1. Introduction

Enlargement significantly affects the constitution of the European Union. Successive rounds of expansion have mechanically modified the text of its founding treaties, while inflating the latter’s specific rules of accession. Enlargement also represents a self-identification exercise of constitutional significance. In effect, by articulating what is required to be(come) a Member State of the Union, enlargement reflects glimpses of the EU constitutional core.

The self-identification facet of enlargement has been particularly patent in recent episodes of EU expansion, as its normative basis has been considerably expanded. Not only have accession conditions been enunciated in greater detail, but the EU has also developed a policy whereby it spells out and monitors the administrative and judicial structures required to meet such conditions, and thus for the candidate to become an operational EU Member State. Through the so-called ‘pre-accession strategy’, the Union has forged an ‘EU Member-State making policy’ which has articulated in sizeable detail the putative attributes of membership. It has in turn disclosed what the Union stands for, or at least how it wants to be perceived by the outside world.

A closer look at the obligations of membership formulated in the pre-accession context however shows that rather than being a genuine reflector of the EU

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1 Many thanks for Anne Myrjord for her helpful comments and support.
identity, enlargement is perhaps more of a miroir déformant that exposes a distorted image of EU membership. As cogently noted by Marc Maresceau, to whom this paper is dedicated, a potent illustration of this distortion is provided by the accession conditionality in the field of minority protection.\(^4\) As the paper argues, the same holds true for fundamental rights more generally\(^5\) the latter’s reflected image as EU membership attribute is misleading, in that it does not correspond to the domestic constitutional reality of the EU in this domain.

The ensuing décalage between accession conditions and membership obligations has been a curse for the EU, not only because it undermines the credibility of its message, but more fundamentally because the Union’s confined ability to react to domestic fundamental rights problems might hamper its very functioning.\(^6\) The boomerang effect of the pre-accession fundamental rights discourse might thus be welcome, in that it might catalyse internal adjustment to address the discrepancy. This is borne out by the growing debate on the matter, both at academic and political levels, in the face of disquieting backsliding in some Member States.\(^7\)

This paper first traces the fundamental rights discourse as it has developed in the EU pre-accession context, focussing on its considerable amplification since the ‘big bang’ expansion of 2004 (2). It then turns briefly to the internal situation to substantiate the claim that the image of fundamental rights, as an element of the Union’s constitutional identity, remains distorted (3). The last section briefly sheds light on the debate on ways to address the distortion and adjust internal arrangements (4).

2. Increasing Significance of Fundamental Rights in EU Enlargement Policy

While expressly required since the Treaty of Amsterdam, respect for human rights has always been a condition for accession to the EU. This condition was bolstered in the context of the Union’s enlargement to the east, and has been


\(^5\) The terminology used by the EU in this domain is somewhat patchy, oscillating between fundamental rights, as per the EU Charter of Fundamental Rights, or human rights, as per e.g. the Preamble and Art. TEU. In the remainder of this paper, the notion of fundamental rights is mostly used.


\(^7\) See Letter by the Foreign Ministers of Denmark, Finland, Germany and The Netherlands to President of the European Commission Manuel Barroso, calling for “a new and more effective mechanism to safeguard fundamental values in Member States”; Associated Press, 8 March 2013.