INTRODUCTION

On 1 May 2004, the European Union embarked on a historic and in many respects unprecedented expansion. It admitted ten new countries, predominantly from Central and Eastern Europe (CEE) which, for half a century, had been separated by the Iron Curtain. One of many aspects that make this enlargement special is that the acceding countries regained their sovereignty only a little more than a decade ago. In response to a painful past, the new constitutions of Central and Eastern Europe accord a prominent status to sovereignty and independence, and were notably closed to the transfer of powers to international organisations. In order to join the European Union (EU), these constitutions therefore needed to be 'opened up', and the countries engaged into a major process of constitutional revision to enable the transfer of a part of their sovereignty to a highly integrated supranational organisation. This proved to be a sensitive and controversial exercise, not least because unlike previous enlargements, these countries joined at a time when the EU has been engaged in a major constitutional reform involving on occasions federal undertones. This book explores the amendments against the background of comparative experience and theory of sovereignty, as well as in the context of political sensitivities, such as rising euroscepticism ahead of accession referendums. It also undertakes a broader inquiry into the role and rationale of the national constitutions in the process of European integration, as well as exploring the implications of the European Constitution.

The book is divided into ten chapters. It starts by outlining the background of the enlargement process. Chapter 2 explores the experience of the 'old' Member States in adapting their constitutions to the demands of EU membership, in order to provide a point of reference to the developments in the accession countries. Chapter 3 highlights some idiosyncrasies of the new constitutions of Central and Eastern Europe: their protective stance towards sovereignty, and their detailed and up-to-date character and prominent role in CEE legal orders. These features set the context for the discussion of constitutional developments regarding European

integration in the subsequent chapters. In chapter 4, the pre-accession adaptations, which usually have been addressed in terms of technicalities of harmonisation and negotiations, will be explored through the broader lens of sovereignty and legitimacy. Showing that the legislative activity of CEE countries in the preceding years has largely been dominated by taking over EU legislation, the chapter draws attention to the paradox that the candidate countries appeared to regain some of their sovereignty upon accession, as they started to participate in the EU's decision-making process. Of particular interest to chapter 4 will be the Europe Agreement Decision of the Hungarian Constitutional Court, where judicial harmonisation during the pre-accession period was found to require a prior constitutional amendment.

The centre of gravity of the book lies in chapter 5, which explores the constitutional amendment debates in individual countries. In order to get a full feel of the factors that influenced the outcome of the amendment process, this chapter should be read together with chapter 7, which discusses the sensitivities surrounding the then imminent accession referendums. These included the popular sentiments about the delegation of sovereignty, widespread euroscepticism in a number of candidate countries and previous experience with invalid referendums resulting from insufficient turnout rates. In order to avoid exacerbating the situation, it was important to keep the constitutional amendments to a minimum, as a wider range of amendments pertaining to the EU's effects upon sovereign governance could have become a dangerous tool in the hands of eurosceptic movements. Besides the shadow of accession referendums, the amendments were also influenced by the constitutional theory in the region, which is explored in chapter 6. That chapter shows that the constitutional theory in Central and Eastern Europe has been underpinned by the traditional paradigm of sovereign nation-state, and the EU has until recently been portrayed as an international organisation. Concluding that as a result of the above factors, the amendments in the CEE constitutions remained relatively minimal, the final part of chapter 5 discusses how this relates to the rationale of constitutions, in the light of the debate about a 'European deficit' in the constitutions of the 'old' Member States.

In chapter 8, the focus turns to the constitutional aspects regarding membership in other international organisations. This will complement the overall discussion of EU membership by offering a point of comparison with constitutional experiences in organisations of more traditional nature, such as NATO.

The penultimate chapter thereafter explores the role of the constitutional courts of the accession countries. Given that constitutional challenges to the supremacy of EU law have mainly originated from those countries that have a constitutional court, the chapter assesses how the advent of new 'activist' constitutional courts may affect the old dispute over who is the ultimate judicial arbiter in the EU – the European Court of Justice (ECJ) or the national constitutional courts.

The final chapter undertakes an analysis of the broader implications of the European Constitution for national constitutions and sovereignty. The European Constitution will be assessed in the light of constitutional boundaries set to European integration by the highest national courts, especially by the German Constitutional Court in the *Maastricht* decision. Taking a post-national approach to the notion of constitution, the chapter contends that the new basic document has a constitutional nature, and, combined with previous steps of integration, it appears to strengthen the case for revising the concept of sovereignty.

The text in principle covers events occurring up to the day of accession, 1 May 2004, but on occasions some subsequent developments will be mentioned, including the final changes to the European Constitution made by the Intergovernmental Conference in June 2004. It should be noted at the outset that the book deals with the eight accession countries of Central and Eastern Europe – Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Estonia, Latvia and Lithuania. In addition, it will include Romania and Bulgaria, the two candidate countries which started accession negotiations simultaneously with the other applicants but are expected to join in 2007 at the earliest. The two remaining accession countries, Malta and Cyprus, are not dealt with in this book due to their different constitutional background.

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1

Overview of the accession process

The European Union's enlargement that took place on 1 May 2004 is in many respects unprecedented.[1] First and foremost, its sheer scale outnumbers previous enlargements – twelve countries were in the process of accession negotiations, and ten countries have joined: Poland, Hungary, the Czech Republic and Slovakia from the so-called Vishegrad block; Estonia, Latvia and Lithuania from the Baltic region; Slovenia from the former Yugoslavia; and Malta and Cyprus from the Mediterranean. In previous rounds of enlargement, up to three countries have joined at a time: the United Kingdom, Ireland and Denmark in 1973; Greece in 1980; Portugal and Spain in 1986; and Austria, Sweden and Finland in 1995. Further, this enlargement has immense political significance as 'a reunification of Europe':[2] the enlargement project aims to rectify historical injustice for countries that had suffered under the Soviet yoke, and bolster the zone of political stability and security in Europe. Unlike past enlargement practice, a pre-accession process of 'unprecedented length and complexity' was designed, involving a sophisticated set of pre-accession instruments, strategies and policies.[3]

For the CEE accession countries, membership of the European Union, along with joining NATO, has formed the main foreign policy goal since the breakdown of the Communist regime. Although in the early years

[1] See on enlargement e.g. M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press, 2003); A. Ott and K. Inglis (eds.), *Handbook on European Enlargement* (T. M. C. Asser Press, The Hague, 2002); C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart, Oxford, 2004); H. Grabbe and K. Hughes, *Eastward Enlargement of the European Union* (The Royal Institute of International Affairs, London, 1998); P. C. Müller-Graff (ed.), *East Central Europe and the European Union: From Europe Agreements to a Member Status* (Nomos, Baden-Baden, 1997); S. Nello and K. Smith, *The European Union and Central and Eastern Europe: The Implications of Enlargement in Stages* (Ashgate, Aldershot, 1998); M. Maresceau (ed.), *Enlarging the European Union: Relations Between the EU and Central and Eastern Europe* (Longman, London and New York, 1997).

[2] M. Cremona, 'Introduction' in Cremona, *Enlargement of the European Union*, p. 2.

[3] *Ibid.*, p. 2.

EU membership was not a self-evident path, and alternative relationships, such as forming an economic area or a loose form of confederation, were offered by the EU's leaders, the CEE countries insisted on the prospect of full membership in order to avoid remaining in a geopolitical 'grey zone'. The prospect of enlargement was ultimately opened in the Copenhagen Summit of the European Council in June 1993. In that summit, a threefold set of criteria, widely known as the 'Copenhagen Criteria', were defined for membership.[4] The first criterion is a political one, requiring demonstration of stability of institutions that guarantee democracy, rule of law, human rights and the protection of minorities. Secondly, there is the economic criterion, under which a country must be a functioning market economy, able to cope with competitive pressures and market forces within the EU. The third was a legal criterion, according to which the country must be able to take on the obligations of membership, that is harmonise its national law with more than 80,000 pages of the so-called *acquis*, the entire body of Community law. The possibility of accession was further defined in Article O of the Maastricht Treaty (TEU), which provides that 'any European State may apply to become a member of the Union'.

Based on Article O TEU, Hungary and Poland opened the chain of submitting accession applications in the spring of 1994, followed in the next couple of years by the other countries. The preparations for accession started with a comprehensive 'screening' of the national legislation with regard to its compatibility with EU *acquis*. This was followed by a gigantic task of harmonisation (sometimes termed approximation) of national law with EU law. A set of 'pre-accession instruments' or so-called 'conditionality documents', including the White Paper and the Accession Partnerships, were developed by the EU to assist the countries in their adaptations, providing at the same time a basis for the Commission's supervision over the meeting of the obligations. Since 1997, the Commission regularly assessed the process of harmonisation in its annual Progress Reports. It is interesting to note that the pre-accession strategies were specifically designed for the eastward enlargement. According to the Commission, these are unnecessary should, for instance, Switzerland or Norway want to become EU members, since they 'already meet all of the membership criteria'.[5]

[4] Bull. EC 6–1993, Pt I.12–13.

[5] See European Commission, 1999 Composite Paper, Reports on Progress Towards Accession by Each of the Candidate Countries, COM (1999)500 final, 13 October 1999, p. 2, cited in M. Maresceau, 'Pre-Accession' in Cremona, *Enlargement of the European Union*, p. 11.

The central basis of the relationships between the EU and the CEE candidate countries in the pre-accession period has lain in the Association Agreements or so-called Europe Agreements.[6] These Agreements established an association between the EU and individual countries, and aimed to help the countries to achieve their goal of EU membership. Initially designed by the Commission as an alternative to accession, the Europe Agreements gradually evolved towards the main vehicle for accession. The Agreements, alongside the pre-accession instruments and the complex process of legal adaptations, will be explored in more detail in chapter 4.

In July 1997, the Commission recommended in its Opinions attached to the *Agenda 2000* to commence accession negotiations with five CEE countries – Hungary, Poland, the Czech Republic, Slovenia and Estonia – as well as with Cyprus. Although none of the Central and Eastern European applicants were found to fully satisfy the Copenhagen Criteria, the Commission was of the view that the selected countries would be able to meet the conditions in the medium term. The invitation was confirmed by the Luxembourg European Council, after which the negotiations were formally opened on 30 March 1998 under the UK Presidency. The second round of countries were invited to join the accession negotiations in December 1999 in the Helsinki European Council; the negotiations were opened in February 2000. This group consisted of Slovakia, Latvia, Lithuania, Romania and Bulgaria, as well as Malta. In the course of accession negotiations, which were structured along thirty-one so-called 'negotiation chapters', the terms of adoption, implementation and enforcement of the *acquis* were agreed, as well as exceptions and transition periods.

In October 2002, the European Commission recommended to admit to the EU eight candidate countries from CEE, plus Cyprus and Malta. Bulgaria and Romania were expected to achieve their EU-readiness as of 2007 onwards. Following Ireland's approval of the Nice Treaty in the notorious second referendum in October 2002, the European Council announced in its Brussels Summit the biggest enlargement in the EU's history. The Accession Treaties were signed on 16 April 2003 in the European Council Summit in Athens, and were then submitted to the Member States and to the candidate countries for ratification. In the latter, the ratification

[6] Europe Agreement with Hungary (OJ 1993, L347/1), Poland (OJ 1993, L348/1), Romania (OJ 1994, L357/1), Bulgaria (OJ 1994, L358/1), Slovakia (OJ 1994, L359/1), the Czech Republic (OJ 1994, L360/1), Latvia (OJ 1998, L26), Lithuania (OJ 1998, L51), Estonia (OJ 1998, L68) and Slovenia (OJ 1999, L51).

involved the adaptation of national constitutions and the holding of accession referendums, which will be the key topic of this book.

As already mentioned, the process of expansion is set to continue. Romania and Bulgaria are continuing negotiations, and are expected to enter the EU from 2007 onwards. These two countries have been joined by Croatia, which submitted its application for accession in February 2003, and has completed the so-called 'screening process'. Turkey continues on the waiting list, although its Association Agreement was concluded already in 1963, and it formally applied for EC membership in 1987. In the Helsinki European Council of 1999, Turkey was finally granted the status of a candidate country; however, negotiations will not be opened until the country is found to meet the political criteria for accession. The controversies surrounding Turkey's membership notoriously include it being an Islamic (albeit a secular) country; its territory being partly in Europe but predominantly in Asia; its size – with almost 68 million people it would be the second biggest country after Germany; and a troublesome albeit improving record of human rights protection.

Last but not least, it should be noted that enlargement has motivated political and economic change not just in the candidate countries: the incentive of potential future membership has equally proved a powerful tool for economic and political reforms in the neighbouring countries.[7] This is especially the case with the troubled region of the Western Balkans.

[7] See in more detail M. A. Vachudova, 'Strategies for Democratization and European Integration in the Balkans' in Cremona, *Enlargement of the European Union*, pp. 141–60, and K. Smith, 'The Evolution and Application of EU Membership Conditionality' in Cremona, *Enlargement of the European Union*, pp. 105–40.

2

Constitutional adaptations in the 'old' Member States

Transfer of sovereign powers: main models

The cornerstone of national constitutions is the idea that sovereignty is vested in the people. Accordingly, national constitutions establish the *pouvoir constituant*'s agreement as to how sovereign powers are distributed and exercised in the state, and embody the idea that no supreme power can be imposed outside the constitutionally established mechanisms. The first exception to this principle was the application of international law in internal legal orders: the Permanent Court of International Justice established in its *Wimbledon* decision of 1923 that obligations undertaken by states under international treaties do not harm sovereignty but are its attribute.[1] In 1951, a number of European countries decided to yield sovereign powers to supranational institutions by creating the European Coal and Steel Community. To legitimise such a step, France, Germany and Italy relied on the provisions permitting limitations of sovereignty or the transfer of sovereign powers to international organisations, which had been introduced in the post-War constitutions. The Benelux countries introduced similar provisions some years after entering into ECSC or EEC.[2] As new treaties were concluded and more countries joined, the picture of constitutional authorisation for European integration became more diverse. In particular, the Maastricht Treaty led in many countries to the introduction of provisions on transfer of powers to the EU, and to amendments concerning various specific aspects of EU membership. Since a number of comprehensive and insightful accounts about the adjustment of the constitutions for EU membership in individual

[1] *S. S. Wimbledon*, PCIJ, Ser. A No. 1 (1923) 25.

[2] The Netherlands amended the Constitution in this respect in 1953, Luxembourg in 1956 and Belgium in 1970. See in more detail on the original six Member States, B. De Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?' in A. Kellermann, J. De Zwaan and J. Czuczai (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (Asser Press, The Hague, 2001), p. 65 *et seq.*

Member States are available elsewhere,[3] this chapter seeks to chart some overarching trends and developments. It will first explore the way in which the delegation of sovereign powers has been accommodated, coming then to amendments pertaining to various specific aspects of EU membership.[4]

Although the experience amongst the 'old' Member States is rather diverse, four broader models for accommodating EU integration in the national constitutions could be distinguished:[5]

- constitutions which contain an explicit provision on delegating powers to the European Union and, in addition, have been comprehensively revised in respect of various specific aspects of EU membership (Germany, France, Austria, Portugal);
- constitutions which contain an explicit provision on delegating powers to the European Union, and some other provisions concerning EU membership (Ireland, Sweden, Greece);
- constitutions where EU membership has been accommodated under a broader clause on international organisations, but some amendments have been made concerning specific aspects of EU membership (Finland, Belgium, Italy, Spain);
- constitutions that are silent on the European Union, accommodating its membership under provisions on international organisations (Denmark, Luxembourg, the Netherlands).

The first and second groups consist of those constitutions which contain explicit provisions on the delegation or transfer of powers to the European Union, the difference lying in the level of comprehensiveness of EU regulation in these constitutions. France, Germany and Portugal

[3] See for the constitutional adaptations in individual countries, e.g. J. Rideau (ed.), *États Membres de l'Union Européenne: Adaptations, mutations, résistances* (LGDJ, Paris, 1997), and Kellermann, De Zwaan and Czuczai, *EU Enlargement*. For a comparative overview see A. Jüränki, 'Transferring Powers of a Nation-State to International Organisations: The Doctrine of Sovereignty Revisited' in A. Jüränki (ed.), *National Constitutions in the Era of Integration* (Kluwer Law International, The Hague, 1999), pp. 61–85; P. Mabaka, 'L'Europe dans le droit constitutionnel positif des Etats' in J. Ziller (ed.), *L'européanisation des droits constitutionnels à la lumière de la Constitution pour l'Europe* (L'Harmattan, Paris, 2003), pp. 25–38.

[4] Updated English versions of the constitutions are available at the website 'Consolidating European Public Law', European University Institute, Florence, www.iue.it/OnlineProjects/LAW/conseulaw/

[5] See also, for a broadly similar typology, F. Jacobs, 'The Constitutional Impact of the Forthcoming Enlargement of the EU: What Can Be Learnt from the Experience of the Existing Member States?' in Kellermann, De Zwaan and Czuczai, *EU Enlargement*, p. 189.