Constitutional Identity in EU Membership

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CONSTITUTIONAL IDENTITY AS A CONDITION FOR EU MEMBERSHIP:

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The Copenhagen criteria of 1993 require candidate countries to demonstrate

"stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Article 49 TEU further conditions membership on respect for the values enshrined in Article 2 TEU: human dignity, freedom, democracy, equality, the rule of law, and the protection of fundamental rights.

Yet the EU's enlargement track record reveals a persistent structural failure: compliance is assessed at the level of **legislation**, not **constitutional culture**. Countries transpose EU directives, adopt human rights frameworks, and formally satisfy benchmarks, and then, once inside, dismantle the very institutional architecture those laws depend upon.

Hungary is the clearest and most consequential illustration. By 2004 it had met every formal accession criterion. By 2022, the European Commission's Rule of Law Report had determined that Hungary no longer constituted a functioning democracy. Article 7 TEU proceedings have produced no enforceable result, effectively blocked by political solidarity among member states. The lesson is that the assessment was incomplete. It measured what Hungary **said**. It never measured what Hungary **was**, constitutionally.

The same risk attaches to current candidates. The Western Balkans have experienced persistent judicial backsliding across multiple accession cycles. Ukraine and Moldova, admitted as candidates in 2022 on grounds of geopolitical urgency, present complex rule-of-law landscapes. In none of these cases does the existing framework provide tools to assess the deeper constitutional culture that will determine whether EU values persist beyond accession day.

Constitutional identity is fundamental concept in EU law. The CJEU has affirmed that EU law possesses its own constitutional identity grounded in Article 2 TEU, and the EU Charter of Fundamental Rights gives that identity its normative expression at the highest legal level. Symmetrically, Article 4(2) TEU preserves Member States' national constitutional identities as a limit on EU law's primacy, a provision engaged in depth by the German Federal Constitutional Court in its Lisbon judgment and carefully navigated by the CJEU in its own constitutional pluralism case law.

The Rule of Law Conditionality Regulation (2020/2092), upheld by the CJEU in Case C-156/21, Hungary v Parliament and Council, further establishes the principle that EU financial benefits can be conditioned on respect for rule of law principles. This is a precedent of the first order for the mechanism proposed below.

What is conspicuously absent from the accession framework is any mechanism to assess whether a candidate country's constitutional culture is **convergent** with EU constitutional identity **before** accession. The Venice Commission's Rule of Law Checklist provides the vocabulary, udicial independence, access to justice, constitutional review, fundamental rights protectio, but operates as an advisory instrument. The Negotiating Framework does not require its conclusions to produce legal consequences in accession proceedings. This brief proposes to close that gap.

We propose that the EU introduce, by amendment to the Enlargement Negotiating Framework, a mandatory Constitutional Identity Convergence Assessment as a binding precondition for closing Chapters 23 and 24 of accession negotiations.

Scope

The CICA would examine the constitutional jurisprudence of the candidate country's

highest courts over the preceding ten years, assessing:

constitutional court, evaluated against the Venice Commission's Rule of Law

Checklist criteria

The assessment would be conducted by a **Joint Convergence Panel** composed of three CJEU judges designated by the Court's President and three Venice Commission rapporteurs, operating independently of the European Commission.

This separation is essential: it eliminates the institutional conflict of interest that currently distorts annual progress reporting, where the body doing the assessment also has a political stake in keeping enlargement on track.

Output

The Panel would issue a **binding convergence opinion**. A negative opinion freezes all remaining accession chapters until identified deficiencies are remedied and a follow-up assessment confirms compliance. A pos-

itive opinion triggers a five-year post-accession monitoring commitment as a bridge to full integration.

Legal Basis

The proposal does not require Treaty amendment. The Negotiating Framework is an instrument of the Council and Commission adopted under Article 49 TEU. Grounding the CICA in that Framework, read together with Article 2 TEU, provides a sufficient and self-contained legal basis. Implementation is therefore a matter of political will, not constitutional revision.

It is pro-enlargement. By generating credible, independent certification of constitutional convergence, the CICA provides political cover for enlargement. Governments and publics sceptical of admitting new members will find it significantly harder to object once a technically rigorous, independent body has certified alignment. Enlargement becomes defensible precisely because it becomes verifiable.

It prevents recurrence of the Hungary scenario. Post-accession democratic backsliding is the EU's most damaging governance failure. The CICA establishes a jurisprudential baseline at the moment of accession, which can then anchor future Article 7 proceedings or conditionality mechanisms, because it defines what a country's constitutional culture demonstrably was when it joined. This answers the core evidentiary problem that has paralysed enforcement since 2010.

It fills an existing gap rather than creating a new barrier. The Venice Commission already conducts constitutional reviews. The CJEU already assesses Member States under Article 7. The FRA already monitors fundamental rights compliance. The CICA formalises and operationalises instruments that already exist but lack binding effect in the accession context.

The debate between 'bigger' and 'better' is a false dilemma, but only if the EU is willing to reform the depth at which it assesses governance. The Constitutional Identity Convergence Assessment offers a legally grounded, institutionally feasible, and intellectually coherent mechanism to ensure that future members are not merely compliant on paper but constitutionally convergent in practice. It closes a genuine legal gap, employs existing institutional resources, and makes enlargement both more credible and more durable. The EU's values are a culture, and accession must require both.