

**Table 3** Positive image of the European Union

	1996		1997		2001		2002
Czech Republic	33	100	34	103	46	139	NA
Poland	58	100	56	96.5	44	76	NA
CEE total	49	100	50	102	52	106	NA

*Source.* Central and Eastern Eurobarometer Nos. 7 and 8, Candidate Countries Eurobarometer 2001, 2002 (first results).

positive utilitarian appraisals, which become, in time, dissociated from performance and get transformed into generalized attitudes of affective allegiance.<sup>41</sup>

In overall terms, the data presented in Tables 3 and 4 appears to support the claim that formal transposition of EU norms to CEE elites can influence public habituation to EU ideas and practices because the normative identification of Czech and Polish respondents with the Union is analogous to the degree of institutionalization achieved in the domestic sphere. How can such a conclusion be drawn? Before proceeding with the analysis, allow me to make a preliminary note concerning the presentation of the collected survey material. Apart from the percentage of those who have responded positively to the above-mentioned survey items, I have chosen to standardize my data to 100, taking as a starting point a period two years before the first Regular Report issued in 1998. This is done not only with a view to ensure consistency and clarity of presentation. Rather, what is more important is registering the change in popular identification with the EU, in both the Czech Republic and Poland, as time goes by. And I have deliberately chosen to make the 1996 percentages my starting point, because this is a period in which popular perceptions of the EU start to grow in maturity moving beyond the revolutionary

**Table 4** Vote for EU membership in upcoming referendum

	1996		1997		2001		2002	
Czech Republic	43	100	49	114	54	126	50	116
Poland	70	100	63	90	54	77	61	87
CEE total	61	100	60	98	65	107	69	113

*Source.* Central and Eastern Eurobarometer Nos. 7 and 8, Candidate Countries Eurobarometer 2001, 2002 (first results).

<sup>41</sup> For a detailed analysis of the notions of “diffuse” and “specific” support, see David Easton, “A Re-Assessment of the Concept of Political Support,” *British Journal of Political Science*, 5 (1975), pp. 435–457, as well as David Easton, *A Systems Analysis of Political Life* (New York: Wiley, 1965).

euphoria of 1991 when the motto “return to Europe” had almost intoxicated the public.

Turning now to the central theme of my inquiry that is the evolution of normative justification for the EU among the public and whether it varies depending on the degree of domestic institutionalization. I shall juxtapose the Czechs with the Poles while evaluating their score in both questions constituting the index of EU affective support (i.e. habituation to EU norms). Looking closely at the standardized figures of Table 3, one does not fail to detect a significant upward trend in positive popular perceptions of the EU among the Czechs. Even though the initial percentage of those who would attribute a positive image to the Union (33%) is well below the CEE average in that period (49%), still positive EU conceptualization grows steadily over the years, reaching the level of 39 points above the 1996 measurement. On the contrary, the figures tapping positive perception of the EU among the Polish public progressively recede. The high percentage (58% = 100) of respondents, who would have a positive “impression of the aims and activities of the EU” in 1996, gives way to a rather disappointing figure 24 points below the initial measurement (that is 44%). Furthermore, such a decline in the image of the EU among the Poles does not reflect a general trend among the CEECs because the CEE total figure is subject to a small but steady increase over the years.

Similarly, the standardized figures in Table 4 register slow but substantive progress in popular approval for EU membership among the Czech public, while in Poland the prospect of joining the EU does not find the degree of ardent popular support it would enjoy in 1996, two years before the opening of accession negotiations. Looking closely at the Czech score, one cannot deny the evolution in popular allegiance to the EU as the initial level of respondents who would vote for EU membership (45% = 100) grows by 26 points in 2001, and despite the decline registered in 2002 percentages, it is still 16 points above the initial measurement. By contrast, the trajectory of public support for accession to the EU has been generally falling in Poland, apart from a small gain in 2002 (from 54 to 61% = 87) which is still 23 points below the wide support of 70% (= 100) registered in 1996. Even though in 2002, the average level of popular support for EU membership is higher among the Poles than the Czechs by 11 percentage points, the overall progress of Poland does not follow the upward trend in average support for accession, registered among the total of CEECs.

## 7. AN OVERVIEW OF THE OPINION POLLS AND CONCLUDING REMARKS

Overall, comparing the results obtained by opinion polling in Poland and the Czech Republic, with Tables 1 and 2 presenting the degree of domestic institutionalization, one does not fail to notice that popular habituation to EU norms and actions can be influenced by formal elite institutionalization. The logic of this discussion suggests that the normative justifiability of EU power is substantially determined by the formal transposition of EU beliefs and actions in domestic institutional practices.

In Poland, the slow process of adaptation to the demands of liberal democracy, matched by the growth in corruption, give rise to public discontent and trigger the so called “impact of waiting”, since people coming out of “the dramatic fast-forward of revolution” want drastic, transformative results.<sup>42</sup> Hence, people’s impression of the aims and activities of the EU does not improve in the course of time. In addition, the Poles’ positive disposition towards EU membership should no longer be taken for granted because it is subject to decline as time goes by. In the Czech Republic, the slow but steady progress in the institutionalization of EU democratic standards has given a favourable push to popular habituation with the EU and the prospect of joining its institutional structures. The percentages indicate, though, that there is still room for improvement. There is no doubt that the Czechs open up to the EU, as the state actors incorporate the EU democratic lessons in the daily experience of domestic institutions. Nevertheless, the Union is still far from having won the hearts and the minds of the Czechs.

Building upon such evidence, the EU should reassess its socialization practices and leave aside coercive persuasion focusing rather on argumentative and “learning by doing” instruments. As the accession negotiations have been successfully concluded with all ten CEE applicants and the day of admission comes closer, it is time for EU actors to show confidence in the CEE “pupils” and gradually enculturate those into the liberal democratic practices without using the socialization “sticks” that only help euroscepticism grow. Instead of taking recourse to exceptional criticisms of the new Member States launched either via Commission written reports or through statements in the media, the EU should rather strengthen its advisory role, better co-ordinate its “learning by doing” tools, and enhance the status of the argumentative mechanisms. The use of “learning by doing” tools, more specifically, should be reinforced in the countries lagging behind in terms of formal transposition of EU membership demands and participation could be encouraged by applying the same tools not just to CEE candidates but even to current Member States. If the socialization mechanisms apply to all members, both old and new, that should increase the credibility of EU socialization efforts in the candidate countries and subsequently the willingness of state actors to move along with formal institutionalization.

Of course I do not dismiss monitoring altogether, as it can still provide the CEECs with useful guidelines on how to successfully assume the responsibilities of membership. Monitoring after accession, nevertheless, would be more effective if conducted under a more argumentative prism, like the one offered by the European Conference, where political consultation becomes more important than mere exposition of the weaknesses of the new members.<sup>43</sup> In this manner, monitoring

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<sup>42</sup> Timothy G. Ash, *History of the Present: Essays, Sketches and Dispatches from Europe in the 1990s* (Allen Lane: The Penguin Press, 1999), p. 43.

<sup>43</sup> In the Comprehensive Monitoring Report issued by the Commission in 2003 it is mentioned that monitoring after accession will not diminish but rather follow different procedures and

will deepen co-operation among member states and shall have a constitutive effect upon the identities of state actors involved. After all, only through genuine dialogue will the EU patient be able to recover the shock the European Constitution failure caused in December 2003, spreading doubts as regards the successful socialization of new Member States in general and Poland in particular.

European heads of state, instead of abandoning negotiations, should rather put all the cards on the table and discuss, at length, if it is possible to find a way out of the impasse characterizing current EU affairs. Deliberation is not a panacea but it will definitely assist in the establishment of common grounds among the new Europe of 25 Member States. The Brussels IGC on 12 December 2003 only proved that in the absence of dialogue, EU solidarity that has so far driven the process of integration, gives way to a “grocers’ mentality” by means of which disagreement over the reweighting of votes in the Council becomes an insurmountable obstacle. European leaders did not take time to exchange views on the subject matter that would help them reach a compromise of some sort. As a Greek newspaper would point out, they only convened for an hour and after a 20-hour break they would discuss for a few minutes before deciding to interrupt the workings of the IGC.<sup>44</sup> Even the new Constitutional Treaty that finally emerged from heated intergovernmental debate on 18 June 2004, was not precisely the outcome of consensual deliberation, where argumentation supplements bargaining over pre-given national preferences. Rather, it was the product of intense interstate negotiations surpassing the initial deliberative character of the Convention that had been responsible for its drafting. As such, there is great uncertainty over the eventual ratification of the Constitutional Treaty by all member states having taken part in its rational bargaining.

On the basis of structured dialogue, however, co-ordinated by EU hierarchy if necessary, i.e. the Commission president, current and new EU members should be able to understand each other better and set in motion the political integration engine. Such co-operation at state actors’ level may also prove useful in inspiring EU citizens to enlarge their national identity by adding to it a European dimension of common political fate. So far, the imposition of EU beliefs in the form of membership conditionality did not help all candidates to successfully “digest” the EU lesson. Neither will the imposition of economic sanctions help appease elite and public discontent in the new Member States, that wish to be treated on an equal

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manifest itself differently, e.g. using the “internal market scoreboard” on the transposition of internal market directives instead of “regular reports”. Where possible it will be based on the ongoing pre-notification of the transposition of directives through the TAIEX office. The Commission will assume its normal task of enforcing the *acquis* and, where necessary, will take administrative and legal action.

<sup>44</sup> Γιώργος Δελάστικ, “Η Διεύρυνση της Ε.Ε Εφερε Μεγάλη Κρίση” [EU Enlargement Brought about an Unprecedented Crisis], *Η Καθημερινή* 21/12/2003, p. 16.

basis after all these years of waiting for EU to open its doors.<sup>45</sup> This time the EU should take recourse to argumentation that will bring the “new” Europe closer to the “old”.

Last but not least, the EU should underlie the need for state actors to reach out to the wider public and restore the linkages that have weakened over time. Of course the challenge of public opinion is something that must be met on the local and national level. The EU should nonetheless reinforce national communication strategies, not just reminding but also supporting politicians and decision-makers in other sectors of society, in their effort to bring the citizen closer to the European cause. Promising steps have been taken in this direction via the Commission’s “Communication Strategy for Enlargement” adopted in May 2000. That is an action meant to improve public knowledge of the EU in the candidate countries, to explain the implications of accession for each country and hence help the citizens to overcome misperceptions that give rise to fears and concerns in the public sphere. Current Member States are also involved with a view to achieve an improved understanding of the enlargement process among the wider public. After all, accession is “a new contract between citizens and not merely a treaty between states” as the heads of state and government vociferously argued while signing the accession Treaty on 16 April 2003. However, co-ordinated efforts of this sort should be maintained even after accession with a view to promote dialogue at all levels of society between policy-makers and the public on the role of the EU in their daily life.

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<sup>45</sup> After the Brussels IGC the six net contributors to the EU budget (Germany, France, the United Kingdom, the Netherlands, Sweden and Austria) sent a letter to the Commission President, Romano Prodi, letting him know that they would “freeze” their contributions to the EC budget to 1% of the current EU GDP for the period 2007–2013.

## **Part II: Constitutionalism**

## 7. Becoming “Europeans”: The Impact of EU “Constitutionalism” on Post-Communist Pre-Modernity

*András Sajó*

### 1. INTRODUCTION

One of the persistent fears in the European Union is that the accession countries will be unable to catch up with the prevailing practices of constitutionalism and the rule of law that supposedly ground the common tradition of Europe. This fear is rationalized when considering that unbridled nationalism necessarily impacts upon territorial stability. There are other concerns regarding the weakness of democratic tradition especially after the years of totalitarian rule. It is believed that the institutional systems in place for enforcing the rule of law<sup>1</sup> merely exist in a formal sense rather than in terms of self-sustaining value commitments. The scope of this chapter does not allow for an analysis into the truth of such assumptions. It is undeniable that extremist nationalism is not absent in the rhetoric, and sometimes actual policies, of Eastern European political elites who in turn find popular endorsement for their nationalistic campaigns.<sup>2</sup> These nationalistic sentiments will be echoed once the population of new member states will be confronted with negative experiences as a result of them being unable to successfully articulate their special interests in a great “empire”; unfavorable comparisons of “Brussels as the new imperial power” with the “yoke of the Soviet empire” has already been made in many former communist countries.

One of the striking features of East European nationalism is that it is embedded in a value system that is (at best) indifferent to modernity as it grounds itself in past (ascribed and mystical) national glory. This belief does not generate much interest in the ethics of modernity as put forward in the rule of law (rational accountability for

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<sup>1</sup> In fact, both new and old member states confront, with some difficulty, the aggressive enforcement of bureaucratic (excessively bounded) rationalism that relies on Union supremacy to the detriment of nation-state level constitutionalism. For the old member states see, e.g., the *Alcan* decision: Case C 24/95, *Alcan* II [1997] ECR I-1591 [German rule of law concept disregarded by the ECJ].

<sup>2</sup> The Summer 2003 Gallup poll indicates that although many Hungarians and Estonians identify themselves as citizens of the nation-state *only* (39%) this is not particularly high compared to Great Britain (64%). However, there was no Hungarian who would have identified himself/herself as “European only”. Hungarian identity correlates with age but not with party affiliation.

one's acts, transparency, predictability through formalism, etc.). Modernists (modernizers) argue that accession will change attitudes toward modernization among large segments of the population. However, given the process of accession and the way the new Union is shaped, firm, popular commitment to an efficient democracy as well as the belief in popular self-government, such an efficient responsive and responsible modern institutional system has limited opportunities to prevail beyond the institutional façade. Citizens of the new member states might become *Zwangsdemokraten* (forced democrats).<sup>3</sup> This is problematic because so long as the new European constitutional identity remains an unfinished and uncertain project (an imposed mask) only a limited modernizing identity will be offered. It is also true that the Eastern European political elite seems to have a very instrumentalist disregard<sup>4</sup> for the rule of law even though formal legalism is at least accepted. (Even Meciar accepted unfavorable decisions of the Slovak Constitutional Court.)

Instrumentalism and the hidden contempt of the rule of law and constitutional values in general are confronted with a normative commitment to constitutionalism and the rule of law which programmatically exists in the "older" member states. So long as "European solutions" are felt as being imposed and detrimental to local self-interests, "modernity" (i.e. efficiency considerations and pragmatism in decision-making, irrespective of traditional values and communitarian sentiments) will be detested. However it could be that those national institutions beyond national democratic control and interrelated with European institutional networks may create institutions within the traditional national(istic) states that serve democracy.

It is believed, and in many regards rightly so, that accession to the Union will push Eastern Europe towards the values and institutional settings of modernity. Modernity, in allowing for interest group collective action, can be considered a mixed blessing. Interest group politics behind European centralization is neither particularly conducive to a robust republican design of democracy nor does it contribute to fairness with regard to the protection of minority and other vulnerable groups.<sup>5</sup> As a result of these shortcomings relating not only to the process but

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<sup>3</sup> The term was used by a German journalist with regard to the late Bavarian Prime Minister Franz-Joseph Strauss. Of course, given certain historical circumstances the progress to genuine democracy might lead through imposed democracy.

<sup>4</sup> It is quite telling that the Hungarian Government's chief delegate to the European Convention who joined the overwhelming majority of the delegates signing a document proposing that the new Constitution should be adopted by national referenda, stated in Hungary that he does not deem it appropriate to call a referendum; his signature was added as part of the horse trading that took place at the negotiations. This is a telling, though not unique, example of the understanding of the binding force of contracts, both in the public and among the political elite.

<sup>5</sup> On the new European constitutional design as a project of centralization related to special interest group interest representation where they are loosing at the national level, see Michele Ruta, "The Allocation of Competencies in an International Union: A Positive Analysis," <http://www.ecb.int/pub/scientific/wps/author/html/author222.en.html>



also the political, historical and cultural consequences of accession, the effect of modernization might, in the short term, be limited and perhaps even quite the opposite. Furthermore, the ambiguities of the European project could reinforce pre-modern values within acceding states. The current practices of constitutional public politics are limited to electoral participation of limited relevance for decision-making. In other words, the rational discourse that allows for intellectual formation, the acceptance of governmental decisions and a more engaging decision-making process is absent.

In this chapter, I will look at the present impact of "Europeanization" on public understanding of constitutional democracy and the institutional structures put in place within new member states. I will then briefly consider the foreseeable impact of the European Constitution on the constitutional structures (the new checks and balances) of new member states. Due to the scope of this chapter, I will not address the human rights dimension of constitutionalism. I will consider, in particular, the formation, and distortion, of constitutional democratic politics in the accession process particularly with regard to the referenda and the constitutional structures that have emerged thus far in the new member states. The politics of accession and other governmental practices remain highly instrumentalist. Such instrumentalism diminishes the likelihood that the general public will cherish the virtues of deliberative democracy and tempered majoritarianism.

Relying primarily on the Hungarian experience I will analyze the potential changes in the democratic and constitutional ethos as a result of the emerging allocation of powers in the new Union. The constitutionalist inspiration that transpires from the debate on the European Constitution as well as the draft itself is highly problematic as a blueprint for "transformative constitutionalism".<sup>6</sup>

My first claim is that the accession process as well as the drafting of the European Constitution has reinforced the irrelevance of constitutional democracy in the eyes of the public who continue to see it as a matter of majoritarianism. It remains to be seen how the emerging European Union model of pluricentric separation of powers ("network constitutionalism") will be understood and used democratically by the citizens of the new member states.

My second claim is that, outside of the genuinely free elections firmly entrenched within new member states, certain patterns of state socialism are going to be reinforced through membership to the Union. Democratic politics is understood for many people as a tool of maintaining free public services, irrespective of contribution or need (except the needs of service providers). Such trends might be

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<sup>6</sup> Transformative constitutionalism is about openness to the future and it is based on a critical relationship to the past. In the distinction of preservative and transformative constitutions I follow Cass Sunstein, *Designing Democracy. What Constitutions Do* (New York: Oxford University Press 2001), p. 67. On the pre-modern traditionalism of post-communist constitutions see András Sajó, "Preferred Generations: A Paradox of Restoration Constitutions", *Cardozo Law Review*, 14 (1993) pp. 847–864.

reinforced whist converting local constitutional politics to the European level. The experiences of the accession process indicate that democratic participation and parliamentarism are often quite formal. Instead of genuine participatory politics and accountability, democracy becomes an opportunity to influence politics in order to maximize welfare services. *Union law and policies reinforce the welfare entitlement attitudes of the East European public.* The Union has its own social welfarist value system (or routine) which reinforces the inherited welfarist expectations in the new member states. In these countries, the use of resources for the maintenance of European Union type welfare systems might be counterproductive and contribute to the difficulty in creating a robust democratic and constitutional culture.

## 2. CONSTITUTIONAL STRUCTURES AND THE THINNING OF MAJORITARIAN DEMOCRACY

### 2.1. “Europe Clauses”—Preservative Constitutionalism

Eastern European accession countries have recent constitutions that were created after the collapse of communism.<sup>7</sup> The Estonian Constitution (1992) (Art. 1)<sup>8</sup>, and the Czech and Slovak constitutions (1992) declare the respective countries to be *sovereign*, while Poland (1997), Hungary (1990 amendment), Latvia (1992), Lithuania (1992) and Slovenia (1991) refer to *independence*. Lithuania’s Constitution also states that people’s sovereignty cannot be limited. Even in cases where the Constitution is less unequivocal (as in Hungary) prevailing national sentiment is well represented in the jurisprudence of the Constitutional Court. Here a very traditional concept of sovereignty (see below) has been agreed upon which in turn has resulted in the restrictive wording of the Europe clause in Hungary. The transfer of public powers is not possible. Only the transfer of the right to exercise certain powers is allowed since such a transfer cannot be based on the ultimate source of sovereignty—the Hungarian people.<sup>9</sup>

This concern with *state* sovereignty as a basis for independence is remarkable when compared with Western European constitutions where the matter is either not discussed at all, or is not made explicit (see e.g. Austria<sup>10</sup>, Belgium), or is

<sup>7</sup> The Hungarian Constitution is technically the Constitution of 1949 but it was fully amended in 1989 with several additional revisions since then.

<sup>8</sup> “Estonia is an independent and sovereign democratic republic wherein the supreme power of the state is held by the people.” The formulation follows closely Article 1 of the 1938 Estonian constitution which is the basis of the adoption by referendum of the 1992 constitution, as expressly stated in the Preamble of the 1992 Constitution.

<sup>9</sup> See for example Olivér Várhelyi, “Hungary” in Andrea Ott and Kirstyn Inglis (eds.), *Handbook on European Enlargement* (The Hague: T.M.C. Asser Press 2002), p. 264.

<sup>10</sup> The Austrian Constitution states (Art. 1) that her legal order originates in the people. This, of course, can be seen as a reference to sovereignty.

referred to in the context of the source of sovereignty: Italy, Art. 1; France, Art. 3—where sovereignty pertains to the people; Spain Art. 1.2—where the people are the depository of sovereignty; Portugal is one of the few exceptions where there is direct reference to state sovereignty.)

Since EU membership affects sovereignty, and arguably the independence of Eastern European states, it is understandable that the independence and sovereignty clauses are therefore seen as obstacles, to integration. The importance of these provisions is increased not only because they touch upon foundational issues but also as a result of the pro-independence public sentiment. The population in nation-states with newly recognized or regained sovereignty is understandably sensitive to issues of independence. Opposition politicians are ready to bring up the issue hoping for increased popularity in a society where popular culture traditionally honors (unsuccessful) heroes of independence. Moreover, the cultural and the legal elite are often keen to emphasize independence as a fundamental constitutional principle (because of the constitutional wording and independence dreams in their legal traditions). Both the general public sentiment and the ongoing political conflicts explain why constitutional amendments intended for accommodating the operations of the Union are sometimes rather narrow.

By way of comparison it is worthwhile noting that the various approaches of transferring competence within the Europe clauses are essentially compatible with the prevailing continental constitutional solutions that emerged in the post-Maastricht context. The East European accession countries have carefully considered the constitutional solutions adopted in the Member States after Maastricht. The EU made it a priority to provide a knowledge base of expertise in this area. Given the increasing uncertainty of the nature of the Union, its identity, mission and decision-making powers at the time the accession clauses were being written into the respective constitutions, it is understandable why some accession countries were reluctant to take a final position on the transfer of powers and competencies to the Union. The Latvian amendment, for example, expressly considers the accession to be subject to revision by way of a referendum that can be initiated by the people. Lithuania’s amendment of Art. 136 also contains a safeguard clause: “The Republic of Lithuania participates in international organizations if such participation does not contradict interests of the state and its independence.” However, the Europe clause states that it expressly “transfers to the EU the competencies of the national institutions in the fields foreseen in the Founding Treaties of the EU, so that it shall be entitled to implement common competencies with other EU member states in those fields.”

## 2.2. *Referendum—Instrumentalism and Lack of Deliberative Democracy*

Given the concern with independence and (popular) sovereignty and because of the fundamental changes that would result from accession, all the Eastern European countries concerned opted for a referendum to sanction accession (or the accession treaty). This was irrespective of whether this form of popular support is prescribed