidate states were above suspicion; moreover, a fundamental ambiguity has persisted about whether human rights matters are relevant to the Community at all.<sup>16</sup> This ambiguity stemmed from the fact that, on the one hand, the absence of specific Treaty bases granting legal powers to the Community in the field of human rights meant that the competence of the Community in this field is questionable. On the other hand, the long line of ECJ jurisprudence declaring respect for fundamental human rights to be part of the Community legal system, culminating in general pronouncements in Article 6 EU about the Union being “founded on” respect for human rights, and the Art. 7 mechanism for EU intervention in its member states

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commitment to democracy, pluralism, the rule of law, full respect of human rights, and the principles of market economy”, quoted in Williams, *supra* note 11, p. 604.

<sup>13</sup> See Toby King, “The European Community and Human Rights in Eastern Europe”, *Legal Issues of European Integration* 23 (1996): 93-125, in particular at 103.

<sup>14</sup> The Council, held in Copenhagen in 1993, established that in order to be successful in its pursuit of full membership the applicant state must enjoy, *inter alia*, “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. . .”

<sup>15</sup> See Williams, *supra* note 11, pp. 609-10.

<sup>16</sup> For a succinct statement of this ambiguity, see Grainne de Búrca, “Convergence and Divergence in European Public Law: The Case of Human Rights”, in Paul Beaumont, Carole Lyons & Neil Walker, eds, *Convergence and Divergence in European Public Law* (Hart Publishing: Oxford 2002): 131-150 at 135-40. For another brief description of “a long record of ambivalence [of the EU and its predecessors] towards fundamental rights”, see Neil Walker, “Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism”, in Tom Campbell, K.D. Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford University Press: Oxford 2001): 119-141 at 120-21 (the quoted words are from p. 120).

in the field of human right), suggest “a significant degree of competence in the field of human rights”.<sup>17</sup> As a consequence, EU legal scholars can keep disagreeing in good faith about whether the EU is “rights-based”, and how central the rights are to the Union itself.<sup>18</sup>

In the context of the enlargement process, after 1993 the contrast between the rules for existing members and the admission criteria for prospective newcomers became sharp, even if its causes were understandable. To be sure, the inclusion of a reference to the principles of liberty, democracy, respect for human rights etc. in the Treaty of Amsterdam<sup>19</sup> might have been seen as somewhat reducing this contrast. On the basis of this inclusion, it has also been claimed that human rights were proclaimed in the Amsterdam Treaty as explicit preconditions for EU membership.<sup>20</sup> However, it has been also noted that the Copenhagen Criteria are not coextensive with the principles proclaimed in Art. 6(1) of TEU: in particular, a specific reference to the protection of minorities is one of the Copenhagen Criteria but is missing in the Treaty’s human rights provision.<sup>21</sup> So even if Art. 6(1) of the Treaty, in connection with the newly established procedure for the suspension of rights of Member States in the case of breach of these principles (Art. 7 TEU), may alleviate the contrast between the external and internal EU human-rights requirements, the indisputable fact is that none of the *current* member states faced these preconditions at the point of *their* admission, and that no earlier enlargement had been conditioned by rules regarding democracy and human rights. (On the other hand, one must not exaggerate the practical - as opposed to the symbolic - political role played by the Copenhagen criteria in the actual control of the candidate states’ compliance with the conditions of membership; as far as the CEE states are concerned, with one exception which is now of historical interest only, there was never an overall negative grade given to

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<sup>17</sup> De Burca, supra note 16 at 138.

<sup>18</sup> Compare, e.g., Agustín José Menéndez, “A Rights-Based Europe?”, in Erik Oddvar Eriksen, John Erik Fossum & Agustín José Menéndez, eds, *Constitution-Making and Democratic Legitimacy* (Oslo: Arena 2002): 123-151 (claiming that European integration has been, from its very beginning, founded on fundamental rights) with Armin von Bogdandy, “The European Union as a Human Rights Organization? Human Rights and the Core of the European Union”, *CML Review* 37 (2000): 1307-1338 (expressing scepticism about viewing human rights as the core of the EU).

<sup>19</sup> Article 6(1) TEU: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to Member States”.

<sup>20</sup> See Manfred Novak, “Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU” in Alston, supra note 11, pp. 689-90.

<sup>21</sup> See Novak, id. p. 692.



any of the applicant states on that basis in the Commission's annual opinions on progress towards accession).<sup>22</sup>

The causes of this contrast were understandable: there has been a natural suspicion in the Western part of Europe concerning the depth and sincerity of democratic transformations in the Central and Eastern parts of the continent. For reasons of geographic and cultural proximity, this suspicion was not felt within the then member states when Spain, Portugal and Greece were to join European Community after their own abandonment of authoritarian rule. The absence of democracy in these three Southern societies was seen to be an aberration while with regard Central Europe it was seen as a more chronic state of affairs. As George Schöpflin notes: “The burdens of the short- and long-term past, the negative practices of post-Communism itself, the dangers of spillover from the interface between democracy and authoritarian systems . . . all implied that greater vigilance [on the part of the EU] was needed. To that extent, democracy and liberalism could be taken for granted in Western Europe, whereas in Central and South-Eastern Europe it could not”.<sup>23</sup> Schöpflin is right, and his remarks imply that to characterize a practice discussed here as a case of “double standards” is not necessarily to condemn it. The EU's use of double standards in its human rights vigilance was *largely justified*, not least because it was welcomed by democratic activists in the candidate states themselves, who saw EU human rights conditionality as an additional tool for consolidating democracy and the protection of rights in their own countries. This is an important point: from the internal perspective of CEE candidate states, such a situation of “double-standards” has not been necessarily viewed with hostility; indeed,

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<sup>22</sup> The exception was Slovakia in 1997; the Luxembourg summit of December 1997 decided to exclude Slovakia from accession negotiations on the basis that the then Meciár government failed to meet the political conditions; the Commission's avis of July 1997 referred to “the instability of Slovakia's institutions, their lack of rootedness in political life and the shortcomings in the functioning of its democracy”, see Geoffrey Pridham, “The European Union's Democratic Conditionality and Domestic Politics in Slovakia: the Meciár and Dzurinda Governments Compared”, *Europe-Asia Studies* 54 (2002): 203-27 at 224 n. 3). At the Helsinki summit of December 1999 the new government of Dzurinda (elected in 1998) won agreement to open negotiations as from February 2000.

<sup>23</sup> George Schöpflin, “Liberal Pluralism and Post-Communism”, in Will Kymlicka & Magda Opalski, *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Press 2001): 109-25 at 124. For a strong expression of similar sentiments, see Marta Cartabia, “Allargamento e diritti fondamentali nell'Unione Europea. Dimensione politica e dimensione individuale”, in S. Guerrieri, A. Manzella & F. Sdogati, eds, *Dall'Europa a Quindici alla Grande Europa. La Sfida Istituzionale* (Il Mulino: Bologna 2001): 123-49.

sometimes it has been applauded, as a device pushing the candidate states into adopting more democratic and consensual institutional designs.<sup>24</sup>

But this contrast between “external” and “internal” standards became, in the long run, untenable. Moreover, from the perspective of candidate states, the contrast led to uncertainty about which specific standards and criteria – going beyond the vague formulations of the Copenhagen Criteria – would be used as a yardstick to assess their alignment with EU-wide human rights standards.<sup>25</sup> The EU Charter of Fundamental Rights *can be seen* as a remedy to this problem – a step taken in order to close the gap between external requirements and internal human rights policy, and also to add a degree of clarity – or specificity – to the actual content of the human-rights conditions.<sup>26</sup> From the perspective of the candidate states, the closing of the gap between external and internal human rights standards helped dispel the suspicion – never quite absent – that human-rights conditionality had been tailored as a somewhat cynical instrument which would allow access to be denied to selected candidate states even after they had fulfilled all the other, more tangible and verifiable, requirements of the *acquis*. There always was a suspicion – not quite irrational, as some observers suggested<sup>27</sup> – that human-rights conditionality rendered the EU a “moving target” for the candidate states, and that they allowed the Union to keep changing the rules of the game due to its position as an arbiter of what constituted meeting the vague Copenhagen tests.

To be sure, the “moving target” factor cannot be dismissed as merely a cynical ploy; as a device to prevent *bona fide* candidates joining the club should the political will on the part of the current members to proceed with enlargement evaporate. The EU constitutional logic (of which the human rights element is an ingredient) is in inevitable tension with the logic of conditionality: the former is dynamic and evolving in a direction which does not have clear, obvious and

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<sup>24</sup> See, e.g., Attila Agh, “Ten Years of Political and Social Reforms in Central Europe”, *Central European Political Science Review* 2 (2002): 24-43 at 39-40.

<sup>25</sup> Koen Lenaerts recently deplored the “overall lack of transparency in the external human rights policy of the European union” as a result of which “the countries applying to join the Union . . . are not aware of the basis on which their performances will be evaluated by the EU . . .”, Koen Lenaerts, “The Impact of the EU Charter of Fundamental Rights in the Perspective of Enlargement”, in Alfred E. Kellerman, Jaap W. de Zwaan & Jenö Czuczai, eds, *EU Enlargement: The Constitutional Impacts at EU and National Level* (T.M.C. Asser Press: The Hague 2001): 447-79 at 474.

<sup>26</sup> “[T]he adoption of a catalogue of rights will make it possible to give a clear response to those who accuse the Union of employing one set of standards at external level and another internally”, Commission Communication on the Charter of Fundamental Rights of the EU, 13.9.2000, COM (2000) 559, para. 12.

<sup>27</sup> See e.g. Heather Grabbe, “European Union Conditionality and the *Acquis Communautaire*”, *International Political Science Review* 23 ((2002): 249-68 at 251.

consensually agreed-upon parameters (hence, the on-going debates about “finality”); the latter is based on the idea of a static, identifiable and unchanging set of conditions. As Antje Wiener has recently argued in her excellent piece, “[w]hile the participants of the constitutional debate find it hard to agree on a compromise towards thinning out a thicket of institutionalized rules and norms, the candidate countries are often forced to comply with norms which remain dubious and under-specified in the EU’s very own context”.<sup>28</sup> With regard to the Charter, the concerns frequently expressed by the representatives of the candidate states (during their so-called “auditions” in the course of preparing the draft Charter), that the Charter should not add to the conditions and burdens of the *acquis*,<sup>29</sup> reflect precisely that reality of the “moving target”: candidates to join the club want to know that the conditions of membership will not keep changing in the period between initial application and the final vetting of the applicant’s profile. But, on the other hand, the fact that the conditions of membership were changing was not (or: was *not only*) an expression of a manipulative politics on the part of the members states but also of the very character of the constitutionalization of the Union, with the dynamic towards an uncertain “finality” built into it. It was also a result of the obvious fact that the EU simply did not have something that could be called a “democracy and human rights *acquis*”: the vague formulae of the Copenhagen conditions did not refer back to a specific set of detailed legal rules and policies about what counts as “democracy, the rule of law, human rights and respect for and protection of minorities” within the Union because such a set did not exist.<sup>30</sup> And the vagueness of the formulaic conditions was a consequence of the lack of powers and policies of the Union in these fields: the Copenhagen conditions were all there was.

The Charter can be seen as a partial solution to the “double standards” and “moving target” problems: by codifying rights within the Union, it extends the rights regime used externally to the current Member States (hence the solution to the double standards problem), and petrifies, or freezes, the understanding of the minimal yardstick of human rights within the Union (hence the solution to the moving target problem). Naturally, this is only a partial and very imperfect solution. As far as the double standards problem is concerned, the final clauses of the Charter cannot really be seen as applying to the member states at all, except when they are implementing Union law.<sup>31</sup> By contrast, human-rights

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<sup>28</sup> Wiener, *supra* note 3 at 4.

<sup>29</sup> Sadurski *supra* note 10 at 346 n. 33 and the accompanying text.

<sup>30</sup> See Heather Grabbe, “Will EU Membership Improve Governance and the Quality of Democracy in Central and Eastern Europe?”, *East European Constitutional Review* (forthcoming, Spring 2003).

<sup>31</sup> Art. 51 (1) of the Charter.

conditionality, as reflected, for example, in the annual reports of the Commission on candidate states' progress towards accession, scrutinized a broad spectrum of political and legal matters in candidate states, regardless of whether these matters could be characterized as "implementation of EU law". As far as the "moving target" problem is concerned, the characterization of the Charter's function as "freezing" the understanding of human rights is an obvious exaggeration: the vague, open-ended wording used by the Charter (as, unavoidably, by any constitutional charter) lends itself to a dynamic, changing interpretation by the judicial and political branches. So, in both these regards, we are talking about a degree rather than a qualitative leap; but differences of degree matter, and as a matter of degree, the Charter *does* reduce both the external-internal human rights scrutiny gap, and the uncertainty produced by evolving admission criteria.

I do not wish to claim that this consideration *actually* motivated the main players involved in the drafting of the Charter. But some students of the EU have made such a claim. George Bermann said: "I certainly view the Charter of Fundamental Rights project as . . . having been pursued in large part in consideration of the EU's prospective enlargement and therefore rightly counted as among the Union's legal response to enlargement. This is not to say that human rights protection did not need to be fortified throughout the Community generally, or that the Charter project would not have been pursued but for the prospect of eastward enlargement. But that prospect furnished an important impetus".<sup>32</sup> It certainly makes good sense to connect the Charter and enlargement in this way, but it is not obvious that, as a matter of the actual process of drafting and preparing the Charter, the enlargement factor played any significant role, at least, at the level of subjective motivations of the Charter drafters and the main players involved in the Charter process.<sup>33</sup> The Cologne summit of June 1999 announced that the main motive for launching the Charter project was the perception that the protection of fundamental rights – and its visible symbol in the form of a Charter – is an indispensable factor of the EU's legitimacy *within* the existing borders of the Union: the summit expressly drew a link between the protection of fundamental rights and the legitimacy of the Union but with an eye on the public in the member states, not the applicants.<sup>34</sup> And yet, regardless of the subjective

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<sup>32</sup> George Bermann, "Law in an Enlarged European Union", *EUSA Review* (14:3), Summer 2001, <http://www.eustudies.org/bermann.html>.

<sup>33</sup> See Sadurski, *supra* note 10 at 346-48.

<sup>34</sup> The conclusions of the Cologne summit of 3-4 June 1999 declared that "[p]rotection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her *legitimacy*", and that "[t]here appears to be a need . . . to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible *to the Union's citizens*", European Council Decision on the Drawing Up of a Charter of Fundamental Rights

motivations of those who launched the Charter project, and those who pursued it up to the Nice summit, the objective function of the Charter has been, among other things, to facilitate enlargement by reducing the above-noted problems related to human rights conditionality. And this is not just sheer speculation; at least some applicant states ascertained the benefit of the Charter in precisely this way.<sup>35</sup>

## 2. Sovereignty Conundrum and the Charter

The conventional wisdom, which has been heard so many times recently in the discussions regarding the accession of CEE countries to the European Union, has it that there is a certain cruel irony in the process of accession. Countries with a proud national history, which have only just emerged from several decades of humiliating and oppressive domination by the Soviet Union, at worst being subjected to forceful integration into Soviet statehood (as was the case of the Baltic states), and at best suffering all the burdens and disadvantages of “limited sovereignty”, are now about to embark upon the surrender their sovereignty again, this time for an admittedly benign foreign body, but foreign nevertheless.<sup>36</sup> This statement (which, for the sake of brevity) I will be referring to as the “sovereignty conundrum” (SC) has been formulated in many variants and versions, both within and outside CEE, and not necessarily by those who are hostile to accession/enlargement. Rather, it has a value-neutral character: it merely draws attention to a certain historical irony, or a major problem to be solved. It points to a possible (partial) explanation for the relatively low support

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of the European Union, Annex IV to conclusions of the Cologne summit, available at <http://db.consilium.eu.int/df/default.asp?lang=en>, emphases added.

<sup>35</sup> An official document of the Polish Ministry for Foreign Affairs entitled “The Treaty of Nice: The Polish Point of View”, in the section devoted to the Charter of Fundamental Rights, states: “The Charter places difficult challenges in front of the candidate-states, but at the same time, it . . . renders the procedures of accession to the EU more transparent and the assessments [of whether a candidate state meets the accession criteria] – more predictable”, Jan Barcz et. al, eds, *Traktat z Nicei.: Wnioski dla Polski* (Warsaw 2001) 208. A similar view was expressed in the first Polish book-length commentary on the Charter, Stefan Hambura & Mariusz Muszynski, *Karta Praw Podstawowych z komentarzem* (Studio Sto: Bielsko-Biala 2001) at 229.

<sup>36</sup> See, e.g. Jürgen Habermas (“In [Central and Eastern European] countries there is noticeably little enthusiasm for the transfer of the recently won rights of sovereignty to European level”), “So, Why Does Europe Need a Constitution?” Robert Schuman Centre Policy Papers, Series on Constitutional Reform of the EU, 2001-02, <http://www.iue.it/RSCAS/e-texts/CR200102UK.pdf> at 7; András Nikodém, “Constitutional Impact of the Eastward Enlargement in Central-Eastern Europe. Report on Session III”, in Kellermann *et al.*, *supra* note 25, at 377.

for accession found in at least some of the CEE countries,<sup>37</sup> and for the popularity in those countries of certain anti-EU political movements which use the slogan: “We have just got rid of Moscow’s domination and are about to subject ourselves to domination by Brussels”. One does not have to buy all the demagogic contents of these slogans in order to appreciate why they may strike a sympathetic cord with a large segment of public opinion in CEE societies. And if this is the case, this may both weaken the legitimacy of the new states’ accession (by depriving the pro-European elites in those countries of strong social support), as well as, in the post-accession period, weaken those states’ commitment to supranationalism, the Community method, and the *bona fide* observance of the Union’s rules (again, due to lukewarm social support for such political behaviour). Or, at any rate, such an argument can be made, and it does not sound wildly implausible.

## 2.1 Sovereignty Conundrum and Nationalism

Like every piece of conventional wisdom, the SC (again, understood as a purely descriptive statement, without either endorsing or refuting the sentiments described by it) has a rational core to it but also builds upon a degree of misperception of the attitudes dominant in the CEE countries. Let me begin with the rational core. It is *not just* that the citizens of postcommunist states of CEE have a special desire for something of which they have been deprived for so long, and that their embrace of a strong sovereignty principle was a natural reaction to decades of forceful denial of, or at least very drastic limitation of, sovereignty. The causes for the celebration of sovereignty of a nation-state go deeper than that. After the fall of Communism, national identity (often perceived in an ethnic rather than civic fashion) has been either the only or the most powerful social factor, other than those identified with the social foundations of the *ancien régime*, capable of injecting a necessary degree of coherence into society and of countervailing the anomie of a disintegrated, decentralised, and demoralized society. An expectation, expressed especially in the 1970’s and 1980’s by the fledgling democratic opposition in some of these countries (in particular, in Poland, the then Czechoslovakia and Hungary), that “civil society”, constructed on the basis of the rules of social solidarity, responsibility and strong informal networks constituting the intermediate structures between the state and the family, would play the role of such unifying, anti-anomie forces, turned out to be a little more than wishful thinking. In some of these societies (in particular, in Poland) the dominant religion played such a role to a limited degree and for a

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<sup>37</sup> In late 2002, in three candidate states in CEE (Estonia, Latvia and Slovenia) a majority of people did not think that their country’s accession would be “a good thing”, see “Candidate Countries Eurobarometer 2002: First Results”, [http://europa.eu.int/comm/public\\_opinion/archives/cceb/2002/cceb\\_2002\\_highlights\\_en.pdf](http://europa.eu.int/comm/public_opinion/archives/cceb/2002/cceb_2002_highlights_en.pdf) visited 11 February 2003.

limited period of time, but it faced its own problems given its need to reconstitute its social role in a situation in which it no longer constituted the only free political space in an otherwise unfree society. So virtually the sole common force capable of supporting the social coherence required for state building after the fall of communism was a national idea which feeds itself largely on the ideal of sovereignty of the nation-state.<sup>38</sup> As Claus Offe has noted: “The sheer absence of imagined as well as institutionalized collectivities such as classes, status groups, professional or sectorial associations, constituted religious groups, etc. moves the ethnic code into a prominent position”.<sup>39</sup>

It is easy (and often, it is more than justified) to discredit the national idea as xenophobic, primitive, and with a built-in potential to degenerate into a rationale for violence against the “other”. The unwholesome picture of the virulent aspects of nationalism in CEE after the fall of Communism, ranging from open discrimination against Russians in newly liberalized Baltic states, through the “velvet divorce” of Czechoslovakia, and ending with brutality towards the Roma throughout CEE, show the pathological excesses of nationalism in the region. But this does not detract from a descriptive statement that nationalism was an indispensable factor in providing the basis for societal mobilization without which the processes of state-building and state transformation would not have occurred, or would have been even less successful than they were in CEE. And since all these countries committed themselves, at least in declarations, to democratic state-building or transformation, a national idea (sufficiently contained and domesticated) turned out to be an indispensable factor of the democratization effort after the fall of communism in CEE. Since the ideological factors presupposing a strong civil society are largely missing in CEE, it is no wonder that it was a by-and-large ethnic variation of nationalism which often provided the support for state building. As a Hungarian scholar puts it succinctly: “Post-communist states cannot escape becoming nation-states because the community and homogeneity necessary for the functioning of a state will be based on ethnic community”.<sup>40</sup>

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<sup>38</sup> Of course, the link between nationalism and celebration of sovereignty is contingent; the national idea (even in its strong forms) can thrive without, or even against, the context of a sovereign state. But in countries such as Poland or the Baltic States where the memories of the loss of sovereignty are strong, the two happen to come in a package. I will return to this point below.

<sup>39</sup> Claus Offe, “Ethnic Politics in European Transitions”, working paper of Zentrum für Europäische Rechtspolitik an der Universität Bremen, Bremen: February 1993, at 26, footnote omitted.

<sup>40</sup> Andras Sajo, “Protecting Nation States and National Minorities: A Modest Case for Nationalism in Eastern Europe”, *U. Chi. L. Sch. Roundtable* (1993) 53-74 at 53.

This confirms the analysis that John Breuilly develops in his study of the relationship between nationalism and the modern state.<sup>41</sup> Breuilly identifies three main functions of nationalist ideologies vis-à-vis the state which render nationalism a particularly effective component of political action: those of coordination, mobilization and legitimacy.<sup>42</sup> The mobilization function is of particular relevance in our context: while Breuilly carefully emphasizes that the general process of mobilization in the modern state does not necessarily give rise to nationalistic politics, especially when different social groups find effective ways of expressing their interests to government, nevertheless in circumstances where civil society is poorly articulated and where the representation of social interests by parties based on class or special interest is either blocked or underdeveloped, nationalism becomes a convenient device of political mobilization. This – we may observe – is precisely the case in postcommunist societies, and the words written by Breuilly about colonial situations apply equally well to postcommunist CEE: “In such cases the appeal to cultural identity is often a substitute for the failure to connect politics with significant social interests. . .”.<sup>43</sup> Furthermore, it needs to be remembered that a significant number of the accession states are, literally speaking, “new” states (all three Baltic states, Czech Republic, Slovakia and Slovenia). It is natural and understandable (even if deplorable) that “new states” make a strong appeal to national identity, both as a way of asserting their legitimacy in the international order and to match a new territorial polity to an ideology which provides the necessary degree of coherence and mobilization to make a new political elite sufficiently comfortable. It is also in the new states that nationalist movements – often in opposition to a dominant elite – have a particularly fertile ground for development (as there is always a degree of territorial-ethnic mismatch inherited from the older state), and they push the dominant elite into a more nationalistic policy, often despite itself.<sup>44</sup>

This indicates that the SC is actually stronger than its conventional articulation would suggest. It amounts to a large irony: on the one hand, the prospects of accession are seen (rightly) as being related to the consolidation of democratic institutions in candidate states; on the other hand, the robustness of new democracy in these countries relies partly on the nationalistic idea which is in tension with the accession. I use the word “tension” rather than “conflict”

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<sup>41</sup> John Breuilly, *Nationalism and the State* (St. Martin’s Press: New York 1982). Chicago 1985) at 349.

<sup>42</sup> *Id* at 365-73.

<sup>43</sup> *Id* at 371.

<sup>44</sup> “It is in the new state rather than in the colonial state that cultural identity becomes a way of justifying political opposition to the state, often a state which itself claims to define and express national values”, *id.* at 374-75.



advisedly as, in the end, there need not be any irreconcilable conflict between membership of the EU and preservation of strong national and ethnic identity, centred or not around the traditional nation-states. Indeed, it is not obvious that nationalist ideas are inevitably hostile to supranational authority, and more specifically towards the "dissolution" of nation-state authority within a web of overlapping networks of authorities within the EU. Under some circumstances, especially when national claims are made from within a cultural-national perspective of a state, which fails to encompass the entire ethnic nation concerned, nationalist feelings may favor supranationalism as a form of transcending the nation-state framework, which is seen as being incapable of properly capturing the cultural space of a nation, and when at the same time a dream of a "larger" nation-state is abandoned as unrealistic. The transfer of a part of sovereign authority to the supranational level on the one hand, and the regional level on the other, may be seen as conducive to, rather than hostile to, the exercise of nationalistic cultural, linguistic and social claims. János Kis describes an interesting development of certain strands of Hungarian nationalist conceptions in recent years. In the late 1970s there was a rediscovery of Hungarian minority cultures outside the Hungarian state, and an attempt to reintegrate them into the general culture of the Hungarian nation.<sup>45</sup> This rediscovery, by Hungarian populist intellectuals, Kis recounts, took several forms, one of which was to adopt the language of minority rights and democracy in order to defend the Hungarians in Romania, Slovakia and Serbia against oppression and forced assimilation. After the fall of Communism, and especially after the government set the goal of entering the EU as one of its key strategic targets, some populist nationalists embraced the idea that the "Hungarian question" could find a proper resolution within the EU rather than within the existing structure of nation-states in Central Europe. As one of the Hungarian authors claimed, in the words of Kis, "the downgrading of the sovereign state and the upgrading of the regions below it, with a capacity for crosscutting state boundaries, might bring the problem of the Hungarians close to a solution".<sup>46</sup>

The story that Kis tells is instructive because it shows that one should not take for granted a relationship between nationalism and the strong endorsement of nation-state sovereignty. Still, it does not fully dispose of the irony just noted with regard to the role of nationalism which is central to the process of state building at the same time that it disrupts moves towards EU accession. For one thing, as Kis himself admits, his story is just part of the picture of Hungarian nationalism;

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<sup>45</sup> János Kis, "Nation-Building and Beyond", in Will Kymlicka & Magda Opalski, *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Press 2001): 220-42 at 232-39.

<sup>46</sup> Id. at 239.

there are also those on the national right who are ideologically hostile towards supranationalism. Second, the alliance of nationalism with pro-EU sentiment is purely strategic and instrumental rather than principled. Third, it is supported by conditions which are not present in many other candidate states. For instance in Poland, a country in which concern for the fate of Poles living in neighboring states has never weighed very heavily on the ideology of the nationalist right (certainly, not as much as was the case of the Hungary), the idea that EU supranationalism may be a form of building linkages with Poles in Lithuania (much less, in Ukraine, Belarus or Russia, for whom EU membership is not on the horizon) simply has not registered in the ideological discourse about nationalism and sovereignty. So the tension just identified, between nationalism and the dissolution of sovereignty with the EU is real, and it needs to be taken into account when discussing the SC.

## **2.2 Sovereignty: Public Concerns and Constitutional Doctrine**

On the other hand, there are some factors which weaken, rather than amplify, the SC insofar as it may pose a problem for the smoothness of the accession process. For one thing, in current debates on accession within candidate states, the question of sovereignty is more often raised by politicians hostile to the EU than by the population at large. The concern about losing sovereignty is not something that dominates Eurosceptic public opinion.<sup>47</sup> Among the factors which trigger anti-accession views, socio-economic factors (a cold calculus of benefits and costs) are far more important than emotional and symbolic sovereignty issues.<sup>48</sup> If one follows public debates in the media, then one will find that the EU-hostile pronouncements are usually based on the feeling that certain groups (such as farmers) will be unfairly treated under the transitional rules; that social and economic dislocations will be too harsh; and that some countries may even become net contributors to the EU rather than net beneficiaries of the accession. A highly symbolic concern about the prospect of a loss of sovereignty is far removed into the background, and much more frequent (and therefore, visible or rather audible) in politicians' speech than in people's minds. There are a number of reasons for this. First, concerns about the loss of sovereignty have been long

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<sup>47</sup> See for example the public opinion survey of January 2003 in Poland, which concerned the motives for approval or rejection of accession to the EU. Among those who intend to vote against accession in the referendum, the danger to national sovereignty was ranked number four among the reasons produced for such a preference. Above it were fears related to the domination of the foreign capital, bad effects upon agriculture and the lack of preparedness of Poland for integration, see 'Motywy poparcia lub odrzucenia integracji: Komunikat z badan', Centrum Badania Opinii Spolecznej, Warsaw January 2003 (unpublished manuscript on file with the author) at 4.

<sup>48</sup> See id. at 4.

associated in these countries with the fear of an aggressive, military neighbor, often an occupant, and “Brussels” simply does not fit this image. In CEE at least, a state “normally” loses its sovereignty to a violent, military aggressor who takes it away from you; not to a benign grouping of states whom you ask to take it from you (however misplaced, in the eyes of the critics, such a request may be). Indeed, the contrast between the old fear of the USSR (or Germany) and the traditionally positive, often lyrical, myth of Western Europe, renders the EU-related sovereignty fears unreal and ridiculous.<sup>49</sup> Second, the EU is widely perceived in CEE as not much more than a free-trade organization, a little bit like the old EEC or current EFTA; the reality of the degree of supranational political phenomena and of the political authority vested with supranational bodies has not been transmitted to many people in CEE, other than a handful of experts. So while, on the one hand, traditional approaches to national sovereignty still dominate in CEE,<sup>50</sup> on the other hand, the popular perception of the EU does not threaten those approaches.

A certain role is also played by doctrinal constructions of sovereignty within the EU, and the fate of the sovereignty of candidate states once they enter into the enlarged EU. To be sure, this role must not be exaggerated. Constitutional legal scholars have a very limited impact upon public discourse in general, and whatever legal constructions of sovereignty they come up with may affect public perceptions only to a limited degree. But there is a slow (and indirect) but steady impact by constitutional scholarly works upon the way in which sovereignty is constructed within the political class, and in society at large. It is therefore important to look at the dominant views within legal-constitutional scholarship about what happens to the sovereignty of the member states within the EU.

As a representative example of the doctrinal approaches to sovereignty in the context of the impending EU membership, consider Polish constitutional doctrine. My own reading of Polish scholarship in the field convinces me that

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<sup>49</sup> Stephen Whitefield and Geoffrey Evans conclude, on the basis of their analysis of surveys in CEE countries that attitudes towards “the West” in those countries are usually not motivated by concerns about national independence. To the extent to which concerns about national independence and patriotism are strong, they are usually related to near neighbors (e.g., nationalist attitudes in Hungary are focused on the fate of ethnic Hungarians in neighboring countries; nationalism in Baltic states is concerned about relations in Russia and Russian-speakers in those countries, etc) rather than to Western Europe, see Stephen Whitefield & Geoffrey Evans, “Attitudes towards the East, Democracy, and the Market”, in Jan Zielonka & Alex Pravda, eds, *Democratic Consolidation in Eastern Europe*, vol. 2 (Oxford University Press, Oxford 2001): 231-53 at 248-49.

<sup>50</sup> See Anneli Albi, “Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and the Candidate States?”, in Neil Walker, ed., *Sovereignty in Transition* (Hart: Oxford 2003, forthcoming).

there is a clear dominance of theories which deny the “loss of sovereignty” thesis, and therefore define the SC out of existence. They all try to reconcile (1) the traditional discourse of sovereignty with (2) the realities of the EU and with (3) the thesis that no loss of sovereignty will occur after accession. One would think that such a combination of these three elements is unlikely; after all, both the range of powers exercised by the EU and the relationship between the EU and national institutions support Bruno de Witte’s suggestion that “the European Community cannot easily be integrated within the traditional account of popular sovereignty”.<sup>51</sup> And yet it seems to come quite naturally to Central European constitutional scholars, especially when helped with the language of the relevant constitutional provisions.

Typically these constructions rely upon a distinction between “sovereign powers” (or “sovereign authority”) of a state and “sovereignty” itself.<sup>52</sup> Some commentators, especially those inclined towards international law, emphasize that any international treaty consists of a surrender of some sovereign rights, but this is in itself an exercise of sovereignty. In this respect, the EU is not seen to be qualitatively different from other international organizations; there may be a difference in the extent of the powers delegated to the EU but this is usually dismissed as being merely a matter of degree. The upshot of these theories is that the states “delegate” to the EU some of their sovereign rights but not their sovereignty itself; hence, in the words of one scholar: “sovereignty is not lost as a result of the process of integration [within the EU]”.<sup>53</sup>

In Poland, as in some other candidate states, these doctrinal constructions parallel the language of the Constitution which provides for a special ratification procedure for those international treaties as a result of which Poland “transfers the competencies of state organs in some matters to an international organization

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<sup>51</sup> Bruno de Witte, “Sovereignty and European Integration: the Weight of Legal Tradition”, in Anne-Marie Slaughter, Alec Stone Sweet & J.H.H. Weiler, *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing: Oxford 1998): 277-304 at 281. Elsewhere, de Witte asks whether it has not become an artificial contrivance to explain the operation of the European Union institutions as the ‘common exercise of State sovereignty’, when we know that important decision-making powers are exercised by the Commission and the European Parliament, who operate independently from the states, and that the Council itself increasingly decides by qualified majority, so that a particular state can be outvoted?”, Bruno de Witte, “Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?”, in Kellerman *et al.* *supra* note 25: 65-80 at 79.

<sup>52</sup> See e.g. Anna Raczynska, “Reinterpretacja pojecia suwerennosci wobec czlonkostwa w Unii Europejskiej”, *Przegląd Europejski* no. 1 (2001): 95-118 at 113-14, and various sources quoted there.

<sup>53</sup> *Id.* at 115.

or an international body” (Art. 90 (1)).<sup>54</sup> On that basis, it is not difficult for doctrine to conclude that the “Constitution guarantees the keeping of sovereignty by the Polish state in the integration processes”.<sup>55</sup> As a leading Polish legal scholar claims, the constitutional formulation implies that (a) there is a constitutional ban on the transfer of the “totality” of state powers; (b) even within the matters transferred, what is being surrendered is the monopoly of state power but the state maintains some powers with regard to these matters; (c) the transfer is not absolute and not irrevocable.<sup>56</sup> (Indeed, an earlier draft of this constitutional provision said that what is being transferred is the “execution” of some state competencies, and not the competencies themselves. While the distinction between the “execution of competencies” and the competencies *per se* was eventually abandoned, the doctrine explains the drop of this formula by “linguistic reasons only” and attaches no significance to this change of mind of the constitution-makers).<sup>57</sup>

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<sup>54</sup> Similar is the wording of the corresponding provisions of many other applicant states’ constitutions in CEE; for a useful compilation and discussion, see Anneli Albi, “The ‘Souverainist’ Constitutions of the Eastern European Applicant Countries with a View to EU membership”, unpublished manuscript 2002 on file with the author, Table 2. A similar construction has been adopted among most other Member States of the European Communities; most of them had adopted, in the words of de Witte, “th[e] cautious approach - accommodation of the principle of sovereignty to the needs of international cooperation, but preservation of its existence”, de Witte, “Sovereignty”, *supra* note 51 at 282. De Witte distinguishes between the two models: the Belgo-German formula which allows for *attribution of powers* to international organisations or transfers of sovereign rights, and the Franco-Italian formula which expressly allows for *limitations of sovereignty*; the only constitution using both these formulas being the Greek Constitution, *id.* at 282-4. De Witte warns against attaching any special importance to the distinction between the “transfer” and the “limitation” formula because, as he says, “in the case of the European Communities, the limitation of sovereignty has been accompanied by the attribution of powers to international institutions, and those two operations are inseparable, *id.* at 284.

<sup>55</sup> Jan Barcz, “Akt integracyjny Polski z Unia Europejska w swietle Konstytucji RP”, *Panstwo i Prawo* no. 4 (1988): 3-17 at 8.

<sup>56</sup> *Id.* at 9.

<sup>57</sup> *Id.* at 9. But, in fairness, I should add that the same author characterized the “traditional point of view . . . that membership of a state is in conformity with the state and national sovereignty and with political independence” as “ever less intelligible and less convincing” and urged reconsideration of the concept of sovereignty in the light of EU integration processes, see Jan Barcz, “Suwerennosc w procesach integracyjnych”, in Wladyslaw Czaplinski, ed., *Suwerennosc i integracja europejska* (Warsaw University Centre for Europe: Warszawa 1999) at 35. Similarly, Mirosław Wyrzykowski called for a “new, modern approach to the problem of sovereignty” and deplored “recourses to a false understanding of the concept of sovereignty”, the one “rooted in the past already gone”, Mirosław Wyrzykowski, “Klauzula europejska - zagrozenie suwerennosci? (suwerennosc a procedura ratyfikacyjna czlonkostwa Polski w UE)”, in Czaplinski, *id.* 85-96 at 96. Another scholar notes that, in view of the ECJ jurisprudence

In conclusion, legal constitutional scholarship in the candidate states is working hard to reconcile the state-focused discourse of sovereignty with the legal realities of the forthcoming accession to the EU, and in doing so it constructs a legal fiction whereby the transfer of some (even crucial) powers to the supranational level does not amount to a transfer of sovereignty but only to a transfer of the exercise of some sovereign powers.<sup>58</sup> The post-sovereign, cosmopolitan position<sup>59</sup> has not yet made any meaningful inroads into scholarly (or political) discourse.<sup>60</sup> But, considering my earlier remarks about the role of nationality in post-communist transformation, this is not surprising, and perhaps not even such a bad thing, because it allows scholarly discourse to stay in reasonable proximity to societal views and expectations. While the attachment to traditional notions of sovereignty by legal scholars is best explained by their intellectual conservatism, a positive side effect of this is that they do not cut themselves off from dominant social attitudes and do not lose the capacity for effective political influence. In this way, constitutional-legal scholarship may play a useful legitimating role: it may produce the legitimating theories which will reconcile the divergent pressures as encapsulated in the SC: the pressure towards accession to the increasingly supranational EU with the pressure to stick to the traditional and deeply cherished notions of sovereignty.

### 2.3 Rights, the Charter, and Public Concerns about Sovereignty

The upshot of the argument so far is that SC poses both a greater and a smaller problem for accession/enlargement than the conventional view would have it. On the one hand, there are factors which amplify its gravity: the natural appeal to nationalism as a rational device for mobilization in state building and state transformation processes, especially in (but not limited to) the circumstances of new states. On the other hand, there are factors which weaken the possible impact

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which grounds the rule of primacy of community law over domestic laws, “de facto decision-making by the [European] Union will deprive the concept of sovereignty of its real contents”, Krzysztof Wójtowicz, ‘Suwerennosc w procesie integracji europejskiej’, in Waldemar Jan Wolpiuk, *Spór o suwerennosc* (Wydawnictwo Sejmowe: Warszawa, 2001): 156-76 at 173, and that the absolute primacy of Community law over national constitutions will lead to “the erosion of the concept of national sovereignty”, id at 174.

<sup>58</sup> I hasten to add that scholarship and doctrine in candidate countries is not alone in having recourse to such fictions; for an account of “the traditional legal fiction that, when the European Community institutions exercise their powers, they are, constitutionally speaking, acting on behalf of the sovereign peoples of the Member States” as propounded in France, see de Witte, “Sovereignty”, supra note 51 at 296.

<sup>59</sup> See Albi, supra note 50.

<sup>60</sup> Though some legal scholars make *critical* statements about the persistence of false, obsolete concepts of sovereignty, see Wyrzykowski, supra note 57 at 96.

of the SC upon the smoothness of accession: an image of the EU as a benign power inconsistent with the traditional picture of sovereignty-threatening power in CEE; the perception of the EU as just another international organization; the legitimating effects of the scholarly construction aimed at reconciling the traditional notion of sovereignty with the legal consequences of accession to the EU.

These latter two factors will not last forever, though. Sooner or later, there will come a “reality check” both for general public opinion and for legal scholarship (and, in between the two, for political élites in the intersection between national government and the EU) that the EU is just not like any other intergovernmental entity; that accession to it is not like a ratification of any other international treaty; and that sticking to traditional constructions of sovereignty, according to which it remains with the Member States notwithstanding a “transfer of some sovereign competencies” will ring increasingly hollow. One cannot build a long-term prospect for the legitimacy of accession to the EU on perceptions which are unlikely to survive the reality of the accession.

My claim is that the constitutionalization of rights in the EU has the potential to overcome the SC. If there is one obvious domain in which the concerns with national identity and the accompanying notions of sovereignty are particularly weak in CEE it is in the area of protection of individual rights: both civil-political, and socio-economic. The reasons for this are too obvious to elaborate on. The legacy of Communism in which individual rights were trampled on is still fresh in many people’s minds. In those days, “intervention” from outside - in diverse forms ranging from official state policy (e.g., under the Carter administration), through NGO actions (especially Amnesty International, Helsinki Committee, and similar) and ending with foreign journalists reporting on human rights abuses in the USSR and its satellite states – was uniformly condemned by CEE governments as “interference in internal affairs” and applauded by the citizens of these states. Hardly anyone (other than those acting in an official capacity) took any offence at such intervention as offending national identity or identity. Indeed, it was often perceived as the only source of hope in an otherwise grim picture. For another thing, the current state of individual-rights enforcement is very far from perfect. Against by-and-large satisfactory constitutional charters of rights, there is a much less impressive practice of administrative non-compliance, and a slow and under-resourced system of justice.

This explains why the Strasbourg Court has been such a great success in the minds of the general public.<sup>61</sup> Even though actual decisions by the European

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<sup>61</sup> One partial measure of this success was the number of applications to the Court. Between November 1998 and 1 September 2000, the Court received 6847 applications from 17 CEE

Court of Human Rights (ECtHR) in cases from CEE are few and far between,<sup>62</sup> the Strasbourg Court occupies a very high position in the pantheon of European institutions as perceived by the citizens of CEE states.<sup>63</sup> The European Convention's system has already affected the sovereignty of European states in multiple ways. It has provided individuals with direct access to an independent European body to complain about their own governments; domestic (constitutional and "ordinary") courts have absorbed the ECtHR case law; legislatures and executives of the Council of Europe (CoE) member states have been compelled to align their laws and policies with the case law of the ECtHR; and specific ECtHR rulings have been implemented by the member states.<sup>64</sup> No serious objections to these "violations of sovereignty" committed by the Strasbourg Court have ever been, to my knowledge, raised in CEE; on the contrary, at the level of civil society, "Strasbourg" often functions as the last resort for those who allege violation of their rights, and its emotive and symbolic significance in public imagery is unequivocally positive. Strasbourg has therefore already made some inroads into state sovereignty via the human-rights path. But of course, the role of the European Convention of Human Rights (ECHR) system in legitimately providing remedies for faulty individual-rights protection systems is limited, both for procedural reasons (the condition of exhausting the national remedies in the states where those remedies are extremely inefficient is in itself, well, exhausting) and for substantive reasons (namely, having regard to the limited scope of the rights protected by the ECHR). The Convention has a very limited potential to become a significant part of the constitutional system of the states party to the ECHR, in a thick and broad sense of the term "Constitution". This is not to deny the status of the ECHR and of Strasbourg jurisprudence as law in a sense which goes well beyond a traditional, inter-governmentalist understanding of international law.<sup>65</sup> But it is not *constitutional* law in the sense

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states, which constituted 41 percent of all applications registered in that period (41 states are members of CoE), see Jeroen Schokkenbroek & Ineta Ziemele, "The European Convention on Human Rights and the Central and Eastern European Member States: an Overview", *Nederlands Juristenblad*, no 39/2000, 3 November 2000: 1914-20 at 1917.

<sup>62</sup> See Robert Harmsen, "The European Convention on Human Rights after Enlargement", *International Journal of Human Rights* 5 (2001): 18-43 at 28.

<sup>63</sup> Harmsen correctly assesses that "expectations of what may be accomplished through the Strasbourg system appear to run comparatively high in the [CEE countries]", *id.* at 27.

<sup>64</sup> For an overview of the main forms and areas in which the participation in the ECHR system has produced important changes in CEE legal systems, practices and institutions, see Schokkenbroek & Ziemele, *supra* note 61.

<sup>65</sup> See Richard S. Kay, "The European Human Rights System as a System of Law", *Colum. J. Europ. L* 6 (2000): 55-71. Kay analyses the ECHR law from the point of view of Hart's



of a polity-defining body of norms (though, arguably, it is more a matter of degree than yes-or-no distinctions), and the ECtHR is more of an international than a constitutional court.<sup>66</sup> Indeed, there has been a debate developing lately about whether the ECtHR should assume a more “constitutional” mantle, for example by elucidating the general principles upon which it bases its decisions rather than continuing its case-by-case approach, and it is interesting to note that it is precisely the enlargement of the CoE with new members from CEE that provided at least some of the participants in this debate with the direct impulse to make this suggestion.<sup>67</sup>

In addition, the strictness of “conditionality” applied by the CoE in considering applications for membership from CEE states has often been relatively low, partly because after the fall of Communism members of CoE perceived the benefits of embracing post-Communist states as outweighing the problems related to their non-compliance with ECHR standards; as one commentator notes, “[t]he West may have wasted leverage by hastily offering membership in the Council of Europe”.<sup>68</sup> Several critics have deplored the lowering of standards of the Council of Europe accompanying its own enlargement from 23 in 1989 to 43 in 2001.<sup>69</sup> In effect, some noted the danger of “double standards” but *reverse* to the one in the EU human rights policy (as discussed in Part I of this working paper) with the new members states of CoE being judged by *less* stringent standards than their Western European counterparts.<sup>70</sup>

However, the case of the EU Charter of Fundamental Rights is quite different. It has the canonical form of a standard constitutional charter of rights,<sup>71</sup> and soon will be incorporated (in one form or another) into a constitutional treaty of the Union. It is comprehensive, in the sense of incorporating, but going far beyond

concept of law and draws conclusions about its law-like character mainly on the basis of the “internal” attitude displayed in the compliance of states with the Strasbourg Court’s decisions.

<sup>66</sup> See Martin Shapiro & Alec Stone, “The New Constitutional Politics of Europe”, *Comparative Political Studies* 26 (1994): 397-420 at 411.

<sup>67</sup> See Harmsen, *supra* note 62 at 32-37.

<sup>68</sup> Karen E. Smith, “Western Actors and the Promotion of Democracy”, in Jan Zielonka & Alex Pravda, eds, *Democratic Consolidation in Eastern Europe* (Oxford University Press: Oxford 2001), vol. 2: 31-57 at 43.

<sup>69</sup> For a discussion of some of these critiques, see Harmsen at 19-22.

<sup>70</sup> See Harmsen, *supra* note 62 at 30.

<sup>71</sup> See Neil Walker, “The Charter of Fundamental Rights of the European Union: Legal, Symbolic and Constitutional Implications”, in Peter A. Zervakis & Peter J. Cullen, eds, *The Post Nice Process: Towards a European Constitution* (Nomos: Baden-Baden, 2002): 119-28 125 (stating that “the Charter as drafted already bears all the hallmarks of a legal instrument” and that it “is designed ‘as if’ it could have proper legal effect” (footnote omitted)).

the strength and the scope of rights protected by, the ECHR.<sup>72</sup> And, finally, there is no expectation that the Charter will be applied less stringently to the new member states as compared to the old members states of the EU, thus becoming a mere “educational” rather than a constitutional document.

The crux of my argument in this part of the paper is that, as the process of European constitution-making progresses and embraces a fully-fledged Charter of Fundamental Rights, the SC can be largely overcome. This is for a combination of the following factors: (a) while the rights-dimension of the EU is now largely invisible to the general public of the candidate states, there is a potentially positive, receptive attitude in those countries for strong external scrutiny of constitutional rights implementation; if the EU becomes perceived in this way, this will strengthen its prestige and weaken any misgivings related to the SC; (b) there is a high degree of consistency between the structure of constitutional rights in the post-communist candidate states of CEE and the structure of rights as displayed in the EU Charter.<sup>73</sup> Note that the *combination* of both these factors, rather than each taken separately, is necessary to make the argument about overcoming the SC work. The first factor, taken on its own, may apply to any external human-rights scrutinizer, including the UN Commission on Human Rights, the US Congress or the ECtHR. The second factor, taken on its own, may merely suggest that the candidate states will have no problems with accepting the Charter because they will recognize in it a lot of their own constitutional design. But when combined, these factors point to a way to overcome the SC because individual rights are a natural and generally accepted inroad into national feelings which feed traditional conceptions of sovereignty, while constitutionalism provides for a process in which a given policy can define its own identity on its own terms without necessarily resorting to hostility-engendering notions of otherness. A smooth absorption of the constitutional identity of new member states (in so far as their constitutional rights are concerned) into a broader constitutional identity of the EU offers hope for overcoming the SC as a possible obstacle to enlargement, which would then not threaten (as many EU observers fear) the further deepening of the political union.

The parallelism between the constitutionalization of rights in, and the enlargement of, the EU opens up a possibility for the EU to be seen as, importantly and alongside its many other legitimating dimensions, an important

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<sup>72</sup> The Explanatory Notes of the EU Charter list twelve articles of the EU Charter (out of fifty substantial right articles) which have equivalents in the ECHR, and additionally four articles where the EU Charter provides more extensive protection than the equivalent right in the ECHR. A very rough and imprecise count would suggest that the ECHR coverage constitutes around thirty percent of the EU Charter’s coverage.

<sup>73</sup> For an argument supporting point (b), see Sadurski *supra* note 10 at 349-59.

human-rights actor in the eyes of politicians, legal scholars and the general public in the accession states (and in the member states, for that matter). The fact that the EU has massively taken on board the issue of human rights at about the same time as its Eastward enlargement, offers an opportunity for combining the two in a way which is more than just chronological but also functional and legitimizing. Functional: in the sense that the important function of the EU may be seen as ensuring the respect for and implementation of specific human rights, and not merely paying lip service to some fundamental principles as pronounced in Article 6 (1). Legitimizing: because its effectiveness in playing this role will constitute an important factor in building prestige, authority and ultimately political legitimacy in the eyes of the general public even in those societies which display the SC.

It is important to emphasize that I am not making a claim that a more human-rights-friendly EU is necessarily a Union closer to citizens everywhere: it may be that, as Professor Weiler has argued, in the states which do not suffer from rights deficits, the effect of adding rights to the supranational level may put more distance between individuals and the Union, rather than bring them closer.<sup>74</sup> My argument is specific to the post-authoritarian societies of CEE: a saturation with rights is emphatically *not* part of the collective memories of these societies, or of their present dominant perceptions, and the identification of the EU as yet another layer of possible rights protection is more likely to strengthen its legitimacy in the eyes of the general public.

The EU is not yet perceived by public opinion in the accession countries as an entity with a high degree of relevance to individual rights:<sup>75</sup> it is seen (by proponents of the accession) as a source of improvement of economic well-being, for example through financial and technical assistance, leading to rapid economic growth and prosperity and, increasingly, as a device for strengthening regional strategic security, especially in the context of – what is often perceived as – the watering down of the defensive nature of NATO. The social perception of the EU as not essentially a human-rights related entity is largely justified: this is for the reasons mentioned at the beginning of this working paper which give rise to the fundamental ambivalence of the EU as far as human rights are concerned. For one thing, the constituent European Treaties – a primary source of knowledge

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<sup>74</sup> J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) at 334-35.

<sup>75</sup> This contrasts with the views of some legal scholars in CEE; the article co-authored by a leading Polish expert in EU law claims that “the mechanisms established on the basis of the [European] Treaties for the protection of individual rights are impressive”, Wladyslaw Czaplinski & Natividad Fernandez Sola, “Demokratyczna forma rządów i ochrona praw człowieka w Unii Europejskiej w swietle Traktatów z Maastricht i Amsterdamu”, in Czaplinski, *supra* note 57 at 179.

about the EU for non-members – contain very few human-rights provisions.<sup>76</sup> Similarly, and importantly to those who, rightly or wrongly, identify rights practice with the justiciability of those rights, the actual human rights record of the ECJ is – quantitatively, at least – quite insignificant.<sup>77</sup> This public perception of the EU explains why the EU Charter does not loom large in the debates about the pro’s and con’s of accession in CEE states. But this need not be so in future, and the more prominence given to the Charter and to the human-rights policies of the EU in the post-accession period, the more likely it will be that the sovereignty conundrum will be largely overcome in its effect upon the behaviour of new member states.

One important occasion, regrettably, has been lost: the possibility of involving the candidate states’ representatives in the substantive debate on the Charter during the Convention on the Future of the EU. So far, the Charter has been treated as substantively untouchable, and nothing suggests that this approach will change before the end of the Convention.<sup>78</sup> The accession states which face a “take it or leave it” situation – of course “took it”, mainly because they cannot afford at this crucial stage of pre-accession to open a major front of conflict with the Member States regarding the fundamental normative ideals about the future of Europe.<sup>79</sup> Alas, the potential of the Charter to penetrate the public discourse

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<sup>76</sup> Textual human-rights provisions of the TEU are limited to the principled commitments of Article 6, to the Article 7 powers to investigate the internal policies of members states in order to monitor compliance with human rights, Art. 177 on development policy agreements and Art. 13 on anti-discrimination legislation; see De Burca, *supra* note 16 at 137-38.

<sup>77</sup> See von Bogdandy, *supra* note 18 at 1321; Bruno de Witte, “The Past and Future Role of the European Court of Justice in the Protection of Human Rights”, in Alston, *supra* note 11: 859-97 at 869.

<sup>78</sup> There is a strong and understandable temptation to treat the Charter as a document which should be included in the future EU Constitution “as is”, and thus best treated as an optimal charter of rights achievable within the EU at this current point in time; any revisiting of the document would be seen as fraught with the danger of (re)opening Pandora’s box, see footnote 6 above. But there is also an opposite view, though expressed outside the Convention, that “before incorporation [into the future Constitutional Treaty], the existing Charter of Fundamental Rights must be revised and aligned with national Constitutions in both the EU-15 and the accession states” and that “there is a need for a more streamlined and consistent document”, “Thinking Enlarged: The Accession Countries and the Future of the European Union”, A Strategy for Reform by the Villa Faber Group on the Future of the EU, Bertelsmann Foundation and Center for Applied Policy Research, University of Munich (October 2001), [http://www.cap.uni-muenchen.de/download/thinking\\_enlarged.pdf](http://www.cap.uni-muenchen.de/download/thinking_enlarged.pdf), p. 13.

<sup>79</sup> For a good description of Poland’s official attitude towards the future of the EU, and its reluctance to enter into fundamental controversy about the *finalité*, see Rafal Trzaskowski, “From Candidate to Member State: Poland and the Future of the EU”, The European Union Institute for Security Studies, Occasional Paper No. 37, September 2002.

about the constitutional future of the EU has been largely lost. (I put to one side the missed potential for generating a debate about the Charter in the West: although it is an interesting and in many respects an impressive document, it is not beyond substantive criticism,<sup>80</sup> and to treat it as untouchable at the first democratic quasi-constitutional forum dealing with the “future of Europe” smacks of manipulative politics). And the formal endorsement of the Charter by the representatives of the accession countries will be superficial and perfunctory for the reasons so well described by Antje Wiener: norm-compliance increases when there is a possibility for agents to contest the norms at the stage of their formulation because it maximizes what Wiener calls “norm resonance”, i.e. the resonance of the supranational norms with the domestic contexts. As Wiener says: “the more the conditions for access to participation in the process of validating constitutional norms are enhanced, the more likely it is that the constitutional bargain resonates well within the fifteen plus domestic contexts”.<sup>81</sup> Indeed, it is sometimes pointed out that among the reasons which may feed “Eurosceptic” attitudes within the candidate states is the fact that “the EU is becoming more and more ‘defined’, which limits the possible revisions to it”;<sup>82</sup> in contrast, the sense of (at least, potential) co-authorship of the EU rules should add to a generally positive attitude towards the Union.

### **3. Conclusions: Constitutionalization, Rights and Enlargement**

The parallelism of constitutionalization and enlargement was characterized at the outset of this paper both as a potential threat and as an opportunity. One way in which it may be seen as an opportunity is that it may indicate to the leading actors in both processes (the élites in the Member States, in the candidate states, and in Brussels) that a lot of learning from one process is available to enhance the other. More specifically, the rules worked out in the dynamic process of accession of new members may feed back into the constitutional structure of the

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<sup>80</sup> For a damning, but serious and detailed, critique of the substance of the Charter, see Nikolas Roos [Professor at Maastricht University], “Fundamental Rights, European Identity and Law as a Way to Survive”, unpublished paper, presented at the conference on Methodology and Epistemology of Comparative Law, Brussels, 24-26 October 2002 (Working Group on Human Rights). For a gentler suggestion that some provisions of the Charter need further work, before the (proposed) incorporation of the Charter into the Treaties, see Jürgen Schwartz, “Constitutional Perspectives of the European Union with Regard to the Next Intergovernmental Conference in 2004”, *European Public Law* 8 (2002): 241-254 at 248. These critiques of the Charter should be invited rather than avoided at this stage of constitutional discourse.

<sup>81</sup> Wiener *supra* note 3 at 30.

<sup>82</sup> Petr Kopecký & Cas Mudde, “The Two Sides of Euroscepticism: Party Positions on European Integration in East Central Europe”, *European Union Politics* 3 (2002): 297-326 at 319.

EU in ways which would have not been thought of (or which would be politically less practicable) in the absence of enlargement. One such example is the way in which the rules on minority protection, coined as they were for the purpose of policing the internal behaviour of candidate states, *may* penetrate into the constitutional normativity of the EU as a whole. As Bruno de Witte speculates, one can envisage a scenario “in which accession of Central and Eastern European countries will gradually make minority questions more prominently present in the institutional system and in the policies of the EU”.<sup>83</sup> More generally, the whole set of meanings and interpretations worked out in the context of conditionality (as evidenced well by the remarkably wide-ranging annual report of the Commission on the progress towards accession by each of the candidate countries) may well become a part of the institutional memory of the Union and loop back in the broader context of the EU, beyond the limited parameters of enlargement.<sup>84</sup> In that way, the parallel pursuit of enlargement and of constitution making may produce synergies which can be beneficial for the better understanding and fine-tuning of constitutional rights within the EU's constitution.

This leads to a broader point regarding the role of values and norms in the construction of the identity of the EU. The normative force of the motives and arguments for enlargement – the force emphasized in the work of such authors as Frank Schimmelfennig,<sup>85</sup> Karin Fierke and Antje Wiener,<sup>86</sup> Lykke Friis and Anna Murphy,<sup>87</sup> and Ulrich Sedelmeier<sup>88</sup> – has huge potential for infusing the EU constitution-making process with value-orientation and with a deliberate reflection on the axiological (as opposed to merely managerial or economic) reasons for a stronger political union supported and symbolized by the

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<sup>83</sup> De Witte, *supra* note 4 at 240.

<sup>84</sup> See, similarly, Wiener *supra* note 3 at 15.

<sup>85</sup> Most recently, “Liberal Community and Enlargement: An Event History Analysis”, *Journal of European Public Policy* 9 (2002): 598-626. For a good summary of the ‘constructivist’ approaches to enlargement (which emphasizes the importance of shared norms and values), see Frank Schimmelfennig & Ulrich Sedelmeier, “Theorizing EU Enlargement: Research Focus, Hypotheses, and the State of Research”, *Journal of European Public Policy* 9 (2002): 500-28 at

<sup>86</sup> Karin Fierke & Antje Wiener, “Constructing Institutional Interests: EU and NATO Enlargement”, *Journal of European Public Policy* 6 (1999): 721-42; see also Wiener, *supra* note 3.

<sup>87</sup> See, e.g., Lykke Friis and Anna Murphy, “The European Union and Central and Eastern Europe: Governance and Boundaries”, *JCMS* 37 (1999): 211-32.

<sup>88</sup> “Eastern Enlargement: Risk, Rationality, and Role-Compliance”, in Maria Green Cowles & Michael Smith, eds, *Risk, Reforms, Resistance, and Revival: The State of the European Union*, vol. 5 (Oxford University Press, 2000): 164-85.

constitutional document.<sup>89</sup> The “values talk” has been, in the EU constitutional discourse often either marginalized (as the domain of idealists, fanatics or ignorants for whom lofty talk about “values” is the last refuge) or turned into ritualistic platitudes; the complaint by Joseph Weiler made not so long ago that “[t]he Europe of Maastricht suffers from a crisis of ideals”, and that it contrasts with the Community’s formative years when “the very idea of the Community was associated with a set of values which ... could captivate the imagination...”<sup>90</sup> still largely rings true if one follows the proceedings of the Convention. As, in particular, Schimmelfennig has shown in his penetrating articles, norms and ideals have an enormous explanatory and pragmatic power with regard to the Enlargement process; indeed, we are unable to understand the strategic move of the Union to enlargement (with all the headaches, risks, troubles, and costs it produces, and with rather uncertain and contingent benefits) unless we understand it as a process in which the norms, once solemnly spelled out in political and (quasi-) constitutional documents, have acquired a life of their own, and bind their authors, or their authors’ successors. Enlargement of the EU (and indeed, of any international organization or polity) is a result not only (and sometimes, not at all) of a cool calculus of costs and benefits, and occurs not only if the marginal benefits for the incumbent and for the applicant states alike outweigh the marginal costs, but also when there is a strong resonance between the dominant norms which underlie the international organization (polity) and the applicant states: the one will tend to gravitate towards the other, with the expansion/accession culminating the process of mutual attraction.<sup>91</sup>

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<sup>89</sup> As an interesting variation on Schimmelfennig’s theme, Helene Sjursen argues that, within the set of normative values, it was the sense of “ethical-political arguments . . . revealed through references to values and traditions . . . seen as constitutive of European identity” (“Why Expand? The Question of Legitimacy and Justification in the EU’s Enlargement Policy”, *Journal of Common Market Studies* 40 (2002): 491-513 at 502) which has been operative in triggering the enlargement process. Sjursen contrasts these “ethical-political” reasons not only to “pragmatic” ones but also, interestingly, to “moral” reasons such as norms of justice, rights and democracy. Sjursen believes that the marked difference in the attitude of the EU towards CEE on the one hand, and towards Turkey on the other hand, proves that it was an appeal to a identity based on a community of values which was decisive. I am not sure how significant this distinction is, and whether it goes beyond mere rhetoric. But from the point of view of my argument it does not matter; what does matter is that the dominant argument behind enlargement refers to those very values which are recognized as the values underlying political union in the Western part of Europe.

<sup>90</sup> Weiler, *supra* note 74 at 238-39. These words come from an article initially published in 1995.

<sup>91</sup> See Frank Schimmelfennig & Ulrich Sedelmeier, “Theorizing EU Enlargement: Research Focus, Hypotheses, and the State of Research”, *Journal of European Public Policy* 9 (2002): 500-28 at 513-15.

This insight may be fruitfully used in the constitutional process: the infusion of constitutional discourse with a more open and direct reflection about the fundamental values of the Union (or, in Weiler's words, "to (re)introduce a discourse on ideals into the current debate on European integration"),<sup>92</sup> and about being faithful to the norms once spelled out in the foundational documents of the EEC/EC/EU, is necessary if the constitution-making process is to have a real purchase upon the public imagination and perform a positive role in polity-building.<sup>93</sup> It is hard to build a polity around the debates on qualified majority voting or the composition of the Council, and on the other hand it is boring to repeat the mantra of "common values"; a more open attempt to spell out those values and to build a link between the values and the institutional design is a challenge, and a promise, which may enrich the constitution-making process and make it more sensitive to community expectations. But even more fundamentally, and apart from the "community-mobilizing"<sup>94</sup> capacity of such a direct appeal to values, there is a clear parallel between the rationale for enlargement (in Schimmelfennig's terms) and the ways of enhancing the constitutional debate; as Neil Walker has observed: "the very constitutional ideals that have facilitated the Enlargement process are also those which are crucial to the present policy-building phase of the EU in nurturing the sense of a common identity and of a community of attachment on which the legitimacy of the polity rests".<sup>95</sup>

To put this point differently: those normative ideals of the EU emanating from its "promise" and built into its foundational documents which are the main drive for enlargement constitute a normative template which should inform a constitutional reflection on the future of the EU. The enlargement with its powerful normative texture (the rhetoric of the "return to Europe")<sup>96</sup> may serve as a reminder that the EU's identity is crucially founded upon certain values, of which respect for human rights is among the most important. Hence, if the enlargement has been largely normatively (rather than pragmatically) driven, then this normativity creates an important resource for the construction of the constitution of Europe.

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<sup>92</sup> Weiler, *supra* note 74 at 239.

<sup>93</sup> On the role of the constitution in polity-building, in the context of EU constitutionalism, see Neil Walker, 'Constitutionalizing Enlargement, Enlarging Constitutionalism' *ELJ* 9 (2003, forthcoming).

<sup>94</sup> See Walker, *id.*

<sup>95</sup> *Id.* For a similar point, see Daniela Piana, "Il processo di allargamento come politica costituente: cambiamento di paradigma e effetti non intenzionali nella costruzione dell'Europa allargata" (unpublished manuscript on file with the author, 2002) at 23.

<sup>96</sup> See K.M. Fierke & Antje Wiener, "Constructing Institutional Interests: EU and NATO Enlargement", *Journal of European Public Policy* 6 (1999): 721-42.



Further, the parallelism of constitutionalization and enlargement may offer a context in which both the processes will be seen as demanding to be filled with democratic, bottom-up procedural rules and principles. One frequent complaint about the way the enlargement process has been initiated and run was that it was a technocratic, elite-based exercise,<sup>97</sup> and the results of the first Irish referendum may be partial evidence of the consequences of not taking the democratic demands of society to have its say in the future of Europe seriously enough.<sup>98</sup> The Convention on the Future of Europe provides a (limited, to be sure) space for reducing this democratic deficit of enlargement. For one thing, it offers a chance for the members of the Convention to bring the enlargement-related issues onto the general agenda of deliberations on the future of the Union, and thus infuse the enlargement process with a degree of democratic legitimacy. For another thing, it brings the representatives of the candidate countries onto a common debating platform with the representatives of the Member States, and thus reduces the distance between the “rule setters” and the “rule followers”. Even though their voice in the Convention is not exactly equal to that of the Member States,<sup>99</sup> it is far stronger, in terms of status and in terms of quality of representatives, than the pale and miserable “auditions” arranged within the process of drafting the EU Charter only two years earlier.<sup>100</sup> In turn, the pressure from the newcomers – the candidate states, clearly sensitive on the issue of being allowed to be heard<sup>101</sup> – may make the entire forum of the Convention, and of post-Convention constitutional deliberations more amenable to democratic and participatory rules.

Neil Walker has recently articulated an intriguing idea, namely, that the *constitutional* dimension of the EU contributes to a reduction of the asymmetry

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<sup>97</sup> See J.H.H. Weiler, “Fischer: the Dark Side”, in Christian Joerges, Yves Mény & J.H.H. Weiler, eds, *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer* (The Robert Schuman Centre for Advanced Studies, European University Institute: Florence 2000): 235-47 at 236-37; see also J.H.H. Weiler, “A Constitution for Europe? Some Hard Choices”, *JCMS* 40 (2002): 563-80 at 564.

<sup>98</sup> “Partial” – because arguably the failure of the first Irish referendum to support the Nice Treaty was largely due to factors which had nothing to do with the “No-vote” campaigners views about the future composition of the EU.

<sup>99</sup> The rules for participation of the candidate states representatives provide that basically they have the same rights as all the other representatives with one exception: they will not “be able to prevent any consensus which may emerge among the Member States”, European Council Meeting in Laeken, 14-15 December 2001, Annex I to Presidency Conclusions: Laeken Declaration on the Future of the European Union, section III.

<sup>100</sup> See Sadurski, *supra* note 10 at 346-48.

<sup>101</sup> For a good description of this sensitivity, see Krassimir Y. Konstantinov, “The Convention and the Accession States: Where Do We Stand? Where Do We Sit?”, *Challenge Europe* January 2002, <http://www.theepc.be/challenge/>.

of power between the current member states and the candidates.<sup>102</sup> One of the grounds upon which he reaches this conclusion is that the first involvement of the *candidate states* in constitutional process (in the framework of the Convention) is at the same time the first involvement of that kind of the broad range of representative institutions of *member states* in this process. It creates therefore “a more level discursive playing-field”<sup>103</sup> and serves to reduce the imbalance of powers inherent in the relationship between the club master and the applicant.

Walker’s conclusions resonate with mine: constitutionalization of rights, I would claim, can act as an equalizer between the “enlargers” and the “enlargees”. This is because, as I argued in Part 2 of this working paper, the emphasis on rights can largely help overcome the “sovereignty conundrum” which adversely affects the smoothness of absorption of new member states into a deepened political union, and thus raises the danger of a division of the new Union into the core (relaxed about the sovereignty issues) and the periphery (obsessed about its sovereignty). But constitutional rights do not lend themselves to “reinforced cooperation” models with a core and a periphery: either you are in or you are out. Hence, a constitutionalized rights system within the EU will counter moves towards the division of members into the first and second categories. As Giorgio Sacerdoti observes: “The eurozone and the Schengen countries do not effectively embrace the whole Union . . . [but] fundamental rights are part of the global framework, shared and indispensable features of the whole Union”.<sup>104</sup>

If rights become constitutionalized within the EU, and the EU Charter becomes a fully-fledged constitutional document, this will create a powerful stimulus for the combination of a deepened and enlarged Union at the same time, and could provide a (partial at least) answer to those who see the territorial “widening” as standing in inverse relationship to institutional “deepening” of the EU. This is not to say that constitutionalization of rights within the EU is an unqualifiedly good thing, and that no serious objections can be addressed against an idea of a robust and judicially enforceable Charter of Rights in the EU.<sup>105</sup> But from the perspective of enlargement and the post-accession absorption of the new states into the Union – the only perspective of concern for this working paper – constitutionalized rights at the EU level may help establish a common

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<sup>102</sup> Walker, *supra* note 93.

<sup>103</sup> *Id.*

<sup>104</sup> Giorgio Sacerdoti, “The European Charter of Fundamental Rights: From a Nation-State Europe to a Citizens’ Europe”, *Colum. J. Europ. L.* 8 (2002): 37-52 at 51.

<sup>105</sup> The most sustained and serious objections have been formulated by J.H.H. Weiler; for the most recent expression of these objections see *supra* note 97 at 574-78, see earlier, J.H.H. Weiler, “Editorial, Does the European Union Truly Need a Charter of Rights?”, *ELJ* 6 (2000): 95-97.

constitutional space in which the member states' constitutional charters of rights are part and parcel of an overall constitutional structure. It goes without saying that those constitutional rights will not be self-executing, and their impact upon the absorption of the new member states into the EU polity will depend, to a large degree, upon the role of the ECJ as a putative future constitutional court of the EU, exercising its review under – among other things – fundamental rights. The ECJ so far has been a major force in EC/EU polity building, and the extension of its powers to rights scrutiny – even if deeply problematic from many points of view<sup>106</sup> – may have a positive effect upon the integration of the new member states of the EU into a common constitutional space.

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<sup>106</sup> For an argument against such a vision for the ECJ, see von Bogdandy, *supra* note 18 at 1320-30.