

Turkey's Accession to the European Union from the Constitutional Perspective

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ABSTRACT

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. 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.

ÖZET

Avrupa Birliğinin uygun biçimde tanımlanmış bir kolektif siyasi kimliğe ve sınırlara kavuşmak ile demokratik ve meşru bir yönetişime sahip olmak yönündeki arayışı mevcut genişleme süreciyle başlamış değildir. Buna karşılık, nihai siyasi yapısına ve kolektif siyasi kimliğine yönelik bu arayış, Birliğin, Türkiye'nin üyeliğine ilişkin sonuçtaki kararının da belirleyici unsurunu oluşturacaktır. Bu çalışma, ülkenin büyüklüğünden ve ekonomik, siyasi ve toplumsal sorunlarından çok, kimliği konusundaki olgusal ya da algısal farklılığın Türkiye-AB ilişkilerinin gidişatını etkileyeceğini ileri sürmektedir. Bu açıdan genişlemenin Avrupa'nın demokratik yönetişimi ve Avrupa siyasi kimliği üzerindeki etkisi tahlil edilmekte ve böylece Türkiye'nin özel konumunun altı çizilmektedir. Bu çerçevede Türkiye'nin Avrupa yönetişimine etkisi demokrasi/meşruiyet ve etkililik ilişkisi perspektifinden ele alınmaktadır.

KEYWORDS

EU Law, European Political Identity, Constitutionalisation in the European Union, EU Constitutional Treaty, Turkey-EU Relations.

ANAHTAR KELİMELEER

AB Hukuku, Avrupa Siyasi Kimliđi, Avrupa Birliđinde Anayasallařma, AB Anayasal Anlařması, Trkiye-AB İliřkileri

Introduction

Starting from the 1990s, studies on the European Union have been preoccupied with the exploration and theorization of the legitimacy problems of the integration process. The substantive and comprehensive developments brought about by the Maastricht Treaty regarding the increase in the competencies of the European integration, together with the reintroduction 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.¹ Coupled with the ratification debacles in France and Denmark, this phenomenon marked the end of the so-called “permissive consensus” and heralded the end of the legal and formalistic approaches to the legitimacy problems of the Union. The recent referenda results in France and the Netherlands regarding the ratification of the “Treaty Establishing a Constitution for Europe” provided further indications regarding 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 general, highlighted the need for a search for different avenues and mechanisms to close the gap between the EU and its citizens, which paradoxically was one of the main justifications behind the recent attempts to create a constitution.²

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¹ WEILER, J.H.H., “Transformation of Europe”, *Yale Law Journal*, Vol. 100, 1991, pp. 2403-2483.

² The Laeken Declaration is available at http://europe.eu.int/futurum/documents/offtext/doc151201_en.htm. For an analysis of the Laeken Declaration regarding its approach to EU’s democratic legitimacy problems see LORD, Christopher, “Democracy and the Future of Europe. Five Questions Raised by the Laeken Declaration”, *ESRC “One Europe or Several?” Programme Briefing Note*, 1/02, February 2002.

Maybe we are at a stage where the European Union is an accepted reality for the daily politics of the Member States and a daily source of identification for their peoples, although this claim is highly debatable in the aftermath of the constitutional referenda. Even in the case of popular legitimacy, however, the normative or theoretical question would not be whether the EU is accepted by the European peoples or not, but whether it deserves to be so on the basis of being a democratic and ethical polity of justice and solidarity.

In that broad context, we will attempt to investigate the impact of Turkey's future membership and its feasibility and desirability in the light of the legitimate democratic governance problems of the Union. This will be an attempt to outline the achievability of realizing the motto of the Union, "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. It will be argued that rather than the size and economic, political and social problems of Turkey, its factual or perceived divergent identity is more likely to influence the course of Turkey-EU relations.

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? Are the objections perhaps stemming from the perceived or real divergences between European and Turkish identities?

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 so fundamentally different in its identity, that its joining the EU would threaten the viability of the project of forging a collective political identity for the legitimation 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, we will first embark on an analysis of the challenges posed to the European integration process by the simultaneous widening, deepening, and highlighting of the existing and increasing problems

of identity, borders, legitimacy, democracy and efficiency in Europe. We will attempt to outline the basic attributes of the European polity in order to establish the feasible parameters with respect to the territorial and democratic governance boundaries of the European Union. In that context, the impact of enlargement on European democratic governance and collective identity will be analyzed 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 the second section of the paper, we will highlight the significance of a collective political identity for the Union and its creation via the process of creating a constitution, together with the nature of such identity. We will then proceed, in the third section, onto the referents of political identity that are being embraced by the Founding Treaties and the Constitutional Treaty, and investigate whether Turkey can be regarded as a component of such political identity. We will argue that these legal texts indicate a project-based, future, rather than past-oriented, open-ended, flexible and inclusive political identity based on universal values, which does not necessarily exclude Turkey from the integration process. Finally, in the last section, we will underline the significance of the European public opinion with regards to Turkey's membership prospects.

I) Democratic and Effective Governance in the European Union: What is the EU?

A) The Defining Characteristics of the European Polity

Since its inception, the European integration process has defined itself, as it went along, with regards to its policies and institutions, its ends and means, and its identity and boundaries. Neither a distinct political self-definition, nor a particular *telos* beyond the cryptic "ever-closer union" formula stated 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.

So, 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. It is a process with no preordained or predefined destination, no predefined structure, no predefined boundary, and no predefined identity.³ It has no deterministic path of progress, no linear direction of

³ See MORAVCSIK, Andrew, *The Choice for Europe-Social Purpose and State Power From Messina to Maastricht*, Ithaca-New York: Cornell University Press, 1998; p. 472. Moravcsik

movement, no teleological existence or mission. It is a “work in progress” to be reconstructed and redefined 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.

Secondly, the Union is a genuine “unity in diversity” or a “mixed polity” based on a “pluralistic citizenship.”⁴ 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 both an international agreement between Member States and a social contract between their peoples. As a polycentric entity, it represents overlapping interests, in particular, of the supranational, national and local types and levels. It has no obvious hierarchical structure, but rather a heterarchical system of simultaneous existence and interaction of various political, legal, economic, social and cultural rules, procedures, objectives, norms and values.

Finally, the Union has a very high level of adaptability and flexibility both territorially and functionally. 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 regarding the defining characteristics of the integration process, it becomes clear that the European Union would only be

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.” Albeit on different grounds, a “Reflection Group”, initiated by the Commission President Romano Prodi for an investigation into 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 WILKINSON, Michael, “Constituting Europe: Flexibility or Finalité”, *Oxford Journal of Legal Studies*, Vol. 22, No. 1, 2002, pp. 177-187.

⁴ WESSELS, Wolfgang and DIEDRICHS, Udo, 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 at <http://eiop.or.at/eiop/texte/1997-006a.htm>.

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, requires an open-ended, not too rigid, and adaptable polity, and a 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.⁵

B) The Significance of Boundaries and Size for the European Governance

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 semblance of borders and boundaries.⁶ Democracy and the rule of law require a bounded territory and political identity in order to enable the exercise of legitimate popular authority. The questions that need to be answered in that context are: 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.

An open-ended polity 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 polity would be both permeable and flexible, reflecting the nature of the project-based, differentiated integration. The borders would shift

⁵ 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 LORD, Christopher and MAGNETTE, Paul, “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.

⁶ For an in-depth analysis on this, see SMITH, Michael, “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; FRIIS, Lykke and MURPHY, Anna, “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, Christopher, “The Geo-political Implications of Enlargement”, *EUI Working Paper*, RSC No. 2000/30, 2000, reprinted in ZIELONKA, Jan (ed.), *Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union*, London, Routledge, 2002, pp. 95-117; ZIELONKA, Jan, “Enlargement and the Finality of European Integration” in JOERGES, Christian, MENY, Yves and WEILER, J.H.H., (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; ZIELONKA, Jan and MAIR, Peter, “Introduction: Diversity and Adaptation in the Enlarged European Union”, *West European Politics*, Vol. 25, No. 2, 2002, pp. 1-19.

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 a normatively justified and practically achievable balance between governability, efficiency and democratic legitimacy.

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 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 on the one hand, and coherence and flexibility on the other, especially in the aftermath of the current enlargement process.

In that regard, 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,”⁷ together with the criteria it employs while delineating such boundary. Finding the right balance between stability and efficiency of borders and the normatively legitimate criteria to draw them are imperative.⁸ 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.⁹ Arguably, the real danger for the integration process lies in the drawing of new exclusionary boundaries, this time around Europe itself.¹⁰

The future of the European Union in the aftermath of the enlargement will be based on a design of flexibility, which will, in turn, have an impact on

⁷ SMITH, *supra* note 6, p. 12.

⁸ See SCHMITTER, Philippe C., “How to Democratize the European Union and Why Bother?”, Lanham-Boulder-New York-Oxford: Rowman & Littlefield Publishers, 2000, p. 15. 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”.

⁹ NICOLAIDIS, Kalypso and LACROIX, Justine, “Order and Justice Beyond the Nation State: Europe’s Competing Paradigms”, in FOOT, Rosemary, GADDIS, John and HURRELL, Andrew, (eds.), *Order and Justice in International Relations*, Oxford-New York: Oxford University Press, 2003, pp. 125-154, at p. 149.

¹⁰ NICOLAIDIS, Kalypso and HOWSE, Robert, “This is my EUtopia...: Narrative as Power”, *Journal of Common Market Studies*, Vol. 40, No. 4, 2002, pp. 767-792, at pp. 781-782.

Turkey's place in the European integration. The Union will have to "[...] act in overlapping circles and along a variable geometry resembling a neo-medieval empire more than a Westphalian federal state."¹¹ 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."¹² 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.¹³

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 the increased diversity and would be incorporated into the Union more comfortably. The flexibility brought about by diversity would pave the way for countries like Turkey to attain full membership, which would ease off the burden of complying with all the policies of the EU and 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.

C) Democracy vs. System Effectiveness in the European Context

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

¹¹ ZIELONKA, *supra* note 6, p. 152.

¹² WALKER, Neil, "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." SHAW, Jo, "Constitutionalism and Flexibility in the EU: Developing a Relational approach", in DE BÚRCA, Gráinne and SCOTT, Joanne, (eds.), *Constitutional Change in the EU from Uniformity to Flexibility?*, Oxford-Portland/Oregon: Hart Publishing, 2000, pp. 337-358, at p. 341.

¹³ WALKER, *supra* note 12, pp. 5-10.

the danger of moving democratic governance even farther from citizens' reach, since more citizens mean fewer opportunities for meaningful participation.¹⁴

In that vein, Weiler argues that the larger the size of the unit, the greater 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 to realize the conditions conducive to a functioning democratic governance as found in 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."¹⁵ Both the opportunities and the relevance of citizens' participation for any individual citizen would decrease as the number of citizens increases remarkably.¹⁶ 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.

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-made 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."¹⁷ 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. The scale of a system, therefore, might adversely affect the put-in legitimacy, yet, might have a positive effect on the output legitimacy.¹⁸

¹⁴ ZIELONKA, Jan, "Europe Moves Eastward-Challenges of EU Enlargement", *Journal of Democracy*, Vol. 15, No. 1, 2004, pp. 22-35, at p. 31.

¹⁵ WEILER, J.H.H., "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.

¹⁶ DAHL, Robert A., "A Democratic Dilemma: System Effectiveness versus Citizen Participation", *Political Science Quarterly*, Vol. 109, No. 1, 1994, pp. 23-34, at p. 29.

¹⁷ *Ibid.*, p. 28.

¹⁸ See in general, SCHARPF, Fritz, *Governing in Europe-Effective and Democratic?*, Oxford-New York, Oxford University Press, 1999.

Moreover, smaller units may suppress diversity and differences more easily than larger units. The larger the unit of governance, the greater the probability of less homogeneity and more diversity. Minorities and divergent identities are generally held to have greater 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 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.”¹⁹

More significantly, it has also been argued 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.²⁰

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 policies, foreign policies and security policies would arguably benefit from a larger European Union, whereas redistributive policies might experience adverse effects from the larger scale. The trade-offs and choices would not be 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.”²¹ 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 the signs of a discourse of “othering?”²²

¹⁹ NICOLAIDIS, Kalypso, “Conclusion: The Federal Vision Beyond the Federal State”, in NICOLAIDIS, Kalypso and HOWSE, Robert, (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.

²⁰ CRONIN, Ciaran, “Democracy and Collective Identity: In Defence of Constitutional Patriotism”, *European Journal of Philosophy*, Vol. 11, No. 1, 2003, pp. 1-28, at p. 14.

²¹ DAHL, *supra* note 16, p. 34.

²² See, e.g., HÜLSSE, Rainer “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; SOFIOLEAS, Penelope, “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.; DIEZ, Thomas, “Europe’s Others and the Return of Geopolitics”, *Cambridge Review of International Affairs*, Vol. 17, No. 2, 2004, pp. 319-335.

The problems of legitimate and democratic governance of the European Union did not start with the enlargement process; they have been there since the 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 has 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 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.”²³

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.²⁴ Suffice it to emphasize that the country's size and its economic, social, political and legal problems would certainly have a huge impact on the efficiency of the European governance and its democratic credentials.

As is well known, size is an important factor that determines the political impact and clout of a Member State because of the allocation of seats in the European Parliament, but more importantly, the weighing of votes in the “Qualified Majority Voting” procedure in the Council.²⁵ The number of MEPs

²³ Weiller, J.H.H., *The State “über alle,” Demos, Telos and the German Maastricht Decision.*, at <http://www.jeanmonnetprogram.org/papers/95/9506ind.html>

²⁴ 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; HUGHES, Kirsty, “Turkey and the European Union: Just Another Enlargement? Exploring the Implications of Turkish Accession”, *Friends of Europe Working Paper*, 2004; EVERTS, Steven, “An Asset but not a model: Turkey, the EU and the wider Middle East”, *Centre for European Reform (CER) Essays*, 2004; GRABBE, Heather, “When negotiations begin: the next phase in EU-Turkey relations”, *Centre for European Reform (CER) Essays*, 2004.

²⁵ POLLAK, Johannes, “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>; BALDWIN, Richard and WIDGREN, Mika, “The Impact of Turkey's Membership on EU Voting”, *CEPS Turkey in Europe Monitor*, Issue 13, (2005), pp. 1-

from Turkey in the European Parliament and the weight of Turkey in the Council would result in Turkey becoming one of the key members of the Union. Especially due to the change in the voting system introduced by the Nice Treaty, and then elaborated by the Constitutional Treaty, the membership of a large and populous country like Turkey would have important repercussions. More significantly, however, Turkey's inclusion would 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 would have 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 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 are 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 through 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 responses to unknown future challenges of the Union cannot be predicted with any precision beforehand, as is the case for any Member State. In that context, Turkey's stance on the American operations in 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

13; ALESKEROV, Fuad, AVCI, Gamze, IAKOUBA, Viatcheslav and TÜREM, Z. Umut, "European Union Enlargement: Power Distribution Implications of the New Institutional Arrangements", *European Journal of Political Research*, Vol. 41, 2002, pp. 379-394.

entities is not necessarily negatively correlated [...] new members have also brought new concerns and demanded policies that have strengthened not weakened integration.”²⁶ That would, arguably, be the case for Turkey as well.

Turkey's future accession to the Union would 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 CAP 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. Yet, if the 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.²⁷ The Europeans' negative attitudes towards Turkey stem 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 the desirability of a common future on the part of the European peoples, Turkey's accession might prove to be an insurmountable challenge.

II) The Significance of a Political Identity for the European Polity

In this section we will briefly analyse the need for a collective political identity for the Union in order to legitimize its democratic governance. Our aim in that analysis is to demonstrate that the options available to the Union to determine its collective identity referents will also constitute the main determinants for its designs on Turkey's future role *vis-à-vis* the integration process.

Legitimacy reflects the belief that a system is just because it embodies the common normative values of a polity. In the present age, such embodiment usually takes shape in a democratic constitution. Legitimacy derives from

²⁶ OLSEN, Johan P., “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, pp. 24-25.

²⁷ CROWLEY, John, “Locating Europe”, in GROENENDIJK, Kees, GUILD, Elspeth and MINDERHOUD, Paul (eds.), *In Search of Europe's Borders*, The Hague-London-New York: Kluwer Law International, 2003, pp. 27-44, at pp. 41-42.

belongingness and solidarity, and being members of a just and legitimate political order strengthens belongingness and solidarity.

The function of a “European Constitution” in strengthening the “we-feeling,” consequently the legitimacy of a polity like the European Union, is a proposition that needs to be investigated in that context.

It has to be pointed out 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 [...]”²⁸

Sustaining the viability of the integration process requires a collective political identity at the 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 as well as cohesion and plurality, European identity can only be a shared and flexible identity of mutual recognition and respect that is constantly negotiated. 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 in mutual respect for divergent identities and accommodation of diversity. Only the dynamism and synergy emanating from diversity, and the normative and functioning methods employed for its accommodation, can distinguish Europe from “others” and enable it to transform such rich diversity into coherent and legitimate

²⁸ DEUTSCH, Karl, *et al*, *Political Community and the North Atlantic Area: International Organisation in Light of Historical Experience*, Princeton: Princeton University Press, 1957, p. 36.

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 by 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 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 particularities 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.²⁹ What needs to be done is to enhance the concept and status of European citizenship, as well as the structure and functioning of the European institutions in order to make them more democratic and efficient, so as to pave the way for the creation of a distinctive European Union identity.³⁰ 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."³¹

"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.

²⁹ DOBSON, Lynn, "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.

³⁰ For a similar view, see, e.g., MAYER, Franz C. and PALMOWSKI, Jan, "European Identities and the EU-The Ties that Bind the Peoples of Europe", *Journal of Common Market Studies*, Vol. 42, No. 3, 2004, pp. 573-598; SKACH, Cindy, "We, the Peoples? Constitutionalizing the European Union", *Journal of Common Market Studies*, Vol. 43, No. 1, 2005, pp. 149-170; WHITE, Jonathan P.J., "The Political Bond in Europe", *Federal Trust Online Paper*, No. 21/04, 2004; MENAUT, Antonio-Carlos Pereira, "Three Critiques of the European Constitution", *Federal Trust Online Paper*, No. 23/04, 2004; PALOMBELLA, Luigi, "Whose Europe? After a Constitution: A Goal-Based, Reflexive Citizenship" in WEILER and EISGRUBER, (eds.), *Alteuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, No. 5/04, 2004.

³¹ MAYER and PALMOWSKI, *supra* note 29, p. 590.

“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 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, multilayered governance system, it performs only those shared objectives and tasks outlined in the founding documents, and consequently does not require the exclusive allegiance and belongingness of its citizens.³² 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.”³³ 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.³⁴ 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, such 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. The European Union has its own historical discourse, its own culture, its own traditions, and its own mores, which originate out of, but yet are distinct from, “European” history or culture. Europe’s only real cultural value is its diversity,

³² For a similar view, see NICOLAIDIS, *supra* note 19, 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, Kalypso, “We, the Peoples of Europe...”, *Foreign Affairs*, Vol. 83, No. 6, 2004, pp. 97-110, at p. 104.

³³ CREMONA, Marise, “The Union as a Global Actor: Roles, Models and Identity”, *Common Market Law Review*, Vol. 41, 2004, pp. 553-573, at pp. 572-573.

³⁴ For similar arguments, see NICOLAIDIS and LACROIX, *supra* note 9, p. 135; see also, KOSTAKOPOULOU, Theodora, “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, Theodora “Democracy-Talk in the European Union: the Need for a Reflexive Approach”, *Columbia Journal of European Law*, Vol. 9, 2003, pp. 411-428.

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 made in 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 real 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.³⁵ If the European Union aspires to be a supranational form of civilian normative power in the world arena, accordingly it should assess what Turkey would bring to the table. By the same token, if the end goal is some sort 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 to both and much more. As a polycentric, multilevel, multilayered, 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 evaluating 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 by 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 result. 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 the 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 an “ever-closer union” can be maintained. Since, the Union is already a flexible, diverse, multilayered and open-ended polity, it can arguably survive and benefit from further enlargement without compromising its so-called *telos*. As Walker asserts, “[T]he

³⁵ For a similar view, see KUMM, Mattias, “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.

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.”³⁶

III) The Referents of a “European Political Identity” in the Constitutional Texts

In the third section of the paper we will proceed on to the referents of political identity that are being embraced by the Founding Treaties and the Constitutional Treaty, and investigate whether Turkey can be regarded as a component of such political identity. Here, it will be argued that these legal texts indicate a project-based future, rather than past-oriented, open-ended, flexible and inclusive political identity based on universal values, which does not necessarily exclude Turkey from the integration process.

Constitutions or constitutional texts have a dual function with respect to the identity formation in a polity.³⁷ 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.³⁸ The political community constitutes, and is constituted, or constructed, by the constitution.

³⁶ WALKER, Neil, “Constitutionalising Enlargement, Enlarging Constitutionalism”, *European Law Journal*, Vol. 9, No. 3, 2003, p. 377. See also, WIENER, Antje, “Finality vs. Enlargement: Constitutive Practices and Opposing Rationales in the Reconstruction of Europe”, *Jean Monnet Working Paper*, No. 8/02, 2002.

³⁷ For the function of constitutions in grounding the identity referents and values of political communities, see ESTELLA, Antonio, “Constitutional Legitimacy and Credible Commitments in the European Union”, *European Law Journal*, Vol. 11, No. 1, 2005, pp. 22-42, at p. 30. See also, PRIBAN, Jiri, “European Union Constitution-Making, Political Identity and Central European Reflections”, *European Law Journal*, Vol. 11, No. 2, 2005, pp. 135-153; GIBBS, Nathan, “Examining the Aesthetic Dimensions of the Constitutional Treaty”, *European Law Journal*, Vol. 11, No. 3, 2005, pp. 326-342.

³⁸ 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 36, pp. 32-33. See also, WHITE, *supra* note 30; MENAUT, *supra* note 30.

The Union's founding documents also perform such dual functions. 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 to forge 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.

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.³⁹ 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 for the emergence of a thin constitutional identity premised on adherence to basic principles, albeit within a European context.

These are universal principles, but they describe 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. We can also point out to 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 in diversity" motto is a fact for the Union in its current legal texts. The polycentricity of the Union is reflected in the provisions of the founding documents, which promote the pluralist prerequisites of diversity

³⁹ For similar views, see LACROIX, Justine, "For a European Constitutional Patriotism", *Political Studies*, Vol. 50, 2002, pp. 944-958; KOSTAKOPOULOU, Dora, "Ideas, Norms, and European Citizenship: Explaining Institutional Change", *The Modern Law Review*, Vol. 68, No. 2, 2005, pp. 233-267.

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 satisfying Article 49 of the TEU and the Copenhagen criteria, Turkey should, or could, not be included in the definition of “Europeaness,” despite its somewhat divergent identity.

Indeed, diversity emerges as the genuine “European” value which needs to be preserved and promoted.⁴⁰ Rather than striving to transcend 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, procedures, projects and diversity constitute the basis of the European political identity.⁴¹ 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 European history and heritage throughout the last millenium, the approach undertaken in the Preamble regarding European history does not preclude Turkey from becoming 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 found in the common future, rather than being premised on the common past. 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. 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 the 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. 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

⁴⁰ 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 30, p. 583. See also, BRAND, Michiel, “Affirming and Refining European Constitutionalism: Towards the Establishment of the First Constitution for the European Union”, *EUI Working Paper-Law*, No. 2004/02, 2004.

⁴¹ For views in regard to the insufficiency of values for serving as the basis of European unity, see NICOLAIDIS and HOWSE, *supra* note 10, p. 784. See also, the Report of the “Reflection Group”, *supra* note 3; LACROIX, *supra* note 39.

characteristics 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 the attainment of the common good.

Indeed, under the Constitutional Treaty, the conception of common good is not grounded in the safeguarding and promotion of some substantive value system beyond the universal principles. As stated in Article I-3(1), the Union's primary objective is "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 values to be promoted, rather than striving for a homogeneous cultural space or a political community.⁴² Accordingly, the Constitutional Treaty cannot be construed to be a search for the boundaries of the European polity by placing it in a culturally-defined space or in opposition to any other culture, be it national or religious.⁴³ Even if Turkey is not considered to be 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

⁴² For the conception of the EU as a "rights-based union" without relying on a common cultural value basis, see FOSSUM, John Erik and MENENDEZ, Agustin Jose, "Still adrift in the Rubicon? The Constitutional Treaty Assessed", in ERIKSEN, Erik Oddvar, FOSSUM, John Erik, KUMM, Mattias and MENENDEZ, Agustin Jose, *The European Constitution: the Rubicon Crossed?*, ARENA Report, No. 3/05, Oslo, 2005, pp. 97-144, at pp. 106-110.

⁴³ 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, Armin, "The European Constitution and European Identity: Text and Subtext of the Treaty establishing a Constitution for Europe", in WEILER and EISGRUBER, (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, No. 05/04, 2004, at p. 13.

cultural and linguistic diversity” supports the argument regarding the main component of the “European cultural heritage” to be “diversity.”⁴⁴ 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 confused with an essentialist commonality on the basis of “culture.” Does the fact that Turkey is a secular country with a predominantly Muslim population, or that it has an “Oriental” component to its identity, in addition to its “European”, “Balkan”, “Mediterranean”, “Caucasian” ingredients, undermine the 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.⁴⁵ If, and when, Turkey conforms to 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.⁴⁶ 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.

IV) European Public Opinion and Turkey’s European Prospects⁴⁷

Related to the issue of democratic legitimacy and public participation in the operation and direction of the integration process within context of the enlargement, is the essential requirement of convincing the European public of

⁴⁴ For an in-depth analysis on this provision, see DOBSON, *supra* note 29, 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 confused.

⁴⁵ For a similar argument on the role of religion within context of Turkey’s EU membership, see MAHLMANN, Matthias, “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.

⁴⁶ 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 30, p. 583.

⁴⁷ The views expressed in this part of the study draws on a previous study by the author. See BAYKAL, Sanem, “Turkey-European Union Relations: Converging or Drifting Apart-What Kind of A Common Future?”, *Ankara Papers*, No. 11, 2004, pp.1-76.

the indispensability and benefits of this process.⁴⁸ European public opinion on enlargement in general has been indifferent, but towards Turkey's accession in particular, has been far from favorable.

Indeed, the main obstacle to the smooth progress of Turkey's accession process emanates from the perceptions of the European public with regards to Turkey. The Europeans' negative attitudes towards Turkey often stem from their view that Turkey would be unable to conform to 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 accession would prove to be an insurmountable challenge.

Concerns about increased immigration, unemployment, organized crime, 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.⁴⁹ For Turkey, in particular, Meltem Müftüler Baç ascertains four factors that shape European public opinion towards Turkey's future accession: center of gravity, immigration, fear of increase in xenophobia/racism, and distribution of funds. Baç also points 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.⁵⁰

Turkey's relative backwardness in economic terms; its population, in terms of its essential attributes such 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; and 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 regarding Turkey's future prospects for EU membership. In that regard, the considerable

⁴⁸ SINNOTT, Richard, "Assessing the Implications of EU Enlargement for the Existing Member States: The Public Opinion Perspective", *EUI Working Papers RSCAS*, No. 2004/11, 2004.

⁴⁹ WALLACE, Helen, "Enlarging the European Union: Reflections on the Challenge of Analysis", *Journal of European Public Policy*, Vol. 9, No. 4, 2002, pp. 658-665; MÜFTÜLER BAÇ, Meltem *Enlarging the European Union: Where Does Turkey Stand?*, TESEV, 2002, available at <http://www.tesev.org.tr>.

⁵⁰ MÜFTÜLER BAÇ, *supra* note 49.

divergences among the individual Member States and their public opinion concerning Turkey's future membership should be noted.⁵¹ Be that as it may, those differences among 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 new members/candidates.

On the basis of these findings, it has to be pointed out that, at a time when the European Union is striving to bridge the gap between itself and its citizens, and for more democracy, participation and legitimacy, such unfavorable public opinion will be a crucial hindrance to 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.⁵² 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?"⁵³ However, more significant queries revolve around the normative premise and framework of such debate; the proper public discourse that should decide this question and the best way to secure these prerequisites and the outcomes.

The unfavorable public opinion regarding Turkey's membership has already started to influence the direction of the integration process. In the Member States that conducted 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.⁵⁴ 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

⁵¹ For differences amongst the Member States on the basis of their particular policy priorities and concerns over Turkey's future membership, see MÜFTÜLER BAÇ, *supra* note 49.

⁵² KUMM, *supra* note 35, 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 exists a "thick" identity in Europe, as Kumm suggests, remains a debatable assertion.

⁵³ WALKER, *supra* note 36, p. 377.

⁵⁴ See, e.g., BIANCHERI, Franck, "Comment: The Day the Commission Torpedoes the Constitution?", *EUobserver* at <http://www.euobserver.com/?aid=17362&sid=9>.

Constitutional Treaty, the reaction of the politicians was far away from reflecting this fact.⁵⁵ Even before the constitutional referendums, in order to appease their public opinions, Austria and France had already committed themselves to a public vote on Turkish accession “when the time comes.”⁵⁶

The normative legitimacy of a referendum only for Turkey's accession would be contentious only 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, reinforces the perception that the Europeans perceive their own identity as a coming together on the basis of some thick commonalities premised on common values, while 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 possibility 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, completed the accession negotiations, and even signed an accession treaty with the Union, would be the rejection 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

⁵⁵ 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.

⁵⁶ 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 35, p. 324.

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 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

Thick or thin, exclusive or inclusive, based on "European" or universal values, the forging of a "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 that context, the only normative and viable identity for the Union would be 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 distinguishing characteristics 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".

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 perceptions 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.