

## Guest Editorial

### THAT OTHER ANNIVERSARY

In the shadow of the grand celebrations of the 60<sup>th</sup> anniversary of the EU and its progenitors, the year 2017 marks another anniversary that is rarely noted, hardly celebrated, scarcely realised. The year 2007, with the accession by Bulgaria and Romania, marked the completion of the biggest and most politically significant enlargement of the EU. With some notable exceptions, each of which is explainable by different reasons (Ukraine, Moldova, Belarus, and post-Yugoslav states with the exception of Slovenia and now also Croatia), the East-West divide, which plagued the Continent after (and as a result of) the Second World War, has been formally and (let us hope) conclusively terminated. The Iron Curtain has been replaced by Schengen-friendly non-borders.

The Great Enlargement of 2004-2007 had many dimensions: economic, strategic, and yes, constitutional. Here, both in light of the author's interests and the profile of this journal, I will focus on the constitutional dimension only.

Constitutionally speaking, the Great Enlargement affected both the EU itself and also the member states—in particular the new member states. Naturally, the enlargement compelled the EU institutions to prepare for the expanded constituency, by deciding about its changed composition, rules of voting etc. However, here I have in mind something less visible, but deeper and more significant. For one thing, there is a clear parallelism between the enlargement towards the East of the continent, and reflection within the EU upon its deepest constitutional values. As Neil Walker succinctly put it: 'the very constitutional ideals that have facilitated the enlargement process are also those which are crucial to the present policy-building phase of the EU in nurturing the sense of a common identity and of a community of attachment on which the legitimacy of the polity rests'.<sup>1</sup>

Why would the enlargement generate reflection on the 'constitutional ideals' to which Walker referred? Most generally, we are unable to understand the broad

<sup>1</sup> Neil Walker, 'Central Europe's Second Constitutional Transition: The EU Accession Phase', in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds.), *Rethinking the Rule of Law after Communism* (CEU Press 2005) p. 341 at p. 356.

move of the EU towards enlargement – with all the risks and challenges attached, some of which became painfully clear in recent years – unless we understand it as a process by which the norms, spelled out in the Treaties of Rome until Maastricht, have acquired a *constitutional* life that is binding on their authors and their successors. Enlargement of the EU towards the East was not only – and not even primarily – the result of a strict calculus of costs and benefits, with the decision of enlargement resulting from a net benefit of such a move. Rather, the decision echoed the strong resonance between the asserted norms and values of a polity that the EU became by 2004 and the norms proclaimed by the candidate states.

Constitutional scholarship on the EU has a tradition of complaining that the discourse about values is subdued and overshadowed by technical legal discussion. One may recall the complaint made by Joseph Weiler that ‘The Europe of Maastricht suffers from a crisis of ideals’, in contrast with the Community’s early years when ‘the very idea of the Community was associated with a set of values which ... could captivate the imagination’.<sup>2</sup> The complaint was largely justified: the post-Second World War pan-European polity stands for *some* values, and crowding these values with language of subsidiarity, supremacy of Community law, majority voting in the Council or agricultural quotas contributes to the alienation of real-life communities from the European project. The enlargement to the East offered a new lease on life to the Europe of values, and assisted – to use Weiler’s words again, although uttered in a different context – to ‘(re)introduce a discourse on ideals into the current debate on European integration’.<sup>3</sup> The pantheon of Europe’s iconic greats, already populated by figures such as Robert Schuman, Jean Monnet and Altiero Spinelli, was supplemented by the heroic figures of Vaclav Havel, Jacek Kuron, Tadeusz Mazowiecki and Bronisław Geremek. Each of them stood, and fought, for the very values that can be traced back to Robert Schuman’s and Winston Churchill’s political rationales for a united Europe.

The harmony between the original values underlying the European integration and the ideals of democracy, human rights and the rule of law under which the Central and Eastern European societies overturned state socialism could have infused the constitutional discourse within the EU with more open reflection on those fundamental values. Or so was the hope at the time. Note the parallels between the trajectories of eastward enlargement and of the increasing talk about the ‘Constitution for Europe’. The values underlying these processes are essentially the same, and while the ‘Constitution making’ process was also permeated by hubris and conceit, one should not be too cynical about the potential it carried for

<sup>2</sup>J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) p. 238-39.

<sup>3</sup>Id. at p. 239.

capturing the public imagination and contribution to the polity-building. There was idealism in the process too, and the link with the enlargement should not be disregarded.

The capital-C Constitutional debacle is known well enough that it does not need to be repeated here, but so is the fact that the Treaty of Lisbon borrowed much from the aborted Constitutional Treaty, minus the hubris. Importantly, after Lisbon the fundamental value statements in Article 2 are more elaborate, extensive and specific than under the old Article 6(2) TEU. These values – of ‘respect of human dignity, freedom, democracy, equality, the rule of law and respect of human rights, including the rights of persons belonging to minorities’ accompanied by the values asserted to be ‘common to the Member States’, namely ‘pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men’ – constitute the EU’s normative template, and can be seen at the same time as the main driver for the enlargement. The accession by 10 Central Eastern European states was powerfully idealistic in nature, promoting romantic ideals of a ‘return to Europe’ and pan-European solidarity. It was a timely reminder that the EU’s identity is based on values, and not just a calculus.

These values are translated into, and protected by, small-c constitutional instruments, and among them the two main inventions of the constitution-making process were the Charter of Fundamental Rights and the enhanced Article 7. The former delivered a standard constitutional canon for the protection of EU citizens’ rights – admittedly a fundamental ingredient of any constitutional structure. The latter provided a mechanism for sanctioning rogue sub-entities (in this case, member states) that departed from the common values and norms of the polity – an important element of any system of constitutional maintenance. Both have been tightly connected to the prospect of the eastward enlargement.

As far as the EU Charter of Fundamental Rights is concerned, the very prospect of the eastward enlargement provided an important incentive to endow the EU with a canonical catalogue of human rights. The Charter, as I argued elsewhere,<sup>4</sup> could have been seen to be a partial solution to the twin problems that arose in connection with the Copenhagen-based conditionality: double standards and the moving target. The ‘double standards’ problem consisted of the fact that the EU expected, through its political conditionality, more from the applicant states than from its own member states: the Copenhagen criteria, coined as they were for purposes of conditionality, were not fully mirrored in the Treaty requirements that applied to member states (consider minority rights). On the one hand, it might have been seen as tolerable (a club may demand anything it wants from applicants for membership, no matter what the requirements regarding the current members

<sup>4</sup>Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012) p. 55-80.

are), but on the other hand, it smacked of hypocrisy. The Charter removed the double standards. The ‘moving target’ problem, in turn, was related to the inherent indeterminacy of the Copenhagen criteria: they could be interpreted and manipulated in a way as to postpone the admission *ad calendas graecas*. The Charter ‘petrified’ the reasonably specific catalogue of rights, the fulfilment of which was expected of the successful candidates, and extended its reach to the entire constituency.

This is only one, and admittedly a highly iconoclastic, way of looking at the Charter, but it is not totally outlandish. In fact, in the process of drafting the Charter, the Commission stated that ‘the adoption of a catalogue of rights will make it possible to give a clear response to those who accuse the Union of employing one set of standards at external level and another internally’.<sup>5</sup> So while it would be preposterous to claim that it was the *main* motivation for adopting the Charter, there is little doubt that the prospect of the enlargement was an important agenda-setter for the elaboration and adoption of the Charter of Rights – a key constitutional step in the EU’s evolution. Similarly, there is little doubt that the adoption of the Charter was partly motivated by the prospect of admission of a number of new countries that had abysmal records as far as human rights were concerned: the Charter was not only a device for narrowing the gap between conditionality and the standards required of current member states, but also a way of strengthening and stabilising the meaning of rights within the EU in the face of prospective enlargement.

A second aspect of the enlargement-driven constitutionalisation of the EU, namely the enhancement of the Article 7 mechanism for sanctioning states that breach the fundamental values of the EU, is perhaps less obvious. After all, the sanctioning mechanism had already been introduced in the Amsterdam Treaty, well before the preparations for the eastward enlargement got underway. And yet, already at that stage, Article 7 (in its earlier iteration, confined to the sanctioning mechanism only) was occasionally viewed in the context of the prospect of the enlargement.<sup>6</sup> But, especially after the Haider debacle of 2000 when the Article was *not* activated at all (the sanctions were undertaken individually by 14 EU member states, and were followed by a report from ‘three wise men’ – a mechanism unknown to Article 7), it became clear that the ‘nuclear option’ of suspending voting rights in the Council is so radical, against the background of traditional EU norms of dealing with the recalcitrant states, that it is wildly unrealistic. At this stage, the accession of the candidate states from Central and Eastern Europe became a realistic prospect. The addition, by the Treaty of Nice, of a second, more moderate

<sup>5</sup> Commission Communication on the Charter of Fundamental Rights of the EU, 13 September 2000, COM(2000) 559 at 4.

<sup>6</sup> See Sadurski, *supra* n. 4, p. 81-84.

and hence realistic mechanism to Article 7, known as the preventive mechanism (for the determination of a clear *risk* of a serious breach of EU values, not followed by any sanctions), could therefore be seen, *apart from everything else*, as an act by which the EU was equipping itself with the means to properly respond to violations of the fundamental values of the EU (i.e. those later codified in Article 2 of the Lisbon Treaty; in its previous, paler version, Article 6 of the Amsterdam Treaty) in the face of accession by the states with low credibility in the areas of democracy, human rights, and the rule of law. And there is some evidence that this is the way that the enhancement of Article 7 *was* actually seen by the EU decision-makers at the time.<sup>7</sup> Soon after the Lisbon Treaty, the Commission issued an important Communication on 'Respect for and promotion of the values on which the Union is based', in which it stated quite unambiguously that 'at a time when the Union is about to enter on a new stage of development, with the forthcoming enlargement and the increased cultural, social and political diversity between Member States that will ensue, the Union institutions must consolidate their common approach to the defence of the Union values'.<sup>8</sup> Article 7, as enhanced in Nice, was explicitly described as a mechanism for such a 'defence'.

The significance of the enhanced mechanism for the constitutionalisation of the EU is high. It is plausible that a transnational system committed to human rights is not complete unless it imposes sanctions for non-compliance to be accompanied, optimally, by preventive mechanisms. Article 7 filled the gap, thus allowing the EU's claims that it is a community of values to be taken seriously, and that any serious violation of these values in a member state is a matter of legitimate concern to the EU as a whole. As such, Article 7 by its preventive and sanctioning mechanisms and accompanying effect as a deterrent, is an important aspect of EU constitutionalisation. Essentially blind to the limits of EU competence,<sup>9</sup> and applicable to member states' actions in all spheres which could be seen to impinge upon Article 2 values (and not merely when implementing Union law), Article 7 is a constitutional device par excellence. In this way, both the prospect and the fact of enlargement can be seen as significant agenda setters for the constitutionalisation of the EU.

But that was *then* and this is *now*. As it happens, the very apprehension that was an important factor triggering the inclusion and subsequent enhancement of Article 7, became an unfortunate reality in recent years in countries such as Hungary and Poland. What should, and what can, be done about this? Lately, an interesting and burgeoning scholarly literature has emerged, which studies the

<sup>7</sup> See Sadurski, *supra* n. 4, p. 86.

<sup>8</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on EU, 'Respect for and promotion of the values on which the Union is based', COM(2003) 606 final, Brussels 15 October 2003, at 4.

<sup>9</sup> See Sadurski, *supra* n. 4, p. 89-91.

various possible responses the EU could give to democratic backsliding in these two countries, and possibly more universal recipes for the future. The two polar extremes among those remedies are infringement actions lodged by the Commission with the European Court of Justice, and Article 7 actions. The former is feasible but relatively ineffective: you need *political* measures to deal with political infractions, and the Article 258 TFEU infringement procedure, even though occasionally applied in cases of systemic breaches, including one against Hungary, is basically tailored to specific violations that can be made good for the parties concerned by legal remedies. There seems to be a common view among scholars that ‘the Commission is limited in its ability to prosecute member state infringements of vague legal principles’.<sup>10</sup> In turn, the latter action, under Article 7, may be effective yet is not feasible (the requirement of unanimity for activation of the stronger option under Art 7 renders its use virtually unthinkable). Hence, a number of in-between measures has been contemplated and occasionally used. The idea of setting up a ‘Copenhagen Commission’ to apply the eponymous criteria to current member states,<sup>11</sup> and Kim Lane Scheppele’s idea of ‘systemic infringement’ actions,<sup>12</sup> are among the measures being contemplated. The rule-of-law framework activated by the Commission with respect to Poland in January 2016, is newly designed, and already thought of as a possible pre-Article 7 procedure, but also as valuable in its own right.<sup>13</sup> As Dimitry Kochenov and Laurent Pech note, the adoption of this new procedure ‘showed that the Commission finally understood the serious, if not existential, threat posed by the solidification of authoritarian regimes within the EU’.<sup>14</sup>

My own view is that the EU *should* activate the Article 7 procedure, regardless of and in addition to all the other procedural devices just mentioned. This is a matter of the EU’s own constitutional integrity. Some years ago Gráinne de Búrca said that, by including Article 7 in the Amsterdam Treaty, ‘the EU was asserting its own virtue and the virtue of its existing members, while simultaneously sending a note of

<sup>10</sup> Michael Blauberger and R. Daniel Kelemen, ‘Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU’, 24(3) *Journal of European Public Policy* (2017) p. 5, available at < dx.doi.org/10.1080/13501763.2016.1229357 >, visited 10 July 2017.

<sup>11</sup> Judith Sargentini and Aleksejs Dimitrovs, ‘The European Parliament’s Role: Towards New Copenhagen Criteria for Existing Member States?’, 54(5) *Journal of Common Market Studies* (2016) p. 1085 at p. 1088.

<sup>12</sup> See Kim Lane Scheppele, ‘Making Infringement Procedures More Effective: A Comment on Commission v. Hungary Case C-288/12 (8 April 2014) (Grand Chamber)’, *EUtopia Law*, 29 April 2014, < eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/ > visited 10 July 2017.

<sup>13</sup> See Dimitry Kochenov and Laurent Pech, ‘Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation’, 54(5) *Journal of Common Market Studies* (2016) p. 1062.

<sup>14</sup> *Id.* at p. 1066.

warning to the new and future candidate States to the east'.<sup>15</sup> De Búrca's references to virtue are perfectly appropriate: if we take the values which underlie European political integration seriously, then we must also be committed to the virtues displayed by people espousing democracy, human rights and the rule of law. If we see Article 7 (as I just argued we should) as an important aspect of EU constitutional structure, we must be committed to invoking it whenever there is reasonable suspicion that those values are seriously endangered. This time is now, and we find ourselves faced with an important test: either we take the constitutional virtues seriously (to use Professor de Búrca's language), or we fall back into the cynical, nihilist view that a constitution really does not matter. If this is the case, the (imperfectly codified) constitution of Europe would be bereft of all value.<sup>16</sup>

Once we make this fundamental choice, there must be a more pragmatic judgement about the path to be taken. That selection should be informed by considerations of expediency: which of the roadmaps designed in Article 7 is the most realistic, while at the same time maximising the clout of 'naming and shaming'? Clearly, the 'preventive' pathway of Section 1 is much more likely to succeed than the 'sanctioning' mechanism of Sections 2 and 3, since the former does not require, at any of its stages, unanimity, and because the procedure can also be initiated by the Parliament. (The procedure described in Sections 2 and 3 cannot be activated by the Parliament – which shows how dismissive of the Parliament the Treaty makers were.) And even though 'a clear risk of a serious breach' is a weaker characterisation than the existence of 'a serious and persistent breach', the reputational penalty is strong enough. As mentioned, there are several options for initiating the 'preventive' procedure: the most feasible and at the same time most efficient route (in terms of the reputational costs to a rogue country) would seem to be initiation by the European Parliament, which is one of the three entities, alongside one-third of the member states and the Commission, with the power to activate the procedure. The Parliament may provide the best forum for debate on democratic backsliding in these countries. Generally, the Parliament has a strong track record in the field of fundamental rights. Reports by its Committee on Civil Liberties, Justice and Home Affairs provide examples of serious and uncensored inquiry into various breaches, often viewed through the prism of Article 7.<sup>17</sup>

These debates may lead to greater understanding of the meaning of the fundamental values of the EU. True, there is no single definition of 'democracy', but certain minimum conditions are indisputable. By the same token, there is no

<sup>15</sup> Gráinne de Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union', 27 *Fordham International Law Journal* (2004) p. 679 at p. 696.

<sup>16</sup> See also Editorial 'Talking about European Democracy', 13 *EuConst* (2017) p. 207 at p. 217-220.

<sup>17</sup> See Sargentini and Dimitrovs, *supra* n. 11.

single meaning of the 'rule of law', although its narrowest connotation is rather uncontroversial: any state authority should, at the very least, respect its own laws, and in particular its own constitution. In this way, the Polish case is both milder and graver than the Hungarian one: milder because the illiberal changes are not constitutionally entrenched, and graver because it involves a systematic set of actions that violate binding constitutional law. In Poland, where the current government does not enjoy a majority capable of amending the constitution, *de facto* constitutional change is executed surreptitiously, through sub-constitutional statutes. The laws on the Constitutional Tribunal in particular, but also those on public media, assemblies, police, the judiciary etc. have significantly changed the Polish constitutional structure (and often, specific constitutional provisions, as is the case with the amendments to the statute on the National Council of the Judiciary) without changing the text of the constitution. In addition, a number of official actions and inactions have been in flagrant contravention of the existing constitution and lower laws (for instance, the failure by the government to publish judgments it did not like passed by the Constitutional Tribunal, or the refusal by the President to swear in certain judges properly elected to the Tribunal, in order to create vacancies for the 'judges' subsequently elected to their seats).

This scandalous assault upon the rule of law renders the Polish case more conducive to applying rule-of-law procedures, since international bodies will find violations of a country's own constitutional laws easier to frame than departures from standards of democracy, which can always be, rhetorically at least, portrayed by the rogue government as alien to the state's 'national identity'. This is not to say that the actions by the Polish government and legislative majority do not *also* adversely affect democracy and human rights: as the Venice Commission noted, the crippling of the Tribunal's effectiveness impairs democracy 'because of an absence of a central part of checks and balances' and human rights, because 'the access of individuals to the Constitutional tribunal could be slowed down to a level resulting in the denial of justice'.<sup>18</sup> But the 'rule of law' ingredient of the crisis is more readily discernible, and less controversial to portray, than impairments to democracy and human rights.

In Hungary, on the other hand, illiberal changes are largely entrenched by the new Constitution, which entered into effect on 1 January 2012 and which renders any future undoing, both in terms of its legal framework and the personnel of constitutional bodies, much more difficult. The Hungarian self-declared 'illiberal democracy' is designed to survive its creators. In this, and many other ways, it is more shrewd and ingenious than the Polish anti-constitutional manoeuvres.

<sup>18</sup> European Commission for Democracy through Law (Venice Commission), Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at the 126<sup>th</sup> Plenary Session (Venice, 11-12 March 2016) para. 138.

For instance, while Tribunal-packing in the Polish case was accomplished through a combination of plain violations of law and *de facto* statutory changes of the Constitution (which of course also amount to violations of law, but are somewhat more ‘sophisticated’), in the Hungarian case, Court-packing was effected visibly *lege artis*, through the constitutional text, by increasing the number of constitutional judges and by allowing the parliamentary majority to appoint new judges without any need to win the concurrence of the opposition. (One may also add that, from a political strategy point of view, Hungarian rulers are in a better position to influence the EU’s response because Fidesz, Victor Orbán’s party, belongs to the centre-right bloc European People’s Party group in the European Parliament, alongside many of the parties currently dominant in the ‘old’ member states).

Notwithstanding these differences – the significance of which must not be underestimated – there is an important basic similarity: both governments have transgressed the fundamental constitutional conditions of the EU, and must be reprimanded and urged to comply with the minimal requirements of democracy and the rule of law. Compliance with these conditions is an obligation that all governments of EU member states have undertaken voluntarily, and if the EU is to be a community of values, these values must be respected. If Article 7 is not used effectively in the present cases of democratic backsliding, the EU will show that it does not take its own constitutional values seriously.

There have been good reasons for the general reticence to use Article 7. First, it is a blunt instrument (even in its weaker, ‘preventive’ version) – in a community that avoids harsh language and sanctions directed at its own members. Voting against a fellow member state (and do note that every Article 7 pathway envisages, at a certain point, votes by other member states in the Council) is politically costly and may easily be portrayed as hostility towards the nation itself, rather than vis-à-vis the government of the breaching state. Second, it is a political instrument par excellence – in a community that is deeply legalised and where legal remedies are more privileged than political measures. Third, the Treaty requirement for the Union to respect ‘national identities inherent in [member states] fundamental structures, political and constitutional...’ (Article 4(2) TEU) *may* be seen to impose some constraints upon a collective call to action to an individual member State to align itself with a common European constitutional architecture: a consequence of that argument is that Article 4(2) would effectively render Article 2 (in conjunction with Article 7) meaningless. (The argument, while seductive, is weak even as a matter of textual interpretation of the Treaty: the Article 2 values are not closely replicated in Article 4(2)’s features of ‘national identities’: democracy, human rights, the rule of law and other values listed in Article 2 are said to be ‘common to the member States’ and as such, do not belong to the scope of features covered by separate ‘national identities’ which might be read as giving

effect to some iconoclastic readings of democracy, etc. In addition, Article 2, in contrast to Article 4, is explicitly cross-referenced in Article 7 which provides, at least on paper, an enforcement mechanism.) Fourth, there has been a view popular among EU decision-makers and scholars that Article 7 was never intended to be actually used, and that its role is epitomised by symbolism and deterrence;<sup>19</sup> the popular metaphor of a 'nuclear option' has reinforced this perception (the strategic role of nuclear weapons could be seen not in their use but in their very existence). Fifth, the procedures for bringing Article 7-based action to fruition are almost grotesquely complicated and excessively tough; hence, there is a strong disincentive to embark upon a road that is unlikely to lead to its destination. Sixth, there is always a lingering anxiety, in the collective European memory, that something like the 2000 response – now widely discredited – to the Haider affair may be repeated, and this, even notwithstanding the fact that the diplomatic response at the time was not an action by the EU, much less an action under Article 7.<sup>20</sup> Seventh, picking on certain member states may be viewed as a case of double standards and hypocrisy. No EU member state is immune from charges of transgression of the values proclaimed in Article 7: consider human rights violations by the United Kingdom in the Iraq war, and attacks on media freedom and pluralism elsewhere, removal of EU citizens of Roma background from the national territory, various legislative provisions allowing excessive governmental interference with independent authorities as well as with courts, etc. Almost every single constitutional 'sin' committed by Hungary and Poland has been prefigured, or echoed, by some other EU member state. But the *cumulative* effect of all these actions, well documented in the burgeoning academic literature on these two cases, matters a great deal and renders these two countries qualitatively different. That is why, in my view, activation of the Article 7 procedure (even with uncertain prospects for its completion) is now needed. Its benefits outweigh the reasons which have been argued against its use so far. The EU cannot look the other way when, for the first time in its history, two of its member states are manifestly sliding into illiberal, authoritarian regimes.

So, what is the constitutional significance of that *second* anniversary falling in 2017, in addition to the 60<sup>th</sup> anniversary of the Treaty of Rome: the anniversary of the grand enlargement of 2004-2007? To some, the recent democratic backlash is proof that the enlargement was premature and the post-communist states of Central and Eastern Europe were admitted too soon. As Amichai Magen suggests,

<sup>19</sup> Kochenov and Pech, *supra* n. 13, p. 1064.

<sup>20</sup> In his speech of 31 August 2015, *in the context of discussing the use of Article 7*, Frans Timmermans, the First Vice-President of the European Commission in charge of inter alia the rule of law, evoked the Haider spectre, saying that 'the case of Austria, with Jörg Haider's party joining the government, has weakened the EU's capacity to react in such a case. It was a political response which completely backfired....', cited by Kochenov and Pech, *supra* n. 13, p. 1067.

'the current crises, particularly in Hungary and Poland, represent a failure of the pre-accession strategy and amount to a poignant vindication of those who feared that some candidates' commitment to EU values was incomplete or shallow at the time of accession and in its aftermath'.<sup>21</sup> If he is right, it is a gloomy anniversary: one of failure, error, and mistake. It would certainly be silly to exclude the possibility of such a conclusion only in order not to spoil the joy of an anniversary, but it would perhaps be excessively pessimistic. The two 'problem cases' are specific to the countries involved in the degree of departure from democratic-liberal standards, while the democratic practices of the other new member states from Central and Eastern Europe do not deviate from the EU-wide norm. It can be speculated (and speculate is all that we are in a position to do regarding such counterfactual scenarios) that, without accession to the EU, several countries in the former Warsaw Bloc would have been much more fragile in their democratic structures. The accession, with an emphasis on the Copenhagen criteria, consolidated democratic resilience in the face of nationalistic and populist tendencies in countries such as Slovakia, Romania and the Baltic states. This democratic resilience was not a force that could have been taken for granted. The institutions (such as Ombudsman offices) were often built and empowered in direct response to conditionality requirements; members of the European parliament, coming from countries with weak parliamentary traditions, learned the rules of the democratic game; institutions and practices, such as independent central banks or civilian control over the army, were closely monitored by the Commission in the process of the accession negotiations.

In addition, both Poland and Hungary were in the forefront of the transition to democracy after 1989; democratic backsliding was not something that could have been anticipated at the time of the conclusion of accession negotiations. The anniversary is a good time to reflect upon what the EU can and should do about violations of such norms by current member states, but it must not be an occasion to re-evaluate the wisdom of the Grand Enlargement of 2004-2007.

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<sup>21</sup> Amichai Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law debate in the EU', 54(5) *Journal of Common Market Studies* (2016) p. 1050 at p. 1057.