The hypothesis being advanced is as follows: if the contribution of the new Member States to the framing of the constitution is marginalized from the outset, a commitment problem down stream is created. In other words, if they are not in at the rule making stage, how can they be expected to adhere to the rules later on? The CEECs do have participatory rights in the Council as a consequence of the accession Treaties, a position which also existed during the accession of Spain and Portugal. Casting our minds back to a previous wave of enlargement serves as a useful reminder of how quickly this process can occur. Spain and Portugal, for example, took part in the Inter Governmental Conference leading up to the adoption of the Single European Act in 1985 prior to having become full members. All that was done was that their signatures of the SEA were postponed until they acquired full membership. However, distinctions between old and new Member States were not made during the course of the IGC.[59]

Be that as it may, what is still unclear for many in the aftermath of the European Convention is what sorts of problems European constitutionalism must tackle and which problems it must leave to be resolved by the respective constitutional courts of the Member States. What can be accepted by the constitutional courts in certain cases can, however, be rejected in others, particularly in the face of the "moving target", so to speak of the competence question in the EU[60] and the eternally thorny issue of the corresponding division of powers between the EC and the Member States.[61] An example of dissent on behalf of the Hungarian Constitutional Court has already been cited in relation to competition law. However, the Hungarian Court has also been willing to consider international conventions as a constitutional obligation,[62] which have, as a result, repeatedly influenced its decisions such as those in the death penalty, agricultural land, the punishability of communist crimes and the statute of limitation, public data and information cases, to mention only a few.[63] The picture which begins to emerge is one where the issue of human rights

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[59] I am indebted to Professor Giuliano Amato for drawing my attention to this point at a conference held at the European Centre Natolin, Warsaw, Poland on January 31, February 1, 2003, entitled *Enlargement and the European Constitutional Process*.

[60] See Gràinne de Bùrca and Bruno de Witte, 'The Delimitation of Powers between the EU and its Member States', in Anthony Arnull and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union*, (Oxford: Oxford University Press, 2002).

[61] See the tobacco advertising ruling judgment of the European Court of Justice; Case C-376/98 *Germany* v. *European Parliament and Council* 2000, ECR-I-8419.

[62] See article 7(1) which provides that, "The legal system of the Republic of Hungary accepts the universally recognized rules and regulations of international law and harmonizes the internal laws and statutes of the country with the obligations assumed under international law".

[63] See generally I. Vörös, *Contextuality and Universality: Constitutional Borrowings on the Global Stage—the Hungarian View*, available at http://www/upenn.edu.

serves as a litmus test of adaptive capacity[64] despite the "stop valve" provided by the principle of subsidiarity now contained in article 5 (2) of the EC Treaty.[65]

3. CONSTITUTIONAL TOLERANCE

The experience of the constitutional discourse between the courts of the current Member States and the European Court of Justice has been varied. Whilst some constitutional courts have embraced a judicial dialogue underlined by mutuality, co-operation and co-ordination, as in the case of The Netherlands,[66] we have witnessed a number of voices of dissent, such as in the cases of the respective constitutional courts of Italy, Denmark and Spain.[67] The notable example is the German Federal Constitutional Court's jurisprudence concerning the impact of European integration on the German legal order in which the Federal Constitutional Court (FCC) has carved out a role for itself as guardian not only of the German constitution, but also of the identity—or "distinctiveness" of the German constitution and the human rights protection contained therein, which provides a useful case study of diversity and its impact on the constitutional cultures at the macro-level of the existing EU Member States.

3.1. Sovereignty, Rights and Macro-Diversity

In its *Solange I* decision,[68] the German Federal Constitutional Court (FCC) held that so long as ("*solange*") the EC did not provide adequate protection of basic rights, the (FCC) remained the ultimate arbiter concerning issues of human rights and would assess the level of protection afforded to human rights in *specific*[69] cases. In *Solange II*,[70] the EC was held to protect human rights in line with the protection of fundamental rights enshrined in the German Basic Law enabling the FCC to

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64 See generally Thomas King, 'The European Community and Human Rights in Eastern Europe', *Legal Issues of European Integration*, 23(1996), at pp. 93–125.

65 Taken in conjunction with Protocol 30. See generally Antonio Estella, *The EU Principle of Subsidiarity and Its Critique* (Oxford: Oxford University Press 2002).

66 Monica Claes and Bruno de Witte, "Report on The Netherlands" in Weiler *et al*., *supra* n. 7 at pp. 171–194.

67 For a general discussion of these cases see Franz Mayer, *Kompetenzüberschreitung und Letztentscheidung: Das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires Akte in Mehrebenensystemen. Eine rechtsvergleichende Betrachtung von Konflikten zwischen Gerichten am Beispiel der EU und der USA* (München: C H Beck 2000).

68 BVerfGE 37, 271.

69 Author's own emphasis. This next section draws on the author's own contribution to the *Columbia Journal of European Law*, "Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht"s Banana Judgment", 9 *CJEL* (2002), at p. 109.

70 BVerfGE 73, 339.

relax its jurisdictional hold over questions of basic rights. Accordingly, as long as the general level of protection was secured by the European Court of Justice, the FCC would not review the level in specific cases. The fundamental rights issue was not directly relevant for the *Maastricht*[71] judgment[72], however, one reading of the case[73] is that the FCC reaffirmed the position it adopted in *Solange II*, that is to say that the FCC would only look at general cases in the event of a decrease in the general level of human rights protection. It was this interpretation[74] of the *Maastricht* decision which was of particular significance regarding the FCC's most recent installment in its jurisprudence concerning European integration, namely, the *Banana* case[75] which was based on a challenge made by a group of third country banana importers[76] before a Frankfurt Administrative Court regarding the constitutionality of the conditions of trade for third countries imposed by virtue of an EU Regulation.[77]

According to the FCC in this case, fundamental rights in the European Communities, as the ECJ's decisions indicate, are sufficiently protected.[78] Moreover, this protection is commensurate with the protection guaranteed by the provisions of the German Basic Law. As long as this continues to be the case, the FCC shall not exercise its jurisdiction concerning the applicability of secondary EC law. The FCC shall therefore not review secondary EC law[79] unless the ECJ fails to protect fundamental rights to the degree envisaged in *Solange II*.[80]

The FCC's judgment was consistent with the provisions of the Basic Law. An amendment to the Basic Law (Article 23 (1) Sentence 1),[81] which was enacted

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71 BVerfGE 89, 155 or *Brunner v. European Union Treaty*, [1994] 1 Common Market Law Reports 57.

72 It is important to point out that the *Maastricht* decision was based on arguments concerning democratic legitimacy and competence-competence. The human rights nexus of the case is *obiter dicta* only.

73 Indeed, there are several. See, for example, Paul Kirchhof, 'The Balance of Powers Between National and European Institutions', *European Law Journal* 5 (1999), at p. 225.

74 A plethora of interpretations of the effect of the *Maastricht* decision were offered as regards the human rights issue.

75 Decision of June 7, 2000—2 BvL 1/97.

76 Referred to as the Atlanta Group.

77 In Germany, prior to the enactment of the regulation, the majority of the bananas on the market emanated from third countries.

78 The FCC was thereby reaffirmed its *Solange II* decision. See BVerfGE 73, 378–381.

79 Or "Solange dies so ist, wird das BVerfG seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht nicht mehr ausüben. Vorlagen von Normen des sekondären Gemeinschaftsrechts an das BVerfG sind deshalb unzulässig." Here the court cross referred to its Solange II decision. See BVerfGE 73, 339.

80 Above n. 79 at para 60.

81 As amended on 21 December 1992. Article 23 (1) of the Basic Law provides that, "(1) To realize a unified Europe, Germany participates in the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle

prior to both the *Maastricht* decision and the ratification of the Maastricht Treaty, provides constitutional limits to European integration. Thus, the EC Treaties and any secondary legislation arising therefrom should be read in the light of other provisions of the Basic Law, such as the provisions falling under the so-called "eternity clause"[82] which contains a reference to human dignity and the value of human life[83] as well as to the federal, democratic and social principles upon which the Federal Republic of Germany is founded.[84] The eternity clause provides that these principles may not be set aside by the legislature.[85]

The questions addressed in the *Maastricht* decision do, to some extent, overlap with those raised in the *Banana* case. The judgments are, however, by no means interchangeable. *Maastricht* concerned the issue of competence of the German state, under its constitution to ratify the Maastricht Treaty. By contrast, the *Banana* case was based on the issue of fundamental rights. Whereas these issues are substantively different, they both raise the question of the ultimate arbiter and by implication, the doctrine of sovereignty. It is of interest to note that the ease with which the FCC dealt with the human rights issue in a case which was essentially based on competence—albeit *obiter dicta*—was noticeably absent in the *Banana* case.[86] That is to say, that it elected not to address the issue of competence by way of *obiter dicta* in a case based on fundamental rights, a move which would have been in line with the tactics it adopted in its *Maastricht* decision.

What begins to emerge is a picture of the Court's power of definition in both framing and interpreting the central feature of the case.[87] Thus, whilst explicitly addressing fundamental rights protection, it has also implicitly developed its

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of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution. The federation can, for this purpose and with the consent of the Senate, delegate sovereign powers. Article 79 (2) & (3) is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorized."

82 Article 79 (III) of the Basic Law.

83 Article 1 of the Basic Law.

84 See Article 20 of the Basic Law.

85 In the event of conflict, the competing constitutional principles must be balanced in accordance with the principle of maximum effectiveness or "practical concordance". See Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (20th edn.) (Heidelberg: Müller 1995), at pp. 28,72. For a succinct yet informative outline of the applicability of Article 23 of the Basic Law, see Christoph Schmidt, 'From Pont d'Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law', in Piek Eeckhout and Takis Tridimas (eds.), *Yearbook of European Law*, 18 (1998), 415, 418–419.

86 See also BVerfG NJW 2000, 3124 and BVerfG EuZW 2001, 255.

87 An issue which I have drawn attention to elsewhere. See "Sovereignty über Alles: the (re) configuration of the German Legal Order", in Neil Walker (ed.), n. 11 above at 279.

"sovereignty jurisprudence" so to speak, based on a vision of itself as the ultimate guardian of the unity of the German state. The "Euro" decision is a further case in point[88] of a tactic which would be surmised thus: *sovereignty by any other name*. Interesting historical parallels arise, such as the German general strategy in 1948–1949 to regain full national sovereignty within parameters framed by military occupation by the Allies in which tactics were adopted to preserve as much national unity of the country as possible.[89] It is arguable that similar voices of dissent are likely to emerge post-accession, albeit in different contexts and within different legal cultural frameworks during the ongoing period of constitutional adjustment. The tension will possibly be accentuated by the power asymmetry which existed during the accession negotiations and which is again witnessed by the position of the CEECs in the Convention. Indeed, this is an issue which has been addressed in the context of referenda and the ratification of EU Treaties in the CEE. What is clear is that some issues may affect the CEE's more stringently than is the case for the current Member States, such as the case of minority rights.[90] Indeed, the issue of rights also provides a useful illustration of the issue of double standards in relation to the policy of political conditionality which exists between the EU and the candidate countries, the effect of which can be divisive.[91] Thus, for example, whereas the protection of minority rights was initially upheld in the Copenhagen criteria, it does not appear in article 6 (1) of the EU Treaty, giving rise to the situation where the CEECs have a more difficult and indeed more onerous burden to displace *vis-à-vis* human rights than the current EU Member States.[92] The Copenhagen criteria illustrate the phenomenon of human rights conditionality as a whole according to which the EU has compelled states to comply with procedural requirements such as human rights clauses which constitute a non-negotiable part of negotiating directives for Community agreements with third parties.[93]

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88 *Id*.

89 See Edmund Spevack, *Allied Control and German Freedom: American Political and Ideological Influences on the Framing of the West German Basic Law* (München: LIT Verlag 2001), at pp. 322–323.

90 See generally Wojciech Sadurski, 'Charter and Enlargement', *European Law Journal*, 8 (2002) 340.

91 See Andrew Williams, 'Enlargement of the Union and Human Rights Conditionality: a policy of distinction?', *European Law Review* 25 (2000), at p. 601.

92 See Bruno de Witte, 'Politics versus Law in the EU's Approach to Ethnic Minorities' in Jan Zielonka (ed.), *Europe Unbound. Enlarging and reshaping the boundaries of the European Union*, (London: Routledge 2002), at p. 137.

93 See, for example, the European Community's development relations with the Lomé countries (the Asian, Caribbean and Pacific or ACP countries) as originally established by Part IV of the Treaty of Rome whereby ACP products are granted preferential access to the Union on a non-reciprocal basis. The Contonou Agreement signed on 23 June 2000, which is the successor of Lomé IV, is a useful illustration of the increasing trend to include human rights clauses as part of the EU's external relations. See O.J. 2000 L 317/3 at Articles 8 and 9 and

This has been extended to formulating human rights as a precondition for EU membership.[94]

3.2. Sovereignty, Rights and Micro-Diversity

The challenge mounted by diversity must be regarded as being mainly two-fold. First, there is the *external* challenge of diversity which the CEECs face on joining the EU and the multiplication of legal fora which accompanies membership. Secondly, there is the *internal* challenge of diversity on the candidate countries. This entails *inter alia* an assessment of how different bundles of norms and regulations which protect ethnic minorities, such as the EU, the OSCE, the Council of Europe and the UN come into play giving rise to what I term "multi-jurisdictionality". The issue concerning the extent to which multi-jurisdictionality provides a means of coming to terms with the complex reality of communities divided along ethnic, religious and linguistic lines in the light of the challenge posed by EU enlargement must operate from a clear empirical basis in order to address the central question: can constitutionalism meet the heavy demands made upon it by diversity, particularly given that one of state constitutionalism's heavy biases is the drive of homogeneity and what James Tully has called the "Empire of Uniformity"?[95] The implications for individual functional fields such as Justice and Home Affairs, Immigration and ethno-linguistic minority rights issues as regards the viability of the EU constitutional framework are considerable, particularly concerning coming to terms with the fragmentation which diversity engenders.[96] Indeed, the impact of EU enlargement is predicated on the reconfiguration of law and politics through models of decentralization, for which state fixated accounts of constitutionalism arguably master neither the grammar, nor the language nor the nuance.[97]

4. ENLARGEMENT AND MULTI-LEVELED CONSTITUTIONALISM

Implementation of the *acquis* has a considerable impact on regions, in particular, administrative institutions such as, for example, local administrative courts which

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also Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community*, (Antwerp: Intersentia 2001).

94 See Manfred Nowak, 'Human Rights "Conditionality" in Relation to Entry to, and Full Participation in, the EU', in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford: Oxford University Press 1999), at p. 687.

95 See James Tully, *Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press 1995) at Chapt. 3.

96 Without, at the same time, sidestepping complexity through somewhat hackneyed recourse to conceptualizations of the Empire: Michael Hardt and Toni Negri, *Empire*, (Cambridge: Harvard University Press 2000).

97 See Neil Walker, 'The Idea of Constitutional Pluralism', *Modern Law Review*, 65 (2002), at p. 317.

act as its gatekeepers. The recognition of rights which arise as a consequence of EC law is dependent on knowledge of EC law as well as the willingness of these judges to apply it, both of which are essential as a means of ensuring meaningful access to EC law. The experience gained in some current Member States is sobering with reports of both knowledge and access being poor which has culminated in an appeal for judges and for legal practitioners to acquaint themselves with the EC treaties.[98] Can we expect the same trend in the CEE states post-accession? Support has been construed as depending on a level of awareness. This requires what has been referred to as *cognitive mobilization*, namely, whereby a citizen is integrated into modern organizations and extensive communication networks through social learning,[99] of which there is, as yet, little sign in the case of local and regional elites in the CEECs.[100] The higher the awareness, the more supportive a citizen becomes of the dominant values, expectations and institutions of a political community. Case studies of the preliminary reference procedure (art. 234 EC Treaty) such as the one conducted by Stone Sweet[101] are essential in order to track the process of constitutionalization, which is jeopardized by threats to uniform application of EU law in the face of decentralized Community courts where the conditions under which national courts must refer preliminary questions are too lax.[102] Lest it be forgotten, European law was instrumental in promoting cooperation and in enacting concrete standards of behaviour. However, the main, if not dominant, actors of the promotion of European integration through the medium of law have been the judges of the European Court of Justice.[103] Less is known, empirically speaking, of the case of the courts of the Member States. However, the regional level is where the dynamics of constitutional adjustment can best be tracked, particularly given the interventionism which is instrumentalised at the regional level.

The use of economic leverage channeled through the PHARE (Assistance for Economic Restructuring Poland and Hungary) program, for instance,[104] in order to support the institutionalization of regional policies of the CEECs is a useful case in

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98 Sacha Prechal, 'National Courts in European Constitution', Paper given at a conference at the European University Institute, The Emerging Constitution of the European Union on April 19 and 20, 2002, which deals with the position in The Netherlands.

99 See Robert Inglewood, *Culture Shift* (Princeton: Princeton University Press 1990), at p. 377.

100 James Hughes, Gwendolyn Sasse and Claire Gordon, 'Saying "Maybe" to the "Return to Europe": Elites and the Political Space for Euroscepticism in Central and Eastern Europe', *European Union Politics*, 3 (2002).

101 See Data Set on Preliminary References in EC Law (1961–1998), Robert Schuman Centre, European University Institute, 1999, available http://www.iue.it/RSC/RSC_TOOLS/.

102 See Anthony Arnull, Modernising "Community Courts", *Cambridge Yearbook of European Legal Studies*, 3 (2000), at pp. 37, 62.

103 See Miguel Poiares Maduro, *We, the Court. The European Court of Justice & the European Economic Constitution* (Oxford: Hart Publishing 1998).

104 Council Regulation (EEC) No. 3906/89 of 18 December 1989, O.J. L375/11 as last amended by Regulation (EC) No. 753/96, O.J. 1996 L 103/5.

point. Thus, for example, the Hungarian government's use of PHARE assistance to elaborate and explore a legal-institutional arrangement of EU compatible regional policy making laid the foundations of the 1996 law on Regional Development in Hungary. To this extent, constitutional lawyers should broaden their perspective to include an appraisal of the impact of the implementation of the *acquis* at the regional level and the consequences for the judicature in a decentralized sense. This entails a multi-leveled evaluation of decisions of courts—that is to say, not only the highest courts seized of the matter as well as an assessment of the behavior of the legal elites, in a broad sense. Thus, for example, *La Doctrine*, which has been referred to by some as being composed of professors of public, European and international law including former and future justices[105] should surely also include legal elites from a broader scope, that is to say, the elites who staff the local courts and other administrative bodies in order to address the following: to what extent does the evidence of negative public opinion towards EU membership in the CEECs foretell a story of the period of post-accession?[106] Can such evidence be found amongst the legal elites and if so, what effect will it have on the process of constitutional adjustment? In other words, to what extent, if at all, will it affect the willingness of the legal elites to implement the *acquis*, both in substance and in form? The legal elites will have to be persuaded not only to work within the new system of rules which the *acquis* engenders but also there will have to be an incentive and indeed a motivation for them to do so.

Whether the ultimate arbiter constitutional discourse of dissent will be reproduced in the candidate countries depends on how supranational law is framed in the respective constitutions and how it is viewed from the perspective of lawyers who apply the norms arising therefrom. For example, in the case of Slovakia, the 1999 Slovak Language law which regulates the language use of national minorities in Slovakia in their "official contacts" with local self-governments,[107] is not only full of inconsistencies and contradictions,[108] but provides a high threshold (of 20%) for it to be applied.[109] Whereas it has satisfied the conditionality imposed the EU accession process, internally, the law has divided both Slovak nationalists and

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[105] See Julianne Kokott, 'Report on Germany' above n. 7 at p. 79.

[106] Comments made by the former Polish minister for European affairs, Jacek Saryusz-Wolski reported by EU Observer on April 22, 2002. See http://www.euobserver.com.

[107] Such as having all correspondence between the local and state administration in the minority language (article 2(3)) with the exception of public documents, the distribution of official forms of the local administrative bodies in a minority language upon request (see Article 2(6), to conduct meetings of the local administrative bodies in a minority language only with the consent of all present (see Article 3(1)).

[108] For example, no definitions of "official contacts" (Article 2(1)) or of "public documents" (Article 2(3)) is given.

[109] Thus, minority language use in official contacts is restricted to those municipalities where minorities constitute according to the last census at least 20% of the inhabitants of a municipality (see Article 2(1)).

ethnic-Hungarians alike. Needless to say that the Nationalists are well represented by elites which staff the state and local administrative institutions. The same cannot be said of the case of the ethnic-Hungarians. Both cases illustrate the issue of formal implementation triumphing over substantive implementation. They also show how dependent recognition of rights are on elites, who, as in the case of the CEECs have had to re-learn political support in relation to a new regime in the age of transition post-1989 and currently, as regards the EU in the accession process. Both elites and citizens in these new democracies have spent most of their lives under an undemocratic regime.[110] A corollary to willingness to implement the *acquis* by the legal elites is the reception and recognition of the norms by citizens. In addressing this question, one must bear in mind that legal elites have a low standing in the CEECs due to the fact that law was traditionally politicized and was subject to the administration of political power. Capacity is often seen in terms of physical capacity like resources, personnel and structures. Capacity is also, however, about skill assets, training and trust.

4.1. Allegiance and Trust

If one supports the tendency by scholars to equate political legitimacy with political support, it follows that one must also consider the distinction between two types of support, namely, specific and diffuse support. Briefly stated, the former refers to a set of attitudes towards institutions based on the fulfillment of expectations of politics or actions. The latter is more contentious given that every citizen will disagree with, dislike or distrust the policies of political institutions. However, whilst they may disagree with the actions of these institutions, they may nonetheless concede its authority as a political decision maker. The importance of maintaining the allegiance of the People to the source of political power emphasizes the relational aspect of sovereignty to the extent that it represents the quality of the political relationship that is formed between the state and the people and is thereby tied up with the notion of political power and public law. Trust of the citizens is essential in order to maintain state sovereignty.[111] The very notion of sovereignty as operating at the state level to sustain the affiliation of the citizen is clearly an argument in favor of the Nation State which sees the transfer of sovereignty to supranational instances as weakening the affiliation of the citizen, an issue which is repeatedly discussed in the multiple citizenship discourse, and also the debates, such as those leading up to the reforms of the Citizenship laws in Germany concerning the concept of dual

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[110] See William Mishler and Richard Rose, 'Learning and re-learning regime support: The dynamics of post-communist regimes', *European Journal of Political Research*, 41 (2002), at p. 5.

[111] See Martin Loughlin, 'Ten Tenets of Sovereignty', in Walker, above n. 11 at p. 55.

citizenship.[112] My contention is that if one regards sovereignty of the Nation State as being pooled by virtue of European and International obligations that this also gives rise to the following corollary, which goes to the heart of the issue of democratic legitimacy and consent, namely, trust is also "pooled", or "qualified" or "lost"—depending on whichever way one regards the effect of European integration on the sovereignty of the Member States.[113] Whether sovereignty resides at the level of the Nation State or elsewhere is largely irrelevant. What is important is that sovereignty *exists*. It will, by nature, command affiliation and trust. The level at which sovereignty resides is irrelevant to the affiliation of the trust of the citizen because sovereignty is intrinsic to whether citizens feel confident that states perform certain duties and the citizens feel comfortable with the obligations. Drawing on performance theories, the following expectation can be voiced: if the EU performs, it will attract both support and affiliation. Thus, for example, many Catalans feel a stronger affiliation with the EU as compared to the Spanish state as such. The same can be said for the case of Scottish nationalists *vis-à-vis* Westminster. This, however, is more linked to the internal political situation in Spain and in the United Kingdom and the impact which the autonomous community of *Catalunya* has in Spain and the limited impact which the Scottish Executive has in a devolved United Kingdom.[114] Much depends on the sphere of public administration, public policy and law.

The challenge to consumer confidence in the face of food scares, particularly in relation to the BSE crisis and Genetically Modified (GM) food is a useful illustration of the concomitant challenge to the citizen's identification with his or her community.[115] This identification is embedded in culture and identity.[116] Thus, particular foods are associated with festivities, rituals and a sense of belonging to a particular community, be it national or regional. The effects of globalization including the consequences of EU membership has opened up internal food markets and has also disaggregated the tacit trust which has traditionally been active between

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[112] Jan Halfmann, 'Immigration and Citizenship in Germany: Contemporary Dilemmas', *Political Studies*, 105 (1997), at p. 260.

[113] See generally Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press 1999).

[114] See Michael Keating, *Plurinational Democracy: Stateless Nations of the United Kingdom, Spain, Canada and Belgium in a post-Sovereign World* (Oxford: Oxford University Press 2001).

[115] See Roberta Sassatelli and Alan Scott, 'Novel Food, New Markets and Trust Regimes: Responses to the erosion of consumers' confidence in Austria, Italy and the UK', *European Societies*, 3 (2001) at p. 213. See also Ellen Vos, 'EU Food Safety Regulation in the aftermath of the BSE crisis', *Journal of Consumer Policy*, 23 (2000) at p. 227.

[116] See generally Aleksander Surdej, *Enlarging the EU Food Safety Regime. Adjustments of Polish Food Safety Regulations to the Requirement of EU Membership*, European Forum 2002/03 Discussion Paper EF.RC&RC/02/3/13.

members of particular communities in relation to its particular institutions.[117] This gives rise to a reconfiguration of the notion of boundaries beyond customary conceptualizations predicated on territory. The complexity which attaches to food consumption and the risks posed by the use of pesticides and food additives not to mention the use of new technologies has placed increasing reliance on experts who have increasingly monopolized the debate concerning the perception of risk.[118].

Matters of trust and loyalty also have to be reconfigured in the face of the plurality of public spheres, an issue which has been recognized in the context of Food Safety in the EU and the proposal for the creation of a European Food Authority, the mandate of which would be the responsibility concerning risk assessment and communication on food safety issues.[119] The process of reconfiguration has also been accompanied by a re-entrenchment of national and local identity.

There is need for differentiation in order to come to terms with different regimes of trust which operate at a number of levels. Thus, bearing the CEECs in mind, Polish citizens, for example, would undoubtedly trust their government to defend their agricultural interests more than the European Union negotiators for accession.[120] Agriculture is at the heart of Poland's accession to the EU given that it accounts for 3.3 percent of the Polish GDP (as compared with 2 percent in the EU), but employs 18.8 percent of all working people (as compared with 4.4 percent in the EU).[121]

By contrast, the same might not be true as regards police protection where they might look to the EU as providing a form of supranational "checks and balances" to safeguard their rights. This is also the case of minorities in the CEECs who embrace the EU as a way of escaping the constraints of unwanted sovereignty at the state level, particularly as the states' regional policy tend to discriminate against them such as the cases of Romania and Slovakia where the respective states drew regional boundaries in order to preclude minorities having regional power, authority and competencies.

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117 See Alan O. Sykes, 'Exploring the need for international harmonization: domestic regulation, sovereignty and scientific evidence requirements. A pessimistic view', *Chicago Journal of International Law*, Fall (2002).

118 See Ulrich Beck, *The Risk Society: Towards a New Modernity* (trans. from the German by Mark Ritter) (London: Sage 1992) who refers this in terms of "primary scientization" at p. 158. See also Cass Sunstein, *Risk and Reason: Safety, Law and the Environment*, (New York: Cambridge University Press 2002).

119 White Paper on Food Safety, COM (99) 719 final at Chapt. 4.

120 Indeed, a climate of "unnecessary mistrust" has been reported to underpin Polish-EU negotiations. See Stephen Holmes, 'Introduction', *East European Constitutional Review*, 9 (2000).

121 See Susan Senior Nello, 'Food and Agriculture in an Enlarged EU', *Robert Schuman Centre Working Paper No. 58/2002* at p. 3.