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**Unity in Diversity? The Challenge of Diversity for the European Political Identity,
Legitimacy and Democratic Governance: Turkey's EU Membership as the Ultimate
Test Case**

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Abstract

The current enlargement is, arguably, the most comprehensive and ambitious project of the European integration so far which presents both challenges and opportunities. It will increase the divergences in the EU and might have deleterious effects on the problems of democratic deficit and belonging. The increased diversity and varying arrangements of governance will intensify the problem of legitimacy and lack of a European public space or collective political identity. The Post-Nice constitutionalisation process can be regarded as an effort in strengthening the legitimate, democratic and efficient governance in the Union to overcome the detrimental implications of enlargement, and pursuing the overall aim of deepening the integration.

The European Union's quest for democratic and legitimate governance, together with an appropriately defined collective identity and boundaries did not start with the current enlargement process. The Union's search for its finalité politique and collective identity, however, will be the determinant factor regarding its final decision on Turkey's membership, its historical "significant other".

This study argues that rather than the size and economic, political and social problems of the country, its factual or perceived divergent identity will influence the course of Turkey-EU relations. The impact of enlargement on European democratic governance and collective identity is analyzed, in this regard, with a view to highlight Turkey's "special case" status and an analysis of Turkey's impact on European governance from a democracy/legitimacy vs. efficiency perspective is undertaken. In that context, various approaches to the conceptions of "collective political identity" and "constitutionalisation" in the EU are examined with a special emphasis on "constitutional patriotism", "constitutional tolerance", and "pluralism/particularism" in order to determine the consequences of each option for a viable integration between Turkey and Europe.

Thick or thin, exclusive or inclusive, based on "European" or universal values, the forging of a "collective political identity" for the European Union to increase its normative and democratic legitimacy will prove to be a challenging task. The main challenge for the Union, however, will be to strike a balance between diversity/dynamism/plurality on the one hand, and unity/cohesion/solidarity on the other, while aspiring to become a normative civilian power as well as a sufficiently democratic and efficient system of governance. In conclusion, the paper claims that the only normative and viable identity for the Union would be a project-based, flexible, future-oriented, open-ended "EU identity" whether Turkey becomes a member or not. Membership is a political decision that should be based on what the candidate brings to the table, rather than its "identity".

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UNITY IN DIVERSITY? THE CHALLENGE OF DIVERSITY FOR THE EUROPEAN POLITICAL IDENTITY, LEGITIMACY AND DEMOCRATIC GOVERNANCE: TURKEY'S EU MEMBERSHIP AS THE ULTIMATE TEST CASE

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PRESCRIPT

The research on this paper started around the time the Treaty Establishing a Constitution for Europe was signed by the Heads of State and Government of the Member States in Rome on the 29th of October 2004. On the 17th of December of the same year, the European Council declared that Turkey was to start the accession negotiations on the 3rd of October 2005. The completion of the paper coincides with that latter date, on which the Member States finally decided to commence the accession negotiations with Turkey following intense debates.

In the meantime, the current endeavor of strengthening the normative, democratic and social legitimacy of the Union, and forging a European collective political identity via constitutionalisation was interrupted by the rejection of the Constitutional Treaty by the French and Dutch people in ratification referendums. The underlying reasons or explanations for this public display of disaffection towards the Constitutional Treaty and the Union are multifaceted and serious. Today, the future of both the Constitutional Treaty and the Union, together with the future designs on enlargement appear to be in flux.

This outcome of events, however, would not take away from the fact that the attempts at forging a European community of solidarity and mutual trust in order to sustain the legitimacy of the European polity, while preserving the diversity prevailing in Europe, have created their own momentum. Such ideal and momentum, together with the underpinning theoretical background that shaped the identity referents of the Constitutional Treaty remain intact, even in the aftermath of the demise of the current text.

Against this background, neither an analysis of the Constitutional Treaty regarding its approach to European collective political identity, nor an assessment of Turkey's potential conformity with this collective identity became obsolete. With this justification in mind, this study remains unaltered in regard to its fundamental research, basic outlook and arguments.

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INTRODUCTION

The first decade of the 21st century marks a period of profound and rapid transformation for the European integration. The Union has almost doubled the number of its members on the 1st of May 2004. The prospects of further enlargement to the East and Southeast Europe are looming large in the horizon despite the recent difficulties encountered due to the ratification problems of the “Treaty Establishing a Constitution for Europe”¹ (hereinafter “Constitutional Treaty”) and the unfavorable public opinion toward enlargement in certain Member States.

Deepening is also taking a new turn. The debates on the *finalité politique* of the integration process gained momentum in the academia following the Maastricht Treaty, and were taken up by policy makers in the post-Nice process. Those debates resulted –for the time being- in a legal text, a “Constitution”, or more precisely a “Constitutional Treaty”, whose legal and political prospects are very much in question in the aftermath of the French and Dutch referenda. Whatever might be the outcome of this process, the momentum created by constitutionalisation and politicization will result in a new chapter in the history of the constantly evolving “polity in the making”, i.e. the European Union.

Since its inception, the European integration process has defined itself as it went along as regards its policies and institutions, its ends and means, its identity and boundaries. Neither a distinct political self-definition, nor a particular *telos* beyond the cryptic “ever closer union” formula informed the foundations and development of the European integration. The hybrid structure of the Union manifested itself in being a union of “Member States” and “their peoples”. Its *sui generis* character and attributes have contributed to, rather than constrained, its policy, process and institution-oriented approach.

Yet, the emergence of a new polity, assigned with well-defined aims and policies; allocated with necessary competencies; furnished with effective and democratic institutions and procedures; delineated by a distinct political identity and plausible borders; a polity that enjoys a sufficient degree of social, democratic and normative legitimacy, is often held to be a prerequisite for the Union to function efficiently and democratically in the aftermath of the current enlargement and constitutionalisation processes.

It is, indeed, at least common sense to assert that a system of democratic and efficient governance that enjoys social, democratic and normative legitimacy necessitates some resemblance of borders and boundaries. Democracy and the rule of law require a bounded territory and political identity in order to enable the exercise of legitimate popular authority.

In this regard, there is an intrinsic correlation between the questions of identity, boundaries, borders, objectives, structure and finality of the integration process. What kind of polity is the European Union and what should it evolve into? In what kind of public sphere, for what kind of *demos* or collective political identity, within which geographical and political boundaries should it operate? What kind of premise should inform such collective identity? Is

¹ “Treaty Establishing a Constitution for Europe”, *Official Journal of the European Union*, OJ C 310/1-474, 16.12.2004.

it desirable, or even plausible, to provide a final destination or a blueprint for the further progress of the process? Should the identity, boundaries and finality of the polity be decided once and for all, or should an approach of flexibility, adaptability and dynamism be preferred?

This brings us to a pivotal issue the EU is trying to solve right now; the link between identity, legitimacy and political order in Europe.² The current enlargement has increased the divergences in the EU and might have deleterious effects on the problems of democratic deficit and belonging, as the increased diversity and varying arrangements of governance would arguably deepen the problem of legitimacy and lack of a European public sphere or a *demos*.³ The Union is believed to be at a crossroads⁴, and no longer in a position to postpone a real debate on legitimate and democratic governance in the European polity, where such debate should end with the final determination of the boundary and identity of the polity in concrete political and geographical terms. Europe has to define what being European means in order to draw the line between “who belongs” and “who does not” so to enable a legitimate, democratic and bounded polity founded on solidarity and mutual trust.

In contrast, it can also be argued that an ongoing process of integration with an open-ended *finalité* and an evolving and flexible constitutional structure necessitates a not too definite border and non-exclusive, contestable and flexible identity referents. A hasty and exclusive drawing of boundaries and definition of identity might also undermine the legitimacy and efficiency of the integration process. Such an approach might easily thwart the process and rob the Union of the ability to adapt to the challenges and requirements of the globalized world and transform itself accordingly. It proves to be a challenge for the Union, however, to strike the balance between unity and diversity, coherence and flexibility, especially in the aftermath of the current enlargement process.

Irrespective of the approach adopted regarding the finality of the integration process, there are several questions pertaining to the collective political identity in Europe which could and should inform a viable transnational polity of a continental scale.⁵ Who is the people(s) of Europe on behalf of which public power is exercised? Should there be “a people” of Europe or the current diversity and plurality of “peoples of Europe” rhetoric and practice be

² See Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (eds.), *Developing a Constitution for Europe*, London-New York, Routledge, (2004); Lynn Dobson and Andreas Follesdal (eds.), *Political Theory and European Constitution*, London-New York, Routledge-ECPR, (2004); J.H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge-New York, Cambridge University Press, (2003); J.H.H. Weiler, *The Constitution of Europe. “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*, Cambridge-New York, Cambridge University Press, (1999); Weiler and Eisgruber, (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, *Jean Monnet Working Paper*, No. 5/04, (2004).

³ See for example Jan Zielonka, “Enlargement and the Finality of European Integration” in Christian Joerges, Yves Meny and J.H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, San Domenico di Fiesole, European University Institute, (2000), pp. 151-162, at pp. 161-162.

⁴ For a similar argument as regards the Union being at a crossroads, see the Laeken Declaration. *Laeken European Council Presidency Conclusions*, 14 and 15 December 2001, SN 300/1/01 REV 1, Annex 1, http://europe.eu.int/futurum/documents/offtext/doc151201_en.htm.

⁵ For seven different types of finality distinguished by Neil Walker as “territorial”, “political”, “institutional”, “purposive”, “social”, “legal”, and “constitutional” see Neil Walker, “The Idea of a European Constitution and the Finalité of Integration”, *Francisco Lucas Pires Working Paper Series on European Constitutionalism*, No. 2002/01, (2002), at <http://www.fd.unl.pt/je/wpflp05a.doc>.

preferred? What are, or should be the conceptions of commonality that bind the European citizens together in a complex, multi-level system of mutual trust and solidarity? How “thick” or “thin” this political identity ought to be in order to enable a normatively and democratically legitimate polity? Are the basic commonalities of interests and objectives, institutions, rules and procedures premised on universal values and principles sufficient, or a more substantial value-based political identity, premised on a “European” historical and ethical contextuality is a must?

Is the “European” identity something beyond the integration process; does it have intrinsically divergent attributes that differentiates it from “Others”, albeit in a non-adversarial manner? If the answer is in the affirmative, what could and should be the basis of this “European” collective political identity?

The answers to these questions, on the other hand, are closely related to the aims and objectives of the European Union: is it going to be a global actor- a normative/civilian power with a civilizing mission, or a hard/military one? Or, maybe a “fortress” -an exclusive sphere of prosperity, freedom, security and justice? As regards its *telos*, even more complex questions might be in order: Is European Union a regional experiment of democracy, justice and rule of law at a transnational or postnational temporal and spatial order, or a regional integration model with predominantly economic objectives? Should it continue to exist as an “ever closer union” among European states and their peoples, or get involved in an endeavor to merge those states and peoples into a single entity of some degree and sort?

In this context, Turkey-European Union relations deserve a closer look. This paper is an attempt at investigating the impact of Turkey’s future membership and its feasibility and desirability in the light of the legitimate democratic governance problems of the Union. It is an attempt at outlining the feasibility of realizing the motto of the Union, i.e. “unity in diversity”, when the challenge of diversity is multiplied both by the size of the prospective member, and its perception as a special case due to its divergent identity attributes.

The paper highlights a “vicious” or a “virtuous” circle, in the sense that the future of the EU is linked to its decision on Turkey, as much as its decision on Turkey depends on its future designs.

What are the justifications for such a bold argument of tying the future prospects of Turkey and EU together? Why Turkey, and not any other candidate country is treated as the ultimate test case for the realization of the motto of the Union, the “unity in diversity”, while forging a concrete and viable collective political identity? First, such an assertion is based on the fact that Turkey has been involved in a special relation with the EU right from its inception. Secondly, because the public opinion in Member States perceives this candidate as “different”. And it is generally held that identities are, at least to some extent, based on the perceptions of the others, rather than the self.

Turkey’s accession to the Union would not only enlarge the area, scope and population of the EU, but more significantly “would alter the way others currently perceive it –as a

broadly rich, western, Judeo-Christian entity.”⁶ As Christopher Hill suggests, “this maybe a good thing; what is clear is that the [internal and] international effects of the Turkish entry would not be neutral.”⁷ Whether they are in favor of or against Turkey’s accession to the EU, there appears to exist some sort of consensus amongst the commentators of Turkey-EU relations on one point: Turkey’s accession would have profound repercussions for the Union and Turkey alike.⁸ As Buzan and Diez assert, Turkey-EU relations and their future prospects are important “[...] not only in itself and for its regional consequences, but also because it is fundamental to the future development of the political form and identity of Turkey and EU alike.”⁹

A country whose land mass is overwhelmingly in Asia, which has a population of Muslim faith -a population with current demographic trends, looks likely to become the largest in the European Union within a few decades-, has prompted many a European to claim that Turkey is not a “European” country.¹⁰ Most controversially, and perhaps significantly, Valéry Giscard d’Estaing, the Chairman of the European Convention and the former President of France, stated in an interview to *Le Monde* published on November 9, 2002 that “Turkey cannot be admitted as a member to the EU, simply because it is Asian.”¹¹ According to Giscard, it would be “the end of the European Union, as we know it if Turkey were actually to get in.” Turkey’s so-called “Islamic” culture, accompanied by the fact that 95% of the country’s land mass being in Asia would and should hinder such entry.

Can the European Union deepen its economic and political integration, strengthen its social and democratic legitimacy, build a collective political identity, attain its overreaching objectives and at the same time absorb a country like Turkey? Can the Union deal with a situation in which the country with the biggest weight in the EU is also the poorest, is on the geographical periphery of Europe, is not a founding member of the European Union, has a limited history of European integration, and is perceived as “culturally” different from the large majority of the European citizens? Is the main issue the size and relative economic, social and political backwardness of this candidate country? Or maybe the objections are stemming from enduring divergences between European and Turkish identities?

⁶ Christopher Hill, “The Geo-political Implications of Enlargement”, *EUI Working Paper*, RSC No. 2000/30, (2000), reprinted in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, London, Routledge, (2002), pp. 95-117.

⁷ *Ibid.*

⁸ For a similar view in regard to the profound effects of Turkey’s accession to the EU, both on negative and positive accounts, see Barry Buzan and Thomas Diez, “The European Union and Turkey”, *Survival*, Vol. 41, No. 1, (1999), pp. 41-57; Vittorio Sanguinetti, “Turkey and the European Union: Dreaming West but Moving East”, *Mediterranean Quarterly*, Vol. 8, (1997), pp. 11-26, Hill, *supra* note 6, pp. 96-97.

⁹ Buzan and Diez, *supra* note 8, p. 41.

¹⁰ Buzan and Diez argue that “A central difficulty lies in the way that the EU Turkey relationship penetrates deeply into the domestic politics of both sides. The internal political constitution and the basic construction of collective identity in both entities are deeply intertwined with the nature of relationship between them. In the case of Europe, the identity issue revolves around who can and who cannot be considered “European””. Buzan and Diez, *supra* note 8, p. 41. See also Sanguinetti, *supra* note 8, pp. 11-26. Sanguinetti states that Turkey is “by definition not European”, at p. 12.

¹¹ “Pour ou contre l’adhésion de la Turquie à l’Union Européenn”, *Le Monde*, 9 November 2002.

These are legitimate questions which require a profound examination of Turkey-EU relations and their respective identities in various respects. Here, however, we will limit our analysis to the answers of these fundamental questions: Is Turkey like any other candidate apart from the problems due to its size -i.e. size of its land mass, size of its population, size of its economic, social and political problems-, so that its impact on the democratic and efficient functioning and deepening of the integration process would be tolerable? Or is this candidate perceived to be fundamentally different in its identity so that its joining the EU would threaten the viability of the project of forging a collective political identity for the legitimization of the European polity? Is the Union a “unity in diversity” in real terms, deriving its legitimacy from its plurality, or should/could there be limits to its diversity, in order to preserve its coherent and democratic governance, when it comes to the inclusion of a “significant other”?

In order to answer these questions I will first embark on an analysis of the challenges posed to the European integration process by simultaneous widening and deepening, and highlight the existing and increasing problems of identity, borders, legitimacy, democracy and efficiency in Europe. I will attempt at outlining the basic attributes of the European polity in order to establish the feasible parameters in respect to the territorial and democratic governance boundaries of the European Union.

In that context, I will deal with the challenge posed by a large candidate like Turkey to the stability and viability of the European governance both on accounts of democracy and efficiency of a polity, in relation to its size. During this analysis I will imagine that Turks have no fundamental cultural differences from the majority of European states’ populations, or that the Europeans perceive them as such. In that way I will have an opportunity to test my main argument, i.e. size is not the issue that causes the ambivalent or even the negative attitude of many Europeans on the question of Turkey’s EU membership; it rather constitutes a “politically correct” excuse.

The second section of the paper will be devoted to an examination of the approaches to constitutionalisation of the Union in order to render it democratically legitimate and to forge a European collective political identity. I will invite the reader back to reality and treat Turkish candidacy as it is perceived by the majority of the Europeans, i.e. as a fundamentally different country’s European adventure. My aim in that analysis is to demonstrate that the options available to the Union in determining its collective identity referents will also constitute the main determinant for its designs on Turkey’s future role *vis-à-vis* the integration process.

Amongst the various conceptions developed on collective identities within context of the European polity, I will focus on the main representative versions of the communitarian and cosmopolitan approaches to European constitution and collective political self-definition. The emphasis will be on “constitutional patriotism”, “constitutional tolerance”, and “pluralism/particularism” in order to determine the consequences of each option for a viable integration both within the Union, and between Turkey and the European integration process.

The last section of the paper will be devoted to the evaluation of the Union's founding documents, the Constitutional Treaty and accession criteria in respect to the above-mentioned approaches to collective political identity and the impact of the recent constitutionalisation process in the emergence of such political community. In that regard, Turkey's membership prospects will be analyzed both on the basis of those legal texts and the public opinion prevailing in the Member States.

I) Deepening and Widening: Impact of Enlargement on Borders, Democracy and Efficiency of the European Governance: Is Turkey "too Big"?

A) Deeper Integration for an Enlarging Union: What is the EU and What can it Evolve into?

What is "Europe" or the "European Union" which Giscard refers to, that the eventuality of Turkish accession would herald its "end"? Is it a functional intergovernmental cooperation mechanism between Member States?¹² Is it a technocratic "problem-solving agent" established to solve the transnational governance problems of an economic and technocratic nature?¹³ Is it a "condominio"¹⁴ of differentiated and layered governance? Is it a "post-Westphalian State"¹⁵ or is it a "neo-medieval empire"?¹⁶ Is it the best display of a system of "multilevel governance"?¹⁷ Or is it a "supranational community" of shared values and "constitutional tolerance"?¹⁸ Maybe an experiment on the cosmopolitan ideals of a "postnational"¹⁹ or a "pluralistic"²⁰ polity? European Union might also be defined as a

¹² Andrew Moravcsik, *The Choice for Europe-Social Purpose and State Power From Messina to Maastricht*, Ithaca-New York, Cornell University Press, (1998); Andrew Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", *Journal of Common Market Studies*, Vol. 40, No. 4, (2002), pp. 603-624.

¹³ Fritz Scharpf, *Governing in Europe-Effective and Democratic?*, Oxford-New York, Oxford University Press, (1999); Giandomenico Majone, *Regulating Europe*, London-New York, Routledge, (1996).

¹⁴ Philippe C. Schmitter, *How to Democratize the European Union and Why Bother?*, Lanham-Boulder-New York-Oxford, Rowman & Littlefield Publishers, (2000).

¹⁵ James Caporaso "The European Union and Forms of State. Westphalian, Regulatory and Post-Modern?", *Journal of Common Market Studies*, Vol. 34, No. 1, (1996), pp. 29-52.

¹⁶ Zielonka, *supra* note 3.

¹⁷ Gary Marks, Liesbet Hooghe and Kermit Blank, "European integration from the 1980s: State-centric v. Multi-level governance", *Journal of Common Market Studies*, Vol. 34, No. 3, (1996), pp. 341-378; Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter and Wolfgang Streeck, *Governance in the European Union*, London-Thousand Oaks-New Delhi, Sage Publications, (1996); Tanja A. Börzel and Thomas Risse, "Who is Afraid of a European Federation? How to Constitutionalise a Multi-Level Governance System", in Christian Joerges, Yves Meny and J.H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity?-Responses to Joschka Fischer*, San Domenico di Fiesole, European University Institute, (2000), pp. 45-60; Erik O. Eriksen, Christian Joerges and Jürgen Neyer (eds.), *European Governance, Deliberation and the Quest for Democracy*, Oslo, ARENA, (2003).

¹⁸ J.H.H. Weiler, "In defence of the status quo: Europe's constitutional *Sonderweg*", in J.H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge-New York, Cambridge University Press, (2003), pp. 7-23; J.H.H. Weiler, "To be a European Citizen-Eros and Civilization", *Journal of European Public Policy*, Vol. 4, No. 4, (1997), pp. 495-519.

¹⁹ Jürgen Habermas, *The Postnational Constellation: Political Essays (Translated, Edited and with an Introduction by Max Pensky)*, Cambridge, Polity, (2001); Deirdre Curtin, *Postnational Democracy-the European Union in search of a political philosophy*, The Hague, Kluwer, (1997); Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*, Princeton-Oxford, Princeton University Press, (2004).

²⁰ James Tully, *Strange Multiplicity. Constitutionalism in an age of diversity*, Cambridge-New York, Cambridge University Press, (1995); Jo Shaw, "Process, Responsibility and Inclusion in the EU Constitutionalism",

normative civilian power with a “federal vision”?²¹ Or even an emerging “European Federal State”?²²

A detailed analysis of the European polity remains outside the scope of this study. Nevertheless, in order to develop a conception of collective political identity for the European Union that is normatively justified and practically achievable, and to critically assess various options that are available to the Union in that context, we have to depict and define the European polity to a certain extent. The issues that are to be discussed in this paper such as collective political identity, boundaries, borders and legitimacy of the Union, and Turkey’s place in it, are all related to the type of polity the Union currently is, or could evolve into.

Any attempt to define the European integration is bound to resign to the fact that the European Union epitomizes the proverbial elephant;²³ depending on the level, approach and objective of the theoretical and empirical analyses the definition differs enormously. European Union is all and none of the above. It certainly is a “contested polity”.²⁴ The relative failure or diversity of descriptive approaches should not, however, make obsolete the normative or prescriptive levels of analyses. The defining characteristics of the Union concerning its polity structure are briefly outlined as follows.

The first defining characteristic of the European Union is that, it is a *sui generis* polity in the making. It is not a state, nor a proper federation, confederation or regional intergovernmental organization; and most certainly not a monolithic polity. The Union is equipped with limited powers and limited political, legal, financial and material instruments and resources compared to nation-states. It is a process with no preordained or predefined destination/finality,²⁵ no predefined structure, no predefined boundary, nor a predefined identity. It has no deterministic path of progress, no linear direction of movement, no teleological existence or mission. It is a “work in progress” to be reconstructed and redefined

European Law Journal, Vol. 9, No. 1, (2003), pp. 45-68; Antje Wiener, “Editorial: Evolving Norms of Constitutionalism”, *European Law Journal*, Vol. 9, No. 1, (2003), pp. 1-13.

²¹ Robert Howse and Kalypso Nicolaidis (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford-New York, Oxford University Press, (2001).

²² G. Federico Mancini, “Europe: The Case for Statehood”, *European Law Journal*, Vol. 4, No. 1, (1998), pp. 29-42.

²³ For the elephant and blind men metaphor within context of the European integration, see Donald J. Puchala, “Of Blind Men, Elephants and International Integration”, *Journal of Common Market Studies*, Vol. 10, No. 3, (1972), pp. 267-284.

²⁴ Zenon Bankowski and Emiliios Christodoulidis, “The European Union as an essentially contested project”, *European Law Journal*, Vol. 4, No. 4, (1998), pp. 341-354.

²⁵ Andrew Moravcsik argues that the European integration has not been “[a] preordained movement toward federal union but a series of pragmatic bargains among national governments based on concrete national interests, relative power, and carefully calculated transfers of sovereignty.” See Moravcsik *supra* note 12, (1998), p. 472. Albeit on different grounds, a “Reflection Group”, initiated by the Commission President Romano Prodi for an investigation on Europe’s spiritual and cultural dimension and commonalities, came to the same conclusion, stating that there is no finality to the EU. See *Spiritual and Cultural Dimension of Europe*, Reflection Group initiated by the President of the European Commission and coordinated by the Institute of Human Sciences-Concluding remarks by Kurt Biedenkopf, Bronislaw Geremek and Krzysztof Michalski, Vienna-Brussels, October (2004), (hereinafter “The Reflection Group”). For a discussion on the “finalité” of the integration process see Michael Wilkinson, “Constituting Europe: Flexibility or Finalité”, *Oxford Journal of Legal Studies*, Vol. 22, No. 1, (2002), pp. 177-187.

by constantly adapting itself to the internal and external economic, political and social developments and dynamics. Each revision of the Founding Treaties, each new accession reshapes and redefines the integration project, as does the day-to-day policy determinations, legislation enactments and implementations. As stated in the Schuman Declaration: “Europe will not be made all at once, or according to a single, general plan. It will be built through concrete achievements, which first create a de facto solidarity.” Irrespective of the functionalist logic of this statement, the open-ended, project-based and incremental nature of the integration process remains true to this day.

Secondly, the Union is a genuine “unity in diversity” or a “mixed polity” based on a “pluralistic citizenship”.²⁶ It displays a dual/hybrid nature both in its structure and functioning. It is premised on the coming together of the Member States and their peoples on the basis of both intergovernmental and federal principles that are prevailing simultaneously. It is an international agreement between Member States and a social contract between their peoples. As von Bogdandy puts it, the European Union is a federal polity that finds its unity in plurality which combines supranationalism and federalism.²⁷ It is also a horizontal and vertical multi-level governance system with a variety of overlapping policies, and instruments as well as institutions to adopt and implement them. As a polycentric entity, it represents overlapping interests, especially of supranational, national and local types and levels. It has no obvious hierarchical structure, rather a heterarchical system of simultaneous existence and interaction of various political, legal, economic, social and cultural rules, procedures, objectives, norms and values.

And lastly, the Union has a very high level of adaptability and flexibility on both territorial and functional aspects. Its membership and citizenship structures highlight this feature. On both accounts the Union has flexible and fluid mechanisms and procedures that obscure the inside/outside divide, while providing the required flexibility for continuous integration and widening. Such flexibility enables adaptability, while adaptability increases system effectiveness and viability.

On the basis of this analysis of the defining characteristics of the integration process, it becomes clear that the European Union would only be able to find a political form that is *sui generis*, a form that evolves permanently. Such constant evolution, and the flexibility of borders and structures require an open-ended, not too rigid and adaptable polity and a

²⁶ Wolfgang Wessels and Udo Diedrichs, A New Kind of Legitimacy for a New Kind of Parliament—the Evolution of the European Parliament, *European Integration online Papers (EIoP)*, Vol. 1, No. 006, (1997): <http://eiop.or.at/eiop/texte/1997-006a.htm>.

²⁷ Armin von Bogdandy argues that the European Union is a non-state federal polity and a supranational federation. For von Bogdandy, “[t]he external nature of the Union has, to a large extent, developed along the lines of federalism [...] the internal, i.e. organizational framework is characterized by polycentrism and fragmentation to such an extent that it is unlikely that unifying forces will lead to the emergence of a state.” See Armin von Bogdandy, “The European Union as a Supranational Federation: A Conceptual Attempt in the light of the Amsterdam Treaty”, *Columbia Journal of European Law*, Vol. 6, (2000), pp. 27-54, at p. 28. For a pluralistic conceptualization of the contemporary European constitutional order(s) as a “European Commonwealth”, see Neil MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford-New York, Oxford University Press, (1999), in particular Ch. 7, 8 and 9.

corresponding collective political identity that would be acceptable to the newcomers and the existing Member States alike, as well as being shaped by them continuously.²⁸

European Union is, to a large extent, a construct of human aspirations and political will, a search for defining and achieving “justice”, “freedom” and the, albeit loosely defined, “common good”. It is a new form of peaceful cooperation amongst nation-states and a form of political self-determination amongst their peoples.

With the current enlargement process, this opportunity of peaceful cooperation and political self-determination has been extended to 10 new Member States as of 1st of May 2004; while Romania, Bulgaria, Turkey and Croatia continue to enjoy the official candidate status and the Southeast European countries are on the verge of becoming candidates.

The discussions on the definition and final destination of the “European polity”, the “European collective identity”, the limits of the European integration, and the criteria to be deployed for their determination have always been the leitmotif of the integration process. The current enlargement of the European Union, however, brought these discussions into the limelight.

To this day, every wave of enlargement of the integration process bears witness to the fact that each new accession alters the governance structures and collective identity of the existing members for the insiders and outsiders alike. The current ongoing enlargement is also “[...] expected not only to increase the EU’s scope of activity in and influence over its external environment, but also to introduce substantial changes in its internal functioning and to its system of socio-economic and political values.”²⁹

In the next section, I will embark on an analysis of the borders and limits of the integration process in light of their significance in shaping and defining political identities and providing the territorial aspect of legitimate and democratic governance.

B) Boundaries-Borders-Limits: Europe of Diverse Boundaries: Is Turkey Inside or Outside?³⁰

The Union has no fixed territory delineated by definite borders over which it can exercise its authority. The end of the Cold War exacerbated the EU’s current dilemma in regard to its borders and boundaries. This historic event left the Union without any clear geographical border, let alone cultural or political boundaries. The ongoing enlargement

²⁸ Lord and Magnette argue that “[...] as the boundaries of the Union have been constantly displaced, this open process has given newcomers the opportunity to argue about the EU’s principles and to influence them, even if they know their admission constrains them to accept the foundations of the EU [...] [A] system whose normative basis is open to permanent deliberation softens the constraints of admission to a supranational body, and facilitates its acceptance by the citizens of the new Member States.” See Christopher Lord and Paul Magnette, “E Pluribus Unum? Creative Disagreement about Legitimacy in the EU”, *Journal of Common Market Studies*, Vol. 42, No. 1, (2004), pp. 183-202, at p. 198.

²⁹ Svetlozar A. Andreev, “Theorising Enlargement: The EU Enlargement Eastwards and European Integration Theory”, *Paper presented at ECSA-Denmark Conference*, University of Odense, 24 September, (2004), available at <http://www.ecsa.dk/2004%20papers/Svetlozar.DOC>, at p. 12.

³⁰ This section of the paper builds on a previous study of the author. See Sanem Baykal, “Turkey-European Union Relations: Converging or Drifting Apart-What Kind of A Common Future?”, *Ankara Papers*, No. 11, (2004), pp.1-76.

process is certain to redefine the current borders of the polity. The momentum however is unlikely to stop there.

As the EU's borders shift to the East, more potential aspirants for EU membership emerge. William Wallace has suggested that "[W]hat Europe you see depends on where you live. "Europe" is a movable set of myths and images, both positive and negative, embedded in national histories and vernacular literature."³¹ Currently, the EU looks likely to evolve into an organization with 30 or more members.

Together with the current members, the acceding and candidate countries, and the perspective presented to the Southeastern European countries regarding eligibility for future membership diminished the possibility of a relatively tidy and homogenous Union. Irrespective of the desirability of such an outcome, and despite the undeniable benefits of diversity, it is generally asserted that every polity requires at least a resemblance of a boundary within which reasonably similar units interact in order to function and govern effectively and democratically.³²

Both at the polity and individual levels, belonging implies boundaries: you belong because others do not.³³ Boundaries are one of the prerequisites, which contribute to the definition of the kind of polity the EU is, or will evolve into.³⁴ The problems to be explored in that context are threefold: whether the Union should define itself by its geography, by its functions or by its values in order to delineate its boundaries; whether such delineation should be conclusive and final, or open-ended, and finally, whether the boundaries should be flexible and porous, or rigid.

The more the number of members of the Union, the more the chance that they will demonstrate an increased diversity in political, cultural, social and economic aspects. A European polity progressing linearly to a pre-defined end-result would require a delineation of its geographical boundaries which would enable some degree of homogeneity amongst its members and a well functioning, democratically legitimate governance. A tightly knit political entity requires more homogeneity compared to a looser integration model. Moreover, in order to be governable and democratic, the borders of such polity would have to be demarcated. It follows that the collective political identity of such tightly knit polity would have to be based on more concrete and substantial commonalities in order to sustain the

³¹ William Wallace, "Where Does Europe End? Dilemmas of Inclusion and Exclusion", in Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, London-New York, Routledge, (2002), pp. 78-94, at p. 79.

³² For an in-depth analysis on this, see Michael Smith, "The European Union and a Changing Europe : Establishing the Boundaries of Order", *Journal of Common Market Studies*, Vol. 34, No. 1, (1996), pp. 5-28; Lykke Friis and Anna Murphy, "The European Union and Central and Eastern Europe: Governance and Boundaries", *Journal of Common Market Studies*, Vol. 37, No. 2, (1999), pp. 211-232; Hill, *supra* note 6, pp. 95-117; Zielonka, *supra* note 3; Jan Zielonka and Peter Mair, "Introduction: Diversity and Adaptation in the Enlarged European Union", *West European Politics*, Vol. 25, No. 2, (April 2002), pp. 1-19.

³³ Weiler, *supra* note 18, (1997), p. 505. For Weiler, the Union is a supranational project that "[...] seeks to redefine the very notion of boundaries of the state, between the national and the state, and within the nation itself." at p. 507.

³⁴ See in general Smith, *supra* note 32; Friis and Murphy, *supra* note 32.

smooth functioning of the system. In such a scenario the emphasis has to be on “unity”, rather than on “diversity”.

An open-ended polity, on the other hand, would be susceptible to accommodate the wide-ranging diversity of its members in economic, cultural, social and geographical terms, and would not require a definite and early delineation of its borders. The borders of such a polity would be both permeable and flexible, reflecting the nature of the project-based differentiated integration. Under this conception, the borders would shift according to the practical and normative requirements of the “polity in the making”, including or excluding countries on the basis of shared objectives and projects between the groups of Member States. This would inevitably increase the need for striking the normatively justified and practically achievable balance between governability, efficiency and democratic legitimacy.

Indeed, the EU’s borders are unsettled not only territorially, but also functionally. Apart from the difficulties and feasibility of establishing definite borders for the EU, the type and strength of these borders present another problem.

As regards the different types of boundaries of the European Union, Smith has ascertained four: geographical, institutional/legal, cultural and transactional.³⁵ According to this classification a non-member might be outside the cultural boundaries, yet might be within the institutional/legal boundaries of the EU by way of adopting at least some of its rules and procedures.³⁶ Similarly, a member country -which is within the geographical and cultural boundaries- might be bound by most of the policies and rules of the Union, but might opt-out of some of them.³⁷

In that context, due to the divergent capabilities and expectations of the current members regarding the requirements and rewards of EU membership, it can be argued that a model of concentric circles or some sort of core/periphery is already a reality whether the Union expands to 30+ members or not. Moreover, such a design is also in conformity with the Union’s desire to exert some sort of influence beyond its rigid borders or the strict confines of full membership.

Such an integration model of concentric circles brings forth the discussion regarding the “sharpness” or “softness” of the EU’s borders. It has been generally pointed out that the Union has remarkably porous borders through which interaction takes place at a very high rate.³⁸ Within the parameters of a flexible integration of either a model of concentric circles or core/periphery, rigid borders do not appear to be a conceivable option for the EU.

³⁵ Smith, *supra* note 32. See also Friis and Murphy for the elaboration of this categorization, Friis and Murphy, *supra* note 32.

³⁶ Turkey might be cited as an example here, as it has a Customs Union with the European Community, and therefore subject to its Common Commercial Policy on the one hand, and a wide-range of its free movement rules and practices on the other.

³⁷ For instance, Britain, Sweden and Denmark, despite being full members of the EU, are out of the Euro-zone, and therefore, not bound by a crucial policy of the Union.

³⁸ See for instance Michael Emerson, “Some Paradigms for the Evolving Map of Europe”, *Centre for European Policy Studies (CEPS) Working Document*, No. 164, (2001), pp. 1-19, available at <http://www.ceps.be>.

Arguably, such soft, permeable and functionally “fuzzy borders”, which appear to be an unavoidable outcome for the EU, would also be instrumental in relieving the tension that might originate from a rigid inside-outside split, and would offer the Union more chance to extend its governance beyond territorial and geographical limits. Nevertheless, no matter how “soft” or “fuzzy” those borders are, a well-functioning Union requires some sort of definition as regards its boundaries. A complex web of external relations and association agreements plays a role in obscuring the conceptual clarity of who the insiders and outsiders shall be. Several countries, that are associated with the European Union in various types and degrees of relations, “[...] gain access to numerous types of status, following both the movement towards convergence and the distance left for achieving membership.”³⁹

In that regards, as pointed out by Smith, the key variable will be “the ability of the EU to draw, to maintain or to modify a boundary between itself and the more general European order”⁴⁰ together with the criteria it employs while delineating that boundary. Delimitation of borders appears to be a politically motivated and heterogeneous process, where political homogeneity seems more important than geographical continuity up until now.⁴¹ Finding the right balance between stability and efficiency of borders and the normatively legitimate criteria to draw them are imperative.⁴² This, however might prove to be a very challenging task and the Union might have to come to terms with the fact that the only option is a continual redrawing and redefining of its boundaries.⁴³ The real danger for the integration process lies in the drawing of new exclusionary boundaries, this time around Europe itself.⁴⁴

C) Enlargement, Flexibility and Legitimacy: Is There Room for Turkey in a Flexible Union?

The future of the European Union will be based on a design of flexibility, which will, in turn, have an impact on Turkey’s place in the European integration. The Union will have to

³⁹ Kalypso Nicolaidis and Justine Lacroix, *Order and Justice Beyond the Nation State: Europe’s Competing Paradigms*, in Rosemary Foot, John Gaddis and Andrew Hurrell (eds.), *Order and Justice in International Relations*, Oxford-New York, Oxford University Press, (2003), pp. 125-154; at p. 148.

⁴⁰ Smith, *supra* note 32, p. 12.

⁴¹ Malcolm Anderson and Didier Bigo, “What are EU Frontiers and What Do They Mean?”, in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds.), *In Search of Europe’s Borders*, The Hague-London-New York, Kluwer Law International, (2003), p. 21. For Weiler, for instance, delimiting Europe’s boundaries does not present an insurmountable normative challenge “so long as the boundaries of Europe are determined pragmatically (e.g. limiting the size to make its democracy real) or not artificially (e.g. historical boundaries of Europe) and not racially or religiously (e.g. not excluding Turkey because of the religious faith of its citizens)[...]” See J.H.H. Weiler, “Epilogue: Reclaiming Nationalism and Patriotism”, in Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe-The Shadow of National Socialism and Fascism over Europe and its Legal Tradition-With a Prologue by Michael Stolleis and an Epilogue by JHH Weiler*, Oxford-Portland/Oregon, Hart Publishing, (2003), pp. 389-402, at p. 401.

⁴² According to Schmitter, “[E]ven a cursory examination of the territorial organization of the EU makes it clear that the boundary between insiders and outsiders remains uncertain and/or follows no uniform criterion”. See Schmitter, *supra* note 14, p. 15.

⁴³ Nicolaidis and Lacroix, *supra* note 39, p. 149.

⁴⁴ Kalypso Nicolaidis and Robert Howse, “This is my EUtopia...: Narrative as Power”, *Journal of Common Market Studies*, Vol. 40, No. 4, (2002), pp. 767-792, at pp. 781-782.

“[...] act in overlapping circles and along a variable geometry resembling a neo-medieval empire more than a Westphalian federal state.”⁴⁵

Flexibility, or to put it differently, several variations of “variable geometry”, “concentric circles” or “multi-speed Europe” are already present in the EU structure; the significant examples of which are the Eurozone and the ESDP.⁴⁶ Flexibility can be seen as a must or a necessary devil for maintaining the momentum of integration or as a way of endorsing a less monolithic EU. In Neil Walker’s words, “[...] flexibility is not an end in itself, but an ubiquitous device which can serve quite different -even diametrically opposed- end-games.”⁴⁷

The Founding Treaties themselves provide for “enhanced cooperation” as a mechanism to manage diversity in the Union since the Amsterdam revisions. The increased diversity as a direct consequence of the enlargement will only amplify this “different degrees of integration within integration” model. This, in turn, will create a very complex structure which is unlikely to resemble any existing model of polity, but will be a *sui generis* experiment in transnational governance. Thus, flexibility is often presented as “a response to the problems of managing the increasing diversity and heterogeneity of the Union.”⁴⁸

As discussed, the diversity prevailing in the Union will only be increased by the enlargement and that would also diminish the possibility of a clearly defined political community, culturally/socially/economically homogenous to a sufficient degree, operating in clearly defined borders, according to visible and predictable rules of governance. This heterogeneity, however, might be a source of creativity and dynamism if regarded as “pluralism”. In Zielonka’s words, “[S]ome would even argue that divergence is ‘pluralism’ by another name and that it is Europe’s greatest historical and cultural treasure. Divergence is

⁴⁵ Zielonka, *supra* note 3, p. 152.

⁴⁶ For detailed analyses on the historical evolution of flexibility in the European integration and the meaning, definition and merits of different versions of flexibility, see Wolfgang Wessels, “Flexibility, Differentiation and Closer Cooperation”, in Martin Westlake (ed.), *The European Union Beyond Amsterdam Treaty-New Concepts of European Integration*, London-New York, Routledge, (1998), pp. 76-98; Philip Lynch, “Flexibility and Closer Cooperation: Evolution or Entropy?”, in Philip Lynch, Nanette Neuwahl and G. Wyn Rees (eds.), *Reforming the European Union from Maastricht to Amsterdam*, Harlow, Pearson Education, (2000), pp. 200-216; John Usher, “Flexibility and Enhanced Cooperation”, in Ton Heukels-Niels Blokker and Marcel Brus (eds.), *The European Union after Amsterdam-A Legal Analysis*, The Hague, Kluwer Law International, (1998), pp. 253-271; Giovanni Grevi “Differentiated Integration in an Enlarged Union”, *European Policy Centre (EPC)*, (2002) available at <http://www.epc.be>.

⁴⁷ Neil Walker, “Flexibility within a Metaconstitutional Frame: Reflections on the future of Legal Authority in Europe”, *Harvard Jean Monnet Working Paper*, No. 12/99, (1999), p. 4. Moreover, as Shaw suggests “Flexibility casts doubt upon the taken-for-granted integrationist telos of the ‘more Europe’ as stating definitively the nature of the ‘progress’ which is being sought. In the contrary flexibility suggests that an integrationist outcome understood in those terms is not necessarily a shared goal of all the Member States. It challenges the presumption that ‘more Europe’ must be the outcome of the project of creating new supranational governance structures within the EU.” Jo Shaw, “Constitutionalism and Flexibility in the EU: Developing a Relational approach”, in Gráinne de Búrca and Joanne Scott (eds.), *Constitutional Change in the EU from Uniformity to Flexibility?*, Oxford-Portland/Oregon, Hart Publishing, (2000), pp. 337-358, at p. 341.

⁴⁸ Johan P. Olsen, “Unity, diversity and democratic institutions-What can we learn from the European Union as a large-scale experiment in political organization and governing?”, *ARENA Working Papers*, No. 04/13, (2004), p. 24.

also a prerequisite of modernity (or, if one prefers, ‘post-modernity’), in the sense that only highly diversified and pluralistic societies acting in a complex web of institutional arrangements are able to succeed in conditions of modern competition.”⁴⁹

As Walker points out, the new flexibility designs consist of four specific dangers to the efficient and legitimate governance in the European Union; (1) the problems regarding the delineation of the boundaries between legal orders and putative legal orders; (2) the problems of political efficacy, democratic accountability and social legitimacy associated with the multi-dimensional configuration of authority which flexibility entails; (3) the problems regarding the legal uniformity in the Union and; (4) the problems regarding striking a balance between the competencies, rights and obligations of the non-participating states against those of the participating states and vice versa.⁵⁰

In order to mitigate the dangers inherent in flexibility arrangements, it is imperative that they do not create impenetrable new boundaries within the integration process. Arguments against the creation of a core and a periphery within context of the European integration are strong and plausible.⁵¹ For instance, the creation of a core group would inevitably create a division between the “ins” and “outs”. If everybody can join the core group, there is no reason for having it, therefore any claim that each Member State of the Union will be welcome to join the core group is not credible, in particular in the case of the newcomers.⁵² As Weiler suggests, “[T]here is something ugly about a ‘you can join, but at the moment of joining we will be leaving for something else’ construction.”⁵³

The creation of a core would create discrimination between the members, or in other words, create first-class and second-class memberships. This would violate some of the basic premises of the European Union, such as the equality and solidarity between the Member States based on a culture of compromise for the maximization of common interests. In fact, the creation of a core might even signal the death of the EU as we know it.⁵⁴

Flexibility in the form of temporary or permanent opt-outs, or the mechanisms such as “enhanced cooperation” would have to be preferred, provided that a basic amount of coherence is preserved in key integration areas. A certain degree of sacrifice in regard to coherence might be inevitable in order to keep the mechanism working and everybody inside and content, as long as the all-important imperative of striking a balance between coherence and differentiation is met.

It remains a plausible possibility that there will be a multiplicity of citizenship status depending on the conditions of accession and date of entry of the countries, which would be

⁴⁹ Zielonka, *supra* note 3, p. 161.

⁵⁰ Walker, *supra* note 47, pp. 5-10.

⁵¹ See Ben Hall, “How Flexible Should Europe Be?”, *Centre for European Reform (CER)*, (2000), pp. 1-20; Zielonka and Mair, *supra* note 32; Zielonka, *supra* note 3.

⁵² Zielonka, *supra* note 3, pp. 152-156.

⁵³ J.H.H. Weiler, “Epilogue-Fischer: The Dark Side”, in Christian Joerges, Yves Meny and J.H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity? Responses to Joschka Fischer*, San Domenico di Fiesole, European University Institute, (2000), pp. 235-247, at pp. 237.

⁵⁴ Hall, *supra* note 51.

challenging a democratic citizenship conception based on equal rights.⁵⁵ The difficulty in this regard will be to reconcile the flexible governance mechanisms with rule of law, democracy and legitimacy on the one hand, and solidarity and equality on the other. The contrast between the basic tenets of democracy being based on a conception of egalitarian citizenship, and flexibility designs is a significant one. If flexibility creates mechanisms that would reinforce the differences between the states or the citizens of the EU, this would exacerbate the problems of participation and belonging, and ultimately the legitimacy of the integration process. In that context, it would be imperative to strike a balance between the legitimacy of rights and obligations of participating and non-participating Member States to the differentiated policy areas, and also to keep open the opportunity to participate in the future for the unable or unwilling of the present. In that respect, the derogations, specific arrangements, and opportunity of invoking safeguard measures on a permanent basis suggested by the Commission and endorsed by the European Council while opening the accession negotiations with Turkey, excluding the country from free movement and access to structural funds and certain policy areas as CAP, might confine Turkish membership to a second-class one perpetually. Consequently, the legitimacy of such a design would become debatable, whereas forging political ties between European and Turkish peoples on the basis of mutual trust and solidarity might prove to be a mission impossible.

The repercussions of differentiated integration in the Union, to Turkey-EU relations would be twofold. First, Turkey would be in a position to take advantage of increased diversity and be incorporated into the Union more comfortably. The flexibility brought about by diversity will pave the way for countries like Turkey to full membership, which would ease off the burden of complying with all the policies of the EU, which might be beyond the desire or capacity of the acceding and existing Member States alike, as long as such exclusion would be consensual and temporary. Second, in an increasingly diversified, project-based integration model, the EU will be better poised to benefit from the accession of a dynamic country like Turkey.

Turkey's future accession to the Union will indeed have significant ramifications for the EU. The institutional structure and decision making mechanisms, the budget and the funds, some significant policies such as the Common Agricultural Policy and free movement of persons, will all be affected to a substantial degree, if and when a big country like Turkey, with its considerable differences from the majority of the Member States, becomes a full member. Be that as it may, it is submitted that the main obstacle to the smooth progress of Turkey's accession process emanates from the perceptions of the European public regarding Turkey. The Europeans' negative attitudes towards Turkey are stemming from their view concerning Turkey's inability to conform to the European ideal and practice, and, this in turn, is the direct result of their divergent identity perceptions. As long as the negative public opinion towards Turkey's accession is not replaced with the desirability of a common future

⁵⁵ Anderson and Bigo, *supra* note 41, p. 19.

on the part of the European peoples, Turkey's becoming a member might prove to be an insurmountable challenge.

D) Enlargement from the Perspective of Democracy v. Effectiveness: Impact of Turkish Membership: Relevance of Size

The rationale which underlies the quest for fixed boundaries is that, following the accession of the current candidates, the Union would reach at a barely manageable size, and further integration might jeopardize the efficient functioning of the Union. As pointed out earlier, the enlargement might result in a “neo-medieval empire”⁵⁶ type of integration that would intensify the problems of belonging and democracy in the Union. As Zielonka puts it, “Democratic rules and norms must operate within a clearly defined territory and for a territorially defined demos [...] Affection, loyalty, and identity could hardly develop in a complex system of open-ended arrangements, with fluid membership, variable purpose, and a net of concentric functional frames of cooperation.”⁵⁷

The enlargement presents challenges to the democratic and efficient governance in the European Union in many respects. First, there is the issue of the transformation of the new Member States and their adaptation to the system of supranational governance. To achieve a smooth transition and adaptation to the European Union policies, procedures and mentality in order not to jeopardize the proper functioning of the system, the newcomers would have to be “Europeanized” and “Democratized” before their accession. An attempt at a political union, such as the one the EU has embarked upon, demands adherence to certain principles as a fundamental minimum to sustain coherence and stability. For the European Union these principles have been ascertained by the relevant Treaty articles and the Copenhagen criteria. In fact, the acceding states are required to comply with more rigid and demanding criteria compared to the present Member States and the reasons for this are twofold. First, both the dynamic and evolving character of the integration process and also its ever-increasing requirements compel the new members to satisfy more rigorous criteria. Secondly, the candidate states' potential for jeopardizing the existing stability, coherence and balance is deemed to be greater compared to the existing Member States.

Have the newcomers achieved sufficient democratic progress? Is there any risk involved in their admission that could lead to the erosion of democratic practices within the Union? These questions seem justified taking into consideration the amount of time needed for a functioning democracy to be rooted firmly with its institutions, its civil society, and more importantly with its mentality and democratic culture.⁵⁸ As with all newcomers this concern also holds true for Turkey's membership.

⁵⁶ See in general Jan Zielonka (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, Routledge, London-New York, (2002).

⁵⁷ Jan Zielonka, “Europe Moves Eastward-Challenges of EU Enlargement”, *Journal of Democracy*, Vol. 15, No. 1, (2004), pp. 22-35, at p. 29.

⁵⁸ *Ibid.*, p. 32.

More significantly, however, it has to be pointed out that the enlargement and the increase in the population and territory of the Union would also entail the danger of moving democratic governance even farther from citizens' reach, since more citizens mean fewer opportunities for meaningful participation.⁵⁹ According to Zielonka, "average citizens can hardly expect to see their influence increase, and will moreover have to sort through issues that are farther away from their own concerns. Enlargement will make the prospect of a truly European demos recede that much further."⁶⁰

Similarly, Weiler argues that the larger the size of the unit, the more the danger that "[...] there would be a diminution in the specific gravity, in the political weight, in the level of control of each individual within the re-drawn political boundaries" even if the Union were to adopt the same institutional structure and realized the conditions conducive to a functioning democratic governance as found in the nation-states, such as a public sphere, public media etc. According to Weiler, that was "[...] an inevitable result from enlarging the membership of the functional polity (when a company issues new voting shares, the value of each share is reduced) and from adding a tier of government thereby distancing it further from its ultimate subjects in whose name and for whom democratic government is supposed to operate."⁶¹ Both the opportunities and the relevance of citizens' participation for any individual citizen would decrease as the number of citizens increase remarkably.⁶² Moreover, democracy requires equal citizenship rights, yet the weight of each citizen's vote is not strictly equal in the European Union. This, however, is a feature of all federal and quasi-federal systems alike.

While it is well known that smaller and more homogeneous units may allow for more democratic control and participation, their system effectiveness is limited due to the problems faced by smaller units in the implementation of their democratically taken decisions and in the attainment of the end results desired in today's globalized world. As Robert A. Dahl argues, a larger unit is required to deal with today's problems; the citizen participation must be supplemented by "system effectiveness".⁶³ A smaller EU might be one where citizens can participate, influence and control democratic decision-making more effectively. The effective implementation of those decisions, however, might be thwarted by external dynamics and developments. The scale of a system, therefore, might adversely affect the in-input legitimacy, yet, might have a positive effect on the output legitimacy.

Moreover, smaller units may suppress diversity and differences more easily than larger units. The larger the unit of governance, the more the probability to have less homogeneity and more diversity. Minorities and divergent identities are generally held to have more and easier access to voice their positions, express their divergent identities and participate in democratic processes in larger units. Especially in complex multi-layered polities like the

⁵⁹ *Ibid.*, p. 31.

⁶⁰ *Ibid.*, p. 32.

⁶¹ J.H.H. Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", *European Law Journal*, Vol. 1, No. 3, (1995), pp. 219-258, at p. 232.

⁶² Robert A. Dahl, "A Democratic Dilemma: System Effectiveness versus Citizen Participation", *Political Science Quarterly*, Vol. 109, No. 1, (1994), pp. 23-34, at p. 29.

⁶³ *Ibid.*, p. 28.

European Union, there may be significant “[...] democratic gains from centralization as groups with disperse interests benefit from economies of scale or groups previously disenfranchised are given access previously denied to them.”⁶⁴

More significantly, after emphasizing the significance of participating in shared tasks and activities for the generation of a strong sense of identification and solidarity, Ciaran Cronin suggests that “[...] the solidarity generating power of shared activities depends less on the size of the group than on whether participants believe that these activities are truly cooperative and mutually beneficial; hence a democratic process can indeed promote social cohesion provided that a sufficient proportion of the citizens regard it as largely fair and in their interest, or, if not, at least as providing them with genuine opportunities to make it more just and equitable.”⁶⁵

The crux of the matter for the Union is to strike the right balance between democratic participation and system effectiveness by taking into consideration the main goals and objectives of the European integration. For instance, trade and foreign and security policies would arguably benefit from a larger European Union, whereas redistributive policies might experience the adverse effects of the larger scale. The trade-offs and choices are not easy. As Dahl puts it, the danger might lie elsewhere: “Because the problem of trade-offs in democratic values resulting from changes in scale has been largely ignored, the opponents of drastic increases in the size of a democratic unit have little to fall back on except sentiment, attachments, loyalties.”⁶⁶ Might this be one of the reasons why in the recent years the debate on the European identity and Turkey’s prospective membership to the European Union is taking adversarial overtones and displays almost a discourse of “othering”?⁶⁷

The problems of legitimate and democratic governance of the European Union did not start with the enlargement; they have been there since inception of the integration process. The issue of the size of Turkey must be taken into consideration in that light too. The difference between a unit composing 100 million, 200 million or 500 million citizens, as far as the legitimate democratic governance is concerned, is not that significant. The added tier of government Weiler points out to, have already been there and is not a consequence of enlargement. The Union is in dire need of overhauling its governance and conforming to the liberal democratic ideals by coming up with innovative solutions appropriate for the requirements of the *sui generis*, open-ended and flexible integration process, whether Turkey

⁶⁴ Kalypso Nicolaidis, “Conclusion: The Federal Vision Beyond the Federal State”, in Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford-New York, Oxford University Press, (2001), pp. 443-474, at p. 459.

⁶⁵ Ciaran Cronin, “Democracy and Collective Identity: In Defence of Constitutional Patriotism”, *European Journal of Philosophy*, Vol. 11, No. 1, (2003), pp. 1-28, at p. 14.

⁶⁶ Dahl, *supra* note 62, p. 34.

⁶⁷ See for instance, Rainer Hülse, “The Discursive Construction of Identity and Difference-Turkey as Europe’s Other ?”, *Discussion Paper presented at the ECPR Joint Sessions of Workshops*, Mannheim, 26-31 March, (1999); Penelope Sofioleas, “Identity Shift and Europe’s Changing Perceptions of Others: Europe, Turkey and the Issue of Self-Identification”, *Online Journal of Peace and Conflict Resolution*, 2.1, available at http://www.trinstitute.org/qjpcr/2_1identity.htm; Thomas Diez, “Europe’s Others and the Return of Geopolitics”, *Cambridge Review of International Affairs*, Vol. 17, No. 2, (2004), pp. 319-335.

becomes a member or not. What is crucial here is whether the added value of including a country like Turkey for the common good and shared objectives of the integration process would justify the loss of the “specific gravity, in the political weight, in the level of control of each individual.” Enlargement has given the Union a unique opportunity to shape its external environment -thereby increasing its effectiveness-, so the challenge now is to find ways to increase legitimate governance, belonging and public participation.⁶⁸

What would Turkey’s impact be on the institutional structure of the European Union and its decision making mechanisms and policies; on the existing or emerging balances and compromises between different types and levels of interests -transnational, national, regional, local, economic, cultural, social etc.- in the Union? This question requires a thorough and multidisciplinary impact analysis that cannot be attempted within confines of this paper.⁶⁹ Suffice to underline that the country’s size and its economic, social, political and legal problems would certainly have a huge impact on the democracy and efficiency of the European governance.

As is well known, size is an important factor determining the political impact and clout of a Member State due to its role in the allocation of seats in the European Parliament, but more importantly, the weighing of votes in “Qualified Majority Voting” procedure in the Council.⁷⁰ The number of MEPs from Turkey in the European Parliament and the weight of Turkey in qualified majority voting in the Council will result in Turkey’s becoming one of the key members of the Union. Especially due to the change in the system of qualified majority voting introduced by the Nice Treaty and then elaborated by the Constitutional Treaty, a large and populous country like Turkey’s membership will have important repercussions. More significantly, however, Turkey’s inclusion will bring about a profound effect on the dichotomy and balance between large and small, or affluent and poor Member States; on the core and periphery, on the North and South, East and West which will make a significant impact on the decision-making procedures. The bargaining and compromise, the consensus and disagreement, the balancing of interests and positions will require a new outlook and new considerations.

Such impact, however profound, will also be limited. No matter how large a Member State is, it has no power to dictate its own policy priorities to the others; compromises and

⁶⁸ Zielonka, *supra* note 57, p. 31.

⁶⁹ For an analysis on Turkey’s impact on the European Union, see Commission Staff Working Document, *Issues Arising from Turkey’s Membership Perspective*, Brussels, COM (2004) 656 final, 6.10.2004, SEC (2004) 1202; Report of the Independent Commission on Turkey, *Turkey in Europe: More than a promise?*, (2004); Kirsty Hughes, “Turkey and the European Union: Just Another Enlargement? Exploring the Implications of Turkish Accession”, *Friends of Europe Working Paper*, (2004); Steven Everts, “An Asset but not a model: Turkey, the EU and the wider Middle East”, *Centre for European Reform (CER) Essays*, (2004); Heather Grabbe, “When negotiations begin: the next phase in EU-Turkey relations”, *Centre for European Reform (CER) Essays*, (2004).

⁷⁰ Johannes Pollak, “Democracy and the European Constitution: Majority Voting and Small Member States”, *Constitutionalism Web-Papers*, ConWEB No. 4/2004, (2004), available at <http://les1.man.ac.uk/conweb/>; Richard Baldwin, Mika Widgren, “The Impact of Turkey’s Membership on EU Voting”, *CEPS Turkey in Europe Monitor*, Issue 13, (2005), pp. 1-13; Fuad Aleskerov, Gamze Avci, Viatcheslav Iakouba and Z. Umut Türem, “European Union Enlargement: Power Distribution Implications of the New Institutional Arrangements”, *European Journal of Political Research*, Vol. 41, (2002), pp. 379-394.

consensus-seeking have always been the name of the game in EU decision making procedures. It is a contestable argument to suggest that a country which complies with the accession criteria and conducts successful accession negotiations, which has been part of the European governance for more than 40 years, due to the association relationship and Customs Union, would not be able to adapt to the necessities of sovereignty sharing and compromise seeking, which is required for the efficient functioning of the system, once it becomes a member.

Nor is it plausible to second guess the preferences, attitudes and priorities of a country like Turkey before it becomes a full member as a result of being transformed appropriately due to a long, arduous and taming accession process. The question is whether there is a natural and linear interest divergence between large and small, or rich and poor member states; and whether Turkey can be predicted to take sides in every issue in such a way that would tip the delicate balance in the Union in one way or the other. Such analyses and predictions might prove to be counterproductive. Turkey is a dynamic and complex country, and its attitudes and responses to unknown future challenges of the Union cannot be predicted with any precision beforehand, as is the case for all Member States. In that context, Turkey's stance in the American occupation of Iraq provides a revealing example.

Moreover, Johan P. Olsen suggests that, the previous enlargements of the integration process illustrate that "system integration in terms of common formal institutions, identities and policies, and diversity among component entities is not necessarily negatively correlated [...] new members have also brought new concerns and demanded policies that have strengthened not weakened integration."⁷¹ That would arguably be the case for Turkey as well.

If, however, suspicions and unease about Turkey's compatibility with the EU mentality and procedures emanate not from the size and particular problems of the country, but from its distinct characteristics and its differences from the rest of Europe, those issues present a "politically correct" excuse for exclusion. As Crowley asserts, "[...] for instance, one form of concern about human-rights abuses in, say, Turkey has as much to do with the unexamined postulate that Turks are incapable of a genuine human rights perspective as it has with straightforward humanitarianism [...] Furthermore, the hypothetical argument that EU 'compactness' counts for more than the self-determination of those potential Member States that may wish to derogate from it would be deeply objectionable on democratic grounds."⁷²

E) Why Enlarge? Does the Rationale Change Depending on Who the Candidate is?

The basic rationale of the current enlargement process can be explained as follows: Western Europe was determined to contribute to the democratization and liberalization of the former Eastern Bloc countries, basically because this was regarded as a moral obligation and

⁷¹ Olsen, *supra* note 48, pp. 24-25.

⁷² John Crowley, "Locating Europe", in Kees Groenendijk, Elspeth Guild and Paul Minderhoud (eds.), *In Search of Europe's Borders*, The Hague-London-New York, Kluwer Law International, (2003), pp. 27-44, at pp. 41-42.

a must for security concerns.⁷³ Inclusion of Turkey, however, has never been seen as the natural outcome of such a moral duty.

The underlying motivation for this difference in attitude might be explained by the concept of “kinship-based duty”.⁷⁴ As elaborated by Sjursen, both a sense of a shared destiny and a kinship-based duty seem to be important arguments for enlargement to Central and Eastern Europe. “[T]he Eastern Europeans constituted the “kidnapped West” [and] [t]he importance of the “myth of Yalta”, symbolizing the failure of the west to prevent the division of Europe, is often stressed in discussion of western policies towards Eastern Europe.”⁷⁵ In fact, the inclusion of Malta and the Greek Cyprus into the enlargement process might also be clarified by this explanation: these countries also constituted the “us” or the “Europeans” for the EU. All these countries belonged to “Europe”; therefore, the costs of their inclusion or returning back to where they belonged were tolerable both in political and financial terms, and consequently justified a worthy sacrifice.

Perhaps, it might be fair to suggest that such commitment on the part of the EU towards Turkey has neither been existent, nor expressed in such definite terms. In contrast, in the case of Turkey, there is neither a feeling of kinship, nor a sense of duty. This might contribute to our understanding of why Turkey has not been prioritized in the EU’s enlargement policy. As Sjursen states “[...] [it also] might contribute to explain why important financial efforts are put into helping, for example Poland, to fulfill the conditions for membership. In other words, why there seems to be a stronger willingness to overcome the cost of enlargement in the case of Poland.”⁷⁶

Turkey poses a significant and multidimensional challenge to the European integration in an incomparable fashion to the CEECs. Its demographics, its economic and political problems, its geopolitics and its somewhat divergent identity increase the costs of its incorporation to the integration process. Here it is contended, however, that if Turkey had constituted an essential ingredient of the definition of “Europeanness” in the perception of the “Europeans”, the policy makers and the public opinion would have considered that cost as tolerable. In Turkey’s case, however, such commitment is remarkably lacking.

⁷³ For similar views, see in general, Michael Baun, *A Wider Europe, The Process and Politics of European Union Enlargement*, Lanham-Boulder-New York-Oxford, Rowman & Littlefield Publishers, (2000), pp. 8-11; Helene Sjursen and Karen E. Smith, “Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement”, *ARENA Working Papers*, No. 01/1, (2001); Helene Sjursen, “Why Expand? The Question of Justification in the EU’s Enlargement Policy”, *ARENA Working Papers*, No. 01/6, (2001), reprinted as “Why Expand? The Question of Legitimacy and Justification in the EU’s Enlargement Policy”, *Journal of Common Market Studies*, Vol. 40, No. 3, (2002), pp. 491-513.

⁷⁴ Sjursen, *supra* note 73 (2001), pp. 16-20. Similarly, Olsen states that “[e]nlargement decisions have been based on principles and ideas about identity and belonging and not solely on utility calculations, and member states have accepted widening even when it has been seen as threatening to their interests.” See Olsen, *supra* note 48, p. 25. For an argument on enlargement being a manifestation of solidarity on the basis of a kinship-based duty, see also Marise Cremona, “EU Enlargement: solidarity and conditionality”, *European Law Review*, Vol. 30, (2005), pp. 3-22, at pp. 6- 9.

⁷⁵ Sjursen, *supra* note 73 (2002), p. 505.

⁷⁶ Sjursen, *supra* note 73 (2001), p. 16.

Instead, Turkey's candidacy is based on a justification pertaining to its strategic importance and the dangers emanating from its "loss".⁷⁷ It was only when the cost of excluding Turkey seemed to become higher than the cost of including it, that the country was explicitly included in the enlargement process.⁷⁸ Turkey was not a "natural insider", but simply the "significant outsider".⁷⁹ The Commissioner responsible for enlargement, Günther Verheugen, immediately preceding the Helsinki decision that granted Turkey the EU candidature status, had expressed this perception in very unambiguous terms. Commissioner Verheugen stated that:

"[...] There are the political and strategic arguments that make it imperative to support Turkey's affiliation with Europe, bring about democratic change in Turkey, encourage it to change its position on Cyprus and puts its relations with Greece on a sound footing [...] were there no history to the Union's relations with Turkey, we could consider a completely different strategy. We could, for example, form a highly developed association with Turkey, creating a model for dealing with other near neighbors, e.g. Russia, Ukraine or North Africa. History, however, precludes this option. If we deprive Turkey of the prospect of accession, we will be held responsible for everything that goes wrong in the country. Then the question might become, 'Who lost Turkey?'"⁸⁰

The main justification for such discrimination and divergence lies in the presumed incompatibility between the "European" and the "Turkish" identity constructions and definitions. There appears to be a strong argument against the European credentials of Turkey, which exacerbates the problem of incorporating this country into the European integration process, a country that already presents formidable challenges irrespective of incompatibility in respect of the basics of its identity. As Keyman and Öniş suggest, "[t]he problems posed by Turkey for the EU on identity grounds have no doubt influenced EU policy towards Turkey over time and clearly constitutes one of the important influences that might account for the relatively unfavorable mix of conditions and incentives faced by Turkey in comparison with other candidate countries."⁸¹

⁷⁷ As William Park points out, "[I]n the final analysis, Turkey has simply been regarded as too important to 'lose'". See William Park, "Turkey's European Union Candidacy: From Luxembourg to Helsinki-to Ankara ?", *Mediterranean Politics*, Vol. 5, No. 3, (2000), p. 44.

⁷⁸ Sjursen, *supra* note 73 (2001), p. 22.

⁷⁹ Ziya Öniş, "Turkey, Europe and Paradoxes of Identity: Perspectives on the International Context of Democratization", *Mediterranean Quarterly*, Vol. 10, No. 3, (1999), pp. 107-136; Ziya Öniş, "Greek-Turkish Relations and the European Union: A Critical Perspective", *Mediterranean Politics*, Vol. 6, No. 3, (2001), p. 37. Similarly, Mayer and Palmowski assert that "[...] for more than 500 years Europe defined itself partially in opposition to the Ottoman Empire, [...]" See Franz C. Mayer and Jan Palmowski, "European Identities and the EU-The Ties that Bind the Peoples of Europe", *Journal of Common Market Studies*, Vol. 42, No. 3, (2004) pp. 584-585, at p. 575.

⁸⁰ Günther Verheugen, *The Second Decade: Towards a New and Integrated Europe*, Den Haag, 4 November 1999 quoted in Park, *supra* note 77, at p. 44. More recently, the prominent French politician Nicholas Sarkozy, amongst others, has commented on the lack of a kinship between Turkey and Europe as constituting the main justification for a differentiated attitude towards this candidate country. See *EUobserver*: <http://www.euobserver.com/?aid=8048&sid=9>, 30 November 2004.

⁸¹ Fuat Keyman and Ziya Öniş, "Helsinki, Copenhagen and Beyond: Challenges to the New Europe and the Turkish State", *Paper presented at the 44th Annual ISA Conference*, Budapest, Hungary, June 24-28, (2003), p. 26.

The analysis provided in this first section of the paper as regards the compatibility of European polity with a large newcomer in terms of efficient and democratic governance only holds true on the basis of the assumption of Turkey being any other candidate country. The reality, however, is somewhat different from this assumption. Turks are, or perceived to be, different from the “Europeans”. The cultural, historical, social and political foundations of this perception, or its accuracy will not be discussed here, and will be taken as given.

If the issue is not the size of the country or the size of its problems, but rather the lack of mutual trust and solidarity between the peoples of Europe and Turkey and the questions about Turkey’s “European” credentials; this prompts us to investigate the identity referents of Europe in order to decide whether Turkish membership would in fact threaten such cohesion or legitimate and democratic governance as well as the emergence of a European political identity.

II) Legitimacy-Democracy-Constitution: The Forging of a European Political Identity and Turkey

A) Legitimacy and the Union: Composite Legitimacy for a Polycentric Polity

Legitimacy is the premise that transforms power into effectiveness⁸² and it requires the realization of democratic and normative ideals within a suitable context of coherence and stability. European Union has many problems of legitimacy and democracy. The various roots, facets and repercussions of the those problems have been widely documented.⁸³

Starting from the mid-90s, the field of European Studies, in particular in the legal realm, has been preoccupied with the exploration and theorization of the legitimacy problems of the integration process. Initially, or more precisely up until the Maastricht Treaty, the legitimacy of the integration process was predominantly held to be legal and indirect. The European Community was regarded as a “community of law”, whose founding documents were the international treaties prepared and ratified by the Member States according to the rules and principles of international law and national constitutional requirements. The European integration, which functioned in a limited, mainly economic and technocratic domain, where decisions were usually taken by unanimity, was not held to require express

⁸² Kalypso Nicolaidis, “EU-topia or the Power of the Superpower-less”, in Tod Lindberg, *Beyond Paradise and Power: Europe, America and the Future of a Troubled Partnership*, London-New York, Routledge, (2004).

⁸³ For one of the earliest studies on the issue see J.H.H. Weiler and Ulrich Haltern & Franz Mayer, “European Democracy and Its Critique, Five Uneasy Pieces”, *Harvard Jean Monnet Working Paper*, No. 1/95, (1995), reprinted as Joseph H. H. Weiler, Ulrich R. Haltern and Franz C. Mayer, “European Democracy and Its Critique”, *West European Politics*, Vol. 18, No 3, (1995), pp. 4-39. See also Weiler, *supra* note 61; Larry Siedentop, *Democracy in Europe*, New York, Columbia University Press, (2001); Erik Oddvar Eriksen and John Erik Fossum (eds.), *Democracy in the European Union-Integration Through Deliberation?*, London-New York, Routledge, (2000); David Beetham and Christopher Lord, *Legitimacy and the European Union*, London-New York, Longman, (1998); Antje Wiener-Vincent Della Sala, “Constitution-making and Citizenship Practice-Bridging the Democracy Gap in the EU?”, *Journal of Common Market Studies*, Vol. 35, No. 4, (1997), pp. 595-614; Giandomenico Majone, “Europe’s ‘Democratic Deficit’: The Question of Standards”, *European Law Journal*, Vol. 4, No. 1, (1998), pp. 5-28; Daniel Wincott, “Does the European Union Pervert Democracy: Questions of Democracy in New Constitutionalist Thought on the Future of Europe”, *European Law Journal*, Vol. 4, No 4, (1998), pp. 411-428; Moravcsik, *supra* note 12 (2002).

and direct democratic legitimacy from the peoples of Europe. The legitimacy deriving from the Member States was deemed to be sufficient for the viability of the European unification.

The substantive and comprehensive developments brought about by the Maastricht Treaty regarding the increase in the competencies of the European integration, together with the re-introduction of the qualified majority voting procedure and the establishment of the political pillars, brought the Union and its technocratic and elitist nature into both scholarly and public debate.⁸⁴ Coupled with the ratification debacles in France and Denmark, this phenomenon marked the end of the so-called “permissive consensus”,⁸⁵ as well as indicating the end of simplistic approaches to the legitimacy problems of the Union. The recent referenda results in France and the Netherlands for the ratification of the Constitutional Treaty provided further indications of the legitimacy and democracy predicaments of the EU. The disaffection and disinterest displayed by the European peoples, not only towards the Constitutional Treaty, but also towards the integration process in general⁸⁶ highlighted the need for a search of different avenues and mechanisms to close the gap between the EU and its citizens, which paradoxically was one of the main justifications and objectives behind the recent constitutionalisation attempts.⁸⁷

An often cited definition of legitimacy is provided by Philippe C. Schmitter as “[...] a shared expectation among actors in an arrangement of asymmetric power, such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to the pre-established norms. Put simply, legitimacy converts power into authority [...] and thereby simultaneously establishes an obligation to obey and a right to rule.”⁸⁸ How can we assess the Union’s legitimacy according to these requirements?

As discussed in the first section, the European Union is a system of multilevel governance, a mixed polity and it displays a dual/hybrid nature in its structure and functioning. It is a polity based on the coming together of the Member States and their peoples.

As a result, the legitimacy of the Union does not rest on one single principle but on a complex network, or layers of legitimation principles that are complementary yet at the same time competitive, a trait that requires a careful and difficult balancing act as is the case with many pluralistic polities.⁸⁹ Several theories have been put forward or adapted to the peculiarities of the European Union in order to grasp and explicate the somewhat shaky, but

⁸⁴ Joseph H.H. Weiler, “Transformation of Europe”, *Yale Law Journal*, Vol. 100, (1991), pp. 2403-2483.

⁸⁵ See, in general, Leon N. Lindberg, and Stuart A. Scheingold, *Europe's Would-be Polity. Patterns of Change in the European Community*, Englewood Cliffs/ New Jersey, Prentice-Hall, (1970).

⁸⁶ For *Eurobarometers* see: http://www.europa.eu.int/comm/public_opinion/index_en.htm.

⁸⁷ See the Laeken Declaration, *supra* note 4. For an analysis of the Laeken Declaration as regards its approach to EU’s democratic legitimacy problems, see Christopher Lord, “Democracy and the Future of Europe. Five Questions Raised by the Laeken Declaration”, *ESRC “One Europe or Several?” Programme Briefing Note*, No. 1/02, (2002).

⁸⁸ Philippe C. Schmitter, “What is There to Legitimize in the European Union ...and how Might This be Accomplished?”, *Jean Monnet Working Paper*, No. 6/01, (2001), p.1.

⁸⁹ For a similar view, see Lord and Magnette, *supra* note 28.

undoubtedly distinct foundations of its legitimacy. In that context, we can mention a few of the legitimacy foundations of the Union as input-oriented, output-oriented, formal, social, democratic, normative, technocratic, legal, procedural etc.

The polycentricity of the Union results in giving priority to different legitimation principles at different times according to the relevant policy or governance areas and under differing conditions. This makes striking the balance in particular between democracy and efficiency a paramount task. Although this is the case for nation-states too, such balancing act becomes even more complex and sensitive for the Union since it is a novel, open-ended and flexible type of polity with no preordained finality, equipped with limited powers and limited political, legal, financial and material instruments and resources. Such task can best be achieved by deliberative and communicative principles and practices and cannot be settled beforehand in a comprehensive manner. The polity should be open to rebalancing and reformulating its standards of legitimacy constantly. Moreover, despite the fact that the sources of its legitimacy are diverse, there also has to be some inherent, all encompassing legitimacy of the overall project for its proper functioning and its being a polity with normative and popular grounds of approval.⁹⁰ In that context, “trust and trustworthiness” are prerequisites for the perceived normative legitimacy of the Union, which would also affect compliance and long term support for the EU.⁹¹

It has to be pointed out in this regard that, as Karl Deutsch has famously argued, lasting communities of integration can only rely on “a matter of mutual sympathy and loyalties; of “we-feeling”, trust, and mutual consideration; of partial identification in terms of self-images and interests; of mutually successful predictions of behavior, and of cooperative action in accordance with it –in short, a matter of perpetual dynamic process of mutual attention, communication, perception of needs, and responsiveness in the process of decision-making.”⁹²

Legitimacy reflects the belief that a system is just because it embodies the common normative values of a polity. And in the present age, such embodiment usually takes shape in a democratic constitution. Legitimacy derives from belongingness and solidarity, and being members of a just and legitimate political order strengthens solidarity and belongingness.

The function of a “European Constitution” for strengthening the “we-feeling” and consequently the legitimacy of a polity like the European Union is a proposition that needs to be investigated in that context. Such an analysis would also assist us in determining whether Turkey and Europe have a realistic chance of establishing a lasting community of integration,

⁹⁰ For a similar view, see Robert Howse and Kalypso Nicolaidis, “Introduction: The Federal Vision, Levels of Governance, and Legitimacy” in Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford-New York, Oxford University Press, (2001), pp. 1-19.

⁹¹ See in general Andreas Follesdal, “Legitimacy Theories of the European Union”, *Arena Working Papers*, No. 04/15, (2004).

⁹² Karl Deutsch *et al*, *Political Community and the North Atlantic Area: International Organisation in Light of Historical Experience*, Princeton, Princeton University Press, (1957), p. 36.

following the recent constitution and identity-building exercise of the European Convention and the Intergovernmental Conference.

Before embarking on such investigation, however, certain caveats are in order. First, identities are not set in stone; they are constructed and mediated constantly and they change according to internal and external dynamics; both “European” and “Turkish” identities should be evaluated in this context. Second, the impact of “others” on individual and group identities varies as well; some are “significant others” and play a more fundamental role in identity construction and differentiation. This is a factor that highlights the importance of the interaction between Europe and Turkey. Third, identities are perceived and invented both by the insiders and outsiders alike, although their perceptions might differ from one another to a certain extent. Moreover, the size and nature of the group are also important factors in the identity construction. Finally, multiple identities are possible both for individuals and for communities, especially in layered structures.

Bearing those constraints in mind, it is asserted that the way the European political identity is defined and its reflection in its “Constitution” would be the determinant factors in deciding whether Turkey would comfortably be a component of this identity. Can the Union forge an identity inclusive and flexible enough to accommodate a country with a somewhat divergent cultural identity like Turkey? Does the viability of the integration require a thick and somewhat exclusive identity that would or should result in the exclusion of Turkey? To what extent values can be part of the European political identity? Could there be other grounds in order to forge a collective identity? How can the relationship between a legal text (“Constitution”) and a political identity (“constituent power”) be defined and designed? To what extent Turkey can be seen as a part of this constitution and identity-building process by the elites and masses of the European polity alike? It is submitted that, without the internalization of this feeling of commonness on the basis of shared projects and objectives, at least at a minimum level, the accession of Turkey to the European Union might not bring forth the desired end of mutual trust and solidarity even in a “unity in diversity”, i.e. a truly pluralistic community.

Here I will engage in an attempt to answer these questions.

B) Democratic Legitimacy and Constitution-Building

What is the function of a constitution for a polity like the European Union? If the Union already has a material constitution as claimed by many legal experts⁹³ does it really need a formal one, and why? The justification for the constitutionalisation process lies in the political and symbolic function of the constitution as well as in its identity generative potential.

⁹³ Jean Claude Piris, “Does the European Union have a Constitution? Does it need one?”, *Jean Monnet Working Paper*, No. 5/00, (2000); Paul Craig, “Constitutions, Constitutionalism, and the European Union”, *European Law Journal*, Vol. 7, No. 2, (2001), pp. 125-150; Weiler, *supra* note 18, (2003).

Constitutionalisation of Europe has not been about identity building up until recently; its constitutional arrangements, however, reflected its identity.⁹⁴ The recent emphasis on democracy and legitimacy deficits highlighted the significance of a collective political identity and constitution building that would function as a panacea for these problems. The Post-Nice debate, the Convention on the Future of Europe and the Intergovernmental Conference (IGC) of 2003/2004 together with the product of these processes, i.e. the Constitutional Treaty, were conceived and publicized as the solution to the legitimacy predicaments of the Union. By giving itself a “Constitution” the peoples of the Member States would become a “European people”, and thus provide the Union with much required democratic and popular legitimacy. In that vein, in regard to the function of the constitution for the current European governance Neil Walker ascertains two main purposes: First of all, the European Constitution was to be a symbolic legal text defining the European polity as “polity”, and secondly it was to define the identity and territory, that is the boundaries of the polity through a set of ideals and collective missions.⁹⁵

Accordingly, the function of a constitution for the emerging European polity would be twofold: First it would be an identity building device, and second, it would be a public sphere building instrument in order to sustain the European polity.⁹⁶ The capacity to communicate about shared objectives and problems discursively, in a mode of ethical discourse would only be enabled by a functioning European public sphere. There is no doubt that such an instrument, i.e. a distinct public sphere, is non-existent in today’s Europe. The debate around the Constitutional Treaty and its ratification were regarded, however, as mechanisms that would help to pave the way for the emergence of such public sphere and political culture. Thus, the constitutionalisation process was characterized as an experiment to generate a development towards solidarity and community.

The main purpose of the political constitutionalisation process was seen by the proponents of the idea of “European Constitution” as to reinforce the mutual trust and solidarity of the European citizens and their attachment to the EU by way of the symbolic force and the democratic mechanisms of a constitution prepared and enacted by a democratic, inclusive and transparent process. Naturally, apart from its community and legitimacy generative function, the Constitution was also deemed to be necessary in order to render the Union more efficient in the aftermath of the big bang enlargement process.⁹⁷ Nevertheless, this was only considered as a secondary objective for the constitutionalisation. Constitution

⁹⁴ Antonio-Carlos Pereira Menaut, “Three Critiques of the European Constitution”, *Federal Trust Online Paper*, No. 23/04, (2004), p. 7. In that regard, Joseph Weiler’s approach of “constitutional tolerance”, which underlines the underpinnings of these constitutional arrangements, will be examined below. For a thorough analysis of the European constitutionalisation process see Weiler, *supra* note 2, (1999).

⁹⁵ Neil Walker, “Constitutionalising Enlargement, Enlarging Constitutionalism”, *European Law Journal*, Vol. 9, No. 3, (2003), p. 370.

⁹⁶ Miguel Poiares Maduro, “How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union”, in Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, No. 5/04, (2004), pp. 39-40.

⁹⁷ For the processual, procedural, debate generative and material reasons behind the recent constitution-making process see Weiler, *supra* note 53, (2000), pp. 241-242.

building, the debate surrounding that exercise and the outcome of the process were regarded by many as catalysts that would mobilize the European citizens, create (or strengthen) a European public sphere, and furnish the Union with institutions, competencies, policies and procedures to attain its goals.⁹⁸ The gradual construction of such European public sphere and political culture, in turn, would constitute an important step in laying the foundations of a collective identity in order to sustain a functioning, democratically legitimate governance of multi-level loyalties and multi-level interests. A “Constitution” in this sense would have to be a social and political practice; the product of some sort of gradual and procedural process.

On the other side of the debate were the proponents of the view that regarded the constitution making as a limited legal instrument in forging a collective political identity and generating mutual trust and solidarity between the citizens of Europe. Some opposed the current constitutionalisation process claiming that what the Union lacks is a public philosophy and that public philosophies are not to be found in Treaty articles,⁹⁹ whereas some asserted the idea that mere legal texts were not sufficient to forge the thick bonds required to bind European citizens together.¹⁰⁰ Similarly, some maintained that since the Union did not suffer from any democratic deficit, it did not require a *demos*, and consequently an identity-building constitution-making process.¹⁰¹ A tidying up exercise which would enable the efficient functioning of the European governance in the aftermath of the enlargement with a slight dose of injection of democratic procedures would cure the Union of its malaise; i.e. its distance from its citizens. Many prominent figures such as J. H. H. Weiler, who highlighted the democratic legitimacy deficits of the integration process, on the other hand, argued that the condition of Europe was not that of “constitutionalism without constitution”, but of a “constitution without constitutionalisation” and consequently, what Europe really needed was not a constitution but an ethos and *telos* to justify the constitutionalism it had already embraced.¹⁰² According to Weiler, the Union had the right kind of constitution for its *sui generis* federal polity; it was working, and therefore, did not require fixing.¹⁰³ Moreover, for some scholars a premature constitution might have even prolonged the time it would take for the *demos* to emerge,¹⁰⁴ or such premature constitutional closure might have foregone the

⁹⁸ See in particular Jürgen Habermas, “Why Europe Needs a Constitution”, *New Left Review*, Vol. 11, (2001), pp. 5-26.

⁹⁹ Ian Ward, “Beyond Constitutionalism: The Search for a European Political Imagination”, *European Law Journal*, Vol. 7, No. 1, (2001), pp. 24-40.

¹⁰⁰ Ulrich Haltern, “Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination”, *European Law Journal*, Vol. 9, No. 1, (2003), pp. 14-44.

¹⁰¹ Moravcsik, *supra* note 12 (2002); Majone, *supra* note 83; Renaud Dehousse, “European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?”, *European University Institute Working Paper*, RSC No 98/11, pp. 1-21.

¹⁰² See, in general, Weiler, *supra* note 61.

¹⁰³ For Weiler’s take on the constitutional equilibrium and the precious *status quo* of “constitutional tolerance” see Weiler, *supra* note 18 (2003).

¹⁰⁴ George A. Bermann, “Editorial: The European Union as a Constitutional Experiment”, *European Law Journal*, Vol. 10, No. 4, (2004), pp. 363-370.

opportunity to build institutions that are equipped to incorporate cultural diversity that is a fundamental added value of the integration process.¹⁰⁵

Both approaches, either in favor of or opposing the formal constitution have much to commend, in their shedding light to the differentiated and composite nature of the Union's legitimacy problems, as long as they are not taken into consideration in isolation from each other, but as concurrent necessities. The Union would certainly have to strengthen both the input and output oriented premises of its legitimacy in order to premise it on normative grounds and secure the allegiances of its citizens.

Indeed, many argue that, for historical and structural reasons, a European civic citizenship or constitutional patriotism can only emerge on the condition of its being complementary or even more democratic than its Member States' national constitutions.¹⁰⁶ For instance according to Étienne Balibar, European political citizenship is "impossible except as a progress in fundamental democratic rights and powers in the "European" framework."¹⁰⁷ This is mainly regarded as a prerequisite for providing legitimacy to the Union, which would be representing the populations of the Member States and would be attempting at mediating and solving their social, economic, legal, cultural, national, regional and cultural conflicts as a multi-layered system of governance.¹⁰⁸ Similarly Weiler argues that his understanding of *demos* makes the need for democratization even more pressing since democracy is a value of his "value-driven demos" and "a demos which coheres around values must live those values."¹⁰⁹

Can there be a supreme constitution without a constitutive act of "we the people"? Who is the constituent power and why should a constitution be observed by the citizens as higher law? The answer given to these questions in liberal democracies is that, in a

¹⁰⁵ Antje Wiener, "Evolving Norms of Constitutionalism in Europe: From 'Treaty Language' to 'Constitution'", in Weiler and Eisgruber, (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, No. 5/04, (2004).

¹⁰⁶ Balibar, *supra* note 19, p. ix. See also Curtin, *supra* note 19.

¹⁰⁷ Balibar, *supra* note 19, p. 162.

¹⁰⁸ Within confines of this paper we will not make an attempt at assessing whether this objective of democratization has been achieved by the Constitutional Treaty, but limit our analysis to the rationale behind the constitutionalisation process: i.e. strengthening the democratic and social legitimacy of the EU by way of constitution making, and polity and identity-building. For an analysis on the democratic qualities regarding the preparation process and the contents of the Constitutional Treaty, see Andreas Follesdal, "Achieving Stability? Forms and Arenas of Institutional and National Balances in the Draft Constitutional Treaty", *The Federal Trust Online Paper*, No. 06/04, (2004), pp. 1-13; Eriksen, Fossum and Menendez (eds.), *supra* note 2; Carlos Closa and John Erik Fossum (eds.), *Deliberative Constitutional Politics in the EU*, ARENA CIDEL Report, ARENA Report, No. 5/04, ARENA/University of Zaragoza: Oslo, (2004); Erik Oddvar Eriksen, John Erik Fossum, Mattias Kumm and Agustin Jose Menendez, *The European Constitution: the Rubicon Crossed?*, ARENA Report, No. 3/05, Oslo, (2005); Agustin Jose Menendez, "Between Laeken and the Deep Blue Sea-An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint", *European Public Law*, Vol. 11, No. 1, (2005), pp. 105-144; Carlos Closa, "Constitution and Democracy in the Treaty Establishing a Constitution for Europe", *European Public Law*, Vol. 11, No. 1, (2005), pp. 145-164.

¹⁰⁹ J.H.H. Weiler, "The Reformation of European Constitutionalism", *Journal of Common Market Studies*, Vol. 35, No. 1, (1997), pp. 97-131, at p. 122. Yet, for Weiler democracy is not an end but a means, whereas "[T]he end is to try and try again to live a life of decency to honour our creation in the image of God or the secular equivalent". See J.H.H. Weiler, "Europe: The Case Against the Case for Statehood", *European Law Journal*, Vol. 4, No. 1, (1998), pp. 43-62, at p. 60.

democratic polity all legitimate power emanates from the people. Since people are the constituent power and the only legitimate source of law, they should observe their self-legislation.

In classical liberal democratic tradition, representation and majority rule –i.e. government by the people- would require a pre-existing collective identity –i.e., government of the people; and an accountable and transparent government together with an opposition. People can be defined as “*ethnos*”, i.e. as an identity of common historico-cultural character, or as “*demos*”, i.e. as egalitarian constituent power.¹¹⁰ Such collective political identity –the demos- would have either organic/objective, or subjective commonalities which would result in loyalty, mutual trust, solidarity and a sense of worthy sacrifice in order to sustain a system of democratic government. The degree of such commonality and its basic foundations differ from common ethnicity, religion, or language; to a common sense of history, tradition, culture and fate, and even in some cases to some civic or constitutional patriotism, depending on the peculiarities of the polity in question. In fact, such bonds between the members of the community might be based on factual or imaginative/perceived/presumed commonalities. Yet, whatever the premise or degree of commonality, a functioning democratic governance necessitates a “we-feeling” of some sort. Moreover, such people must be bounded in a defined and delineated territory, which implies a definition of who is included and who is excluded.

A democratic constitution, in turn, is the self-constitutive act of a people defined as such, which depicts, displays and puts into practice the common values/good of such community in politics, as well as the mechanisms related to the understanding and attainment of those common values/good. The legitimacy of the constitution derives from its giving a form and legality to such commonalities. A constitution has democratic legitimacy only if it embodies the idea of self-government and popular sovereignty. Yet, as Scharpf asserts, such self-determination, like the concept of democracy itself is “value-laden, contested, and complex.”¹¹¹ Political choices can be legitimate first “[b]ecause they reflect the “will of the people”, i.e. input legitimacy, and second because “they effectively promote the common welfare” of the people, i.e. output legitimacy.¹¹²

The debate on whether “*demos*” or the “constitution” comes first is an interesting one, in particular, in respect of the recent developments in the European polity. Briefly, the relation between the people (or *demos*) and the constitution is always a two-way process; they constitute each other. In Weiler’s words “[I]n many instances constitutional doctrine presupposes the existence of which it creates: the demos which is called upon to accept the constitution is constituted, legally, by that very constitution, and often that act of acceptance is among the first steps towards a thicker social and political notion of constitutional demos.

¹¹⁰ Balibar, *supra* note 19, p. 161. See in general Andreas Kalyvas, “Popular Sovereignty, Democracy and Constituent Power”, *Constellations*, Vol. 12, No. 2, (2005), pp. 223-244.

¹¹¹ Scharpf, *supra* note 13, p. 6.

¹¹² *Ibid.*, p. 6.

Thus, the empirical legitimacy of the constitution may lag behind its formal authority [...]”¹¹³ A constitution both assumes and promotes a political identity.¹¹⁴ Irrespective of the relevance of the discussions as regards the existence of a European collective political identity to give itself a legitimate constitution, Europe attempted, and at least for the time being, failed to get a “constitution.”¹¹⁵

What needs to be discussed at this stage is whether the recent constitutionalisation process and its product were apt to create or sustain such *demos* or European collective political identity? More significantly, what kind of collective political identity should Europe be striving for? An ethno-cultural-organic identity seems both undesirable and out of reach, but what are the remaining options? A civic identity based on citizenship? A “constitutional patriotism”? A European identity of “common/shared values”? Or an economically motivated identity based on functional interests?

There are various approaches to the collective political identity in democratic theory and philosophy, and in that context European Union provides a challenging and interesting site for theoretical, normative and empirical analyses. While providing a basic description of these approaches with a view to demonstrate their implications on Turkey’s role and impact on the forging of a European political identity, and the repercussion of such identity on Turkey’s future EU membership, three caveats are in order. First of all, such categories or approaches are mainly overlapping; collective identities in reality usually exhibit several different facets of these contrasting approaches and the differences are not clear-cut. Secondly, most of these approaches to collective political identity do not represent the facts or the practical realities as such, but mainly the theoretical assumptions or normative ideals. And lastly, European collective political identity is to be considered, by definition, as distinct from nation-state political identities, and should not be evaluated from a purely statal perspective.

The European Union is not a nation-state, not even a federal one in the making. Thus, the question of collective political identity in the European Union context brings forth several challenges and possibilities: (1) the first challenge revolves around the issue of whether such collective political identity is attainable in a *sui generis* polity like the European Union; (2) if the answer to the first question is in the affirmative, the second challenge is to decide whether it is desirable; (3) the third challenge involves the question of what could and should be the basis of such collective political identity? Finally, (4) how comprehensive and thick should this common political identity be, without endangering the originality and particularities of

¹¹³ Weiler, *supra* note 18 (2003), p. 9. Similarly, according to Jürgen Habermas, “[...] the argument that there is no such thing as a European people, and thus also no force capable of generating a European Constitution, only becomes a fundamental objection through a particular use of the concept of “a people”. The prognosis that there cannot be any such thing as a European people remains plausible only if “the people”, as a source of solidarity, actually depends on some corresponding community as a pre-political basis of trust, which fellow countrymen and women inherit as the shared fate of their socialization.” See Habermas, *supra* note 19 (2001), p. 100.

¹¹⁴ Maduro, *supra* note 96, p. 54.

¹¹⁵ Whether what we are faced here is a “constitution” or a “treaty”, however, remains a valid question. See Luis Diez-Picazo, “Treaty or Constitution? The Status of the Constitution for Europe”, in Weiler and Eisgruber, eds., *Altneuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper*, No. 5/04, (2004).

the national identities, and without doing away with the flexibility and dynamism of diversity? And what would be the best means for achieving such an objective?

The answers to these questions differ once again according to the conceptions and perceptions of the integration process as a polity. I will briefly analyze the “economic/market citizenship” approach and the “statist/communitarian” approach under the heading of “no *demos*”; and proceed with examining the approaches of “constitutional patriotism”; “pluralism/particularism”; and “constitutional tolerance” and their impact on the prospects of Turkey-European Union relations.

C) Conceptions on the European Political Identity

1) “No *Demos*?”: “Economic/Market Citizenship” and “Statist/Communitarian” Approaches to European Political Identity and Turkey

a) Economic/market citizenship approach¹¹⁶

For the followers of this approach, there is no need and basis for a European political identity or self-legislation in the form of a “Constitution”. European Union is a creation of sovereign Member States on the basis of international treaties; it, therefore, enjoys a sufficient amount of indirect legitimacy and does not require a distinct political identity to legitimize its governance.¹¹⁷

For many observers who depict the European Union as a functional, technocratic problem-solving agency,¹¹⁸ the input legitimacy -government of and by the people- of the Union will always be limited, despite the room for improvement on participation, transparency and accountability. The European Union has no thick collective identity; it has to rely mainly on output legitimacy which is compatible with a thin identity.¹¹⁹ However, the Union can survive with such “thin” identity, which “need not claim the exclusive or even the primary loyalty of its members [...] [based on] the coexistence of multiple, nested or overlapping, collective identities defined by specific classes of problem solving concerns, and organized according to territorial as well as functional criteria.”¹²⁰ The benefits accruing from membership, in particular of an economic type, would result in the popular support that would be sufficient to sustain the minimum amount of direct legitimacy required by the European governance. In that regard, the output legitimacy -government for the people- and efficiency of the Union should be strengthened, while channels for democratic participation and accountability are improved. Thus, the thin identity based on common interests and

¹¹⁶ Carlos Closa and John Erik Fossum, “Introduction: Constitution-Making and Democratic Legitimacy in the EU”, in Carlos Closa and John Erik Fossum (eds.), *Deliberative Constitutional Politics in the EU*, ARENA CIDEL Report, ARENA Report, No. 5/04, ARENA/University of Zaragoza: Oslo, (August 2004), pp. 1-20; Tore Vincents Olsen, “Europe: united under God? Or not?” in Lynn Dobson and Andreas Follesdal (eds.), *Political Theory and the European Constitution*, London-New York, Routledge-ECPR, (2004), pp. 75-90.

¹¹⁷ Moravcsik, *supra* note 12 (2002).

¹¹⁸ Majone, *supra* note 83; Scharpf, *supra* note 13; Dehousse, *supra* note 101.

¹¹⁹ Scharpf, *supra* note 13, pp. 9-10.

¹²⁰ *Ibid.*, p. 11.

institutional and procedural mechanisms for implementing and maximizing these interests constitute sufficient bonds among the European peoples for a polity like the Union.

By the same token, according to Ulrich Haltern, national law has a richly textured fabric of cultural resources to rely on that makes it “ours”; whereas EU law “embodies the fluid surface of consumer identity and appears less “ours””.¹²¹ For Haltern, mere law is not sufficient for identity and political collective self-construction as the post-nationalists argue, and the EU citizen can only be a market citizen, not a citizen of shared values and historically situated communality. Consequently, there is no basis or normative justification for forging a European collective political identity or *demos* beyond the interest-based market citizen and the distinct peoples of the Member States.¹²² Europe is not a polity in its own right, and it cannot, and should not for that matter, have a “Constitution”. Europe is “government for the people” and nothing beyond.

As a result, the EU should either remain below the threshold of visibility or it must search for conflict minimizing solutions between the national and supranational levels of interest; and it should rely on the ability of national governments to employ their own, indirect legitimacy resources.¹²³ In that vein, Andrew Moravcsik argues that the more visible the EU becomes the more there is a danger of increase in peoples disaffection with the functioning of the integration process.¹²⁴

b) Statist or Communitarian Approach

In the most radical version of the view, the statist and communitarians consider the nation-state, as the only type of political structure that would enable and sustain democratic governance of popular legitimacy and self-determination due to its definite political and geographical boundaries and thick collective identity. In contrast, others embrace the communitarian conception of political identity and adapt it to the peculiarities of the European polity.

The various versions of this view, based on very different and sometimes contrasting foundations, are embraced by a variety of sources ranging from Carl Schmitt¹²⁵ to the German Constitutional Court.¹²⁶ For legitimate democratic rule and constitution-making a pre-existent

¹²¹ Haltern, *supra* note 100, p. 14.

¹²² *Ibid.*

¹²³ Scharpf, *supra* note 13, p. 23.

¹²⁴ See Moravcsik, *supra* note 12 (2002). See also Peter A. Kraus, “A union of peoples? Diversity and the predicaments of a multinational polity”, in Lynn Dobson and Andreas Follesdal (eds.), *Political Theory and the European Constitution*, Oxford-New York, Routledge-ECPR, (2004), p. 49.

¹²⁵ For arguments as regards the relevance of Carl Schmitt’s conception of the “other” or the “enemy” within context of the European integration, see Navraj Singh Ghaleigh, “Looking into the brightly lit room: Braving Carl Schmitt in ‘Europe’”, and John P. McCormick, “Carl Schmitt’s Europe: Cultural, Imperial and Spatial Proposals for European Integration, 1923-1955”, both in Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe-The Shadow of National Socialism and Fascism over Europe and its Legal Tradition-With a Prologue by Michael Stolleis and an Epilogue by JHH Weiler*, Oxford-Portland, Oregon, Hart Publishing, (2003), at pp. 43-54 and pp. 133-141 respectively.

¹²⁶ For the Maastricht judgment of the German Constitutional Court: *Brunner v. European Union Treaty (Bundesverfassungsgericht)* [1994] 1 C.M.L.R. 57.

“people” is a prerequisite. The constitution legitimizes public authority by “[...]drawing on social prerequisites that it can itself no longer guarantee.”¹²⁷ Only “the people” of thick ethnic, cultural, social and/or historical bonds could and should give itself a constitution.

The emphasis in this view is on thick commonality, homogeneity, boundaries, originality and an inevitable exclusiveness -at least some degree of “Othering”. Anthony Smith points out that “identities are forged out of shared experiences, memories and myths, in relation to those of other collective identities. They are often forged through opposition to the identities of significant others, as the history of paired conflict often demonstrates.”¹²⁸

According to this statist premise, in the European Union there is not yet -and for some can never be -a truly constituent, democratic power defined in nation-state terms, whether the determining criteria are belonging, or boundaries. In Dieter Grimm’s words, “[T]he European public power is not one that derives from the people, but one mediated through States.”¹²⁹ According to Grimm, it is not the lack of a homogeneous ethnic community that causes the problem at European level; there is no European public sphere, no public discourse, no civil society, no media, no political party system, and most significantly no common language that would result in a consensual agreement on legitimizing the political rule by giving expression to divergences of opinion and interests, which, in turn, would enable democratic majoritarian rule by transnational discourse. Consequently, the European Union cannot have a constitution.¹³⁰ Similarly, as Cederman asserts, “[W]ithout the clear boundaries and identity-(re)producing processes of the nation-state [...]” the emergence of a viable European political identity is almost impossible.¹³¹

In that vein, it would be futile to attempt at a fully-fledged democratic governance at European level, since the lack of a European *demos* precludes true democratic legitimacy. In view of the cultural, linguistic, religious, historical, social and political plurality and heterogeneity of the peoples of the Member States, and the lack of a true European public discourse, European public sphere and European party system, it is either impossible or at the very least doubtful whether such *demos* can ever emerge. Since the only viable site for democratic rule is the Member States, the Union should make do with its indirect legitimacy and stay well clear of attempts at forging a political identity by way of constitution making.¹³² In that regard, the only European identity, both suitable and available, would be a market-driven, materialistic, functional and utilitarian conceptualization of citizenship.

¹²⁷ Dieter Grimm, “Does Europe Need a Constitution?”, *European Law Journal*, Vol. 1, No. 3, (1995), pp. 282-302, at p. 288.

¹²⁸ Anthony D. Smith, “National identity and the idea of European unity”, *International Affairs*, Vol. 68, No 1, (1992), pp. 55-76, at p. 75. Smith continues and asks the crucial question: “Who or what then are Europe’s significant others?”

¹²⁹ Grimm, *supra* note 127, p. 291.

¹³⁰ *Ibid.*, pp. 292-297.

¹³¹ Lars Erik Cederman, “Nationalism and Bounded Integration: What it would take to construct a European Demos”, *European Journal of International Relations*, Vol. 7, No. 2, (2001), pp. 139-174, at p. 152.

¹³² See for instance, Grimm, *supra* note 27 and Smith, *supra* note 128.

According to the communitarian approach to the European political identity, the “thin” universal values of democracy, rule of law and respect for human rights are not sufficiently strong to sustain the legitimacy of a democratic polity at the postnational level.¹³³ Moreover, since such cosmopolitan understanding of political membership is too inclusive, it lacks the defining element to decide who belongs. Even the interpretation and implementation of these universal values require a particular, bounded and contextually specific cultural, temporal and territorial sphere. The political identity of a legitimate polity must be premised on some pre-existing commonalities of, in particular, historical and cultural sort, that would emphasize common values and norms, and a thick conception of the common good.¹³⁴ The political identity, political structures and legal texts, including the constitution of a community, should reflect its common values and conceptions of common good, instead of creating or shaping them. In that vein, the “constitution” of such polity should explicitly draw the line between who belongs to the community, and those who do not, through the values it supports.¹³⁵

Hans Lindahl, whose somewhat communitarian conception of European political identity must be distinguished from the statist approaches, despite underlining the necessity of a partly “thick” identity and inevitable “othering”, attempts at answering the question regarding the type of relationship between enacting the legal norms and the identity of the people, and suggests that the process of political will formation gives legal expression to what unites the people, their identity.¹³⁶ Accordingly, a constitution must endorse and rephrase the normative values of a singular collective identity in order to have legitimacy. “[T]he very idea of a *European* integration suggests that integration is only imaginable by reference to a closure provided by an identity, a boundary that is normative rather than geographical” and a “European people is the necessary presupposition of integration, not merely its telos”, consequently, there can be no integration without inclusion or for that matter exclusion alike.¹³⁷ Yet, the challenge is to remedy the consequences of such othering in the most appropriate

¹³³ For Bellamy and Castiglione’s hybrid conception on the European political identity that would reflect the hybrid characteristics of its polity, the so-called “cosmopolitan communitarianism” see Richard Bellamy and Dario Castiglione, “Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union” in Archibugi, Held and Kohler (eds.), *Transnational Democracy*, Cambridge, Polity Press, 1998, pp. 152-178; Richard Bellamy and Dario Castiglione, “Democracy, Sovereignty and the Constitution of the European Union: The Republican Alternative to Liberalism”, in Zenon Bankowski and Andrew Scot (eds.), *The European Union and its Order*, Oxford, Blackwell, (2000a), pp. 170-190; Richard Bellamy and Dario Castiglione, “The Uses of Democracy: Reflections on the EU’s Democratic Deficit”, in Erik Oddvar Eriksen and John Erik Fossum (eds.), *Democracy in the European Union-Integration through deliberation*, London, Routledge, (2000b); Richard Bellamy and Dario Castiglione, “Legitimizing the Euro-‘Polity’ and its ‘Regime’”, *European Journal of Political Theory*, Vol. 2, No. 1, (2003), pp. 7-34. In contrast to scholars like Bellamy and Castiglione, however, the republican/communitarian view point generally regards democracy and *demos* as concepts limited to nation-states, and therefore, not suitable for the European Union.

¹³⁴ For the thick conception of common good in communitarian approach regarding European constitutionalism see Vincents Olsen, *supra* note 116.

¹³⁵ Antonio Estella, “Constitutional Legitimacy and Credible Commitments in the European Union”, *European Law Journal*, Vol. 11, No. 1, (2005), pp. 22-42, at p. 30.

¹³⁶ Hans Lindahl, “European Integration: Popular Sovereignty and a Politics of Boundaries”, *European Law Journal*, Vol. 6, No. 3, (2000), pp. 239-256, at p. 241.

¹³⁷ *Ibid.*, p. 253.

way. Since the geographical boundary is not sufficient, values should form the basis for inclusion or exclusion. In his words, “[...] only by safeguarding a relation to what it marginalizes can European integration be the expression of a process of self-determination.”¹³⁸ Rather than questioning whether European peoples could and should become a European people, we should dwell on what the Europeans should become.¹³⁹ Lindahl asserts, however, that acknowledging the fact that a European people constitutes the presupposition and the *telos* of the integration process does not necessarily mean endorsing the emergence of a European federal state.¹⁴⁰

There are two possible consequences of the “statist/communitarian” and “economic” conceptions of the European collective identity and their impact on Turkey’s European prospects: If a collective political identity is not possible at the European level beyond a “market citizen”, and European integration’s *raison d’être* is mainly economic, functional and intergovernmental, the level of mutual trust and solidarity required for the viability of the process is minimal. Common interests and shared projects alone are apt to forge the minimum levels of trust and solidarity such an entity requires in order to generate social legitimacy and achieve efficient functioning. As a result, a country like Turkey, despite its divergent identity, can easily be accommodated in that kind of entity, which would display the characteristics of multilevel governance and flexibility.

If, however, communitarian approaches to European collective political identity imply a thick, nation-state like ethno-cultural *demos* for the Union, with a strong emphasis on exclusion, the emergence of such identity in today’s economic, political and social circumstances becomes highly unlikely. Such a simplistic and monolithic approach to collective identity at European level, however, does not go beyond conflating the multilevel, multi-layered, *sui generis* European polity with that of the nation-states. Hence, it undermines the unique attributes and realities of the integration process. In the event of attempting to forge a nation-state like political identity for Europe which highlights the common values and thick conceptions of common good premised on culture or history, irrespective of the high probability of failure at many levels, then Turkey’s accession to the Union, with its obvious divergent attributes, would naturally become either impossible or undesirable for the sustainability/viability of the integration process. The fact remains, however, whether the people in the EU can “realistically envisage building a just order predicted on such an assumption” of commonality and exclusivity.¹⁴¹

2) *Constitutional Patriotism in a European Context and Turkey*

In contrast to such economic, communitarian or statist approaches to democratic legitimacy, cosmopolitan, liberal or post-nationalist theories premise the democratic legitimacy and its *demos* on the universal principles of democracy, rule of law and respect for

¹³⁸ *Ibid.*, p. 254.

¹³⁹ *Ibid.*, p. 251.

¹⁴⁰ *Ibid.*, p. 253.

¹⁴¹ Nicolaidis and Lacroix, *supra* note 39, p. 152.

human rights. Any polity with a sufficiently functional and ethical public sphere of deliberative discourse, and willingness to forge a common destiny, is capable of establishing a collective political identity on the basis of such normative, universal values. In contrast to the communitarian approaches, cosmopolitan collective identity is inclusive, pluralistic and procedural. By the same token, there is no need for an “other” to determine who constitutes “us”. By giving itself a constitution a collective of peoples might transform itself into a collective political identity of common destiny, a constitutional community. What is required is a popular identification with a constitution constructed and reconstructed by continuous public debate and self-understanding. The restrictive political and geographical boundaries of a nation-state, or a thick commonality of an ethnos are not prerequisites for legitimate democratic rule. Therefore, the conditions of an inclusive and normative belonging can also be constructed at the European level, which might serve as a site of experiment for post-national democracy at the universal scale.¹⁴²

As one of the ardent defenders of a European constitution and a European *demos*, Jürgen Habermas asserts that democratic citizenship establishes an abstract and legally mediated solidarity among strangers. The mere fact that such democratic site has been the nation-state to this date does not automatically render impossible democratic rule at the European level. An ethical political self-understanding of citizens can communicatively develop and be reproduced under the conditions conducive to such development.¹⁴³ A constitution based on universal principles of democracy, rule of law and respect for human rights would be the required catalyst for the formation and strengthening of a European civil society, European public culture and European public sphere of ethical discourse or communication, an intersubjectively shared context of possible understanding.¹⁴⁴

Even Habermas, however, acknowledges that “a politically constituted context of solidarity among citizens who despite remaining strangers to one another are supposed to stand up for each other is a communicative context rich in prerequisites.”¹⁴⁵ A functioning public sphere and civil society premised on a political culture are amongst those prerequisites. Nevertheless, he asserts that such prerequisites could also be embedded in the context of a freedom valuing political culture, and be supported by structure of a civil society in liberal democracies which would be generated through the legal institutionalization of citizens’ communication, and in that context the institutions of the Union created by a European constitution would play a crucial role.¹⁴⁶

¹⁴² For a similar view see in general, Nicolaidis and Howse, *supra* note 44.

¹⁴³ Jürgen Habermas, “Remarks on Dieter Grimm’s ‘Does Europe Need a Constitution?’”, *European Law Journal*, Vol. 1, No. 3, (1995), pp. 303-307, at p. 305.

¹⁴⁴ Habermas, *supra* note 98, p. 13-17.

¹⁴⁵ Habermas, *supra* note 98, p. 18-20.

¹⁴⁶ For Habermas’ conception of constitutional patriotism, civil society and ethical communication see, in general, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Massachusetts, MIT Press, (1996); Jürgen Habermas, *The Inclusion of the Other*, Cambridge, Massachusetts, MIT Press, (1998).

Habermas depicts certain common values and normative reasons in his urge for a “European constitution”. According to Habermas, Europe is “Christianity, [...] global spread of modern science and technology, of Roman law and the Napoleonic Code, of human rights, democracy and the nation state [...]” Europe is also the original way of dealing with deep national, regional, religious, social, economic cleavages, learnt through a painful process.¹⁴⁷ Moreover, in his collaboration with Jacques Derrida they assert that “[T]he acknowledgement of differences-the reciprocal acknowledgement of the Other in his otherness-can also become a feature of a common identity.”¹⁴⁸

Amongst the “European values”, the preservation of the European welfare state has a prominent place in Habermas’ identity referents. As he remarks, the regulatory policies with a redistributive impact would require “positive coordination” on both the output-side -that is implementation- and the input-side -that is legitimation- of a quite different kind: i.e. a delicate balance between legitimacy and efficiency.¹⁴⁹ Moreover, in order to tackle the challenge of increased divergences the enlargement is bound to create, a constitution is required.

Habermas also underlines the need for the European Constitution to include a definite answer to the issue of territorial boundaries of the Union. In his words “[I]t is important to settle soon the thorny problem of which countries will finally belong to and which are to be excluded from the Union; the determination of frontiers is compatible with a ‘variable geometry’ that would facilitate the process.”¹⁵⁰

It has to be pointed out right at the beginning that the content of the Constitutional Treaty falls short of the objective of creating a Habermasian constitutional patriotism -it is not even a real constitution but another treaty signed by individual Member States according to their own constitutional procedures and would have to be ratified and amended accordingly. Moreover, despite the progress in the field of public debate, and in terms of the establishment of a Convention, the constitution making in Europe did not conform totally to the ideal of communicative public sphere in the Habermasian sense.¹⁵¹

Habermasian constitutional patriotism that is based on cosmopolitan ideals has been subject to criticism both in national and global, as well as in European contexts. Such criticisms generally revolve around the utopian or idealist nature of the conception; its being a “thin” and “procedural” identity incapable of competing with more substantial commonalities

¹⁴⁷ Habermas, *supra* note 98, p. 15-16.

¹⁴⁸ Jürgen Habermas and Jacques Derrida, “February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe”, *Constellations*, Vol. 10, No 3, (2003), pp. 291-297, at p. 294.

¹⁴⁹ Habermas, *supra* note 98, p. 9-11.

¹⁵⁰ *Ibid.* 18-19.

¹⁵¹ See in general, Carlos Closa, “Improving EU Constitutional Politics? A Preliminary Assessment of the Convention”, *Constitutionalism Web-Papers*, ConWEB No. 1/2003, (2003) at <http://les1.man.ac.uk/conweb/>; Lars Hoffmann, “The Convention on the Future of Europe-Thoughts on the Convention Model”, *Jean Monnet Working Paper*, No. 11/02, (2002); Shaw, *supra* note 20; Carlos Closa and John Erik Fossum (eds.), CIDEL-ARENA Report, “*Deliberative Constitutional Politics in the EU*”, ARENA Report, No. 5/04, (2004); Paul

and generating sufficiently strong bonds of mutual trust and solidarity among strangers; its being premised on abstract universal principles of contested and divergent interpretation and application; its somewhat artificial and unrealistic efforts regarding the severance of culture and politics; its not being specifically “European” and its inability to provide explicit criteria and yardsticks to delineate the boundaries of the polity regarding its territory and citizenship.¹⁵² Below, these criticisms will be explored together with Turkey’s place in Habermasian constitutional patriotism and European collective political identity. In that context, several questions and assertions might be in order.

First, it should be noted that under the Habermasian conception of European collective identity, creation of a singular collectivity, a post-national civic community, coexisting side by side with national or local identities, is the ultimate objective.¹⁵³ The goal is to create a common (or shared?) European identity sufficiently “thick” in the sense that it should be able to compete with the national/local identities in the long run, at least to a certain extent.¹⁵⁴ The premises of European constitutional patriotism, however, are “thin”, in the sense that the European identity is based on the universal values of democracy, rule of law and respect for human rights. Whether such “thin” values or principles would create such strong bonds and solidarity between peoples, overcome the existing divergences to create a resilient collectivity in times of deep disagreement, contestation and trouble is a question worth asking.¹⁵⁵ Would mere constitutional patriotism be sufficient or should a more substantial bond be required in the case of the European Union?

Habermasian constitutional patriotism should certainly not be reduced to a mere allegiance to the universal, liberal principles, or to legal texts, but be rationalized and distinguished in context of their practice by citizens “who actively exercise their rights to participation and communication.”¹⁵⁶ The ethical self-understanding of a community does not require an intense historical or cultural premise of thick commonalities; it rather results from

Craig, “Constitutional Process and Reform in the EU: Nice, Laeken, The Convention and the IGC”, *European Public Law*, Vol. 10, No. 4, (2004), pp. 653-674.

¹⁵² For criticism and analysis on Habermasian constitutional patriotism, see Justine Lacroix, “For a European Constitutional Patriotism”, *Political Studies*, Vol. 50, (2002), pp. 944-958; Richard Bellamy and Dario Castiglione, “Lacroix’s European Constitutional Patriotism: A Response”, *Political Studies*, Vol. 52, (2004), pp. 187-194; Justine Lacroix, “A Reply to Bellamy and Castiglione”, *Political Studies*, Vol. 52, (2004), pp. 194-196; Robert Fine and Will Smith, “Jürgen Habermas’s Theory of Cosmopolitanism”, *Constellations*, Vol. 10, No. 4, (2003), pp. 469-487; Cronin, *supra* note 65; Matthias Kumm, “The Idea of Thick Constitutional Patriotism and Its Implications for the Role and Structure of European Legal History”, *German Law Journal, Special Issue-Confronting Memories*, Vol. 6, No. 2, (2005), pp. 319-354.

¹⁵³ As Ciaran Cronin remarks Habermas seems to be in two minds over whether constitutional patriotism is supposed to supersede nationality as a form of political identification or whether it can flourish within nationally differentiated political cultures. See Cronin, *supra* note 65, p. 1.

¹⁵⁴ Many argue, however, that Habermasian constitutional patriotism at European level does not aim at trumping the national identities but strives for the existence of European, national and local identities side-by-side. See, for instance, Lacroix, *supra* note 152 (2002); Kumm, *supra* note 152.

¹⁵⁵ For a similar query and an answer in the affirmative by way of developing a “thick” European constitutional patriotism, see Kumm, *supra* note 152, p. 320.

¹⁵⁶ Jürgen Habermas, “Citizenship and National Identity” in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, Massachusetts, MIT Press, (1996), pp. 491-516, at p. 495.

the institutionalization of democratic deliberation and communication on diverse values and conceptions of common good. The citizens, however, would have to share some minimum, yet explicit commonalities in order to exercise those rights and communicate with each other. They would have to share a minimum understanding regarding political structures and culture that is sufficiently institutionalized in order to enable the endurance of their polity through mutual trust and solidarity.

As a multilevel, multi-layered polity, the Union is conducive to the coexistence of several political identities simultaneously. Divided, multiple allegiances and belonging at different levels and different intensities is an approach in conformity with a multi-layered governance conception of the Union. As a heterarchical rather than a hierarchical polity, however, the European Union might not be capable of generating a political bond that would trump the national identities, in particular if such principles and values are also embraced by the Member States in their constitutions and practices. From this perspective, the European constitutional patriotism can only be understood as complementary, rather than competing, with the national and local identities and their public spheres.

Inherent to Habermas' objective to impose a common European political identity, on the basis of a single *demos*, however, is the danger of constraining the diversity of the Union.¹⁵⁷ If not only cultural but also national diversity is a "European" value, it surely needs to be preserved with maximum care.¹⁵⁸ Moreover, the existing cultural, and to a certain degree political divergences between the Member States are resilient constraints for the attainability of a European "*demos*" in the singular. The lack of consensus, or the existing contestation on the interpretation and application of those universal principles in Member States might be regarded as a weakness, if the objective is reduced to forging a singular, homogeneous collectivity. However, a different picture emerges if such contestation and diversity is regarded as a "European" value and a strength that deserves to be promoted. In that context, European constitutional patriotism can only be understood as forging a political and plural community that allows space for shared, rather than common identities.¹⁵⁹ Solidarity of a political community can also be premised on a sharing of identities and projects rather than a common identity that should necessarily culminate in a single "*demos*".¹⁶⁰

Second, Habermas' suggestion that the Constitution should settle the question of who belongs must be taken either as wishful thinking or only as a repetition of the formula already

¹⁵⁷ Bellamy and Castiglione, *supra* note 152 (2004), p. 190.

¹⁵⁸ See in general Max Pensky, "Cosmopolitanism and the Solidarity Problems: Habermas on National and Cultural Identities", *Constellations*, Vol. 7, No. 1, (2000), pp. 6-79.

¹⁵⁹ Lacroix, *supra* note 152 (2002), p. 956.

¹⁶⁰ As Nicolaidis argues, "[F]orging common projects is no less demanding than forging a common identity, but it is voluntary and differentiated rather than essentialist and holistic." See Kalypso Nicolaidis, "We, the Peoples of Europe...", *Foreign Affairs*, Vol. 83, No. 6, (2004), pp. 97-110, at p. 104.

¹⁶¹ Kumm also suggests that an identity focused on thick constitutional patriotism provides a basis for the existing law and the practice of enlargement, hence necessitates employing the Copenhagen criteria and nothing beyond for deciding on "who belongs". See Kumm, *supra* note 152, p. 323.

existing in the founding treaties and the Copenhagen criteria.¹⁶¹ Otherwise, if belonging is premised on an inclusive, procedural process, on the basis of “common/shared values of “Europeanness”” how and with what normative legitimacy can the definitive line be drawn by the Constitution? Can the “Europeans” decide on the question of who shares European values on their own -especially if “European values” are premised on “universal values” albeit in a regional, i.e. European context? Would it not be detrimental to the legitimate democratic self-definition of others who identify themselves by the so-called European values?

Third, even Habermas and his followers cannot get away with “othering” to a certain extent, in order to limit the boundaries of the European integration. A frequent criticism against constitutional patriotism is that its conception of legal/procedural belonging is too inclusive, and hence not capable of an unequivocal demarcation between who belongs and who does not.¹⁶² When cosmopolitans establish their concept of Europe, they build it against something specific, otherwise on the basis of their cosmopolitan approach the scale would have to be universal, since there is nothing specifically “European” today regarding the universal values of democracy, rule of law and respect for human rights.¹⁶³

Indeed, rather than othering, distinguishability and distinctiveness is needed even in Habermasian constitutional patriotism. A group must be aware of its distinctiveness, it must be able to differentiate itself from “others”, even if such others are not perceived as opponents or enemies. In Habermas’ recent work, such “other”, or more precisely the distinguishing yardstick, appears to be the USA for Europe, both on account of the European social model and Europe’s identity as a normative civilian power in the international arena.¹⁶⁴ Moreover, even if the values to be found in the constitution are universal moral principles, as Matthias Kumm puts it, “[...] citizens appropriate and interpret them in the context of their particular history and in the light of their ethical and political commitments.”¹⁶⁵ Deliberative practices and democracy cannot even take off the ground unless those who are involved already view themselves as belonging to a prepolitical community. The universal values and principles are to be interpreted and applied contextually, where certain pre-existing commonalities, at least pertaining to political culture, such as history and culture of the community, come into play.¹⁶⁶ Whilst it is generally maintained that historical narratives and cultural traits of the European nations display more of a diversity rather than unity, “Europe”

¹⁶² For such an argument, see McCormick, *supra* note 125. McCormick asserts that “[...] Habermas has not answered what might definitively justify the very demarcation of a European *Grossraum* from the rest of the world; and his plan for legal-democratic governance in the EU is hardly operational at the present time. Until these questions and problems are addressed Schmitt’s work and career, like a specter haunts the study of European integration.” at p. 141.

¹⁶³ Stefan Seidendorf, “Defining Europe Against its Past? Memory Politics and the Sanctions Against Austria in France and Germany”, *German Law Journal*, Vol. 6, No. 2, (2005), pp. 439-464, at p. 440.

¹⁶⁴ Habermas, *supra* note 98; Habermas and Derrida, *supra* note 148.

¹⁶⁵ Kumm, *supra* note 152, p. 321.

¹⁶⁶ For a discussion on the difficulties regarding the separation of political and subpolitical culture and corresponding levels of social integration see Cronin, *supra* note 65, p. 5.

might also be regarded as a distinct and distinguishable geography from the rest of the world, on the basis of its albeit vague and intangible commonalities.

In that vein, Kumm suggests a “thick constitutional patriotism” for the European Union, since it reflects the specificity of a particular community “[b]y being connected to a particular history, ambitions and current political practices [...]” of such a specific collectivity, and points out that it can be achieved without emphasizing the importance of a contemporary other.¹⁶⁷ For Kumm, one of the ways in which thick constitutional patriotism differs from its thin version is that, the former is embedded in a historical narrative about how the European polity evolved to become what it is today.¹⁶⁸ The constitutional principles, structures and institutions established in the specific constitution would both reflect, and shape the thick constitutional patriotism the citizens of the European Union would embrace and practice.

It flows from the present investigations that in a Habermasian construction of European constitutional patriotism, Turkey’s EU accession would be conceivable, even though significant challenges would still have to be tackled for forging a collective political identity that would sustain the legitimacy of the European polity. If “Europeanness” is understood as “a loose geographical criterion”¹⁶⁹ that underlies the idea that the EU is a regional, and not a global organization, the issue of Turkey’s membership can be resolved in an ethical, normative and objective manner, on the basis of concrete and tangible criteria. The distinct values, traditions and cultures of the Member States coming together on the basis of cosmopolitan principles would be reflected in their “constitution” and governance, which would enable and enrich, rather than constrain democracy and justice, premised on mutual trust and solidarity. In fact, as Ciaran Cronin suggests, “[T]here is nothing in Habermas’s conceptual and historical analysis of nationalism, national identity and the nation state that excludes the possibility that historically distinctive cultures can foster cosmopolitan conceptions of citizenship and sovereignty.”¹⁷⁰

However, there is another aspect to “thick” or “European” constitutional patriotism. Turkey would have to be deemed, by the majority of the Europeans, as conforming not only to the universal principles that inform the accession criteria of legal, democratic, economic and geographical kinds, but also be regarded or perceived –somewhat subjectively– as

¹⁶⁷ Kumm, *supra* note 152, p. 321. For some common legal/historical roots of European integration, see Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe-The Shadow of National Socialism and Fascism over Europe and its Legal Tradition-With a Prologue by Michael Stolleis and an Epilogue by JHH Weiler*, Oxford-Portland/Oregon, Hart Publishing, (2003) and the *German Law Journal*, *Special Issue-Confronting Memories*, Vol. 6, No. 2, (2005).

¹⁶⁸ Kumm, *supra* note 152, pp. 323-324. For the detailed arguments regarding why a thick constitutional patriotism is the best solution for Europe, see *idem*. pp. 352-353.

¹⁶⁹ Mattias Kumm, “To be a European Citizen: Constitutional Patriotism and the Treaty Establishing a Constitution for Europe”, in Erik Oddvar Eriksen, John Erik Fossum, Mattias Kumm and Agustin Jose Menendez, *The European Constitution: the Rubicon Crossed?*, ARENA Report, No. 3/05, Oslo, (2005), pp. 7-63. For Kumm, “[T]he requirement that a state be European is no reason to engage in soul searching about the ontology of Europeanness. The requirement of Europeanness is best understood and in fact been understood as a loose geographical criterion that underlies the idea that the EU is a regional and not a global organisation.” at p. 12.

¹⁷⁰ Cronin *supra* note 65, p. 20.

forming part of the historical, ethical and cultural contextuality that shapes the interpretation and practice of those principles. Whether Turkey is regarded as such by the European public opinion or not, remains a significant and legitimate question.

As far as the construction of the public sphere is concerned, which is seen as a prerequisite for democratic legitimacy by Habermas and many others, the recent and lively debate on Turkey's future membership to the Union plays a modest, yet crucial role. The publics of the Member States are engaged in a debate which questions Turkey's European credentials, which in turn, would result in seeing their reflections in the mirror and contemplating on their own identity.¹⁷¹ Whatever might be the outcome of this process in respect to Turkey-EU relations, its positive impact on the creation of a European public sphere and collective identity will be significant. The exploration of the commonalities and the divergences between Turkish and European identities would also contribute to European peoples' evaluation of what brings them together or sets them apart. One only hopes that the image reflected in the mirror will make the Europeans comfortable and proud in identifying with being "European".

Another question to be asked in that context is whether Turkish identity is conducive to the emergence of such a European public sphere and public discourse in the eventuality of accession. Can Turkey be part of the political culture embedded in the pure sense of "Europeanness"? Is this a question to be answered by the "Europeans" themselves, either nationally or as a whole, or by engaging in a dialogical discourse with the Turkish people?

3) Pluralism/Particularism Approach to the European Political Identity and Turkey

In pluralistic societies the common objectives and values of the people and the constitution, by definition, are always open-ended, contested, and this contestation forms the very premise and essence of the democratic process. The collective political identity of a pluralistic approach cannot, or should not for that matter, be definitively depicted beyond universal values and procedures. In that regard, the European Union epitomizes a pluralistic polity. Various interests, principles, values and norms are constantly deliberated and contested with a view to strike a balance and a compromise between various layers of governance. Rather than a stable and static consensus, even on a thin set of principles or values, the identity of the political community as a whole is constituted through the claims and counterclaims of the individual interests, originality and particularities; on the basis of the principle of mutual recognition premised upon a public discourse.¹⁷²

This characteristic makes a too definite and hasty definition of "common values" in a constitutional text both difficult and counterproductive. The danger lies in fixing a

¹⁷¹ Meltem Müftüler Baç points out to the fact that throughout history Turks and Europeans have reflected each others identity referents like a "looking glass". See Meltem Müftüler Baç, "Through the Looking Glass: Turkey in Europe", *Turkish Studies*, Vol. 1, No. 1, (2000), pp. 21-35. Similarly, Nicolaidis and Howse argue that how the Europeans choose to deal with Turkey will force them to come to terms with their identities and shared values, or lack thereof. See Nicolaidis and Howse, *supra* note 44, at p. 788.

¹⁷² Damian Chalmers, "The Reconstitution of European Public Spheres", *European Law Journal*, Vol. 9, No. 2, (2003), pp. 127-189, at pp. 170-171.

constitutional identity which might function as a straightjacket for a dynamic, pluralist polity that requires the flexibility of principles and institutions to deliberate and reconstitute its values, norms and identity constantly through communicative interaction.¹⁷³ Moreover, such a fixed identity might be regarded as oppressive, and thereby result in the alienation of certain groups within the community.

Canadian scholar James Tully's particularistic "constitutionalism in diversity" approach is taken up in Europe by scholars such as Jo Shaw and Antje Wiener.¹⁷⁴ According to Tully, "[c]onstitutions are not fixed and unchangeable arrangements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent."¹⁷⁵

As Wiener argues, the goal of the universalist approach is to overcome diversity in the quest of the best values and identity referents in a constitution, whereas the goal of the particularistic/pluralistic approach is the accommodation of such diversity in the most appropriate fashion.¹⁷⁶ Thus, not only the principles or values, but their interpretation and meaning should be open to constant contestation and reappraisal both at the Member State and Union levels, which would, in turn, result in mutual recognition and respect for divergent identities.¹⁷⁷

Under this conception, rather than deciding on the *finalité* of the integration, Europe has to come to terms with the fact that such a final decision is not feasible or desirable, taking into account the processual and open-ended nature of the integration. A too definite and premature decision on the limits and identity of the Union might result in an undesirable outcome.

Europe needs to tackle the issues that would result in the appraisal and reappraisal of the common good and shared objectives, which would be conducive in constructing a public sphere and mobilizing the Europeans in the creation of a political community.¹⁷⁸ The constitutional arrangements of the Union should involve an institutional structure that would guarantee the accommodation and preservation of such diversity, while allowing for the peaceful coexistence and contestation of divergent conceptions of values and common good.¹⁷⁹ In that context, the question regarding the place and role of Turkey in the future design of European integration might be crucial.

¹⁷³ For a similar view, see Wiener, *supra* note 105.

¹⁷⁴ Shaw, *supra* note 20; Wiener, *supra* note 105.

¹⁷⁵ Tully, *supra* note 20, p. 36.

¹⁷⁶ Wiener, *supra* note 105, p. 18.

¹⁷⁷ *Ibid.*, p. 25

¹⁷⁸ For a similar view on the need for addressing the controversial question of common or public good, see Maduro, *supra* note 96 and Luigi Palombella, "Whose Europe? After a Constitution: A Goal-Based, Reflexive Citizenship" in Weiler and Eisgruber, (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, No. 5/04, (2004).

¹⁷⁹ For different forms of homogeneity and their accommodation, see Theodora Kostakopoulou, "Democracy-Talk in the European Union: the Need for a Reflexive Approach", *Columbia Journal of European Law*, Vol. 9, (2003), pp. 411-428, at p. 414.

Arguably, a pluralistic approach, accommodates a divergent country like Turkey with considerable ease. It is normative, “politically correct”, in conformity with the main motto of the Union, i.e. “unity in diversity”, and compatible with the social, religious, ethnic and cultural diversity of the European societies of the 21st century.

Turkey’s membership prospects, however, urge the Union to answer some difficult questions, despite the rosy ideals of “unity in diversity”. What are the limits that would allow the lack of homogeneity for a viable political community? In other words, at the inclusion of whom, would the identity become too diluted, to the degree that too much heterogeneity would stop being multiculturalism and plurality, but become cacophony and conflict, leading not to a viable polity, but to disharmony and even disintegration? Where and how to draw the line on who is to be included and who is to be excluded? When would the diversity and difference become destructive, and when would they be energizing and regenerative? Due to its divergent identity referents would Turkish meaning of interpretation of the agreed upon principles and norms be too divergent from the majority or the general meaning, so that it would render a viable integrated polity unattainable?

Plurality, contestation, continuous appropriation of values and practices would create significant dynamism and synergy for the viability of the European project. When the diverse identities are reconcilable it is relatively easy to forge a resilient and functioning political collectivity on the basis of mutual recognition and appropriation. The difficulties emerge, however, when the divergences are perceived as fundamental for the stability and solidarity of the polity. Under the pluralistic approach, European *demos* can only be procedural in the context of the collective outcome of the functioning of the institutions and mechanisms of the integration process for the attainment of shared goals. Yet, even the definition of these shared goals might prove to be problematic in a too diverse polity, which includes too many divergent collectivities/communities.¹⁸⁰ Stability, solidarity, social cohesion and trust are as valuable as diversity and adaptability for the survival of the flexible, open-ended European polity. There has to be a normative and feasible, albeit minimum, agreement/contract/understanding on the definition of “common” goods/outputs/values beyond the principles and institutions of contestation for the survival of the polity as “polity”. The question to be put to the followers of such inclusive and cosmopolitan approaches to the European political identity is “whether we can imagine a plural, dispersed, and multifaceted public collectivity addressing the problems of its self-organization as a collective actor.”¹⁸¹ From this perspective, one might plausibly dispute the appropriateness, added value and

¹⁸⁰ For a discussion on the repercussions of cultural diversity on multilevel democratic governance, see Peter A. Kraus, “Cultural Pluralism and European Community-Building: Neither Westphalia nor Cosmopolis“, *Journal of Common Market Studies*, Vol. 41, No. 4, (2003), pp. 665-686. For the repercussions of cultural heterogeneity on constitutionalism, see also Robert C. Post, “Democratic Constitutionalism and Cultural Heterogeneity”, *Institute of Governmental Studies Working Paper*, No. 2000-8, (2000), pp. 1-16.

¹⁸¹ Rainer Schmalz-Bruns, “Review essay: The Postnational Constellation: Democratic Governance in the Era of Globalization”, *Constellations*, Vol. 8, No. 4, (2001), pp. 554-568, at p. 565.

viability of forging a European political collectivity, a common government if there are no distinct common/shared values between European peoples beyond “diversity.”¹⁸²

Turkey’s EU membership prospects urge the Union to tackle the main challenge for this pluralistic polity: how to strike a balance between diversity/dynamism/plurality on the one hand and unity/cohesion/solidarity on the other, while aspiring to become a normative civilian power and a sufficiently democratic and efficient system of governance.

4) Weiler’s “Constitutional Tolerance” Conception and Its Impact on Turkey’s Membership Prospects

J.H.H. Weiler’s position in the constitutionalisation and *demos* debate represents a unique and somewhat hybrid nature. According to Weiler, in its foundational period the European integration was based on a duality in regard to the intergovernmentalism of its decision making and supranationality of its legal order.¹⁸³ This duality is also evident today in its multiple-*demos*: national *demos* and citizenship is based on substantive/material values, whereas the European collective political identity and its citizenship are processual and procedural, based on the “values of the European community”. The fact that the Union is grounded on various national *demos* reflects heterogeneity and plurality. And such heterogeneity and plurality are its strengths, not its weaknesses.

In following with the central theme of Weiler’s conception of the European polity as a supranational community based on “constitutional tolerance”, its *demos* is not a “singular”, “cultural-organic”, “ethno” *demos*, nor it should be. This would be an undesirable end-result which would negate the uniqueness of the integration process and its achievements by turning it into an, albeit federal, nation-state. Europe has a shared ground of solidarity and values, but this does not necessarily require that it should have a singular political identity. Europe is about building “an ever closer union among the peoples of Europe”, that is the *telos* of integration, not the forging of a singular “people” of a “state”.

According to Weiler, “[N]either the subjective element (the sense of shared collective identity and loyalty) nor the objective conditions which could produce these, (the kind of homogeneity of the organic national-cultural conditions on which the peoplehood in the European tradition depend, such as shared culture, a shared sense of history, a shared means of communication) exist. Long-term peaceful relations with thickening economic and social intercourse should not be confused with the bonds of peoplehood and nationality forged by language, history, ethnicity and all the rest.”¹⁸⁴ There is no European *demos* in the statal sense and there should not be one as this would be a betrayal of the European supranational

¹⁸² As Navraj Singh Ghaleigh questions, “Why should we expect a collective of individuals who conceive their interests, futures, values [...] as diverse and distinct (that is not shared) desire to exist under a common government?” See Ghaleigh, *supra* note 125, p. 53. For similar arguments, see Michael A. Wilkinson, “Civil Society and the Re-imagining of European Constitutionalism”, *European Law Journal*, Vol. 9, No. 4, (2003), pp. 451-472, at p. 472.

¹⁸³ J.H.H. Weiler, “The Community System: The Dual Character of Supranationalism”, *Yearbook of European Law*, Vol. 1, (1981), pp. 267-306.

¹⁸⁴ Weiler, *supra* note 109 (1997), p. 116.

ideals.¹⁸⁵ Weiler's European political identity is a "[...] coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcends organic-national differences."¹⁸⁶ It is a multiple political *demos* of simultaneous human attachment of different intensities, to the national and European polities; a concentric circles approach to political identity in line with the multi-layered structure of the integration.

Weiler differentiates his position from Habermasian constitutional patriotism at the European level, which he asserts to be conflating citizenship and nationality, by underlining the fact that Europe is about preserving the originality of the nations, not creating a European nation as in the melting pot metaphor. For Weiler the European endeavor is about striving for a European-civic, value-driven *demos* co-existing side by side with a national, organic, cultural one.¹⁸⁷

So what gives the required legitimacy to the European legal order and governance in that conception? The thrust of Weiler's argument is that " 'the union among peoples' telos is [...] a reflection of a deep moral ethos."¹⁸⁸ The Europeans are "others" of each other as nations, yet, they are willing to share certain aspects of their life and order in this polity they have established with their "European others", since they are convinced that all those Europeans share the same basic values and norms. Such an understanding enables majority decisions and the minimum level of solidarity and trust required for the viability of the integration process. This submission to the political will of the "other" is consensual and renewed constantly. A formal constitution would deprive the Union of its most significant normative value: its "constitutional tolerance".

In Weiler's words "in the alien [...] man discovered the idea of humanity" by not forcing an assimilation –"come be one of us"- but by accepting and tolerating the alien in his particularity. For Weiler this is constitutional tolerance and the civilizing nature of the integration project. As a result, "[...] in the Community we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civil tolerance to accept to be bound by precepts articulated not by 'my people' but by a community composed of distinct political communities: a people of others. I compromise my self-determination in this fashion as an expression of this kind of internal-towards myself-and external-towards others-tolerance."¹⁸⁹

It is debatable whether such constitutional tolerance by constant renewal and renegotiation might still ultimately end up in a "*demos*" as the final destination of the process.¹⁹⁰ It is a kind of allegiance strong enough to mitigate the totalizing tendencies of

¹⁸⁵ *Ibid.*, p. 117.

¹⁸⁶ *Ibid.*, p.118.

¹⁸⁷ *Ibid.*, p. 121.

¹⁸⁸ Weiler, *supra* note 109 (1997), p. 117.

¹⁸⁹ Weiler, *supra* note 53, p. 247.

¹⁹⁰ For a critical assessment of Weiler's conception of constitutional tolerance, see Bellamy and Castiglione, *supra* note 133 (2000a); (200b) and (2003); Nicolaidis, *supra* note 64; Cederman, *supra* note 131; Lindahl,

bounded communities, but weak enough in order not to threaten their boundaries.¹⁹¹ In that regard, constitutionalising the social solidarity of Europe as a defining identity marker, and taking it out of the day-to-day politics might also be detrimental to the creation of such political community, as it would impede the normal political discourse. Moreover, a “European Constitution” might not be able to deliver what it promises, and such an outcome would cause even more disenchantment amongst the European citizens.

In line with this approach, it might be plausible to accept the fact that there is no need for a European constitution in Weiler’s terms. This does not, however, make obsolete the quest for the shared values or commonalities of the European collective political identity, those shared values that prove to be indispensable for the mutual trust and solidarity amongst European citizens in order to establish the legitimate and democratic polity Europe aspires to.

The main distinction between Weiler’s and Habermas’ approach stems from their conception of the European *demos*. For Weiler, the ideal is to preserve the national political identities while creating a European identity that would legitimate the integration process, increase the solidarity and trust amongst the citizens without turning the Union into a state. Habermas, on the other hand, does not put such a strong emphasis on the preservation of unique national identities. Central to Weiler’s assessment is the view that constitutional patriotism is still a conception in state terms, and does not go beyond creating a nation-state like *demos* at the European level. Both the originality and the strength of the European integration, however, originate from its multiple, value-driven *demoi*.

Underlying this looser political identity, however, are “thick” values. Weiler’s conception of European political identity is thicker than Habermas’, since it is based on certain “common/shared values” of a contextual nature, more specific to Europe, which goes beyond the universalist values of Habermasian *demos* of democracy, rule of law and respect for human rights. For Habermas, the values are universal, whereas their interpretation and application are context bound, i.e. European. In contrast, for Weiler, the values that shape the European “community” should also be specifically European.

Weiler argues that it is not clear how the matrix of values embraced by the constitutional patriotism approach, “[...] would be qualitatively different from the normal artifacts of constitutional democracy practiced in most European nation states [...] Secondly, a community of value expressed in these terms provides a rather thin even if laudable content to

supra note 136; John Erik Fossum, “Still a Union of deep diversity? The Convention and the Constitution for Europe”, in Erik Oddvar Eriksen, John Erik Fossum and Agustin Jose Menendez (eds.), *Developing a Constitution for Europe*, London-New York, Routledge, (2004), pp. 226-247; Carlos Closa, “Deliberative Constitutional Politics and the EU Value-Based Constitution”, in Carlos Closa and John Erik Fossum (eds.), *Deliberative Constitutional Politics in the EU*, ARENA CIDEL Report, ARENA Report, No. 5/04, ARENA/University of Zaragoza: Oslo/Zaragoza, (2004) pp. 21-52; Cindy Skach, “We, the Peoples? Constitutionalizing the European Union”, *Journal of Common Market Studies*, Vol. 43, No. 1, (2005), pp. 149-170; Michiel Brand, “Affirming and Refining European Constitutionalism: Towards the Establishment of the First Constitution for the European Union”, *EUI Working Paper-Law*, No. 2004/02, (2004).

¹⁹¹ Nicolaidis and Howse, *supra* note 90, p. 8.

the notion of citizenship.”¹⁹² For Weiler, what is required in the European context is “[...] to embrace the European in terms of European transnational affinities to shared values which transcend the ethno-cultural diversity.”¹⁹³

While underlining the necessity of preserving the national identities by embarking on a search for shared values as the normative foundation of the EU, Weiler also grounds the legitimacy of the Union on some commonality, a degree of homogeneity, which emerges as a prerequisite for sustainable integration.

Weiler’s approach to the European collective political identity and constitutional principles are grounded on a deep ethos and normative values of Europeanness. Even this highly inclusive approach, however entails a degree of exclusivity, which is unavoidable. Are Weiler’s “others” the “significant others”? Or are they the “European others” defined by their commonalities, not on organic terms but on the basis of some primordial and profound – maybe invented- perception or feeling of sameness in terms of norms and values? The answer is clear; the “alien” Weiler refers to is not the real “other”, it is “us” in the political, and maybe even the cultural meaning of the term. “Europeanness” is bounded in a contextuality of normative values. It is not the geography, or the ethnicity, or the interests and institutions, or even the “culture” -at least explicitly- that draw the boundary of the polity, but the “values”.¹⁹⁴ Here, the “Europeans” are “us”, and the “non-Europeans” are “them”, or the “other”. Hence, the question cannot be whether there should be a European collective political identity even under Weiler’s terms, but what should those common values be that would include the “Europeans” but exclude the “others”? Without the “other” or the “alien” sharing “our” basic normative values, could there be a viable political system of mutual trust and solidarity?

What would happen, however, if the “significant other” embraces “our” values and wants to become “one of us”? Would it be normatively legitimate to deny such a claim and aspiration unilaterally on the basis of some intangible identity criteria? Should other concerns and evaluations, such as the added value of the aspirant for advancing and extending “our” values not be taken into consideration? In regard to Turkey’s European vocation, Nicolaidis asks the crucial question: “Is Turkey the European “other” or the “non-European other”?”¹⁹⁵

J.H.H. Weiler’s recent contribution to the values, political identity and constitution debate, “Un’Europa Cristiana”¹⁹⁶ takes a very distinct position on the nature and characteristics of the “European values”.¹⁹⁷ According to Weiler, a reference to the Christian heritage in the Constitution would be a step in coming to terms with one of the most

¹⁹² J.H.H. Weiler, “To be a European Citizen-Eros and Civilization”, *Journal of European Public Policy*, Vol. 4, No. 4, (1997), pp. 495-519, at p. 510.

¹⁹³ *Ibid.*, *idem*.

¹⁹⁴ For a similar view see Lindahl, *supra* note 136, p. 242-251.

¹⁹⁵ Nicolaidis, *supra* note 82.

¹⁹⁶ J.H.H. Weiler, *Un’Europa Cristiana*, Milano, Biblioteca Universale Rizzoli, (2003).

¹⁹⁷ For the critique of *Un’Europa Cristiana*, see Agustin Jose Menendez, “A pious Europe? Why Europe should not define itself as Christian”, *ARENA Working Paper*, No. 10/04, (2004); Srdjan Cvijic and Lorenzo Zucca,

significant identity referents of Europe. By referring to Christianity in an intelligent way, secular Europeans would not be offended, just as in the case of a reference to the secular identity would not offend the Christians. As regards the Muslims and Jews, Weiler concedes the delicacy of the issue, yet suggests that it is possible to be sensitive/sensible without being politically correct. These religious minorities would not be offended by a reference to God or Christianity, since all three major religions are monotheistic, and there can even be a reference to those dominant religions if need be.

In regard to Islam and Turkey, Weiler asserts that, while the political and cultural presence of Islam has been a long-standing element in European history, the impact of Christianity has been dominant in the evolution of Europe. It is important, however, to make the increasing number of Muslims living in Europe, and in many cases as European citizens, feel at home. As far as Weiler is concerned, the reference to the Christian heritage of Europe would not render the Muslims secondary class citizens.

For the specific case of Turkey's EU membership, Weiler's position is clear: it is not possible to argue that just because the majority of Turkish population is not Christian, this constitutes a justification for the exclusion of the country from the Union. For Weiler this is an artificial problem. There could be valid reasons to reject Turkey, but to do this only on the basis of its religious identity would impair the commitment pledged by Europe to tolerance, plurality and human rights. Therefore, the case of Turkey is not a challenge to European faith but it is a challenge to the good faith of Europe.

Despite these strong arguments, a reference to Christianity in European Constitution remains highly problematic both for European political identity and for Turkey's inclusion.

Regarding the European collective political identity, suffice here to underline the fact that religion in public life can be as divisive as it can be a ground for commonality, as the European history itself bears witness. The role of religion in Europe today might be regarded as contestable and diminishing or strong, stable and manifest, depending on the perspective one prefers. What is obvious is that such role would not change whether it is referred to in the Constitution or not. More significantly, it is a contestable argument to suggest that a debate on religious values in the European Constitution would have much added value in respect of forging the European collective political identity or the European public sphere, in particular if weighed against the possible cleavages it might create.¹⁹⁸ If being European is assumed or perceived as identical to being Christian, to avoid the alienation of non-Christians, and promote their genuine integration to the political community might prove to be rather an insurmountable challenge.¹⁹⁹ As argued by Cvijic and Zucca, the absence of Christian values

"Does the European Constitution Need Christian Values?", *Oxford Journal of Legal Studies*, Vol. 24, No. 4, (2004), pp. 739-748.

¹⁹⁸ In that vein, Anthony Smith argues that the deep inroads made by Secularism "into the political consciousness of most classes in several European states, [are] too deep for any genuine religious revival to be less than divisive." Smith, *supra* note 128, p. 74.

¹⁹⁹ For a similar view see, Menendez, *supra* note 197, p. 30.

from the Preamble would be the price to pay for a constitution, which aims to establish a pluralist society.²⁰⁰

As Weiler suggests, Turkey can be included in a European Union that employs Christianity as one of its main identity referents. In that eventuality, however, the country's difference and uniqueness would be permanently and firmly entrenched, and it would be confined to a somewhat different status from the other Member States.²⁰¹ This status does not necessarily have to be inferior, yet it would accentuate the differences rather than establishing a common ground.²⁰² This might be a good thing if diversity is in fact the primary "European" value; yet, it might also prove to be an obstacle in building mutual trust and solidarity amongst already divergent identities.

5) "European Union Identity" as the Collective Political Identity and Turkey

The European identity understood under those terms can only be a "European Union identity"; a unique way of doing things together within a specific legal order, and through institutions, tools and mechanisms that are originally and uniquely set forth by the peculiarities and objectives of the integration process. The only traditions and history that matter to the EU are those produced within, and by its own institutional development.²⁰³ What needs to be done is to enhance the concept and status of European citizenship, and the structure and functioning of the European institutions to make them more democratic and efficient in order to pave the way for the forging of a distinctive European Union identity.²⁰⁴ As Mayer and Palmowski assert, "[t]he institutional and legal mechanisms of European Union have enabled Europe to overcome its historical divisions and to 'invent' a new identity based on popular notions of justice, and the legalization of intra-European conflict."²⁰⁵

"Europe" might be a cultural, geographical, historical, ethnic or even religious concept depending on various perceptions. Some of its values, such as democracy, rule of law and human rights are universal, whereas some, such as individualism, Enlightenment, secularism, and maybe to a certain extent, Christianity, are mainly Western.

"European Union", on the other hand, is a specific regional project, a process of coming together and sharing sovereignty by like minded states and their peoples in order to

²⁰⁰ Cvijic and Zucca, *supra* note 197, p. 745.

²⁰¹ Weiler compares this situation to the relations between the Anglican Church and the religious minorities in Britain. In that case, however, the bonds that bring the "British" people together, irrespective of their religious minority status are conducive to a much deeper level of mutual trust and solidarity than would have been the case for Turkey in a "Constitutionally Christian" European Union.

²⁰² For a discussion on the relation between a reference to God or Christianity and Turkey's accession see Matthias Mahlmann, "Constitutional Identity and The Politics of Homogeneity", *German Law Journal, Special Issue-Confronting Memories*, Vol. 6, No. 2, (2005), pp. 307-317, at p. 310.

²⁰³ Lynn Dobson, "We Have the Stars, Let's Add the Moon: EU, Turkey, and the Constitutional Values of Free Citizens", *Towards a European Constitution-from the Convention to the IGC & Beyond Conference*, Goodenough College, London, 1-2 July (2004).

²⁰⁴ For a similar view, see for instance, Mayer and Palmowski, *supra* note 79; Skach, *supra* note 190; Jonathan P.J. White, "The Political Bond in Europe", *Federal Trust Online Paper*, No. 21/04, (2004); Menaut, *supra* note 94; Palombella, *supra* note 178.

²⁰⁵ Mayer and Palmowski, *supra* note 79, p. 590.

attain the common good which is depicted in the founding treaties and their amendments, including the Constitutional Treaty, in a minimalist fashion. That common good is identified and substantiated by the shared objectives and projects that are laid down in the founding legal documents of the integration process. Since the Union is a multilevel, multi-layered governance system, it performs only those shared objectives and tasks depicted in the founding documents, and consequently does not require the exclusive allegiance and belongingness of its citizens.²⁰⁶ As Cremona argues, an integrated identity emerges “incrementally out of concrete policy initiatives” and that “the gradual creation of a perceived common interest capable of holding its own against diverse national interests is an organic process, which new structures can assist but not artificially induce.”²⁰⁷ Mutual identification with those shared objectives, while generating solidarity and trust in order to sustain the viability of the integration process, does not necessarily imply a thick identity based on real or invented commonalities.²⁰⁸ Any state adhering to the shared policies, goals and ends of the Union, and the means and procedures to realize them, which is at the same time geographically “European”, should not be excluded. Moreover, that mutual identification is an open-ended process, which involves the constant negotiation and renegotiation of the shared objectives and projects, as well as the restructuring of the institutions and procedures for their attainment.

The fact that many countries within the vague geographical boundaries of Europe would aspire to take part in that endeavor would not take anything away from the “Europeanness” of those principles and values. On the contrary, being a pole of attraction would only add to the uniqueness of the EU ideal, based on a “European” interpretation and implementation of universal values. European Union has its own historical discourse, its own culture, its own traditions, its own mores, which originate, yet distinct from the “European” history or culture. Europe’s only real cultural value is its diversity, or more precisely its way of creating a “unity in diversity”. Its unique history, is the history of the reasons compelling the creation of such unity, and the efforts striving for its attainment.

The real question is not defining the common values beyond the obvious ones articulated in the Treaty articles and the Copenhagen Criteria for accession. The question is to assess the impact, role and added value of a state and its people who strives for membership in pursuing the very same objectives and values.²⁰⁹ If the European Union aspires to be a supranational form of civilian normative power in the world arena, it should assess what Turkey would bring to the table accordingly. By the same token, if the end goal is some sort

²⁰⁶ For a similar view, see Nicolaidis, *supra* note 64, p. 466-468. Nicolaidis also argues that the “Constitution’s proclamation of common European values, [...] should be read as a guide for action, not a definition of “Europeanness””. See Nicolaidis, *supra* note 160, p. 104.

²⁰⁷ Marise Cremona, “The Union as a Global Actor: Roles, Models and Identity”, *Common Market Law Review*, Vol. 41, (2004), pp. 553-573, at pp. 572-573.

²⁰⁸ For similar arguments, see Nicolaidis and Lacroix, *supra* note 39, p. 135; See also Theodora Kostakopoulou, “Why a “Community of Europeans” Could be a Community of Exclusion: A Reply to Howe”, *Journal of Common Market Studies*, Vol. 35, No. 2, (1997), pp. 301-308 and Kostakopoulou, *supra* note 179.

²⁰⁹ For a similar view, see Kumm, *supra* note 152.

of federation with thick collective identity, then Turkey's impact should be assessed with this consideration in mind. This approach would also involve some exclusivity and "othering", or more precisely some differentiation, but in the least controversial and discriminatory, and most normative way.

The problem arises from the fact that the European Union aspires for both and much more. As a polycentric, multilevel, multi-layered, hybrid, flexible polity of an open-ended nature, the Union cannot set either clear and fixed objectives, or a finalité, and delineate its boundaries accordingly. In that context, both striking the right balance between various objectives of the integration process, and deciding on Turkey's impact on each of them, require a very complex and difficult impact analysis. Certain trade offs are inevitable. If, however, the European Union is to define itself on some collective missions/goals/projects as well as common/shared values, the act of defining the boundaries and peoples who belong in the pursuit of those collective missions might have a different take. Some degree of exclusivity is inescapable whatever conception or ground is preferred for a normative political identity in order to achieve a coherent and functioning, democratic and legitimate system of governance. This exclusivity, however, must be based on normative and rational grounds.

Another question to be answered within context of enlargement, is whether the increased heterogeneity following widening especially with Turkey inside, would necessitate, by definition, a more intergovernmental or shallow integration model, or whether the *telos* of "ever-closer union" can be maintained. Since, the Union is already a flexible, diverse, multi-layered and open-ended polity, it can arguably survive and benefit from further enlargement without compromising its so-called *telos*. As Walker asserts, however, "[T]he different commitments to and interpretations of democracy, and the different analyses and projections of decision making efficiency and effectiveness that underpin it are too deep-rooted and complex to admit of any final solution."²¹⁰

III) European Political Identity: Existing and Potential Referents, Public Opinion and Turkish Membership

A) The Identity Referents of the European Union According to Its Constitutional Legal Texts and Their Impact on Turkey's Membership

Under this section, a brief analysis of the Preambles of the "Treaty establishing the European Community" (hereinafter "EC Treaty"), "Treaty on European Union" (hereinafter "TEU") and the "Constitutional Treaty", as well as their provisions regarding the identity and objectives of the Community/Union will be undertaken with a view to assess, whether they contribute to the emergence of a European collective political identity, and whether they are capable of accommodating Turkey's somewhat divergent identity.

²¹⁰ Walker, *supra* note 95, p. 377. See also Antje Wiener, "Finality vs. Enlargement: Constitutive Practices and Opposing Rationales in the Reconstruction of Europe", *Jean Monnet Working Paper*, No. 8/02 (2002).

Constitutions or constitutional texts have a dual function in respect to the identity formation in a polity.²¹¹ First, they depict and lay down the basic characteristics of a polity through the identity referents of its political community in the form of largely shared principles and values in a legal text of highest order. Secondly, they provide for the institutional and procedural mechanisms that would preserve and strengthen those principles and values, and thus reinforce, and sometimes reshape the identity referents of that given community.²¹² The political community constitutes and is constituted, or constructed by the constitution.

The Union's founding documents also perform such dual function. On the one hand, they display the basic characteristics of the Union, and the basic principles and values of its political community; on the other hand, they strive at forging a political community of a shared destiny that would sustain the European polity.

In line with our argument in the previous section, since the main identity referents of the integration process are legal and institutional as well as being specific to the European integration process, we need to undertake an analysis of the legal texts of the Union in order to depict the identity referents of the integration process. In that context, the Preambles of the Constitutional Treaty and the European Charter of Fundamental Rights, together with the Treaty articles pinning down the identity and objectives of the Union in its current legal texts of constitutional character, provide the definitive reference points and guidelines.

1) Analysis of the Existing Founding Documents in respect to the Collective Political Identity and Turkey's Membership

In the Preamble of the EC Treaty the *telos* of the integration process has been depicted as “to lay the foundations of an ever closer union among the peoples of Europe”.²¹³ This cryptic formula portrays the basic characteristics of the Union as being a *sui generis*, multi-level, multi-layered, hybrid, open-ended, dynamic and flexible polity. According to this formulation the European integration has no blueprint or *finalité* beyond “an ever closer union”. Such “ever closer union” is to be achieved by establishing the European Community by the “High Contracting Parties”,²¹⁴ that is the Member States, in order to perform limited

²¹¹ For the function of constitutions in grounding the identity referents and values of political communities, see Estella, *supra* note 135, at p. 30. See also Jiri Priban, “European Union Constitution-Making, Political Identity and Central European Reflections”, *European Law Journal*, Vol. 11, No. 2, (2005), pp. 135-153; Nathan Gibbs, “Examining the Aesthetic Dimensions of the Constitutional Treaty”, *European Law Journal*, Vol. 11, No. 3, (2005), pp. 326-342.

²¹² In contrast, many argue that the role of a constitution is not the definition or promotion of values of a community, but setting the legal mechanism for power structures in a polity. For instance according to Estella constitutions are not about values as such, but about negotiations over power structures and “[i]f allegiance to the constitution is created, it is because the constitutional arrangements are good enough, and because they allow individuals to develop and implement their different values and interests [...] See Estella, *supra* note 211, pp. 32-33. See also, White, *supra* note 204; Menaut, *supra* note 94.

²¹³ For the symbolic function of “preambles” in particular in the European context, see Mahlmann, *supra* note 202, pp. 308-309; Simone Chambers, “Democracy, Popular Sovereignty, and Constitutional Legitimacy”, *Constellations*, Vol. 11, No. 2, (2004), pp. 153-173, at p. 159; Kumm, *supra* note 169, pp. 14-15.

²¹⁴ See Article 1 of the EC Treaty.

tasks and attain limited objectives that would bring the integration process closer to its aforementioned *telos*.²¹⁵

The TEU in its Preamble and Article 1 reiterates the “ever closer union” formula while declaring the Union’s task, *inter alia*, as to organize “the relations between the Member States and between their peoples”, in a manner demonstrating consistency and solidarity. The dual premises of legitimacy for the Union are illustrated by this provision: the European integration is a coming together of the Member States and their distinct peoples, not a merging of those peoples into a singular “*demos*”. The diversity promoting approach of constitutional tolerance and pluralism appear to have been preferred to constitutional patriotism to a certain extent. Moreover, grounding the Union’s legitimacy on a somewhat indirect and intergovernmental premise of that of Member States reinforces the arguments regarding the contingent conception of its political identity.

The TEU also contains provisions that manifest the identity of its polity and its political community. Its Preamble²¹⁶ asserts that in establishing the Union, the Member States also confirm their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. The Article 6 of the TEU repeats these principles by stating that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law”, whereas emphasizing the fact that these principles are “common to the Member States.”²¹⁷ Article 49 of the TEU, which lays down the conditions and procedures of accession of new Member States to the Union, on the other hand, refers to these principles set out in Article 6(1), and states that “any European state” which respects aforementioned principles, may apply to the Union in order to become a member.²¹⁸

Similarly, the Copenhagen criteria which set forth the conditions of membership for the aspirant “European” countries state that “membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”²¹⁹

²¹⁵ See Articles 2 and 3 of the EC Treaty.

²¹⁶ von Bogdandy notes that the Preambles of founding legal texts can directly affect the identity formation through the reading and promulgation of the Preamble itself, whereas it can also “[...] indirectly influence the relevant ‘narratives’ and, thereby, constructions of reality by providing an origin for further constructions, as such are found in educational materials.” See Armin van Bogdandy, “The European Constitution and European Identity: Text and Subtext of the Treaty establishing a Constitution for Europe”, in Weiler and Eisgruber, (eds.), *Alteuland: The EU Constitution in a Contextual Perspective, Jean Monnet Working Paper*, No. 05/04, (2004), at p. 5.

²¹⁷ See Article 6(1) of the TEU.

²¹⁸ See Article 49 of the TEU.

²¹⁹ For the Copenhagen Criteria see *Conclusions of the Presidency-Copenhagen*, June 21-22 1993 SN 180/1/93 REV 1. The Presidency Conclusions continue with an important caveat regarding the Union’s capacity to absorb new members, while maintaining the momentum of European integration, and highlights this as an important consideration in the general interest of both the Union and the candidate countries. Moreover 1995 Madrid and

In Article 6(3) of the TEU, the Union's commitment to respect the national identities of its Member States is stressed, whereas the Preamble affirms the desire to deepen the solidarity between the peoples of the Member States "while respecting their history, their culture and their traditions." The linguistic, regional, cultural and national diversity is regarded as a value that needs to be protected and promoted throughout the Union, through the Community policies in the field of culture and education.²²⁰

Moreover, as regards the use of "identity" referents of the Union, in the Preamble, the main aim of the Common Foreign and Security Policy is described as "reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world", whereas the Article 2 of the Treaty states that the Union is "to assert its identity on the international scene". In order to depict and distinguish the Union as a distinct territory of somewhat bounded nature, special emphasis on "an area of freedom, security and justice" and "an area without internal frontiers" are also included in the Treaty.

History as a premise for identity building is given a minimal significance in the Preamble of the TEU which recalls merely the "historic importance of the ending of the division of the European continent", rather than any emphasis on a common past, since the perceptions of such commonality is very much contested amongst the European nation-states and their peoples. No less contested is whether such history is suitable for any glorification in order to provide the narrative glue for identification and identity-building.²²¹ In contrast, the objective of forging a shared destiny or future is reflected in the Preamble which affirms "the need to create a firm bases for the construction of the future Europe". The blueprint of this shared destiny, however, is not detailed any further than the "ever closer union among peoples" recipe.

A brief examination of these Treaty articles illustrates that the Union's identity referents are generally of a universalist or cosmopolitan nature, where the values and principles are premised on a minimalist conception, rather than a communitarian or an essentialist one.²²² These are "thin" values and principles which do not go beyond the universal principles of Habermasian constitutional patriotism, i.e. democracy, rule of law and respect for human rights. Accordingly, they are sufficient only to the emergence of a thin constitutional identity premised on adherence to basic principles, albeit within a European context. However, the fact that the founding documents are international treaties, despite their constitutional peculiarities, indicates that they are prepared and ratified in a manner inconsistent with the deliberative and communicative ideals and prerequisites of constitutional patriotism of public participation, communication and functioning public sphere. Moreover, there is not much in the contents of the Treaties that would trigger the emergence of such

1997 Luxembourg Summit Presidency Conclusions are generally held to have elaborated the Copenhagen criteria, in particular in respect to the effective implementation of the aforementioned principles.

²²⁰ See Articles 149 and 151 of the EC Treaty.

²²¹ For the suitability of history as a common identity referent in European integration see, in general, Joerges and Ghaleigh, *supra* note 167.

²²² For similar views, see Lacroix, *supra* note 152; Dora Kostakopoulou, "Ideas, Norms, and European Citizenship: Explaining Institutional Change", *The Modern Law Review*, Vol. 68, No. 2, (2005), pp. 233-267.

public sphere and constructed political identity, or to stimulate the necessary identification with it at the European level in order to sustain a system of democratic and legitimate governance.

The emphasis on the universal values and principles as originating from what is common to the Member States, on the other hand, reinforces the arguments premised on the constitutional tolerance approach to European collective identity. These are universal principles, but they inform the integration process insofar as they are recognized within the constitutional, legal and political orders of the Member States. The fact that the origins of those principles being premised on Member States' political cultures and legal orders assists the Union to frame the cultural, political and territorial boundaries of its polity contextually. It can also be argued that the constitutional tolerance logic is reflected in the insistence on the preservation of national identities, cultures and traditions while forging "an ever closer union". In a similar vein, the plurality of values and interests that are depicted, contested and promoted within the Union, together with the inevitable divergent interpretations and practices of those principles demonstrate that the "unity and diversity" motto is a fact for the Union in its current legal texts. As noted in the first section of this paper, the Union epitomizes a polycentric entity by representing overlapping interests, in particular of supranational, national and local types and levels. Such polycentricity is reflected in the provisions of the founding documents which promote the pluralist prerequisites of diversity accommodation, as well as the mutual recognition and appropriation of principles and values in a continuous manner.

Portrayed and construed as such, there is nothing pertaining to the collective political identity of the Union in its founding legal documents which indicates that, as a candidate country that satisfies the Article 49 of the TEU and the Copenhagen criteria, Turkey should or could not be included in the definition of "Europeanness", despite its divergent identity.

*2) Analysis of the Constitutional Treaty in respect to the Collective Political Identity and Turkey's Membership*²²³

A study of the Constitutional Treaty reveals that the perspective that informs the preparation and contents of the "Constitution" is that of a compromise between the various approaches to collective political identity investigated above in the previous section. While both the normative and theoretical frameworks are grounded on Habermasian constitutional patriotism, the contents of the text preserve and include certain aspects of the communitarian, constitutional tolerance, and pluralist approaches to European collective political identity. The simultaneous existence of the various approaches under the Constitutional Treaty reflects a compromise between them, and underpins the constructed, composite and peculiar nature of

²²³ For analyses on the Constitutional Treaty and its approach to the European political identity see in general, Tore Vincents, *supra* note 116; von Bogdandy, *supra* note 216; Fossum, *supra* note 190; John Erik Fossum and Agustin Jose Menendez, "Still adrift in the Rubicon? The Constitutional Treaty Assessed", in Erik Oddvar Eriksen, John Erik Fossum, Mattias Kumm and Agustin Jose Menendez, *The European Constitution: the Rubicon Crossed?*, ARENA Report, No. 3/05, Oslo, (2005), pp. 97-144.

the European collective identity and the premises of its polity legitimacy. In that regard, it should be noted that the Constitutional Treaty does not establish a federal polity or a singular *demos*, it rather preserves the *sui generis*, hybrid, multi-layered, open-ended, flexible nature and structure of the European polity. In so doing it also strives for, and to a certain extent succeeds at, improving the identity and legitimacy generative characteristics of the Union, together with certain aspects of its democratic governance. The collective political identity of the Union, even in the aftermath of the Constitutional Treaty, however, continues to be an “EU identity”, i.e. something specific to the integration process.

Drawing on the constitutional patriotism conception of collective identity, the Preamble of the Constitutional Treaty begins with referring to the “universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law”, yet situates them as developing from the “cultural, religious and humanist inheritance of Europe” as sources of inspiration for the preparation of the Constitutional Treaty. Similarly, the Preamble of the Charter of Fundamental Rights states that the Union, which is founded on the “universal” values of human dignity, freedom, equality and solidarity and based on the principles of democracy and the rule of law, is “conscious of its spiritual and moral heritage.”

Thus, the universal values are to be discerned and construed as they originate from a distinct European origin, a European heritage. Apart from this reference to a glorified European past from which have developed the universal values, however, the only other reference to Europe’s common history in the Preamble of the Constitutional Treaty is limited to the Union being a project of reunification after bitter experiences.²²⁴ To be “reunited after bitter experiences” might not be regarded as a sufficiently “thick” narrative for strengthening the feelings of belongingness or solidarity. However, it is the only uncontested reference to the European history that reflects the realities of the Union, hence should be regarded as capable of bringing the peoples of Europe together within the current project of supranational governance.²²⁵ The forging of a community and the distinct method employed for its establishment constitute the reaction of Europe to the bitter experiences of its history in general and the 20th century in particular, and a guarantee against their recurrence. Any other reference to the past beyond the “cultural, religious and humanist inheritance of Europe” and its being “reunited after bitter experiences” is bound to create cleavages, rather than bringing the distinct histories and cultures of European peoples together. Historical experiences cannot shape the political identities without “self-conscious appropriation” as is the case for the

²²⁴ For a discussion see von Bogdandy, *supra* note 216.

²²⁵ For a similar view in respect to the fact that the Preamble’s discourse being centered on building an “*acquis historique communautaire*” rather than a teleological one, see Fabrice Larat, “Present-ing the Past: Political Narratives on European History and the Justification of EU Integration”, *German Law Journal, Special Issue-Confronting Memories*, Vol. 6, No. 2, (2005), pp. 274-290. See also Mayer and Palmowski, *supra* note 79, pp. 580-583. For the role of “history” in the construction of the integration process, see Bo Strath, “Methodological and Substantive Remarks on Myth, Memory and History in the Construction of a European Community”, *German Law Journal, Special Issue-Confronting Memories*, Vol. 6, No. 2, (2005), pp. 255-271.

Union.²²⁶ The Preamble might be regarded as a suitable tool for contributing to the emergence of such constructed historical narrative that would bring the distinct European histories, and consequently their peoples together.²²⁷ In order to perform such function, however, the narrative must be premised on facts, as is the case for the Constitutional Treaty, rather than attempting at invoking or creating contested myths.

Reflecting the significance of generating a consciousness on the basis of a shared political fate and the prospect of a common future for forging a European political identity, a “future-oriented”, rather than a “past-oriented” approach, is also underlined in the next paragraph of the Preamble. It states that “while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny.” While “the past” is mainly about “division” for European peoples, “the future” is to be built together on the basis of a “common destiny”.

In addition to limiting the significance of a common past in regard to the forging of a European collectivity, the first paragraph of the Preamble also highlights the objective regarding the maintenance of the existing diversity between the European nations; while keeping with the main *telos* of the integration process, that is aiming at progressing to be “united ever more closely”. Since the Constitutional Treaty is a product of Member States’ will, and the plenipotentiaries that are referred to are the “Heads of State and Government” as the “High Contracting Parties”, the dual legitimacy premises of the Union, i.e. the Member States and their peoples formulation, as well as the “ever closer union” rhetoric remain intact, even under the conception of the Constitutional Treaty.²²⁸ The last paragraph of the Preamble, while extending gratitude to the European Convention that prepared the draft of the “Constitution”, underlines once again that this was accomplished on behalf of the “citizens” and “States” of Europe. Similarly, the Preamble of the Charter of Fundamental Rights, after enumerating the “common values” on which the Union is founded, declares the Union’s objective to be the contribution to the preservation and to the development of these common values “while respecting the diversity of the cultures and traditions of the peoples of Europe” as well as the “national identities of the Member States”.²²⁹ The Constitutional Treaty does not alter the premise of the European polity or the collective political identity; the different peoples of Member States continue to come together for a distinct and common future, without merging into one.

²²⁶ Habermas and Derrida, *supra* note 148, p. 295.

²²⁷ For a similar view, see von Bogdandy, *supra* note 216.

²²⁸ Kumm underlines the irony of the fact that the invitation to identify with a particular conception of constitutional patriotism within European context which is reflected by the substance of the Preamble being issued by the “Heads of States and Governments.” See Kumm, *supra* note 169, p. 50.

²²⁹ As Christian Joerges asserts, law has to provide an answer to the paradoxical task of “forging a common destiny” for the European peoples while they remain distinct and “proud of their own national identities and history”. See Christian Joerges, “Introduction to the Special Issue: Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process: Constructing Europe in the Shadow of its Pasts”, *German Law Journal, Special Issue-Confronting Memories*, Vol. 6, No. 2, (2005), pp. 245-254, at p. 251.

The famous motto of the Union, i.e. “Unity in diversity” is confirmed in the fourth paragraph of the Preamble. It declares the conviction that “Europe” which is a “unity in diversity” offers its peoples “the best chance of pursuing [...] the great venture which makes of it a special area of human hope”.²³⁰ The Preamble thus strives for distinguishing the territory of the Union as “a special area of human hope” both in an attempt at fixing the boundaries of the European polity, and igniting the spirits of the Europeans and strengthening their allegiance to the Union. It does so by reminding them that the European endeavor is an experiment in democratic governance not only for the benefit of the European peoples, but also for the benefit of whole humanity.

The lack of a reference to God or Christianity beyond the moral and spiritual heritage of Europe in the Preamble also strengthens the argument that what the Constitution aims at is stimulating the emergence of a constitutional identity based on rational, abstract and universal values. Such an approach is in conformity with preserving the cultural diversity, rather than forging a “community of values” premised on thick commonalities or contested narratives, that would be bound to alienate a sizeable proportion of Europeans of other religious or spiritual belief systems.

The text of the Constitutional Treaty reiterates and strengthens the multifaceted objectives of constitution making in the Union displayed by the Preamble. These objectives are striving for forging a common destiny and a collective political identity; reinforcing the Union’s democratic legitimacy while preserving the distinct existence of its legitimacy premises; and maintaining its dual/hybrid polity and multilevel governance nature. In that vein, the first paragraph of Article I-1 of the Constitutional Treaty pronounces that the Constitution establishes the Union by reflecting “the will of the citizens and States of Europe to build a common future” and “to attain the objectives they have in common”. The commonality that is underlined here would be the glue between the European citizens and their States that would legitimize the endeavor at creating the Union and subjecting them to the will of the collectivity in addition to their distinct polities. Moreover, the objective-oriented and project-based qualities of the Union are also illustrated in this Article since the rationale underlying the forging of a Union is limited to attaining common objectives.

Article I-1, paragraph 2 of the Constitutional Treaty seeks to delineate the European polity while asserting that “the Union shall be open to all European states which respect its values and are committed to promoting them together.” Article I-2, in turn, enumerates those values on which the Union is founded as “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”²³¹ The Article continues by declaring these values to be common to

²³⁰ For the references to the “European” territory that underlines a shift in association of “union” from the organization in Brussels, to an area in which union citizens live, see von Bogdandy, *supra* note 216, p. 9. See also Kumm who suggests that by emphasizing Europe as a “special area of human hope” the Union aspires to be a model that others have reasons to emulate. See Kumm, *supra* note 169, p. 17.

²³¹ As regards the risks of creating alienation and cynicism amongst the European citizens by suggesting democracy as a European value, in view of the poor state of democratic governance in the European Union, see von Bogdandy, *supra* note 216; Kumm, *supra* note 152.

the Member States in a society in which “pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The “Europeanness” and the “European values” that shape the Union set forth in the Article are universal and abstract in nature. As von Bogdandy asserts, “values are normative convictions of a highly abstract order and are part of the social identity of the individual”, and by referring to values, the Constitutional Treaty claims “its roots in the ethical convictions of an overwhelming majority of Union citizens.”²³² In order to prevent dissent, and premise the Union’s legitimacy on the value system of a very large majority of European citizens, the Constitutional Treaty prefers a long list of abstract and universal values that are largely neutral in their conceptions of common good.²³³ Indeed, any attempt to ascertain the European values in the Constitution beyond this universal approach would have been “confronted with a variety of diverging national, regional, ethnic, sectarian, and social understandings.”²³⁴

Article I-3, paragraph 2 attempts at delineating the European territory and forging a belongingness by connecting the European citizens to this territory and, thus, defines the Union as “an area of freedom, security and justice without internal frontiers”, and as an “an internal market”.

So, what do the Preamble and the text of the Constitutional Treaty tell us in respect to Turkey’s conformity with the European identity, and the plausibility of forging a European collectivity, a politically grounded community bound by the ties of solidarity in the aftermath of Turkish entry into the Union?

The philosophy underpinning the text of the Constitutional Treaty appears to be universal, inclusive and open-ended. It is based on shared objectives and projects, which are, in turn, premised on a minimum, and somewhat neutral conception of common good.²³⁵ An approach in regard to the plurality and flexibility of values and principles, both in their enumeration and interpretation, is preferred to a thick “community of values” approach.²³⁶ Such diverse values and principles are to be renegotiated and reinterpreted by the European institutions and peoples constantly. The Union’s potential for change and renewal on a permanent basis, its “polity in the making” nature, both as a result of internal and external dynamics, have been the most important sources of its success and the manifestations of its unique character; this will continue to be the case also under the Constitutional Treaty.²³⁷ As a consequence of such flexibility and plurality, a conclusive set of values is not fixed by the

²³² von Bogdandy, *supra* note 216.

²³³ For an argument regarding “solidarity” as a different and “thicker” conception of common good from the rest of the values articulated in the Constitutional Treaty in that context, see Dobson, *supra* note 203. For an in-depth analysis on solidarity as a constitutional value for the European Union see Cremona, *supra* note 74.

²³⁴ See the Report of the “Reflection Group”, *supra* note 25.

²³⁵ For an assessment on the perfectionist and neutral conceptions of common good in the Constitutional Treaty and their impact on Turkey’s future membership, see Dobson, *supra* note 203.

²³⁶ von Bogdandy asserts that the declaration of values in the Constitutional Treaty appears “rather diffuse and powerless”, whereas the Union’s motto of unity in diversity “hardly affords any ground for identification.” See von Bogdandy, *supra* note 216, p. 12.

²³⁷ For a similar view, see the Report of the “Reflection Group”, *supra* note 25.

Constitutional Treaty that would decide who should or could be included in the Union, and who should be excluded, beyond a vague geographical standard and the well-established, universal and minimalist “Copenhagen criteria”. What needs to be discussed is whether the Constitutional Treaty provides for the proper and sufficient mechanisms, structures and principles for the constant and workable deliberation and re-negotiation of those diverse values, principles and interests.²³⁸

Indeed, diversity emerges as the genuine “European” value which needs to be preserved and promoted.²³⁹ Rather than striving for transcending the diversity in order to forge a collectivity, the Constitutional Treaty preserves and promotes the “unity in diversity” approach. Not “values” as such beyond the universal ones, but processes and diversity constitute the basis of European political identity.²⁴⁰ Seen as such, the text of the Constitutional Treaty and the normative framework reflected therein are conducive to the accommodation of the divergent identity of Turkey.

Even if we do not take into consideration the arguments regarding Turkey’s contribution to the European history and heritage throughout the last millenium, the approach undertaken in the Preamble regarding the European history does not preclude Turkey’s being a component of the European political identity. This argument is strengthened by the fact that the commonality required to forge a shared destiny is deemed to be searched in the common future, rather than being premised on the common past.²⁴¹ Peoples who come together on the basis of shared objectives and shared projects are capable of building a minimum solidarity and mutual trust to sustain the viability of their polity. As Ciaran Cronin argues, participation in shared tasks can generate a strong sense of solidarity even when those involved are not aware that they share any prior cultural, social, or ethnic commonalities. Correspondingly, insofar as citizens view themselves as engaged in shared practice of self rule, this can itself become a source of mutual identification and solidarity, even if they are divided by class, culture and religion.²⁴² If Turks are perceived to strive for the same minimum conception of common good as the “European” peoples, and if that conception of common good is premised merely on universal values, other distinguishing peculiarities of Turkish identity should not render impossible the attainment of these common objectives. If, however, Turkish identity is, or perceived to be, irreconcilably different from the “European” identity, such fact or perception would, of course, render even an agreement on a minimum conception of common good impossible, let alone its attainment.

²³⁸ For such discussion, see Olsen, *supra* note 48. See also Kraus, *supra* note 124.

²³⁹ For a similar view, see Mayer and Palmowski who assert that only heterogeneity and multiplicity can be identity referents for the EU. See Mayer and Palmowski, *supra* note 79, p. 583. See also Brand, *supra* note 190.

²⁴⁰ For views in regard to the insufficiency of values for serving as the basis of European unity, see Nicolaidis and Howse, *supra* note 44, p. 784. See also the Report of the “Reflection Group”, *supra* note 25; Lacroix, *supra* note 152.

²⁴¹ Kostakopoulou notes the problems inherent in speaking even of a “shared destiny” for the Union, since its destiny is unknown. See Kostakopoulou, *supra* note 208 (1997), p. 305.

²⁴² Cronin, *supra* note 65, p. 13.

Indeed, under the Constitutional Treaty, the conception of common good is not grounded on the safeguarding and promotion of some substantive value system beyond the universal principles. Under Article I-3(1), the Union's primary objective is stated as "to promote peace, its values and the well-being of its peoples." Article I-3, paragraph 4, on the other hand, states that "In its relations with the wider world, the Union shall uphold and promote its values and interests." The "European" values depicted in Article I-1 that are to be promoted both internally and in the wider world, however, are not premised on thick or "European" specific commonalities, but on universal values to be interpreted in a European context.

The only article to be found in the Constitutional Treaty that proclaims the Union's objective to be the promotion of its somewhat "European" cultural values is Article I-3, paragraph 2, which states that the Union "[...] shall respect the rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". The objective of the Union is thus stated as not only to respect its cultural and linguistic diversity, but also to safeguard and enhance Europe's cultural heritage, a heritage which arguably consists of cultural diversity, rather than commonness. If diversity is the genuine "European" value, then cultural heterogeneity and its maximization are to be preferred as values to be promoted, rather than striving for a homogeneous cultural space or a political community.²⁴³ Accordingly, the Constitutional Treaty cannot be construed as a search for the boundaries of the European polity by situating it in a culturally defined space or in opposition of any other culture, be it national or religious.²⁴⁴ Even if Turkey is not considered within the boundaries of the vague definition of "European cultural heritage" by a majority of European citizens, whatever that definition might be, the Article's emphasis on the "rich cultural and linguistic diversity" substantiates the argument regarding the main component of the "European cultural heritage" to be "diversity".²⁴⁵ Such diversity already accommodates different faiths, ethnicities, and "cultures", and would only be enriched by the accession of a "divergent" country like Turkey. In contrast, it can also be argued that, although the European values are universal, diverse and sometimes divergent, there is still a shared context for their understanding and practice. Within context of the European integration, however, the common "political culture" and "collective political identity" that are prerequisites for sustaining the legitimacy and viability of a polity should not be conflated with an essentialist commonality on the basis of "culture". Does the fact that Turkey is a secular country with a predominantly Muslim population or has an "Oriental" component to its identity, in addition to its "European", "Balkan", "Mediterranean", "Caucasian" ingredients undermine the

²⁴³ For the conception of the EU as a "rights-based union" without relying on a common cultural value basis, see Fossum and Menendez, *supra* note 223, pp. 106-110.

²⁴⁴ For an opposing view regarding the use of the USA in the Constitutional Treaty as a distinguishing reference for Europe, both in terms of attitudes towards international law and welfare state, see von Bogdandy, *supra* note 216, p. 13.

²⁴⁵ For an in-depth analysis on this provision, see Dobson, *supra* note 203, pp. 22-23. According to Dobson, the cultural heritage that matters here is the European Union's and not Europe's. Since these are not the same, they should not be conflated.

European polity? It is a contestable argument and very much contrary to the universalist ideals of the Union to claim that cultures or religions other than Christian and strictly “Western European” are not capable of the internalization of those values and principles into their social, legal and political ordering.²⁴⁶ If, and when, Turkey conforms with the Copenhagen criteria and the Union *acquis* both on paper and in practice, that would be sufficient to reflect the fact the Turkey can be a compatible component of the “European” political culture.²⁴⁷ Since cultural homogeneity does not necessarily and automatically imply a political community or a constitution, by the same token cultural divergences should not be regarded as precluding solidarity and trust.

B) An Analysis of the Recent Constitutionalisation Process in Respect to its Collective Political Identity Generative Potential

As discussed in the previous section, constitution building, the debate surrounding that exercise and the outcome of the process were regarded by many as catalysts that would mobilize the European citizens, create (or strengthen) a European public sphere, and furnish the Union with institutions, competencies, policies and procedures to attain its goals. This was one important aspect of Habermas’s assertion that “Europe needs a Constitution” as a catalyst. According to Habermas, the empirical circumstances necessary to the extension of the process of identity formation beyond national boundaries were the emergence of a European civil society; the construction of a European-wide public sphere; and the shaping of a political culture that can be shared by all European citizens. This process would have to begin with a referendum arousing a Europe-wide debate, whereas the making of the constitution would be “representing itself as a unique opportunity of transnational communication with the potential for a self-fulfilling prophecy.”²⁴⁸

The way the Constitutional Treaty is prepared and enacted has an undeniable normative significance both for the legitimacy of the European governance and for the emergence of a collective political identity. In liberal democracies only the “people” can give themselves a constitution and the process should be democratic in the purest sense of the term. In that context, what can be said about the Constitution drafting method employed recently by the European Union?²⁴⁹ Should the dual processes of Convention and IGC be assessed as a relative success or business as usual? Should and could the Convention be ascertained as a “constituent assembly”? Have we experienced a “constitutional moment”²⁵⁰

²⁴⁶ For a similar argument on the role of religion within context of Turkey’s EU membership see Mahlmann, *supra* note 202, p. 310.

²⁴⁷ For Mayer and Palmowski “[a]s long as Turkey can fulfill the institutional, economic and legal requirements for membership it is not principally excluded from the European identity which has been shaped so decisively by the institutions and law of the EU.” See Mayer and Palmowski, *supra* note 79, p. 583.

²⁴⁸ Habermas, *supra* note 98, p.17.

²⁴⁹ For an interesting critique of the functioning of Convention on the Future of Europe see the Alternative Report included in the Draft Constitution, “*The Europe of Democracies*”. For the analysis of the recent constitution-making process see *supra* note 151.

²⁵⁰ For the concept of a “constitutional moment” within context of constitution-making in the US, see Bruce Ackerman, *We the People: foundations*, Cambridge Massachusetts, Harvard University Press, (1991); Bruce

or the gradual integration as usual?²⁵¹ Could a Europe-wide popular referendum have better served to forge a European public discourse, European public space and the emergence of European collective political identity -perhaps even irrespective of the outcome?

The debatable and limited democratic qualities and reach of the Convention on the Future of Europe, which prepared the Constitutional Treaty to be submitted to the IGC process, and the unfavorable referenda results in two of the leading, original and traditionally pro-EU members of the Union, France and the Netherlands, demonstrated the limits of the polity and political identity building potential of written texts, albeit constitutions. In that regard, von Bogdandy points out to the limited potential of a text in forging collective identities by reminding that a constitution can only be one element in a broad social evolution that shapes the identities of the citizens.²⁵² The results suggest restraint but there is no ground for despair for the future prospects or viability of the European polity and transnational democratic governance.

The representativeness, inclusiveness and transparency of the Convention process reflect an improvement in participatory democracy in the European governance compared to the bureaucratic, diplomatic, elitist and nontransparent nature of the IGCs alone, which had defined the reform processes previously.²⁵³ Even the Convention method itself demonstrates the shift in approaches to democracy, legitimacy and politics in the European integration. The recent process carried further the democratization of constitution-making, through a heightened degree of inclusiveness and transparency.²⁵⁴ Despite some harsh and legitimate criticism²⁵⁵ the Convention process is generally regarded as a right step in the right direction which helped to sow “[...] the seeds of a critical and reflexive approach to constitutionalisation.”²⁵⁶

Ackerman, *We the People: transformations*, Cambridge Massachusetts, Harvard University Press, (1998). For the adaptation of this concept to the European Union, see Neil Walker, “The Legacy of Europe’s Constitutional Moment”, *Constellations*, Vol. 11, No. 3, (2004), pp. 368-392. See also Dario Castiglione, “A Constitutional Moment without a constitution?”, in Carlos Closa and John Erik Fossum (eds.), *Deliberative Constitutional Politics in the EU*, ARENA CIDEL Report, ARENA Report, No. 5/04, ARENA/University of Zaragoza: Oslo/Zaragoza, pp. 65-92.

²⁵¹ See, for instance, J.H.H Weiler, “A Constitution for Europe? Some Hard Choices”, *Journal of Common Market Studies*, Vol. 40, No. 4, (2002), pp. 563-580; Maduro, *supra* note 96.

²⁵² von Bogdandy, *supra* note 216, p. 6.

²⁵³ See in general, Francis Snyder, “Editorial: Enhancing EU Democracy, Constituting the European Union”, *European Law Journal*, Vol. 11, No. 2, (2005), pp. 131-134; Fossum, *supra* note 190; Yves Meny, “The Achievements of the Convention”, *Journal of Democracy*, Vol. 14, No 4, (2003), p. 57-63; Juliane Kokott and Alexandra R  th, “The European Convention and its Draft Treaty Establishing a Draft Constitution for Europe: Appropriate Answers to the Laeken Questions”, *Common Market Law Review*, Vol. 40, (2003), pp. 1315-1345.

²⁵⁴ John Erik Fossum and Augustin Jose Menendez, *The Constitution’s Gift? A deliberative democratic analysis of constitution-making in the European Union*, ARENA Working Paper, No. 13, March 2005; Paul Magnette and Kalypso Nicolaidis, “The European Convention: Bargaining in the Shadow of the Rhetoric”, *West European Politics*, Vol. 27, No. 3, (2004), pp. 381-404.

²⁵⁵ Mayer and Palmowski, *supra* note 79, pp. 584-585. For a critique of the Convention process, see also Hjalte Rasmussen, “The Convention Method”, *European Constitutional Law Review*, Vol. 1, No. 1, (2005), pp. 141-147.

²⁵⁶ Shaw, *supra* note 20, p. 45.

Yet, the difficulties experienced during the Convention and the ratification debates illustrate the fact that the recent constitutionalisation process constitutes a limited success in reinforcing the democratic qualities of the integration process, and the forging of a collective identity. The justification for this argument is related to the fact that both the process and the outcome, i.e. the Constitutional Treaty did not generate the expected mobilization and identification with the constitutionalisation in particular, and the integration process in general. The results of the recent Eurobarometer surveys and the ratification referenda substantiate this view.

The near fatal blow to the political constitutionalisation came with the French and Dutch referenda on the 29th of May and the 1st of June respectively. The French rejected the Constitutional Treaty by a 55-45% margin, whereas the Dutch did the same by a margin of 62-38%.

What are the reasons behind this public display of disaffection with the constitutional project? Was Moravcsik right to argue that more visibility meant less support for the integration process?²⁵⁷ Is there really a structural or contingent democratic deficit that needs to be remedied at the Union level, or is the problem a mere communication gap,²⁵⁸ a distance that can be bridged between Europe and its citizens by some novel approaches to governance? Are legitimacy and public support for the Union contingent on its efficient functioning and delivering the goods? Are we witnessing a backlash against the elite-driven top-down approach regarding the constitutionalisation process?²⁵⁹ Were the citizens of France and the Netherlands expressing their displeasure with their own governments, their fears for the poorly performing domestic economies and fears of foreign competition, whereas European issues were peripheral to their concerns, or were they expressing their profound dissatisfaction with the way things are being run in the EU, while revealing a crisis of legitimacy?²⁶⁰

In order for the “Constitution” to perform the legitimating and identity generative function, first it should have generated the right incentives for people to embark on the European project, and secondly, it should have provided an adequate framework for constructing a polity and collective political identity in order to secure the political loyalty required to sustain the viability of the project.²⁶¹ Moreover, it would also have to strengthen

²⁵⁷ See also Lee Miles, “Editorial: The Paradox of a Popular Europe”, *Journal of Common Market Studies*, Vol. 42, Annual Review, (2004), pp. 1-8.

²⁵⁸ Christoph Meyer, “Political Legitimacy and the Indivisibility of Politics: Exploring the European Union’s Communication Deficit”, *Journal of Common Market Studies*, Vol. 37, No. 4, (1999), pp. 617-640.

²⁵⁹ For an analysis on whether there is a deep divide between elite and public opinion towards the EU, see Liesbet Hooghe, “Europe Divided? Elites v. Public Opinion on European Integration”, *European Union Politics*, Vol. 4, No. 3, (2003), pp. 281-304.

²⁶⁰ For an argument asserting that the problem is “European” rather than “domestic”, see “The Europe that died”, *Economist*, 4 June (2005), pp. 11-12.

²⁶¹ Maduro, *supra* note 96, p. 53.

the problem solving capacity of the Union and its institutional structure and satisfy the expectations of the European citizens.²⁶²

The strengths and weaknesses of the constitution rhetoric as a community/identity generative method have been highlighted during this process.²⁶³ On the one hand, its capacity for both eliminating and reinforcing the expectations/capabilities gap of the Union; on the other hand its potential for eliminating the danger of legitimacy crisis or reinforcing it by imposing on the European peoples yet another integrationist step in the absence of their consent or explicit will, have been established.

The reasons behind the “No” vote demonstrate the paradox of the condition of the EU integration and the overall objective of the Laeken Declaration; i.e. bringing the European citizens closer to the Union; a document assumed to bring more democracy to Europe was being rejected by its peoples.²⁶⁴ Moreover, the assertion that the more visible the EU becomes the more dissent it is faced with held true; a phenomenon which suggests severe difficulties for the Constitution in serving as a common ground and source of identification for the EU.

On the basis of these observations, should we conclude that the recent European experiment in deliberative democracy and constitutional engineering of identity construction has failed completely?

Constructing a community like the one the Union aspires to, demands strong leadership, sense of direction and the opportunities presented by existing political, social, economical, cultural and legal conditions surrounding the polity in question, which cannot be created solely by constitution-making. Whether Europe has reached such a stage is the question that needs to be answered right now.

What we have experienced cannot be defined as a “constitutional moment”. The inter-state bargaining and incrementalism have influenced and shaped the outcome more than the Convention process. The democratic and inclusive qualities of the Convention and the debate created around the idea of constitutionalisation, however, have created their own momentum.

²⁶² For a survey on the expectations of the European citizens from the integration process, see *Perceptions of the European Union- A Qualitative Study of the Publics Attitudes to and Expectations of the European Union in the 15 Member States and the 9 Candidate Countries- General Report*, June 2001.

²⁶³ For critical analysis on the recent constitutional process from legal and political science perspectives, see in general, Neil Walker, “Europe’s Constitutional Momentum and the Search for Polity Legitimacy”, in Weiler and Eisgruber, (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, No. 5/04 (2004); Neil Walker, “Postnational Constitutionalism and the Problem of Translation”, in J.H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge-New York, Cambridge University Press, (2003), pp. 27-54; Bermann, *supra* note 104; Maduro, *supra* note 96; Shaw, *supra* note 20; Closa and Fossum (eds.), *supra* note 2; Eriksen, Fossum, Kumm and Menendez, *supra* note 108; Dario Castiglione, “Reflections on Europe’s Constitutional Future”, *Constellations*, Vol. 11, No. 3, (2004), pp. 393-411; Menendez, *supra* note 108; John Erik Fossum and Hans-Jörgrenz, “The EU’s fledgling society: From deafening silence to critical voice in European constitution making”, *ARENA Working Paper*, No. 19, (2005).

²⁶⁴ For the surveys conducted in France and the Netherlands in the aftermath of the referenda regarding the reasons behind the no-vote, see *Flash Eurobarometer 171: The European Constitution: Post-referendum survey in France: Fieldwork conducted in 30&31 May 2005*, published in June 2005 and *Flash Eurobarometer 172: The European Constitution: Post-referendum survey in The Netherlands: Fieldwork conducted in 2/4 June 2005*, published in June 2005.

More than its content, the Constitutional Treaty is significant for its potential and rhetoric.²⁶⁵ Although the ratification debates and the referenda results indicated that there is no basis for a thick European constitutional patriotism in the Union for the time being, the signs regarding the emergence of a collective political identity in Europe, that is reflexive, goal-based²⁶⁶ and peculiar to the Union, are strong.

In that context, the constitutionalisation process has proved to be valuable in the sense that it has opened the floodgates of public debate on the *raison d'être* and direction of the European integration amongst the citizens of the Union. Such debate was desperately needed and awaited, despite its potential for temporal setbacks, some of which are being experienced today, regarding the future of the Constitutional Treaty, the budget and so on. What we are faced with is a community/identity/public sphere generative exercise; a process that is set alive by the post-Nice debate, irrespective of the current crisis. If such community generative exercise cannot create a belongingness and solidarity on the basis of shared principles geared towards activating shared objectives, then of course what we would be left with is the “market citizen” driven by self-interest and nothing more.²⁶⁷ The prospect of achieving a political citizenship grounded on a transnational allegiance, solidarity and mutual trust is, however, not out of reach. The Union has to rise to this challenge, or risk the further alienation of its citizens.

Devices such as a real European-wide debate on the future of Europe, resulting in a European-wide referendum on the outcome of this process would be instrumental to raise a European awareness, not only because such manifestations of direct democracy would enhance the legitimacy of the Union, but also because they would create the preconditions of a meaningful debate on what Europe is, and what it is for. Constitution and *finalité* debates, as well as debates on the US's invasion of Iraq and European attitudes on this issue, and Turkey's accession to the European Union can easily be interpreted as signs of the emergence of a European public sphere and discourse, albeit rather slowly.²⁶⁸

Here we are faced with the problems of finding and agreeing upon new shared interests, objectives and ideals for the integration process. The normative argument underpinning this paper is that the collective efforts for the attainment of shared goals and maximization of shared interests may also be instrumental in forging collective identities, especially if they are successful. There has to be a plausible -albeit minimum- agreement and understanding on the definition of common good/output/values of the integration project. Moreover, the citizens must have a minimum degree of democratic participation in order to

²⁶⁵ See in general, Eriksen, Fossum and Menendez (eds.), *supra* note 2; Erik O. Eriksen (ed.), *Making the European Polity. Reflexive integration in the EU*, London, Routledge, (2005); John Erik Fossum and Augustin Jose Menendez, “Democratic constitution-making. Reflections on the European experiment”, *ARENA Working Paper*, No. 18, (2005).

²⁶⁶ For an argument regarding the EU identity being an open and inclusive, reflexive and goal based one, see Palombella, *supra* note 178.

²⁶⁷ Von Bogdandy argues in favor of orienting “[...] the European project not toward collective identity, but toward the long term self-interest of citizens.” See von Bogdandy, *supra* note 216, p. 16.

²⁶⁸ Habermas, *supra* note 98; Follesdal, *supra* note 91.

identify with the system and its outcomes.²⁶⁹ The days of “practical achievements calling for real solidarity”²⁷⁰ are over; functionalist approaches are not sufficient on their own. Neither raising awareness, nor democratic participation are sufficient; the EU should also make its citizens care for and identify with the integration process through its values and normative underpinnings, and its aims and objectives. The challenge is to politicize the Union in order to motivate the citizens for identity building without damaging the delicate balance premised on the intrinsic attributes of the existing *sui generis*, multi-layered, flexible and open-ended structure.

C) European Public Opinion and Turkey’s European Prospects²⁷¹

Related to the issue of democratic legitimacy and public participation in the functioning and direction of the integration process within context of the enlargement, is the essential requirement of convincing the European public of the indispensability and benefits of this process.²⁷² The European public opinion on enlargement in general has been indifferent, and towards Turkey’s accession in particular, has been far from favorable.²⁷³

Indeed, the main obstacle to the smooth progress of Turkey’s accession process emanates from the perceptions of the European public as regards Turkey. The Europeans’ negative attitudes towards Turkey are often stemming from their view of Turkey’s inability to conform to the European ideal and practice, and this, in turn, is the direct result of their divergent identity perceptions. As long as the negative public opinion towards Turkey’s accession is not replaced with some degree of the desirability of a common future on the part of the European peoples, Turkey’s becoming a member would prove to be an insurmountable challenge.

The concerns about increased immigration, unemployment, organized crime and drug trafficking, redistribution of the funds for the current and acceding members, increased difficulty in decision making in the enlarged Union and a decrease in living standards have been cited as the underlying motives for this ambivalent public opinion towards enlargement.²⁷⁴ For Turkey, in particular, Meltem Müftüler Baç ascertains four factors that shape European public opinion towards Turkey’s future accession, as the issues of center of gravity, immigration, fear of increase in xenophobia/racism, and distribution of funds, and

²⁶⁹ Kumm underlines the significance of European-wide electoral politics in that context. See Kumm, *supra* note 169, pp. 59-63.

²⁷⁰ For the Schuman Declaration see: http://europe.eu.int/abc/symbols/9-may/decl_en.htm.

²⁷¹ The views expressed in this part of the paper draws on the aforementioned study of the author. See Baykal, *supra* note 30.

²⁷² Richard Sinnott, “Assessing the Implications of EU Enlargement for the Existing Member States: The Public Opinion Perspective”, *EUI Working Papers RSCAS*, No. 2004/11, (2004); Erik Jones and Niels Van Der Bijl, “Public Opinion and Enlargement: A Gravity Approach”, *Centre for European Policy Studies (CEPS) Working Document*, No. 192, (2003).

²⁷³ Eurobarometers for monitoring the attitudes of the European citizens towards enlargement are available at http://www.europe.eu.int/comm/public_opinion.

²⁷⁴ Helen Wallace, “Enlarging the European Union: Reflections on the Challenge of Analysis”, *Journal of European Public Policy*, Vol. 9, No. 4, (2002), pp. 658-665; Meltem Müftüler Baç, *Enlarging the European Union: Where Does Turkey Stand?*, TESEV, (2002), available at <http://www.tesev.org.tr>.

points out to the fact that with the possible exception of xenophobia/racism -to a certain extent- almost all of these concerns apply to all the other new members and candidates of the EU.²⁷⁵

Turkey's relative backwardness in economic terms; its population -in terms of its essential attributes, and its size and potential weight in the decision making structures of the Union; the so-called cultural differences, and the possibility of these differences triggering xenophobic tendencies in European societies; an unstable neighborhood as a direct consequence of Turkey's geopolitics appear to be the fundamental grounds for concern for the European public opinion. The social and political tendencies of the domestic public opinion at the Member State level, as well as the general attitudes at the European level have a significant bearing on the decision for Turkey's future prospects concerning its EU membership. In that regard, the considerable divergences amongst the individual Member States and their public opinion on Turkey's future membership should be noted.²⁷⁶ Be that as it may, those differences amongst the Member States in the degree of support for Turkey's membership or the divergences in the approach to the assessment of the country's contributions to and challenges for the integration process, do not alter the fact that Turkey's membership appears to be the least desirable, compared to all the other candidates.

On the basis of these findings, it has to be pointed out that, at a time when the European Union is striving for bridging the gap between itself and its citizens, and for more democracy, participation and legitimacy, such unfavorable public opinion will be a crucial hindrance for Turkey's EU membership. Further enlargement, including Turkey's accession, without proper debate on its normative, political and pragmatic justifications in order to convince the European peoples of its necessity and advantages, entails the risk of tensions emanating from diversity rather than the maximization of its benefits. Moreover such an outcome has the potential of alienating the European citizens from the integration process.²⁷⁷ Walker puts forward the crucial question: "Can the fragile legitimacy of the EU shoulder the burden of further enlargement without proper public debate and social legitimation?"²⁷⁸ However, more significant queries revolve around the normative premise and framework of such debate; the proper public discourse that should inform it; and the best way to secure these prerequisites and the outcomes.

The unfavorable public opinion on Turkey's membership has already started to influence the direction of the integration process. In the Member States that conducted

²⁷⁵ Müftüler Baç, *supra* note 274.

²⁷⁶ For differences amongst the Member States according to their particular policy priorities and concerns over Turkey's future membership, see Müftüler Baç, *supra* note 274.

²⁷⁷ Kumm, *supra* note 152, p. 323-324. Kumm asks whether it is true that Turkey's membership without proper public debate and popular legitimacy would "effectively preclude the development of a genuine European democracy, a European public sphere and a strong social cohesion in Europe, because it would further alienate a majority of European citizens, and strengthen Euroscepticism across Europe?" Whether the existence of such potential already points to the fact that there is a "thick" identity in Europe, as Kumm suggests, remains a debatable assertion.

²⁷⁸ Walker, *supra* note 95, p. 377.

referendums for the ratification of the Constitutional Treaty, like France, the issue of Turkish membership has become one of the obstacles in the way of a favorable vote.²⁷⁹ Despite the fact that the results of the public opinion surveys undertaken in the aftermath of the French and Dutch referendums demonstrated that opposition to Turkey's EU membership played a very insignificant role in the unfavorable vote against the Constitutional Treaty, the reaction of the politicians was far away from reflecting this fact.²⁸⁰ Even before the constitutional referendums, in order to appease their public opinions, Austria and France had already committed themselves for a public vote on Turkish accession, "when the time comes."²⁸¹

The normative legitimacy of a referendum only for Turkey's accession would be contentious if it is not generalized on the basis of some normative approach, where each new accession is subjected to such a procedure and also in the entirety of the Member States. Such a "European" referendum, rather than national referendums for future enlargements might have the added value of assisting the emergence of a European public space. The insistence on subjecting only Turkey's accession to such procedure, however, resonates with the perception that the Europeans perceive their own identity as a coming together on the basis of some thick commonalities premised on common values, whilst Turkish identity is seen as substantially divergent and hence would justify such discriminatory behavior. Our discussions within the framework of this paper, however, indicate only the prospects of the emergence of a European collective identity which is "thin" in the sense that it is based on shared objectives and their attainment through EU law, institutions and mechanisms, rather than on a "thick" conception of common values.

The cost of a rejection by popular vote of a candidate country which has fulfilled the accession criteria, and completed the accession negotiations, even signed an accession treaty with the Union would be the refusal of the EU values of respect for the supremacy of law, adherence to legal and political commitments, and fulfillment of legitimate expectations. This would, in turn, be damaging to the credibility of the EU both inside and outside. A sufficiently normative EU identity that is worth identifying with cannot be based on such discriminatory and arbitrary attitudes. The legitimate expectations that have been raised both within Turkey and in the wider world by the last 40-odd years of progressive relations between the parties deserve a normative approach. If the Union's identity is an open, inclusive, normative identity based on universal ideals and on practical necessities in order to provide legitimacy to its democratic governance and constitutionalism, and if popular or social legitimacy cannot be the only basis for European legitimacy, this must also hold true for the rejection of Turkey's accession into the European Union. The Union's decision on Turkey cannot solely be based on favorable public opinion, but should be premised both on

²⁷⁹ See, for instance, Franck Biancheri "Comment: The day the Commission torpedoes the Constitution?", *EUobserver* on <http://www.euobserver.com/?aid=17362&sid=9>.

²⁸⁰ See *supra* note 264.

²⁸¹ Mattias Kumm asserts in that regard that Turkey's accession would be highly problematical "if a clear and stable majority of European citizens continues to be against it. In this respect the decision by France to hold a referendum need not be inappropriate." Kumm, *supra* note 152, p. 324.

normative and pragmatist justifications. Moreover, in the eventuality of a referendum on the issue, its timing, procedure and mechanism should be considered and designed with utmost care.

CONCLUSION

Sustaining the viability of the integration process requires a collective political identity at European level on the basis of some shared or presumed commonalities which would generate trust and solidarity. The problem is where to ground such commonality, and whether such commonality implies some measure of homogeneity in terms of ethnicity, history, tradition, culture or religion. It is relatively easy to forge a collective identity when the constituting units are more or less similar, or reconcilable. It is a different matter altogether when such constituting units display a substantial amount of divergence and diversity. Whether such collective identity should and could be bounded once and for all in terms of constituting principles, structures and processes as well as territory, is another pressing question that needs to be answered.

If European Union's motto and real challenge is realizing unity in diversity; solving the inherent tension between dynamism and stability; cohesion and plurality, European identity can only be a shared and flexible identity of mutual recognition and respect, negotiated constantly. Internalization of the feeling of solidarity and mutual trust premised on shared objectives and mutual recognition is not a distant ideal but an attainable goal for the Union. Collective political identities not based on pre-existing commonalities, but on shared interest, objectives and projects; on a "we-feeling" of shared destiny, albeit without a concrete destination, can also be instrumental in forging resilient polities of a supranational type. Europe needs to ground its legitimacy, collective identity and solidarity on mutual respect for divergent identities and accommodation of diversity. Only the dynamism and synergy emanating from diversity can distinguish Europe from "others", and enable it to transform such rich diversity into coherent and legitimate governance. Both the conception of its collective political identity and its democratic governance require flexible, open-ended solutions.

Accordingly, the EU identity can only be a flexible identity shaped and reshaped by constant deliberation, negotiation and appropriation on the basis of shared projects, rather than a rigid collective identity. Europe can only identify itself with its ability to unify the diversity of its Member States and their peoples, and mobilize them around shared goals, projects, processes, procedures and institutions on the basis of universal values. Its constitutional collective identity should reflect this plurality and flexibility in the most appropriate manner.

The only normative and viable identity for the Union is a legal, institutional, procedural one; based on common projects and objectives; an "EU identity" of an open-ended nature reflecting the open-ended character of the European polity with its borders and finality, whether Turkey becomes a member or not. If the EU identity is shaped by the peculiarities

and shared objectives of the integration process, and by the institutions, law, procedures and political culture of the Union, a candidate country fulfilling the legal, economic and democratic conditions of membership cannot be excluded on cultural grounds. European project is not a cultural or historical endeavor, it is a distinct political, economic and social model. Consequently, its membership must also be a political decision, not a cultural or historical one. And such decision should be based on what the candidate brings to the table, rather than its “identity”.

Thick or thin, exclusive or inclusive, based on common “European” or universal values, the forging of a “collective political identity” for the European Union in order to increase its normative and democratic legitimacy will prove to be a challenge. To construct a constitutional order that enables the constant re-negotiation of shared values, interests and projects, and strives for the accommodation of plurality and diversity is no easy task. The main challenge for the Union, however, will be to strike a balance between diversity/dynamism/plurality on the one hand, and unity/cohesion/solidarity on the other, while aspiring to become a normative civilian power and a sufficiently democratic and efficient system of governance.

The future prospects of Turkey EU relations will depend on the ability of the two sides to come to terms with concepts such as diversity and coherence. The perception of dangers deriving from differences and disparities should be replaced by the potential of dynamism and synergy presented by diversity. Turkey possesses the inner strength and capacity to transform sufficiently in order not to threaten the coherence and functioning of the European political process. The European Union, for its part, possesses the capacity and the mechanisms to accommodate Turkey, with all its diversity. The question is whether both parties have the political will.