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Constitutional Enthusiasm Towards Network Constitutionalism?

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CONSTITUTIONAL ENTHUSIASM TOWARDS THE EUROPEAN CONSTITUTION?

(Constitution - without the constitutional moment: A look from the new member
states)

Introduction

The theory of the ‘constitutional moment’ focuses on lasting constitutional arrangements that result from specific, emotionally shared responses to shared fundamental political experiences. The US, 19th century Belgium, and perhaps post-Apartheid South Africa are close to this ideal.¹ The overwhelming majority of the constitutions that we know do not have these specificities. Constitutions serve other, more technical goals and cannot be considered as fundamental choices regarding the political design of a country. Where does the Constitution for Europe belong in terms of its future-shaping capacity? In the case of the Union Constitution it cannot be considered to be a settlement that ends of a polity shaping political tension and debate; it will be the consolidation of an existing process, setting up other open-ended processes. As a process oriented consolidation it is perhaps the best achievable *modus vivendi* for Europe but it does not look as a new, polity shaping arrangement. The inter-governmental political debate continues without being necessarily channeled into constitutional politics. The emerging European constitution is created without much popular or other enthusiasm and it is not going to constitutionalize ordinary politics. Lack of the blessing of a constitutional moment has its problems, among others because it is not creating union and identity.

¹ The most influential, or at least the most eloquent contemporary theory of the constituent moment is Bruce Ackerman, *We the People*, Cambridge, Mass: Belknap Press of Harvard University Press (1998).

This problem of the emerging European Constitution is particularly felt in Eastern Europe where the accession related constitutional changes and the lack of public interest in these matters indicate that the distance between citizens, “ordinary government institutions”, and the constitution (including its European component) will persist. This is not to say that the Constitution for Europe will remain an elite compact that will necessarily contribute to further popular alienation from constitutional values but people have to learn to live in a world where traditional forms of constitutional identity and traditional constitutional safeguards of liberty are to be replaced with new, pragmatic forms of interest protection.

The question to be considered in this paper is the following: what are the consequences of such pragmatism, especially, though not exclusively in the new member states? Here traditional constitutional (and rule of law) conventions are not fully embedded. What happens if the pragmatism of the EU Constitution reinforces the existing anti-constitutionalist mood that disregards constitutional values and replaces it with pure legal formalism? What kind of constitutional identity the emerging EU Constitution will offer for people whose constitutional identity is mostly shaped by *ressentiment*-nationalism?

In order to shed some light on these problems from the perspective of the new member states first I discuss the problem of constitutional enthusiasm as a mechanism of turning the constitution into a binding set of norms. Part Two reviews the formative elements of the constitutional identity of the post-communist countries and the impact of the post-communist constitutional development on constitutional identity. It is in this context that I will discuss the relevance of constitutional enthusiasm. Part Three considers how the constitutional changes that result from European integration and enhanced integration under the emerging European constitutional regime affect constitutional identity. Loss of traditional national sovereignty and the replacement of national checks and balances with trans-European networks are the key developments discussed here. These developments offer new challenges to constitutionalism in the region. The most important issue is this: to what extent the present European transformation that is taking the form of constitutionalization might generate enthusiasm or any other form of popular endorsement? Part Four considers the impacts of the

constitutional changes on the identity of East European citizens, particularly the impact on nationalism and identification with 'Europe'. Part Five discusses the impact of integration on democracy, including problems of democratic accountability and argues that little democratic legitimacy is to be gained in the short run, although alternative legitimating forces may make the emerging systems acceptable, notwithstanding loss of citizen control.

The following remarks are intended to reflect developments in the new member states, using first and foremost Hungarian examples. There are considerable differences between new and old member states. Established Western European democracies have institutionally better-enhanced democratic tradition, stronger rule of law, better knowledge of and more power to rely on European institutions. Nevertheless, I believe that many of the elements that contribute to lack of constitutional enthusiasm are present in Western Europe too.

Part One: A note on constitutional enthusiasm

What is the relevance of constitutional enthusiasm? After all only the romantic version of constitutionalism presupposes such enthusiasm – though I notice that Westerners expect that citizens of new member states should feel happy and show gratitude and commitment now that they are 'allowed' into the club, notwithstanding their poor economic and allegedly dubious constitutional performance.² The emotionally grounded identification with the constitution serves for its unconditional bindingness. Bindingness here would be the result of an emotionally supported and unquestionable socio-cultural

² Country Reports, monitoring etc., incessantly blamed the candidates for insufficient performance in the area of the rule of law, and there is a general fear that there is lack of administrative capacity in the new member states. The tabloid press presents citizens of the new member states as barbarians hungry for Western welfare and ready to overtake social services of their more established brethren. Governments of the new member states on the other hand emphasize (at least in their rhetoric intended for domestic consumption) that these countries were always part of the West; it is not the new members who enter the Union, it is the Union that comes to the new member states.

fact.³ Of course, it is possible that the constitution and the practices around the constitution are perceived as unquestionable socio-cultural fact. Max Weber argued that legitimacy is simply the ‘prestige of being exemplary or binding’ (*das Prestige der Vorbildlichkeit oder Verbindlichkeit*)⁴ But being exemplary is not the same as being emotionally attractive. Beyond the taken-for-granted socio-cultural fact all other forms of acceptance (bindingness) of constitutions require more problematic, easier to challenge justifications. Other grounds of acceptance include various rational arguments: for example that a European-national constitutional complex serves material interests efficiently; or that the given arrangement among powers and nations provides enough guarantees that none of them will become oppressively strong. The two foundations might be interrelated: people might find the constitution to be an uncontested socio-cultural fact as it intuitively corresponds with the cherished values of people (e.g. the constitution provides to free exercise of religion or freedom which is a generally asked for value). Intuitiveness matters: if the constitution is a fact it will not be questioned; it will be assumed that it will indeed provide for the cherished values. In other words once a constitution is a fact this will preclude the consequentialist analysis of its performance. It does not require justification based on supposed or perceived performance. This assumption does not work well in the Union where the constitution is more procedural than structural; where the procedure intends to allow for performance based revision and does not favor pre-commitment. On the other, hand there is an element of rationality in the factual acceptance of any constitution as constant revision of arrangements in terms of their rationality (goal purposiveness, etc.) is extremely costly and very often based on

³ This is what Michelman calls “existential,” “bindingness a matter of how things are (what I see that we in this country just happen to find ourselves doing)”. Frank I. Michelman, “Constitutional Authorship by the People,” *Notre Dame Law Review*, (June 1999) 1605.

⁴ Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, Tuebingen: Mohr (1980) 16.

irrational assumptions anyway. Constitutions as value judgments economize on the cost of decision in matters of extreme uncertainty.⁵

As to constitutional sentiments in the East Central European states it suffices to say that for a number of political and historic reasons, and partly because of the way the political elite treated the constitution there was little chance that people would recognize in it their “feelings and judgments about what is required and permitted in the conduct of political affairs”.⁶ Certain negative rules like political tolerance in the sense that the political has to leave private life intact and non-exclusion of the citizens (in the sense that in principle, at least in the formal sense, they all are entitled to participate in the fundamental decisions affecting the community are important exceptions to the above “constitutional alienation”).⁷ Hence the lack of enthusiasm from the very beginning. The Constitution for Europe and the Europeanization of national constitutions is not a process that could have generated much enthusiasm either. This is not an argument against these processes - it just indicates that other normative grounds for acceptance and identification are to be developed and reinforced.

I am aware of the fact that constitutionalization serves also the denial and disguise of the political (including the denial of accountability). However, constitutional enthusiasm allows for the assumption that there is indeed a possibility for value oriented public action where decisions and considerations are not only the dictates of interest politics and graft. The constitutional amendments to the new member states serving ‘Europeanization’ and the democratic process of accession (via referendum) had some of that potential. This potential was not used to the extent that the accession and the related

⁵ It would be very costly to let parliamentarism or presidentialism prevail alternatively according to the predictions of a given political moment, under the assumption that one or the other form will serve the country better. Fujimori’s presidentialism served Peru for a while quite well, ending in disaster.

⁶ Michelman, “Constitutional Authorship,” op. cit., 1609.

⁷ The plebiscites were relevant in this regard: I suppose that they were felt necessary to indicate that the principle of popular authorship is still respected by the elite. On the other hand, the tribal understanding of the national community is problematic exactly in this regard, that it denies the possibility of participation. It is for this reason that references to division into good and bad (or ‘illoyal,’ i.e. Jewish, Roma, or in Romania Hungarian) citizens results in strong divisions.

Europe clause amendments were part of ordinary politics the legislative process contributed to the sense of irrelevance that has been developed regarding constitutionalism. The feelings of ordinary politics as usual once again undermines the transformative potential of membership in the Union, which might be aggravated by the inherent problems (the lack of democratic legitimization) of the emerging Constitution for Europe.

Part Two: Elements of post-communist constitutional identity

The constitutional culture and institutional arrangements that emerged after the collapse of communism in the East Central European and Baltic states reflect a strange mixture of nation state (sovereignty) centered constitutional politics and reliance on democratic myth. The prevailing form of government in most of these countries is parliamentary resulting in cabinet dictatorship, with some counterbalancing power of the president of the Republic in a few countries, especially in case of cohabitation. Cabinet dictatorship is made simple as these are unitary states and federalism does not play a role.

As mentioned already, although the post-communist constitutions were intended to satisfy demands of providing protection against despotism using ‘Western’ solutions (as part of the ‘return to the West’) the driving force behind constitutional structures was the affirmation of sovereign nation statehood. The affirmation of the preexisting state or the invention of new statehood implied the invocation of pre-modern and often very problematic elements. ‘Problematic’ here means that at the level of symbols and at the level of constitutional interpretation and sub-constitutional institution building there was always a demand to reestablish authoritarian elements of the past, including pre-modern, nationalistic values. Some of these values run the danger that semi-authoritarian traditions will continue as is the case with ‘Christian values’ in Poland where Christian values might be influenced or determined by a very conservative, pre-Vatican II clergy.

The affirmation of the independent state was the decisive popular moment in the making of the post-communist constitutions. Given the importance of independence for the public the political elite tries to hide that the European constitution is (or would be) about restricting and replacing national sovereignty. I am not arguing that the emerging

European constitution is moving towards a new federal entity directly curtailing independence and sovereign national powers but it certainly presents developments that make the traditional national sovereignty based assumptions difficult to sustain and problematic for the citizens of the new member states.

The hard to grasp nature of the emerging European entity results in a standard public domestic position of the national political elites in East Central Europe. In the standard nationalistic competition where the agenda is who is a better, more efficient nationalist the dominant theme is that the role of the national government is to protect the best possible way the national interest at the European level; interests that would emerge at a European level are without relevance in the (restricted) public discourse. Of course, this “protection” is not operationalized, national interest is not articulated and the presentations are not accompanied with any hint to a European identity and related advantages. Needless to say, such defense of national interests is highly problematic in the European Union, not necessarily because the new member states are too weak to protect it, although under an integrationist Constitution such national interest protection would become more difficult and not only for the weak players. If one accepts what the new institutionalist approach has to say about the emerging Europe there is simply no clearly identifiable national interest that is articulated at the intergovernmental level. William Wallace argued that “...[i]t would be a caricature of this intricate policy process to counterpose national actors and supranational entrepreneurs as separate elites, promoting opposed interests.”⁸ It is quite possible that government representatives bargain in most areas without a clear national agenda, or priorities.⁹ After all, the lack of domestic democratic control allows for considerable insularity to the detriment of national constitutional considerations but certainly not to the detriment of integration creating a new sphere of life for the citizens of the nation. It would be unfortunate to

⁸ William Wallace, “Collective Governance,” in H. Wallace and W. Wallace, (eds.) *Policy Making in the European Union*, Oxford and New York: Oxford University Press, 4th ed. (2000) 529-30.

⁹ See in particular Jeffrey Lewis, “National Interests: Coreper,” in John Peterson and Michael Shackleton (eds.) *The Institutions of the European Union*, Oxford: Oxford University Press (2002). See also Wessels’ concept of ‘fused’ national and Brussels politics, W. Wessels, “An Ever Closer Fusion?,” *Journal of Common Market Studies*, 35.2. (1997) 267-299.

allow national constitutions to operate as semi-legitimized bulwarks of pre-set national interests. The problem is particularly acute in East Central Europe where such national interest (because of the nationalistic or 'tribal' agenda) could be one of anti-modernization. Ideally the new constitutionalism should be one for optimal European integration, in harmony with a democratic and transparent trans-European constitutional structure.

Beyond the nation building, nation asserting elements of the post-communist constitutions, the primary public (popular) assumption about constitutionalism was that of democratic participation resulting in majority rule. In this regard a naïve Rousseauist/Leninist concept of people's democracy, with strong emphasis on referendum and majoritarian representative parliamentary government was probably prevailing among citizens in the new member states.¹⁰ Popular participation in elections and referenda was considered to be quintessential for a strong legitimation for politics. However, only the Lithuanian Constitution insists on the importance of direct democracy. (Mass participation in the demise of Soviet rule was crucial in Lithuania.) In the other post-communist countries referendum is neglected or relegated to secondary role through the interpretations given to it by the political elite as it was the case in Hungary, where the Constitutional Court systematically restricted the possibilities of popular initiative.¹¹ In the Czech Republic there was no legislation whatsoever on referendum. Poland operates with a popularly elected President but the President's powers were restricted in 1997.

¹⁰ For a criticism of the attractiveness of the 'people's will' position see Lawrence G. Sager, "The Incurable Constitution," 65 *N.Y.U. L. Rev.* (1990) 893, 902, ("The claim of privilege [for popular will]... would have to be that popular will enjoyed a powerful advantage in accuracy or reliability [given a metric of what makes a political choice good] over other possible means of choosing among social options."). It is noteworthy that contrary to the American Founding Fathers myth, in Eastern Europe there is little veneration of those figures who led the foundations of the new republics. Moreover in countries like Hungary, Slovakia or Slovenia there was little genuine public participation in the transition that was negotiated with communist elites.

¹¹ Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer, *Comparative Constitutionalism*, American Casebook Series, Thomson West (2003) 260-261.

In less than fifteen years the former state-socialist countries of East Central Europe and the Baltic turned into stable democracies in the sense that they satisfy the political criteria of European accession. Checks and balances are in operation, elections are free, and the mechanism of fundamental rights protection is in place. These results were achieved with limited popular participation and without a strong republican commitment. Constitutional enthusiasm was nearly absent in the formative process. Public opinion is uninterested, at best, as far as the values and practices of constitutionalism are concerned. It may well be that the presence of an enthusiastic constitutional debate is not required in forging lasting constitutional arrangements but an apparent lack of constitutional commitment and passion of the citizenship might become a problem in case tyrannical or corrupt elites attempt to govern.

The European accession process and the governmental structures of the emerging European constitutional regime are partly counterproductive in terms of democratic identity building in the new member states where citizens struggle with the non-democratic legacy of their past. Fairness requires that I should add immediately that the European dimension of citizenship has beneficial effects and potentials even if it acts only as a disturbing superego, an efficient task-master, censor and educator. However, in this paper I am considering only the more problematic aspects and dangers of the emerging European constitutional institutions and values that are influencing constitutional identities in the new member states.

The EU integration process triggered constitutional rearrangements in all affected Eastern European countries. In principle, a new constitutional vista should open up in such a process for the future European citizens of East-Central Europe. In many regards the importance of the integration is comparable to the creation of the democratic nation-states after the collapse of communism. Is it reasonable then to expect a renewed constitutional commitment on par with that observed at the birth of these new democracies? After all, we are facing here a largely technical process that simply frames and codifies the de facto economic and social integration of these states. Could one expect constitutional enthusiasm in countries where the right to independent nationhood was only recently acquired and where perhaps the strongest integrative element is a sense of 'national togetherness', that is a pre-political community of fate? Is the

constitutionalisation of the integration process simply another consequence of the current process taking place within the Union, namely the identification of ‘a new format to safeguard the great achievements of the Nation State beyond national borders’?¹² Could one rightfully expect the arrival of a genuine *constitutional moment* to Eastern Europe instead of a constitutional patchwork being institutionalized? Is a ‘grand constituent moment’ a realistic expectation considering that the Union itself is rather reluctant (for good reasons) to offer a grand vision of a genuine European citizenship based on solidarity and common values, other than those that can be expected of a large unified market exhibiting conveniently generalized consumer behavior? Moreover, the new European constitutional structure emerges at the very moment when citizens of the new member states will face the strongest disenchantment: at the very moment of entry into the Union they are treated as suspicious welfare service hunters, not worthy of being employed in the old member states. On top of that, the application of the employment safeguard clause was prepared in the Western public opinion with a strong ‘the Gipsy are coming’ campaign. This will not help soul-searching among East Europeans regarding their prejudices, hence it will not help them to get closer to a brave civilized European identity.

Note also that the quite a-democratic structure of the EU Constitutional Convention and the way the Constitution will fall one day upon the public of the new member states cannot increase the sense of involvement and the belief in self-determination in the concerned countries. The 2003 IGC became a forum for some governments playing to their respective national state audiences. Most new member states representatives could not present a democratically endorsed position that was at least articulated within the national public opinion. (As a matter of fact there was no genuine discussion concerning the future of constitutionalism at the European level either.) The main governmental concern in the new member states is to keep one Commissioner per country. Given the prescribed independence of the Commissioners one finds such efforts irrelevant for national interest representation, or for the democratic

¹² Jürgen Habermas, “So, Why Does Europe Need a Constitution?” European University Institute, (2001) [http://www.iue.it/RSC/EU/Reform02\(uk\).pdf](http://www.iue.it/RSC/EU/Reform02(uk).pdf)

expression of the ‘national will’- which are the standard arguments of policy legitimization for the politicians of the region.¹³ (The position of the Commissioner might be personally important for the head of the negotiating delegation.)

The lack of constitutional enthusiasm in the general public of the new member states and the uncertainty towards ‘Europeanization’ does not mean that there is insufficient interest in the *common European future*. There is, however lack of enthusiasm regarding the common constitutional traditions and values of modernity. These sentiments are prevalent among the political and cultural elites and the civil service that is supposed to become the interface with the European administrative state.¹⁴

Contrary to tabloid perceptions, the loss of belief in representative institutions will not necessarily increase the sanguine nationalism though xenophobia might be on the rise regarding ‘alien forces’. Instead of such militant nationalism, disillusioned pragmatism and increased reliance on neo-corporative interest protection through the Union and its institutional culture might prevail. (For the impacts of this institutional culture on welfare attitudes, see below).

Part Three: The Nature and Impact of the European-National Constitutional Complex

The romantic vision of constitution making considers the people to be the key actor of constitution-making: it is the element of participation in the sense of people giving itself the constitution that the constitution gains specific legitimacy and normative supremacy. Constitutions are created in unique blessed historical moments by genuine constituent

¹³ New members are not different from ‘old’ members in this regard: the Commission size received much more attention at the European Convention than the question of accountability. The problem is that such disregard of constitutional and democratic considerations reinforces the weakness of democratic commitment in East Europe.

¹⁴ This is more than simple insufficiency in capacity building. The bureaucrats will learn (at least as fast as it happened in Greece or Italy) the ‘Eurospeech’ of bureaucratic communication. But the professional and bureaucratic dislike of the rule of law (beyond the simple responsibility-avoidance that is promised by legalism) will persist. It will reinforce the popular dissatisfaction and it will contribute to the disregard of the rule of law and acquiescence into the lack of democratic control.

powers with lasting effects. The proper ‘constitutionalist’ constitution contains crucial elements of popular and institutional self-commitment or pre-commitment. Here pre-commitment is not simply the result of technical solutions like qualified majorities and non-amendable provisions. Ironically, membership in the Union increases constitutional pre-commitment at the national constitutional level, as many constitutional elements that exist in the domestic constitution (e. g. human rights – see the impact of the anti-discrimination directive) are now beyond the reach of national majorities. Further, many constitutional elements are protected by European institutions that are independent from domestic politics. The law-making arrangements that follow from the European division of competences are also beyond domestic reach and are safeguarded by the European Court of Justice (ECJ).

It is difficult to find a constitutional development that is more distant from the above normative-romantic vision of constitution-making than the one that we observe in Europe since 1958. The process is devoid of opportunities for traditional constitutional enthusiasm; there was and there is no opportunity for emotional identification with the constitution in the process of its making; not even for the makers themselves. There were, of course, other opportunities for historical identification and good enough reasons for pride. The French-German rapprochement is certainly such an event, at least retrospectively. To the extent the Community offered the institutional structure that precludes armed conflicts among traditional enemies and offers a dynamic frame for coordination and conflict resolution there is much to celebrate. One cannot, however, maintain enthusiasm for a negative (lack of conflict), especially as the historical conflict fades away from memory.

The fact that the European constitution remains a matter of open process with little identifiable additional structures and without visible state or nation building (other than increasing an allegedly benevolent heterogeneity) is particularly felt in the new member states. Citizens of the old member states might find identifiable elements in the interaction between European and national constitutions, and may have trust in (though not enthusiasm towards) decades old national constitutions. Such experience is missing in East Central Europe. Moreover, the constitutional process of accession does not promise opportunities for identification with the existing structures or with the planned

Constitution. The accession process was one that was both objectively and subjectively one of submission; it may well be that it is in the best interest of the new member states but still a submission. The *acquis* was imposed unconditionally and in the most extended sense, and many people in the East considered it a kind of dictate. The population of the concerned countries could not see an act of generosity in the technical assistance provided during the accession. Many Eastern Europeans believe that it served openly and primarily to ease access to their markets and government structures. Such access resulted in obvious disadvantages to many citizens who lost their jobs as a result of market changes or found their conditions deteriorating with growing income inequalities. Given that the accession was a unilateral process and very much one that an elite governmental bureaucracy carried out without ever allowing for genuine public discourse one cannot be surprised that there was little popular enthusiasm when very late in the game and hastily an opportunity for plebiscitarian approval was granted to the public in the accession referendum. The referenda offered an opportunity to endorse membership in the Union without specifying its conditions, including conditions of how the domestic democratic process will relate to the European decision-making. Of course, the accession referenda of 2003 took place at a moment of confusion: it was called exactly at the moment when the Constitution for Europe was still debated – so no one was in the position to say what exactly the European entity will be to which the peoples of East Central Europe and the Baltic will join.

What is visible of this European constitutional structure did not offer much to identify with in traditional constitutional terms. Even that part of the constitutional structure that was visible is not necessarily perceived, and certainly not thematised (*'thematisiert'*) among the public; and it is even less perceivable in pre-membership countries. It was clear, however, that in the existing and emerging European constitutional structure traditional forms of popular representation and control were incomplete. Moreover, the traditional forms of popular control that existed in the domestic arena were undermined by the emerging European structures. What seems to emerge is a loose structure discussed in terms of governance outside the reach of the constitutional consideration. Governance is not exactly the kind of visible structure that generates enthusiastic commitments. This is not to say that governance and structures of

pre-commitment to governance cannot serve as foundations of a new European entity. Such ‘post-constitutionalist’ governance might replace constitutions as we know. However, at the moment the problem remains a thorny one and not only for East Central European citizens: is there a constitutional commitment possible towards an ‘alternative constitutionalism’ that serves governance?

How constitutional governance replaces constitutionalism at the nation-state level? Popular representation at the national level diminishes with the diminishing importance of national parliaments *vis-à-vis* the executive. (See also in Part Five on what is called *grosso modo* the democratic deficit at both national and European levels).

The emerging structures of the European Union do not fit well into the traditional models of democratic constitutionalism. Note that this is not only a new member state problem. For example, as Weiler has pointed out: “Europe’s constitutional architecture has never been validated by a process of constitutional adoption by a European constitutional *demos* and, hence, as a matter of both normative political principles and empirical social observation, the European constitutional discipline does not enjoy the same kind of authority that may be found in federal states where their federalism is rooted in a classic constitutional order.”¹⁵

It would be odd to expect constitutional enthusiasm among citizens of the new member states when there are substantive and procedural obstacles to such enthusiasm in the old member states. Further, it is a well-known maxim of ‘popular’ constitutional theory that commitment to the constitution (enthusiastic or not) presupposes that the People as constituent is already established before the commitment is made. I would like to avoid at this point the debate on European *demos*. It suffices to say that People had little or no opportunity to make commitments – a constitutional shortcoming that applies even more for people in the new member states. Mobilization of the European *demos* for the endorsement of the new European Constitution will occur within the boundaries of the respective nation states. Such bounded, compartmentalized process hardly leads to

¹⁵ J.H.H. Weiler, “A Constitution for Europe? Some Hard Choices” 40 *Journal of Common Market Studies* 4 (2002) 567. Weiler finds additional shortcomings in the Community that preclude constitutionalism. The draft Constitution would not have made away these shortcomings.

European constitutional commitment among the public. (Note that the draft Constitution envisions state ratification of future amendments).

It is clear that the Union has at least the potential for a new form of governance where the political element of government is replaced with alternative forms of interest group politics that are developed within policies. Obviously this is not the end of politics i.e. domination that is the goal and result of political games. The difficulties of national parliaments are fundamentally related to the nature of the European institutions. The Union is progressing to become a loose administrative state that consists of networks of national and Union level administrations (independent agencies) and a central Commission bureaucracy that acts as a coordinator and generator (a kind of spiritual leadership) of such networks. The model has the potential constitutional advantage of reducing the problems of majoritarian democracy at the nation state level – the prevalent, non-deliberative model in the new member states. Obviously majoritarianism tends to disregard minorities, especially if it is coupled with nationalism, where majority means rule by national (ethnic) majorities. The diffusion of power that is offered by the emerging European structures is certainly a welcome constitutional correction to such majoritarianism. The growing number of independent, democratically non-accountable European institutions, patterns of co-ordinated partnerships, etc., which at the same time increase the power of their national partners (which form an increasingly interrelated network) changes the constitutional landscape, moving towards more *pouvoir neutre*. The deliberations within these institutions, and within the network, however, remain non-transparent and do not contribute to rational public deliberation.

It is formidably difficult to control these European networks of governance through institutions of traditional popular representation (Parliaments).¹⁶ The difficulty of interconnectedness between these independent regulatory network structures and national parliaments puts the traditional role of the legislative branch into jeopardy. What are the

¹⁶ Notwithstanding the rich literature on networks and policy networks the domestic and European constitutional implications of the network phenomenon are disregarded in the constitutional literature. It seems that the problem of the lack of interface between networks and constitutional structures is neither intellectually nor in practical terms recognized.

implications for a popular sovereignty or is people's self-determination rights based understanding of parliamentarism? The trend, if continues, cannot be accepted and the resulting sense of democratic deficit may result in a sense of lack of legitimacy – except if the networks of governance that claim to offer non-partisan expert knowledge will lend a new, expertise based legitimacy to the European and interrelated national governments. In more practical terms democracy through national parliaments cannot tolerate such developments. To the extent that interest groups cannot get access to spoils that are offered through the control over government, or that majorities cannot force welfare redistribution through legislation the Union as a network of independent regulators that aims to provide an ever increasing number of harmonized governmental welfare is unacceptable in terms of Realpolitik.

On the other hand, independent agencies, both at national and Union levels were created partly because of the advantages the system offered to interest groups politics, and partly as devices of quasi-constitutional pre-commitment. Without such arm's length operating agencies the democratic welfare redistribution would have become unsustainable. Democratic politics was *too responsive* to short term constituency interests pushing the responsive welfare state to unsustainable largesse. It was for such reasons that regulation through independent agencies (the whole concept of neutral powers) emerged.¹⁷ Independent agencies protect established interest groups against newcomers

¹⁷ For a study of the constitutional relevance of independent agencies and their networking, A. Sajo, "The Concepts of Neutrality and the State," in Ronald Dworkin et al. (eds.), *From Liberal Values to Democratic Transition*, New York/Budapest: CEU Press, (2003) 107-144. Andras Sajo, "Neutral Institutions: Implications for Government Trustworthiness in East European Democracies," in Janos Kornai and Susan Rose-Ackerman (eds.), *Building a Trustworthy State in Post-Socialist Transition*, New York: Palgrave Macmillan (2004); on networking in international relations Anne-Marie Slaughter, "Global Government Networks, Global Information Agencies, and Disaggregated Democracy," 24 *Michigan Journal of International Law*, (Summer 2003) 1041; on European networks Renaud Dehousse, "Regulation by networks in the European Community: the role of European Agencies," *Journal of European Public Policy*, (1997) 246. In 2002 Majone found that although political compromise resulted in institutional designs with ambiguous responsibilities and uncertain competences, "the issue of independent and credible European agencies is still very much alive". Giandomenico Majone, "Functional Interests: European Agencies" in

who would use parties through parliament and the executive; and protect these established interests against politically induced redistributive policies. The autonomous independent regulatory agencies are created in the name of the needs of the socio-economic regime (or the whole polity) to protect itself against its own self-destructive mechanisms. The independent central bank is built to resist the welfarist inflationary policies of elected governments, etc. The independent regulatory agencies obviously run counter to traditional notions of accountability hence they have the birthmark of lack of legitimacy. To the extent the independent agencies exercise powers delegated by elected bodies and exercise powers within the rule of law there is some derivative legitimacy to their action, notwithstanding the possible unconstitutionality of delegation.¹⁸ However, such independent agencies that monitor each other might contribute towards minimal constitutionalism in the sense of avoidance of tyranny. Institutions of representative democracy are part of the checks and balances scheme; they serve as important counterbalance to the other branches but fail to deliver in most parliamentary systems. As to the European Union, here a network of independent regulatory agency networks *may* offer an alternative non-tyrannical solution to the dilemma of constitutional government where institutions of representative democracy did not deliver. Unfortunately the draft European Constitution did not address the agency problem in a principled manner and had left the problem of European and national (coordinated) administrative implementation unresolved.

John Peterson and Michael Shackleton (eds.) *The Institutions of the European Union*. (2002) Oxford: Oxford University Press. 322.

Any discussion of democratic accountability in the network age should start from Slaughter's warning: "the impossibility of fully "reaggregating" the state in a tidy democratic package will ultimately require a much more sophisticated understanding of networks and the interaction of nodes in a network with each other, whether individual or institutional." *op.cit.* 1068.

¹⁸ See Giandomenico Majone, "Regulatory Legitimacy" in Giandomenico Majone (ed.), *Regulating Europe*, London and New York: Routledge (1996) 285-86. Majone, *ibid.* adds that 'Recent empirical research provides additional evidence in favour of the thesis that non-majoritarian decision-making mechanisms are more suitable for complex, plural societies than are mechanisms that concentrate power in the hands of the political majority.'

Needless to say, independent agencies are still not fully independent from political branches and even less from interest politics, though such independence is more likely at the Union level. To the extent the Union is indeed an administrative state (with an overloaded bureaucracy that is made up of generalists) it does not presuppose much democratic control; at least neither national parliaments, nor a Union level parliament are designed for that job.

To sum up once again from the perspective of consitutionalism and constitutional legitimacy (not to speak of enthusiasm¹⁹) as seen from the new member states traditional constitutional considerations and expectations do not apply to European level network regulatory systems. The traditional constitutional design at the national level is made irrelevant as national agencies follow European guidance, but the Constitution for Europe does not offer sufficient constitutional control at least for legitimacy purposes at the European level. Nevertheless, the promised a-political (non-partisan) and professional performance may offer new sources of legitimacy, *if* it is backed by efficient service delivery by the policy networks.

Part Four: Identity Problems

A number of the new member states are struggling with nationhood. Their national minority problems have a destabilizing potential. Most of these states have a recent history of being oppressed or occupied by their neighbors. It is widely believed that the former oppressors or dominant ethnicities will use the first opportunity to undermine the status quo. Radical nationalist groups consider national minorities (who often are members of the former majority, i.e. a majority that was seen as the obstacle to independent statehood in the past as ‘enemies within’. For the Baltic states the EU (and NATO) is the bulwark against Russian intervention. Such intervention is potentially

¹⁹ Note that the way European bureaucracy mastered governance beyond the state is “not the very way in which preferences get ‘aggregated’; the aggregation “is perhaps just a function of dominance.” “In any case, as Europe’s response to the Statue of Liberty, comitology may not be quite as inspiring.” Kalypso Nicolaidis and Robert Howse, *This is my Eutopia. Narrative as Power*, Oxford: Blackwell Publishers (2002) 771-72.

legitimized as intervention to protect Russian minorities. Hungarian authorities hope that the Hungarian minorities in the neighboring countries will be better protected once these neighboring countries as member states have to accept EU standards and European pressures. Poland too has similar hopes regarding the future of the Polish minority in Lithuania. Hungary's neighbors hope that Hungarian membership will reduce alleged Hungarian inclinations to interfere in the affairs of its neighbors. There are hopes that the Czech Republic and Germany as well as Poland and Germany will come to terms with each other regarding their troubled past. It is assumed both in Western and Eastern Europe that integration will have a major stabilizing impact as to nationalistic conflicts. Stability appears to be a constitutional value that may legitimize a European Constitution.

But hopes that are based on future Realpolitik turn into frustration of the day. It is certainly frustrating for strong nationalist that traditional forms of national minority protection are being castigated as impermissible in the Union.

European integration promises political stability and economic well-being through increased mobility. Both advantages have ambiguous effect on Central East European citizens' European constitutional sentiment. Stability means that nationalistic aspirations will be curtailed and repressed (as a non-option). It may well be that the relations with formerly competing neighbors will improve and national minorities will have a more protected (but changing) identity, and national majorities and their brethren abroad will have better ties. As mentioned above, these are mostly long term effects and it is possible that in the short run the learning process will be full of conflicts. Consider for example the exasperation in the *Sudetendeutsch* issue, once this became a matter of political discussion in the Czech Republic due to accession. Further, Western European nationalism, anti-migrant sentiments, xenophobia and anti-Semitism might cause additional damage in East Central Europe where the social and cultural circumstances differ from those in the West. Lack of strong civil society and lack of politically efficient anti-nationalistic positions and facing the past makes such negative influences stronger). Hence on the short run (coupled with the economic difficulties of transition for certain groups) one cannot hope for identification with integration as a source of stability.

As to the consequentialist legitimization of the emerging Constitution that would be attractive for reasons of service efficiency and economic benefits once again one can expect conflicting developments.²⁰ The prevailing literature that is based on empirical observations in the EU member states indicates that integration effects differently situated resource users differently. Further, nationalism is against integration and a source of Euroscepticism. In view of the accession referenda there were vocal minorities against accession in some of the East Central European countries. Further, Eurobarometer surveys indicate that a dual identity (European and national) is less developed among the citizens of the new member states than in other continental European countries. Hooghe and Marks find that exclusive national identity depresses support for European integration. Moreover, given the historical reasons referred to in Part One national identity in the post-communist countries is often ethnic identity as opposed to civic identity.²¹ In the case of ethnic identity nation is an ascriptive community, while in the case of civic identity nations remain a matter of choice of institutions. Further, as to the short term future of European identity and enthusiasm towards a constitution that would consolidate integration, one should note that contrary to citizens of ‘old’ member states where there are younger generations who were politically socialized in a ‘European’ environment such actual socialization is missing in the post-communist countries. Finally at this point in time when citizens of the new member states suffer humiliation at the very moment of entering into the Union by being denied equal rights as to the free movement of labor, there is simply no opportunity for constitutional enthusiasm.²²

²⁰ Here I rely on Liesbet Hooghe and Gary Marks, Does Identity or Economic Rationality Drive Public Opinion on European Integration (manuscript presented at the Hauser Seminar, NYU. Law School (Spring 2004).

²¹ This distinction draws on Stephen Shulman, “Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism,” 35 *Comparative Political Studies*, (2002) 554-85.

²² Some member state governments made encouraging statements regarding the actual use of the seven years safeguard provision of the accession treaty. However, Austria and Germany applied the strictest form of the restriction and, the other member states followed the lead after public opinion was alarmed that welfare seeking entrants will overload the welfare services system.

Part Five: With or Without Democracy?

Whatever the intricate relation between democracy and constitutionalism, it is obvious that no constitution can be legitimate in the free world if it does not serve democracy. Constitutional regimes will suffer a legitimacy deficit if not operated according to the community's expectations of democracy. However, alternatives to democracy may serve to legitimize the state. Such alternative forms hardly satisfy normative expectations of liberal constitutionalism. However, especially if democracy is understood as majority rule, majoritarian democracy may not serve the specific needs of efficient decision-making in the Union.²³ The importance of democratic legitimization for constitutional structures is important not only because in some dominant forms of democracy democratic processes are indeed promoting constitutional values including the protection of certain (not all) fundamental rights.

Notwithstanding the shared belief in democracy and democracy enhancing constitutionalism the understanding of democracy remains a matter of some uncertainty in the European Union. It seems that concepts of robust republican democracy and deliberative democracy are fused.²⁴ Because of the Rousseauist-Leninist legacy, the East

²³ Majone, *Regulatory*, op.cit. 287, quoting R. Dehousse, "Institutional reform in the European Community: Are There Alternatives to the Majoritarian Avenue?" Florence: European University Institute, EUI Working Paper, Robert Schumann Centre, RSC 95/4. (1995). The draft constitution moves exactly in the problematic direction of majoritarianism envisioned by Dehousse (increased role of Parliament in appointment of Commissioners, stronger Presidency to the detriment of smaller countries, majority voting in the Commission, etc.)

²⁴ See Cass R. Sunstein, *Designing Democracy. What Constitutions Do?* Oxford, New York: Oxford University Press (2001) 6-10. In the approach that Sunstein exemplifies constitutions serve as a set of "preconditions for a well functioning democratic order, one in which citizens are genuinely able to govern themselves." In Sunstein's view constitutions "should promote deliberative democracy an idea that is meant to combine political accountability with a high degree of reflectiveness and a general commitment to reason-giving." One can find a strong element of deliberative democracy in the Union at the level of formative principles: at least the European Court of Justice finds that reason-giving is a formal condition of legislation. However, if one looks at the actual reason giving process, and the arguments offered in the directives one comes to the conclusion that reason giving remains at the level of formal, at best. Deliberative communities are opaque and self-recruiting.

European public imagination of politics is closer to the robust version of democracy, one that is summarized by Frank Michelman and Terrance Sandalow²⁵ as meaning the “ideal that government policies ought to respond to the wishes of the citizenry.” Further, the democratic ideal requires “that politically responsible institutions should determine the direction of government policy.”²⁶ It is not excluded that government policies (developed at the national level or derived from Union policies) will respond to (or correspond with) the wishes of the citizenry but the institutional guarantees for such correspondence are limited in the emerging national-European constitutional complex. After all, as long as the citizenry understands itself as members of a national (and in particular ethnic or other ascriptive) community there are only limited opportunities to force the government to be responsive to that community in the democratic process for the simple reason that the national government has little power in many regards to be responsive. After all the national government’s powers were transferred to the Union. As to the European level the democratic influence of the national community is very limited, not only because its representatives often act as cosmopolitans in the European decision-making bodies, but also because of the very limited influence ethnic community representatives coming from small nations will have. Further, if one accepts that intergovernmental and policy network institutions are to take the decisions the democratic accountability will be of little relevance.

Lack of political (democratic) accountability is aggravated by the legalistic difficulties of holding policy-makers responsible. Rule of law based considerations appear to be easy justifications for not calling to accounts government officials and their cronies for misappropriation of public monies, for acquiescing in government stupidity, overspending and inaction.

²⁵ Frank I. Michelman, “Terra Firma: Background Democracy And Constitutional Foundations,” *Michigan Law Review*, (2001) 1827, discussing Terrance Sandalow, “Racial Preferences in Higher Education,” 42 *U. Chi. L. Rev.* (1975) 653.

²⁶ Sandalow, *op.cit.* 695 and 700. Michelman finds these positions to be two distant or different positions. Michelman, *op.cit.* 1839.

Once the political and economic system will fail to deliver the expected radical improvements in the life of the citizenry popular distrust in representative democracy will emerge in the period of transition. Such distrust contributes to the de-legitimization of other forms of democracy (e.g. deliberative democracy). A more deliberative form of democracy, that might be still a possibility within the Union is a concept that is not grasped and given the disenchantment with the forms of democracy based on vote, binding mandate and recall, it will be difficult to learn for the citizens of the new member states to appreciate this more subtle form of democracy where deliberation takes place outside the traditional interaction of separated branches of government, and often among non-elected, hardly accountable actors.

The possible end of democracy as we know and traditional constitutionalism is not the beginning of uncontrolled diffuse power. There are liberal though non-democratic control mechanisms. Some of the politically non-accountable networks may operate in such manner (as is the case with financial controls - an area that remains underdeveloped in the Union). Further, judicial review may counter part of the accountability deficit. This trend was noticeable in the accession countries and hence similar trends emerging at the Union level will be seen as legitimate.²⁷

A partial constitutionalization of policy networks is not out of question. *If* the decision-making of the independent agency, and the communications among the agencies were transparent, the decisions reasoned and were to follow professional and objective criteria, the decision would correspond to a fundamental value of democracy as deliberative democracy. In this understanding parliament is just one forum that provides the opportunity for public reflection: although independent agencies operating in a transnational network do not provide the opportunity of participation, at least there is deliberation that was expected from participation based government. But policy networks

²⁷ On the difficulties of learning to trust the ECS and the Union as a different but reliable protector of fundamental rights, see Andras Sajo, "Learning Co-operative Constitutionalism the Hard Way: The Hungarian Constitutional Court Turns its Gaze away from EU Supremacy, 3 *Zeitschrift für Soziologie der Erziehung und Sozialisation* [Journal for Sociology of Education and Socialization] 2004 (forthcoming).

are not the opposite of participation: they do offer *intense* participation for a select few (i.e. expert and interest groups). The constitutional dimension of this type of participation concerns the determination of the fair conditions of the *selective* participation. But participation that is based on traditional egalitarian majoritarianism does not offer the intellectual framework for the constitutionalization of selective participation.