THE EUROPEAN CHARTER –
Between deep Diversity and Constitutional Patriotism?

By

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Abstract

The purpose of this paper is to shed light on the type of allegiance that the Charter of Fundamental Rights of the European Union is based on. Charters as Bills of Rights establish or entrench fundamental rights, democracy and the rule of law, and the relevant sense of allegiance and attachment is constitutional patriotism. Does the Charter of Fundamental Rights of the European Union rest on constitutional patriotism as its underlying philosophy? Can it contribute to foster such? Europe is extremely diverse. Its sheer diversity may make it hard to reach any sense of commonality, let alone a sense of patriotism, however weak that may be. The question then is to what extent the diversity of Europe is recognised as an element to be promoted and protected – and how such diversity awareness might affect or shape the Charter? The relevant mode of allegiance that I draw on to respond to this question is the notion of deep diversity. These questions are addressed by looking at the preamble of the Charter, its provisions, and its anticipated and currently envisioned role within the EU, including, in particular, its role and status within the currently working Convention on the Future of Europe.
I. Introduction

The European Union, as noted in the Laeken Declaration, is at a critical crossroads. Enlargement, and thus a much larger and more diverse EU, is imminent. Under the shadow of this profound change, the EU has launched a broad and deep process on the fundamentals of the Union, which is to help it in its efforts to grapple with the challenges ahead. Two sets of processes may thus converge: One is the adoption of new members, as a vital step to the end of the division of the European continent. This decision to include ten new Member States in May 2004 is a decision of major constitutional significance. The other process is the forging of a constitutional and institutional framework that can carry these changes and that can also provide a clearer sense of the nature of the polity and the fundamental principles that this is to be based upon. A critical question here is what type of allegiance the entity requires, in normative terms, as well as what it can actually draw on and foster, in empirical terms.

The essential principles that the Union has referred to in the treaties are “liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” These principles are central requirements of democratic legitimacy, and although they emerged in Europe, they have been spread worldwide. They are also universalistic, in that they provide few, if any, clues to the specification of a unique European identity. Efforts to establish a set of values that are reflective of a particular and uniquely European identity and sense of self, have met with strong opposition. Nationalists defend their national identities and their nationally based conceptions of the good life. The challenge facing the EU is that of reconciling three sets of concerns: the first is the commitment to a set of universal values, the second is the quest for a particular European identity, and the

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third is the protection and promotion of *national* (and other, such as regional)
difference and distinctness.

Charters as Bills of Rights establish or entrench fundamental rights, democracy and
the rule of law, and the relevant sense of allegiance and attachment is *constitutional
patriotism*. Such a type of support is *post-national* and derived from basic principles,
rather than pre-political values and attachments steeped in a culture, tradition, or way
of life. Individual rights are critical components of this mode of allegiance, through
the manner in which we recognize other persons, as holders of other rights. Rights can
ensure both an individual sense of self and a collective sense of membership of a
community. Does the Charter of Fundamental Rights of the European Union rest on
constitutional patriotism as its underlying philosophy? Can it contribute to foster
such?

The EU, as noted, is faced with the challenge of relating to its very complexity and
the staunch defence of national (and regional, infra-national and other) identities.
These facts make it highly unlikely that it will ever establish a set of allegiances and
attachments similar to those of the nation-state. The EU is an extremely complex
*multinational* and *poly-ethnic* entity. The relevance of this fact is compounded by the
lack of consensus as to what the EU is, and ought to be. The structure of the EU also
leaves the Member States (and regions) with a pivotal role in determining its future,
including the determination of the underlying principles and mode(s) of allegiance. To
what extent is the diversity of Europe recognised as an element to be promoted and
protected? More specifically, how reflective of the diversity of Europe is the Charter?
The relevant mode of allegiance that I draw on to respond to this question is Charles
Taylor’s notion of *deep diversity*. With deep diversity is understood a situation of a
multitude of different collective goals and conceptions of the polity. Groups and
collectives have different relations to the overarching entity; there is no overall

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“Struggles for Recognition in the Democratic Constitutional State” in Taylor and Gutmann, (eds.)
*Philosophy & Social Criticism*, (1996)
6 Taylor, *Reconciling the solitudes: essays on Canadian federalism and nationalism*. (McGill-Queen’s
University Press 1993).
agreement on what the country (or polity) is for; and there are different collective
goals as to what the society ought to be and ought to look like.

What type of allegiance is the Charter based on – constitutional patriotism or deep
diversity? This question will be addressed by looking at the preamble of the Charter,
its provisions, and its anticipated and currently envisioned role within the EU. The
latter issue requires attention as the Charter is, formally speaking, a political
declaration and not a legally binding document. Its status is to be decided before
2004. The work and results from the Convention on the Future of Europe will likely
give vital inputs into this decision. This convention, the so-called Constitutional
Convention, has as its mandate, among other items, to discuss the incorporation of the
Charter into a future European constitution. A specific working group was set up to
assess this question and has delivered its recommendations.

A critical test of whether the EU has embraced a Charter-based constitutional
patriotism is for such a commitment to have been carried forth into the deliberations
of the Convention and reflected in the output from this body. At the present stage of
the Convention’s work, the relevant sources to be assessed include the constitutional
proposals, the recommendations of the Charter Working Group, and the plenary
debates. Conversely, if the EU has endorsed the spirit of deep diversity, this will be
reflected in the status of the Charter (non-binding), as well as in the scope for
difference/diversity expressed in those same sources.

A Charter, however important as a means of fostering constitutional patriotism, is no
sufficient test. To properly foster constitutional patriotism, certain institutional and
formal procedural requirements, in addition to fundamental rights, are required. Even
more so, to assess the scope and salience of deep diversity, such institutional factors
are essential. The two perspectives differ on how they conceive of constitution. The
former, constitutional patriotism, sees constitution in terms similar to those of the
democratic Rechtsstaat, whereas deep diversity can be consistent with a constitutional
treaty made up of Member States. The chapter examines two constitutional proposals,
respectively reflective of constitutional patriotism and deep diversity, in more in-
depth, so as to shed further light on the nature and direction of the thinking in the
Convention.
This chapter is divided in five parts. Part One is the introduction. Part Two presents constitutional patriotism and deep diversity, as alternative approaches to the fostering of allegiance in Europe. Part Three briefly presents and assesses the Charter against the two notions of constitutional patriotism and deep diversity. Part Four assesses the relevant aspects of the Constitutional Convention. Part Five holds the conclusion.

II. Constitutional Patriotism vs. Deep Diversity

“The contextualisation of democratic values and human rights in a constitutional structure permits the willing acceptance of a system of authority embedded in the constitution and this is what holds people together and makes for their constitutional patriotism.” This sense of allegiance is not derived from pre-political values and attachments steeped in a culture, tradition or way of life, but in a set of principles and values that are universal in their orientation. Constitutional patriotism elicits a post-national and rights-based type of allegiance. However, constitutional patriotism is more than attachment to abstract principles. It is a mode of allegiance because it elicits support and emotional attachment, through a set of universalistic principles that are embedded in a particular context. Hence, people derive their attachments from the manner in which a set of universal principles are interpreted and entrenched within a particular institutional setting, how they are fused with a particular set of values steeped in a particular geographical setting, and how they are embedded within a particular set of traditions. The universal principles help entrench a set of procedures that, when made to operate within a particular context, render it self-reflective, and hence responsive to contextual changes. Constitutional patriotism thus provides one set of answers or recommendations for how to reconcile universal values with context-specific ones, whilst also retaining sensitivity to difference and diversity.

Constitutional patriotiism is based on universal rights steeped within a particular legal community. There are three central components to this. The first relates to rights, the second to institutional conditions, and the third to the constitutional framework or the status of the constitution.
With regard to rights, constitutional patriotism presupposes a firm commitment to personal autonomy, in the sense of both private and public autonomy – as both are required for democracy. This means private protective rights and political participatory rights. Further, social rights are also important in that they both help ensure autonomy and also foster a deeper sense of solidarity. The Charter must also contain cultural rights, as part of a commitment to and provisions for the respect of diversity, albeit in conditional form rather than in an absolute one. The underlying principle is the notion of “the reciprocal recognition of different cultural forms of life.”

Second, with regard to institutional conditions, for the Charter and the Constitution of which it has to be part, to be consistent with the core tenets of constitutional patriotism, it must contain a set of institutional prescriptions that ensure that citizens can see themselves as the ultimate authors of the law. This means representative bodies that can transform popular deliberations into binding decisions in a manner consistent with the spirit of these deliberations. This also speaks to the division of competences, congruence and accountability. In complex entities the vertical and horizontal division of competences must be such construed as to ensure that the basic criteria of congruence and accountability are maintained, not through excessive centralisation but through a vertical division that is consistent with the location of problems and the means to their solution.

Third, with regard to the constitution, the strongest and clearest expression of constitutional patriotism, in substantive and symbolic terms, is through the full incorporation of a Charter of Rights in the constitution. This gives it high visibility and unambiguous status as an intrinsic part of the constitution, and status as ‘higher’ law. Applied to the European setting, an unambiguous expression of constitutional patriotism is found in the explicit pronouncement of a European constitution, and not

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8 Habermas links individual rights to the notion of individual autonomy and places particular emphasis on the vital link between democracy as popular sovereignty and the constitutional state (Rechtsstaat). Popular sovereignty is expressed in such rights as communication and participation, which ensure the public autonomy of citizens, whereas the constitutional state is expressed in the classic human rights which guarantee the private autonomy of citizens. Habermas, supra (1996), and supra (1994).
a European constitutional treaty, and one that is both fully recognised and acknowledged as, ‘higher’ law.

In both substantive and symbolic terms, the framers’ inclusion of a strong and comprehensive commitment to rights in the constitution serves to direct subsequent constitutional interpreters to ensure that these provisions are heeded and also that the other provisions in the constitution are made to cohere with this strong commitment to rights. As noted above this pertains for instance to the provisions on institutional make-up and on the division of powers and competences. Constitutional patriotism also presupposes that the universal orientation of the rights is somehow protected, for instance through provisions that ensure compatibility with individual rights protection at the global or cosmopolitan level. A further requirement of constitutional patriotism is that constitutional amendment be consistent with the principle of popular sovereignty. This entails a commitment to some majoritarian formula. To be consistent with constitutional patriotism implies that no single Member State can have veto power over constitutional change.

Deep diversity

The notion of deep diversity refers to a situation where a “plurality of ways of belonging … [are] … acknowledged and accepted…”10 within the same state. That this diversity is accepted means that special political-legal and even constitutional measures have been devised to preserve and promote it. Deep diversity has as its philosophical basis the communitarian position that rights are inadequate as means of fostering a sense of community and belonging. One reason for this is that the law and rights are always steeped within a particular cultural setting that provides people with deep-seated cues as to who they are and what is good and valuable.11

In legal-political terms, the notion of deep diversity can be specified using the following criteria. First, the society contains several and different collective conceptions of its cultural or national or linguistic or ethnic make-up, and there is thus

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10 Taylor, loc cit., 1993, 183.
no overarching agreement on what the country is for. The EU is a particularly complex multinational and poly-ethnic entity, with a wide range of sources of difference and diversity. Its sheer range of diversity, and the strong sense of national identity, have prompted many opinion makers and even decision makers, to conclude that there is no European demos. This position is shared with many academic analysts.

Second, the existence of different collective goals is an acknowledged and accepted fact and something that is accommodated through differentiated citizenship and other means through which collectives seek to maintain their sense of difference. Joseph Weiler has argued that what sustains the EU as a unique non-state entity is the principle of constitutional tolerance. This is premised on the explicit rejection of the One Nation ideal and the recognition that “the Union … is to remain a union among distinct peoples, distinct political identities, distinct political communities… The call to bond with those very others in an ever closer union demands an internalisation – individual and societal – of a very high degree of tolerance.” As Weiler notes in a more recent article, “in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by ‘my people’, but by a community composed of distinct political communities: a people, if you wish, of ‘others’.” The lack of a clear normative hierarchy and sanctioning means, make acceptance and subordination voluntary.

Third, active measures are taken by those that feel different or distinct to maintain this diversity over time. The sense of belonging to the overarching entity, in case of deep diversity, is one in which a group’s or collective’s belonging passes through its belonging to another smaller and more integrated community.

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12 The German Constitutional Court’s ruling, in the famous Maastricht case, was premised on the notion that there is no European demos. See Weiler 1995. European Convention, Contribution by Mr. Jens-Peter Bonde, “The Convention about the FutureS of Europe”, CONV 277/02, 45
15 Weiler, J. loc.cit. 2002:568
When we apply this notion to the European Charter, we can derive the following criteria. In its strongest or most pronounced form, deep diversity is incompatible with a constitutionally entrenched Charter of rights. By this is not meant that deep diversity is incompatible with individual rights (in particular those rights that ensure private autonomy) but with the explicit entrenchment of the full range of rights in the constitution. Deep diversity is thus compatible with the Charter as a mere political declaration.

If the Charter were to be adopted as legally binding, there could still be scope for deep diversity, provided the following requirements were met. First, its underlying philosophy would be accepting of different conceptions and visions of what the EU is, and ought to be. If so, this would be apparent from the statements in the preamble and from the provisions in the text. Second, the Charter would have provisions on differentiated citizenship and other means of acknowledging cultural and national and other forms of difference. Third, the scope of application of the Charter would be very limited and only apply to issues that would not affect the propounding of such forms of difference. Fourth, each member state and other relevant cultural actors would have veto over treaty or constitutional change. Fifth, the Charter and the constitution would be open to actors actively seeking recognition of uniqueness with reference to their unique history, culture, language, and national identity. This could manifest itself in (a) the pursuit of distinct collective visions and group-based rights, (b) opposition to a Charter that would have binding effect, (c) demands for exemptions from the provisions in the Charter, and (d) the setting of standards is considered a national concern.

III. The European Charter

The EU is often conceived of as a ‘post-national’ entity.\textsuperscript{16} Its commitment to those values generally associated with constitutional patriotism - democracy and the rule of law - has become increasingly visible and manifest in the treaties.

In the following pages an assessment of the Charter in relation to the two conceptions of allegiance identified above will be undertaken. This assessment focuses on the preamble and the nature and scope of rights. First, it is clear from the text of the preamble that the spirit of the Charter is that of rights-based constitutional patriotism. Rights are central ingredients in the EU’s attempt to foster a sense of allegiance. The preamble of the Charter reiterates those values appealed to in the Amsterdam and Nice Treaties. It states that:

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

In the preamble, there is no attempt to circumscribe these values or to render them subservient to a particular European culture or tradition. But this is not akin to saying that these principles are disconnected from any reference and application to a particular European context. The main reference is social solidarity, not cultural homogeneity.

The preamble also speaks directly to the value of diversity in Europe and it notes that European diversity is valuable:

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.

But this is no wholehearted endorsement of deep diversity, as the protection of national identities must be reconciled with the protection and promotion of common values. The common values appealed to are those associated with constitutional patriotism and with the democratic constitutional state. If pursued to the full, they can help form a European constitutional demos and a political culture that ensure a shared sense of what Europe is for.

For a more detailed examination of these aspects of the Charter, from the vantage point of constitutional patriotism and deep diversity, see Fossum, J. E. “The European Union …”; loc. cit. 2003. The analysis in the article is confined to the Charter Convention. For another complementary assessment, see Maduro, this volume.
The assessment of the drafting of the Charter, its provisions, and the locating of the Charter within the legal-institutional context of the EU, revealed a more complex picture, with regard to the type of allegiance we can discern from the Charter. The provisions on private autonomy appear no less comprehensive than those of other charters or bills of rights. The provisions to ensure public autonomy, however, are weaker. These are foremost the rights listed in Articles 39 and 40, which provide European citizens with voting rights and rights to stand as candidate at European and municipal elections. European citizenship, however, is derived through citizenship in a Member State. Thus, far from all those resident in the Union can obtain citizenship, and as national incorporation rules differ substantially, the rights in institutional terms are quite differentiated. Ulrich Preuss has noted that:

"Union citizenship is not so much a relation of the individual vis-a`-vis Community institutions, but rather a particular legal status vis-a`-vis national member states, which have to learn how to cope with the fact that persons who are physically and socially their citizens are acquiring a kind of legal citizenship by means of European citizenship without being their nationals."\(^{18}\)

The citizenship provisions in the Charter are inadequate to ensure public autonomy. However, Union citizenship, it should be noted, is a dynamic concept and its status does depend on the nature and direction of the larger process of European integration.

There are strong provisions for citizens’ private autonomy in the text of the Charter. But their effect in ensuring private autonomy will be circumscribed if the pillar structure of the treaties is retained.\(^{19}\) Thus, the Charter in its present form, and within the context of the present treaties, cannot credibly be said to produce the essential mutually reinforcing character of private and public autonomy, which constitutional patriotism presupposes. The first requirement of constitutional patriotism is thus not fully complied with, partly due to the Charter and partly due to the structure in which it is to be situated (the second criterion of constitutional patriotism). A similar argument applies to social rights. The Charter holds numerous provisions on social rights. Their salience depends on the entrenchment of a notion of social Europe within the Communities’ socio-economic structure. There are some important traits of this, which help provide the constitutional patriotism of the Charter with a stronger ethical


foundation. Respect for diversity is voiced in the preamble and further greatly reinforced through the institutional system of the EU and the treaties. In fact, the sheer diversity of the EU, in structural-institutional, as well as cultural terms, can work as a great deterrent to the very fostering of constitutional patriotism. On the third criterion, that of higher law, the Charter was presented as a political declaration but there is strong evidence to the effect that it will become binding. It has already become part of the sources of legal interpretation. Its constitutional status depends on the outcome of the Convention’s deliberations and their subsequent fate in the forthcoming IGC 2004.

Given that there is a strong commitment to the protection of the cultural diversity of Europe in the preamble, the Charter was also assessed in terms of its compliance with the criteria for deep diversity. Might the spirit of the Charter better be labelled that of deep diversity? Deep diversity, as noted, presumes an absence of overarching agreement of what the EU is for. It also presumes differentiated citizenship. The Charter does not introduce or endorse the notion of differentiated citizenship, albeit the fact that the incorporation rules are based on national citizenship provisions does instil a de facto element of differentiation. However, neither the spirit of the Charter, as revealed in the preamble, nor the provisions on citizenship suggest that the Charter was framed in the mindset of deep diversity.

Once we look at the actual provisions in the Charter, and the setting of the EU, we find a strong de facto diversity awareness that is more pronounced than in the preamble. Of particular importance is the considerable scope for exemptions and the large room for national standards entrenched in the horizontal clauses (articles 51-52). Consider for instance Article 51, which refers to the scope of the Charter. This provision states that it only applies to the EU institutions and to the Member States, insofar as they implement Union law. Article 52(2) states that “Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.” The gist of Articles 51 and 52(2) is to leave the Member States with a lot of scope. In formal terms they are also the ones who set the terms of their own

interaction through being ‘masters of the treaties’. The Charter builds upon existing rights, many of which are in the treaties and in the constitutional traditions of the Member States. The Charter, through Articles 51 and 52, is confined to the limits set by the Treaties. Hence, the treaties work as guidelines and serve to confine those provisions of the Charter that have a basis in the treaties.

Having said that, whilst these provisions clearly leave a lot of room for diversity protection and promotion, the spirit of the Charter is not that of deep diversity. It contains a clear commitment to constitutional patriotism but is steeped within the highly complex European setting, one that is very conscious of the diversity of its past and of its present, and that is highly protective of its variegated traditions.

These comments serve to underline that the Charter does not offer an adequate test of the allegiance forming ability of constitutional patriotism. The Charter has, however, served to bring this debate and process forward. For one, it served as a vital precursor to, and model for, the Convention on the Future of Europe, or the Constitutional Convention.

The explicit endorsement of constitutional patriotism in the Charter can serve as an impetus and guideline for the Convention in its further efforts at constitutionalising the EU. The clear commitment to constitutional patriotism in the Charter can serve to move the EU further in its promotion of a rights-based sense of allegiance. The question we now turn to is whether this spirit permeates the work of the Convention and the constitutional proposals that have been presented thus far to the Convention - or whether these are all more reflective of the spirit of deep diversity.

IV The Convention on the Future of Europe

At the Laeken European Council in December 2001, the decision to establish a Convention on the Future of Europe was announced. The declaration contains the Convention’s mandate, which is to “consider the key issues arising for the Union's future development and try to identify the various possible responses.” 21 One of the central components of this broad mandate is to clarify the status of the Charter. The

Laeken Declaration does not spell out a grand vision of the EU. Instead it poses a large number of large and small questions that need to be considered. It does present a clear view on the fundamental mode of allegiance and this is cast within the spirit of constitutional patriotism: “The European Union derives its legitimacy from the democratic values it projects, the aims it pursue and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project.”

The establishment of the Convention on the Future of Europe is the single most important sign that the EU is involved in constitution-making, albeit in actual terms it has been involved in such for an extended period of time. The Convention on the Future of Europe was modelled on the Charter Convention, in that both were set up as deliberative bodies. In their composition, both were made up of a majority of parliamentarians (46 out of 66 full members, and 26 out of 39 from the candidate countries), although each Member State also has a government-appointed representative present.

**The Convention Working Group on the Charter (WG II)**

For the Convention to operate within the spirit of and to represent an endorsement of constitutional patriotism, it should be expected to:

- deliver one constitutional proposal entitled ‘Constitution of Europe’ or equivalent rather than a constitutional treaty,
- which contains a fully incorporated Charter,
- where the Charter is revised to bolster provisions on public autonomy and social rights,
- where the division of powers and competences is in compliance with personal autonomy,
- and where the provisions for constitutional change are based on the principle of popular and not Member State sovereignty.
The question posed to the Convention by the European Council in the Laeken Declaration was as follows: “Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.” The Working Group on the Charter interpreted this in the following manner: “If it is decided to incorporate the Charter of Fundamental Rights in the Treaty: how should this be done and what would be the consequences? What would be the implications of accession by the Community/Union to the European Convention on Human Rights?”

The Chairman of the Working Group set down the following principle for the work of the group: “the Working Group should not get involved in discussion of the major political questions (whether the Charter should be incorporated or whether there should be accession to the ECHR). It should rather focus on examining the more specific matters outlined below, on the assumption that the two questions will meet with a positive political response.” The Chairman thus recommended that the Working Group continue the approach to the Charter in the first Convention, that of treating the Charter as if it were to become binding. This suggests that the Working Group was inspired by the notion of constitutional patriotism, in that it sought a legally binding Charter. However, the Chairman’s recommendation that the contents of the Charter should not be reopened for debate in the Working Group does not necessarily point in the same direction. The rationale for this recommendation was that the previous Convention had deliberated over these issues, and there was no point in questioning the legitimacy of the work of the previous Convention.

The members of the Working Group accepted this recommendation, and this was reiterated in the final report of the Working Group. However, some members noted that if the Charter were to become binding, there was need to take a closer look at the horizontal clauses. There was no strong push to reopen the debate on the Charter to

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23 Ibid.
25 European Convention, Working Group II, “Final report of Working Group II”, CONV 354/02
strengthen its autonomy-enhancing role. The Working Group’s main focus was on the techniques for incorporating the Charter and the question of accession to the ECHR.

In July 2002, on the question of the constitutional status of the Charter, a majority of the members of the Working Group favoured the insertion of the complete Charter into a new treaty.\(^\text{26}\) In October 2002, in its report (draft) to the Convention, the Charter Working Group noted that “all members of the Group either support strongly or are open to giving favourable consideration to an incorporation of the Charter in a form which would make the Charter legally binding and give it constitutional status.”\(^\text{27}\)

The Working Group recommended that the Charter Preamble should be preserved and included in a Constitution. It concluded that the Charter would “in no way modify the allocation of competences between the Union and the Member States.”\(^\text{28}\) This meant that the limited reach of the Charter in the field of social policy, for instance, despite its many provisions on social rights and justice, would not be altered. The Working Group’s way of resolving this apparent contradiction is quite interesting:

“The fact that certain Charter rights concern areas in which the Union has little or no competence to act is not in contradiction to it, given that, although the Union’s competences are limited, it must respect all fundamental rights wherever it acts and therefore avoid indirect interference also with such fundamental rights on which it would not have the competence to legislate.”\(^\text{29}\)

How the Union then would reconcile a conflict between economic and social concerns appears difficult to establish. The Working Group stressed that the Charter is forged in the spirit of subsidiarity. This would not seem to resolve the dilemma, simply push it down one or several steps, to be handled by the Member States or by the regions or actually defer to the strong market-based thrust of the Treaties.

The Working Group also recommended the EU to accede to the ECHR. On the basis of expert advice, the Working Group came to the conclusion that accession to the ECHR would not undermine the autonomy of Union law. From that we can derive

\(^{26}\) European Convention, Working Group II, “Summary of the meeting held on 12 July 2002”, CONV 203/02.

\(^{27}\) European Convention, Working Group II, loc cit., CONV 354/02. Two options for how to incorporate the Charter as a legally binding document were listed here. A large majority of the Working Group favoured the first option, which was to include the full text of the Charter into the Constitution.

\(^{28}\) Ibid., 5.
that it would not weaken the legal-institutional basis for constitutional patriotism. The reasons put forward for accession were inspired by concerns with unity, not diversity, and referred to ensuring the same level of protection to citizens, as citizens obtain from the Member States, all of whom have entered the ECHR. ECHR adherence is also a requirement for membership in the EU. Further, accession would help ensure “a harmonious development of the case law of the two European Courts in human rights matters (...).”

A very large majority of the members of the Convention that spoke in response to the Working Group’s Report supported the recommendations of the Working Group, both with regard to making the Charter binding and for the EU to accede to the ECHR.  

To what extent, then, is this commitment to a binding Charter reflected in the constitutional proposals that have been presented to the Convention?

**Constitutional Proposals**

What is the status of the Charter of Fundamental Rights of the European Union in the constitutional proposals? If all proposals – institutional and personal - seek to incorporate the Charter in the future constitution, this would be critical evidence of the Charter having taken hold, and therefore, it should say something about the constitutional patriotism – deep diversity divide.

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<th>Proposal Title</th>
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<tr>
<td><strong>Proposer: European Convention Presidium</strong>&lt;br&gt;Status: skeletal draft&lt;br&gt;Title: Preliminary draft Constitutional Treaty CONV 369/02**</td>
<td>Listed under Article 6, three options:&lt;br&gt;- refer to the Charter;&lt;br&gt;- binding Charter with provisions listed in protocol;&lt;br&gt;- all articles of Charter incorporated in the text</td>
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<tr>
<td><strong>Proposer: European Commission:</strong>&lt;br&gt;Status: Commission discussion paper on institutional framework and reforms&lt;br&gt;Title: For the European Union – Peace, Freedom, Solidarity COM (2002) 728 final</td>
<td>Charter fully incorporated. Text says: “(S)et out in a constitutional text the values and fundamental rights on which the union bases its action.”</td>
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<th>Proposer</th>
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<td>Elena Ornella Paciotti</td>
<td>prepared by Basso Foundation and</td>
<td>A draft constitution for the European Union</td>
<td>Charter fully incorporated in the Constitution under Title I – including preamble</td>
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<td>based on European Parliament texts</td>
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<td>Elmar Brok</td>
<td>informal discussion paper</td>
<td>Constitution of the European Union</td>
<td>Charter fully incorporated in the Constitution under Part One</td>
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<td>Garrido/Borrell/Carnero</td>
<td>personal proposal by representatives of</td>
<td>A European Constitution for Peace, Solidarity and Human Rights</td>
<td>Charter fully incorporated in the Constitution in the First Chapter</td>
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<td>the Spanish Socialist Party</td>
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<td>The Charter should be amended so as “to have a wider reach: it should become the minimum standard of protection for all citizens resident in Europe”</td>
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<tr>
<td>Peter Hain</td>
<td>Draft prepared by Alan Dashwood et al. –</td>
<td>Constitutional Treaty of the European Union</td>
<td>Charter referred to in Article 2 of the constitutional treaty. Status as one of the sources of EU fundamental rights. Commentary says status is unclear: either a legally enforceable Bill of Rights incorporated into the Treaties OR a non-binding point of reference for the institutions</td>
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<tr>
<td></td>
<td>not official UK policy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Romano Prodi, aided by Barnier</td>
<td>feasibility study</td>
<td>Constitution of the European Union</td>
<td>Charter is fully incorporated in the constitution under Part Two, Fundamental Rights, with some additional provisions</td>
</tr>
<tr>
<td>and Vitorino and working party</td>
<td></td>
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<tr>
<td>Andrew Duff</td>
<td>personal proposal</td>
<td>A Model Constitution for a Federal Union of Europe</td>
<td>Charter referred to in Article 3 and is to be established “as a Protocol to this Constitution. It is binding upon the institutions, bodies and agencies of the Union in its entirety. It is binding upon the member states and political authorities within them when and in so far as they implement Union law and policy.”</td>
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<tr>
<td>J. Chabert</td>
<td>Opinion of the Committee of the Regions</td>
<td>Towards a constitution for European citizens</td>
<td>Charter should be made binding and “serve as an integral part of a broader European constitutional structure, in order to ensure that the rights set out therein are inalienable…” Applies to human and civil rights, whereas economic and social rights should remain policy objectives at EU level</td>
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<tr>
<td>Neil MacCormick</td>
<td>personal proposal</td>
<td></td>
<td>“The Charter of Rights will be a corner-stone in a European Constitution”</td>
</tr>
<tr>
<td>Title: Democracy at many levels: European Constitutional Reform</td>
<td>Specific mode of incorporation is not listed</td>
<td></td>
<td></td>
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<tr>
<td>Proposer: Jens-Peter Bonde</td>
<td>The EU should accede to the Human Rights Convention. If the Charter is made binding clear limitations should be set down. Further, “(i) the Charter is included, it should be explicitly stated that no rights deriving from national constitutions or the European Human Rights Convention should be limited by the decisions of the EU court in Luxembourg.”</td>
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<tr>
<td>Status: personal proposal</td>
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<tr>
<td>The Convention about the Future of Europe</td>
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<td>CONV 277/02</td>
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<tr>
<td>Proposer: European Peoples Party (EPP)</td>
<td>“The Charter of Fundamental Rights has to become an integral part of the European Constitution.” The EU should also acceded to the European Convention of Human Rights</td>
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<tr>
<td>Status: party proposal</td>
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<tr>
<td>Title: A Constitution for a Strong Europe</td>
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<tr>
<td>Proposer: Party of European Socialists</td>
<td>The Charter should be integrated into the future Treaty and have its binding legal character guaranteed</td>
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<tr>
<td>Status: party proposal</td>
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<tr>
<td>Title: A successful Convention on the Future of Europe: Our essentials</td>
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<tr>
<td>Proposer: The Altieri Spinelli Institute for Federalist Studies</td>
<td>The Charter is included in the Federal Constitution. “Peace is the value upon which the identity of the European citizen is founded. The assertion in the Constitution of everlasting peace among the European states is the starting-point for extending this principle to the world level.”</td>
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<tr>
<td>Status: Institute proposal</td>
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<td></td>
<td></td>
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<tr>
<td>Title: Towards a European Federal Constitution</td>
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Several important conclusions emanate from this brief survey. First, no proposal explicitly rejects incorporation of the Charter. Second, the proposals differ somewhat in how the Charter is to be incorporated. The proposals echo the positions that were assessed in the Charter Working Group. Third, it is notable that none of the proposals with an institutional sponsor rejects incorporation, albeit the proposal from the UK group of scholars is less supportive than the other ones.

**Constitutional proposals - constitutional patriotism vs. deep diversity**

In the following I have selected two very different constitutional proposals that have been presented to the Convention in the latter part of 2002 for further in-depth scrutiny. The point is to examine whether the proposers think of the larger
institutional and constitutional setting of the EU as foremost a site of the fostering of constitutional patriotism or of deep diversity. The first proposal is seen as one of the best examples of constitutional patriotism thinking in the Convention, and is labelled a proposal for a European Constitution, whereas the second proposal is probably the coherent proposal that comes the closest to deep diversity, and is labelled a Constitutional Treaty.31


This draft constitution was presented as a contribution from Ms Elena Ornella Paciotti, member of the Charter Convention and alternate member of the Convention on the Future of Europe.32 The reason for including and assessing this draft is that it is representative of a large group of European Parliamentarians who emphasise the need for the EU to be based on direct democratic legitimacy. The draft is a “practical technical exercise to translate proposals which the European Parliament has already adopted by a very large majority.” The draft takes as its starting point the consolidated text of the Treaties (including Nice). It is limited in the sense that it is based only on those proposals that have been set forth in agreed-upon (majoritarian) EP resolutions.

The proposal is clearly written in the spirit of constitutional patriotism, as is clear from the preamble, from the inclusion of the complete Charter of Fundamental Rights, from the statement of the fundamental principles and objectives of the Union (cf. Articles 55-57), from more specific provisions on division of competences and institutional arrangements, and from the rules on amendment. It echoes the same fundamental universal values as the Treaties and the Charter preamble. The core principles ascribed to are those we associate with the democratic constitutional state and the relevant mode of attachment appealed to is that of constitutional patriotism. In the preamble it is also noted that there is a need to overcome Europe’s historical divisions through creating a solid construction, “with the prospect of federal-style development.”33 It is interesting to note how strongly the EP situates these principles

31 I have chosen this over that of Bonde’s, as this is a coherent proposal, whereas Bonde’s is a discussion note.
33 Ibid., 5.
within a cosmopolitan framework (Article 55(2)). One source of constitutional patriotism is precisely such a cosmopolitan rights-based framework or foundation. Another is the situating of the principles in an institutional structure that permits citizens to see themselves as the ultimate authors of the law. A further is a more contextually based set of values that help to further entrench an attachment to a particular entity. How far does this constitutional proposal go in propounding such, from the text and structure of the proposal itself? In the following, the proposal will be assessed in relation to the criteria of constitutional patriotism, outlined above.

With regard to constitutional patriotism, the first criterion identified above speaks to a firm commitment to personal autonomy. The constitutional proposal sees the EU as explicitly founded on the notion of popular sovereignty, where all powers of the Union emanate from its citizens (Article 55(1)). This is a breach with the present system, which is based on the principle of the EU’s powers and competences are conferred upon it by the Member States.

It incorporates the entire Charter as part of the constitution, including the preamble. On the one hand this is a clear signal to a strong commitment to a rights-based mode of legitimation, a core component of constitutional patriotism. On the other hand, in terms of ensuring personal autonomy, the constitutional proposal appears imbued with the same weaknesses as those associated with the Charter (as pointed out above), in particular in terms of the weak role and status of political rights within the EU. For one, citizenship of the EU is still mainly derived from and based on citizenship in a Member State. Persons who are long-term residents of another Member State are still barred from voting in the national elections where they reside. Further, third-country nationals cannot obtain citizenship in the EU, without first obtaining citizenship in a Member State, and the rules of naturalisation vary considerably. Their application may be different in that the division of powers gives more scope to the EU than does the present situation. This will be assessed in more detail below. The division of powers cannot rectify the problem pertaining to citizens being subject to laws they do not have an ability to alter or affect, however.

34 The proposal copies the horizontal provisions of the Charter and spells out to which articles of the Charter they apply – they do apply to all those pertaining to citizenship. Hence, the criteria for membership are determined in the treaties, not in the constitution.
The complete inclusion of the Charter in the constitutional proposal indicates a commitment to social values and social solidarity, as the Charter holds numerous provisions on social rights and expresses a commitment to social solidarity. However, as noted above, such a commitment to social values in the Charter is inadequate unless the Union also has powers and competences within the social field. Social and employment policy are not among the areas defined as the Union’s own competences (as spelled out in Article 63), but are listed under Article 64 which speaks to those competences that are shared among the Union and the Member States. A strong commitment to social values would seem to presuppose either (a) an explicit fiscal base or source of funds, or (b) a specification of minimum standards and a commitment to uphold such. Article 64 speaks to (b) and notes that “the Union shall lay down the guidelines, general principles and objectives, including, where necessary, common rules and minimum standards…” pertaining both to taxation and to social and employment policy. Article 63 speaks to (a) insofar as it specifies that the funding of the Union’s budget is within its own area of competence. It is also interesting to note that with regard to the rules of application of the principles of subsidiarity and proportionality, in those areas not exclusively within Union competence, one of the three criteria is that “the proposed action meets a requirement for solidarity or cohesion which, in the light of disparities in development, cannot be met satisfactorily by the Member States acting alone.” Article 107, on financial equalisation, further reinforces this commitment.\(^{35}\) How strong this will be in redistributive terms depends, among many factors, on the Union’s funding, and the extent to which it also succeeds in reaching down to the level of groups and individuals. This proposal does seek to embed a general commitment to constitutional patriotism within a constitutional structure with a strong onus on social values.

Constitutional patriotism is also premised on accommodation of and not eradication of cultural and other forms of difference. The proposal contains numerous statements on the need to respect the diversity of the peoples of Europe, in terms of their history, culture, language and institutional and political structures (cf. Preamble). These are repeated in the Charter provisions and in the nature of the division of competences. Consistent with the tenor of constitutional patriotism, the proposal is more focused on

\(^{35}\) It states that “A system of financial equalization shall be introduced in order to reduce excessive economic imbalances between the regions. The Treaty shall lay down the procedures for the application of this system.” Ibid., 37.
forging a sense of unity and comity than of promoting difference and diversity, as such.

To foster constitutional patriotism, the Constitution also needs a set of institutional prescriptions that ensure that citizens can see themselves as the ultimate authors of the law. This has implications for the patterns of representation and accountability and the (horizontal and vertical) division of powers. The division of powers also speaks to the reach of the Charter, as the Charter only applies to the EU level. The proposal departs from the principle of conferred powers. Core principles are proportionality, subsidiarity and transparency (Article 55(2)). Article 61 (2) states that “In areas which fall within the exclusive competence of the Union it alone shall have the authority to adopt legislative rules. The Member States may take action in these areas only if authorised by the Union and within the limits of such authorisation, in accordance with the rules laid down by the Treaty.” Article 55 (4) states that “In accordance with the Constitution, the law of the Union takes precedence over the law of the Member States.” These provisions serve to underline the notion of supremacy of Union law.

The division of powers and the principles guiding this distribution - as set out in the relevant articles - do not differ much from what we normally associate with a state. The elimination of the pillar structure is an element in this, and a step towards a strengthened institutional commitment to constitutional patriotism. Article 64 contains a long list of shared competences and these are subject to quite general principles for the more specific allocation of tasks between levels. The three main criteria refer to: “relevant scope of action; synergies in terms of effectiveness and economies of scale; and that the proposed action meets a requirement for solidarity or cohesion which, in the light of disparities in development, cannot be met satisfactorily by the Member States acting alone.” How far the latter provision extends is not clear but its wording opens up for the taking of the EU in a far more clear social direction, a clear objective in the proposal.

On inter-institutional relations, the proposal is based on the current institutional structure but where the Parliament is given more say, in terms of initiating policy (in relation to the Commission), more say on foreign and security policy, through the

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36 Ibid., 15.
issuing of “a binding opinion on the principal aspects and fundamental choices in the area of the foreign and security policy of the Union and shall be kept regularly informed by the Presidency and the Commission of its development”\textsuperscript{38}, and where the President-in-Office of the Council will be instructed to report to the EP at various stages of its half year work programme. The Commission is to remain an appointed body, but where the EP elects the president of the Commission from two candidates proposed by the Council (meeting as Heads of State or Government). The president nominates the members of the Commission and their appointment is subject to a vote of approval by a majority of MEPs.\textsuperscript{39}

The proposal intends to move the EU closer to a parliamentary system, in that the ability of the elected parliament to hold the Commission accountable is strengthened. Some provisions are also made to strengthen the EP’s check on the Council and the proposed reforms of the Council would seem to make it more of a European and less of an intergovernmental body (Article 78). The lines of accountability are made clearer in that co-decision is adopted as the procedure for legislative acts. Since there is no pillar structure this also places the EP on an equal footing with the Council in legislative terms. As such the proposal embodies some of the criteria of representativeness and accountability we associate with constitutional patriotism. However, the fact that the Commission is considered to remain an appointed body and as such does not emanate from the EP, suggests that the citizens’ principled deliberations in strong publics\textsuperscript{40} (EP and national parliaments) and in the general public sphere are less likely to be directly channelled to the executive, and be set forth in programmes where the political-ideological content, significance and implications are made clear. The lines of accountability will continue to operate in the shadow of an executive imbued with a strong technocratic mindset.

\textsuperscript{37} Ibid., Article 62.
\textsuperscript{38} Ibid., Article 73(3).
\textsuperscript{39} Ibid., Article 82.
The third set of criteria pertaining to constitutional patriotism is that it both is, and is fully recognised and acknowledged as, ‘higher’ law. The proposal consists of two main parts, a Constitution and a Treaty. The wording of the text is such as to clearly privilege the Constitution over that of the treaty. In symbolic terms, the proposal speaks of a Constitution and not a Constitutional Treaty. With regard to constitutional amendment, constitutional patriotism presupposes that it is consistent with the principle of popular sovereignty. This entails a commitment to some type of majoritarian formula. No single Member State can have veto power over constitutional change. The suggested procedure in the proposed constitution is fourfold. First is the proposal stage. The ability to formulate a proposal is granted to every Member State, the European Parliament, and the European Commission. The second step – provided the proposal is adopted by the Council (which is obligated first to consult the EP and the Commission) – is to establish a Convention modelled on the present one to assess the proposal. The Convention’s proposals will then in a third stage have to be approved by a conference of representatives of Member State governments and convened by the President of the Council. For approval a four-fifth majority is needed. The final stage is ratification, which requires a majority of the Member States and whose population totals two-thirds of the Union’s population. This provision represents a strong modification and perhaps even departure from the present intergovernmental and IGC-based procedure. These changes would clearly move the EU in the direction of constitutional patriotism.

Treaty change is regulated by Article 118 and is a slightly modified version of the present IGC-based system of treaty change, the main modification being the introduction of majoritarian rules rather than Member State veto.\(^{41}\)

In summary, this constitutional proposal is written in the spirit of constitutional patriotism. It does take the existing structure as its point of departure, with the Charter made part of the primary law of the Union. But whilst clearly modifying the existing provisions in a manner compatible with the requirements of constitutional patriotism, this process has not been carried through completely.

\(^{41}\) For reaching a decision a two-third majority of the Council is required and for ratification a majority of Member States, and where their populations total two-thirds of the EU’s population is needed.\(^{\text{CONV 335/02:43}}\)
2. Draft Constitutional Treaty of the European Union

This is the contribution presented by Peter Hain but based on the work of Dashwood et.al.42 This assessment deals with the first part of the draft, i.e., what they term the Constitutional Treaty. The Proclamation’s concluding paragraph (5) sums up the constitutional status of the EU as “a constitutional order of a new kind, uniting the peoples of the Member States, while preserving the diversity of political institutions and of cultural and linguistic traditions that enriches European civilisation.”43 The introductory Proclamation and Articles 1 (Nature of the Union), 2 (Basic values of the Union), 3-5 (Objectives and Activities of the Union), 6 (Citizenship of the Union), and 7-8 (Organising Principles of the Constitutional Order), seek to retain the EU as a creature of the Member States. From paragraph 4 of the Proclamation, we find that the Member States are seen to exercise their sovereignties in common, through the EU; that the Member States retain their national identities, subject to certain limits; and that the “Union has only those powers which have been conferred on it by the Member States. All powers which the Member States enjoy by virtue of their sovereignty, and which they have not conferred on the Union, remain theirs exclusively. …The powers conferred on the Union are to be exercised in ways that encroach as little as possible on the powers of the Member States.”

With regard to the first criterion of deep diversity, the proposal is not premised on the need to formulate an overarching agreement as to what the European Union is for in terms similar to those used to assess countries. The proclamation underlines the European achievement in ensuring peaceful co-operation among age-old rivals, and emphasises the need to continue to ensure peace, respect for basic principles of democracy, social progress and prosperity, security, as well as “the well-being of humankind”. These values are to be propounded by an entity whose defining features are its uniqueness in constitutional terms, its derivative status – as an entity derived

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43 Ibid., 9.
from the Member States, and *its diversity* – in national, institutional and cultural terms. From this can be adduced an instrumental conception of the institutions of the EU, in the sense that their purpose is to ensure that the continued co-operation takes place, and not to foster a deeper sense of allegiance and attachment to the citizens of the EU. Such an allegiance is to be reserved for the Member States. The proposal does clearly not envisage the presence or prospect of a European *demos*, and the institutions of the Union are not intended, nor presumably assumed to have the power or ability, to seriously promote such. The Member States, as portrayed in this proposal, do not appear to be, in a formal-institutional sense, barred from instilling such attitudes, insofar as these sentiments are not directed against other Member States. How this is to be assured requires a closer look at the nature and depth of diversity and how the entity is seen as being held together. The proposal seeks to retain parts of the pillar structure, so that foreign, security and defence policy remain differentiated within the second pillar and remain the preserve of the Member States.

The second criterion to assess deep diversity pertains to the overarching society acknowledging the existence of different collective goals, and accommodating these through accepting differentiated citizenship, and allowing for collectives to maintain their sense of difference. The third is that the EU does not curtail the ability of actors to protect their difference.

In its present form, the proposal does not include the text of the Charter, although the Charter is referred to in Article 2, as *one of the sources of fundamental rights*. In other words, the proposal does not endorse the full incorporation of the Charter into the Constitutional Treaty. The Commentary notes that this article is based on Articles 6(1) and (2) TEU (with the added reference to the Charter). The Commentary makes clear that the status of the Charter is not determined and leaves several options, from “a non-binding point of reference for its institutions” to a legally enforceable Bill of Rights. It does go on to say that: “It would certainly seem unsatisfactory for the Union to have promulgated a Charter of Fundamental Rights, which is then excluded altogether from the Constitutional Treaty’s list of notional sources of inspiration for the protection of human rights.”\(^{45}\) The Charter will clearly figure as a source of legal rights but the proposal does not adopt it. However, it is interesting to note that having

it as only one among the sources could actually leave the Court of Justice with further discretionary powers, as the Court would have several sources from which to pick and choose the basis of its legal interpretations. This is clearly contradictory to the British official rationale for not fully supporting the Charter, namely the problem of entrusting protection of fundamental rights to Courts. The present system does leave the Court with considerable (excessive) leverage. Lenaerts and de Smijter, however, argue that the Charter will reduce this. They note: ”the Charter contains a sample – albeit a most impressive one – of the total range of fundamental rights whose respect is guaranteed by the Court of Justice. In that sense the scope of application ratione materiae of the Charter is more limited than the protection offered by the present system of guaranteeing respect of fundamental rights in the EU flowing from Article 6(2) juncto Article 46(d) EU.” The proposal’s retention of the relevant articles in the Treaties therefore does not restrict - but enlarges - the scope for the Court of Justice to pursue further rights development and innovation.

On the question of citizenship, the text essentially reproduces the provisions in the existing treaties on access and voting rights. As such, it explicitly states that: “Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.” The other provisions under citizens’ rights listed in the Charter are moved to the Act. The provision on the right to move and reside freely in the Union is kept (as Article 6(4)). The resultant provisions on citizenship are clearly conducive to not only differentiated citizenship but a notion of citizenship that is solidly anchored in the Member States, as its core institutional mainstay.

With regard to the scope for collectives to maintain their sense of difference, the EU is supposed to ensure the protection of the sovereignties of the Member States, and to ensure that they retain their national identities – subject to some constraints. This is further ensured through retention of the principle of conferred powers (cf. Article 7), and through what appears as the elevation of this principle to the key constitutional

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46 The author is grateful to Agustin Menendez for this point.
48 Ibid., 21.
principle in the relation between the EU and the Member States. This assertion is
given credence in light of the following provision of Article 7: “The conferment of
powers on the Union shall not in itself restrict the powers of the Member States in
respect of the same subject-matter, except in the areas identified in Article 9 of this
Treaty as falling within the exclusive competence of the Union.” This assertion is
given further weight when examining the manner in which the principles of
subsidarity and proportionality are considered, again in terms of serving as
safeguards for the Member States (cf. Article 7 (3), and (4), respectively). These three
core principles guiding the division of powers and competences are thus set up in a
mutually reinforcing manner so as to support the Member States. The only exclusive
competences allocated to the Union are: (a) common commercial policy; (b) fisheries
conservation; and (c) monetary policy for the Member States, which adapt the euro as
their currency. In the latter case this exclusive competence is subject to Member State
acceptance of monetary union and adoption of the euro, in the first place. The fourth
and only ‘countervailing’ principle is the ‘principle of loyal cooperation’, which
“requires that the Member States support the actions and policies of the Union
actively and unreservedly in a spirit of loyalty and mutual solidarity, to ensure
fulfilment of the obligations arising out of this Treaty or resulting from action taken
by the institutions of the Union.” According to the included commentaries, this
applies to the entire remit of the Union, not only exclusive competences, but also
overlapping and shared, competencies. It does not appear reasonable to assume that it
applies to those areas where the Member States have exclusive competence.

The areas deemed to belong to complementary competences include culture, public
health, education, vocational training and youth, but here the scope for Union action is
defined narrowly: “action by the Union shall be limited to supporting, encouraging,
and coordinating action taken by the Member States.”(Article 10).

Article 11 spells out a residual category, that of shared competences, which are those
“competences of the Union which are neither exclusive nor complementary…” These
must be spelled out in the acts, in consistency with the principle of conferred powers.
Further, as the commentary section notes, “In areas of shared competence, unless and
until the Union has adopted a measure, the Member States retain their freedom of

action, subject to the horizontal obligations enshrined in the Constitutional Treaty and the annexed Acts. So, for example, national measures intended to protect the environment must respect the rules on free movement of goods.\textsuperscript{50}

The assessment of the proposal in relation to the second and third criteria of deep diversity reveals that its notion of Union citizenship is very thin and consistent with deep diversity. Member States have much scope to pursue national projects, in that the exclusive competences of the Union are cast thinly, so as to leave most of the powers and prerogatives with the Member States. As such, the stipulated division of powers and competences is entirely consistent with the Proclamation and the concomitant provisions on the nature of the entity and its basic principles. The Union’s remit, in terms of exclusive competences, is almost exclusively economic. There are also explicit limitations on Member State interference with these provisions, as spelled out in Article 9.\textsuperscript{51} The very strong economic thrust of the Union and the strong provisions for the protection and promotion of this particular set of functions at Union level might reduce the scope of action for the Member States to actually protect and promote their diverse traditions, their specific languages and their unique institutions. The question then is whether the proposed constitutional treaty provides enough safeguards – not against Union incursions, as such – but against the strong homogenising thrust of the market. For instance, in the Commentary section on Article 10 (Complementary competences) it is noted that horizontal principles such as non-discrimination and free movement bind the Member States. Insofar as these horizontal principles operate according to an economic, market-based logic, they could have such a homogenizing thrust. Such a thrust is clearly not consistent with the spirit of deep diversity.

The fourth criterion to assess deep diversity refers to provisions on constitutional amendment. For these to be in the spirit of deep diversity they must contain provisions to protect national veto rights. Article 25 of the proposal essentially copies the present Article 48 TEU, which sets out an intergovernmental and executive-based approach to treaty change and is based on national veto. It is also noteworthy that the European Parliament (and all national parliaments must go through the governments or the Commission) has no ability to initiate a proposal for change. The amendment

\textsuperscript{50} Ibid., 31. 

\textsuperscript{51} Ibid., 31.
procedures for the Constitutional Treaty are thus consistent with what might be expected from deep diversity.

The fifth criterion of deep diversity is that those groups or collectives that feel different or distinct will have access to measures that serve to maintain their sense of difference or distinctiveness over time. In other words, there have to be channels of access and other institutional arrangements that privilege collective and group-based actors that pursue their distinct identities. This also speaks to what type of entity the EU is, fundamentally – market or polity - and further how overall conducive to identity politics it is. In this sense it is important to consider what effects the strong market logic that this proposal propounds will have on the role and prospects for an EU based on deep diversity.

The proposal provides one important such recourse, Article 27, which sets out the procedures on withdrawal from the Union. In the Commentary it is noted that: “The wording of the proposed Article 27(1) makes it explicit that a Member State does not need “permission” to withdraw from the Union.” This of course is an important safety valve but if the threshold is low for withdrawal, it might end up lowering the actual diversity of the EU, as those states that see their uniqueness threatened, leave the Union.

It is also interesting to explore how comprehensive - in terms of forms of difference and diversity - the proposal is. Does it speak to regions or social movements or does it simply privilege Member States? Are other forms and types of identities in any sense privileged? In the proclamation this is fairly widely cast, is this also reflected in the relevant provisions of the draft? The overall impression is that the proposal is foremost concerned with Member States. There are no special provisions for social movements to gain access.

This proposal is written in the spirit of the EU as an entity derived from the Member States and not in the spirit of a European constitutional patriotism. However, the commitment to deep diversity, as both Taylor and Weiler see this, is not as apparent as might be assumed from the strong onus on the Member States, as the proposal

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Ibid., 27, see also Commentary, 27-8.
envisions the EU as a largely economic type of entity with a set of institutions to entrench these. There is scope for market correcting measures but these are not given the same strong standing as the market protecting ones in the proposal.

V Conclusion

The purpose of this chapter was to assess the underlying type of allegiance that we can discern from the Charter. The EU is a unique type of entity that requires conceptual and normative categories that can capture its particular features, whilst also simultaneously spell out a set of normative standards that are reflective of the achievements of modern democracies. The two relevant standards of assessment used here are a rights-based constitutional patriotism and a culture-based deep diversity. These two standards provide very different intakes to the role and status of the Charter, and to the nature and status of constitution itself.

The assessment found that the spirit of the Charter was that of constitutional patriotism but that this was not carried through in the provisions of the Charter, in particular with regard to the provisions for public autonomy. The democratic impetus of the Charter was thus found to be wanting, in relation to the standards of constitutional patriotism. To get a better sense of the role of the Charter to serve as a vehicle to propound constitutional patriotism, it must also be assessed in relation to the institutional and constitutional setting in which it is to be placed. The Charter in its present form is a political declaration and not, formally speaking, a legally binding document. It is also steeped in the complex institutional setting of the EU, an entity with clear institutional defects, when considered from a democratic perspective. This institutional setting is forged amidst conflicting conceptions of the EU and reflects and to a large extent also protects the great amount of diversity in Europe.

But there are important developments that promise to relegate these assessments to the dustbin of history, at a pace that is truly breathtaking. Since constitutional patriotism presupposes a legally binding Charter that is also a part of the constitution, the role and status of the Charter in the Convention provides us with an important test of the prospects for constitutional patriotism in the EU. It was shown that the

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31 *Ibid.,* 49.
Constitutional Convention has embraced the Charter. This applies to the recommendations from the Working Group on the Charter, from a clear majority of the members of the Convention, and from basically all the constitutional proposals. The Convention has also proposed institutional changes – abolition of the pillar structure – that promise to give the Charter a more clear legal and constitutional status. The Convention’s deliberations, thus, take place within an atmosphere more marked by constitutional patriotism than by deep diversity. But the Convention appears bent on accepting the Charter as is, and will therefore not rectify the limitations built into it, in relation to the requirements of constitutional patriotism. It remains to be seen how much further in this direction the Convention will move and whether these developments will be endorsed by the IGC-2004. The examination of the two proposals revealed that both took the present EU as their point of departure and both were to different degrees encumbered by it.

The Laeken Declaration noted that the EU is at a crossroads. This is clearly a correct assessment. The analysis presented here reveals that there is a clear sense of which direction to take, but whether this road will be travelled or not, remains to be seen. This is not a trite matter. There is much at stake.