9. An Evolutionary Approach to the Constitutionalism of an Enlarged EU: Why will Cognitive and Cultural Boundaries Matter?

*Daniela Piana**

> "Laws, in their most general signification, are the necessary relations arising from the nature of things. In this sense all beings have their laws . . . We must therefore acknowledge relations of justice antecedent to the positive law by which they are established: as for instance if human societies existed it would be right to conform to their laws."[1]

1. Introduction

Several different perspectives have been put forward in order to reach a better understanding of European constitution making and, at the same time, of constitution making processes that have occurred in the Central and Eastern European countries (CEEC). In this chapter, I will address the impact enlargement has had on the European constitution-making process by analyzing three main issues.[2] The first relates to questioning the empirical adequacy of models provided by the social sciences to study the interaction between constitutionalisation and the enlargement of the EU. The second is concerned with the capacity of these very models to grasp the essence of the normative validity of constitutional rules. I will argue that the models proposed are inadequate in explaining and shaping (through policy making and the institutional building in the CEECs) the constitutional rules of new Member States. I will propose a mode of analysis which, in my view, transcends the limitations of the above mentioned models, as it is better equipped to detect the

* I am very grateful to W. Sadurski for his remarks on a draft version of the chapter. The seminars in legal and political theory, organized in Paris in 2002, and directed by Jon Elster, have been very enlightening about the processes of institutional building.

1 Charles de Secondat Montesquieu, *De l'esprit des lois* (1748) (Paris: Flammarion, 1979), p. 4.

2 For an overall analysis of the impact of the various normative sources on domestic systems see Rein Mullerson *et al* (eds.), *Constitutional Reform and International Law in Central and Eastern Europe* (The Hague: Kluwer Law International, 1998) and, for a more specific view on enlargement, Alfred Kellerman *et al* (eds.), *EU Enlargement. The Constitutional Impact at the EU and at the National Level* (The Hague: Asser Institute, TMC, 2001).

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 219–235.

complex interplay between the multiple sources of norms within the constitutional game in CEECs, on the one hand and, the impact of enlargement on the meaning that constitutionalism would have in the future Europe, on the other. I will take an evolutionary approach to the constitution making processes and will highlight how, in this evolutive process affecting the scope and the meaning of the constitutional rules, cognitive and cultural factors matter. This analysis should be considered as a preliminary assessment of the approach which is mainly used here to make the point about its advantages and adequacy. A further and more detailed empirical research on the issues touched in this chapter will be required in the future.

2. Building an Enlarging European Constitution: where does the Rationale Come from?

Following a classic distinction introduced by Friedrich von Hayek, two main traditions can be distinguished. The first "constructivist" tradition is based upon a strongly rationalist view of social orders. The second "evolutionary" tradition assumes that social orders are created through spontaneous processes where human rationality does not constitute the absolute and sufficient reason of their existence.[3] With specific reference to the CEECs' application to enter the constitution making processes, I would state—following Hayek—that the first view holds that constitutions are designed and implemented according to some rational procedures. Whereas the second claim affirms that constitutions are spontaneous orders which can be explored and discovered.[4]

The constructivist perspective relies upon three main premises. The first relates to the (rational) capacity of agents to shape their social rules according to a given set of preferences and interests. The second affirms that rules bind rational actions because they have an impact on the pay-offs of the alternatives.[5] The third premise assumes that it might be possible to design a social, decisional procedure that transmits (once rational agents decide to adopt institutions to solve their social dilemmas) the initial normative meaning, attributed by the individual to the preferred alternative, to the final outcome of the collective choice.[6] Put simply, social orders are held to be rational and, therefore, valid from a normative point of view because they have been chosen according to a social decision making process which is neutral with regard to the decision makers' interests, with regard to the alternatives and those problems faced by the collectivity. In the case of the constitutional choices, the constructivist view says that constitutions, because they are

---

3 Friedrich von Hayek, *Law, Legislation and Liberty* (London: Routledge, 1982), Chap. 1.
4 *Ibid*.
5 Kenneth George Binmore, *Game Theory and Social Contract* (Cambridge: MIT, 1994).
6 James Colomer, *Political Institutions and Social Choice* (Oxford: Oxford University Press, 2001).

born from rational and formally valid collective decision making, are legitimate.[7] This view is represented by the contractualistic perspective[8] which states that the procedure to create a legitimate constitution is a contract among free and rational citizens:[9] "the rules of political order can legitimately be derived only from the agreement among individuals as members of the policy."[10] In this perspective, the legal orders—and *a fortiori* constitutional ones—are held to be structures, fixed in time. Therefore, the contract is held to able to organize *ex nihilo* a social system, a social community.

The empirical adequacy of this framework to explain the process of European constitution making turns out to be too narrow and inadequate. As a matter of fact, the constitutional norms of the EU have not been intentionally agreed anywhere, nevertheless, their existence and validity has been extensively argued. It is much more likely to interpret the process of the constitutionalisation of the EU in a completely unintentional perspective where the choices made by institutional agents—the European institutions and the states—have to interact with a wider, broader and diffuse process of evolution of the European legal order.[11] This process has partially occurred outside the scope of the interests and the intentions rationally and strategically pursued by actors through explicit agreements. As it has finally been highlighted, the constitution of the EU is much more of an overlapping structure where the rationale cannot be ascribed to an initial constitutional choice. It is true that the European constitution determines the main axes of the political structure of the EU, while the policies and the social processes originated by them are dynamic and changing in time. But it is also true that many feedbacks turn out to affect the validity and the meaning of the constitutional rules. If this is the state of the art then some critical assessments can be put forward about the framework adopted to shape the guidelines of the pre-accession strategy. In effect these guidelines follow the constructivist vision where the constitutional norms of the EU could be transferred as a packaged out system of data.[12] They have been held to transmit normative content that, once integrated in the legal orders of

---

7 Geoffrey Brennan and James Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press, 1996).

8 For a critical assessment of the contractualist theories, *see* Christopher Morris, *The Social Contract Theories: Critical Essays on Hobbes, Locke and Rousseau* (Lanham: Rowman Littlefield, 1999).

9 See for a criticism of this view Russell Hardin, "Why a Constitution?", in Bernard Grofman and Donald Wittman, eds., *The Federalist Papers and the New Institutionalism* (New York: Agathon Press, 1989), pp. 100–101.

10 Brennan and Buchanan, *op. cit.* n. 7, p. 26.

11 Bruno De Witte, "The closest thing to a constitutional conversation in Europe. The semi-permanent treaty revision process", in Paul Beaumont, Carole Lyons and Neil Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford: Hart, 2002).

12 Lykke Friis, "Conceptualising Enlargement", paper prepared for the workshop "Governance by Enlargement", Darmstadt, 23–25 June 2000, and Anna Murphy, "The European Union

the new Member States, could transform them into *European States*. The implicit hypothesis within this policy is a rationalist one which assumes that social orders can be created through a well-designed institutional change. The criteria adopted to assess the impact of the transfer of norms to the candidate countries have been targeted according to a frozen idea of the European constitution as well.[13]

However, this framework would have been rejected from an evolutionary perspective. Actually, the divide between the constructivist and the evolutionary perspective is threefold. The first concerns the limited rationality ascribed to agents. Constitution makers do not forecast the outcomes of their choices, neither are they allowed to govern the process of implementation of the set of the institutional tools which they have opted for. Furthermore, the evolutionary perspective holds the causal mechanisms at the origin of the emergence and stabilisation of a constitution to be close to those mechanisms that are at the origin of the natural and cultural evolution. Therefore, this view tries to figure out patterns for the introduction of novelties, for the selections of variations and for the transmission of these novelties that make sense in the social orders. The outcomes of these mechanisms are over and above human intentions, in the sense that the content of a constitution can't be reduced to the intention of a human player. In fact, since human minds are naturally and intrinsically bounded and subject to failure,[14] the rules composing a stable constitution go far beyond the rules that could be created with what can be called "one shot choices"—as it would be an intentional agreement.[15] Thirdly and consequently, the rationality of a constitution can be assessed only through a dynamic perspective, looking at its capacity to cope with the changes and the new issues that come out from collective actions.[16]

The advantage of this second view follows from its greater empirical adequacy, with regard to the real capacity of people to shape reality through institutional design. Moreover, it is a perspective that is closer than the constructivist one to the on going process linked to the use of rules. Evolutionary scholars have pointed out that norms change because of an internal process of change. This change is the outcome of interpretative actions and impinges upon the scope and the social impact of the norms themselves. Therefore, behind the intentional selection of

---

and Central and Eastern Europe: Governance and Boundaries", *Journal of Common Market Studies* (37) (1999), pp. 211–232.

13 Elena Iankova, "Governed by Accession. Hard and Soft Pillars of Europeanization in Central and Eastern Europe", *East European Studies*, *Occasional papers*, 2001.

14 Friedrich von Hayek, *Scientism and the Study of Society* (1942–1944), in *The Counter–Revolution of Science. Studies on the Abuse of Reason* (Glencoe: The Free Press, 1952), pp. 13–102 and 207–221.

15 Friedrich von Hayek, "The Use of Knowledge in Society", *American Economic Review* (35) (1945), pp. 519–530.

16 Viktor Vanberg, "Institutional Competition Among Jurisdictions: An Evolutionary Approach", *Constitutional Political Economy* (5) (1994), pp. 193–219.

norms—that is represented for example by the statutory acts of the legislative or of the government—a widespread and incremental process of change affects the meaning of the constitutional rules and renders them to be effective.[17] Furthermore, the interpretation of the norms is strongly related to the values that social actors attributed to them. Since constitutions are very general rules governing the abstract relationship between citizens on the one hand, and between citizens and the State on the other hand, their normative value is not only related to the specific, punctual outcomes reached through their implementation, but also the general meaning that is attributed to them. This meaning is determined by cognitive and cultural factors shared by a collectivity.[18]

This twofold composition of the mechanism of change that impinges upon constitutional rules is very pertinent if we look at the constitution-making process of an enlarged Europe. In fact, the normative validity of the legal order of a future Europe will go beyond the normative contents of the Treaties and beyond the normative content that has been intentionally transmitted and intentionally adopted by the candidate countries. The outcome of enlargement and the European process of constitution making can be grasped only if we account for the widespread interactions among several normative sources of constitutional principles and constitutional rules that have participated in this process. Therefore, it seems that to grasp the dynamics of constitution making, a set of evolutive mechanisms should be created in order to come to terms with the puzzle of the constitutionalisation of an enlarged Europe. Such mechanisms should enable us to understand not only the changes in the legal systems, but also—I would argue this to be the most important aspect in this context—the micro-changes in the scope of the norms following from their *interpretation*.

3. ENLARGING THE RULE OF THE LAW OR CHALLENGING THE NORMATIVITY OF LAW: A COMPLEX EVOLUTIONARY APPROACH

If we take the points stressed in the last paragraph, the events that have characterized the recent history of the new Member States seem to have a wide and unpredictable impact on the overall political and legal order of the future Europe Union. In order to have an insight into the weight of, and the meaning of, enlargement on the constitutionalisation of the EU, the effects born from the interaction of the various sources of norms that have played a role in shaping post-communist constitutions[19] have to be accounted for. For instance, it should be considered that in the first period

---

17 Robert Alexy, *A Theory of Legal Argumentation: the Theory of Rational Discourse as a Theory of Legal Justification* (Oxford: Clarendon, 1989).

18 Donald Davidson, *Subjective, Intersubjective and Objective* (Oxford: Clarendon, 2001).

19 Friedrich Kratochwil, *Rules, Norms, and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

of the democratic transition some international economic institutional players—namely the World Bank and the IMF—have contributed to enhancing the liberal imprinting of the economic constitutions of the CEECs.[20] Moreover, the Council of Europe has pushed towards a very pervasive and punctual monitoring of the integration of the provisions held to be able to enforce the protection of human rights in CEECs. With regard to the domestic sources, the democratic transition has represented, on its own, a process of creation, selection and retention of norms adopted and used by the CEECs to shape their constitutional structures. Therefore, once the pre-accession strategies for the candidate countries have been adopted, their processes of constitution making have already begun. This means that the transfer of the "European" constitutional principles and norms, which have been governed through the pre-accession strategy by the European Commission, have crossed the outcomes, more or less consolidated, of the democratic transition.[21] As a result, domestic solutions to constitutional problems, historical traditions making sense of the identity of candidate countries and legal cultures[22] shared by domestic legal experts have been deeply exploited to shape the new states. Once accession to the European Union has been negotiated, the normative contents of the constitutional rules, the structure of the State and relationship between the legislature, the executive and the judiciary has been affected again. The *repertoire* of values and principles that are expected to be respected, enforced and protected in the CEECs have been integrated in the *repertoire* of the national constitutions.[23] The equilibrium among the different branches of the State has also been touched. Legal cultures have been influenced through an intensive contact with problems strictly related to the *European* dimension of the legal issues.

How should the feedback that the outcome of this complex process will have on constitutionalism of the EU be understood? The scientific literature developed to study democratisation turns out to be deficient when it faces the puzzle of the constitution making of the CEECs. The analysis of post-communist democratisation has been biased since the consolidation of democracy has represented a sort of rupture with the past and, therefore, the democratisation of Central and Eastern Europe will create a reality that is more or less similar to democratic regimes existing in Western Europe.[24] Since history is constituted by change and tradition, by novelties and memories, it is also reasonable to assume that people have learnt

---

[20] Geoffrey Pridham *et al* (eds.), *Building Democracy? The International Dimension of Democratisation of the Eastern Europe* (London: Leicester University Press, 1990).

[21] Andrew Janos, "Continuity and Change in Eastern Europe: Strategies for Post Communist Politics", *East European Politics and Society* (8) (1994), pp. 1–31.

[22] Detleft Pollack, *Political Culture in Post Communist Europe* (Aldershot: Ashgate, 2003).

[23] Carlo Gialdino, "Some Reflections on the *acquis communautaire*", *Common Market Law Review*, 32 (1990), 5, pp. 1089–1121.

[24] Adam Fagin, "Democratisation in Eastern Europe: The Limitations of the Existing Transition Literature", *Contemporary Politics* (4) (1998), 143–159.

something useful, and helpful in the reconstruction of their political life,[25] even from their experiences under the communist regimes—in the negative or in the positive sense of the word. In other words, it seems that the term "transition" has been used too easily to refer to a rupture or a radical change, without questioning if some outcomes of the historical past of communist regimes have been maintained as reference points in the post-transition stage.[26] This idea not only forms the basis of democratisation studies but has somehow been accepted within European political discourse relating to enlargement.[27] In fact, when the pre-accession strategy was conceived, Western States agreed on core principles held to be the crux of a good and efficient democratic regime.[28] Somehow, it seems that the theory used to explain how transition has occurred has (supposedly) negatively influenced the discourse on the constitutionalization of the EU.[29] From an empirical perspective, the enlargement of the EU—in particular with regard to the pre-accession strategy and the transfer of a huge set of norms and procedures to the CEECs over the past decade[30]—has been governed by a rationale that is totally disjointed from the rationale of European constitution-making. This is not only limited to the policy strategy adopted,[31] but has also been extended to the theoretical frameworks used to grasp the logic of enlargement and the constitutionalization of the EU. To put it into dramatic terms "can we identify theoretical and substantial linkages between the dynamics of enlargement, pan-European politics, regional developments, and domestic politics within EU Member States?".[32] In more constructive terms, it can be questioned whether it is possible to integrate, in an enlarged "constitutional discourse",[33] the meaning that constitutionalism has in the European Union as well

---

25 James Gregor, "Constitutional Factors in Politics in Post-Communist Central and Eastern Europe", *Communist and Post Communist Studies* (29) (1998), 147–166.

26 Milada Anna Vachudova, "Are Transitions Transitory? Two Types of Political Change in Eastern Europe since 1989", *East European Politics and Societies* (11) (1997), pp. 1–34.

27 Lykke Friis, *op. cit.* n. 12.

28 European Commission, *Explaining enlargement*, http://European.Eu.int/comm/enlargement, 2002.

29 See Grzegorz Ekiert and Jan Zielonka, "Introduction: Academic boundaries and Path Dependencies Facing the EU's Eastward Enlargement", *East European Politics and Society* (17) (2003), pp. 7–23.

30 Lykke Friis, "The End of the Beginning of Eastern Enlargement—Luxembourg Summit and Agenda Setting", *European Integration Online Paper* (27) (1998), http://eiop.or.at/eiop/texte/1998-007a.htm.

31 Antje Wiener, "Finality vs. Enlargement. Constitutive Practices and Opposing Rationales in the Reconstruction of Europe", *Jean Monnet Working Papers* (8) (2002), http://www.jeanmonnetprogram.org/papers /02/020801.html.

32 Grzegorz Ekiert and Ian Zielonka, *op. cit.* n. 29, p. 8.

33 The choice of this unity of analysis implies a specific methodological perspective, namely relying upon discourse analysis. See Michel Stubbs, *Discourse Analysis* (Chicago: Chicago University Press 1983). See also Daniela Piana, "Constructing the European Constitutional

as in the CEECs, through the very complex historical processes that have characterized their recent histories. I would argue that this is only possible if the existence and the relevance—both at the descriptive and at the normative level—of the cognitive and cultural boundaries that pre-structured the set of normative solutions to the constitutional problems are taken seriously. Therefore, we come back to the first premise of the evolutionary approach, namely the hypothesis concerning the role played by norms in coordinate collective actions. In the specific case represented by constitutional norms, the analysis should aim to understand how different normative sources can interact in shaping constitutional solutions to collective problems, which are essentially *constitutional*. This interaction is held to be created through the use of normative sources in shaping the argumentations that actors would put forward when speaking about constitutional issues.

I have already stressed that from an evolutionary perspective, the concept of legal order is meant to refer to a process rather than to a system. In this sense, the very nature of the order and its interaction with other social or political orders that exist in social reality is conceived as an on going process instead of a match of structural properties. The dynamic dimension of social order depends on the essential and crucial character that social orders have within themselves. Since they come up from the existence of norms governing the relationship among social actions, the character of social order is strongly liked to the essence and the nature of these norms. Norms, as it has been argued, have an open semantic, in the sense that they are applied only once their semantic has been narrowly defined in a somehow conditional definition that makes the norm pertinent for a specific case.[34] To put simply, the practical consequences of norms,[35] when they are used by people to shape argumentations and to justify their choices and their actions are not simply deducted from the norms themselves. A fundamental intermediate step occurs in the middle between the existence of a norm and its use. This step is represented by their interpretation. Because of the structural character of the norms, social orders are opened to novelties and changes coming from the inside.[36] An external change to the norm is not needed in order to introduce novelties in these orders. A new interpretation of an old norm is enough to reach the same result. In this sense, an evolutionary approach to legal orders should integrate some analytical tools that enable researchers and experts to detect novelties and changes occurring inside the

---

Discourse? Arguments for Common Values in the European Convention", *South European Society and Politics*, 9 (2004) 24.

[34] Daniela Piana, *Rappresentazione cognitiva delle norme sociali ed effetto framing*, in Rosaria Egidi e Massimo dell'Utri (eds.), *Normatività, fatti e valori* (Macerata: Quodlibet, 2003), pp. 335–343.

[35] Michael Bratman, "Cognitivism about Practical Reason", *Ethics* (102) (1991), pp. 117–128.

[36] James March and James Olsen, *Ambiguity and Choice in Organisations* (Bergen: Universitätforlagt, 1979).

system. These changes are caused by the interpretation that people, moving within the system, attribute to the norms.[37] In fact, from an evolutionary point of view, the change in scope and meaning of the rules does not happen by fiat, in just one shot.[38] As Hayek puts it, the changes of rules and institutions cross the social and political contexts where they are used and interpreted.

Once applied to the empirical field of constitution-making of the CEECs, the evolutionary approach implies that researchers and scholars should pay attention to the use and the interpretation adopted to make sense of the constitutional discourses of these countries. Two main dimensions should be considered in order to grasp the logic at the basis of the use of the norms. The first one is represented by the constraints that exist inside the constitutional discourse. I call these constraints "cognitive boundaries" because they are related to the categories used in the constitutional debate and in the constitutional texts.[39] The second one is represented by the constraints that are outside the constitutional discourses, *stricto sensu*. I refer to the collective beliefs and the historical traditions shared in these countries and call them "cultural boundaries." They are linked also to the previous experimented solutions and the previous consolidated equilibria discovered to cope with collective action problems.[40] Institutional legacies, political praxis and social capital[41] are the main empirical fields to which the research should be addressed.

So, when new norms—for instance European norms—have been introduced in these legal orders they have interfered with the cognitive and cultural boundaries. This interference has determined different outcomes according to the different contexts in which it has taken place.

4. Cultural and Cognitive Boundaries in East-European Constitution Making

When collective bodies or communities take decisions with regard to their own organization and their own finalities, they adopt rules and accept them on the basis of certain grounds that are said to constitute "good reasons". These reasons

---

37 Here again the intuition of Friedrich von Hayek, *op. cit.* n. 3, p. 52, is perfectly pertinent.

38 Jon Elster, "Coming to Terms with the Past. A framework for the Study of Justice in the Transition to Democracy", *Archives Européennes de Sociologie* (39) (1998), pp. 7–48.

39 Peter Häberle, "Constitutional developments in Eastern Europe", *Cahiers de Philosophie Politique et Juridique*, 24 (1993), pp. 127–157 and Wolf Heydebrand, "The Dynamics of Legal Change in Eastern Europe", *Studies in Law, Politics and Society* (15) (1995), pp. 263–313.

40 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Actions* (New York, Cambridge: Cambridge University Press, 1990).

41 Kathleen Dowley, "Social Capital, Ethnicity and Support for Democracy in the Post Communist States", *Europe Asia Studies* (54) (2002), pp. 505–527.

depend on the framework the community has adopted to make sense of its social dilemmas. In a sense, it is because of these reasons that the rules adopted have some normative value.[42] This is a kind of "cement"[43] that exists at the backdrop of the diversity and fragmentation within societies and makes possible some implicit consensus about a core of collective values. These values are also at the basis of the collective meaning attributed to constitutional principles and norms. There might be a differentiation in the practical consequences that actors, placed within different strategic or cognitive contexts, can draw from these principles.[44] But this contextual disagreement does not dismantle the fundamental consensus about the core values that should be protected in the constitutional game. Disagreement can enter the game when the values have to be mutually balanced and then applied to practical decisions.

In this work, we would look at the constitutional discourses and the constitutional cultures of the CEECs with regard to three points. The first one is concerned with the meaning that is attributed to the concept of being a "right-holder" in a legal and political order. Who are acknowledged as right-holders? Which properties make an individual a right-holder in a specific legal order? In which legal orders would CEECs citizens like to be recognized as right-holders?

The second point relates to the argument put forward to justify the legitimacy of the actions accomplished by public authorities. Are they related to the common aims of the communities living in a state? Or are they based on a more instrumental and functional conception of the state? These arguments have been used in shaping constitutional discourses in order to define a legitimate space where public authorities can use their power. There is a relationship between the reasons to believe in the legitimacy of the public action of the state and the reasons that people are disposed to endorse the limitations of individual rights due to that public action. This is actually what happens when individual rights—protected before the rule of the law—have to be balanced with the need to achieve collective aims and to provide public goods.

The third point relates to the relationship between national identity and transnational identity of right-holders. This is crucial to the mutual relationship that will emerge between the national level and the European level of the identity of European citizens. The collective answers formulated in the CEECs are very much influenced by the institutions or the traditions that people recognize as the normative sources from which values and principles of action are created.

---

42 Raymond Boudon, "The Cognitivistic Model. A Generalized 'Rational-Choice' Model", *Rationality and Society* (8) (1996), pp. 123–150.

43 Jon Elster, *The Cement of Society: a Study of Social Order* (Cambridge: Cambridge University Press, 1989).

44 Raymond Boudon, "Local versus General Ideologies: A Normal Ingredient of Political Life", *Journal of Political Ideology* (4) (1999), pp. 141–161.

It is noteworthy that these three points have not been extensively developed in this chapter since a detailed and multi-disciplinary empirical research is needed to achieve such a complex analysis. Still, I would argue that it is worth beginning the analysis by highlighting some aspects that could immediately impact upon the overall meaning that constitutionalism will have in the enlarged EU.

With regard to the first point, one of the most striking features of the constitution making process of the CEECs is represented by the interaction between the construction of a legitimate national sovereignty and the bargaining and the sharing of such a sovereignty at the transnational level. Actually, the CEECs have been integrated in a transnational order where the European Union is only one of the main sources of norm.[45] Both international law and community law—in particular at the level of the protection of human rights—have created a common legal grounding where national states share common rules. But this has also created a differentiation in the legal orders where individual rights can be expected to be enforced.[46] As a result, this could weaken or, at the very least, bind the legitimacy and strength of states in creating effective and reliable laws for sensitive policy fields. In other words, it is likely that the existence of alternative levels of seeking protection will become an opportunity to address the demands of justice differently, according to the respective right at stake.

Since the post-communist states have a weakened credibility in the protection of human rights—in particular with regard to minority rights—it might be that the protection of human rights will be framed within the transnational legal order rather than the national one. With specific regard paid to minority integration into the political and social order of the post-communist states, Popovic[47] talks about ethnic nationalism, on the basis of a comparative analysis of the perception that Central and Eastern Europeans have. He underlines that ethnic nationalism is not only present in constitutional texts, but also within administrative practices as well as day-to-day life.[48] If these elements are taken into account, it could be argued that social cognition[49] and collective representations of the relationship existing

---

45 Karen Henderson, *Back to Europe: Central and Eastern Europe and the European Union* (London: UCL 1999). See also Anneli Albi, "Postmodern Versus Retrospective Sovereignty: Two Different Discourses in the EU and in the Candidate Countries", in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003).

46 Christophe Bertossi, *Les Frontières de la Citoyennété en Europe: Nationalité, Residence, Appartenance* (Paris: L'Harmattan, 2001).

47 Dejan Popovic, *Les Ambiguités de la Conception Postcommuniste de l'Etat-nation. Fondements Constitutionnels de l'Etat-nation*, in Slobodan Milacic (ed.), *La Réinvention de l'Etat* (Bruxelles: Bruylant, 2003), p. 74.

48 Lorent Licata *et al*, "Driving European Identification through Discourse: Do Nationals Feel more European when Told they are all Similar?", *Psychologica Belgica* (43) (2003), pp. 85–102.

49 Albert Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory* (Englewood Cliffs, NJ: Prentice-Hall, 1986).