

of services for free, irrespective of individual contribution and need assessment. (Needless to say this may not correspond to the principle of social solidarity even though it may not be in conflict with the European practices that emerge in the name of social solidarity). Most political parties and governments have subscribed to this popular/populist attitude. This primitive theory of entitlements has been elevated to a theory of “subjective rights” in Hungary; that “theory” is voiced by government and opposition and sanctioned by the decisions of the Hungarian Constitutional Court.²⁴ Social rights serve as the basis of government provided services, which are taken for granted for all citizens. The attitude is inherited from socialism—the state socialist system provided all sorts of services in exchange for political loyalty and to a great extent irrespective of merit and economic inefficiency consequences. The resulting inefficiencies made the state socialist system unsustainable. However, the welfare expectations continued to operate in conformity with what one could expect on the basis of the endowment effect. People are generally inclined to ask much more for selling a good they possess than they are ready to pay, if asked to buy it. People estimate very highly the services which were already provided, although they would be reluctant to pay for such services. Such attitude is generally quite irrational, especially where it helps to maintain very inefficient and costly bureaucracies, as it is the case in the post-communist countries (see, in particular the healthcare system).²⁵

Endowed welfarism has proven to be quite popular. This popularity is not limited to Eastern Europe although richer countries may afford it more. It is a typical middle class attitude that favors, among others, the maintenance of universal services. The attitude was masterfully summarized in a dissenting opinion of Justice Kisényi of the Hungarian Constitutional Court.²⁶ Justice Kisényi argued that social rights are to be understood in conjunction with the constitutional right to social security. Social security is far more than the right to a social existence minimum (i.e. subsistence support). It is a constitutional right that pertains to *all* (individuals and families), “irrespective of differences in wealth.” It includes the obligation of the state not to interfere with the material conditions of the citizens in a way that imposes on the masses of citizens burdens that are disproportionate and exceed their possibilities. At the beginning of 1995 the Hungarian Constitutional Court repeatedly protected existing, non-contribution based social services as statutory entitlements amounting to acquired rights that cannot be repealed, at least not until

²⁴ Likewise the Polish Tribunal, in the Pension cases. For Hungary, see A. Sajó, “How the Rule of Law Killed Welfare Reform,” *East European Constitutional Review*, 5 (1996) pp. 31–41.

²⁵ Posner argues that endowment effects are rational if the disparity reflects the unique character of the goods in question—unique in the sense of lacking close substitutes. This is certainly not the case of the welfare services which are (or would be) available on the market. Richard Posner, *Economic Analysis of Law* (5th edn.), (New York: Aspen Law & Business 1999), p. 95.

²⁶ 26/1993 (IV.29.) AB hat, [annualized increase of pensions below inflation upheld].

the recipients had sufficient time and opportunity to find alternative protection. The Court and, increasingly, most political parties accepted that general entitlements, unrelated to needs assessment are “subjective rights” and pertain to all.

The social welfare dependency that is rooted in the endowment effect had dramatic fiscal consequences. Universal services that were inherited from socialism were of a nominally high quality. As a result of different populist-electoral policies, at least some of these services were further extended after the collapse of state socialism. The state could not sustain these services, or their level (quality), except at the price of excessive taxes with negative impact on investment and increasing government debt that imposed increasing fiscal burden on economic development. At the moment when the requirements of the Stability and Growth Pact became a concern to the new member states and the governments, certain governments attempted to reduce the budget deficit. There was a general public outcry against any attempt to move towards a needs assessment based welfare system. It has to be admitted that the gross income of the population is HUF 1,1 m (4,000 Euro) with an average of 28% income tax and approximately another 11% social security tax. Only 4% of the taxpayers reported more than HUF 4,000.000 annual gross income. As long as the tax remains high (40% above the 4,000 Euro bracket) there is no disposable income for social services and the population is not in a position to make informed choices, even though, in the given system, the level of services deteriorates.

It is likely that the welfare expectations attitude will be reinforced ideologically in the Union. Further, to some extent, such tendencies might be reinforced on the basis of the specific rules of the secondary legislation of the Union that reflect welfarist concerns but correspond to the possibilities of much more affluent societies. (It is a matter of conflict for the future how the new member states will satisfy the budget deficit, and national debt reduction, etc. requirements of the Euro zone.) The solidarity-inspired and other socialistic provisions of the Treaty/Constitution will enhance the attitude of middle class welfare dependence.

The European attitude is exemplified in the Constitution that continues to enhance the idea that a high level of health protection is to be provided under nationally determined systems as promoted by Union policies.²⁷ To the extent that this points to an all-European standard, the pressure on the weaker national economies to maintain free, or below market price services will continue. Note that per capita health care spending in Germany exceeds at least sevenfold Hungarian per capita expenditure, though in terms of the respective percentages of the national budgets the

²⁷ Article II-35: Health care:

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

two countries are not fundamentally different. However, the Hungarian expenses are almost exclusively covered on the basis of a national insurance system that runs a major deficit, covered by the budget.²⁸

I would like to illustrate the welfarist burden on the new member states (with the already mentioned consequences of welfare dependency reinforcement and negative impacts on economic development) with a more specific example that originates in the secondary legislation on commercial activities. Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) requires that universal services be made available at an "affordable price" (Article 3(2)). Annex IV specifies that such a duty implies averaged prices or the provision of specific tariff options for consumers with low incomes. The resulting loss to the operator has to be recovered from contributions from the other undertakings (who will charge more to their users). I am sure that even Adam Smith would offer some arguments for such arrangements referring to public goods; modern economists would talk about positive network externalities. Further, solidarity might provide additional justification for such arrangements. For example, emergency calls will be available to all. However, what are the implications of such logic where large numbers of the population have low incomes? The affected companies (sectors) will lose their competitiveness.

Welfarist provisions in European Union law, similar to the above mentioned examples, are of considerable importance for reinforcing socialist mentalities of endowment and post-socialist welfare institutions with all the inherent inefficiencies, unfairness (middle class bias) and non-sustainability that it entails.

After all, the quoted welfarist provisions of European Union law seem to reflect the same welfarist perspective that the national parliaments have inevitably accepted in response to democratic pressure. Such language and policies might be attributed to the self understanding of the administrative welfarist state. The Union's institutions and networks are not catering to welfarism and function to some extent as buffers against the self-destructive welfarism of democracy at the national level. Nevertheless, the comprehensive language of the Union seems to mimic what would have resulted from traditional popular representative democracy. This may not be decisive where particular policies are left to independent networks without a welfare-oriented redistributive mission. It should be added quickly that all this is intended to indicate a possible trend only, a trend that at this moment is undermined by at least three facts. Firstly, the Union does not have much power of direct reallocation as this remains within the budgetary powers of national parliaments.

²⁸ The health care expenditure looks non-sustainable in its present system of administration based on an allegedly "acquired right". Attempts to reform the system run into the resistance of the well organized medical profession and the pharmaceutical industry, supported by the opposition of the day, claiming that any reform imposing direct costs on the population violates people's rights.

SPREADING DEMOCRACY AND THE RULE OF LAW

Secondly, the transfers of the Union are certainly and perversely redistributive (see CAP). Thirdly, there are genuine efforts to recreate representative government or a network of representative governments at the Union level that might respond to (or resist) the same redistributionist democratic impulses that characterize national parliaments.

8. Happy Returns to Europe? The Union's Identity, Constitution-Making, and its Impact on the Central European Accession States

Jiri Priban

1. INTRODUCTION

This chapter addresses the problem of political identity within the ambit of the post-war European integration process as well as the recent Constitution-making efforts. It focuses on the distinction between civic and ethnic political identity within the framework of the European Union and in the context of the Central European accession states. The first section analyses the problem of ethnicity in modern European history drawing on the role of the EU as a neutralizing force of ethno-national divisions, tensions and conflicts. The following section deals with the enlargement process, paying particular attention to policies set up by the EU to contain ethno-political conflicts emerging in Central Europe after the collapse of communism. The final section is a discussion of the European Union's political symbolism premised on the possibility of a potential European *demos*.

The crux of the argument lies in comparing two models of constitution-making: the Hobbesian vertical versus the Lockean horizontal version of the social contract. I shall argue that the vertical constitutional model does not allow for the political ambitions of a European Federation or a Europolity to be met due to the notable absence of a European People as the Constitution's constituent power. The vertical, authority-promoting model may have been beneficial to the accession countries were it applied during the Convention's deliberation. Conversely I aim to demonstrate that the horizontal constitutional model, as presented in the Convention's Draft Treaty, has great potential for creating a Constitution which embraces a European identity premised on the tension between civil democratic virtues and old national loyalties.

2. CONSTITUTION-MAKING AND POLITICAL IDENTITY IN POST-COMMUNIST CENTRAL EUROPE: PRELIMINARY REMARKS

Most of the countries which joined the European Union in 2004 are experiencing a unique movement related to their constitution-making. After the fall of communism in the late 1980s and the early 1990s, former communist countries such as the Baltic States, the Czech Republic, Hungary, Poland, Slovakia and Slovenia reinvented

their national sovereignty by introducing and cementing the liberal democratic rule of law into their new constitutional systems. The constitution-making processes, typical of the political climate in the early 1990s, were part of the juridification of emerging democratic politics and human rights culture in post-communist countries.

The constitution-making process in Central and Eastern Europe in the 1990s was heavily influenced by the political motivation to accede to the European Union. Under the “Return to Europe” slogan, former communist countries opened a complex process of negotiations with the EU which resulted in the enlargement of the Union from its existing 15–25 Member States. The enlargement process began at the EU Copenhagen summit in June 1993, continued at the EU Amsterdam summit in 1997 where the process of negotiations commenced, was formally recognised at the EU Nice summit in 2000 where the accession countries were invited to participate in the Convention’s constitution-making, and was completed at the EU Copenhagen summit in December 2002 when the Central and East European countries concluded negotiations on the EU accession.

National sovereignty achieved after the fall of communism was used as a political instrument to negotiate new forms of integration and limitations to sovereignty. The revival of the Nation-State in post-communist Europe was transitional in bringing those nations into the “postnational constellation” of the European Union. The symbolic and somewhat vague claims of integration were gradually converted into pragmatic policies of the institutional and structural accommodation of democratic government, the civil rights based rule of law, and the market economy. The consolidation of these democratic regimes and their accession negotiations were taking place simultaneously. The integration process was part of the post-communist state-building and constitution-making exercise due to its symbolic power of bringing together the region with the liberal democratic and prosperous Europe (symbolic rationality) on the one hand and its pragmatic effect on political, economic and constitutional transformations (purposive rationality) on the other hand. The European Union was the main “focal point”¹ which had a profound effect on the quality of the political process and the nature of the self-reflection of collective political identity in those countries. For many Czechs, Hungarians and Poles, this development was merely a restoration of the region’s historical and cultural unity with the West. Despite the resurgence of historical nationalist movements, ethnic tensions, xenophobia and other transient “turbulence”, the general support of this integration policy has remained solid over the last 15 years.²

¹ J. Elster, C. Offe and U.K. Preuss, *Institutional Design in Post-communist Societies: Re-building the Ship at Sea* (Cambridge: Cambridge University Press, 1998), p. 188.

² For a detailed analysis, see annual reports of *Central and Eastern Eurobarometer General Public Opinion Surveys*, and more recently (since 2001) *Candidate Countries Eurobarometer General Public Opinion Surveys*.

3. EUROPEAN CONSTITUTION-MAKING: THREE ARGUMENTS

By trading their national sovereignty in favour of European integration, the Central and Eastern European countries are partaking in the constitution-making process at the European level. Within this 15 year period therefore, these countries have experienced two fundamental constitution-making processes: from building national sovereignty to building supra-national sovereignty.

Prior to analysing the role of the EU's institutional framework in these processes, it is worthwhile summarizing the major arguments in favour of the current European constitution-making efforts which began with the work of the Convention and subsequently were transferred to the Intergovernmental Conference in October 2003 and signed in Rome in October 2004. We may divide these arguments into the following three categories: the functionalist argument, the democratic renewal argument and the identity argument. The functionalist argument primarily uses the language of globalisation to demonstrate that the shape of the European political map must change since European nation states can no longer regulate the global economic, environmental and political processes effectively. Global communication and economic exchange exceed the power of nation states.³ The modern state can neither promote nor benefit from national economic development alone. The mobility of capital fundamentally affects the labour markets of wealthy post-industrial societies and their social welfare systems. According to the functionalist argument, state administration is too weak to cope with the disappearance of national economies. As a result the progress of the European integration process into a tighter, constitutionally entrenched, political model appears to be a direct consequence of economic and political global trends.

Following the functionalist argument, the European Union has to be constructed as a supranational political agency which would be able to address the challenges of the existing monetary union and denationalised European market. For instance, Jürgen Habermas demands the "overcoming" of the nation-state in the post-Maastricht Europe when he states:

[F]or the present, a politics still operating within the framework of the nation-state limits itself to adapting its own society in the least costly way to the systemic imperatives and side-effects of a global economic dynamic that operates largely free from political constraints. But instead it should make the heroic effort to overcome its own limitations and construct political institutions capable of acting at the supranational level.⁴

³ K. Ohmae, *The End of the Nation State: The Rise of Regional Economies* (New York: Free Press, 1995).

⁴ J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press, 1999), p. 124.

According to Habermas, tighter political and administrative integration is considered to be the only anti-dote to the erosion of social solidarity, the welfare state and the public sphere. One does not have to be a hero politician to see the political challenges of economic globalisation, yet all attempts to reconstruct and strengthen the European political system in order to respond to the developments in the European and global economic systems have received rather mixed and mostly lukewarm reactions.

Political building of the “ever closer union” had been mentioned already in the 1957 Treaty of Rome and Jean Monnet, one of the European “founding fathers”, advocated the process of institutionalisation which, although not an end in itself, might result in the tight-knit political entity of the United States of Europe.⁵ The object of post-war European integration was the fostering of peace, prosperity and liberty where the building of a democratic community was left to the nation states.⁶ Nevertheless, the permanent shift in power to the European level puts further pressure on overcoming the democratic deficit of the Union’s institutions within the spheres of authority, representation and accountability. The European Union has to deal with its own democratic deficit and therefore needs to “democratize” the system of its administrative institutions. It cannot be a union merely based on functional integration⁷ by harmonizing its political institutions with economic developments as a result of reactive strategies.⁸

This argument of democratic renewal has been the most common source of criticism of the European Union. It treats European politics as the politics of a “confused empire” in which the proliferation of offices obfuscates the political rule.⁹ A critique of the pathological nature of current European politics is the starting point of this argument with the aim of strengthening the weak democratic legitimacy of EU institutions. The Union obtains its legitimacy through the previous and therefore indirect legitimacy of the member states.¹⁰ The People of Europe do not identify themselves with, and take very little interest in, European politics which is an issue that needs to be tackled through the constitution-making process. An expansion of democratic legitimacy and its incorporation into formal constitutional

⁵ J. Monnet, *Memoirs* (London: Collins, 1978), p. 520ff.

⁶ G.F. Mancini and D.T. Keeling, “Democracy and the European Court of Justice”, 57 *Modern Law Review*, 2 (1994), pp. 175–90.

⁷ For the concept of “functional integration”, see especially H.P. Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen: Mohr, 1972).

⁸ W. Wallace and J. Smith, “Democracy or technocracy? European integration and the problem of popular consent”, 18 *West European Politics* 3 (1995), pp. 137–157.

⁹ For the term, see P. Sloterdijk, *Im selben Boot. Versuch über die Hyperpolitik* (Frankfurt: Suhrkamp, 1993), Chapt. 3.

¹⁰ See, for instance H. Wallace, “Deepening and Widening: problems of legitimacy for the EC”, in S. Garcia (ed.), *European Identity and the Search for Legitimacy* (London: Pinter, 1993), pp. 95–105.

rules of the EU is therefore being requested in order to promote the regulatory power of European institutions.

This idea of dealing with democratic deficit by reducing the constitutional deficit of the Union is closely related to the outcome of the third identity based argument. While the democratic renewal argument demands democratisation of the political bodies of the EU in order to legitimate them, the identity argument builds upon the successful historical achievements of the European integration process thus far. It is premised on the primary function of the European integration process of neutralising nationalist tensions. Taming *ethnos* in European nation states has always been considered to be the primary purpose of both economic and political integration. European popular identity is constructed as the reverse of modern nationalism and its political myths. This creation of a civil European *demos* is contrasted with different ethnic pre-political identities of peoples of Europe and its symbolic power is supposed to keep *ethnos* on the sidelines of European politics. *Ethnos* is treated as a mere structural excess of post-nationalist European politics. Within the process of European integration a common European people is to be invented and given a voice which adheres to the principles of democratic government. The identity argument accommodates the notion of cosmopolitan citizenship and invents the *demos* as democracy's subject which is extended from the boundaries of the nation-state to those of the supra-national level.¹¹ Nevertheless, this effort is rendered more complex by the fact that European integration runs two different courses. On the one hand, an intensive process of transferring power from national to European institutions is occurring and on the other hand, an extensive process of the incorporation of the new member states to the European Union is also taking place.

4. TAMING *ETHNOS* AND ITS SYMBOLIC POWER FOR THE NEW MEMBER STATES

The first argument could only affect the post-communist accession countries indirectly since they are just opening their markets to the forces of globalisation. The second argument could have no impact until the acceding states are informed that they are to become "members of the EU family." Unlike the first two, the identity argument has played an essential role in the national constitution-making in Central and Eastern Europe in the 1990s. It has also formed an important part of the public discourse of the accession states.

Modern European states were created as institutions of both liberal democratic hopes and exclusive political identity of an ethnically integrated community. Romantic nationalism resulting in the creation of modern nations often initiated the transformation of the early modern states into democratic and republican regimes.

¹¹ See, for example, D. Beetham, *Democracy and Human Rights* (Cambridge: Polity Press 1999).

The nationalist discourse therefore provided a very effective symbolic universe which facilitated a more abstract form of the social integration of populations in modern political societies.¹² The nation as an ethnic community of common language, tradition and ancestry represents the collective identity even for the modern European states that are premised on principles of democracy and liberal republicanism. This duality of civic and ethnic collective identity and the institutional framework of modern politics “leads to a double coding of citizenship, with the result that the legal status defined in terms of civil rights also implies membership in a culturally defined community.”¹³ In this respect, Habermas summarizes that “[T]he tension between the universalism of an egalitarian legal community and the particularism of a community united by historical destiny is built into the very concept of the nation(al) state.”¹⁴

The European Union has been symbolically constructed as a civil alternative to the ethnically burdened nation states. Taken from the historical point of view, the European integration process is a post-1945 attempt to successfully answer the “German question” and its ethnic extremism of *Volk* politics which continues to haunt modern European history. The question of whether the people constitute an ethnic or civic community has also been central in all Central European states. The Union’s recent policy of promoting regionalism only strengthens its civic image because it delimits administration to the units beyond the institutional framework of a sovereign state. The modern administrative and redistributive roles of a nation state are weakened by the two opposite trends in the shifts in power. While the first trend delimits more power to “smaller” regions of the EU member states, the second one shifts more power to the “bigger” European Union. The Union has thus been perceived as an organisation able to promote the values of cosmopolitan republicanism and civic virtues and curb the risks arising from ethno-nationalism. The modern state is an institution affected both by the ideals of a republican political society and the vices of ethnic communitarianism. The struggle between society and community, so central in the modern sociological paradigm, finds its reflection in the symbolic political language of European integration. The EU represents itself as a cosmopolitan civil society which is ready to recognise ethnic communities at the regional level, but which confronts the residual ethnic nature of its member states.

The political dualism of community versus society may be far from the reality of EU politics yet it plays a significant role in its legitimation. This argumentation has also played an essential role in the mandates of pro-EU campaigners in the former Central and East European countries. This strategy should come as no surprise when considering the recent history of Central and Eastern states and in particular the

¹² H. Schulze, *Staat und Nation in der Europäischen Geschichte* (München: C.H. Beck, 1994).

¹³ J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press 1999), p. 113.

¹⁴ *Ibid*, at 115.

shocking example of Yugoslavia disintegrating into isolated islands of ethnic hatred and violence. The “Europeanization” of the Central and Eastern European countries was perceived as the best scenario for the region since the post-communist political reconstruction of democratic institutions and economic reforms could be backed by the “grand design” of the European Union.¹⁵ The strong involvement of “patron power” guaranteeing the peaceful nature of post-communist transformations and the enforcement of democratization by internationally recognised standards had been favoured because of its ability to curb the growing threats of political authoritarianism, nationalist factions and other disturbing consequences of the post-1989 political changes.¹⁶

5. THE COPENHAGEN CRITERIA AND BEYOND: THE UNION’S *ETHNOS*-ORIENTED STRATEGIES IN CENTRAL EUROPE

Central European states formally started the process of the EU integration after the Copenhagen summit of 1993 which set up conditions for the accession states. In June 1993 in Copenhagen, the European Council specified the following criteria which individual states had to meet: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criterion); the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union (economic criterion); and the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union (criterion concerning adoption of the Community *acquis*). These accession conditions are very general and vague but their meaning could largely be extracted from the existing institutional frameworks and practices in the EU and its member states. However, these frameworks and practices were changing as a result of the transformation of the EU itself during the 1990s.¹⁷ For the accession states, the Union became a fluid goal which was yet to be achieved. While the Union was progressing in its political debates during the 1990s and proposed fundamental constitutional changes, the accession talks were driven by clear reference to the status quo of the 1993 Copenhagen criteria. The enlargement process required compliance and stabilisation whereas the Union’s stability was non-existent.

Furthermore, these conditions even expand the EU frameworks and practices as in the case of ethnic and national minority rights. Although the EU regulations dominated the list of conditions, the conditionality policy was not necessarily limited to the Union’s own standards. The Union could demand extra conditions only

¹⁵ A. Agh, *The Politics of Central Europe* (London: Sage, 1998), pp. 43–44.

¹⁶ See, for instance, C. Offe, “Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe”, 58 *Social Research*, 4 (1991), p. 889.

¹⁷ See, for instance, C. Jenkins (ed.), *The Unification of Europe: An Analysis of EU Enlargement*. (London: Centre for Reform, 2000).