



# Analizy *natolińskie*

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## Constitutionalisation of the European Union and its Enlargement to the East

The recent enlargement of the European Union (the EU) is exceptional in terms of the overlapping between the process of enlargement and the process of constitutionalisation. This parallelism started in the mid-nineties when the idea of linking enlargement to the East with deepening of the EU integration was gaining an increasing number of supporters amongst the EU political elites<sup>1</sup>. In 1993, the Treaty on the European Union signed in Maastricht came into effect, which meant the transformation of the European Community into the European Union and deepening of institutions of the newly established Union. The treaty contained formulations concerning the Economic and Monetary Union and steps towards common foreign and security policy. Simultaneously, the rejection of the Treaty from Maastricht in the first Danish referendum and its ratification in France by a narrow majority, demonstrated for the first time the legitimisation problems of the EU. This indicated the beginning of the end for the permissive consensus among EU societies, which until the nineties had unquestioningly consented to decisions of their political elites in relation to the process of European integration. At the same time, an academic debate started as to the constitutionalisation of the European Union in response to diminishing EU acceptance<sup>2</sup>. The issue of constitutionalisation has spread into a debate, as to the democratic deficit of the Union, which presently continues. The debate became even more intense particularly after the decision of the German

Federal Constitutional Tribunal (FCT)<sup>3</sup>. That decision stated that a European nation as such did not exist simultaneously emphasizing the non-nation character of the Union and the necessity for the democratic legitimization of the union's decisions through nations, parliaments and governments of member states.

At the same time in 1993, the European Council in Copenhagen decided to admit Central and Eastern European states to the EU under the condition of their fulfilling relevant political and economic criteria. However, the parallelism of enlargement and the constitutionalisation processes only entered into a fundamental phase after the Laeken summit of December 2001. There, the European Convention was established and entrusted with the task of carrying out a deep reform of the EU as well as working out a constitutional document. Neither the Treaty of Nice in December 2000 nor the proclamation of the Charter of Fundamental Rights in December 2001 solved the problems of the necessary institutional adjustment to the enlarged EU; nor did these measures diminish the democratic deficit of the Union. On that account both institutional reform of the EU as well as the democratization of union structures became tasks for the European Convention<sup>4</sup>.

Of course the very debate about the European constitution is a lot older<sup>5</sup> as is the opinion that the EU already has a constitution in the form of treaties<sup>6</sup>. Proper constitutionalisation however started together with deliberations of the European Convention, since it was the Laeken summit that reacted to the problems of the European Union treating constitutionalisation as panacea<sup>7</sup>. Definition herein, constitutionalisation represents the process of coming into existence and entering into effect of the constitution which configures and strengthens political order of a given polity<sup>8</sup>. Therefore, the process of constitutionalisation of the EU should be regarded as yet unfinished. Not only does the ratification process of the constitutional treaty signed by member states in Copenhagen in December 2003 (or rather its modified and at present still negotiated version after negative referenda in France and Netherlands) remain unfinished, as well, the real functioning of the treaty of constitutional character remains unknown<sup>9</sup>. It is not clear as to what extent the constitutional treaty can fulfil the expected functions. Similarly, as it is in the case of national constitutions, a gap can arise between postulates of the constitution (i.e. the constitutionalism) and the constitutional reality. While a temporal correlation between the enlargement of the Union and the constitutionalisation is visible, the causal link between these two processes still remains vague. The most oft presented view is that constitutionalisation of the EU is a response to the functional challenges of the enlargement.<sup>10</sup> In other words, it is suggested that only in the framework of the constitution and through the method of the constitutional convention, problems could be

solved with regard to the institutional “over-stretching” of the union to twenty seven member states, a lacking ability to reform itself and the need to reduce the legitimacy deficit<sup>11</sup>.

The first step in this article will be to discuss the potential causes of constitutionalisation of the Union as a response to EU Eastern enlargement. It will be based on three basic functions of the constitution: organization, stabilization and legitimisation. It is argued here, however, that assuming the functional necessity of constitutionalisation as a response to enlargement is insufficient for two reasons, in spite of the fact that it appeared in the political discourse about the European constitution. First, it stems from the fact that functions expected from the constitution can be carried out by different institutions. Second, the debate on the constitution appeared in a context independent from the EU enlargement.

The second step will be to sketch out a specific functional relation between enlargement and constitutionalisation, which however did not play the deciding role in the political and academic discourse, although it should have. It concerns the impact of enlargement on democratic legitimization of the EU. This relation - in the author’s opinion - has long-term significance for the future of the Union and could be treated as an intervening variable playing an important role in the correlation between constitutionalisation and enlargement.

In third step I will discuss a thesis concerning the direct and temporal causes of constitutionalisation of the EU as the reaction to enlargement. It pertains to the motivation of the dominating member states of the Union and suggests that their aim was to change power relations within the EU to their benefit. Enlargement provided not only the opportunity but also the legitimization of concentrating power in the hands of large member states. In the process, the European convention played a decisive role not only making it possible but also authorising such a move.

## **I. Causes for constitutionalisation of European Union in the context of enlargement**

Suggested causes of the EU constitutionalisation are closely related to the functions assigned to a constitution in the literature. A functional approach towards the issue of constitutionalisation assumes that the constitution plays the deciding role in the configuration of political processes.<sup>12</sup> In political discourse on EU constitutionalisation, arguments appear that suggest multi-functionality of the European constitution. These are visible for instance in the postulates of Laeken in December 2001. These postulates refer to not only simplifying the structure of the union treaties (points 2, 5), increasing the effectiveness of the decision-making of the Union (1, 3), but also to its democratization (3, 6, 7). By this understanding, the European constitution should

accomplish functions which are expected from the constitutions of national states. Here, we can distinguish the organizational function, the stabilization function and the legitimization function.

### *Organization function*

With reference to the organizational function, the constitutions are expected above all to regulate the relations of power. The main purpose of regulating relations of power is to protect freedom of political subjects from the dominance of political institutions and powerful political actors. The protective aim is perhaps the most fundamental and refers in the first place to citizens to whom the constitution assigns rights and obligations.<sup>13</sup> The first rudimentary constitution of this type was The Magna Charta Libertatum of 1215 which limited the power of the English King John II to the advantage of the aristocracy and clergy.<sup>14</sup> For that reason many authors stress the necessity to include the charter of fundamental rights in constitutions, including the EU's constitution.<sup>15</sup> However, the necessity of codifying fundamental rights in the European Union is controversial.<sup>16</sup> The controversy primarily relates to the argument that member states of the Union, as being democratic regimes, guarantee the fundamental rights of their citizens, otherwise they would not be members of the Union. Moreover, on the supranational level fundamental rights are protected by the European Human Rights Convention signed in 1949. Therefore, the argument follows that a Charter of Fundamental Rights only would be copying the existing institutions. Ignoring the controversy surrounding this issue, the relation of the Charter of Fundamental Rights to the Eastern enlargement appeared only marginally in the debate at hand.<sup>17</sup> Some authors have suggested that the Charter of Fundamental Rights can not only constitute a signpost for new members of the EU in the process of their democratic consolidation, but also can calm their over-sensitivity in their relation to allegedly centralist impulses from Brussels after their newly regained independence.<sup>18</sup> However, it does not change the fact that this argument has been marginal, whereas working out and proclaiming the European Charter of Fundamental Rights has not exhibited practically any link with the Eastern enlargement of the European Union.<sup>19</sup>

Apart from the codification of fundamental rights, regulating relations of power occurs both on the horizontal as well as vertical level. On the horizontal level, the constitution introduces the division of power in order to limit both its concentration and

its abuse.<sup>20</sup> Here, the US Constitution represents a classic example of regulation of power through its division among different institutions. On the vertical level, the constitution guarantees the participation of local governments (states, counties, Länder, cantons etc.) in the decision making process at the highest level thus ensuring self-determination of these political entities. Thanks to a vertical division of power, the probability of power concentration in the centre of the political system decreases. In the case of the European Union, the treaties fulfil the function of regulation of power, hence some authors argue that the Union already possesses a constitution and a new one is unnecessary.<sup>21</sup> In this sense, the treaties construe the unique separation of power among the decision-making bodies of the European Union such as the European Parliament, the Commission and the European Council. In the decision-making process of the EU, in the majority of cases, the Commission possess the exclusivity of legislative initiative, whereas the Council takes final decisions.<sup>22</sup> Such an arrangement is supposed to ensure that the EU decisions are initiated by the body committed to the realization of European interests, whereas the final decisive powers rest with of the member states, which is supposed to guarantee the democratic legitimization of the EU.

Nevertheless, enlarging the Union to the East did not cause any intensified debate on issues of the horizontal division of power. Debate concerned above all the need of the adaptation of the institutional structure of the EU with the aim of increasing its effectiveness. Changes in the horizontal division of the power through Constitutionalisation have not been seriously envisaged, even though at the same time, plans of radical institutional change of the EU existed, as articulated e.g. by Joschka Fischer in his famous speech delivered at the Humbolt University in Berlin.<sup>23</sup> Fischer suggested a parliamentarisation of the EU, modelled on the nation-state with a bi-cameral parliament. However, as the European Convention began its sessions, it was certain that institutional changes would not be revolutionary and they would be made on the basis of the existing institutional system. Changes were to include primarily the wider application of the majority voting principle and the introduction of a new mode for vote weighting within the decision-making system.

In contrast, the vertical regulation of power relates to the division of competences between the European level, the national and regional level. It assumes the form of a federal construction.<sup>24</sup> In the context of federalism, the task is to create such a balance

of the power so that none of levels should dominate the others, while not allowing for any changes in the decision-making system. In the case of the EU, some authors see the danger of a competence shift to the European level as a result of the blurred vertical division of competence within the treaties and their pro-supranational interpretation by the European Court of Justice.<sup>25</sup> The shifting of competences towards the centre can be interpreted as a characteristic feature of the so-called cooperative federalism, an example of which other than the EU is Germany, where for a long time attempts at a new division of competences between the Lands and the federal government have been made.

However, postulates for clear division of competences in the European constitution were presented independently from the Eastern enlargement of the EU and well before the idea of enlargement to the East appeared in the political debate. Even though they were mentioned in the Declaration of Laeken., there was no direct link to the enlargement, since they resulted from older discussions on competence arrangement between the EU organs and the the member states. Here, the major problem was that the interlacing competencies between the different levels made the reform of the entire decision-making system of the EU virtually impossible. Already in mid eighties Fritz W. Scharpf introduced the notion of 'joint-decision trap' (or *Politikverflechtungsfalle*) and applied it with reference to the federal decision-making system of Germany and the European Union.<sup>26</sup> A joint-decision trap can occur when at least two decision-making levels make joint decisions regarding their mutual division of power and have to do so unanimously. It leads to a stalemate since the new division of power automatically creates new losers and winners, and is hard to become consensual. Therefore, such a decision-making system would support the status quo and result in a limited reform capability. In the practice of European integration, it means that national states are not capable of reforming the growingly ineffective decision-making system and that it is hard for them to prevent the increasing concentration of power of the supranational level, since the EU was able to establish the primacy of European law over the national law by the European Court of Justice.<sup>27</sup>

Again, these kinds of arguments were presented in the debate on the European constitution, but did not have any relation to enlargement.<sup>28</sup> Postulates of the reform of the decision-making system have often used primarily regarding the clearer division of competences and the increased application of the majority rule. Enlargement, how-

ever, was not associated with the danger of increasing centralist tendencies. States supporting the European Constitution such as Germany, France or Belgium conducted the debate based on arguments concerning the necessary preservation of the decision-making ability of the EU after its dramatic increase in members, but did not openly call for strengthening of national states vis-à-vis Brussels. Germany as the initiator of constitutional debate was particularly reserved to undermine the he supranational level for fear of not exposing herself to accusations of reviving nationalism.<sup>29</sup> Contrary to that, with the enlargement to the East anxieties grew that new member states could counteract the EU “central government”, rather than strengthen it. An argument was presented here that new members had stronger preferences for nationalism and weaker for European cooperation, which would constitute an obstacle to the proper functioning of the EU decision-making system. Therefore, creating an integration avant-garde was deemed necessary.<sup>30</sup> At the same time, however, if this argument holds true, one should admit, that it was precisely the enlargement and not the constitution that could be an effective instrument in limiting the competence shift to the centre of the EU, since the constitution would introduce additional mechanisms inducing cooperation between the member states and a wider application of majority voting, all of which strengthen the central power.<sup>31</sup>

### *Stabilization function*

Apart from division of power, constitutions are ascribed a stabilisation function.<sup>32</sup> It acquires more significance in two special cases: social heterogeneity and the revolutionary situation. First of all, constitutions stabilize political systems with high degree of heterogeneity by codifying the federal structure of the state. In addition, constitutions can introduce a system of compensation between membership states for the purpose of stabilizing the political system. In most of the cases, sub-national political units are construed asymmetrically when it comes to their size and financial resources. On that account, constitutions regulate not only an asymmetrical representation at the central level but they also establish a system of financial balance between the political units, as it is also the case within the EU. Compensation is perceived by some authors as necessary, in particular in the case of a strong central power and heterogeneity of the society. Weaker territorial units aspire not only to influence decisions taken at the

central level, but especially decisions disadvantageous to them. Only thus, they have enough motivation to remain in an asymmetrical (and for that matter suboptimal) political system.<sup>33</sup> In other words, constitutions of federal states (in the system of cooperative federalism) systematically privilege weaker territorial units for the sake of stabilizing the political system.<sup>34</sup> The constitution represents an appropriate stabilization instrument, since it is a kind of an institution which cannot easily be changed. It freezes the compensating system giving the guarantee to weaker units that without their participation the system will not change (at least not to their disadvantage).<sup>35</sup> That would mean that primarily small and poorer states should be interested in the constitutionalisation of the EU, since in this way they can not only better centrally control hegemonic impulses of large states but can also participate in the system of the financial compensation which cannot be changed without their consent.<sup>36</sup> However, the initiative concerning the constitutionalisation of the EU stemmed from Germany and France which have also been the driving forces behind this process. At the same time, it should be assumed that these states as the largest in the EU were not interested in limiting their powers. In this context, Jon Elster's thesis regarding constitution as the mechanism of the self-binding of political subjects is often referred to.<sup>37</sup> With reference to the EU, it would mean that all member states, particularly the large ones, impose constitutional limitations upon themselves for fear that they themselves could abuse power for their selfish goals. In the perspective of observed aspirations for maximization of power by political subjects this thesis is theoretically little convincing and empirically false. Moreover, Elster in his more recent publications revisits the thesis in favour of an opposed concept, according to which political subjects aim at limiting the power of other subjects.<sup>38</sup>

A further case, in which the constitution accomplishes the stabilizing function is so called "revolutionary situation". It results from the fact that constitutions are often constructed in the period of important political transformations and their fundamental objective is stabilizing the newly established political order. Constitutionalisation in this context means codification of norms, rules and political procedures, i.e. newly established political institutions. It implies that these institutions must be internalized by society, whereas the constitution performs a stabilizing and consolidating function. In the case of the system change the constitution is one of the first institutional steps strengthening the new regime. Also in the case of the European Union similar argu-

ments have appeared with reference to the stabilization function of the European constitution, although suggesting different motivation of political subjects. Ron Hirschl put forward the thesis that constitutionalisation of the EU was carried out as a result of the initiatives of the large EU member states such as Germany and France which were afraid of a destabilization of the balance of power in the EU after enlargement to the East.<sup>39</sup> Since massive enlargement was perceived as a risk to the current political order and the system of benefit distribution, in particular for the large states, Hirschl calls this motivation “hegemonic preservation”. In this reasoning, stabilization of the political system of the EU was directed at maintaining the status quo of power by the so-called motor of the European integration i.e. France and Germany, rather than at the consolidation of the new political order. Hirschl suggests that enlarging the EU to the East brings geopolitical and macroeconomic benefits primarily to the large states. At the same time, however, it represents a threat to the stability of the division of power within the Union, in which France and Germany enjoy the most considerable influence. Thus, constitutionalisation of the EU is the only instrument allowing for further profiting from the specific system of the power within the EU, and simultaneously for taking advantage of the new geopolitical and economic situation. However, this argument is not entirely convincing, not only on account of the strategic explanation of motivation for Constitutionalisation. A problem remains in the assumption that geopolitical or economic needs of large states required enlargement to the East. Some studies point out that those benefits could be equally or perhaps even better achieved through association agreements or other forms of close cooperation between the EU and Central-Eastern European states. Frank Schimmelpfennig conducts his examinations on such assumption, convincingly arguing that old EU member states in spite of their fundamental reluctance to enlargement fell into their own rhetorical trap.<sup>40</sup> They promised the membership to all European states meeting the Copenhagen criteria and they could not retreat from an enlargement trap. Since the Union defines itself as community of liberal and democratic values, it could not step down from its promises without losing credibility and creating a crisis of its own identity. Schimmelpfennig argues that EU enlargement

## In societies

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both in geopolitical and economic respects entails for the old EU states more costs than benefits.<sup>41</sup> According to the analyses of a considerable number of economists, enlargement resulted in a relatively small number of benefits which were additionally unevenly attributed among EU members.<sup>42</sup> At the same time, enlargement costs, for instance, within the Common Agricultural Policy explicitly outgrow economic benefits of enlargement. Therefore, the decision for enlargement to the East was irrational in terms of the interests of the EU fifteen, which suggests that the causality between enlargement and the stabilization function of the constitution is vague.

### *Legitimation Function*

Apart from the functions mentioned above (organizational and stabilisation) the constitutions are also assigned a legitimizing function.<sup>43</sup> It follows from two argumentative lines. Firstly, the constitution of democratic regimes is assumed to be an expression of self-determination and the will of the people.<sup>44</sup> In other words, the constitution is an articulation of the sovereignty of the nation. Without sovereignty of the nation, the true constitution cannot exist, as it will only be an organisational statute.<sup>45</sup> A 'genuine' constitution is regarded to be an expression of fundamental consensus within a given society. This consensus is not subject to daily fluctuations of the public opinion, and like the constitution it does not change with every new government, since it expresses agreement reached regardless ideological and socio-economic divisions. Precisely for that reason, democratic societies are expected to be able to overcome differences of interests in a productive way and to realize mutual solidarity claims.<sup>46</sup> Resulting from this is the belief that the constitution cannot exist in an undemocratic society or in a society deprived of consensus of basic value and norms. Some authors postulate moreover that such an understanding of the constitution makes sense only for communities with strong collective identities which are able to absorb the burden of an abstract solidarity among citizens which personally do not know each other but yet have the feeling of belonging to the same community. This identity seems necessary to accept decisions taken by a majority vote. Only in this way can the minority accept decisions of the majority without feeling disadvantaged or exploited.<sup>47</sup> Peter Graf Kielmansegg argues that a democracy of the representative majority requires a community sharing the same experience, the same historical memory and an integrated space for communication.<sup>48</sup> A democratic constitution is in this respect an articulation of political community and a specification of social consensus. The existence of the

constitution indicates to individuals that they belong to a shared community, which legitimizes political decisions of the central government. Thus, in societies which are not communities (meaning that they do not have their collective identity), the representative democracy leads to tyranny of the majority. In the case of the EU, a majority of researchers are of the opinion that such a European identity does not exist. For this reason, representatives of this school of thought reject the draft of the European constitution which in their view can only worsen the state of the European democracy, since the EU is not capable of democracy at its present stage of its development.<sup>49</sup> Joseph Weiler even argues that constitutional debate can lead to an increase in perception of heterogeneities among member states by making them aware of differences among them. Consequently, the very process threatens the current quo status. Simultaneously, it should be assumed that enlargement of the EU strengthens even more its heterogeneity, which in turn would worsen the negative impact of the constitution.<sup>50</sup> The consequence of such argumentation is an antinomy between enlargement and constitutionalisation of the EU.

A further argumentative line highlights the legitimising impact of the constitution even in the absence of community or societal consensus. It assumes that the constitution can have symbolic impact independently from the existence of a strong collective identity. It results from the fact that the constitution is something more than only an organizational statute of a state. It is an evaluative, cultural and affective system of reference, through which citizens interpret their experiences and expectations. For this reason, the constitution can become a symbolic medium for creating social-cultural identity of a given society.<sup>51</sup> It results from the fact that the constitution is expected to represent normative superiority vis-à-vis 'usual' law-making. Hence, it can become a crucial system of reference and a source of identity for an entire society. In this way, the constitution can integrate even highly heterogeneous societies.<sup>52</sup> In the case of the symbolic impact of the constitution, the Constitutional Court plays an important role, since it interprets the constitution thus constructing the social order with the reference to the absolute value of the constitution. Brodocz argues that constitutions represent forms of transcendental order which creates political reality.<sup>53</sup> Therefore, the constitution not only legitimises the political process of decision making, but also remains the ultimate source of the responses to questions, to which political elites or society itself are not able to or do not want to respond by appealing to a higher moral author-

ity. The Federal Republic of Germany is a classic example of the symbolic and integrative influence of the constitution.<sup>54</sup> Decisions of the Federal Constitutional Court grant meaning to the fundamentals of the political order and cause their internalisation in the social consciousness. Therefore, in Germany due to the lack of integrative impact of the nation the constitution has become the basis for the collective identity, giving rise to the so-called constitutional patriotism.<sup>55</sup> The Constitution develops its impact in that it is not only accepted by the society, but also becomes a kind of fetish generating social bonds. The constitution can above all have an impact by creating confidence in the political system<sup>56</sup> and by providing worshiping of the constitution.<sup>57</sup> The worshiping of the constitution, which is visible above all in the USA and in Germany, induces a permanent process of forming the political identity of the society. Brodacz argues<sup>58</sup> that the constitution can accomplish the integration function, only if it is open to different interpretations, thus creating an opportunity for internal integrating of heterogeneous societies.<sup>59</sup>

In the case of the EU, it implies that even in the enlarged EU the constitution could accomplish its integrative function. Habermas argues that by involving citizens in the democratic process of creating constitution a communications structure can be established, which would fulfil the integrating function. Moreover, if the constitution establishes democratic institutions, also from them an inductive development of a shared political identity can arise, which will be able to overcome conflicts and to create solidarity amongst strangers.<sup>60</sup>

A group of scholars from the Social Science Research Centre Berlin suggests in their research project that a European identity does not exist in the EU. However, common political communication processes are visible even without the shared language and shared mass media. It points to a rise of a communication space in the EU which eventually might become the nascent egg of political identity.<sup>61</sup> However, the problem lies in the fact that the described communication processes have probably unfolded independently from the European constitution, whereas the very constitutional debate did not reach the citizens of the EU, as Jürgen Habermas had hoped. In spite of the European Convention, the inductive impact of constitutional debate was weak: Few citizens were interested in this topic, whereas the perception of the constitution itself was anchored in domestic politics of the member states, which was visible in the example of the last elections to the European Parliament.<sup>62</sup> Of course, a definitive out-

come of the European constitution-making is still not visible, as the constitutional treaty has not had yet the chance of developing its impact. In the case of Germany the creation of constitutional patriotism had taken a few decades.<sup>63</sup>

However, also in this case, a correlation between enlargement and constitutionalisation is vague. The constitution would have the task of granting legitimacy to the EU, which after the Eastern enlargement of the EU would become even weaker. But the EU enlargement can also signify an increase in EU acceptance (at least in the first phase of the enlargement), since the new states willingly acceded to it. For them the EU had sufficient legitimisation, as they were willing to give up a part of their national sovereignty. On that account, the constitution does not seem to be a necessary instrument of rescuing the legitimisation of the UE.

## II. The constitution as the response to the necessity of the democratisation of the Union after EU enlargement?

A certain line of thought exists, which links EU enlargement with its deepening legitimisation deficit. This argument did not emerge in the wider debate on the constitution and one should not treat it as the cause of constitutionalisation of the EU.<sup>64</sup> This argument refers to the long term future of the EU and concerns the results of the EU enlargement for its democratic legitimacy. As it has a long-term relevance for the future of the Union, it should be treated as an indirect variable playing an important role in the correlation between constitutionalisation and enlargement. The basis for this argument is an assumption that the increase of the legitimacy of the EU through enlargement results from the specific support of the new members for the political system of the EU.<sup>65</sup> It is related to the expectations of tangible benefits by new members and it is unsteady, since in the period of crisis the political system at hand does not possess any general legitimacy independent from the output. Durable legitimacy is however, according to David Easton, a consequence of generalised support which refers to the political system as such, and not to effects of its functioning (diffuse support vs. specific support).<sup>66</sup> The most important fact is that specific support has nothing to do with the democracy, since autocratic systems can also legitimise themselves through positive results of their governance, in other words through output. Assuming specific support<sup>67</sup> the European Union can however remain a form of a “commis-

sary regime” which tries to legitimise itself through effectiveness of its administrative decisions.<sup>68</sup>

In order to guarantee the long-term generalised legitimacy, the constitution can be an appropriate instrument, if certain conditions are met. Some authors have suggested that constitutionalisation of the EU can become a promising panacea, provided it is combined with democratisation.<sup>69</sup> The debate on the constitutionalisation of the EU has been accompanied in Western Europe by an academic discussion on the democratic deficit of the EU, which however did not result in connecting it to enlargement. After the enlargement of the EU to the East, its democratic deficit is however changing.

After the enlargement, the heterogeneity of the social structure of the EU has grown considerably. It means that not only the decision-making structure is becoming more complex but also problems of social choice are growing. The heterogeneity of political subjects, their interests and political preferences practically makes the choice of common good impossible.<sup>70</sup> With the increase of heterogeneity, the probability raises that more and more political subjects (voters or collective subjects such as political party or state bureaucracies) will not be able to discover their preferences in decisions taken at the pan-European level. Since the political system of the EU does not allow the change of the government through new elections thus punishing unpopular decision-makers, heterogeneity can cause feelings of helplessness and alienation worsening the problems of democratic legitimisation of the EU. In other words, every EU enlargement increases the democratic deficit of the Union. If the constitution is to be a response to enlargement, it should contain a solution for the problem of heterogeneity. The creation of the Charter of Fundamental Rights and its integration within the draft of the constitution has undoubtedly constituted such an attempt. However, the constitution does not provide for different specific mechanisms reacting to the increase in heterogeneity. Therefore, it is doubtful whether the Charter of Fundamental Rights in a mid-term can accomplish the integrative role. A consensus on European values has not been achieved which could positively influence the construction of the European identity. The normative impact of the draft of the European constitution is to be doubted, since instead of integrating through working out normative orientation for citizens, it introduces an inflation of such values as solidarity, which ultimately takes the form on non-reflective enumeration.<sup>71</sup> Thus, instead of creating the Euro-

pean identity, the draft of the European constitution rather introduces the risk of constitutional fiction, since it becomes less probable that all enumerated values and laws could be legally enforced.

A possible solution to the problem of the heterogeneity of the EU could be a legitimisation based on the effectiveness of governing.<sup>72</sup> It should be however assumed that after the enlargement it will be more and more difficult in the mid-term to guarantee the legitimisation through output, that is, production of expected results such as welfare.<sup>73</sup> If the Union is not able to ensure its own legitimisation through the effective and fair system of financial distribution, its chances for specific support amongst the population will diminish. Already in the course of the accession negotiations, the EU was confronted with distribution conflicts which will undoubtedly increase during the next budget negotiations in the EU. On one hand, we should expect further discussions aimed at lowering the EU's overall budget, on the other not only the amount of distributed financial resources but also to the system of their allocation will subject to conflicts. However, a perception of the allocation as unfair could lower specific support for the UE. A lack of legitimisation through output can however be compensated for through the creation of a relevant system of democratic representation, which would allow for an increased control of political elites. In other words, more democracy can reduce governance deficits. Robert Dahl and Edward Tufte argue in their classical study on correlation between the size of the political system and citizens' satisfaction that the increase in participatory channels strengthens considerably the generalised legitimacy of the political system.<sup>74</sup> Therefore, the constitutional Treaty or its recent version known as Reform Treaty could accomplish an increase in legitimacy provided it will generate decision-making possibilities for citizens in a perceptible way. However the draft constitutional treaty has not reduced the democratic deficit of the EU in any considerable way, since decision-making and the institutional structure of Union have not been significantly reformed. An increase in application of majority decisions worsens even further the democratic deficit of the Union, as it increases the probability of being overruled in the Ministerial Council, leading to the tyranny of majority.<sup>75</sup> Consequently, the EU enlargement increases in the mid-term the democratic deficit which does not mean that it is its cause.. Thanks to the enlargement the issue of the democratic deficit becomes more prominent. As the constitutional treaty/reform treaty does not refer explicitly either to the problem of heterogeneity or

the lacking democratic legitimisation of the EU, it should become the priority of the EU within a few coming years. The precondition for it is obviously the ability of the EU for supplementing or changing the constitution i.e. the constitutional flexibility.<sup>76</sup>

### III. Constitutionalisation as the change in the relation of power

A possible functional correlation between enlargement and constitutionalisation does not provide information on causality. However, an explanation exists for direct and temporal causes of the constitutionalisation of the EU as a reaction to enlargement. It concerns the motivations of dominating member states of the Union and it suggests that their objectives were to change power relations in their favour, whereas the enlargement not only did provide the opportunity but also the legitimacy to concentrate power in the hands of large member states. The European convention played the decisive role here not only enabling but also authorising that move.<sup>77</sup>

While discussing different functions of constitution and their significance, a further important aspect of constitutionalisation is frequently forgotten. In an ideal world, the constitution establishes legitimate power, protects minorities, ensures power balance as well as organizes relations of power. In the real world, constitutions can not only *freeze* the hegemonic position of some political subjects but also legitimise a radical change in power relations. Constitutions provide a one shot opportunity to win a power advantage, since they are unusually hard to modify. This stability or rigidity of constitutions is the fundamental element of constitutionalism, i.e. the assumption that constitutions should configure political processes. Therefore, many obstacles stand in the way of constitutional changes. In the majority of democracies, changes of such kind require a special type of parliamentary majority, i.e. so-called “supermajority”, which hard to arrange. Therefore, creating a European constitution has offered one time and unique opportunity for radical change in power, its freezing and its legitimisation through deliberate processes within the European Convention.

In the debate on European Convention, the majority of scholars tend to idealise the convention viewing it not only as a break-through in the democratisation of the EU, but also as a method allowing for efficient institutional reforms necessary after the EU enlargement.<sup>78</sup> They claim that the institutional structure of the convention and its procedures demonstrate deliberate character. This deliberative character is distinctive

by fact that the political subjects involved make decisions through public interchange of arguments, and renounce on strategic realization of their own interests. Thanks to the transparency of the decision-making in the convention, its openness to arguments and to a spirit of inclusion towards all kinds of political subjects, and in the particular towards actors of civil society, the EU becomes more democratic and better prepared for functioning with 27 member states. Hence, the convention is presented as the only appropriate response to the challenges of the Eastern enlargement. Taking decisions through the exchange of arguments and without voting is supposed to bolster mutual understanding and compromise. Supporters of such an interpretation build their position on assumptions borrowed from the deliberate theory of democracy.<sup>79</sup> This theory argues among other things that deliberation is not only the essence of democracy, as it creates public space necessary for the functioning of democracy, but also it reduces the tendency of political subjects to support decisions based on their own particularistic interests. Thus it transforms particularistic decisions into decisions serving the common good.

The problem of this argument lies in the assumption of deliberative honesty, thus idealising the European Convention and ignoring the possibility of strategic manipulation of arguments. Arguments can however be used as power resources in order to realize self-interests. Frank Schimmelfennig labels this sort strategic rationality “rhetorical action”.<sup>80</sup> It differs from openly strategic acting (bargaining) and exclusively argumentative action (arguing). In the former case, political subjects realize their interests by negotiating package deals and deciding on so called side payments. In the latter case, political subjects are ready to accept arguments of their political opponents. Hence, rhetorical action represents realization of particularistic interests in a less obvious way, as subjects’ interests are concealed in arguments appealing to common good. However, the precondition for deliberation is the readiness of the political subjects to change their preferences, or even their identities under the influence of convincing arguments. In contrast, subjects involved in rhetorical action are not ready for those kinds of changes. They use arguments adjusted to their own

## The method

*of the convention legitimises the realization of particularistic interests of member states camouflaging their true motivation through deliberation processes, which are falsely interpreted as democratic.*

particularistic interests. Consequently, this does not lead to deliberation, but to a political debate, in which the best justification of one's own particularistic position in the name of common good wins, rather than the most convincing argument.<sup>81</sup> By using arguments referring to shared identity, shared ideology or values and norms of a political community, political subjects attempt to establish a legitimacy for their particularistic interests. In addition, they will attempt to de-legitimise arguments and preferences of their political opponents, they use arguments as an instrument of soft power. For instance, opponents can be moved to compliance through public shaming strategies.

The European convention was an excellent opportunity for manipulation of arguments aimed at the change in the power relations to the favour of large EU member states.<sup>82</sup> Briefly before finishing meetings of the European Convention, the presidium together with its chair, the former French president Giscard D'Estaing introduced new regulations in the decision-making system of the EU, which were supposed to replace the system agreed in Nice in 2000.

The new system of the double majority was promoted primarily by the governments of Germany and France which argued that changing the decision-making system made it more effective through the reduction in the number of states necessary to block a decision. This argument emphasised the necessity of such a solution in the enlarged EU. Since the system of the double majority was introduced by representatives of France and Germany as a common good, member states rejecting this solution were accused of nationalism or lack of understanding for common values in the EU. While in the German discourse Polish and Spanish nationalism were highlighted, French commentators argued that Poland as a new and inexperienced member state did not understand the principles of the EU, both of which constituted strategies of public shaming. At the same time in the European discourse in France and in Germany none of the political decision-makers brought up the fact that the new decision-making system was giving France and Germany far more powers than it was provided for by the Nice Treaty. According to several studies, particularly the analysis by the Vienna Institute of Higher Studies<sup>83</sup> the new system shifted radically the power relations (in the scale between the equality and the justice) from 40 points (slightly to the benefit of small states) to 80 points (strongly to the benefit of large states). This shift provided a strong stimulus for Germany and France to push such the double majority,

whereas the convention allowed for a rhetorical camouflaging of particularistic interests and the constitutionalisation of their implementation.<sup>84</sup>

Consequently, the method of convention not only allows political subjects for rhetorical action but also supports it. Even currently, it is not known exactly, who was the initiator for change in the power relations in the EU. Vienna analysis emphasises that the majority of members of the convention were unaware of the implications of the double majority system for the power relations in the EU, as the structure of the convention permits for dilution of responsibility for legislative moves. There is also another factor apart from rhetorical action, for which the convention is an easy field for political manipulation by governments of the member states:<sup>85</sup> Even though various institutions were represented in the convention, including national parliaments, not all subjects possess the same rhetorical resources.

The probability of camouflaging particularistic interests by rhetorical action increases with the participation of bureaucratic and executive actors such as ministries of Foreign Affairs. In general, ministries possess larger human and ideological resources, thus a greater potential for the production of arguments. The German and French Ministers of Foreign Affairs have a gigantic rhetorical advantage over, for example, a Lithuanian member of a parliament. For that very reason, the governments of France and Germany were represented in the convention by their Ministers of Foreign Affairs.<sup>86</sup>

Paradoxically, the convention method legitimises the realization of particularistic interests of member states camouflaging their true motivation through deliberation processes, which are falsely interpreted as democratic.<sup>87</sup> Deliberation and democracy are two different concepts, and putting the equal sign between them wrongly suggests a priori democratic legitimisation of deliberation processes.

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The constitutionalisation of the EU has not been a response to the necessity of establishing a new institutional organization of the EU, its stabilization or increase of legitimization of the EU. Regarding these classical functions of constitutions, the European constitution has neither been necessary on the functional account nor has it been promising in this respect, even if arguments referring to organization, stabilization or legitimization appeared in the discourse on European constitution. By using

the convention method, however, constitutionalisation has given Germany and France an opportunity for radical change in the EU relations of power. The EU enlargement and related necessities for institutional change have been exploited as the pretext for the increase in their power potential while simultaneously erasing traces of their motivation.

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<sup>1</sup> H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, *Europäische Verfassung. Zum Stand europäischer Demokratie im Zuge der Osterweiterung*, Mainz: Lit Verlag, 2004, p. 337 [in]: N. WALKER, *Constitutionalising Enlargement, Enlarging Constitutionalism*, „European Law Journal“ 2003, 9, pp. 365-385.

<sup>2</sup> D. GRIMM, *Braucht Europa eine Verfassung?* Paper delivered at Siemens Foundation, 19.01.1994, München 1994; R. ERNE et al., eds., *Transnationale Demokratie. Impulse für ein demokratisch verfasstes Europa*, Realtopia, Zürich 1995; J. HABERMAS, *Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm*, [in: ] J. HABERMAS, *Die Einbeziehung des Anderen*, Frankfurt/M.: Suhrkamp, 1996, pp. 185-191.

<sup>3</sup> Bundesverfassungsgericht, *Urteil des Zweiten Senats vom 12.10. 1993*, „Europäische Grundrechtezeitschrift“, 1993, 20, Heft 17, pp. 429-446. Referring to criticism of the Court's decision see J.H.H. WEILER, *Der Staat ‚über alles‘. Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichtes*, Jean Monnet Working Paper 88, Boston: Harvard University, 1995.

<sup>4</sup> The Convention finished its activity with working out a draft text of the European Constitution on 13.06.2003 and 10.07.2003. See EUROPEAN CONVENTION, *Draft Treaty Establishing a Constitution for Europe*, Brussels 2003; H. KLEGER, ed., *Der Konvent als Labor. Texte und Dokumente zum europäischen Verfassungsprozess*, Münster: Lit Verlag, 2004, pp. 21-179.

<sup>5</sup> H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, „*Europäische Verfassung...*“, op. cit., pp. 41-94.

<sup>6</sup> See among others: J.H.H. WEILER, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999; J. H. H. WEILER, *A Constitution for Europe? Some hard Choices*, „Journal of Common Market Studies“ 2002, 40, pp. 563-580.

<sup>7</sup> Cf. G. de BÚRCA, *The European Constitution Project after the Referenda*, „Constellations“ 2006, 13, pp. 205-217. Joseph Weiler represents a different opinion, as he speaks about quasi-constitutionalisation of the EU lasting for over many years. That constitutionalisation encompassed decisions of the European Court of Justice persistently interpreting European Law as the one having primacy over national laws, thus establishing a supranational constitutional order. Weiler, however, represents a very narrow understanding of the constitution, limiting it only to its organisational function. This eliminates the essential difference between a treaty and constitution. See J.H.H. WEILER, *The European Union: Enlargement, Constitutionalism, and Democracy*, paper delivered at Walter-

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Hallstein-Institut für Europäisches Verfassungsrecht at Humboldt University in Berlin, 29.11.1999, Forum Constitutionis Europae, Berlin 1999.

<sup>8</sup> Berthold Rittberger and Frank Schimmelfening propose an alternative and narrower conception which defines constitutionalisation of the EU as a process of its parliamentarisation and institutionalisation of human rights. See: B. RITTBERGER, F. SCHIMMELFENNIG, *Explaining the Constitutionalisation of the European Union*, "Journal of European Public Policy" 2006, 13, pp. 1148-1167. Sandra Lavenex uses an even narrower conception of constitutionalisation as codification of rights. See: S. LAVENEX, *Towards the constitutionalization of aliens' rights in the European Union?*, "Journal of European Public Policy" 2006, 13, pp. 1284-1301. Also see: A. WIENER, *Comment: Fact or artefact? Analysing core constitutional norms in beyond-the-state contexts*, "Journal of European Public Policy" 2006, 13, pp. 1308-1313.

<sup>9</sup> In further parts of this article I use the expressions constitutional treaty or European Constitution interchangeably, although most probably the modified treaty will not contain the adjective „constitutional". It stems from the wish of de-politicising of the treaty, which is a direct result of the ratification crises within the EU. Such terminology, however, is still justified since constitutional functions can still be assigned to the treaty.

<sup>10</sup> See e.g.: D. C. THOMAS, *Constitutionalization through enlargement: the contested origins of the EU's democratic identity*, "Journal of European Public Policy" 2006, 13, pp. 1190-1210.

<sup>11</sup> Cf. T. RISSE/M. KLEINE, *Assessing the Legitimacy of the EU's Treaty Revision Methods*, "Journal of Common Market Studies" 2007, 45, pp. 69-80.

<sup>12</sup> There are positions stressing that constitution radically loses its configuring functions, among others, due to globalisation processes limiting its impact, changing citizens' expectations towards constitution as well as limited adaptation capability of constitutions. Petra Dobner speaks in this context of the crisis of constitution. See: P. DOBNER, *Konstitutionalismus als Politikform. Zu den Effekten staatlicher Transformation auf die Verfassung als Institution*, Baden-Baden: Nomos, 2002.

<sup>13</sup> H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, *Europäische Verfassung...*, op. cit., p. 33.

<sup>14</sup> Cf. W. REINHARD, *Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*, München: Reinbeck, 1999.

<sup>15</sup> Cf. E.O. ERIKSEN, E. ODDVAR, *Why a Constitutionalized Bill of Rights*, [in:] E.O. ERIKSEN, J. FOSSUM, A.J. MENÉNDEZ, eds., *The Chartering of Europe. The European Charter of Fundamental Rights and its Constitutional Implications*, Baden-Baden: Nomos, 2003, pp. 48-70.

<sup>16</sup> Cf. inter alia E.O. ERIKSEN, J. FOSSUM, A.J. MENÉNDEZ, eds., *The Chartering of Europe*, op. cit.; A.J. MENÉNDEZ, *Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union*, "Journal of Common Market Studies" 2002, 40, pp. 471-490.

<sup>17</sup> Por. E.O. ERIKSEN, J. FOSSUM, A.J. MENÉNDEZ, eds., *The Chartering of Europe*, op. cit.

<sup>18</sup> H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, *Europäische Verfassung...*, op. cit., p. 293-300; Cf. G. SCHWELLNUS, *Reasons for constitutionalization: non-discrimination, minority rights and social rights in the Convention on the EU Charter of Fundamental Rights*, "Journal of European Public Policy" 2006, 13, pp. 1265-1283.

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<sup>19</sup> The Charter of Fundamental Rights was a creation of German politicians/jurists who intended the Charter to become the heart of the future European Constitution reflecting a consensus of the European legal and political tradition. The MP of the SPD and professor of law Jürgen Meyer has promoted this idea in the German Bundestag since the mid-nineties. The idea of the Charter of Fundamental Rights was even included in the coalition agreement between SPD and the Green Party in 1998. At the European level, the idea of the Charter was pushed by the German Minister of Justice Herta Däubler-Gmelin during Cologne European Summit in June 1999. See H. KLEGER, I.P. KAROLEWSKI, M. MUNKE,, *Europäische Verfassung...*, op. cit., p. 272 ff.

<sup>20</sup> Cf. A. FØLLESDAL, *Towards a stable finalité with federal features? The balancing acts of the Constitutional Treaty for Europe*, "Journal of European Public Policy" 2005, 12, pp. 572-589.

<sup>21</sup> Cf. D. GRIMM, *Braucht Europa eine Verfassung?* Paper delivered at Siemens Foundation, 19.01.1994, München 1994. also P. CRAIG, *Constitutions, Constitutionalism, and the European Union*, "European Law Journal" 2001, 7, pp. 125-150.

<sup>22</sup> In the case of ideal type division of horizontal power, which the USA approach, executive organs do not have the power to dissolve law-making organs such as the Kongress, whereas the law-making organs possess marginal or highly limited influence on the personnel composition of the executive organs. In the USA the President can only be brought down by means of a complicated impeachment procedure, whereas the European Commission needs to be approved by the European Parliament. The Constitutionalism of the USA and the EU is examined comparatively for instance by S. FABBRINI, *Transatlantic constitutionalism: Comparing the United States and the European Union*, "European Journal of Political Research" 2004, 43, pp. 547-569.

<sup>23</sup> J. FISCHER, *Vom Staatenbund zur Föderationen. Gedanken über die Finalität der europäischen Union*, paper delivered at Walter-Hallstein-Institut für Europäisches Verfassungsrecht at Humboldt University in Berlin, 12.05.2000, Forum Constitutionis Europae, Berlin 2000.

<sup>24</sup> Andreas Auer argues that the EU currently fulfils all the constitutional criteria for a federation. A. AUER, *The Constitutional Scheme of Federalism*, "Journal of European Public Policy" 2005, 12, pp. 419-431.

<sup>25</sup> Cf. U. LEONARDY, *Kompetenzabgrenzung in der Europäischen Union: Eine Marotte der deutschen Länder?*, „Jahrbuch des Föderalismus“ 2001, pp. 454-470.

<sup>26</sup> F.W. SCHARPF, *Die Politikverflechtungs-Falle: Europäische Integration und deutscher Föderalismus*, „Politische Vierteljahresschrift“ 1985, 26, pp. 323-356.

<sup>27</sup> See A.-M. BURLEY, W. MATTLI, *Europe before the Court : A Political Theory of Legal Integration*, "International Organization" 1993, 47, pp. 41-77.

<sup>28</sup> Cf. EUROPÄISCHES PARLAMENT, *Bericht über die Abgrenzung der Zuständigkeiten zwischen der Europäischen Union und den Mitgliedstaaten*, Ausschuss für konstitutionelle Fragen, Sitzungsdokument A5-0133/2002, 2001/2024(INI), Berichterstatter Alain Lamassoure, Brüssel 2002.

<sup>29</sup> However, it needs to be said that particularly in Germany the necessity of strengthening of the regional level in the EU has been voiced, which however has not had any direct relationship to the Eastern enlargement. This German preference for regional interests can be interpreted in twofold way;

firstly as an attempt to acquire further power for Länder vis-à-vis the federal government in the context of a permanent struggle for competences; secondly as a strategic move of the opposition against the government, since the most active in the regionalisation debate were Baden-Wuerttemberg and Bavaria, i.e. Länder governed by CDU/CSU, whereas the federal government was made up by coalition of the SPD and the Green Party.

<sup>30</sup> Cf. J. ZIELONKA, *Enlargement and the Finality of European Integration*, Harvard Jean Monnet Paper 7, Boston: Harvard Law School, 2002.

<sup>31</sup> Cf. I.P. KAROLEWSKI, *Constitutionalization of the Common Foreign and Security Policy of the European Union: Implications of the Constitutional Treaty*, "German Law Journal", 2005, 6, pp. 1649-1666; L. THORLAKSON, *Building Firewalls or Floodgates? Constitutional Design for the European Union*, "Journal of Common Market Studies" 2006, 44, pp. 139-159.

<sup>32</sup> Cf. I.P. KAROLEWSKI, *Constitutionalization of the Common Foreign...*, op. cit., pp. 1649-1666; L. THORLAKSON, *Building Firewalls or Floodgates?...*, op. cit., pp. 139-159.

<sup>33</sup> R. BAUBÖCK, *Why Stay Together? A Pluralist Approach to Secession and Federation*, [in:] W. KYMLICKA, W. NORMAN, eds., *Citizenship in Diverse Societies*, Oxford: Oxford University Press, 2000, pp. 366-394.

<sup>34</sup> Cf. T. RISSE/T. BÖRZEL, *Who is Afraid of European Federation? How to Constitutionalize a Multi-Level Governance System*, [in:] C. JOERGES, Y. MENY, J.H.H. WEILER, eds., *What kind of Policy? Responses to Joschka Fischer*, Florence 2000, pp. 45-59.

<sup>35</sup> Jon Elster and Rune Slagstad see within the frozen aspect of the constitution an injustice towards future generations in the case of socio-economic changes, since future generations do not participate in the creation of the constitution but will be bound by it. See J. ELSTER/R. SLAGSTAD, eds., *Constitutionalism and Democracy*, Cambridge: Cambridge University Press, 1989. At the same, it can be argued that lack of contentment from compensation as well as constitutions inadequate response to new societal conditions can become source of instability of the political system. In the case of the EU, e.g. both the system of structural funds and financing within the Common Agricultural Policy have become unjust after enlargement to the east, since the poorest states receive least subsidies. Cf. H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, *Europäische Verfassung...*, op. cit., p. 510.

<sup>36</sup> In mid nineties Joseph Grieco proposed a similar thesis called *voice-opportunity-thesis*. Grieco argued that European integration could be explained by European states drive to control (in the framework of the common institutions) countries with a hegemonic potential, above all Germany. Precisely for that reason France was to lobby for the establishment of the European Central Bank desiring to control the dominant position of the German currency. See J. GRIECO, *The Maastricht Treaty. Economic and Monetary Union and the Neo-Realist Research Programme*, "Review of International Studies" 1995, 21, pp. 21-40.

<sup>37</sup> See J. ELSTER, *Ulysses and the Sirens: Studies in Rationality and Irrationality*, Revised edition, Cambridge: Cambridge University Press, 1984.

<sup>38</sup> See J. ELSTER, *Ulysses Unbound. Studies in Rationality, Precommitment, and Constraints*, Cambridge: Cambridge University Press, 2000, p. 92.

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- <sup>39</sup> Ran HIRSCHL, *Preserving Hegemony? Assessing the Political Origins of the EU Constitution*, "International Journal of Constitutional Law" 2005, 3, pp. 269-292.
- <sup>40</sup> F. SCHIMMELPFENNIG, *The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union*, "International Organization" 2001, 55 (1), pp. 47-80; F. SCHIMMELPFENNIG, *The EU, NATO and the Integration of Europe. Rules and Rhetoric*, Cambridge: Cambridge University Press 2003.
- <sup>41</sup> F. SCHIMMELPFENNIG, *The EU, NATO and the Integration of Europe...*, op. cit., pp. 55-62.
- <sup>42</sup> Cf. Ch. WEISE et al., *Ostmitteleuropa auf dem Weg in die EU – Transformation, Verflechtung, Reformbedarf*, Berlin: Duncker & Humblot, 1997; J. von HAGEN, *The Political Economy of Eastern Enlargement of the EU*, [in:] L. AMBRUS-LAKATOS, M.E. SCHAFFER, eds., *Coming to Terms with Accession*, London: CEPR, 1996, pp. 1-41.
- <sup>43</sup> Cf. H. BRUNKHORST, *The Legitimation Crisis of the European Union*, "Constellations" 2006, 13, pp. 166-180; J. BOHMAN, *Constitution Making and Democratic Innovation: The European Union and Transnational Governance*, "European Journal of Political Theory" 2004, 3, pp. 315-337; J. BOWMAN, *The European Union Democratic Deficit: Federalists, Skeptics, and Revisionists*, "European Journal of Political Theory" 2006, 5, pp. 191-212. The analysis of Thomas Christin, Simon Hug and Tobias Schulz stresses antinomies of constitutionalisation suggesting a systematic conflict between legitimizing and stabilizing function. T. CHRISTIN, S. HUG, T. SCHULZ, *Federalism in the European Union: The view from below (if there is such a thing)*, "Journal of European Public Policy" 2005, 12, pp. 488-508.
- <sup>44</sup> Por E.-W. BÖCKERFÖRDE, *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*, Frankfurt/M: Suhrkamp, 1992, p. 42.
- <sup>45</sup> A. KALYVAS, *Popular Sovereignty, Democracy, and the Constituent Power*, "Constellations" 2005, 12, pp. 223-244.
- <sup>46</sup> H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, *Europäische Verfassung...*, op. cit., p. 33.
- <sup>47</sup> Cf. F. W. SCHARPF, *Regieren in Europa. Effektiv und demokratisch?*, Frankfurt/M: Campus, 1999.
- <sup>48</sup> P. G. KIELMANNSEGG, *Integration und Demokratie*, [in:] M. JACHTENFUCHS, B. KOHLER-KOCH, eds., *Europäische Integration*, Opladen: Leske + Budrich, 1996, pp. 47-71.
- <sup>49</sup> P. G. KIELMANNSEGG, *Integration und Demokratie*, op. cit., pp. 47-71.
- <sup>50</sup> J.H.H. WEILER, *The European Union: Enlargement, Constitutionalism, and Democracy*, paper delivered at Walter-Hallstein-Institut für Europäisches Verfassungsrecht at Humboldt University in Berlin, 29.11.1999, Forum Constitutionis Europae, Berlin 1999.
- <sup>51</sup> A. BRODOCZ, *Die Symbolische Dimension der Verfassung. Ein Beitrag zur Institutionentheorie*, Westdeutscher Verlag, Wiesbaden 2003, p. 26.
- <sup>52</sup> Certainly a similar system of symbolic reference can be created by other institutions such as for example the national myth, which in case of France entails similar integrative functions as the Constitution in Germany. This was at the source of argumentative differences in the debate between Joschka Fischer and Jean-Pierre Chevènement, in which Chevènement criticized that Germany rejects the idea of nation due to its historic experiences. See: Die Zeit from 21.06.2000.
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- <sup>53</sup> A. BRODOCZ, *Die Symbolische Dimension der Verfassung...*, op. cit., p. 27.
- <sup>54</sup> Jutta Limbach proves on the example of Germany that the Federal Constitutional Court fulfills an even educational function towards the society by teaching it about democracy. See J. LIMBACH, *Die Integrationskraft des Bundesverfassungsgerichts*, [in:] H. VORLÄNDER, ed., *Integration durch Verfassung*, Wiesbaden: Westdeutscher Verlag, 2002, p. 316.
- <sup>55</sup> See J. HABERMAS, *Vom sinnlichen Eindruck zum symbolischen Ausdruck*, Frankfurt/M: Suhrkamp, 2001; D. STERNBERGER, *Verfassungspatriotismus. Schriften*, Volume 10, Frankfurt/M: Insel, 1990.
- <sup>56</sup> G. SCHAAL, *Vertrauen, Verfassung und Demokratie. Über den Einfluss konstitutioneller Prozesse und Prozeduren auf die Genese von Vertrauensbeziehungen in modernen Demokratien*, Wiesbaden: VS Verlag, 2004, pp. 11-15.
- <sup>57</sup> H. VORLÄNDER, *Integration durch Verfassung? Die symbolische Bedeutung der Verfassung im politischen Integrationsprozess*, [in:] H. VORLÄNDER, ed., *Integration durch Verfassung*, op. cit., p. 26.
- <sup>58</sup> A. BRODOCZ *Chancen konstitutioneller Identitätsstiftung. Zur symbolischen Integration durch eine deutungsoffene Verfassung*, [in:] H. VORLÄNDER, ed., *Integration durch Verfassung*, op. cit., pp. 101-120; A. BRODOCZ, *Die Symbolische Dimension der Verfassung...*, op. cit.
- <sup>59</sup> Gary Schaal distinguishes four modes of integration through constitution: integration through neutrality, integration through value consensus, integration through debate, and integration through conflict. See: G.S. SCHAAL, *Vier normative Konzepte von Integration qua Verfassung*, [in:] H. VORLÄNDER, ed., *Integration durch Verfassung*, Wiesbaden: Westdeutscher Verlag, 2002, pp. 71-100.
- <sup>60</sup> J. HABERMAS, *Braucht Europa eine Verfassung?...*, op. cit., p. 189; S. S. GREWAL, *The Paradox of Integration: Habermas and the Unfinished Project of European Union*, „Politics“ 2001, 21, pp. 114-123.
- <sup>61</sup> The results of the project are described *inter alia* in the monograph by Cathleen Kantner. See: C. KANTNER, *Kein modernes Babel. Kommunikative Voraussetzungen europäischer Öffentlichkeit*, Wiesbaden: VS Verlag, 2004. Also see: E.O. ERIKSEN, *An Emerging European Public Sphere*, “European Journal of Social Theory” 2005, 8, pp. 341-363.
- <sup>62</sup> Cf. H. KLEGER, ed., *Der Konvent als Labor. Texte und Dokumente zum europäischen Verfassungsprozess*, Münster: Lit Verlag, 2004.
- <sup>63</sup> Vito Breda voices his scepticism regarding the long-term workings of the European constitution, hence he proposes the theory of constitutional multi-nationalism. V. BREDA, *A European Constitution In a Multinational Europe or a Multinational Constitution for Europe?*, “European Law Journal” 2006, 12, pp. 330-344.
- <sup>64</sup> In this context, Antje Wiener and Vincent Della Sala are skeptical regarding the possible reduction of democratic deficit through constitutional engineering. A. WIENER, V. DELLA SALA, *Constitution-making and Citizenship Practice – Bridging the Democracy Gap in the EU*, “Journal of Common Market Studies” 1997, 35, pp. 595-614.
- <sup>65</sup> Cf. D. EASTON, *A Re-Assessment of the Concept of Political Support*, “British Journal of Political Science” 1975, 5, pp. 435-457; D. EASTON, *Theoretical Approaches to Political Support*, “Canadian Journal of Political Science” 1976, 9, pp. 431-448.
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<sup>66</sup> D. EASTON, *A Systems Analysis of Political Life*, New York: Wiley, 1965. Easton admits himself that positive experiences of a given society with the expected results of the functioning of the political system can in a long run create a generalised support. However, it is a kind of legitimacy that forms for a long time and is uncertain, since even short term negative experience can destroy it.

<sup>67</sup> In the case of the EU, specific support can be short-lived, since there are serious doubts in the research as to the capability of the EU to produce solutions to common problems. See: E. GRANDE, M. JACHTENFUCHS, eds., *Wie problemlösungsfähig ist die EU?*, Baden-Baden: Nomos, 2000.

<sup>68</sup> Cf. S. PUNTSCHER RIEKMANN, *Die kommissarische Neuordnung Europas. Das Dispositiv der Integration*, Wien: Springer, 1998.

<sup>69</sup> See: H. KLEGER, I.P. KAROLEWSKI, M. MUNKE, *Europäische Verfassung...*, op. cit., pp. 528-536.

<sup>70</sup> R. A. DAHL, E. R. TUFTE, *Size and Democracy*, Stanford: Stanford University Press, 1973.

<sup>71</sup> H. KLEGER, ed., *Der Konvent als Labor...*, p. 217.

<sup>72</sup> Cf. F. SCHARPF, *Politische Optionen im vollendeten Binnenmarkt*, [in:] M. JACHTENFUCHS, B. KOHLER-KOCH, eds., *Europäische Integration*, Opladen: Leske + Budrich, 1996, pp. 219-286.

<sup>73</sup> The short term EU legitimisation in the new member states is possible resulting from an increase of infrastructure investments financed from the EU budget or from an alleviation of the labour markets due to migration.

<sup>74</sup> R. A. DAHL, E. R. TUFTE, *Size and Democracy*, op. cit., p. 41-65.

<sup>75</sup> Cf. M. HÖRETH, *Die Europäische Union im Legitimationstrilemma*, Baden-Baden: Nomos, 1999.

<sup>76</sup> Cf. M. O. HOSLI, *The Flexibility of Constitutional Design: Enlargement and the Council of the European Union*, Vienna: Institute for Advanced Studies, 2004.

<sup>77</sup> An alternative and theoretically interesting analysis of treaty reforms from the perspective of theory of systems of Niklas Luhmann is proposed by: T. CHRISTIANSEN, G. FAULKNER, K.E. JØRGENSEN, *Theorizing EU treaty reform: beyond diplomacy and bargaining*, „Journal of European Public Policy“ 2002, 9, p. 12-32.

<sup>78</sup> See P. MAGNETTE, *Deliberation versus Negotiation. A First analysis of the Convention on the Future of the Union*, paper presented at the 1st Pan-European Conference on European Union Politics, 26-28 September, Bordeaux 2002; A. MAURER, *Less Bargaining – More Deliberation: The Convention Method for Enhancing the EU Democracy*, „International Politics and Society“ 2003, I, pp. 167-190; C. CLOSA, *Improving EU Constitutional Politics? A Preliminary Assessment of the Convention*, Constitutionalism Web-Paper (ConWeb) No.1, University of Manchester, 2003; K. BACHMANN, *Deliberating or Bargaining – the New Members and the Convention on the Future of Europe*, [in:] T. LANE, E.. STADTMÜLLER, eds., *Europe on the Move: The Impact of Eastern Enlargement on the European Union*, Muenster, LIT 2005, pp. 55-68.

<sup>79</sup> See among others J. COHEN, *Deliberation and Democratic Legitimacy*, [in:] A. HAMLIN/P. PETTIT, eds., *The Good Polity. Normative Analysis of the State*, New York 1989, pp. 17-34; S. BENHABIB, *Toward a Deliberative Model of Democratic Legitimacy*, [in:] S. BENHABIB, ed., *Democracy and Difference. Contesting the Boundaries of the Political*, Princeton: Princeton University Press,

1996, pp. 67-94; J. ELSTER, *Deliberation and Constitution Making*, [in:] J. ELSTER, ed., *Deliberative Democracy*, Cambridge: Cambridge University Press, 1998, pp. 97-122; J. HABERMAS, *Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt/M1981; J. HABERMAS, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates*, Frankfurt/ M 1992.

<sup>80</sup> F. SCHIMMELPFENNIG, *The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union*, "International Organization" 2001, 55 (1), pp. 47-80.

<sup>81</sup> Diana Panke even argues that intergovernmental conferences are characterised by more deliberation than the institution of convention. D. PANKE, *More Arguing than Bargaining? The Institutional Design of the European Convention and Intergovernmental Conferences Compared*, "Journal of European Integration" 2006, 28, pp. 357-379. Cf. also J. E. FOSSUM/A. J. MENÉNDEZ, *The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union*, "European Law Journal" 2005, 11, pp. 380-410.

<sup>82</sup> See I.P. KAROLEWSKI, *The Convention as a New Method of Decision-Making in the Enlarged European Union. How democratic can it really be?* [in:] T. LANE, E. STADMÜLLER, eds., *Europe on the Move: The Impact of Eastern Enlargement on the European Union*, Muenster, LIT 2005, pp. 36-53; J.-E. LANE, R. MAELAND, *Constitutional Analysis: The Power Index Approach*, "European Journal of Political Research" 2000, 37, pp. 31-56.

<sup>83</sup> See B. FELDERER, I. PATERSON, P. SILARSZKY, *Draft Constitution: The Double Majority Implies a Massive Transfer of Power to the Large Member States, Is this Intended?*, Vienna: Institute of Higher Studies, 2003; See also I. PATERSON, *A Lesser Known Probabilistic Approach to the Shapley-Shubik Index and Useful Related Voting Measures*, paper presented at the EPCS, Durham, March 31-April 3, 2005; W. SŁOMCZYŃSKI, K. ŻYCZKOWSKI, *Penrose voting System and Optimal Quota*, *Acta Physica Polonica*, 2006, 37 (11), pp. 3133-3143; C. BEISBART, L. BOVENS, S. HARTMANN, *A Utilitarian Assessment of Alternative Decision Rules in the Council of Ministers*, *European Union Politics*, 2005, 6, pp. 395-418. In reference to the power distribution in the Nice treaty see F. ALESKEROV, G. AVCI, V. IAKOUBA, Z.U. TÜREM, *European Union enlargement: Power distribution implications of the new institutional arrangements*, "European Journal of Political Research" 2002, 41, pp. 379-394.

<sup>84</sup> Although Great Britain belongs to the group of large states benefiting from the new decision making process, it is traditionally not interested in making the decision making process more effective or in creating integration an avant-garde. The Nice Treaty allowed Great Britain to preserve its own traditional method of pragmatic cooperation with various partners depending on the current political context. Cf. A. MENON, *Britain and the Convention on the Future of Europe*, "International Affairs" 2003, 79, pp. 963-978. Difficulties in the analysis of preferences of political subjects, also in the framework of the intergovernmental conferences, are stressed by T. König. T. KÖNIG, *Measuring and Analysing Positions on European Constitution-building*, "European Union Politics" 2005, 6, pp. 259-267.

<sup>85</sup> See: G. TSEBELIS/S.-O. PROKSCH, *The Art of Political Manipulation in the European Convention*, "Journal of Common Market Studies" 2007, 45, pp. 157-186; I.P. KAROLEWSKI, *The Convention as a New Method*, op. cit., p. 48.

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<sup>86</sup> Cf. P. MAGNETTE, K. NICOLAIDIS, *The European Convention: Bargaining in the Shadow of Rhetoric*, "West European Politics" 2004, 27, pp. 381-404.

<sup>87</sup> Confounding these concepts occurs also in the literature on the theory of democracy. See, e. g. G. S. SCHAAL, *Vertrauen, Verfassung und Demokratie...*, op. cit. p. 12. It is an essential mistake dangerously narrowing the definition of democracy to deliberation processes, which can be at most treated as one phase of democratic decision making process serving crystallization of collective preferences.